

PRIVATE POWER AND THE CONSTITUTION

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The papers in this symposium deal with two large subjects. The first is the breakdown of the public/private distinction. The second is the problems caused by this breakdown.

I

I will speak first about the breakdown of the public/private distinction. The legal name for it is the state action problem. This is such a common term that we sometimes forget that it is actually a phrase—a compound of two nouns ('state' and 'action'), like bank holiday, or dance card, or dog pound. I draw attention to this fact because we have difficulties with both parts of the phrase. Some of our problems center about the meaning of the word 'state.' Others concern the word 'action.'

I will begin with the word 'state.' The term appears in § 1 of the Fourteenth Amendment, and it seems to refer to places like Nebraska and Utah. We also use the word to refer to nation-states, like the United States of America. But what exactly do we mean when we say that the state has acted? Suppose Nebraska passes a law abolishing the tort of defamation for public figures. (This gives speakers more protection than the First Amendment, which only abolishes defamation without malice.) And suppose now that the Omaha police chief arrests me for saying things about him that are nasty but true. Or suppose that a state trial court awards the chief damages for what I said. Who represents Nebraska in these hypotheticals—the legislature, or the police and the court?

There are two good reasons for saying that the real state action is the action of the legislature. One is that state law makes the legislature the supreme authority on most questions. The police chief and the court are acting illegally under Nebraska law. If we give Nebraska's legal system a chance to work it will ultimately repudiate their actions.

The other reason to focus on the action of the legislature is that the Constitution seems to require it. The First Amendment says

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that "Congress shall make no law . . . abridging the freedom of speech." It is addressed to Congress, not the President or the courts. And it forbids lawmaking (the sort of thing legislatures do), not arrests or trials. If we extend this prohibition to the states (by incorporation), we should probably observe a comparable limitation there.

As you know, this is the place where the state action limitation first broke down. In 1913 the Supreme Court held that state action was not limited to lawmaking; it included all kinds of acts by government officials, even those that violated state law.¹ About fifty years later the Court held that the federal courts had not only constitutional but also statutory authority to deal with such acts. That is the meaning of *Monroe v. Pape*,² which lets people sue for lawless official action under 42 U.S.C. § 1983. It now accounts for a large percentage of the business of the federal courts.³ Richard Kay argues that the first of these decisions was a mistake—that the Constitution should limit only acts of lawmaking (and official action carrying out contestable laws).⁴

I said that the idea of state action has been expanded along two axes. One is the meaning of the word 'state.' The other is the meaning of the word 'action.' Here I want to mention two influential theories for stretching in this direction. There are more, and these two may actually collapse into one, but for our purposes I will focus on just these two and treat them separately.

The first theory argues that the idea of state action also encompasses state inaction: sometimes we can hold the state responsible when it appears to be doing nothing. I will call this the permission theory. It reminds me of scholastic brain-teasers about the omnipotence of God. If God is omnipotent, how can we explain the presence of evil in the world? What makes the question hard is the implicit assumption that God is morally responsible for allowing things to happen that he has the power to prevent. According to the permission theory the state is like God. It is practically omnipotent; there are very few things it can't forbid. To take an obvious example, it could (if it wanted to) outlaw most kinds of private discrimination. If it fails to do this, it is morally responsible when

1. *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278 (1913).

2. 365 U.S. 167 (1961).

3. Peter W. Low & John Calvin Jeffries, Jr., *Civil Rights Actions* 16 & note g (Foundation Press, 1988).

4. Richard S. Kay, *The State Action Doctrine, The Public-Private Distinction, and the Independence of Constitutional Law*, 10 Const. Comm. 331, 344-51 (1993). Kay includes in the category 'lawmaking' not only statutes, but also common law-making by courts and executive law-making in areas where the Constitution gives the executive (the President or comparable state officials) that authority.

bad things happen. Consider also the case of Joshua DeShaney.⁵ He lived with his father after his parents divorced, and over a period of four years his father beat him senseless. The Wisconsin social welfare bureaucracy observed all this going on but did nothing to stop it—though it had ample legal power to do so. It is morally responsible for permitting this brutality to go on, like Kitty Genovese's neighbors, or like God.

