

A Conceptual Disaster Zone Indeed: The Incoherence of the State and the Need for State Action Doctrine(s)

Brookes Brown

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Constitutional Law Commons](#), and the [Law and Philosophy Commons](#)

Recommended Citation

75 MD. L. REV. 328 (2015)

This Symposium is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

**A CONCEPTUAL DISASTER ZONE INDEED: THE
INCOHERENCE OF THE STATE AND THE NEED
FOR STATE ACTION DOCTRINE(S)**

BROOKES BROWN*

The state action doctrine is famously a disaster zone. In this Paper, I will argue that the doctrine's problems have an unexpected source: *there is no such thing as the state*. In saying this, I mean nothing spookily meta-physical. Police exist, legislators exist, courts exist, laws exist, and so on. But the concept of the state is itself incoherent. Our core intuitions about what it is to be a state are in conflict.

The appropriate response might seem to be that defended by several recent authors: give up on the doctrine altogether. I however, maintain the opposite: recognizing this incoherence allows us to rescue the doctrine. Upon reflection, our interest in the state reveals itself as an interest in several different clusters of features, each of which prove independently coherent and morally significant. This suggests a new way of understanding the doctrine that can overcome existing criticisms. Rather than attempting to save *the* state action doctrine, we need to develop a pluralistic set of state action *doctrines*, clarifying when we have reason to attend to each of these traits.

I. THE STATE ACTION DOCTRINE

First, we need to get a sense of the problem. To that end, I will start by giving a brief overview of the state action doctrine before detailing why so many critics find this framework unacceptable.

The Supreme Court first articulated this doctrine in the "Civil Rights Cases," a group of lawsuits brought in response to the Civil Rights Act of 1875.¹ The Act barred inns, public conveyances, theaters, or places of public amusement from forbidding entry to people on the basis of race, color, or previous status as a slave.² In 1883, the Court found this restriction unconstitutional on the grounds that the Fourteenth Amendment does not give Congress the right to regulate private entities.³ Because the Amendment

© 2015 Brookes Brown.

* University of North Carolina, Philosophy, Politics, Economics Program.

1. The Civil Rights Cases, 109 U.S. 3 (1883). "The Civil Rights Cases" consist of five cases (ultimately consolidated) in which black citizens were denied access to white-only facilities (*United States v. Stanley*, *United States v. Ryan*, *United States v. Nichols*, *United States v. Singleton*, and *Robinson v. Memphis & Charleston R.R. Co.*).

2. Civil Rights Act of 1875, 18 Stat. 335 (1875).

3. *The Civil Rights Cases*, 109 U.S. at 15.

forbids *states* from abridging the privileges and immunities of citizenship, Section Five (the “enforcement provision”) is limited in scope, granting Congress the right to enforce this requirement only against *state actors*, not private individuals or associations.⁴ State actors can thus be found to violate the Constitution in a way private actors cannot.

This naturally raises the question, “who counts as a state actor?” If state and non-state actors are to be held to different legal standards, we need to know who falls into each category.

It is here where courts run into trouble. Those unfamiliar with the doctrine might think the task of identifying state actors relatively simple. After all, most of us move through the world relatively confident in our assessment of who does and does not constitute a government agent. Those more familiar with the doctrine will find this laughable. Far from being non-controversial, the state action doctrine is notoriously confused and contested. Generations of law professors and lawyers have struggled to make sense of the relevant jurisprudence with no real success. Charles Black famously noted that the courts’ approach to the issue resembles “a torchless search for a way out of a damp echoing cave.”⁵ Laurence Tribe has declared the doctrine to be in a state of bankruptcy.⁶ Even the lightest perusal of literature on the subject turns up sentences like, “[t]he state action doctrine is slowly descending into utter confusion,”⁷ “the state action doctrine [is] one of the most complex and discordant doctrines in American jurisprudence,”⁸ or, as Daniel Gifford more gently describes, the “case law exhibits a remarkable lack of coherence.”⁹

We can divide the most prevalent criticisms of the doctrine into three categories: that the doctrine is unintelligible, purposeless, and meaningless.

A. *Unintelligible*

Many argue the jurisprudence is *unintelligible*. Justice Souter put the point rather delicately when he wrote that, “no one fact can function as a

4. *Id.* at 13. The case remains good law to this day. For example, similar analysis explains the Supreme Court’s refusal to uphold parts of the Violence Against Women Act. *United States v. Morrison*, 529 U.S. 598 (2000). However, courts have permitted Congress to enforce bans against discrimination in public accommodations by expansively interpreting the Commerce Clause. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (holding that the Commerce Clause could be used to force private businesses to satisfy the Civil Rights Act of 1964).

5. Charles L. Black, Jr., *Foreword: ‘State Action,’ Equal Protection, and California’s Proposition*, 81 HARV. L. REV. 69, 95 (1967).

6. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1149 (1978).

7. Julie Brown, *Less Is More: Decluttering the State Action Doctrine*, 73 MO. L. REV. 561, 581 (2008).

8. Developments in the Law, *State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1250 (2010).

9. Daniel J. Gifford, *Federalism, Efficiency, the Commerce Clause, and the Sherman Act: Why We Should Follow a Consistent Free-Market Policy*, 44 EMORY L.J. 1227, 1229 n.5 (1995).

necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient.”¹⁰ The number of tests used by courts to identify state actors has ballooned—counts of five, six, or seven are common.¹¹ There appears to be no stable set of features we can rely on to assess whether a given entity counts as part of the state. As Christian Turner writes, “it is unclear which facts truly matter, how much they matter, or why they matter.”¹² To be of any use, the doctrine must be simplified. Yet courts have reached little agreement as to what kinds of facts are relevant to such an assessment.¹³ Indeed, a workable method of identifying state actors has been called the “Holy Grail that has eluded state action theorists for decades.”¹⁴

B. Purposeless

Others challenge the *purpose* of the doctrine. Why draw this distinction? Why should it be legal for a person to discriminate on racial grounds in selling her home, but illegal for a judge to enforce the exact same restrictive covenant—as the Supreme Court famously found in *Shelley v. Kramer*?¹⁵ These critics contend that state and non-state actors have the same moral standing.¹⁶ Consequently, the effort to distinguish these actors is misguided. Even if we could find a workable test, the distinction would have no normative significance. Rather than attempting to identify state actors, we should be looking for other traits whose presence or absence actually makes a moral difference. Charles Black, for example, declares of the state action doctrine that, “[t]o state a criterion is not to ensure that it will draw a useful line.”¹⁷ He further notes that, “[m]ost constructive sugges-

10. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001).

11. *See, e.g., Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982) (recognizing that the Court has articulated a number of different factors or tests in different contexts and leaving open the question whether these are actually different in operation); *see also* John Dorsett Niles, Lauren E. Tribble & Jennifer N. Wimsatt, *Making Sense of State Action*, 51 SANTA CLARA L. REV. 885, 886 (2011) (acknowledging that the court has considered the problem of finding a meaningful distinction between state and private action “more than seventy times”).

12. Christian Turner, *State Action Problems*, 65 FL. L. REV. 281, 290 (2013).

13. For examples of courts relying on different sets of facts, *see* *Tulsa Professional Collection Services Inc. v. Pope*, 485 U.S. 478 (1988) (determining whether agents receive governmental benefits); *Sniadach v. Family Finance Court*, 395 U.S. 337 (1969) (considering whether agents receive overt assistance from state officials); *Evans v. Newton*, 382 U.S. 296 (1966) (assessing whether a private action is intertwined with governmental policies).

14. Thomas D. Rowe, Jr., *The Emerging Threshold Approach to State Action Determinations: Trying to Make Sense of* *Flagg Brothers, Inc. v. Brooks*, 69 GEO. L.J. 745, 769 (1981).

15. 334 U.S. 1 (1948).

16. *See, e.g.,* Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 471 (1923).

17. Black, *supra* note 5, at 100.

tions come down, one way or another, to the suggestion that attention shift from the inquiry after ‘state action’ to some other inquiry altogether.”¹⁸

C. *Meaningless*

Finally, many scholars contend there is no meaningful distinction between so-called state and so-called non-state actors. Following in the steps of Robert Hale, such critics argue there are no actions that can properly be termed private, as all so-called private actions are possible only because so-called state actors permit them.¹⁹ Mark Tushnet, for example, writes that, “[t]he state action doctrine is analytically incoherent There is no region of social life that even conceptually can be marked off as ‘private’”²⁰ In a similar vein, Cass Sunstein concludes that state action is always present. “Suppose,” he writes, “that an employer refuses to hire women If an employer . . . is being allowed to do so, it is not because nature has decreed anything. It is because the law has allocated the relevant rights to the employer.”²¹ Since there are no non-state actions, there is no point attempting to distinguish state from non-state actors. The latter category will simply be empty.

These criticisms set the standard for the rest of our discussion. On these grounds, many legal scholars have argued that we should abandon the state action doctrine.²² At best, the doctrine creates confusion; at worst it leads us to systematically overlook civil rights violations. Any successful defense of the doctrine must answer these concerns: proving that we can develop workable tests for identifying state actors, showing that there are meaningfully distinct individuals and institutions that qualify as state and non-state actors, and—most importantly—exhibiting principled reasons as to why we should hold such actors to different legal standards.

II. THE ROOT OF THE PROBLEM: OUR INCOHERENT STATE

Contra critics like those just described, I will defend the state action doctrine. I believe that there is value to identifying state actors, and that this can be meaningfully and workably accomplished. Unlike recent attempts to respond to the above criticisms, however, I do not think we can rescue the doctrine merely by simplifying the tests courts use to identify

18. *Id.* at 95.

19. *See, e.g.*, Garry Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 *GEO. L.J.* 779, 789 (2004); Cass R. Sunstein, *State Action Is Always Present*, 3 *CHI. J. INT’L L.* 465, 467 (2002).

20. *See* Peller & Tushnet *supra* note 19, at 789.

