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On Doctrinal Confusion: The Case of the State Action Doctrine

Christopher W. Schmidt[*]

ABSTRACT

In this Article, I use a case study of the Fourteenth Amendment's state action doctrine as a vehicle to consider, and partially defend, the phenomenon of persistent doctrinal confusion in constitutional law. Certain areas of constitutional law are messy. Precedents seem to contradict one another; the relevant tests are difficult to apply to new facts and new issues; the principles that underlie the doctrine are difficult to discern. They may become a "conceptual disaster area," as Charles Black once described the state action doctrine. By examining the evolution of the state action doctrine, this notoriously murky field of constitutional law, I seek to better understand doctrinal confusion, to examine why it often occurs and why it sometimes persists, and to argue that under certain circumstances doctrinal confusion may actually be a good thing.

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INTRODUCTION

In his 1967 *Harvard Law Review Foreword*, Charles L. Black pronounced the Fourteenth Amendment's state action doctrine to be a "conceptual disaster area."[1] In his assessment of this particular area of constitutional law, Black was hardly alone. Scholars over the years have approvingly recycled Black's nice turn of phrase[2] or they have exhausted their thesauruses searching for evocative formulations to reiterate his basic point. The state action doctrine has been labeled "a murky borderland of law,"[3] "a self-contradictory invention,"[4] "a

1. Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967).

2. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 552 (4th ed. 2013); Henry J. Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1290 (1982).

3. Paul Freund, *The "State Action" Problem*, PROCEEDINGS AM. PHIL. SOC. 3, 5 (1991).

continuing doctrinal anachronism."[5] The judiciary has been equally critical, if somewhat less poetic, in their assessments. Judges preface discussion of the doctrine with an obligatory lamentation: "We now turn to the obdurate question of state action";[6] "We are required in this appeal to plunge once again into the murky waters of the state action doctrine";[7] "This appeal requires us to [engage] one of the more slippery and troublesome areas of civil rights litigation."[8] The Supreme Court has generally favored understatement. "Unfortunately, our cases deciding when private action might be deemed that of the state have not been a model of consistency," Justice Sandra Day O'Connor once noted before plunging into the murk.[9]

The only thing that is clear when it comes to the state action doctrine is that the doctrine is a mess. Everyone, it seems, agrees that

4. William W. Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action*, 1965 DUKE L.J. 219, 245 (1965).

5. Arthur Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387, 415 (1967).

Other favorites: Paul Brest noting that the applicable legal standard in *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961), one of the most significant of all state action cases, "differs from Justice Stewart's famous 'I know it when I see it' standard for judging obscenity mainly in the comparative precision of the latter." Paul Brest, *State Action and Liberal Theory: A Casenote on* Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1296, 1325 (1982) (citation omitted); Philip B. Kurland describing *Shelley v. Kraemer*, 334 U.S. 1 (1948), as "constitutional law's *Finnegan's Wake*." Philip B. Kurland, *Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143, 148 (1964); Judge Friendly writing that any "attempt to extract a satisfying general principle" from *Shelley* "seems to lead inescapably to the great blue yonder." HENRY J. FRIENDLY, THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA 14 (1969).

After collecting enough of these gems, one cannot help but suspect that denouncing the state action doctrine has become a game of scholarly one-upmanship. In this contest, Charles Black still reigns supreme. *See, e.g.*, Charles L. Black, Jr., *The Problem of the Compatibility of Civil Disobedience with American Institutions of Government*, 34 TEX. L. REV. 492, 497 (1965) ("that most storm-vexed field of law"); Black, *supra* note 1, at 89 (a "paragon of unclarity"); *id.* at 95 ("a 'doctrine' without shape or line"); *id.* ("a torchless search for a way out of a damp echoing cave"); *id.* ("a map whose every country is marked *incognita*").