You will see a discussion of the permission theory in several of the papers in this symposium. Larry Alexander and Michael Seidman find it persuasive.⁶ Richard Kay argues against the permission theory. He thinks that we can distinguish between actions and omissions. (We do it all the time in criminal law and torts.) And he says that we should not hold the state responsible for the mere failure to act.⁷

The permission theory holds that we have state action when the state sits idly by and lets bad things happen. The second theory argues that the state is actively involved in (almost) all private action, but at such a deep level that we tend to overlook it. I will call this (sticking with my theological metaphors) the prime mover theory. Consider again the case of Joshua DeShaney. We think it rather natural that he was living with his father. But that was in fact the result of a state court decision awarding the father custody after a divorce. The first cause of Joshua's predicament was the state, which delivered him up to a brutal custodian.⁸ Or consider the case of *Flagg Brothers v. Brooks*.⁹ The question was whether there was state action when a warehouseman engaged in self-help and sold a bailor's goods to cover his charges. Such a sale could only take place in a legal system with property and contract rules. In New York, where this case happened, those rules allowed Flagg Brothers to pass good title and prevented Brooks from interfering with the sale.¹⁰ You will see the prime mover theory discussed also in several of these papers—Kay's and Seidman's in particular.

To recapitulate very briefly: the border between private action

5. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989).

6. Larry Alexander, *The Public/Private Distinction and Constitutional Limits on Private Power*, 10 Const. Comm. 363 (1993); Louis M. Seidman, *The State Action Paradox*, 10 Const. Comm. 381 (1993).

7. Kay, 10 Const. Comm. at 348-60 (cited in note 4).

8. Seidman, 10 Const. Comm. at 389 (cited in note 6).

9. 436 U.S. 149 (1978).

10. Alexander, 10 Const. Comm. at 365-66 (cited in note 6). Brooks also relied on the permission theory, because New York had a law (Uniform Commercial Code § 7-210) allowing a warehouseman to satisfy a lien on goods in his possession by selling the goods. The Court rejected this argument. It held that § 7-210 merely embodied (in statutory form) the state's decision not to act, and states were not responsible for inaction.

and public (state) action is no longer a clear one, because state action has spread out so far in two directions. First, the idea of the 'state' is larger than it used to be. It includes not just lawmakers but all public officials, even ones who are acting lawlessly. Second, the meaning of the word 'action' has also been enlarged. It can include inaction as well (the permission theory), because the state may be responsible for failing to prevent harm. And it is present in the background of every case (the prime mover theory) where private actors rely on the legal system to order their affairs.

II

I now want to say a few words about the problems caused by the breakdown of the public/private distinction. These papers suggest three such problems, though whether they actually *are* problems, and whether these costs outweigh the benefits of abolishing the distinction, are disputed questions.

The first problem is that there is an economy of restraint, and the breakdown makes the Constitution a less effective restraint on government. Those who make this argument begin with the assumption that the power of the government is qualitatively different from the power of any other social institution: it is "the only actor not subject to regulation by ordinary law."¹¹ All the other (private) centers of power—defense contractors, public utilities, pension funds, churches, Madison Avenue—are (putting the Constitution to one side for a moment) subordinate to the lawmaking power of the state. The Constitution thus performs the special function of providing "a law for the lawmaker."¹²

Now it is a fact well known to football fans that if you string your defense out along the line of scrimmage you open yourself up to runs up the middle, where you have no depth. A defense only has eleven players, and it's important to position them so as to get the maximum effect. The more ground you try to cover, the less protection you will get within the covered area. People sometimes make this argument about the scope of rights protected by the Constitution. If we apply the same rules to advertising and pornography as we do to political speech, there is a danger that we will weaken the freedom of speech in cases where it really matters.¹³ If we extend the freedom of religion to cover all claims of conscience,

11. Kay, 10 Const. Comm. at 354 (cited in note 4).

12. *Id.* at 355.