21. Sunstein, *supra* note 19, at 467.

22. *See, e.g.*, Mark Tushnet, *State Action in 2020*, in *THE CONSTITUTION IN 2020*, at 69, 69–77 (Jack M. Balkin & Riva Siegel eds., 2009) (arguing that the state action doctrine is misleading, and should be abandoned).

state actors, or by locating a singular principle to explain the unique significance of such actors.²³ Instead, I think answering these challenges requires radically revising how we think about the doctrine and the entity it tracks.

The issue, loosely, is that existing attempts to untangle the confusion surrounding the state action doctrine begin with the sense that we can—and should—first work out the essence of what it is to be a state, and then find a feasible way of identifying the relevant actors and a principle that explains why they should be held to special constitutional requirements. The problem is that this will never work. There is a simple—if unexpected—explanation for the confusion that pervades discussions of the state action doctrine: our concept of the state is incoherent. Without noticing, we have clung to three different and mutually incompatible notions of states' fundamental nature. Consequently, there is no unequivocal thing that it is to be a state. In looking for the state, we have been seeking something that does not exist.

The hope for a way out of our jurisprudential morass lies in recognizing this incoherence. However, first I must clarify what I mean when I declare the concept of the state incoherent. My claim is that our notion of the public realm is *practically incoherent*. This is a cousin to logical incoherence. Logical incoherence occurs when two propositions contradict by definition. For example, you cannot both be married, and be a bachelor. What it means to be a bachelor is that you are not married. Practical incoherence, in contrast, occurs when two propositions are compatible as a matter of logic, but cannot, in practice, describe the same subject. For example, a *desert whale*—a whale that can eat only desert-growing cacti—is incoherent in this way. Such a thing seems possible as a matter of definition, but any animal that meets the first standard (being a whale) will not satisfy the second (eating only cacti) since desert plants do not grow in the ocean. Unlike a married bachelor, talk of such a thing is possible, but it remains senseless except in imaginative storytelling.

This is what I argue is true of the state. Our intuitions about the features an entity must possess to qualify as a state cannot coexist in practice. Like the idea of a marine mammal and the notion of an animal that must eat desert plants, these intuitions point to incompatible features. Consequently, we find ourselves deeply confused when we go looking for state actors. Depending on which intuition attracts our cognitive attention, we will reach

23. See Brown, *supra* note 7; see also Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767 (2010) (arguing that we can make sense of the state action doctrine by concluding that state actors are those who act on behalf of other people, in contrast with private actors who act on their own behalf); Wilson Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379 (2006) (contending that the state action doctrine can be understood as protecting the principle of democratic choice); Julie Brown, *Less Is More: Decluttering the State Action Doctrine*, 73 MO. L. REV. 561 (2008) (arguing that the Supreme Court should simplify and clarify the tests it uses to distinguish state actors).

different answers about what makes an entity part of the state, and thus about which individuals and institutions count as state actors.

To demonstrate this, I need to tease out our intuitions about what it is to be a state, and then show that these intuitions are incompatible. It is to the first of these tasks to which I will now turn.

A. *What Do We Believe States to Be?*

What courts believe states to be does not tell us what these entities really are. Nonetheless, it is a useful starting point for such conceptual analyses. In their efforts to identify state actors, lawyers and judges are forced to consider a variety of possible situations. In the process, they reveal widely held intuitions about the nature of states. Looking at how courts understand the state thus helps us clarify what ordinary users mean by the term.²⁴

We can group the tests courts use to identify state actors into roughly three categories: entanglement, public function, and traditional government actor. Each exposes a broadly held belief about the nature of the state.

1. *Entanglement Tests*

Entanglement tests focus on the connections between actors.²⁵ According to these tests, an individual qualifies as a state actor if her behavior is properly attributed to a government agent. The idea is that an act still counts as a government action if the government directs somebody else to do the task, just as you still bear responsibility for a murder if you hire a hit man.

Courts have looked to many different factors to assess the existence of this relationship. Included in this category, for example, are “entwinement tests” assessing how closely the government is connected to a group’s management or control,²⁶ “nexus tests” analyzing whether there is a close enough link between the state and the entity such that the “action of the latter may be fairly treated as that of the state itself,”²⁷ “state compulsion tests” examining the degree to which the state exercises coercive power

24. *See generally* FRANK JACKSON, *FROM METAPHYSICS TO ETHICS: A DEFENSE OF CONCEPTUAL ANALYSIS* (1998) (arguing that conceptual analysis typically proceeds by canvassing intuitions about possible cases to see what ordinary users find central about a given kind of thing).

25. *See, e.g.,* *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 300 (2001) (suggesting that it is the closeness of the relationship between a potential surrogate association and public officials that determines the organization’s qualification as a state agent).

26. *Id.* at 288 (holding that a sports association counts as a state actor because it is entangled with state action).

27. *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992) (finding that a community mental health center was not a state actor).

over the choice of a purportedly private organization,²⁸ and “symbiotic relationship tests” considering the level of interdependence between an entity and the state.²⁹ Judges have relied on a wide range of information to make these assessments, including (but not limited to): the extent to which the people or institutions in question receive government benefits,³⁰ whether they receive overt assistance from state officials,³¹ whether they are imbued with the capacity to undertake actions traditionally associated with the state such as the “power to subpoena witnesses, to impose contempt sanctions, or to assert sovereign authority over any individual,”³² whether a purportedly private action is “intertwined with governmental policies,”³³ and whether the state has provided a great deal of “encouragement, either overt or covert” for the entity’s actions.³⁴

Underlying these tests is a sense that the state is *an organization* that can be treated as a collective agent. As such, it has a clear decisionmaking process that organizes and manages how its parts behave. Specific individuals and institutions owe their status as state actors to the fact that their actions embody the choices of that decisionmaking process, not of their own independent decisions. They fail to qualify as state actors when their behavior cannot be traced back to this source, instead reflecting their own autonomous decisionmaking.

We see this intuition at play when, for example, we accept the metaphor of the state as a body, commanded by the head—the sovereign—who directs how the body will behave. This view was popularized by Thomas Hobbes, who famously wrote, “by Art is created that great Leviathan called a Common-wealth, or . . . State . . . which is but an Artificial[] Man; though of greater stature and strength than the Natural[] . . . in which, the *Sovereignty* is an Artificial[] *Soul*, as giving life and motion to the whole body.”³⁵ The same intuition is in play when we feel inclined to hold the state responsible for what is done by military contractors, but not the mafia, on the

28. *Blum v. Yaretsky*, 457 U.S. 991 (1982) (holding a nursing home did not count as a state actor).

29. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (finding that a coffee shop counted as a state actor because of a close symbiosis between the shop and government).

30. *Tulsa Prof'l Collection Serv., Inc. v. Pope*, 485 U.S. 478 (1988) (finding a collection agency connected to a hospital to count as a state actor).

31. *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337 (1969).

32. *NCAA v. Tarkanian*, 488 U.S. 179, 197 (1988) (holding that the NCAA does not constitute a state actor).

33. *Evans v. Newton*, 382 U.S. 296, 299 (1966) (finding that operating a park is a public function).

34. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).

35. THOMAS HOBBS, *LEVIATHAN* 9 (Richard Tuck ed., Cambridge University Press 1991) (1651).

grounds that the former's—but not the latter's—behavior can be properly attributed to legislators' decisions.

2. *Public Function Tests*

Public function tests identify state actors by the actions they perform and the powers they wield.³⁶ The most famous case decided under this rubric is *Marsh v. Alabama*.³⁷ The case involved a corporation, Gulf Shipbuilding, that forbade a Jehovah's Witness from distributing literature on a sidewalk owned by the company.³⁸ Gulf claimed that, as a private corporation, it had a right to prohibit such actions on its property.³⁹ The Court disagreed. Because the company owned and operated all the sidewalks and streets in the city, employed a police officer, and provided the usual accouterments of town life, the Court found that the corporation functioned as a municipality.⁴⁰ As such it was subject to First Amendment requirements, and thus forbidden from imposing such restrictions on the distribution of information.⁴¹ Courts have used similar reasoning to classify individuals and organizations who perform a wide variety of services as state actors, including, to name but a few, people who make peremptory challenges during jury selection, organizations that provide medical care in prisons, groups that provide transportation, as well as people who oversee parks, take custody of neglected children, or manage libraries.⁴²

36. *Robert Janusaitis v. Middlebury Volunteer Fire Dep't*, 464 F. Supp. 288, 298 (1979) (noting that, "the public function test turns on the nature of the power actually exercised").

37. 326 U.S. 501 (1946).

38. *Id.* at 502.

39. *Id.* at 503.

40. *Id.* at 507.

41. *Id.* at 508. The Court found that the corporation qualified as a state actor because its actions had the same impact on the interests of the affected citizens. Justice Black wrote that the citizens of the company town, "just like the citizens of towns that are not privately owned and operated . . . must make decisions which affect the welfare of the community and nation. To act as good citizens, they must be informed. In order to enable them to be properly informed, their information must be uncensored." *Id.*

42. *See West v. Atkins*, 487 U.S. 42 (1988) (finding that private physicians under contract to provide prisoners with medical care constitute state actors as part of the state's standing obligation to provide medical care to prisoners); *Edmonson v. Leesville Concrete, Co.*, 500 U.S. 614 (1991) (finding lawyers who make peremptory challenges to prospective jurors in civil trials to be state actors on the grounds that shaping the body that administers justice is a quintessentially state power); *Evans v. Newton*, 382 U.S. 296 (1966) (finding the trustees of a park to be state actors on the grounds that the park was an integral part of the city's activities, that parks were necessary to maintain the public domain, and that citizens needed places to recreate free from the constraints private actors place on their property); *Perez v. Sugarman*, 499 F.2d 761 (2d Cir. 1974) (finding that private hospitals who provided health services to neglected children are subject to Section 1983 claims because the provision of care to abandoned and neglected children is a clearly public function); *Chalfant v. Wilmington Inst.*, 574 F.2d 739 (3d Cir. 1978) (finding that a corporation operating a library under contract with the city was performing a public function because there is a public interest in an informed citizenry).

