Untying the State Action Knot

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In the 1994 case of *N.O.W. v. Scheidler*, a civil suit brought under the federal RICO statute, the Supreme Court unanimously held that RICO is applicable to the activities of non-profit organizations such as the "pro-life" groups that were the defendants in that case. In so holding, the Court did not reach the question of whether, and to what extent, the protections of the First Amendment apply to a civil RICO suit brought by one private party against another. However, in the concurring opinion of Justice Souter, and the briefs of both sides, it was assumed that the First Amendment applied with full force in such a case. That is, that a civil RICO case raised the same First Amendment issues that a criminal RICO case would.

I was troubled by this assumption. Since this was a civil case, I would have thought that there were serious questions as to whether or not state action was present in this suit between private parties. However, in analyzing the case, I was content to put this problem aside as everyone else had done.

I now return to the problem of state action, glad that I had bypassed this snakepit of twisted reasoning and poisonous confusion on the way to my analysis of Scheidler. Does the Bill of Rights apply with full force to such a case, as well as to other civil matters including such famous civil suits as *NAACP v. Claiborne Hardware* and *New York Times v. Sullivan*? The answer turns out to be a complicated one.

*James Louis Calamaras Professor of Law, Indiana University (Bloomington) School of Law. I would like to thank Professors Dan Conkle and Joe Hoffmann, as well as the participants in the University of San Diego School of Law symposium on the civil-criminal distinctions, Larry Alexander, Don Dripps, Steve Schulhofer, Gary Schwartz, Mike Seidman, and members of the University of San Diego Law Faculty for their helpful comments on an earlier draft of this article.


2. The defendants, various "pro-life" groups, had argued, based on some earlier Court of Appeals cases, including the Seventh Circuit's ruling in the *N.O.W.* case itself, that for an enterprise to be subject to the RICO statute, it must have a "financial purpose." The Supreme Court held that there was no limit to the kind of "enterprise" that RICO applied to, other than the statute's own limitation to enterprises involved in or affecting interstate commerce. 114 S. Ct. 798, 804 (1994).

3. 114 S. Ct. at 806.

4. *See, e.g.*, Brief for Petitioners and Brief for Respondent Joseph M. Scheidler, Andrew Scholberg, and the Pro-Life Action League, Inc. Instead, Justice Souter questioned whether, as the RICO action proceeded, it might lead to an infringement of the defendants' First Amendment rights to disseminate their anti-abortion message. 114 S. Ct. at 806-07. The petitioners, while tacitly conceding the applicability of the First Amendment (i.e. the presence of state action) argued that it would not be violated by successful prosecution of their lawsuit. The respondents, also operating under the assumption that state action was present, argued that their First Amendment rights would be violated.


The First Amendment, as well other rights enumerated in the Constitution, is limited by its terms to protecting the citizens against the actions of government. The Amendment does not, for example, prevent A, a private citizen, from marching up to an anti-abortion demonstrator B, snatching B's sign away from him, and tearing it up. While A may violate some statute, he will not violate the Constitution, which provides only that "Congress shall make no law... abridging the freedom of speech, or of the press." Although the Fourteenth Amendment has extended the Bill of Rights to cover the activities of state and local, as well as federal, officials, it has not extended it generally to govern the interactions of private parties. For example, it is a commonplace in the law of criminal procedure that illegal searches by private citizens do not violate the Fourth Amendment.

It is obvious, however, that constitutional protections cannot, and should not, be strictly limited to activities to which a government is a formal party. In *New York Times v. Sullivan*, for example, the Court easily disposed of the claim of the Respondent, an Alabama sheriff, that the First Amendment should not apply to his libel suit against the New York Times:

> Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

In *New York Times*, it was easy to conclude that the action of the Alabama courts was "state action." However, as the above quotation makes clear, the fact that Sullivan was a public official is not important to the Court's finding of state action, but only to the second issue of whether the action of the Alabama courts violated the Times' First Amendment rights. As to this issue, since the Alabama rules of law were designed to stifle criticism of public officials, the newspaper prevailed.

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8. U.S. CONST. amend. I.

9. By contrast, the Thirteenth Amendment is enforceable against private parties who engage in certain types of racial discrimination. See, e.g., *Runyon v. McCrary*, 427 U.S. 160 (1976), and cases cited therein.

10. *Burdeau v. McDowell*, 256 U.S. 465 (1921). "[The Fourth Amendment's] protection applies to governmental action." *id.* at 475. As Prof. Louis Michael Seidman has observed, the state action requirement "is... a necessary prerequisite to the very idea of rights—that without it, rights, as generally understood, could not exist." *The State Action Paradox*, 10 CONST. COMMENTARY 379, 380 (1993). Contrary to Prof. Seidman, however, *id.* at 382-83, I believe that the Due Process clause, either by its terms or by its history, places an affirmative obligation on government to right certain wrongs. The Equal Protection clause is a different matter, as I shall discuss infra p. 242.

11. 376 U.S. at 265 (citation omitted).
But, as the Court was soon to demonstrate, *New York Times* would apparently have come out the same way on the state action question had Sullivan been merely a famous person with no ties to state government.\(^\text{12}\)

Similarly, in *Claiborne Hardware*, the Court found that a state court's granting of money damages and injunctive relief in a suit filed by merchants to end a boycott of their stores by the NAACP amounted to the State's "impos[ing] liability on an individual solely because of his association with another."\(^\text{13}\) "State action" was less obviously present in *Claiborne Hardware*, since no public official was involved in the original dispute, and the laws invoked were not aimed, on their face, at suppressing First Amendment rights. Nevertheless, as in *New York Times*, the state laws, as applied by the state courts, did specifically target the political speech and associational rights of NAACP members.

But what if, as in *N.O.W. v. Scheidler*, there appears to have been no attempt by government officials, either in the legislative, executive, or judicial branches, to stifle constitutional rights, but the activity in question, anti-abortion protests, is political speech which generally receives constitutional protection against the government?\(^\text{14}\) Since this issue was not addressed by the parties, it remains an open question what the "state action" was in that case and whether, if state action were shown, a constitutional violation could be found.\(^\text{15}\)

**What is State Action?**

It turns out that my concerns about whether and how the First Amendment should apply in a case such as *N.O.W. v. Scheidler* were well founded. Though the commentators don't agree on much else in this area, they sing in harmony when they lambaste the Supreme Court's state action cases as hopelessly confusing. In 1967, Charles Black deemed state action "the most important problem in American law,"\(^\text{16}\) and the field of commentary on it "a conceptual disaster area."\(^\text{17}\) He added that, "as long as the 'state action' concept is looked to, even pro forma, for significant

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13. 458 U.S. at 918-19.
14. Unless it is criminal behavior or poses a clear and present danger. One of the matters in dispute in *N.O.W.* was whether the activities of the defendants were legitimate protest activities or unprotected crimes. This issue remained to be litigated after the Supreme Court's remand. See, Bradley, *supra*, at 137-46 (complaint did not adequately set forth the crime of extortion, the basis of the RICO suit).
15. See, e.g. Brief for Respondent Monica Migliorino, at 20-32; Reply Brief for Petitioners of Jan. 12, 1993, at 3-5; Reply Brief for Petitioners of Nov. 1, 1993, at 14-20. Instead, both sides assumed that state action was present, with Petitioners arguing that their suit did not infringe upon First Amendment protected activities and Respondents arguing that it did.
17. Id. at 95.
limitations, it will either remain vague and ambiguous or become arbitrary, losing correspondence to the varieties in life." Nearly twenty years later, Erwin Chemerinsky explained that the lack of interest in state action issues in the mid-'80s was because "the early commentators were so successful in demonstrating the incoherence of the state action doctrine. For twenty years, scholars persuasively argued that the concept of state action never could be rationally or consistently applied."