6. Braden v. Univ. of Pittsburgh, 552 F.2d 948, 955 (3d Cir. 1977).

7. Fitzgerald v. Mountain Laurel Racing, Inc., 607 F.2d 589, 591 (3d Cir. 1979).

8. Graseck v. Mauceri, 582 F.2d 203, 204 (2d Cir. 1978).

9. Edmondson v. Leesville Concrete Co., Inc., 500 U.S. 614, 632 (1991); *see also* Reitman v. Mulkey, 387 U.S. 369, 393 (1967) (Harlan, J., dissenting) (describing state action doctrine as based on "a slippery and unfortunate criterion").

the doctrine is unclear; it is contradictory and inconsistent; it lacks conceptual coherence.[10]

Typically, at this point my role as a legal scholar would compel me to reveal a path forward. I would formulate a more coherent and reasoned state action doctrine. I would provide a relief plan for the legal disaster area. Contradictory, unclear, incoherent doctrine is a problem to be fixed, and one of the central roles of legal scholarship is to fix these kinds of problems. In this Article, however, my agenda runs in a different direction. Rather than offer a remedy for this supposed constitutional ailment, I seek to better understand it and to examine why doctrinal disaster areas often form and why they sometimes persist. I also argue that scholars tend to exaggerate the problematic nature of doctrinal confusion, a point that becomes clear when we abandon narrow court-centered conceptions of constitutional development for a more institutionally pluralistic conception. Legal doctrine is but one component of a socio-legal system in which the people, their elected representatives, and judges

10. Complaints of the incoherence of state action doctrine have been a cottage industry among legal commentators since the Supreme Court's decision in *Shelley*. *See, e.g.*, Louis Michael Seidman, *The State Action Paradox*, 10 CONST. COMMENT. 379, 391 (1993) ("No area of constitutional law is more confusing and contradictory than state action."); Freund, *supra* note 3, at 11 ("As a doctrinal matter, it must be evident that the state-action problem is left in an incoherent state."); Erwin Chemerinsky, *Rethinking State Action,* 80 NW. U. L. REV. 503, 504–05 (1985) (arguing that one reason scholars stopped writing about the state action doctrine in the late 1970s was "because earlier commentators were so successful in demonstrating the incoherence of the state action doctrine"); William W. Van Alstyne & Kenneth L. Karst, *State Action*, 14 STAN. L. REV. 3, 58 (1961) ("The state action cases, at least since *Smith v. Allwright*, have fulfilled Holmes' prophecy: 'Certainty generally is illusion, and repose is not the destiny of man.'" (footnotes omitted)); Thomas P. Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1121 (1960) ("The contexts of these problems so far have varied enough that one line of cases provides hardly a clue about the disposition of another."); Note, *The Disintegration of a Concept—State Action Under the 14th and 15th Amendments*, 96 U. PA. L. REV. 402, 412 (1948) ("[E]xtension of the [state action] concept . . . has rendered impossible the . . . use of the concept as a guide.").

There are always exceptions to the rules of course. (In the contrarian profession of legal academia, how could there not be?) So, for example, Laurence Tribe has written that the state action doctrine "is, in my view, considerably more consistent and less muddled than many have long supposed." LAURENCE TRIBE, *Refocusing the "State Action" Inquiry: Separating State Acts from State Actors*, *in* CONSTITUTIONAL CHOICES 248 (1985). Lillian BeVier and John Harrison have argued that the state action principle is both coherent and defensible. Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767 (2010). Although more a defense of the state action doctrine than is typical in the scholarship, even this defense is a partial one in that BeVier and Harrison defend a *principle* of state action only partially reflected in the doctrine.

define and contest constitutional norms.[11] From this perspective, whether doctrine achieves a satisfying coherence may be less important than other vital roles doctrine plays in constitutional development, particularly when courts engage in constitutional dialogue with nonjudicial actors. This point illuminates a potential line of division between the work of scholars and that of lawyers engaged in constitutional litigation. What scholars lament as a failure of principled reasoning or legal craft may create valuable opportunities for those who seek to use the law to effect social change. Confused doctrine may even help the courts serve a productive role in the dialectic of constitutional development. Those outside the academy who struggle to advance alternative claims on the meaning of the Constitution have often recognized this. In this Article, I urge scholars to do the same.

One of the central challenges for an inquiry into doctrinal confusion is that the phenomenon resists easy identification. Although certain criteria commonly associated with doctrinal confusion, such as indeterminacy or complexity, might be susceptible to quantification, other essential elements are not. There is an unavoidable we-know-it-when-we-see-it[12] quality to my subject: widespread perception creates and populates the category without stopping to define it. To navigate these difficulties, I choose to employ what I term an *illustrative case study* approach to doctrinal confusion. I use an analysis of a single notoriously confused area of law to illuminate the larger phenomenon of doctrinal confusion—what it means for doctrine to be confused, why doctrine may become this way, and the costs and benefits of doctrinal confusion.[13]

11. *See, e.g.*, Richard A. Primus, *The Riddle of Hiram Revels*, 119 HARV. L. REV. 1681, 1699 (2006) ("On a properly rich understanding, the subject of American constitutional inquiry is not a written document alone, or that document and its judicial glosses, but the fundamental set of ideas, practices, and values that shape the workings of legitimate American government.").

12. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

13. The state action doctrine is not alone, of course, in being notorious for its confused state. Other areas of constitutional law that are common targets for criticism on this count include: regulatory takings, *see, e.g.*, Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 97 n.2 (2002) (summarizing scholarly complaints); Joseph Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964) (describing takings doctrine as "a welter of confusing and apparently incompatible results"), Establishment Clause doctrine, *see, e.g.*, William Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986), unconstitutional conditions, *see, e.g.*, Daniel A.

Although this approach to doctrinal confusion has its limitations, I believe it preferable to alternative approaches. One of the key points I emphasize in this Article is that a proper assessment of doctrinal confusion demands depth rather than breadth. Close analysis of the doctrine captures only a piece of what doctrinal confusion is all about. To understand doctrinal confusion is not only to understand a tangled area of law, but also the way in which that doctrine has developed over time. It requires an appreciation of the political and societal context in which doctrine operates. The reasons a given area of law becomes confused have as much to do with what is happening outside the courts as what is happening inside them. I therefore have selected several narrowing filters for my primary subject of analysis. Not only do I focus on a single area of constitutional law, but I give primary attention to a particular issue—the constitutional status of private racial discrimination—during a particular moment in history—the years of the civil rights movement. Out of a precise, historically grounded analysis of a particular instance of doctrinal confusion I construct a preliminary theory of the larger phenomenon.[14]

My approach allows me to claim two distinct contributions for this Article. One is an analysis of the phenomenon of doctrinal confusion. Jurists and scholars regularly categorize various areas of law as doctrinal disaster areas, but the category itself has never been the subject of direct inquiry. The other contribution is to offer a fuller account of the development of the state action doctrine. Approaching this doctrine through the lens of an inquiry into doctrinal confusion, with particular attention to the historical circumstances and multiple institutional actors that produce it, provides fresh insight into the state action doctrine's development.

I divide this Article into three Parts. Each revolves around the state action doctrine. References to other areas of constitutional law

Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 572 (1991) (describing the unconstitutional conditions doctrine as a "notorious conceptual quagmire"), and the Dormant Commerce Clause, *see, e.g.*, Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

14. For a discussion of single case study designs and their rationales, including the ways in which case studies can generate theoretical insights, see ROBERT K. YIN, CASE STUDY RESEARCH: DESIGN AND METHODS (4th ed. 2009).

indicate points where the state action case study offers more generalizable insight into doctrinal confusion and where it stands apart. Part I uses the state action doctrine as an entry point for defining the characteristics commonly associated with doctrinal confusion. Part II categorizes different kinds of doctrinal confusion and then explains the factors that lead to its development and, in some cases, its persistence over time. Part III presents my partial defense of doctrinal confusion in constitutional law. Here I suggest that confused doctrine may serve a valuable role in the process of constitutional development.

I. DEFINING DOCTRINAL CONFUSION

First, the definitional question: What is doctrinal confusion? This is a surprisingly tricky question. Scholars and judges frequently and enthusiastically attack the failings of various areas of legal doctrine. They do so not just because they disagree with the outcomes that doctrine produces, but because the doctrine fails to achieve some basic goal of what law should be. It is murky, messed up, confused. But what does it mean to categorize a given area of doctrine as a disaster area? I approach this question by closely examining a single area of law that has been identified with near-unanimity as a poster child for doctrinal confusion.

I do not claim state action as a necessarily *representative* case study of doctrinal confusion. Although certain aspects of this doctrine's confusion seem generalizable, others appear unique. Rather, I use the state action doctrine as an *illustrative* case study. To generate a theory of what constitutes doctrinal confusion, I begin with an example of what others have commonly identified as a confused area of law and then extract the components of the doctrine that have been used to justify this categorization. This then provides a preliminary definition of doctrinal confusion that can be interrogated, applied to other areas of law that have been labeled "confused," and used to advance the primary agenda of this Article, which is to explain why doctrinal confusion occurs.