These tests are animated by the sense that the state serves a particular *role*. What makes an entity a state is the fact that it wields a special sort of control over the lives of those subject to its power, or plays a distinct part in the provision of significant resources. An entity qualifies as a state actor if it performs the role of government, just as a woman who raises a child qualifies as a mother by performing the role of mother, regardless of whether the child is her genetic offspring.

It should be obvious that this view of the state is widely shared. For evidence, you need only look as far as the most famous definition of a state: Weber's declaration that "[t]he state is the human community *that, within a defined territory . . . (successfully) claims the monopoly of legitimate force for itself.*"⁴³ Social scientists and the general public endorse this sense of the state when they assume a given region contains a failed state if it no longer possesses institutions with the ability to control the use of force or to provide public services.⁴⁴ The implicit assumption is that the ability to do these things is what distinguishes a state from other kinds of entities.

3. *Traditional State Actor Tests*

Finally, the traditional state actor test identifies individuals or institutions as state actors on the grounds that they occupy roles long associated with the state. For example, in *Shelley v. Kraemer*, the Supreme Court found that judges count as state actors even when enforcing private contracts, holding "[t]hat the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment is a proposition which has long been established by decisions of this Court."⁴⁵

This test reflects a broadly shared sense that particular actors—police officers, magistrates, post office employees—represent the state, and others—Catholic schoolteachers, advertising executives, Uber drivers—do not. This intuition about the nature of the state frequently presents as basic intuition. Though strongly held, those who express this intuition often suggest no further theory about what—if anything—unifies these positions. The implication is that this feature is a base fact, uniformly held, about the state. Any taxonomy that does not place these actors in the right categories will be *prima facie* inaccurate. Lillian BeVier and John Harrison capture this phenomenon nicely:

43. MAX WEBER, *Politics as a Vocation*, in MAX WEBER'S COMPLETE WRITINGS ON ACADEMIC AND POLITICAL VOCATIONS 156 (John Dreijmanis ed., Gordon C. Wells, trans., 2008) (emphasis added).

44. See, e.g., Jean-Germain Gros, *Towards a Taxonomy of Failed States in the New World Order: Decaying Somalia, Liberia, Rwanda and Haiti*, 17 THIRD WORLD Q. 455 (1996).

45. *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948).

All participants in the debate over state action appear to assume that there are institutions for collectively organized coercion, such as police forces and armies, and institutions that make primary decisions about how that force is to be used. . . . All also seem to assume that there are unproblematically private persons to whom state power can in a sense be delegated through the creation of private rights that will be coercively enforced. Core examples of the latter include individuals as well as artificial persons with legal personality, such as corporations.⁴⁶

To see this intuition in play, you need only ask your friends or family members who is part of the state and who is not.

Collectively, these tests capture our three strongest intuitions about the nature of the state: the state (1) is an organization, (2) governs, that is to say, it wields the power to control social outcomes, and (3) consists of those who occupy certain offices (like elected officials and judges acting in their official capacities), but not others (like corporate CEOs and private school-teachers).

B. What Are Political Institutions Actually Like?

These intuitions are practically incoherent. These propositions do not—and realistically cannot—describe the same subject. The set of individuals and institutions that count as *an organization* are inconsistent with the group of actors who take up *the role* of governing, and both in turn are at variance with the people who occupy traditionally recognized *offices*. What it takes to be an organization is incompatible with what is required to govern effectively, and neither intuition can be reconciled with our first-order intuitions about state offices. Consequently, our convictions about the state are in tension. We cannot find an intelligible, meaningful, and purposeful way of identifying state actors because our intuitions about what a “state” is point us in different directions.

To see this, we need only consider who qualifies as part of the state according to each of our intuitions about the concept’s nature. As we will see, what it takes to make one intuition about the state true makes the others false. These intuitions thus produce divergent answers, simultaneously telling us that particular individuals are—and are not—part of the state. The concept itself is incoherent.

1. The State-as-Organization Is Not the State-as-Office

Let’s begin with the first and third of the intuitions described above: our sense that the state is an organization, and that it consists of traditional

46. BeVier & Harrison, *supra* note 23, at 1802.

offices. As legal scholars should find unsurprising, these visions of the state prove inconsistent.

The problem stems from what an entity must be like to constitute an organization. A necessary feature of an organization is that its members' behaviors and relations are structured, managed, and controlled, such that their actions can be attributed back to the same decisionmaking process.⁴⁷ Such entities have a coordinated decisionmaking process that exercises effective command over how members behave, allowing the organization itself—qua collective entity—to deliberate about how it behaves and control its actions, and ensure that the members align with its intentions. This distinguishes the members of an organization both from a mere mob or group of people, and from the members of two or more distinct organizations.

The issue is the kind of control a particular decisionmaking process must have over an individual or institution for that actor to count as part of the organization in question. There is no way to understand the control that underlies our intuitions about what offices constitute the state. Thus, if the state is an organization—as intuition (1) above holds—it cannot also consist uniquely of traditional offices—as intuition (3) requires.

To see this, let us consider two actors, one of which counts as a traditional state actor, and one of which does not: the Environmental Protection Agency (“EPA”), and a barista in a coffee shop. As a rulemaking agency, the former easily holds a position traditionally associated with the state.⁴⁸ The latter, however, does not. It is hard to imagine a survey on the street would discover many people who think that coffee shop employees occupy offices of the state.

There are two ways we might understand the power a centralized decisionmaking process must exercise over a person or institution for the latter's actions to count as those of the organization, and not the person's autonomous decision or that of another organization. Neither reaches the right conclusions for our purposes. Read one way, agencies like the EPA will not qualify as state actors. Read another, baristas will. Either way, our intuitions prove inconsistent.

If we adopt a strong reading, an individual's behavior counts as that of an organization only when it clearly instantiates the results of the decisionmaking process thought to unify all the members. In the context of the state, this reading means that a person's actions count as state actions only when her intention to act can be traced in lineage to lawmakers. This is

47. See PETER FRENCH, *COLLECTIVE AND CORPORATE RESPONSIBILITY* (1984); CHRISTIAN LIST & PHILIP PETTIT, *GROUP AGENCY* (2007) (arguing that groups must have a defined organizational structure to count as a group agent).

48. See, e.g., *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791 (1975) (acknowledging that rulemaking agencies are state actors, though finding the issue inapplicable to the facts of the case); see also *Food and Water Watch v. Environmental Protection Agency Civil Action No. 2012-1639* (2013) (referring to the EPA in a way that recognizes it as an acknowledged state actor).

what we saw courts attempting to assess in the context of the entanglement test.⁴⁹ We see just this kind of standard, for example, in the courts' approach to the state action immunity doctrine. In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, the Court found that an act in restraint of trade received the immunity from anti-trust violations granted to state actors only if it was (1) clearly articulated and affirmed as state policy and (2) the state actively supervised the implementation of the policy.⁵⁰ These dual requirements ensure that entities count as agents of the state only when they are clearly acting to instantiate lawmakers' decisions.

The problem is that by this standard, rulemaking agencies like the EPA would not qualify as state actors. Lawmakers rarely affirmatively express the policies these agencies enact, and they routinely fail to actively supervise agency choices or policy implementation.⁵¹ Consequently, if we adopt this high standard, agencies like the EPA do not count as part of the state according to intuition (1). They enjoy too much autonomous decisionmaking capacity to qualify as simply a member of one broader organization.

Perhaps you dispute this. Agencies, you might think, appear to have discretion. But in fact, their choices reflect lawmakers' will. These officials simply wish them to behave as the agencies do. Those inclined to this argument should recall the limitations of the nondelegation doctrine. According to this doctrine, legislators are forbidden to delegate regulatory power without providing an intelligible principle to direct agency behavior. If legislators did so, agencies would qualify by our standard. But legislators do no such thing.⁵² As anybody familiar with the doctrine will recognize, courts permit legislators to delegate regulatory power with only the barest of guidelines or directives—so much so that legal scholars have declared the nondelegation doctrine to be “a constitutional lost cause.”⁵³ What is important for our purposes is not just that legislators do not issue guiding directives or actively supervise agency behavior, but *why* they fail to do so.

49. See Part II.A.1.

50. 445 U.S. 97, 105 (1980) (holding that a wine pricing system authorized by California statute constituted resale price maintenance in violation of antitrust laws on the grounds that while legislators clearly authorized price setting, they did not actively supervise the system).

51. See Matthew McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrol v. Fire Alarms*, 28 AM. J. POL. SCI. (1984) (accepting that Congress does not exercise active oversight over agencies and attempting to argue that legislators might nonetheless influence how agencies behave more indirectly).

52. Richard Murphy, *The Limits of Legislative Control over the 'Hard-Look'*, 56 ADMIN. L. REV. 1125, 1131 (2004) (“As the ill-health of the non-delegation doctrine demonstrates, the separation-of-powers requirement that law place substantial constraints on the scope of executive discretion is for the most part honored in name but not in practice. This state of affairs came to pass for good reasons. Vast delegations often make policy sense—many people think it is an excellent thing for the Environmental Protection Agency (EPA) to have broad authority to clean up the environment, for example.”).

53. Cynthia R. Farina, *Deconstructing Nondelegation*, 33 HARV. J.L. & PUB. POL'Y 87, 88 (2010).

The answer is that they cannot. They lack the knowledge, expertise, attention span, or resources to engage in this kind of management.⁵⁴ As Justice Blackmun wrote, “in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”⁵⁵

Work in empirical political science bears this out. Though scholars dispute the details, researchers typically agree that asymmetries in information and expertise—as well as natural limits on the scope of attention—make it impossible for lawmakers to meaningfully supervise agency policy choices in any active sense.⁵⁶ The same limitations that make *ex-ante* direction functionally impossible make *ex-post* oversight unduly challenging. This is not to say that lawmakers exercise no influence over the behavior of administrative agencies, or that they lack the capacity to override these decisions in particular instances. Such a claim would be silly. My point is only that lawmakers do not have the ability to meaningfully supervise or command most of the agency’s decisions at any given moment. Consequently, these groups typically operate with a high degree of autonomous decisionmaking capacity.⁵⁷ In these cases, their decisions are best understood as their own, not as instantiating the choices of higher-level decision makers. Thus, if we understand the relations that define an organization in this relatively strong way, administrative agencies will routinely fail to count as state actors, despite passing the traditional state actor test.