William Marshall, disagreeing with virtually everything else that Chemerinsky said, did agree that "state action doctrine has been soundly criticized for being hopelessly confused and inconsistent. . . . With this I have no quarrel." The most recent commentator on the subject, Alan Madry, writing in 1994, averred that state action doctrine is a "quagmire" that "reflects a profound ignorance of the workings of federalism. . . ."

Thus, I was led to this inquiry, at the intersection between criminal and civil law, as to what state action is, when it is present, and whether there is anything special about the RICO statute as a basis for a civil suit that makes it more likely that state action will be found in such cases.

Any discussion of the modern doctrine of state action must begin with the 1948 case of *Shelley v. Kraemer*, for it is there that the Court set out the basic principles that it continues to apply today.

In *Shelley*, the respondents, property owners in an area subject to a restrictive covenant, had sued to block the sale of a parcel of land to petitioners, who were black, on the ground that the covenant barred sale to "people of the Negro or Mongolian race." It was already well settled that statutes or ordinances could establish no such racial barrier. But respondents argued, and the Supreme Court agreed, that

[T]he action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however

18. *Id.* at 91.
19. *Rethinking State Action*, 80 NW. U. L. REV. 503, 505 (1985) (citation omitted). This led Chemerinsky to conclude that the state action limitation should be scrapped, and the "infringement of the most basic values—speech, privacy and equality—should [not] be tolerated just because the violator is a private entity rather than the government." *Id.*
22. 334 U.S. 1 (1948).
23. However, the history of the "state action" issue in the Supreme Court goes back to the Reconstruction era, and the doctrine generally is bound up in the most fundamental issues concerning the meaning and reach of the Constitution. For discussions of the history of the doctrine see Alan R. Madry, *State Action and the Obligation of the States to Prevent Private Harm: The Rehnquist Transformation and the Betrayal of Fundamental Commitments*, 65 S. CAL. L. REV. 781, 786-95 (1992); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1688-98 (2d Ed. 1988) (hereinafter TRIBE); Chemerinsky, *supra* note 19, at 507-19.
discriminatory or wrongful. . . So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, . . . there has been no action by the State. . . .

However, the Court went on to hold that the enforcement of these restrictive covenants by the state courts constituted state action, "in the full and complete sense of the phrase," and violated the petitioners' Equal Protection rights. Thus *Shelley* established the two basic touchstones of current state action doctrine: First, that purely private interference with "rights" (even followed by state inaction) is not a constitutional violation, but second, that "state action" may be found when the courts, or other state officials, do nothing more than such an arguably "neutral" act as enforcing the terms of a contract, or, as I shall argue, refusing to intervene when called upon to do so.

In my view, *Shelley* correctly identified what is, and what is not state action, and did so in a way that, strictly applied, should have lead to rational results in later cases. However, neither commentators nor future Courts have been willing to accept *Shelley* on its terms.

For example, Gerald Gunther has observed that:

If *Shelley* were read at its broadest, a simple citation of the case would have disposed of most subsequent state action cases. Some seemingly "neutral" state nexus with a private actor can almost always be found: at least by way of the usual state law backdrop for exercises of private choices: usually via more concrete state involvement than that. Given the entanglement of private choices with law, a broad application of *Shelley* might in effect have left no private choices immune from constitutional restraints. But as [subsequent cases] show, the Court has rejected so expansive a reading and has taken seriously the *Shelley* assurance that, despite some of its analysis, a state-private distinction was to be retained.

25. *Id.* at 13 (citations omitted).
26. *Id.* at 19.
27. "These are not cases. . . .in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit." *Id.*
28. *Shelley* has been called "constitutional law's Finnegan's Wake" upon which each reader may stamp his own meaning. Phillip B. Kurland, Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of Government," 78 HARV. L. REV. 143, 148 (1964). It is certainly true that the sentence quoted by Kurland is enigmatic: "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities," 334 U.S. at 22. However, *Shelley* seems to me to be quite clear as to its main points: Any action by state courts is "state action," but inaction by state officials is not state action.
Likewise, Laurence Tribe blames Shelley as the beginning of a "peculiarly unpersuasive" doctrine because

The Court appeared to find the requisite state action in the fact that the state courts had indeed enforced the covenants; but such reasoning, consistently applied, would require individuals to conform their private agreements to constitutional standards whenever, as almost always, the individuals might later seek the security of potential judicial enforcement.  

A FRESH LOOK AT SHELLEY V. KRAEMER

Contrary to Tribe, Gunther, and everyone else who has complained about Shelley, it can be read as standing for a straightforward proposition: there is government (state) action whenever government officials or their surrogates act, and there isn't when they don't. Thus, when a court hears or dismisses a case; when a zoning board decides an appeal; when a sheriff's department seizes property, fires an employee, or refuses to intervene in a dispute; and when a legislature passes, or defeats, a bill, there is state action. To hold otherwise, as the Court has sometimes done, is to make an argument that defies ordinary language and common sense.

As the above formulation indicates, however, there are two distinct grounds on which a complainant may show state action: First, he may demonstrate "genuine state action" simply by showing that a state official has acted; it is not necessary that that action be "overt" or "significant." Alternatively he may demonstrate "surrogate state action" by showing that a private actor is acting sufficiently like a governmental official to count

30. Tribe, supra note 23, at 1697 (citation omitted). Tribe further observes that, in the view of many commentators, the Court's finding of state action in Shelley, as well as in Reitman v. Mulkey, 387 U.S. 369 (1967), has rendered state action "a nearly empty or at least extraordinarily malleable formality." Id. at 1698 (citing Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 29-31 (1959)).

31. Harold Horowitz, in The Misleading Search for "State Action" Under the Fourteenth Amendment, 30 S. Cal. L. Rev. 208 (1957), advanced a similar, but narrower, theory: "When state law is applied to determine legal relations between private persons there is 'state action.'" Id. at 209. However, his approach seems to be limited to actions of state courts rather than all state officials, and breaks down, or at least diverges from mine, when specific cases are analyzed. See discussion, infra note 39.

32. Contrary to the consistent holding of a majority of the Court. E.g., Tulsa Professional Collection Servs. v. Pope, 485 U.S. 478, 486 (1988): "[W]hen private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found." As will be discussed, this is the issue in a surrogate state action case, but not in a "genuine" state action case.
as a "state actor." In this case there need be no actual involvement of a state official at all.\textsuperscript{33}

If the complainant establishes state action by one of these two methods he must then demonstrate, not that his constitutional rights have been in some general sense abridged, but that \textit{they have been abridged by the state actor (actual or surrogate) in question}. The Supreme Court has failed to recognize, first, that there are two kinds of state action, and second, that merely finding state action does not necessarily mean that the complainant will be able to demonstrate that the state actor violated the Constitution.\textsuperscript{34} These two failures have bedevilled the Court.\textsuperscript{35}

In \textit{Shelley}, the question of whether a state official violated the petitioner's rights was easily answered. The state court in \textit{Shelley} ruled, in effect, that property owners subject to a restrictive covenant can't sell their property to blacks. Such a pronouncement by a public official—court, mayor, legislature, or sheriff—is flatly impermissible and a violation of equal protection. Also impermissible would be a more "neutral" ruling by a court: "If people choose to abide by restrictive covenants in selling their property, the court will not enjoin such a sale when asked to do so by a black plaintiff."\textsuperscript{36}

