

[State Action in 2020]

How should we – nonlawyers and lawyers alike – think about the following problem? Suppose New York adopts an extensive program that provides “vouchers” to send their children to non-public schools. The state imposes lots of requirements for schools to be eligible to receive vouchers: They have to pay their support staff the minimum wage, they have to recycle the waste they produce, they have to teach a specified number of core courses, they have to test their students regularly, and much more. A school affiliated with an evangelical church qualifies for the program, and about 75% of its budget comes from the vouchers it gets. The school has an explicit policy of refusing to employ mothers with pre-school-age children as teachers, because of its belief, rooted in religion, that such women should spend their time with *their* children. The question is: Is the school’s policy *unconstitutional*?¹

A lawyer today would address that question by asking first whether the school was a so-called *state actor*, because today the only entities that have to comply with the Constitution are such actors. Under today’s doctrine, the school is certainly not a state actor. Knowing that, though, tells us close to nothing about how to think about what we should do about the school’s policy. The state action doctrine is profoundly misleading, distracting us from paying attention to what truly matters. It should be abandoned – as it almost had been by the late 1960s.

The state-action doctrine emerges out of the language of the Fourteenth Amendment, but the doctrine doesn’t do any useful work in constitutional analysis. The

¹ Let’s assume that allowing church-related schools to accept vouchers doesn’t violate the Constitution.

Fourteenth Amendment says, “No State shall” deny people their constitutional rights.²

It’s a restriction on *government* power, not a restriction on private power. But we don’t know what that restriction is until we figure out what constitutional rights people have, and how those rights can be denied.

Consider an example that sometimes crops up in discussions of abortion. Suppose that children and adults have a constitutional right to life. The government would certainly violate that right if it adopted a policy of arbitrarily seizing people walking down the street and shooting them. But suppose the government has a policy of providing no police services whatever to some neighborhood. The predictable effect is obvious: The neighborhood becomes a free fire zone for (private) criminals. And innocent people lose their lives as a result of the policy. It’s not hard to argue that the government’s policy violates the assumed constitutional right to life – and that’s true even though no government official actually shoots anyone. The assumed constitutional right to life is violated when the government fails to protect people from private depredation. Or, put another way, that right imposes a duty on government to protect people from such depredation. More generally, take any situation you worry about, and you’ll see that the government either has done something to cause a problem, or hasn’t done something to alleviate the problem. In one case there’s obvious state action, in the other there’s apparently no state action – but maybe there’s a violation by the government of its constitutional duty to do something to address the problem.

² A similar restriction has been read into constitutional provisions dealing with the national government. So, the “state action” doctrine probably should be called the “government action” doctrine, but the existing terminology is well-established.

Now, maybe we don't have a constitutional right to life of that sort. But we can figure that out only by analyzing what the Constitution requires *of government*. The observation that private criminals are the direct murderers doesn't move us forward in doing that.

In short, the Constitution's language generates the state-action requirement, but the Constitution's substance tells us when the state has in fact acted unconstitutionally – and, in particular, when the state's failure to act is unconstitutional.

What should we pay attention to when we try to answer the right question? Three categories of things – two involving constitutional rights, and one involving a blend of federalism, meaning the ability of different states to adopt different non-discrimination policies, and concerns about judicial enforcement of constitutional rights. Return to the problem we began with, the voucher-accepting school that won't hire mothers with young children.

1. Maybe the school has a right based on the Free Exercise Clause to accept vouchers *and* enforce its religious views about what mothers should do. The school would, in effect, be claiming a right to operate within a zone of religious autonomy into which the government's regulatory authority couldn't enter. To figure out whether the school's Free Exercise claim is a good one, we'd have to think about – obviously – the Free Exercise Clause. Whether the school is a "state actor" would play no role in our thinking.³

³ As we'll see immediately, the school's Free Exercise rights would have to be balanced against whatever rights mothers have. Saying that the school is not a state actor does not eliminate the need to engage in that balancing.