If we adopt a lower standard, we get the opposite problem. Too many individuals qualify as state actors. On this approach, an individual would count as part of an organization such that her actions are properly attributed to the organization, if the group’s decisionmaking process gave her the tools to act as she did. Administrative agencies will certainly qualify on this standard.

The problem is that almost every action taken by citizens will qualify. As Robert Hale argues, much of what we are able to do is possible because the law gives us property rights over resources, grants us exclusive access to goods, protects our rights to use such goods as we see fit, and permits us

54. See Murphy, *supra* note 52 and accompanying text.

55. *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

56. See Matthew C. Stephenson, *Bureaucratic Decision Costs and Endogenous Agency Expertise*, 23 J.L. ECON. & ORG. 469, 470 (2007) (“The informational asymmetry that justifies the delegation in the first place makes it difficult for Congress, courts, or other overseers to monitor the agency.”); see also David B. Spence, *Agency Policy Making and Political Control: Modeling Away the Delegation Problem*, 7 J. PUB. ADMIN. RES. & THEORY 199, 214 (1997) (arguing that politicians’ ability to understand and act upon policy choices is much more limited than formal political models suggests).

57. See Spence, *supra* note 56, at 214.

to act.⁵⁸ This is precisely what Tushnet and others have in mind when they hold that there is no region of social life that is conceptually private.⁵⁹

Take, for example, our barista. Though not the holder of a traditional office, she would qualify under this standard. We see this exact situation in *Burton v. Wilmington Parking Authority*.⁶⁰ In that case, the Supreme Court found the Eagle Coffee Shop, a privately run restaurant, to be guilty of a Fourteenth Amendment violation when it refused to serve black customers.⁶¹ The coffee shop in question clearly would not qualify as a state actor under the stronger standard. The Court found no evidence that lawmakers or other officials actively supervised the coffee shop or encouraged employees' behavior.⁶² Yet the shop qualified as a state actor on the grounds that the land and buildings on which the shop operated (and for which the shop paid rent) were owned by the state, as were nearby convenient parking facilities.⁶³ The Court thus found that the state gave the coffee shop the tools to act as it did.

Intuition (1) and intuition (3) are thus in tension. If we take the state's status as an organization to require a meaningful link between the head and hands of the body politic—the sovereign's choices and the behavior of so-called members—institutions that qualify as state actors according to intuition (3) will fail according to intuition (1). If we adopt a looser notion of what it means for the state to be an organization, entities that fail according to intuition (3) will qualify according to intuition (1).

2. *The State-as-Organization Is Not the State-as-Governor*

Lawyers and legal scholars are unlikely to find the above revelation surprising. After all, the vast jurisprudence of the state action doctrine is in many ways set up to address the divergence between what strikes us as a traditional state actor and what our other intuitions would seem to imply should qualify. But the tension between the idea of the state as an organization, and the idea of the state as playing a special role, proves to be slightly more subtle.

Part of the challenge lies in pinning down what role we think the state plays. Everyone from philosophers to the man on the street is quite convinced that the state enjoys unique powers and performs special tasks. Yet

58. Hale, *supra* note 16, at 470.

59. See LOUIS MICHAEL SEIDMAN & MARK TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES (1996); Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779 (2004).

60. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

61. *Id.* at 717.

62. *Id.* at 723–724. In describing the relationship between the state and the parking authority, the Court mentions only financial dealings involving rents and the upkeep and maintenance of the building. *Id.*

63. *Id.*

it proves quite difficult to resolve what people have in mind with any precision. When pressed, people tend to resort to quite abstract statements—for example, Weber’s declaration that the state has a monopoly on the legitimate use of coercive force.⁶⁴ But it is obvious that most do not straightforwardly believe these claims. It is hard to believe anybody thinks I would be wrong to physically restrain Fred if he is beating his toddler. But nobody thinks it follows that I must be a state agent. And many of these references to the state as possessing such a monopoly prove quite circular or under-theorized.⁶⁵ *Who* has to have a monopoly on legitimate violence for us to say *the state* does?

Courts provide markedly little guidance. In fact, they have further confused the issue by suggesting that what appears to be the exact same act—the enforcement of a private racial covenant—is transformed in nature if enforced by a judge.⁶⁶ Typically, courts resort to historical references, pointing to the fact that a particular behavior was a “traditional function of government,”⁶⁷ or whether an entity exercises powers “traditionally exclusively reserved to the state,”⁶⁸ as if the mere history of who had performed an act could transfigure its nature.⁶⁹ But this resort to history is inconsistent with our intuitions as to what makes the state unique.⁷⁰ If we were to discover that only elected officials were traditionally allowed to wear brown belts, I doubt we would think that frozen yogurt purveyors counted as state actors if permission was expanded to them as well. Instead, the direction of

64. See, e.g., GEORGE KLOSKO, POLITICAL OBLIGATION 9 (2005) (“In discussing the ‘state,’ I use the term to represent an institution that corresponds to Max Weber’s standard definition, an agency that successfully claims a monopoly of legitimate force in a given territory.”).

65. For a further example of talk about the state that implicitly assumes it possesses such a monopoly, see Andrea Sangiovanni, *Global Justice, Reciprocity, and the State*, 35 PHIL. & PUB. AFF. 9 (2007) (declaring that “it is only states that coerce in the domain of private law and taxation and with respect to individuals”).

66. See, e.g., *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948).

67. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991) (finding that a private civil litigant’s use of race-based preemptory challenges constituted state action).

68. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974) (holding that state regulation of a public utility does not make the utility into a state actor).

69. Indeed, courts have vacillated as to whether it matters that an act is functionally equivalent to that performed by a traditional state actor. Although in *Terry v. Adams*, the Court found it relevant that the election would be functionally equivalent to a forbidden election, and in *Richardson v. McKnight*, the Court denied that private prison guards constituted state actors (though it found that government-employed prison guards do) on the grounds that the prison has not always been exclusively public. *Terry v. Adams*, 345 U.S. 461 (1953); *Richardson v. McKnight*, 521 U.S. 399 (1997).

70. Even courts have found public function tests to be unworkable. In *Garcia v. San Antonio Metro. Trans. Auth.*, for example, Justice Blackmun indicated that a historical standard for a public function was arbitrary because governmental functions shifted over time, and a nonhistorical standard was unworkable. 469 U.S. 528, 530 (1985). See also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/GGD-92-11, GOVERNMENT CONTRACTORS: ARE SERVICE CONTRACTORS PERFORMING INHERENTLY GOVERNMENTAL FUNCTIONS? 3 (1991) (concluding that inherently governmental functions are difficult to define).

causation seems to go the other way. Ordinary intuitions suggest that acts have been historically reserved for these actors because of something special about their nature. It is this functional component that we think is central to the state's nature. There is something unique about what states are able to do that makes them a state.

One quick and dirty way to avoid this confusion is simply to pick a few roles generally associated with the state and show that they are performed by actors who would not qualify as part of the state understood as an organization. Here I will stick with something closer to the higher standard discussed in the last section, since under the lower standard—as we saw—all actors will count as part of the same organization.

This is easy to do. Consider, for example, two famous cases in which courts found institutions to qualify as state actors on the grounds that they exercised special types of power, *Marsh v. Alabama*⁷¹ and *Terry v. Adams*.⁷² Both cases address functions widely associated with states: managing a town and electing lawmakers, respectively. Yet in neither case do the actors in question act as lawmakers' agents, as an organizational view of the state requires.

We encountered *Marsh* earlier. The case dealt with a town, Chickasaw, Alabama, that was owned by a corporation, Gulf Shipbuilding.⁷³ Gulf provided streets, police, and other typical accouterments of city life.⁷⁴ When a Jehovah's Witness dispensed religious literature outside the post office, the company had her arrested for trespassing.⁷⁵ The Court found Gulf's behavior to violate the First Amendment—something only state actors can do—on the grounds that running the town constituted a public function.⁷⁶ Since Gulf performed the role of a state, it could not violate constitutionally protected rights.

In *Terry*, the Court reached a similar conclusion with regards to a private association, the Jaybirds, that held what were known as “all-white” primaries in a Texas county.⁷⁷ The “club” held a straw poll primary prior to the county's formal election procedures.⁷⁸ All qualified white voters (and only white voters) in the county were eligible to participate in the straw poll. The poll used no public funds, candidates were not legally required to participate, and winners were not legally required to enter the formal party

71. 326 U.S. 501 (1945).

72. 345 U.S. 461, 461 (1953).

73. *Marsh*, 326 U.S. at 503.

74. *Id.*

75. *Id.*

76. *Id.* at 506 (noting that “since these facilities are built and operated primarily to benefit the public, and since their operation is essentially a public function, it is subject to state regulation”).

77. *Terry*, 345 U.S. at 470.

78. *Id.* at 493.

primaries.⁷⁹ In practice, however, the winner of the Jaybird primary was guaranteed to run unopposed in the Democratic Party primary, and thus—since the district was heavily partisan—to win in the general election.⁸⁰ The Court found the Jaybirds’ behavior unconstitutional on the grounds that the association—though nominally private—was in fact a state actor because it performed a quintessentially public function.⁸¹ “The Jaybird primary,” Justice Black wrote, “has become an integral part, indeed the only effective part, of the elective process that determines who shall govern in the county.”⁸²

These cases are enough to show that our intuition that states are defined by what they do is in tension with our sense that states are defined by how they are structured.