By contrast, consider the "company town" case of \textit{Marsh v. Alabama}.\textsuperscript{37} In \textit{Marsh}, a Jehovah's Witness was arrested and convicted for trespass when she refused to desist from distributing religious literature in a privately owned company town. According to my analysis, both when she

\begin{itemize}
  \item At times, Prof. Tribe also seems to advance this view, such as when he finds two kinds of state action cases: those in which there "plainly existed a government-formulated discriminatory classification," (such as the state constitutional amendment in \textit{Reitman v. Mulkey} that allowed property owners to dispose of their property to whomever they chose) and those in which "the only apparently unconstitutional rule may be the product of a private actor's decision," as in \textit{Burton v. Wilmington Parking Authority}, 365 U.S. 715 (1961). TRIBE, \textit{supra} note 23, at 1700-01.
  \item However, when Tribe declares that there is no state action "if the racist actor is in fact a private individual, and if the only government choice takes the form of a racially neutral decision to enforce the trespass laws," \textit{id.} at 1702, he not only diverges from my approach, but does so in a way that will continue to provide inconsistent doctrine. "Racially neutral decisions" by courts may not violate Equal Protection, but they are definitely state action.
  \item Prof. Larry Alexander has previously pointed out that state action can easily be found in any regime of legal entitlements. "But having said that, absolutely nothing follows about the constitutional validity of those legal regimes." The Public/Private Distinction and Constitutional Limits on Private Power, 10 Const. Commentary 361, 367 (1993). However, I disagree with Prof. Alexander that "all private action implicates state action [and] no case involving a constitutional challenge can be lacking in state action." \textit{id.} at 362-63. Until state actors or their surrogates have acted, there is no state action.
  \item This confusion is not limited to the present Court. In 1964, in \textit{Bell v. Maryland}, 378 U.S. 226 (1964) Justice Black, speaking for three Justices, averred that "the reason judicial enforcement of the covenants in \textit{Shelley} was deemed state action was... not merely the fact that a state court had acted, but rather that state enforcement of the covenants had the effect of denying to the parties their federally guaranteed right to own, occupy, enjoy and use their property without regard to race or color." \textit{id.} at (Justice Black, J. dissenting). This is a typical reading of \textit{Shelley} that leads to confusion in subsequent cases. State action was present merely because the state court had acted. But the complainants in \textit{Shelley} only prevailed because they were also able to show that that action violated their equal protection rights.
  \item Why this pronouncement is unconstitutional whereas other such neutral decisions regarding private infringements on due process and free speech interests are not is discussed infra, p. 231.
\end{itemize}
was arrested, and when she was tried, whatever the result of the trial, state action occurred. But what did the state actors do (or decide)? Both the sheriff and the judge decided, in effect, that a person can't distribute handbills on private property without permission. This is an unexceptional, and patently constitutional, position. Consequently, unlike the state court's ruling in Shelley that private racial discrimination would be enforced by the courts, these state actors did not violate the complainant's rights. 58 However, it was still open to her to argue, as she did, successfully in the Supreme Court, that the private company that owned the town was so cloaked in the mantle of government that it was a surrogate state actor which, by banning the distribution of literature in what was considered a "public place," was violating the First Amendment. 39

Does this simple approach "require individuals to conform their private agreements to constitutional standards whenever, as almost always, the individuals might later seek the security of potential judicial enforcement" as Tribe suggests? And would this reading of Shelley "have disposed of most subsequent state action cases," as Gunther avers? My answers are: to Tribe, "Yes, but not in the way you envision;" to Gunther, "No."

As to Gunther's point, such an approach does not render the "state action" issue nugatory. First, this approach has no application to the "surrogate state action" cases, which have made up a major portion of the Supreme Court cases in this area, beyond recognizing that they make up a distinct subgroup. 40 Second, it does not relieve the complainant in either type of case from proving that the activities of the state officials have violated his constitutional rights. But it does relieve the Court of

38. It may not be obvious why a decision by a judge upholding exclusion of political speech from private property is not a constitutional violation whereas the decision of a judge upholding a racially discriminatory private contract is. This result, reflecting the unique position of racial discrimination, in our law is developed infra, p. 242.

39. It is in the analysis of Marsh that I diverge from Prof. Horowitz' position. Horowitz argues that it is not "necessary to attempt to equate the company town with the state," Horowitz, supra n. 31 at 217, in order to reach the decision that the Court reached in Marsh. To me, that finding is crucial. He further claims that the reason for the Marsh result is that suppression of speech to "an entire town" is worse, "in a quantitative sense" than suppression of speech to an individual. Id. at 217-18. To me, this misses the point. If I open my land to a rock concert with 50,000 people in attendance I may ban Jehovah's Witnesses and their ilk from distributing religious literature. But if I own what appears to be a "town" of 2,000 people, I may not keep the Jehovah's Witnesses away because I am functioning like a government, regardless of the size of my potential audience. Indeed, for First Amendment protection to hinge on the size of the audience would be a troubling departure from current law.

40. Thus, the three part test of Lugar v. Edmonson Oil Co., 457 U.S. 922 (1983), quoted above, continues to be useful in deciding, or explaining why the Court decided, whether such private parties as a utility company, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (no); a fraternal organization, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (no); or a restaurant in a city-owned parking garage, Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (yes), should be considered surrogate state actors.
The State Action Knot

having to do contortions to either "find" or not find state action in what is obviously a state activity, such as a trial.\footnote{1}

As for Tribe's objection, if people want to discriminate, interfere with others' free speech, etc., on their own, then they don't violate the Constitution.\footnote{2} But they can't escape constitutional scrutiny of such acts if the state is called upon either to ratify or disapprove them, even by "neutral decision[s] to enforce the trespass laws,"\footnote{3} because any such action by police, judges, zoning officials, etc. is, by definition, "state action." So too, as I shall argue, is a refusal by state officials to stop such private activities (as opposed to total inaction) when the alleged victim of private wrongs seeks relief.

But to say that "constitutional scrutiny" can't be escaped is not to say that the complainant always wins. In any state action case, the complainant must also establish that "government officials," either actual or surrogate, violated his constitutional rights.

Reconsider the case of \(A\ v. \ B\) (the anti-abortion protest) discussed above. At the time of \(A\)'s acts, he had not violated \(B\)'s constitutional rights because there was no state action. However, if \(B\) brings a tort suit against \(A\), any action that the court takes on the suit, including dismissing it, is state action. Now the question is, did the court violate \(B\)'s rights. In \textit{Shelley}, "neutral" enforcement of the restrictive covenant by the court did deny the plaintiff equal protection of the laws because it put the court in the position of endorsing and enforcing racial discrimination.

In \(A\ v. \ B\), by contrast, the existence of a constitutional violation would depend on whether, for example, the state law applied to the case was designed to stifle political protest, as in \textit{New York Times}. If so, the enforcement of such a law by the court would be a constitutional violation. But if the suit were dismissed solely because there is no tort that covers \(A\)'s acts under state law, then, despite the state court action, \(B\) would likely have failed to make out a constitutional violation by state officials. Then, as in \textit{Marsh}, \(B\)'s only hope would be to show that \(A\) was a surrogate state actor.

THE FRESH APPROACH AT WORK

Under this regime, complainants will have a relatively easy time establishing, and even forcing, state action, by such simple expedients as

\footnote{1} The Court's two most recent decisions in this area performed such contortions in attempting to determine whether or not "state action" was to be found in the granting of peremptory challenges by the defendant in a civil and a criminal trial. \textit{Edmonson v. Leesville Concrete Co., Inc}, 500 U.S. 614 (1991); \textit{Georgia v. McCollum}, 505 U.S. 42 (1992). These cases are discussed \textit{infra} pp. 234-36.