When describing the state action doctrine, scholars and judges typically identify some variation of three characteristics as evidence of its doctrinal confusion. First, there is the *vagueness* concern. State action analysis requires a context-specific, fact-intensive approach. The test used to identify nonobvious state action is quite vague—much more a general "standard" than a precise "rule"—and courts

have resisted extracting more determinate legal tests from the body of state action decisions. Case-specific facts rather than legal guidelines do the preponderance of the work in state action cases. A second and related characteristic of the state action doctrine's confusion falls under the category of *complexity*. The fundamental task the state action doctrine performs—drawing a line between a public sphere in which all sorts of constitutional protections will apply and the private sphere in which they will not—is fraught with analytical difficulty. It is, quite simply, a complex job. The problems of vagueness and complexity go a long way toward capturing what scholars and jurists talk about when they lament the confused condition of the doctrine. But there is another essential element that goes into these critiques: the doctrine at some basic level does not make sense. It is *incoherent*. As applied to the state action doctrine, I identify the coherence critique as rooted in a perceived disconnect between the doctrinal test and the constitutional norm the doctrine is being used to implement.[15]

This Part begins with a short discussion of the challenge that substantive disagreement poses for my definitional project. I follow with a brief overview of the historical development of the state action doctrine. The remainder of this Part demonstrates how the state action doctrine exemplifies the three most common markers of doctrinal confusion—the dominance of facts over legal rules (vagueness), the analytical difficulty of the legal task (complexity), and the norm-doctrine disconnect (incoherence).

A. Substantive Disagreement and Doctrinal Confusion (or the "Argle-Bargle" Problem)

The problem here can be stated simply: when we do not like the substance of a given area of law, we are more likely to denounce it as incoherent or confused or, in Justice Antonin Scalia's hard-to-forget

15. My refinement of the coherence critique into a disconnect between doctrine and norm draws on Lawrence Sager's foundational scholarship on underenforced constitutional norms, Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978), and Richard Fallon's writings on doctrine's role in implementing constitutional norms, Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275 (2006); Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997).

phraseology, "legalistic argle-bargle."[16] Thus one of the obstacles to locating criteria that distinguish a given doctrine as particularly confused is the unavoidable subjective element of the inquiry. Whether one sees a particular area of law as incoherent or not is often wrapped up in what one thinks about the substance of that area of law.[17] Those who disagree with the law on a given question often attack that law as incoherent or conceptually confused. They thus transform a critique of the substance of the law into a critique on ostensibly more neutral, legalistic grounds, the form of the law. Perhaps no one has been a more adept practitioner of this approach than Justice Scalia.[18]

This dynamic has been evident with regard to the state action doctrine. Much of the judicial and scholarly criticism of the confusion of the doctrine has been driven by, or at least coupled with, a critique of the outcome of particular cases. Professor Black's scathing attack in the 1960s on the incoherence of state action doctrine was motivated by his belief that the Court should recognize more forms of nominally private action as constrained by the Fourteenth Amendment.[19] The chorus of critics of the state action doctrine in the 1950s and 1960s generally framed their critiques in similar normative packaging,[20] and much the same can be said about

16. United States v. Windsor, 133 S. Ct. 2675, 2709 (2013) (Scalia, J., dissenting).

17. Furthermore, even if one concludes that some aspects of the law are confused, whether that confusion is a seen as a significant problem is invariably colored by one's view of the substance of the law. *Cf.* Dan M. Kahan et al., *"They Saw a Protest": Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851 (2012) (demonstrating the effect of substantive commitments on one's perceptions of legally consequential facts).

18. *See, e.g.*, *Windsor*, 133 S. Ct. at 2705 (Scalia, J., dissenting) (describing the majority's legal reasoning as "rootless and shifting" and "perplexing"); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring) (criticizing Establishment Clause doctrine as creating a "strange . . . geometry of crooked lines and wavering shapes").

19. *See, e.g.*, Black, *supra* note 1, at 70 ("The amenability of racial injustice to national legal correction is inversely proportional to the durability and scope of the state action 'doctrine,' and of the ways of thinking to which it is linked.").