I offer a more robust theory of the public function, one that—unlike the under-theorized historical account—is sensitive to all the different ways in which governments have been shaped across time, and all the different sorts of tasks lawmakers have undertaken. To do this, I will step away from the law for a second into the realm of political philosophy.

Scholars of political obligation and distributive justice provide insight into our intuition that states constitute a special role. Loosely, they contend the following: there are certain goods everybody values—physical safety, public health, access to basic resources, and so on.⁸³ These goods are complex. For them to be robustly available, many people’s behavior must combine in the right way. Welfare policy *X* might produce the right results when combined with housing policy *Q*, and welfare policy *Y* might do the same if combined with housing policy *Z*, but the conjunction of policy *X* and policy *Z* might not do so, and the same might be true of social norm *A* and *B*. This kind of complicated harmonization is unlikely to spontaneously arise or reliably persist. It requires active coordination.⁸⁴

I theorize that this coordination is the special function we believe is performed by the state. Consistent with our normal views about coordination, the idea is that one source of decisionmaking—and only one source of decisionmaking—must have the ultimate authority to direct the patterns of behavior that collectively produce these goods. If multiple sources of decisionmaking have this kind of power, their directions might conflict, or fail

79. *Id.* at 461.

80. *Id.* at 483.

81. *Id.* at 482.

82. *Id.* at 459.

83. See Jeremy Waldron, *Special Ties and Natural Duties*, 22 PHIL. & PUB. AFF. 3 (1993); Sangiovanni, *supra* note 65, at 3 (arguing that the provision of certain goods like safety and health can trigger special moral obligations because they are universally desirable).

84. See GEORGE KLOSKO, *POLITICAL OBLIGATIONS* 35 (2005) (arguing that the production of indispensable goods “appears to require regulated coordination and so” also requires “the state”).

to align in the right way, disrupting the necessary coordination. The state, we believe, is an organization. As such, it is thought to have a single decisionmaking process that ultimately controls how all of its member-parts behave, just as we discussed earlier. Moreover, the state is believed to be an omnipotent organization, one whose decisionmaking process has the capacity to control all the behaviors of all the individuals and institutions subject to its power—such as the previously discussed monopoly on the legitimate use of violence.⁸⁵ As an organization with this sort of power, the state is uniquely able to actively oversee all the behaviors that play a part in bringing about these socially desirable goods. This is the special role we attribute to the state. Particular actions are exclusively reserved for state actors because they are necessary to the state's ability to perform this kind of regulated coordination. On these very grounds, the philosopher Jeremy Waldron argues that:

[T]he fact that there *is* a state and that it is, for all practical purposes, dominant and unchallenged in a territory will be sufficient [to make it the proper subject of political obligation]. This is the organization that deserves our support in the enterprise of doing justice if any organization does.⁸⁶

As I have just described it, the idea that the state is an organization, and the notion that the state performs the function of regulated coordination, are not in conflict. Indeed, the assumption is that the state is able to provide this kind of coordination *because* it is an organization, and thus has a centralized decisionmaking process which, as a result of its assumed omnipotence, has the ability to oversee and control as necessary all those whose behavior shapes the production of desirable social goods.

The problem is what emerged in our earlier discussion. Understood as an *organization*, the state does not have this kind of all-encompassing power. Furthermore, if it wants to actually achieve the desired outcomes, it cannot acquire such power. Recall Justice Blackmun's comments that in a complex society, replete with rapidly changing and highly technical problems, Congress "simply cannot do its job absent an ability to delegate power under broad general directives."⁸⁷ In saying this, Justice Blackmun recognized that no single decisionmaking process could effectively pay attention to what was done by all of the individuals and institutions who can influence social outcomes, much less understand what must be done to pro-

85. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 5 (1986) (distinguishing the state on the grounds that it has the general authority to regulate all aspects of life and that—unlike other powerful groups—it has the "responsibility of supervising the activities of all persons and organizations within its jurisdiction and *seeing to it that they all conform* to certain appropriate standards of behaviour").

86. Waldron, *supra* note 83, at 25.

87. *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

duce the desired coordination in the vast array of highly complex policy arenas that play a part in the production of these goods. If lawmakers want to have any chance of achieving the social outcome they want, they must allow a wide variety of loci of power and influence. Not for nothing is the paradigm picture of a command and control economy an empty grocery shelf. As Jan Kooiman writes, “[n]o single actor, public or private, has the knowledge and information required to solve complex, dynamic, and diversified problems; no actor has an overview sufficient to make the needed instruments effective; no single actor has sufficient action potential to dominate unilaterally.”⁸⁸

Indeed, even this picture can be misleading. The way I have described it might leave the impression that lawmakers are *letting* other actors exercise quasi-autonomous power. That is at best partially true. Certainly, lawmakers make conscious choices to delegate the ability to discretionarily exercise power to other actors. An example is the FCC authorizing statute, which permits the agency to issue regulations “as public convenience, interest or necessity require.”⁸⁹ However, not all who exercise this kind of influence on the production of desirable social outcomes are consciously given this power by lawmakers. Lawmakers do not always have the *ability* to exercise full control. They often lack the necessary resources, knowledge, attention, and skills.⁹⁰ If they want to achieve a desired outcome, they *must* rely on others’ knowledge and skills to do so. It simply is not feasible to effectively centralize decisionmaking—or even functional oversight—over everything from the design of roads to the development of vaccinations. Even if lawmakers gave up trying to achieve any particular desirable outcome and simply sought to exercise control, the reality is that, in practice, they would always share that power with other actors. With so many complicated issues in hand, influence from other sources sneaks in. In practice, even so-called absolutist monarchs were forced to share power with other actors. As Roger Mettam has noted, Louis XIV—the shining exemplar of centralized control—“lacked the independence of action which is implied in the word ‘absolutism.’”⁹¹ In reality, “[m]uch of government within the realm was always a dialogue between the crown and a series of local elites,

88. Jan Kooiman, *Societal Governance: Levels, Modes, and Orders of Social-Political Interaction*, in *DEBATING GOVERNANCE: AUTHORITY, STEERING, AND DEMOCRACY* 142 (Jon Pierre ed., 2000).

89. *United States v. Sw. Cable Co.*, 392 U.S. 157, 178 (1968).

90. See NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLITICAL BUBBLES: FINANCIAL CRISES AND THE FAILURE OF AMERICAN DEMOCRACY* (2013) (finding that regulators lacked the skills and knowledge to fully understand what banks were doing before the financial crises).

91. Roger Mettam, *Louis XIV and the Illusion of ‘Absolutism,’* 5 *SEVENTEENTH CENTURY FRANCE STUD.* 27, 34 (1983).

institutions and social groups The king sought their co-operation but could never hope totally to dominate them.”⁹²

The reality is that no single decisionmaking process does—or could—effectively oversee all the individuals and institutions whose behavior influences the production of desired social goods. The idea of *an* organization undertaking regulated coordination is thus misleading. Such coordination is indeed required, but rather than being traceable to the decisions of any one organization, this coordination is achieved through the ongoing efforts of many interrelated but quasi-independent organizations who must actively work to align their behavior if we are to achieve the outcomes we desire. As Jody Freeman writes:

[G]overnance [is] a set of negotiated relationships [P]olicy making, implementation, and enforcement is dynamic, nonhierarchical, and decentralized, envisioning give and take among public and private actors. Information, expertise, and influence flow downward, from agency to private actors; upward, from private actor to agency; and horizontally, among public and private actors.⁹³

This explains why our intuitions are in tension. If we think of the state as centrally an organization, we cannot think of it as uniquely engaging in the role of governance. Since the process is so vast and complicated, there will always be other organizations—perhaps like Gulf Shipbuilding or the Jaybirds—that participate in regulated coordination, either formally or functionally.⁹⁴ If we define state actors by their status as part of the state quasi-organization, we will be forced to leave these organizations out. Conversely, if we think of the state as the function of overseeing coordination necessary to the production of social goods, we cannot think of it as simply one organization. There will always be actors who play a part in this coordination but must be seen as a distinct quasi-autonomous agent, not merely a cog in a broader organization. These two intuitions are in conflict.

3. *The State-as-Governor Is Not the Same as the State-as-Office*

This brings us to our final comparison—intuition (3), the state consists of certain traditionally recognized offices, and intuition (2), the state plays a special role. Like the other intuitions we have discussed, these theories of the state prove incompatible.

Once again, the quick and dirty approach makes this easily apparent. Our discussion so far has provided several examples of entities that perform

92. *Id.*

93. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 571 (2000).

94. See text accompanying *supra* notes 71–82.

what strike us as public functions but do not hold traditional offices. Gulf was a shipbuilding company; the Jaybirds a club.⁹⁵ We need not look far for further examples. Voluntary groups and privately funded associations do not fit our traditional notion of a government actor, but courts have found both to qualify as a state on the grounds that they perform government functions. In *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, for example, the Supreme Court found the Society of Mechanical Engineers—a volunteer standard-setting organization—to count as part of the state because it is, “in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce.”⁹⁶ In *Earles v. State Board of Certified Public Accountants of Louisiana*, the Fifth Circuit found the financially independent board of certified public accountants to be “functionally similar to a municipality” because it was performing a public function by regulating a profession.⁹⁷

I argued earlier that an interest in governance explains our sense that certain actions are unique public functions. Roughly, public functions are those necessary to the achievement of regulated coordination, ensuring patterns of behavior align to produce desired social outcomes. For all of the reasons discussed in the previous section, this role is performed by many actors who do not hold traditionally recognized government offices.⁹⁸ This is certainly true formally. Industry associations, financial institutions, labor unions, and others participate in the process of coordination when they engage in negotiated rulemaking or audited self-regulation.⁹⁹ It is also true when applied informally. Because of their specialized information, focused attention, expertise, and resources, private standard-setting organizations, for example, play a central role in a wide variety of policy areas. Often, their decisions are directly translated into law. Even when such groups have no formal rulemaking power, their decisions often have the functional regulatory effect of law. Many rulemakers are heavily dependent on the guidance of outside experts, such as these organizations. Beyond this, a wide variety of so-called private groups—from credit agencies to media outlets—have the capacity to influence what happens on the ground directly. They can influence social conditions in ways that those who occupy traditionally recognized government offices, like lawmakers or administrative agents, lack the knowledge, capacity, or resources to prevent or control. In many cases, they can, in fact, constrain how these traditional government

95. *Id.*

96. 456 U.S. 556, 570 (1982) (quoting *Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457, 465 (1941)).