\footnote{2} As the Supreme Court has consistently recognized. \textit{See, e.g.} \textit{Moose Lodge No. 107 v. Irvis}, 407 U.S. 163, 173 (1972).

\footnote{3} TRIBE, \textit{supra} note 23, at 1702.
filing a lawsuit or calling the police. However, the more remote the official action is from the behavior of the original actor, the less likely it is that the complainant will be able to show that the official acts violated the Constitution.

I thus disagree with Tribe that "the state action inquiry...is a search not simply for a government rule, but for a government rule possessing the forbidden characteristics identified by the particular right the litigant invokes." On the contrary, the state action inquiry is a search for a governmental (or governmental surrogate) rule, ruling, or other act, nothing more or less.

I do agree with Tribe that the complainant's ultimate success will depend upon showing that the government has violated his rights. But this is not merely a semantic difference. When the two issues are bound together, as Tribe suggests and as the Court frequently does, courts are likely to confuse the underlying constitutional issue with the state action question, producing murky doctrine as to each.

Consider the 1970 case of Evans v. Abney, cited by Gunther as illustrative of the Supreme Court's narrow treatment of Shelley. The Court had previously held, in Evans v. Newton, that a will that conveyed property to a city for use as a park "for white people only" could not be enforced by the courts. This was consistent with Shelley, because such enforcement is action by the state that allows racial discrimination. However, in Abney the Court did not disapprove the action of the Georgia courts in reverting the property to the heirs, rather than forcing the city to operate an integrated park.

The majority, without mentioning "state action," held that the reversion, which deprived white and black citizens alike of the use of the park, was permissible. The Court distinguished Shelley on the ground that there "state judicial action...affirmatively enforced a private scheme of discrimination against Negroes. Here the effect of the Georgia decision eliminated all discrimination...by eliminating the park itself..." In this passage, the majority got it right by seeming to hold that the complainant had gotten over the state action hurdle, but had faltered when he tried to show that that action was discriminatory.

Unfortunately, the majority confused matters by also distinguishing a hypothetical case where a city closed its own park to avoid integrating it, on the ground that there it would be "the State and not a private party that

44. Tribe, supra note 23, at 1700 (emphasis in original).
45. 396 U.S. 435.
46. Evans v. Newton, 382 U.S. 296 (1966). The Supreme Court did not find "state action" in the court case itself. Rather, "state action" was found in the fact that the city maintained the park and was "entwined in [its] management or control." Id. at 301.
47. 396 U.S. at 445. The Court further noted that "[i]n the case at bar there is not the slightest indication that any of the Georgia judges involved were motivated by racial animus or discriminatory intent of any sort..." Id. But this is "equal protection" language, not "state action" language.
is injecting the racially discriminatory motivation."\textsuperscript{48} But if this was intended to suggest that there would be state action in such a case, but not in the \textit{Abney} case itself, it misses the point. "State action" doesn't depend upon a finding that certain acts are unconstitutional, but simply on whether the state has acted, which it obviously had in both \textit{Abney} and the hypothetical case. But although state action should be found in both cases, the Court was correct in its conclusion that the racially neutral decision in \textit{Abney} was not unconstitutional, but the action of the city of closing the park to avoid integration \textit{would} be unconstitutional.

Dissenting Justice Brennan clearly believed that the majority found this to be a "no state action" case when he complained that "this discriminatory closing is permeated with state action" in that Georgia statutes authorized the discriminatory will provisions, public officials accepted title to the park, and a state court enforced that racial restriction that kept apparently willing parties of different races from coming together in the park.\textsuperscript{49} In this he was correct.

However one feels about the merits of the equal protection claim, it is on that issue, rather than on the state action issue, that the battle should have been fought.\textsuperscript{50} There was, or should have been, no real dispute between the majority and the dissent that state action was present when the Georgia courts enforced the reverter clause. The only serious issue in the case is thus whether that action violated equal protection. The indeterminacy is thus more the product of the Court's confusing the issues than it is of the doctrine's inherent contradiction.

The approach of this article can be consistently applied to any state action case. Consider \textit{Flagg Bros., Inc. v. Brooks}.\textsuperscript{51} In \textit{Brooks}, the petitioner warehouse company had stored Brooks' furniture, by arrangement with the sheriff and pursuant to state law, when she was evicted. She had approved of the storage but complained that the prices were too high. After a time, petitioner notified Brooks that it planned to sell the furniture to satisfy warehouse fees. She sued in federal court under 42 U.S.C. § 1983, claiming that Flagg Bros. was a state actor and consequently could not deprive her of her property without due process of law.\textsuperscript{52} The Court held that Flagg Bros. was not sufficiently cloaked in state authority to be considered a state actor. (Brooks did not claim that the original actions of the sheriff breached her rights.) That is, according to my view of the case, the Court first found no genuine state action, since no state officials were

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  \item \textsuperscript{48} 396 U.S. at 445.
  \item \textsuperscript{49} Id. at 454-55.
  \item \textsuperscript{50} The majority, evidently believing that discriminatory acts cited by Brennan were pertinent only to the earlier case, confined its consideration entirely to the reverter decision in the courts.
  \item \textsuperscript{51} 436 U.S. 149 (1978).
  \item \textsuperscript{52} Id. at 156. It is not clear exactly what process Brooks claimed she was due.
\end{itemize}
involved, and then found that Flagg Bros. did not qualify as a surrogate state actor. Consequently, it didn't reach the due process issue.

Could Brooks have won in this case by the simple expedient of seeking an injunction in state court, thereby creating “state action” and, with it, a need to comply with due process requirements? The answer is no. A dismissal or adverse judgment in her case would indeed be state action. But would it be unconstitutional? This depends on figuring out just what the thrust of that judgment would have been. The state court would have held something to the effect that a private warehouseman may sell goods stored for nonpayment of storage fees without notice or a hearing. This is unexceptionable. No matter how the issue is framed, so long as one concedes, as the Supreme Court found, that Flagg Bros. was a private party and not a surrogate state actor, Brooks cannot show unconstitutional action by the state court because all that the court did was to reaffirm the principle that private parties need not accord due process when they seize property to satisfy a debt.\textsuperscript{53}

Seen in this light, many of the problems that inhere in the Supreme Court’s most recent decisions in this area, \textit{Edmonson v. Leesville Concrete}\textsuperscript{54} and \textit{Georgia v. McCollum},\textsuperscript{55} can be resolved. In \textit{Edmonson}, a defendant in a civil suit allegedly used peremptory challenges to exclude black jurors from the jury. In \textit{McCollum}, the defendant in a criminal case did the same. In both cases, it was argued that defendants and their attorneys were not state actors and, consequently, there could be no Constitution-based objection to their acts.

In both cases, the Supreme Court disagreed. Since \textit{Edmonson} is the first case, and is relied on heavily in \textit{McCollum}, I will limit my discussion to it. In \textit{Edmonson}, the Court went through a lengthy, and unnecessary, exegesis of the factors to be considered in answering the “state action” question. There was a two-part test, the second part of which was further subdivided into a three part test: “[F]irst whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority.”\textsuperscript{56} (Yes, peremptory challenges do.) “[S]econd, whether the private party charged with the deprivation could be described

53. Thus I take no position on the disputed issue in \textit{Brooks}: whether Flagg Bros. must be considered a surrogate state actor which would be required to provide due process. See opinion of Justice Stevens, dissenting, 436 U.S. at 168.