20. *See, e.g.*, John Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966); Jerre S. Williams, *The Twilight of State Action*, 41 TEX. L. REV. 347 (1963); Harold W. Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957).

its present-day critics.[21] In most scholarship on the state action doctrine, attacking the doctrine as incoherent is but a means toward attacking the courts for not recognizing a greater scope to the reach of the Fourteenth Amendment.

My challenge, then, is to identify some criteria of relative coherence/incoherence when assessments of judicial doctrine are always and inevitably intertwined with normative assessment of the substance of the doctrine. I cannot claim to resolve this definitional dilemma, but I do believe that a case study of the state action doctrine minimizes it as much as possible. It is hard to find anyone, regardless of their position on where the state action line should be drawn, who believes the state action doctrine to be anything but a distinctively confused area of law. Those who believe the Supreme Court has gone too far in applying the Fourteenth Amendment to private action[22] as well as those who believe the Court has not gone far enough all seem to agree that a root problem with the state action doctrine is that it fails to make much sense.[23]

B. The State Action Doctrine—First Principles and the Exceptions

What then are the basic components that go into this consensus of doctrinal confusion? The essence of the state action limitation is seductively simple: the Fourteenth Amendment restricts government, not private individuals. The text of the Amendment

21. *See, e.g.*, LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 49–71 (1996); Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779 (2004); Chemerinsky, *supra* note 10.

22. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369, 387–96 (1967) (Harlan, J., dissenting); PHILIP B. KURLAND, *Egalitarianism and the Warren Court*, *in* POLITICS, THE CONSTITUTION, AND THE WARREN COURT (1970).

23. So, for example, we have the frequent occurrence of a majority opinion and a dissent disagreeing on the outcome of a state action case but agreeing that the doctrine is a mess. *See, e.g.*, Fitzgerald v. Mountain Laurel Racing, Inc., 607 F.2d 589, 605 (3d Cir. 1979) (Adams, J., dissenting) ("The majority's description of this case as requiring yet another 'plunge . . . into the murky waters of the state action doctrine' is quite apt. Few, if any, of the recent Supreme Court pronouncements on this subject have gone uncriticized; and, if the commentators differ about which precedents to assail and which to defend, there is virtual unanimity regarding the lack of a coherent state action doctrine." (citation omitted)). Analogously, we have both academic critics and defenders of the state action doctrine coming together in agreement on the fact that the doctrine is confused. *Compare, e.g.*, Chemerinsky, *supra* note 10, at 504–05, *with* William P. Marshall, *Diluting Constitutional Rights: Rethinking "Rethinking State Action,"* 80 NW. U. L. REV. 558, 558–59, 570 (1986).

provides a reasonably clear basis for this: "*No State shall* make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State* deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[24] The first case in which the Court squarely faced the question of how far the Fourteenth Amendment would reach into private affairs, the 1883 *Civil Rights Cases*,[25] introduced a dichotomous reading of the constitutional language. "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment . . . . The wrongful act of an individual . . . is simply a private wrong."[26]

The Court has repeatedly reaffirmed this basic principle.[27] Yet beginning in the 1940s, the Court began crafting a set of exceptions to the rule. By fitting more and more formally private activity into these categories of exceptions, the Court steadily expanded the definition of state action to incorporate action that it had previously confined to the private sphere, thereby expanding the reach of the Fourteenth Amendment. The state action doctrine's ignominious state of confusion stems from the fitful accumulation of exceptions to the basic state action requirement.

1. The public function exception

The case law defines two categories of exceptions to the state action limitation. One category is for private actors who serve a "public function." In 1944, in *Smith v. Allwright*,[28] the Court identified the operation of elections as an essentially public activity that would be held responsible to constitutional standards, regardless of whether private political actors were running the primary election process. The constitutional prohibition of racial discrimination in elections, the Court explained, "is not to be nullified by a State

24. U.S. CONST. amend XIV, § 1 (emphasis added).

25. 109 U.S. 3 (1883). On the history of the early state action cases, see PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION (2011).