2. Maybe the school's policy violates the rights of mothers with pre-school-age children. Here the first thing to notice is that such women have *statutory* as well as constitutional rights. New York certainly has an anti-discrimination law. It's just another of the regulatory requirements the school – here, like every other employer – has to comply with. Suppose New York's anti-discrimination law treats the school's policy as an impermissible form of gender-based discrimination. The affected women's statutory rights are violated, and we shouldn't care much about whether their constitutional rights are violated as well (particularly when it's clear that the New York legislature enacted the anti-discrimination statute out of a sense that discrimination was something fundamentally wrong). Of course the school might say that enforcing the anti-discrimination law violates its Free Exercise rights, but we've already worried about that.

(Lawyers might note that the remedies available under state law for violating the anti-discrimination law might not be as good as the remedies available under federal law for violating constitutional rights. That might be true in some limited situations, but it's almost certainly not true generally. Lawyers will also note that it's hard to enforce violations of state anti-discrimination laws in federal courts, which may be more competent than state courts, unless there's some constitutional violation alongside the statutory one. Even if these lawyers' concerns have some substance, they clearly shouldn't have a large effect in our deliberations what to do about the school's policy.)

The problem gets a little trickier if New York's anti-discrimination law simply doesn't address the question of whether the school's policy is impermissible discrimination based on gender. From the affected women's point of view, the question becomes, Does New York have a constitutional *duty* to treat the policy as gender-based

discrimination? The question of constitutional duty can arise in a slightly different form. Remember that New York imposes lots of conditions – duties – on schools if they are to be eligible to receive vouchers. Even in the absence of a state anti-discrimination law, maybe New York has a constitutional duty to include a non-discrimination provision among the conditions of eligibility.

We can see how the state-action doctrine is really about constitutional duties by looking at one important Warren Court decision. The case involved a coffee shop located in a parking structure owned by the city of Wilmington, Delaware. The city rented out the space for the coffee shop, which refused to serve African Americans (the case was decided in 1961, before the national Civil Rights Act of 1964 prohibited racial discrimination in places like the coffee shop). When it was sued for discriminating, the city's parking authority said that *it* wasn't discriminating, the coffee shop was. So, the city said, the state-action doctrine meant that it couldn't be held liable for the discriminatory acts of the coffee shop. The Supreme Court held that the relationship between the city and the coffee shop made it reasonable to attribute the coffee shop's discriminatory actions to the city as well. The best way to understand the decision is that the city had a duty under the Constitution to include an anti-discrimination provision in the lease it gave the coffee shop.

The usual form taken by litigation in which the state-action issue arises obscures the connection between the state-action doctrine and the idea of constitutional duty. Suppose African Americans sued the coffee shop. It would defend by saying that it faced no legal barrier that prohibited it from discriminating (remember, this was in 1961). Or, put another way, the coffee shop had no constitutional duty to stop discriminating,

because the Constitution regulates only the actions of government. If anyone had a constitutional duty, it was the city's parking authority. But, no one associated with the parking authority is a defendant in a suit against the coffee shop. That, though, is just an accident of litigation. The African Americans could sue the parking authority – as indeed they did. The accidents of litigation-form shouldn't distract us from understanding what the state-action doctrine is about – in this branch, the existence or not of a constitutional duty to enforce non-discrimination norms.