There was also state action when the legislature passed the authorizing statute, but since it did not allow either the state, or a surrogate state actor (which the Court held Flagg Bros. was not), to seize property without due process, it was not unconstitutional. Prof. Alexander, supra note at 363, by contrast, is of the view that the \textit{statute itself} was not only state action, but unconstitutional. Since the \textit{statute itself} did not deprive anyone of property, it could only be unconstitutional if state officials, genuine or surrogate, seized property without due process. But this is the argument that \textit{Brooks} rejected.


56. 500 U.S. at 619 (citation omitted).
in all fairness as a state actor.\textsuperscript{57} The answer to this question depended on (1) "the extent to which the actor relied on governmental assistance and benefits," (2) "whether the actor is performing a traditional government function," and (3) "whether the injury caused is aggravated in a unique way by the incidents of governmental authority.\textsuperscript{58}

After much discussion, the Court concluded that the answer to both prongs was "yes" (which it had to be if state action were to be found),\textsuperscript{59} and remanded the case for a determination of whether a prima facie case of racial discrimination in the jury-choosing process had been established.

The dissent began by claiming that, "[n]ot everything that happens in a courtroom is state action,"\textsuperscript{60} a proposition with which the majority evidently agreed.\textsuperscript{61} The dissent then went on to point out that it is ridiculous to charge the state with the actions of the lawyer for a private party. (The dissent made that claim even more strongly about the lawyer representing a criminal defendant in \textit{McCollum}.\textsuperscript{62})

In my view this latter argument by the dissent is patently true. The lawyers in both of these cases cannot reasonably be said to be acting for or on behalf of the state. The majority's conclusion that when they exercise peremptory challenges they are, but at other times they are not, is not just wrong, but makes no sense.\textsuperscript{63} Lawyers for private parties, especially criminal defendants, are not surrogate state actors at trial. Nevertheless, I agree that the majority has reached the correct result because the dissent (and the majority) proceeded from a false premise.

Contrary to both the dissent and the majority, "everything that happens in a courtroom" is state action. How could it be otherwise? A trial is a quintessential governmental proceeding, held in a government building and presided over by a government officer. There is not, as the majority held, anything special about peremptory challenges that makes their exercise

\begin{itemize}
\item \textsuperscript{57} Id. (citation omitted).
\item \textsuperscript{58} Id. at 621-22 (citations omitted).
\item \textsuperscript{59} "While private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action. This is subject to constitutional restraints. . . . If the second element of the state action requirement [whether the private party can be described as a state actor] is met as well." \textit{Lugar v. Edmondson Oil Co.}, 457 U.S. 922, 941 (1982). As discussed in the text, a showing of \textit{either} of these factors should be enough to establish state action.
\item \textsuperscript{60} Id. at 632 (O'Connor, J. dissenting).
\item \textsuperscript{61} In \textit{Tulsa Prof. Collection Serv. v. Pope}, 485 U.S. 478 (1988), the Court, per Justice O'Connor, held that some admittedly "state action" "falls short of constituting the type of state action required to implicate the protections of the Due Process Clause." \textit{Id.} at 487. This confuses the two issues, (1) whether there is \textit{any} state action and (2) whether \textit{that} action is a due process violation.
\item \textsuperscript{62} 505 U.S. at 62-63 (O'Connor, J., dissenting).
\item \textsuperscript{63} Especially in light of the earlier case of \textit{Polk County v. Dodson}, discussed below, in which the Court had held that a public defender was \textit{not} a state actor when she appeared in court on behalf of her client.
\end{itemize}
“state action” where other things that happen during the trial are not. Rather, genuine state action is to be found in the trial itself.

The Court’s struggle to find state action in a proceeding where it obviously exists (and the dissent’s claim that it is absent) is due to its apparent assumption, shared by Tribe and Gunther, that it can’t be admitted that the whole trial is state action because to do so would be to open up a constitutional challenge to everybody who files a lawsuit—to turn every case in state court into a constitutional case in federal court. But this ignores the ability of federal judges to dismiss such claims, not because there is not state action but because the state actor has violated no constitutional rights.

Consider Polk County v. Dodson, a case relied on, to great effect, by the Edmonson dissent. Dodson attempted to sue his lawyer, a public defender, under 42 U.S.C. § 1983 on the ground that she had failed adequately to represent him at his criminal appeal because she moved to withdraw from the case on the ground that his appeal was frivolous. The Supreme Court concluded that, despite her being on the state payroll, she was not a “state actor” for the purposes of establishing the requisite constitutional violation. The Edmonson dissenters pointed out, correctly, that that conclusion could not reasonably be squared with the opposite result reached by the Edmonson and McCollum majorities.

Since the issue before the Court in Dodson was whether or not the public defender was a state actor, the Court was technically correct to apply the usual indicia in determining whether an ostensibly private party is a surrogate state actor, or, as in this case, whether an ostensibly public party is a private actor. However, had Dodson alleged that the Iowa Court of Appeals, in accepting the lawyer’s motion, had violated Dodson’s constitutional rights, then he would have established state action because

64. As the Court put it in McCollum, “[t]he exercise of a peremptory challenge differs significantly from other actions taken in support of a defendant’s defense,” (which are not to be considered state action). 505 U.S. at 54.
65. At least every part that is under the control or auspices of the judge is state action. Thus, if one of the lawyers at the trial were to suddenly fire one of her associates because he was black, this private act of discrimination would not be considered “state action” merely because it happened in the courtroom. But every part of the trial proceedings themselves is “state action.”
67. 454 U.S. at 318.
68. In agreeing that the public defender is not a “state actor” despite being on the state payroll, I recognize that I have muddied the waters slightly on this issue. However, public defenders, legal aid lawyers, and court appointed defense lawyers are probably unique in that, though they are paid by the government, they certainly don’t represent it and often oppose it. Thus it is reasonable not to consider them public officials when they represent clients, though they may be when they act as an employer. A more common problem will be to determine when a state official is acting in his/her public capacity. Obviously, if a sheriff sues a doctor for malpractice, the sheriff is not engaging in state action. Of course, the court that hears the suit is, but that fact is only relevant if the parties claim that the court has itself deprived them of some constitutional right, as in New York Times.
the actions of the Iowa Court of Appeals are, unavoidably, state action. Having won that point, however, Dodson surely would have lost the case, because the Supreme Court had previously found that such attorney withdrawals are constitutionally permissible.

*Lugar v. Edmondson Oil Co.*, the case relied on most heavily by the majority in *Edmonson* (no relation to *Edmondson Oil Co.*), is also unhelpful to the resolution of *Edmonson* and *McCollum*. In *Lugar*, the question was whether a prejudgment attachment of the petitioner's property in a suit to recover a debt was "state action." The Court held that, in order to find state action, the complainant must prove both that the "claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority," and that "respondents, who are private parties may be appropriately characterized as 'state actors.'"

The first prong doesn't seem meaningful. If I run somebody over in my car, I am "exercising a privilege having its source in state authority," i.e., the driver's license. But this doesn't shed any light on the state action issue. Why should the resolution of that issue be in any way affected by the fact that I was driving rather than walking? On the other hand, the second prong, requiring a determination of whether the actor in question either is a governmental official or is cloaked in governmental authority, is dispositive of the state action issue.

In *Lugar*, since state officials acted in both issuing the writ of attachment and executing it, there should have been no problem finding genuine state action. Instead, the Court, in a hotly contested 5-4 decision, treated this as a surrogate state action case, finding that a "private party's joint participation with state officials... is sufficient to characterize that party as a 'state actor.' . . ." This in turn led the Court in *Edmonson* and *McCollum* to strain to find that private parties, the attorney, could be "appropriately characterized as state actors" when the case could have been much more easily resolved by recognition that the trial itself was state action.