26. Civil Rights Cases, 109 U.S. at 11, 17.

27. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 621 (2000); Jackson v. Metro. Edison Co., 419 U.S. 345, 349 (1974); Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

28. 321 U.S. 649 (1944).

through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election."[29] This ruling led some lawyers to wonder how far the Court would go down this road. What other important activities might fall into this emerging public functions exception to the state action doctrine?[30]

An even more suggestive holding came two years later in *Marsh v. Alabama*.[31] This case involved a private "company town" that the Court held was to be treated as a public entity for purposes of the First Amendment. Because it had assumed all the functions of a traditional municipality, the company town therefore took on the additional constitutional responsibilities. Justice Black's opinion for the Court emphasized the limitations of private property rights and the responsibilities that accompany involvement in the economic sphere: "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[32] *Marsh* thus seemed to call for some sort of balancing test to guide the state action analysis, in which the key consideration would be the extent to which a private actor engages with the public sphere.

The open question was how far the courts would extend this reasoning. What other private actors "open[] up [their] property for

29. *Id.* at 664; *see also* Terry v. Adams, 345 U.S. 461 (1952) (extending reasoning of *Smith v. Allwright* from a primary election run by a state-wide political party to an election run by a county political organization).

30. *See, e.g.*, William H. Hastie, *Appraisal of* Smith v. Allwright, 5 LAW. GUILD REV. 65, 71–72 (1945) ("It may well be that *Smith v. Allwright* marks the emergence of a conception of governmental action which will subject numerous important activities, heretofore customarily regarded as 'private', to the constitutional restraints applicable to government . . . . [A]lready it appears that labor unions are added to political parties in the new catalogue of social instrumentalities whose conduct must on occasion conform to the constitutional standards of governmental action. There is no reason to believe that the vitality of this emerging concept is spent or that the fields of voting and collective bargaining are the only areas in which it may be controlling."). As Sophia Lee has shown, beginning in the 1940s, labor rights activists sought to take advantage of the fractures in the traditional state action doctrine by calling on the courts to expand constitutional protections to the realm of employment relations. SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT 11–55 (2014).

31. 326 U.S. 501 (1946).

32. *Id.* at 506.

use by the public in general" to such an extent that Fourteenth Amendment limitations might be applied to their actions? When Jehovah's Witnesses claimed the right under the First Amendment to enter the corridors of a large apartment house to distribute literature to residents, the New York Court of Appeals rejected their claim.[33] The court distinguished *Marsh*, holding that the operations of the internal corridors of an apartment building were not a "public function" in the same sense that operating streets in a company town was.[34]

From the 1940s through the 1970s, various advocates urged the courts to broaden their "public functions" category of exceptions to the state action principle. In 1966 the Supreme Court identified parks as serving a public function and therefore falling within the ambit of the Fourteenth Amendment, even when they are privately owned.[35] In 1968, the Court held that a large shopping mall was "the functional equivalent of the business district" that was held to be serving a public function in *Marsh*, and, therefore, should be held accountable to First Amendment requirements.[36] Some ambitious advocates turned to an abandoned relic of the *Lochner*-era jurisprudence, the category of "affected by a public interest,"[37] as a possible framework for a reconceptualized state action. Civil rights lawyers argued that businesses that were "affected with the public interest," such as restaurants and hotels, should be treated as state actors under the Fourteenth Amendment.[38]

33. Watchtower Bible & Tract Soc. v. Metro. Life Ins. Co., 79 N.E.2d 433 (1948).

34. *Id.*; *see also* Dorsey v. Stuyvesant Town Corp., 87 N.E.2d 541 (1949) (racial discrimination by large private housing developer not subject to Fourteenth Amendment constraints), *cert. denied*, 339 U.S. 981 (1950); Hall v. Virginia, 49 S.E.2d 369 (1948), *appeal dismissed*, 335 U.S. 875 (1948) (holding that apartment building could prohibit distribution of religious pamphlets).

35. Evans v. Newton, 382 U.S. 296 (1966).

36. Amalgamated Food Emps. Union v. Logan Valley Plaza, 391 U.S. 308, 318 (1968).

37. *See* Munn v. Illinois, 94 U.S. 113, 139–40 (1877). As a limitation on the constitutional scope of economic regulation under the Due Process Clause, the Court rejected an inquiry into whether a business is "affected by public interest" in *Nebbia v. New York*, 291 U.S. 502 (1934).