13. John H. Garvey & Frederick Schauer, *The First Amendment: A Reader* 148 (West Pub. Co., 1992); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 Vand. L. Rev. 265 (1981).

we will get so many requests for exemptions that the laws will become unenforceable. Then the only way to prevent anarchy will be to weaken the protection of the Free Exercise Clause—to say that it is subordinate to the everyday concerns of government. The safer thing to do in each case is to put more protection in the middle (use linebackers and a secondary) so you can stop the plays that really matter.

We can make the same kind of argument about the public/private distinction. The more actors the Constitution has to defend us against, the less protection it will give us in cases that really matter. If the same rules that cover the state of Nebraska are applied to the Garvey family and the Home Dairy, we will have to start weighing interests and making exceptions. Or to put it in legal jargon, we will have to engage in a lot of ad hoc balancing. The end result will be that we get less protection where we really need it. Better to limit private power by passing laws, and save the Constitution to check the lawmakers.

Richard Kay relies on the economy of restraint as a reason for saving the public/private distinction.¹⁴ Larry Alexander disagrees. He argues that if we look hard enough we will find state action in every case. But this does not mean that the Constitution requires families, farms and pension funds to behave as Nebraska must. There are special reasons for allowing private choices—even choices that states themselves could not make—and these will often tip the balance against regulation.¹⁵ Implicit in Alexander's argument is the assumption (which Kay disputes) that courts can do this kind of balancing without jeopardizing the rule of law.

Let me turn now to a second problem caused by the breakdown of the public/private distinction, which I will call the threat to private rights. There are always two parties in state action cases, and we are tempted to invoke the Constitution because one of them is a bad guy. Randy, let us say, is mistreating Jane. If we can show that Randy is a public actor, we can apply the Due Process Clause to their relationship and right this wrong. But we may catch Jane in the same net we throw over Randy.

Suppose that she is Jane Roe. The right to make choices about reproduction assumes that there is a public/private distinction; we call the right a right of privacy. *Roe v. Wade* holds that "there is a sphere of privacy within which each woman has a right [free from state interference] to decide for herself whether she ought to have

14. Kay, 10 Const. Comm. at 341-43 (cited in note 4).

15. Alexander, 10 Const. Comm. at 367-68, 374 (cited in note 6).

an abortion.”¹⁶ But if there is no sphere of privacy for Randy, there will be none for Jane either. As Michael Seidman shows, we could make the same arguments for finding the state behind Jane’s actions as we would for Randy: the state determined her choice by refusing to provide health benefits for pregnant mothers and child services for new infants.¹⁷

We could extend this point in various directions. Many people argue that the foundation of free speech is the individual interest in self-rule or self-expression.¹⁸ These ideas, like the right of privacy, make no sense unless there is a private realm within which a person can make her own choices and determine the direction of her own life. If everything we think and do is state action, the freedom of speech rests on an illusion.

Or, to take another example, consider the case of religious freedom. Law schools usually teach that religion is a private matter. The Establishment Clause is designed to keep it out of public life; the Free Exercise Clause protects it within the private sphere. But if everything is public there is no work for the Free Exercise Clause to do; indeed, it may even be that the Establishment Clause applies to the affairs of the Catholic Church.

This is a high price to pay to keep Randy from abusing Jane. Akhil Amar proposes a lower-cost solution. He argues that some private actions, like child abuse, are forbidden by the Thirteenth Amendment.¹⁹ This solution does not deny that there *are* private actions. Nor does it deny that many of them are beyond the reach of the Constitution. It only says that some parts of the Constitution apply directly to private behavior (a point no one disputes), and then makes a (more controversial) claim about what types of behavior are covered.

Let me turn now to the last of the problems associated with the breakdown of the public/private distinction. I will call this an ideological problem, for reasons that I think will be obvious. For the first decade after *Brown v. Board of Education*, before Congress got involved by enacting the 1964 Civil Rights Act, the courts were the only place plaintiffs could go to enforce the principle of racial equal-

16. Seidman, 10 Const. Comm. at 395 (cited in note 6).

17. *Id.* at 395-96.

18. C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. Rev. 964 (1978); Martin H. Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591 (1982); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. Pa. L. Rev. 45 (1974).