97. 139 F.3d 1033, 1041 (5th Cir. 1998).

98. *See supra* Part II.B.1-2.

99. *See* Douglas C. Michael, *Federal Agency Use of Audited Self-Regulation as a Regulatory Technique*, 47 ADMIN. L. REV. 171 (1995); *see also* Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L. J. 32, 33 n.1 (2000)

actors are able to behave. For these very reasons, a frustrated James Carville, advisor to President Clinton, once announced, “I used to think if there was reincarnation, I wanted to come back as the President or the Pope or a .400 baseball hitter. But now I want to come back as the bond market. You can intimidate everybody.”¹⁰⁰

Like our other theories of the state, intuitions (2) and (3) are thus in tension. If we insist the state is uniquely associated with certain offices, we cannot say it uniquely governs. Many individuals and institutions that do not occupy these offices play a part in regulated coordination. If we think of the state as a distinctive role, we cannot say it is narrowly tied to these traditional offices.

Indeed, we can see evidence of this tension in how courts have addressed the public function test. In recent years, courts have narrowed this test, holding that entities qualify as state actors only if the action they perform has traditionally been the exclusive prerogative of state actors.¹⁰¹ We can read this restriction as an attempt to respond to critics who note precisely what we have just described—that any search for the entities who perform the kinds of functions we associate with the state reveals many individuals and institutions who do not occupy traditionally recognized offices.¹⁰²

Adding this historical requirement forces the actors who qualify under each intuition to more closely align. Many more of those who perform acts historically within the exclusive prerogative of state actors occupy offices historically recognized as part of the state. But from the perspective that underlies the public function test—thinking of the state as performing a special role—this limitation is unwarranted. The historical standing of the actors who perform a test may (questionably) be a decent heuristic for those who play a necessary role in governance. However, as I argued earlier, our intuitions about the role of the state run in the other direction.¹⁰³ We tend to think functions are reserved for state actors because the functions themselves are special, not the other way around. The limitation thus does violence to our intuitions about the state’s nature.

Indeed, limiting our sense of what behaviors constitute public functions in this way would empty the category of many we associate most strongly with the state. On this logic, for example, the Supreme Court found that guards in a privatized prison do not constitute state actors because at various times throughout history prisons have been managed by

100. David Wessel & Thomas Vogel, *Market Watcher: Arcane World of Bonds Is Guide and Beacon to a Populist President—Rally Is Seen as Endorsement of Policy—and It Helps Economy as Rates Fall—But It Could Be Fickle Friend*, WALL ST. J., Feb. 25, 1993, at A1.

101. *See* Jackson v. Metro. Edison Co. 419 U.S. 345, 351, 352 (1974).

102. *See supra* Part II.B.2.

103. *See supra* Part II.B.2.

private contractors in addition to governments themselves.¹⁰⁴ With this rider, running a prison is not a state action. Such guards, however, wield precisely the sort of power most paradigmatically associated with the state—the right to exercise coercive violence to enforce the law. On any sensible reading, it would follow that the sense that the state performs a distinct role, and that it points to the occupants of traditional offices, would prove to be in conflict.

III. EXPLAINING THE WEAKNESS OF THE STATE ACTION DOCTRINE

Our intuitions about the state, it follows, are incompatible. We can think of the state as an organization, we can think of it as a role, and we can think of it as a set of offices. But we cannot think of it as all three. What the state must consist of to qualify as the first intuition is inconsistent with what it must consist of to qualify as the second intuition, and both in turn are in tension with what it must be to make sense of the third.¹⁰⁵ One institution cannot singlehandedly govern, and it cannot do so by traditional offices alone. If we cling to these intuitions as jointly necessary, we must conclude that there is no such thing as the state. The concept is incoherent.

Empirical social scientists have long recognized this incoherence. As early as 1914, Norman Angell decried the habit of “thinking in States” as failing to capture the “true nature of that relation within the community,” and as leading to false conclusions.¹⁰⁶ In using states as our tool to understand politics, he argued, “we are not facing facts; that we proceed habitually upon assumptions which analysis does not support, that we are ignoring changes which have taken place, and basing our action daily upon conceptions which have become obsolete, upon unrealities, sometimes upon shams.”¹⁰⁷ Arthur Bentley wrote in his 1908 treatise, *The Process of Government*, that “[t]he ‘idea of the state’ has been very prominent, no doubt, among the intellectual amusements of the past,” but found that, “as soon as it gets out of the pages of the lawbook or the political pamphlet, it is a piteous, threadbare joke. So long as there is plenty of firm earth under foot there is no advantage in trying to sail the clouds in a cartoonist’s airship.”¹⁰⁸ Regarding the idea that states should be considered distinct from other social organizations, he wrote, “a kindergarten acquaintance with the facts of government, as apart from the halos, the hero-worship, and other sensationalism, should suffice to put an end to any such approach to the subject.”¹⁰⁹

104. *Richardson v. McKnight*, 521 U.S. 399, 404–07 (1997).

105. For a discussion of these intuitions, see *supra* Part II.B.3.

106. NORMAN ANGELL, *THE FOUNDATIONS OF INTERNATIONAL POLITY* xxviii–xxix (1914).

107. *Id.* at 7–8.

108. ARTHUR F. BENTLEY, *THE PROCESS OF GOVERNMENT: A STUDY OF SOCIAL PRESSURES* 263–64 (1908).

109. *Id.* at 264.

By 1938, the incoherence of the concept of the state was so widely acknowledged that George Sabine wrote in the *Encyclopedia of the Social Sciences* that the phrase “the State . . . commonly denotes no class of objects that can be identified exactly, and for the same reason it signifies no list of attributes which bears the sanctions of common usage. The word must be defined more or less arbitrarily to meet the exigencies of the system of jurisprudence or political philosophy to which it occurs.”¹¹⁰

Unfortunately, our discussion reveals that courts and legal scholars have been slower to pick up on this incoherence, or its consequences.¹¹¹ And consequences it has. The revelation that the concept of the state is incoherent explains the force of the criticisms we have seen leveled at the state action doctrine. Let us review these concerns.

A. *Intelligibility Revisited*

Critics first challenged our ability to find a workable way of identifying state actors. They argued that there is an ever-growing array of tests purporting to do this work, each assessing a shifting assortment of characteristics.¹¹² Despite decades of effort, we seem unable to develop a consistent method of classification.

The discovery that the concept of the state itself is incoherent explains this failure. Of course, we have not been able to establish a single test or set of features that can reliably distinguish state actors; there is no single thing that defines what it means to be a state. Any test that satisfies one of our intuitions fails the others.

B. *Purposelessness Revisited*

This incoherence equally makes sense of the worry that the doctrine is purposeless. That concern is driven by the sense that the division between state and non-state actors tracks nothing of moral significance. If that is true, we should hold both types of actors to the same standard.

The incoherence of the state explains why this so often seems the case. Imagine that we have a reason to track the *organization* that is the state—say, for example, we want to hold accountable everybody who bears responsibility for some act the organization undertook as a collective agent.¹¹³ If we identified state actors by looking for those who played the *role* of the state or occupied a traditional *office* (*a la* intuitions (2) and (3)) the classifi-

110. George Sabine, *The State*, in *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* (1934) (cited in JENS BARTELSON, *THE CRITIQUE OF THE STATE* 77 (2001)).

111. They are not unique in this failure. Elsewhere, I argue that political philosophers have done a much worse job of recognizing this incoherence or its consequences for their claims.

112. See *supra* Part I.A.

113. See Avia Pasternak, *Sharing the Costs of Political Injustices*, 10 *POL. PHIL. & ECON.* 188 (2010).

cation would have no value for our purpose. Many of the actors the test would identify are not part of the relevant organization and thus would not bear such responsibility. But our mistake would not be looking for “the state” per se. Instead, *because we lack a consistent notion of the state*, we vacillate with regard to what we seek. Since the occupants of the state qua role, and the state qua organization are not the same, identifying the former has no special value when we are trying to apply a moral principle applicable only to the latter. This leads us to believe the distinction has no significance; this type of vacillation and attendant confusion drives our sense that the act of categorizing actors has no purpose.

C. *Meaninglessness Revisited*

Finally, critics contend that the effort to distinguish state actors is meaningless because all action is state action. So-called private actors are able to act as they do only because the state has developed background conditions that make it possible for them to do so.¹¹⁴ We can now see that this criticism itself gains traction from the kind of confusion we discussed in Part II.B. If lawmakers really were part of an organization that governed fully with the coordination of patterns of social behavior, then it would be true that anything done by so-called “private actors” consistent with the law would happen by their leave and thus constitute a state action. If this were the case, Mark Tushnet would be correct in writing that, “the setting of each of the background entitlements is a result of state power that could have been exercised differently—that is, the result of policy and politics.”¹¹⁵

Lawmakers, however, do not have that kind of power. As we have seen, they often lack the knowledge or capacity to monitor, control, or understand what is being done with these background entitlements. Perhaps background entitlements could be set differently. But lawmakers are not always in a position to make this happen. Differentiating between our different intuitions about the state allows us to draw meaningful distinctions between state and non-state actors. There are certainly individuals and institutions that have the ability to make autonomous choices in ways the organization’s decisionmaking processes cannot effectively control or correct. If we think of the state as an organization (or an office), they are thus meaningful non-state actions.