Here we've returned to the same problem that arose in connection with the hypothesized constitutional right to life. Our constitutional tradition recognizes relatively few constitutional duties: The government has a duty to provide lawyers for poor people it prosecutes for crime; it has to provide fair procedures when it takes away a person's liberty or property; and maybe a few more. Mostly, we leave people alone to try to work out their problems within the framework of our law of contracts and property. Or, when we think that contracts or property law might not work well – because one side has too much more power than the other, for example, or because the people making the contracts might disregard the interests of others their decisions would affect – we let legislatures regulate what people do. The examples here are the minimum wage and environmental protection laws the voucher-accepting school has to comply with. Beyond that, we aren't too comfortable with the idea of *constitutional* duties, that is, things governments have to do even if they don't want to. Still, the point here is that we know how to think about the question of whether there's a constitutional duty to treat the school's policy as gender-based discrimination. The question is an ordinary, every-day question of *substantive* constitutional law. Starting off by saying, "Well, the school isn't

a state actor,” doesn’t tell us anything about how to think about the substantive question of constitutional duty.

3. Things get even trickier if New York’s legislature has made a deliberate decision to *exclude* policies like the school’s from its anti-discrimination law, or a deliberate policy decision against requiring non-discrimination as a condition of eligibility. Again, if we think that New York has a constitutional duty, that’s the end of it – subject to the school’s Free Exercise objection. But maybe we want to say, “Some states should be allowed to impose non-discrimination requirements, while others can be free not to. That way we’ll capture one of the benefits of federalism – the knowledge we’ll gain about what sort of voucher programs and non-discrimination laws work best from seeing how different systems work.”

This is what the state action doctrine actually did when it was first applied. It protected a realm of discretionary policy-making at the state level from displacement by the national government. The *Civil Rights Cases* (1883) held the national Civil Rights Act of 1875 unconstitutional because it required hotels and theaters – private actors – to refrain from discriminating on the basis of race. The Supreme Court emphasized that the fundamental problem it had with the statute was that it foreclosed states from adopting varying policies with respect to discrimination. That is, at its origin the state-action doctrine was a federalism doctrine.

Today, it can’t be quite that. We know that the national government does indeed have the power to require that hotels and theaters refrain from racial discrimination – at least when the national government acts through national *legislation*. So, today the state-action doctrine doesn’t preserve a domain within which state legislatures are free to

experiment. Instead, the state-action doctrine has become a tool for judicial restraint. It tells the courts that – sometimes – they should not interpret the Constitution to impose duties on states. The reason for this caution has to be fairly complicated. The basic idea has to be that imposing duties truncates the process of learning from experience that is one of federalism’s benefits. But, because *Congress* can truncate that learning process, the state-action doctrine has to rest on some idea that Congress is better than the courts in figuring out when we’ve learned enough to know that it’s a good idea to impose a specific statutory duty on places like schools getting vouchers.

The important point here is that saying that the school is not a state actor tells us nothing about whether the policy-area we’re concerned with – here, anti-discrimination law and its application to schools that get vouchers – is one that would benefit from continued experimentation. Or, put another way, saying that the school is not a state actor should be the *conclusion* of the inquiry, not its starting point – a label we apply once we’ve decided that this is an area where experimentation remains valuable until Congress decides otherwise.

The state-action doctrine thus contributes nothing but obfuscation to constitutional analysis. It substitutes an inquiry into the status of some legal entity for an examination of that entity’s substantive constitutional rights, or for an examination of whether a state legislature or Congress has a constitutional duty to protect somebody’s interests, or for an examination of the benefits (and costs) of giving legislatures discretion to adopt or refrain from adopting particular policies in specific policy-areas. Every state-action decision can be translated into these substantive terms, and doing so would clarify precisely what was at stake.

There's one important "tweak" we need here. We know that Congress has the power to enact civil rights laws because it has the power to regulate interstate commerce. That's an obvious dodge. The real reason for enacting such laws is that they enforce the Fourteenth Amendment's guarantees. As – discuss in Chapter ---, the Constitution in 2020 would openly acknowledge broad congressional power to do so. Then, instead of dismissing an action on state-action grounds, a court could say that *it* was not going to award relief because the subject was one where Congress should be the primary constitutional decision maker.

In one sense, eliminating the state-action doctrine wouldn't change constitutional law at all. Every state-action question can be translated directly into a question about substantive constitutional law. The real issue in every state-action case is: Does the Constitution create some duty on the government in the circumstances?