Recognizing that state action occurs whenever governmental officials or their surrogates are acting also resolves the converse issue, which has

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69. Dodson did allege that certain government agencies that had nominal authority over the public defender should be charged with responsibility for her acts. While the Court did not put it in these terms, essentially it found that, while these agencies were state actors, their acts were unrelated to Dodson's claimed constitutional violation. See 454 U.S. at 320-21.

70. See *Anders v. California*, 386 U.S. 738 (1967) (if counsel finds an appeal too frivolous, he may withdraw from the case after filing a brief referring to anything in the record that might arguably support an appeal).


72. id. at 939.

73. "[A] clerk of the state court issued a writ of attachment, which was then executed by the County Sheriff." 457 U.S. at 924.

74. Id. at 941. This may have been due to the fact that, if the only state action was by state officials, the complainant may not have received much by way of damages.
sometimes troubled the Court: It does not occur when they are not acting. While this may seem as obvious as the first principle, it has not been so to the Court.

In *Burton v. Wilmington Parking Authority*,\(^\text{75}\) the Court found state action in the exclusion of blacks by a private lunch counter located in a government-owned parking garage. While there was state action in *Burton* because the state court denied the complainant relief, the Supreme Court's conclusion did not rest on that ground. Instead, the Court observed that the state, by its "inaction," in failing to require restaurants to be integrated, has made itself "a party to the refusal of service."\(^\text{76}\) More recently, in *Flagg Bros*, discussed above, the Court has retreated from the newspeak position that "inaction" is "action," by finding the "total absence of overt official involvement" as the key to distinguishing earlier cases.\(^\text{77}\) Rather, as the Court held, state action cannot be demonstrated "by the simple device of characterizing the State's inaction as 'authorization' or 'encouragement.'"\(^\text{78}\)

I agree with the Court that the actual participation of a state official in the matter at issue is decisive in a "genuine state action" case. However, Justice Rehnquist seems to retreat from this position in dictum in his majority opinion in *Flagg Bros*:

If the mere denial of judicial relief is considered sufficient encouragement to make the state responsible for those private acts, all private deprivations of property would be converted into public acts whenever the state. . .denies relief sought by the putative property owner.\(^\text{79}\)

As Dean Paul Brest has pointed out, this statement does not seem to hinge the finding of state action on the actual participation of a government official (the issuance of a writ by the clerk of court).\(^\text{80}\) Once cut

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\(^{76}\) Id. at 725. However, despite this statement, the Court resolved this case on surrogate state action grounds, finding that "[t]he State has so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity. . ." Id.

\(^{77}\) 436 U.S. at 157, distinguishing North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) and Sniadach v. Family Finance Corp., 337 U.S. 67 (1969). The Court further observed that "In each of those cases a government official participated in the physical deprivation of what had concededly been the. . .plaintiff's property under state law before the deprivation occurred." 436 U.S. at 160, n.10.

\(^{78}\) 436 U.S. at 164 (citationas omitted).

\(^{79}\) Id. at 165. On the contrary, a judge's decision to deny relief is, necessarily, state action. A statute is also (contrary to the Court's view, 436 U.S. at 160, n.10), but a statute that merely allows creditors to seize debtors' property to satisfy the debt will never be found to pose constitutional problems. By contrast, if the judge's decision to deny the complainant relief could, in a particular case, be shown to be based on race, that decision could be struck down (see discussion, infra p. 242).

\(^{80}\) Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296 (1982): "What 'government official' participated in the deprivation in *Sniadach* and *North Georgia Finishing*? Only the clerk [of the court] was involved, and, as Justice Rehnquist himself suggests, the clerk's participation was of no moment: 'The constitutional protection attaches not because. . .a clerk issued a ministerial writ out of the court. . .'" Id. (quoting Flagg Bros., 436 U.S.
loose from that mooring, the Court's decision would seem to be cast adrift from logic and constitutional doctrine.

Dean Brest has correctly criticized the Court for first claiming that the ministerial act of a court clerk was the key to distinguishing earlier cases and then admitting that that act was not the reason that constitutional protection attached. Whatever the Court may have meant, the apparent contradiction in *Flagg Bros.* can be resolved by considering the above dictum to be the answer to the "surrogate state action" question rather than the "genuine state action" question, as the Court's discussion of a lack of governmental "authorization" or "encouragement" of private activity suggests.

That is, there was "state action" when the legislature passed the statute, when the clerk issued the writ and when the state courts denied relief. However, none of those acts would constitute a seizure of property by the government, without due process. Consequently, there was genuine state action, but no constitutional violation. Brooks' second line of attack, that *Flagg Bros.* was acting as a government surrogate, was the one that the Court was mostly discussing. On that issue, if *Flagg Bros.* was a surrogate state actor it clearly did violate her due process rights. But the Court, finding no "authorization" or "encouragement" of *Flagg Bros.* acts by the state, concluded that it was not.

But are Brest, and Justice Stevens, the author of the dissent in *Flagg Bros.*, correct when they assert that constitutional review should not rest on the "fortuity of such [ministerial] governmental intervention?" Once it is recognized that the technical presence of some governmental act is essential only to the question of whether genuine state action will be found and does not decide either whether a private actor can be cloaked with governmental authority or whether the "state action" in question is constitutional, this distinction is not troubling.

Moreover, it is not a mere "fortuity" or technicality. As discussed, once state action is found, the complainant must then show that the state official's acts were unconstitutional. But how can we characterize the acts of the policeman who was not called or the court that was not asked to act? Only when a state official has acted, even if only by refusing to intervene, can we go on to the issue of whether his or her action (not the action of a private party) was unconstitutional.

The distinction between actual state action, however slight, and inaction is further important because it affects the answers to the remaining issues of whether the private actor may be considered a surrogate of the state and

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at 161 n.10).

81. Immediately after the portion quoted by Prof. Brest, Rehnquist observes that "a State may act through different agencies—either by its legislative, its executive, or its judicial authorities." 436 U.S. at 161 n.10.

82. Brest, supra note 80, at 1311 (quoting *Flagg Bros.*, 436 U.S. at 174 (Stevens, J., dissenting).
whether the acts of the various actual and surrogate "state officials" are constitutional. The more minimal the official actions in question, the less likely it is that they will amount to a constitutional violation. Furthermore, the more power the state delegates to private individuals, so that they can act on their own without government assistance, the greater the chance those private actors will be considered surrogate state officials.

For example, the fact that no governmental officials participated in the "whites only" primary cases, while it avoided "genuine" state action, made it easy to find "surrogate" state action because the elections are a traditional government function that the state had allowed private parties to perform. While Flagg Bros. shows that it is entirely possible for the complainant to fall short on both lines of attack, it is still not only the easiest, but the most sensible, approach to view the state action question as involving two possible bases for suit rather than only one, but with two barriers to recovery that the plaintiff must overcome.

Thus, the fact that a complainant can always establish state action simply by asking state officials to act and being refused does not render the "state action" limitation nugatory. First, as noted above, if state officials do not "act," at least by refusing to take action, it will be virtually impossible to attribute an unconstitutional meaning, or any meaning, to their non-behavior. Second, as the amount of state action approaches zero, so too will the complainant's chances of proving that those acts were unconstitutional. Finally, the harder the state tries to avoid challenge to its acts by delegating its power to private parties, the more likely it is that these parties will become surrogate state actors.