114. See Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 265 (1992) (arguing that the government does not act only when it upsets existing distributions of rights and resources because the government is responsible for those distributions in the first place).

115. MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE IN COMPARATIVE CONSTITUTIONAL LAW* 189 (2009).

The same is true if we think of the state as a role. On that view, the state consists of those who influence regulated coordination.¹¹⁶ In contrast with the vision of a single organization ensuring coordination, this image allows us to recognize the fact that background conditions are often the product of decentralized, dynamic negotiations between many actors, each of whom exercise some influence, but none of whom exercise all influence. This disaggregation means that problems of coordination sneak back into the process of governance. It therefore simply is not true that all of the background entitlements are the product of state power that could have been exercised differently. Sometimes, these conditions are the result of interactions that no institution or individual who played a part in governance were in a position to foresee or forestall. It follows that we can meaningfully distinguish between those actions that are the result of policy choices that could reasonably have been exercised differently by governing agents, and those which are not. The category of the non-state actor is not conceptually empty. Our confused efforts to combine the three different traits we associate with the state have led us to overlook all the power that private actors exercise independent of state control, and thus to falsely presume there are no meaningful non-state actions.

These explanations drive home that the incoherence of the concept of the state has real consequences. Among other things, it explains why the state action doctrine is such a mess. We have been unable to find an intelligible, meaningful, purposeful way of differentiating state actors because there is nothing coherent in what it means to be a state, and nothing in practice that possesses all the characteristics we mistakenly presumed states to have.

IV. THE WAY FORWARD

Where do we go from here? One thing is clear. We cannot solve our issues with the state action doctrine by trying to develop clearer tests, or by working to uncover the essence of the state or the principles that might apply to it. Because the concept of the state is itself incoherent, such efforts will merely result in further confusion. To get ourselves out of this mess, we need to think about the state—or the doctrine—differently.

The easiest answer would seem to be that advocated by many legal scholars: just give up.¹¹⁷ If there is nothing coherent in what it means to be a state, it does not make sense to try to identify these actors, much less hold them to different legal requirements. The effort to identify the state is

116. See Andrew Gamble, *Economic Governance*, in *DEBATING GOVERNANCE: AUTHORITY, STEERING, AND DEMOCRACY* 110 (Jon Pierre ed., 2000) (arguing that governance is “the steering capacit[y] of a political system, the ways in which governing is carried out, without making any assumption as to which institutions or agents do the steering”).

117. See Black, Jr., *supra* note 5.

merely, as J.A. Nicholson put it in 1928, “a source of great embarrassment and confusion”¹¹⁸ These critics argue that it is one we should stop attempting. I want to dispute this move. Instead, I think there is reason to rescue the state action doctrine—and the resources to do so in a way that avoids the serious criticisms rightly lobbied at the current approach. In fact, I think we are closer to achieving this than we have realized.

Our discussion above revealed three strongly held intuitions about the nature of the state: the state is an organization, a role, or a set of offices. Each of these intuitions point to a set of morally significant characteristics. Thus there is reason to identify those who qualify as state actors according to each of these intuitions, and reasons to hold them to different standards. Moreover, we can develop workable tests that allow us to do so.

Of course—as we have seen—these characteristics do not point to the same actors. But here is the key: that it is not a problem, it is a benefit. We have long thought this incoherence concerning because we have mistakenly believed that there is some coherent entity called the “state” whose nature and identity we can clarify if only we work hard enough. As I have shown, this belief is false. The characteristics we have long associated with the state do not point to a single coherent set of actors and we should not expect they ever will. Yet if each of these clusters of features is morally significant, this inconsistency is not troubling. Rather than attempting to develop a single state action doctrine that somehow makes sense of all of these discordant features, we must instead develop several different state action *doctrines*, each tracking a distinct set of morally significant features. Instead of attempting to reconcile these doctrines, we must work out the legal context in which each is relevant.

A full defense of this view lies beyond a paper of this length. What I do here is lay the groundwork for this argument. To do so, I will reconsider each of the intuitions I discussed earlier.¹¹⁹ I will show that each vision of the state is associated with a set of features we can successfully track, that draw a meaningful division, and that point to individuals and institutions we have principled reason to grant different rights and responsibilities. My defense will necessarily be preliminary and promissory—more must be said about the moral reasons that explain our interest in these characteristics and to identify the contexts in which these concerns rightly subject an actor to different legal standards. Still, my claims are sufficient to show why this new approach overcomes the criticism to which the current jurisprudential framework is rightly subject.

118. J.A. Nicholson, *Reviewed Work: Sovereignty: A Study of a Contemporary Political Notion*, 25 J. PHIL. 550, 550 (1928) (reviewing a book by Paul Ward).

119. *See supra* Part II.

A. *The Organization*

Let us start with our first intuition, that the state is an organization. Organizations differ from mere aggregations of individuals because they possess a decisionmaking structure and a system of internal control that directs how members behave. As the sociologist Edgar Schein notes, “[a]n organization is the rational coordination of the activities of a number of people for the achievement of some common explicit purpose or goal, through division of labor or function, and through a hierarchy of authority and responsibility.”¹²⁰ An angry mob and an army acting under orders may both destroy a city, but the behavior of the latter represents the intentional choice of a standing decision procedure, while the former is merely the aggregate result of many people’s individual choices.

Loosely, the scope of an organization is equivalent to the set of individuals who: (1) possess a set of mechanisms through which they make binding choices about courses of action in response to reasons; (2) effectively enforce standards of conduct on individual members so as to bring about these choices, such that the behavior of members of the group can be appropriately said to reflect these binding choices; and (3) define roles that allow individuals to exercise certain powers and anticipate how other members of the group will behave.¹²¹ The cashier at AMC theaters can truthfully say that she is charging you twenty dollars for a ticket because AMC requires it, not because *she* wants to—in a way that the kid bargaining with you to shovel your driveway cannot.

Now we have a relatively clear way of distinguishing state actors: such actors are the group of people whose behavior can reasonably be said to reflect the choices of the *same* structured decisionmaking process—loosely, the lawmaking process—not their own independent choices, or those of a different set of decisionmaking mechanisms. Although more can be said, this is enough to get a sense of how we might go about developing a workable test for identifying such actors. Indeed, it is reasonable to think that a workable test such as the one set forth here is what courts that employ entanglement tests have been working towards.¹²²

Our earlier discussion should make it clear that the distinction between organizational and non-organizational decisions is meaningful. In practice, the decisionmaking process of any organizational structure—even a government’s—is limited. As a result, many individuals and institutions are

120. EDGAR H. SCHEIN, ORGANIZATIONAL PSYCHOLOGY 9 (2d ed. 1970).

121. See PETER A. FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY 13–15 (1984).

122. Recall that entanglement tests assessed the relationship between recognized state actors and the individuals or entities in question, considering, for example, whether there was a close enough tie between the two that the “action of the latter may be fairly treated as that of the state itself.” *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992) (finding that a community mental health center was not a state actor).

able to make choices of their own accord—that is, choices that purportedly hierarchically superior decisionmaking mechanisms could not effectively prevent or override.

Perhaps most importantly for our purposes, this organizational status is morally significant. We have principled reasons for taking account of who qualifies as acting on behalf of a particular organizational structure, including the organizational structure we have associated with the state. Much more needs to be said about these reasons than can be considered in the confines of this paper, but let me gesture towards a few of the reasons these characteristics prove significant.

First, philosophers contend that organized groups—in contrast with less structured collections of persons or institutions—can be ascribed to a kind of collective agency. Because the group can make reflective choices about its behavior as a group, we can hold it responsible for the choices it makes. By extension, we can hold members of a group accountable for what they jointly bring about in ways that distinguish them from a mere collective.¹²³ This gives us reason to track the scope of the organization. The boundaries of effective organizational control define the limits of this sort of responsibility.

Second, as an agent, an organization can enter into moral relations—making promises and being granted permissions. This can give an organization special moral responsibilities and special rights. If an organization makes a promise—to provide certain goods, to limit itself in certain ways, and so on—then those whose actions represent the organization are bound by that promise. Conversely, if you give an organization permission to exercise a certain kind of power over you, those whose behavior stems from the organization's decisionmaking promises have the right to wield the relevant power in a way others do not—even if the result of the two actions is equivalent. Some people have the view that governments have made clear promises, and that citizens have granted lawmakers this kind of special power over their lives.¹²⁴ If this is true—and more must be done to show that—those who act on behalf of the state qua organization will enjoy moral rights other actors do not.¹²⁵

123. See Philip Pettit, *Responsibility Incorporated*, 117 *ETHICS* 171 (2007).

124. Joseph Carens, for example, writes that:

if the voter thinks that politicians are too ready to compromise on questions of principle, that is partly because the politicians often present a position as a question of principles in a speech but treats it as negotiable interest in the making of policy. The false expectations are his own creation.

Joseph Carnes, *Compromises in Politics*, in *COMPROMISE IN ETHICS, LAW AND POLITICS* 138 (Roland Pennock & John Chapman eds., 1979). This suggests that the relationship between representatives and citizens is contractual in form, reflecting acts of promise-making and permission-granting. *Id.*

125. This is what I think Lillian BeVier and John Harrison have in mind when they contend, “when government officials, qua government officials, exercise their constitutionally conferred

Contra critics, it follows that we can meaningfully distinguish those whose actions instantiate the *organization* that is the state, and that we have (at least *prima facie*) reason to do so. A test designed to track these features can overcome the criticisms that have dogged the state action doctrine.

B. *The Role*

The same is true of the features associated with our second intuition, the state as a role. In Part II.B.2, I developed a theory of the special powers and capacities that constitute this role. Our sense that the state performs a special function, I argued, stems from our interest in *governance*, that is, our interest in the oversight required to coordinate our behaviors, policies, and practices to ensure they produce desirable social outcomes, such as physical safety, public health, and improved access to basic resources.¹²⁶ Our inquiry revealed that no single institution has the power to ensure this coordination. Instead, the achievement of these desirable conditions requires ongoing negotiation between a wide array of quasi-independent actors, each of whom exercise meaningful influence.