Why, then, does the state-action doctrine persist? The first thing to note is that the state-action doctrine is largely the re-invention of the Burger and Rehnquist Courts of one initiated by the reactionary post-Reconstruction Supreme Court. As Charles Black observed in 1967, at that time – a few years before Warren Burger became chief justice – the state-action doctrine was something of a bogey-man, a rhetorical device invoked to scare people (unsuccessfully) from using the federal courts to protect the interests of African Americans.⁴

Why would anyone think that the state-action doctrine *might* scare people off of enforcing constitutional rights or imposing constitutional duties? Again, the place to

⁴ Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967).

begin is the Constitution's language. When a criminal thug beats you up, everybody knows that the thug "acted" against you. It's harder to see what the government "did" to hurt you. Consider again the problem of litigation-form. The thug's behind bars, and you sue the city council and police chief. They say, "Wait a minute. *We* didn't beat you over the head with a pipe; the criminal, who we've put in jail, did that. What's your problem?" That response to your lawsuit has a certain superficial appeal – but only until you make it clear that you're not suing them for beating you up but for failing to satisfy the constitutional duty you say they have to provide you with adequate protection against thugs.

The state-action doctrine might work as a bogey-man because it appeals to a vaguely libertarian sense Americans have about the proper relation between them and their government. By saying that the Constitution applies only to governments, and not to private businesses or ordinary Americans, the doctrine seems to send the message that there's a domain of freedom into which the Constitution doesn't reach. Of course, freedoms can be exercised in morally distasteful ways, but – according to this view of the state-action doctrine – that's simply one of the costs of preserving freedom, which is itself one of the most fundamental goals of our constitutional system.

Unfortunately, the libertarian sense associated with the state-action doctrine is completely illusory because, as we have seen, state legislatures and Congress can invade the domain of freedom purportedly carved out by the state-action doctrine. We might well want to preserve a domain of freedom, but the state-action doctrine doesn't do it. What does preserve our (competing) domains of freedom are the substantive constitutional rights we have, like the Free Exercise Clause the school might be able to

invoke successfully. Switching our rhetoric from the state-action doctrine to substantive constitutional law would actually improve our understanding of the domains of freedom the Constitution protects. As it is, maybe people who read news stories about a Supreme Court decision denying someone a remedy because of the state-action doctrine might mistakenly think that the decision preserves *their* freedom, which however remains as vulnerable as before to legislative invasion.

The state-action doctrine serves another rhetorical function, and this one may be more important than the *faux*-libertarian one. The Constitution in 2006 doesn't impose many duties on government, which is why plaintiffs lose state-action cases. Sometimes ordinary people would be surprised and dismayed to learn that the government actually didn't have a constitutional duty to protect them, or someone else. Saying that a lawsuit actually seeking to enforce a constitutional duty failed not because there was no such duty but because there was no state action might provide cover for the disquiet we might feel if we were told that there was indeed no constitutional duty.

Consider here the famous case of Joshua DeShaney. Joshua was a young boy whose parents divorced. The divorce decree gave custody to Joshua's father, who turned out to be a violent, physically abusive parent. The father's abusive acts came to the attention of the state's child protective services agency, which conducted a superficial investigation and decided against intervening to protect Joshua. After a particularly savage beating left Joshua with enormous and permanent physical impairments, his guardian sued the protective services agency, claiming that *it* had violated Joshua's constitutional rights. The Supreme Court ordered that the suit be dismissed, invoking the state-action doctrine.