19. Akhil Reed Amar, *Remember the Thirteenth*, 10 Const. Comm. 405 (1993); see also Akhil Reed Amar and Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 Harv. L. Rev. 1359 (1992).

ity. And in the absence of federal statutory commands the only justification for interfering in state affairs was proof that existing social practices violated the Equal Protection Clause. The state and federal legislatures were not just idle, but institutionally incapable of acting. State legislatures in the south (and the north) were malapportioned and constituted in a way that represented the existing segregated social structure. Congress's own internal practices, in particular the committee structure and the filibuster, inhibited it from passing laws to deal with voting, housing, schools, employment, public accommodations, and so forth. So it is no surprise that the classical texts on the problem of state action are cases dealing with race relations: *Shelley v. Kraemer*,²⁰ the *Girard College Case*,²¹ *Evans v. Newton*,²² and *Evans v. Abney*,²³ *Burton v. Wilmington Parking Authority*,²⁴ *Moose Lodge No. 107 v. Irvis*,²⁵ *Reitman v. Mulkey*,²⁶ and the *White Primary Cases*.²⁷ Given these circumstances it is no wonder that, as David Strauss says, the state action doctrine was seen as "the enemy."²⁸ The federal courts were on the side of the angels, and any legal barrier that kept them from getting involved in the cause of reform had to be knocked down.

Today, Strauss argues, there may be better ways of solving the kinds of problems he is concerned about: hate speech and pornography, affirmative action, election finance, integration maintenance. It is not always clear which side of these problems the good guys are on. We need to experiment with different solutions. But constitutional remedies, which are what the courts give us, are by nature uniform and inflexible. Legislative solutions, on the other hand, can be different in different jurisdictions, and tailored to fit the shape of the body politic. What's more, Strauss asserts, we are more likely to get action out of our legislatures on these issues, because they are no longer immobilized by the kind of institutional gridlock that we had in the era of Jim Crow. For purposes of our discussion, this means that we should not strain to find state action at every turn. It

20. 334 U.S. 1 (1948).

21. *Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957). See also *Pennsylvania v. Brown*, 392 F.2d 120 (3d Cir. 1968), *cert. denied*, 391 U.S. 921 (1968).

22. 382 U.S. 296 (1966).

23. 396 U.S. 435 (1970).

24. 365 U.S. 715 (1961).

25. 407 U.S. 163 (1972).

26. 387 U.S. 369 (1967).

27. *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); *Grove v. Townsend*, 295 U.S. 45 (1935); *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953).

28. David Strauss, *State Action After the Civil Rights Era*, 10 Const. Comm. 413, 418 (1993).

will be all right, indeed it may be better, if we preserve some remnant of the public/private distinction.

I have called this problem ideological because it puts the public/private distinction at the service of political goals. For Strauss the state action doctrine seems not to have any independent significance. We should find state action, or not, depending on which answer will better serve the ends of justice.

Edwin Baker has given us a wonderful illustration of how legislative solutions (the kind Strauss prefers) can advance constitutional ends in the post-civil rights era.²⁹ Baker argues that the most potent and pernicious censor of content in the media today is not the government but advertisers. One way to deal with this problem would be to show that commercial censorship was not private but public action, and let the courts impose First Amendment restrictions. Baker takes a more Straussian approach. He concedes that advertisers exercise private power, and argues for a legislative solution. He proposes a tax on advertising and a subsidy for readers—a remedy that the courts would be institutionally incapable of providing.

If I may recapitulate once more: we hear today three kinds of reasons for preserving the public/private distinction. One (the economy of restraint) is that we need it to make the Constitution an effective restraint on government. A second (the threat to private rights) is that we cannot control bad private actors without also controlling good ones. If we abolish the notion of privacy to get at child abuse, we may also break down the barrier that protects reproductive freedom, freedom of speech, freedom of religion, and so on. Third (the ideological problem), those who want to abolish the public/private distinction for political reasons—to let progressive courts solve social problems—may find that they can get better relief for today's problems from other branches of government. I should add that there is considerable disagreement about these so-called problems: many find them untroubling, or even incoherent. But the papers in this symposium offer a much-needed discussion of all these issues.

29. C. Edwin Baker, *Private Power, the Press, and the Constitution*, 10 Const. Comm. 425 (1993); see also C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. Pa. L. Rev. 2097 (1992).