This approach will also help to decide cases where there is doubt about whether a particular person is a "state actor" or an activity a "state activity." In an early and insightful article on state action, Professors William Van Alstyne and Kenneth Karst posed a series of hypothetical cases to bolster their conclusion, shared by most subsequent commentators, that there was no formula that could be consistently applied to state action cases. For example, is it "state action" when "a police officer, while off duty, presents his badge to a Negro, pretending to arrest him, and then beats him severely"? Equally troublesome would be whether a "whites only" fundraising barbeque held by a volunteer fire department on public land is a state activity or not.

Our instinct is to conclude that such actions should be subject to sanction. However, I believe that this can be achieved without sacrificing a rigorous approach to the state action question. In the first instance, I

84. The Court pointed to these cases in Flagg Bros. as examples of "surrogate state action" without using the term. See 436 U.S. at 158-59 and cases cited therein.
86. Id. at 9.
would take a narrow approach to both of these cases, concluding that "genuine" state action is limited to real state officials who are acting in the line of duty. Thus, while both actors are real state officials, since both are off duty at the time of the discriminatory act, there is no genuine state action. To hold otherwise would unfairly subject the government to liability for the acts of rogue off-duty employees.

Nor, in my view, can surrogate state action be found here, though this could be argued either way. Applying the criteria set forth in Edmonson, the actors have not relied on "government assistance or benefits," they are not "performing a traditional governmental function" (beating people up and charitable fundraising are not such functions), and the injury caused is not "aggravated by the incidents of governmental authority." In short, brutality by off-duty police and fundraising by volunteer firemen simply cannot "in all fairness" be characterized as governmental acts.

But this does not mean that such actions cannot be sanctioned. Rather, it must be shown, just as the Supreme Court required in the Civil Rights Cases in the 1880s, that the complainant first turned to state and local government for relief. If he calls the police and they won't come, seeks an injunction that is denied, or files a tort suit that is dismissed, then state action has occurred. If, as in these examples, the claim is racial discrimination, then the government must establish that the denial of relief by state officials in the face of such private discrimination could not be seen as an endorsement or an enforcement of such private racial discrimination. Since it probably would be seen as tacit approval of discriminatory acts, state action and a constitutional violation would be found.

By contrast, if someone excluded blacks from his home, a police or state court enforcement of that exclusion, while constituting state action, would be merely a legitimate recognition of the homeowner’s right to exclude anyone he wished. But if he opened his home to the public "except blacks," the state could not enforce that exclusion or refuse, on

87. 500 U.S. at 621-22.
88. If one wanted to come out the other way, he could argue that "arresting people and the work-related activities of volunteer fire department are 'traditional government functions' and that the racial discrimination is aggravated by the fact that governmental officials, even off-duty, are involved in it." On balance, I don’t think these activities, "in all fairness" can be characterized as governmental.
89. Edmonson, supra at 621-22. I would, however, find state action in Van Alstyne and Karst’s Case 6, where "after making a formal arrest, an officer removes his badge, declares that he is no longer acting in the name of the law and beats the Negro severely." Van Alstyne and Karst, supra note 85, at 9. The state action is the arrest and the detention of the suspect. Once he comes under official control, his treatment is a state responsibility.
90. 109 U.S. 3 (1883).
91. As Professor Tribe has observed, "In some circumstances, the majority opinion implied, a state’s failure to regulate private conduct could constitute 'state action' justifying federal intervention." Tribe, supra note 23, at 1693.
92. As discussed below, such denial of relief by state officials should be subject to strict scrutiny in race cases. A different result would obtain, however, if the complainant claimed that she had been excluded from the barbeque for distributing religious literature.
motion of a black plaintiff, to stop it, even though the state decision was "racially neutral." 93

TREATING RACE DIFFERENTLY

Up to this point, I have held in abeyance discussion of what appears to be an inconsistency in the results of the cases under my approach. Why is it unacceptable for the state court in Shelley to declare that private racial covenants restricting land sales are enforceable as "neutral enforcement" of a contract, but acceptable for state courts to hold that one private citizen may interfere with another's political expression?

The Court has never claimed that resolution of the state action issue is different in cases involving racial discrimination, though state action has usually been found in such cases and usually denied when other constitutional claims are raised. Nor would the state action inquiry be any different in race cases under my approach since, as I argue, action is action, regardless of the actors motivation or lack of it. However, the resolution of the underlying constitutional claim is different when that claim involves racial discrimination.

Suppose that, in Brooks, the complainant alleged and could establish that Flagg Bros. only acted in such a peremptory fashion in selling the party's property when the debtors were black. The police refusal to intervene would be state action. The issue would then hinge on the real constitutional question in this case: whether the police refusal constituted an endorsement or tolerance of Flagg Bros.' discriminatory behavior sufficient to violate equal protection. Similarly, if she sought, and was denied, an injunction against Flagg Bros. the case would turn on whether the state action of denying her claim violated equal protection.

The resolution of these cases is a question of equal protection law, not state action law, and, as such, is beyond the scope of this article. However, once it is recognized that the ultimate success of the complainant's case hinges, not on whether there was state action but whether she was denied equal protection, resolution of the case becomes easier. Whereas due process only imposes a limitation on state action, equal protection requires the state to act to stamp out racial discrimination.

Just as legislative acts that permit racial discrimination are subjected to "strict scrutiny," so should the acts of state officials in this context. 94

93. It is in this case that my analysis diverges from Tribe's, as discussed, supra note 33. See further discussion, text accompanying note 94, infra.

94. The Court did exactly this in the case of Reitman v. Mulkey, 387 U.S. 369 (1967). It struck down a state constitutional amendment that purported to withdraw the state from entanglement in decisions by private homeowners to discriminate in the sale of their houses on the ground that it "encouraged" private discrimination. Id. at 375. For a discussion of the Reitman case see, Kenneth L. Karst and Harold W. Horowitz, Reitman v. Mulkey: A Telophase of Substantive Equal Protection, 1967
That is, once the complainant has offered evidence that the original act was racially motivated, official refusal to intervene should be considered to be an endorsement of such racism unless the government can establish otherwise.

It is, however, at least arguable that the government could meet this burden as to the police, though not the state courts. When Brooks calls the police and complains, "they're selling my furniture because I'm black!" the police, at least in the first case, have no way of knowing if this is true. Therefore a police reaction of, "We're not in a position to evaluate such a claim, tell it to the judge," could be taken at face value and not be treated as a tacit condonation of discrimination. In other words, it should not automatically be treated as an equal protection violation for police to refuse to act every time someone alleges racial discrimination. A pattern of police refusal to enforce the law as to blacks, by contrast, would appear to be an equal protection violation.

However, if Brooks seeks an injunction in state court and meets the preliminary requirement of showing a racial pattern either in Flagg Bros.' behavior, or in police refusal to respond to such complaints by blacks against other warehousemen, the court must then enjoin such discriminatory activity, and its refusal to do so is state action which violates the Equal Protection Clause. It is not enough for the court to say, "we don't get involved in any repossession cases, as long as they follow the statute." Such a "neutral" holding is tantamount to the "neutral" enforcement of all covenants in Shelley. It is simply not acceptable for public officials, who have the authority to prohibit private racial discrimination, to "not get involved" when called upon to act, at least when some credible showing of such discrimination has been made.

Although the Supreme Court has not articulated it, a "strict scrutiny" rationale like this may have underlain the Court's rather consistent finding of state action in racial discrimination cases where it has seemed much more reluctant to find it when other constitutional abridgments have been alleged. Indeed, this would explain the (heretofore inexplicable) differing results in Edmonson and Dodson.

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95. Unless the defendants can meet their burdens of showing that the plaintiffs' allegations of racial discrimination, or condonation of it by police, are false.