What was at stake in the DeShaney case? Obviously no one was contending that Joshua's right not to be beaten by government officials was violated. Rather, the claim was that the government had failed to comply with a constitutional duty to protect Joshua against his father. A lot of Americans probably think that the very point of having a government is to ensure that someone else – the police – will be available to help them out when someone else threatens their physical security. That is, lots of people probably think that there's a constitutional duty to provide protection against physical violence inflicted by criminal thugs. That was indeed the issue presented in the DeShaney case. Perhaps disposing of the case on state-action grounds hides from Americans – or, perhaps more important, from law students as the lawyers of the future – the fact that the Supreme Court was actually saying that they didn't have a constitutional right to protection against physical violence that many probably thought they had. And this is so even though the Court in the DeShaney case said that the Constitution does not "requir[e] the State to protect the life, liberty, and property of its citizens against invasion by private actors."

Maybe Americans don't – and shouldn't – have that constitutional right. A more recent case again addressed the question of the government's duty to provide protection against domestic violence. Referring to the federalism theme that runs through the state-action doctrine, the Supreme Court held that any duty to protect arose not from the Constitution but from state law.

The case involved another of the all-too-common incidents of violence against children in connection with divorce. Jessica Gonzales got a restraining order against her estranged husband Simon, directing that he stay away from their three daughters, except on alternate weekends, for two weeks during the summer, and for pre-arranged dinners

once a week. Early one evening and without prearrangement, Simon picked the girls up as they were playing outside their house. A couple of hours later Jessica called the police, showed them the restraining order, and demanded that the officers find the children and return them to her. The officers did nothing, even though the restraining order contained a notice to law enforcement officers saying, in capital letters, “You shall use every reasonable means to enforce this restraining order. You shall arrest . . . the restrained person when you have information amounting to probable cause that the restrained person has violated or attempted to violate any provision of this order.” Jessica called the police again three hours later, and was told to wait until midnight. When midnight arrived, Jessica again called, and then, an hour later, went to the police station to file a formal complaint. At 3 AM, Simon showed up at the police station with a semiautomatic handgun he had bought after he picked the girls up. He fired at the police, they fired back and killed him. When they went to his pickup truck, the police discovered the bodies of the three girls, who Simon had killed.

Jessica sued the city for violating what she said was its constitutional duty to protect her and her children, a duty, she said, that was created by the restraining order’s statement that the police “shall” arrest her husband if he violated it. The U.S. Supreme Court disagreed. The restraining order didn’t give Jessica or the children any rights beyond the ones Joshua DeShaney had. But, at the end of the Court’s opinion, Justice Antonin Scalia observed that Jessica and the children might have rights under *state* law that had been violated by the inaction of the police officers to whom Jessica complained.

That observation signals the complexity of the question of constitutional duty, and why sometimes we ought to leave the question of duty up to state legislatures to figure

out. Impose a duty on the child protective services agency in the DeShaney case or on the police in the Gonzalez case, and they may intervene too frequently, disrupting difficult but not physically threatening relations between parents and their children. Indeed, sometimes the intervention might actually violate an independent constitutional right to family privacy – akin to the voucher-accepting school’s claim that requiring it to hire mothers of young children violates its Free Exercise rights. So, this may be an area where legislatures are better at working out the policy-implications of enforcing a statutory duty to intervene than the courts would be in imposing a constitutional duty.

And here another rhetorical function of the state-action doctrine comes in. It allows courts to pretend that they are enforcing rights rather than balancing competing constitutional interests, a pretense that suppresses the question, “If all that’s involving is balancing interests, why are you any better than a legislature at the job?”

Yet, figuring out whether there is or should be a constitutional duty of a particular sort *should* be a quite difficult task, and it’s not clear why courts should do it all the time. Sometimes the answer will be clear, as it was to the Warren Court with respect to government duties to act to eliminate private discrimination against African Americans. Sometimes the answer may be less clear, as it was to the Rehnquist Court with respect to government duties to intervene against domestic violence. The crucial point, though, is that we ought to be trying to figure out what the government’s constitutional duties are. The state-action doctrine distracts us by directing that we look at the status of particular entities, to find out whether they are “state actors” or “private actors.” We would be well rid of it.