Once again, more empirical work must be done to define precisely the characteristics that give an actor that kind of influence. But the above discussion suggests a first-pass test: in virtue of its resources, knowledge, skills, position, and formal or informal authority, does the institution or individual in question have the ability to meaningfully influence the extent or quality of these social goods in ways that other actors cannot easily override—or that it can anticipate they will not correct? Though the claim requires a great deal of fleshing out, this first pass points in the direction of a workable test, answering our concern about intelligibility.

Such a test would also draw a meaningful distinction. There are certainly actors who satisfy this standard and others who do not. My local independent coffee shop, for example, means a great deal to me. But it hardly has the ability to meaningfully influence the quality of my access to basic resources or physical security (as much as I love a good latte). Nor does it play much role in determining the number of people who enjoy these goods. By contrast, Raytheon, one of the largest defense contractors in the world,¹²⁷ HSBC holdings, one of the largest banks in the world,¹²⁸ or the

state power, they are always and everywhere *agents*, whereas when private citizens *qua* private citizens exercise their private rights backed by state power they are . . . always and everywhere principals.” BeVier & Harrison, *supra* note 23, at 1791–92.

126. See text accompanying *supra* note 82.

127. As of 2014, Raytheon was the fourth largest recipient of defense contracts, receiving \$11.92 billion dollars. See *Top 1—Defense Contractors 2014*, AEROWEB <http://www.bga-aeroweb.com/Top-100-Defense-Contractors-2014.html> (last visited Aug. 24, 2015).

128. HSBC is a multinational bank and financial services company. As of 2015 Forbes listed HSBC as the world’s fifteenth largest public company. *The World’s Biggest Public Companies*, Forbes, <http://www.forbes.com/global2000/list/#tab:overall> (last visited Aug. 19, 2015).

Society of Chemical Manufacturers and Affiliates (“SOCMA”), the trade association of the specialty chemical industry, may well exert this kind of power.¹²⁹

We have principled reason to hold actors with the ability to govern to special moral standards. Once again, more work must be done to flesh out these reasons. But the basic idea is simple. As Uncle Ben once said to Spiderman, “With great power comes great responsibility.”¹³⁰ Actors with the characteristics we have described exercise a special kind of power. Consequently, they are subject to unique moral restrictions. To give just one example, consider again my local coffee shop. There are many things wrong if the shop refuses to serve me a sandwich because I am a woman. Yet one wrong is not available to it. The shop does not have the power to prevent me from accessing nutrition. I can simply wander to the nearby dumpling shop. By contrast, if lawmakers passed a law requiring such discrimination, or a local bureaucrat refused me my SNAP benefits on this basis,¹³¹ it might be difficult or impossible for me to access an alternative source. It follows that groups with these characteristics give rise to distinct concerns.

Like the characteristics associated with the state as an organization, those connected to the state as a role prove to satisfy our standard: they suggest a reason for identifying the actors with these traits, and point towards a functional way of doing so.

C. *The Office*

Our final intuition—and I suspect our most commonly employed—proves the most elusive. Recall that this intuition is that the state consists of certain traditionally recognized offices—judges, magistrates, elected officials, and so on. It is easy to dismiss this sense as reflecting merely our (as it turns out) inaccurate heuristic for assessing who satisfies the standards described above. But we can make a separate case for distinguishing the occupants of these offices, and subjecting them to special standards.

It is far less clear what characteristics this intuition tracks than in our earlier cases. The temptation is strong to presume there is some further theory that explains our sense that these offices are special—perhaps a variant of those we have already discussed. Nonetheless, it is possible to imag-

129. The Society of Chemical Manufacturers and Affiliates is the trade association for chemical producers, representing over 200 member companies and 2,000 manufacturing sites. SOCIETY OF CHEMICAL MANUFACTURERS & AFFILIATES: OUR MEMBERS, <http://www.socma.com/about/?articleID=4584> (last visited Aug. 26, 2015).

130. Stan Lee, *Amazing Fantasy #15* (Aug. 10, 1962).

131. SNAP is the Supplemental Nutrition Assistance Program, a food program operated by the United States Department of Agriculture that offers assistance to low-income individuals. See UNITED STATES DEPARTMENT OF AGRICULTURE: FOOD AND NUTRITION SERVICE, SUPPLEMENTAL ASSISTANCE PROGRAM (SNAP), <http://www.fns.usda.gov/snap/supplemental-nutrition-assistance-program-snap> (last visited Aug. 25, 2015).

ine a fairly workable test: assess what offices are consistently accepted as central to the state.¹³² There is clearly a meaningful category of actors who qualify and actors who do not.

This leaves only the question of why this distinction might be of any significance. Do we have any principled reason to identify these actors and hold them to special standards? I can gesture towards at least two.

First—rightly or wrongly—those who occupy these offices are thought to reflect the interests, choices, and values of the public as a whole. They are widely perceived as speaking “in our name.”¹³³ This gives them an expressive capacity others lack. There is something meaningfully different about a judge mandating that you wear a “kick me” sign than a colleague taping it to your back. The former action brands you as judged unequal by your community, while the latter is viewed as reflecting only the choices of a particular individual. This gives the former an expressive force the latter cannot and will never attain—a power that is itself morally significant. We have reasons to control what is “said” by traditional state officeholders in their official capacity that does not extend to other actors.

This same capacity to be viewed as acting in our name gives such officeholders the ability to morally burden the general public. The issue is as follows: if a person widely believed to be operating on your behalf and speaking in your voice does something wrong, you have a duty to make it clear that you do not wish the person to act in this way, and that you do not endorse what was done. This relationship generates its own obligations. A person who puts herself in a position to generate this kind of duty has a responsibility to account for those who will be burdened by her behavior, and to accept restrictions that might not apply to others who lack this standing.

These two points suggest we have principled reason to track this feature as well. Like the traits associated with our other intuitions, it passes our standard: there are distinct categories of actors who do and do not have these characteristics, we have a functional way of identifying them, and we have reason to do so.

132. Recall, for example, Lillian Bevier and John Harrison’s comment that:

[A]ll participants in the debate over state action appear to assume that there are institutions for collectively organized coercion, such as police forces and armies, and institutions that make primary decisions about how that force is to be used All also seem to assume that there are unproblematically private persons to whom state power can in a sense be delegated through the creation of private rights that will be coercively enforced. Core examples of the latter include individuals as well as artificial persons with legal personality, such as corporations.

BeVier & Harrison, *supra* note 23, at 1802.

133. See ERIC BEERBOHM, IN OUR NAME: THE ETHICS OF DEMOCRACY (2012).

V. CONCLUSION

This Paper suggests a very different way of approaching the state action doctrine. Each of our theories about the nature of the state proves to point to a different set of features. Each cluster of characteristics is morally significant, distinguishing a set of actors we have reason to hold to special moral standards. In each case, knowing who acts tells us something important about how to assess the behavior in question.

It follows that we have reason to track those who qualify as state actors according to all of these standards. If we were to pick just one of these clusters of characteristics and prioritize it as *the account* of what it is to be a state, we would lose something important: the capacity to point to a set of morally significant characteristics and—by extension—actors that have special moral standing. This would only be exacerbated were we to give up on the doctrine altogether.

This puts a very different spin on the state action doctrine's acknowledged messiness. We have reason to hold on to three different state action tests, each tracking different features and identifying different actors. The result will be inconsistent answers as to whether a particular actor qualifies as part of the state. This has long seemed a problem—a sign that we were confused about what states are like.

But as we now see it, this inconsistency is no longer troubling. Although talk of the state action doctrine's inconsistency has long been tinged with the sense of failure, this inconsistency is now revealed as valuable. The three tests cannot be reconciled because there is no coherent thing that makes a state a state. And they *shouldn't* be reconciled because we have different reasons for wanting to track each of the clusters of characteristics these tests pick out.

Legal scholars have long responded to this kind of inconsistency and lack of reconciliation by declaring the doctrine “a mess.”¹³⁴ This Paper, however, has revealed that this inconsistency is not a sign of failure, or something we have reason to eliminate. Instead, it reflects the fact that we have different reasons to track different traits, each of which have long been associated with the state. This incoherence is not itself something we have reason to eliminate. The source of our problem is not per se jurisprudential. Rather, the issue lies in our assumption that these divergent tests *ought* to be unified into a single doctrine. Once we recognize this is not so, the task

134. Turner, *supra* note 12, at 281, 283; David Topel, Note, *Union Shops State Action and the National Labor Relations Act*, 101 YALE L.J. 1135, 1142 (1992) (suggesting that it is difficult to make sense of the state action doctrine); see also Joan Kante, Note, *The Constitutionality of Red-lining: The Potential for Holding Banks Liable as State Actors*, 2 WM. & MARY BILL RTS. J. 527, 558 (1993) (suggesting that it is not possible to predict what standard courts will use when examining the state action doctrine).

that motivates the doctrine—that of identifying the actors who should be granted special rights and responsibilities—seems far more achievable.

Much, of course, remains to be done. I have only gestured towards a description of the moral reasons that give us an interest in the clusters of features that underlie our longstanding interest in the state. Each of these reasons—and the characteristics whose values they explain—requires further explication. Perhaps most importantly for our purposes, we must work out what kinds of constitutional concerns connect to each of these clusters of characteristics. What reason do we have to rely on one or another of these doctrines when addressing specific types of legal questions? Answering such questions will prove challenging. Our recognition that there is no such singular thing as “the state,” however, should allow us to approach this work with a lightness of heart that efforts to understand the state action doctrine have rarely seen. Far from being a reason for despair, the incoherence and complexity that have long characterized the state action doctrine hints at a light that can lead us out of Charles Black’s “damp echoing cave.”¹³⁵

135. Black, Jr., *supra* note 5, at 102.