96. As the Court observed in Edmonson, "By enforcing a discriminatory peremptory challenge, the court 'has not only made itself a party to the [biased act], but has elected to place its power and prestige behind the [alleged] discrimination.'" 500 U.S. at 624 (quoting Burton, supra). By contrast, a court's acquiescence in interference with speech by private parties, or legally authorized seizure of property by private parties without due process, does not seem so troubling.

97. This raises another question, which I will leave to others to answer, whether gender based peremptory challenges must also be subjected to "intermediate scrutiny" of some sort. However, so far, such challenges have only been forbidden to the government, not to defense attorneys. J.E.B. v. Alabama, 114 S. Ct. 1419 (1994).
Thus, state action occurs any time a state official acts. But the ultimate issue of whether that action was unconstitutional will depend on accurately characterizing the official's action and identifying the right involved. In my view, it is not problematic for a judge to hold, either explicitly or implicitly, that private actors may seize property without due process or exclude political speech from their land, for such a holding merely reflects the "state action" limitation of the Constitution. By contrast, it is wrong for a public official to say, in effect, "private racial discrimination is okay." Just as state legislation that promotes racial discrimination must be treated with strict scrutiny, so it is that other official acts should be treated that way as well, for even tacit approval of racial discrimination by state officials is unacceptable.

*Moose Lodge 107 v. Irvis* represents an exception to the Court's pattern of finding "state action" in race discrimination cases while generally not finding it when other constitutional rights are claimed to be abridged. In *Moose Lodge*, the issue was whether there was state action when a private club would not serve liquor to black guests of members. The plaintiff had urged that there was state action because the state liquor authority had issued a liquor license to the club. The Court tacitly conceded that the issuance of a liquor license was state action, but then concluded that the state played "absolutely no part in establishing or enforcing the membership or guest policies of the club that it licenses to serve liquor." That is, there was "state action" when the liquor license was issued, but no discrimination. There was no state action when the Moose Lodge discriminated, nor were they cloaked in state authority.

By contrast, Justice Brennan, dissenting, argued that, because of a pervasive scheme of regulating liquor licensees, the state had become, in
effect, a partner in the Moose Lodge’s liquor business, and state action was therefore present.\(^{102}\)

However one may feel about the result in this case, the mode of analysis used by both the majority and the dissent was correct. First, the Court looked to whether or not state officials were acting and agreed that, when they issued liquor licenses, they were. Then the Court asked whether that state action was discriminatory or caused or condoned discrimination and concluded that it was and did not. Finally, the Court asked whether, due to the regulation of the business inherent in the state’s liquor code, the Moose Lodge was a surrogate state actor when it discriminated and concluded that it was not.

I would approach this case in much the same way the Court did but subject the state’s decision to grant the liquor license to strict scrutiny. However, unless it could be shown that, either in the issuance of the license or in its continued enforcement of its mandate, the liquor control authority had the apparent power to forbid racial discrimination but refused to do so, I would reach the same result that the Court did on the genuine state action argument.\(^{103}\) That is, the result of this case would be the same as that where the police, in the *Flagg Bros.* hypothetical, said, “We are not empowered to evaluate and act on racial discrimination claims.”\(^{104}\) Thus, even applying a “strict scrutiny” to public officials’ acts in race cases does not necessarily mean that such claims will succeed.\(^{105}\)

**CONCLUSION**

In summary, state action may be found in two ways: genuine and surrogate. The former occurs whenever a state official acts in his official capacity, however minimal that action may be. It includes refusals to act, but not total inaction. Surrogate state action occurs when a private actor is cloaked in the mantle of governmental authority such that he “could be described in all fairness as a state actor.” In either case, the complainant

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102. *Id.* at 185-86.
103. Leaving aside the resolution of the surrogate state action issue that was the source of the disagreement between the majority and the dissent.
104. I recognize, of course, that the court decision making all these findings would itself be state action. However, as noted above, the Supreme Court has acknowledged that racial discrimination by certain private clubs is protected by the First Amendment. Recognition of that right would not, therefore, violate equal protection.
105. The dissenters did not claim issuance of a license by state officials directly or indirectly caused discrimination, and thus tacitly agreed with the Court that only the surrogate state action issue was in dispute. The dissent then concluded that the state was sufficiently intertwined with the *Moose Lodge* in the liquor business that that business should, like the restaurant in a state-owned parking garage in *Burton v. Wilmington Parking Authority*, be treated as a state entity. Resolution of this surrogate state action issue, which would be dispositive of the constitutional claim because a state surrogate would be discriminating, is not affected by any of the arguments made in this article.
must then establish that his constitutional rights were abridged by the state actor, genuine or surrogate, in question. If complainants can make some showing of racial animus, then the official actions or refusals to act will be strictly scrutinized. Unless the government, or surrogate, can establish another explanation for its behavior, the plaintiff will prevail. In other types of cases, however, the burden is on the plaintiff to establish that his constitutional rights were infringed by the actions of the actual or surrogate government officials.

Applying this approach to the litigation in \textit{N.O.W. v. Scheidler}, it would appear that Congress, in passing the RICO statute, cannot be shown to have exhibited any animus to legitimate First Amendment protests since the statute is limited to punishing criminal behavior as defined in a list of serious federal and state crimes. Even a civil action under RICO must be based upon proof of criminal wrongdoing.\textsuperscript{106} Similarly, the mere entertainment of a RICO suit in a federal District Court, though it is state action, would not represent a constitutional violation.

However, if it could be shown that that suit was founded on a claim that legitimate political protest was criminal activity, then the refusal by the court to dismiss the suit would be government action that chilled the exercise of First Amendment rights.\textsuperscript{107} Thus, federal courts, in allowing civil RICO suits to survive a motion to dismiss, must take care that truly criminal behavior is the basis of the suit, not First Amendment-protected protest activities.\textsuperscript{108}

There is another peculiarity of the RICO statute that deserves mention. RICO is unusual in that it provides for treble damages in civil suits.\textsuperscript{109} In fact, civil RICO was designed this way in order to encourage individuals to serve as “private attorneys general” to ferret out and punish wrongdoing.\textsuperscript{110} As such, it is considerably easier to show that a civil RICO litigant should be considered a surrogate state actor than an ordinary civil litigant because that is exactly the role that Congress envisioned.

\textsuperscript{106} 18 U.S.C. § 1961(1) defines “racketeering activity” as any of a long list of federal and state crimes. To prevail in a civil suit, the plaintiff must establish that the defendants operated their anti-abortion organization “through a pattern of racketeering activity.” 18 U.S.C. § 1962(c).

\textsuperscript{107} See Bradley, \textit{supra} note 5, at 137-46, arguing that N.O.W.’s complaint in this case did not adequately allege extortion, but that criminal or civil punishment of some of the illegal acts alleged in the complaint would not violate the First Amendment. \textit{Id.} at 161-66.

\textsuperscript{108} This, as discussed in Bradley, \textit{supra} note 5, at 151-66, is likely to pose problems in the \textit{N.O.W. v. Scheidler} case itself, now that that case has been remanded for trial.

\textsuperscript{109} 18 U.S.C. § 1964(c).

\textsuperscript{110} “Both RICO and the Clayton Act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney’s fees. Both statutes bring to bear the pressure of ‘private attorneys general’ on a serious national problem for which public prosecutorial resources are deemed inadequate; the mechanism chosen to reach the objective in both the Clayton Act and RICO is the carrot of treble damages.” Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143, 151 (1987).

However, since the entertainment of the suit by the court is state action anyway, this point would not seem to be of much practical use.