38. *See* Bell v. Maryland, 378 U.S. 226, 314 n.33 (1964) (Goldberg, J., concurring); *id.* at 255 (Douglas, J., concurring); Garner v. Louisiana, 368 U.S. 157, 181–85 (1961) (Douglas, J., concurring); Civil Rights Cases, 109 U.S. 3, 37–43 (1883) (Harlan, J.,

The Court never accepted this far-reaching argument. Indeed, in the 1970s the justices began to push in the other direction. The 1968 decision defining shopping malls as serving a public function was sharply narrowed[39] and then overturned.[40] In 1974 the Court reined in any potential expansion of this category with its decision in *Jackson v. Metropolitan Edison Co.*,[41] which limited the public functions category to those activities that have been traditionally and exclusively the responsibility of the state.[42] With this narrowing move, the Court's treatment of the category of "public function" exceptions to the state action doctrine, which from the 1940s through the 1970s was an evolving and difficult-to-define category, achieved a measure of stability and clarity. The trend of public function state action decisions was reversed. The Court considered and rejected a series of claimed additions to its category—not only large shopping centers but also private schools[43] and medical providers[44] were rejected as candidates for the category.[45] The exclusive-traditional limitation to the public function category brought a new level of determinacy to at least this corner of the state action doctrine. Indeed, today, it is the very clarity of the public function test that critics attack for being inadequately responsive to the need to extend constitutional oversight over activities that, while not necessarily traditionally and exclusively public functions, the government has delegated to private entities.[46]

dissenting); Theodore J. St. Antoine, *Color Blindness but Not Myopia: A New Look at State Action, Equal Protection, and "Private" Racial Discrimination*, 59 MICH. L. REV. 993 (1961).

39. Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

40. Hudgens v. NLRB, 424 U.S. 507 (1976).

41. 419 U.S. 345 (1974).

42. *Id.* at 352–53.

43. Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

44. Blum v. Yaretsky, 457 U.S. 991 (1982).

45. The only traditional and exclusive government function the Court added in this category was exercising the right to peremptory challenges. Edmondson v. Leesville Concrete Co., 500 U.S. 614 (1991).

46. *See, e.g.*, Gilliam E. Metzger, *Private Delegations, Due Process, and the Duty to Supervise*, *in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (Jody Freeman & Martha Minow eds., 2009). Although critics of the recent increase in the privatization of public services often characterize this trend as a sharp departure from historical precedent, a recent trend in historical scholarship has emphasized the long history of government use of private actors to enforce public policy. *See, e.g.*, GARY GERSTLE, LIBERTY AND COERCION: THE PARADOX OF AMERICAN GOVERNMENT FROM THE FOUNDING TO THE

2. The entanglement exception

While the public function line of exceptions to the state action limitation of the Fourteenth Amendment evolved into a relatively stable, predicable strand of state action analysis in the 1970s, the same cannot be said about the other category of exceptions, the state "involvement" or "entanglement" exception.[47] It is this category of exceptions that has produced—and continues to produce—the most confusion. When judges and scholars lament the murky waters of state action they generally are referring to this line of cases.

The critical question here is how much government involvement is required to transform, for purposes of the Fourteenth Amendment, a private act into an act of the state. As the Supreme Court once put it, the goal is to determine when the state has "so far insinuated itself into a position of interdependence" with a private non-state actor "that it must be recognized as a joint participant in the challenged activity."[48]

PRESENT (2015); NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940 (2013); BRIAN BALOGH, A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA (2009); WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996); William J. Novak, *Public-Private Governance: A Historical Introduction*, *in* GOVERNMENT BY CONTRACT, *supra*. This scholarship indicates that the idea of a distinctive category of activities that have been traditionally and exclusively the role of the government is, in many ways, a useful fiction.

47. The Court has identified the "entwinement" of state and private action as a possible additional category of exceptions—or perhaps a variant of the "entanglement" category. (It's confusing.) *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 302–03 (2001). Some courts have differentiated an analysis of whether there is a "close nexus between the state and the challenged action of the [private] entity so that the action of the latter may be fairly treated as that of the state itself," *Jackson,* 419 U.S. at 351, and whether there is a "symbiotic" relationship between the state and the private actor. *See, e.g.*, Perkins v. Londonderry Basketball Club, 196 F.3d 13, 19–23 (1st Cir. 1999). While the "nexus" test focuses on the challenged conduct, the symbiosis test "concentrates instead on the nature of the overall relationship between the State and the private entity." *Id.* at 18. Because the goal of this Article is not to provide a comprehensive overview of the state action doctrine but to explain certain key features of its development, I have opted for the simplified but still useful division of the doctrine into just two prongs of exceptions, public function and entanglement.

48. Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961); *see also* Evans v. Newton, 382 U.S. 296, 299 (1966) ("Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action.").

This gets tricky in a hurry. When the challenged action involves a private actor responding to a clear state requirement—when, for example, a state segregation law or policy requires private actors to practice racial discrimination—there is clearly state involvement.[49] But what if the state stops short of requirement? Is some form of state encouragement sufficient? In one of the cases arising from prosecution of lunch counter sit-in protesters, the Supreme Court found the requisite state encouragement in a statement by a local sheriff expressing disapproval of the actions of the protesters.[50] In other sit-in cases, the Court located state encouragement in the mere existence of a city restaurant segregation ordinance,[51] even if the business operator would have refused service in the absence of the official segregation policy.[52] What if a history of official segregation, even if now repealed, leaves behind "a custom having the force of law"?[53] What if the state merely *allows* private discrimination to occur, doing nothing to prevent the discrimination, when it has the power to do so? Is this kind of tacit "authorization" tantamount to state involvement in the private discrimination?[54] Can inaction be a form of state action?[55]

If all this is not challenging enough, we have yet to even touch on the murkiest reaches of the entanglement prong of exceptions to the state action requirement: the question of judicial enforcement of legal claims between private parties. The basic rule here is straightforward: judicial enforcement does not transform private

49. *See, e.g.*, Gayle v. Browder, 352 U.S. 903 (1956) (holding that a municipal ordinance that required a privately operated bus company to enforce a segregation policy violated the Equal Protection Clause).

50. Lombard v. Louisiana, 373 U.S. 267 (1963).

51. Peterson v. Greenville, 373 U.S. 244 (1963).

52. Robinson v. Florida, 378 U.S. 153 (1964).

53. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 171 (1970).

54. *See* Reitman v. Mulkey, 387 U.S. 369, 394–95 (1967) (Harlan, J., dissenting) (warning of the "far-reaching possibilities" of a state "permission" theory of state action). *Compare* Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) ("By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination."), *with* Flagg Bros. v. Brooks, 436 U.S. 149, 164 (1978) (stating that "a State's mere acquiescence in a private action" does not convert private action to state action).

55. *See, e.g.*, Horowitz, *supra* note 20 (arguing that state action is present whenever the state has authority to prohibit or allow a given private activity); BRANDWEIN, *supra* note 25 (excavating a "state neglect" reading of the early state action cases).

action into state action. An alternative rule would, in effect, explode the entire state action limitation on the reach of the Fourteenth Amendment. But then there are the exceptions. The most famous of these is *Shelley v. Kraemer*,[56] the 1948 decision in which the Court held that judicial enforcement of one particular form of private contractual agreement, the racially restrictive covenant, would be treated as a form of state action and therefore held to the Equal Protection Clause's standard. The reasoning expressed in the decision itself did not reveal much in terms of the limiting principle behind this exception. There was nothing exceptional about the activity of the state at issue in the case—courts regularly enforce private agreements, and this had never before been understood as the kind of state action that demanded application of constitutional standards. Scholars sought to fill in the void, suggesting rationales for why this particular instance was different.[57] Perhaps it was the willing-buyer-willing-seller situation in *Shelley*.[58] Perhaps it was the way in which state enforcement of racially restrictive covenants functioned as a kind of state-sanctioned racial zoning policy, which the Court had long ago held unconstitutional.[59] Perhaps the most forceful line of reasoning was the one that lacked much of any kind of larger legal principle—that this particular act of private racial discrimination itself was so offensive that the state's ostensibly neutral enforcement could not escape constitutional oversight.[60]

During the height of the civil rights era, a period in which a majority of the Supreme Court seemed to be willing to press the reach of the Fourteenth Amendment deeper and deeper into the private sphere, many observers believed the accumulated exceptions

56. 334 U.S. 1 (1948).

57. *See, e.g.*, Mark D. Rosen, *Was* Shelley v. Kraemer *Incorrectly Decided? Some New Answers*, 95 CAL. L. REV. 451 (2007); Mark Tushnet, Shelley v. Kraemer *and Theories of Equality*, 33 N.Y.L. SCH. L. REV. 383 (1988); TRIBE, *supra* note 10, at 259–66; David Haber, *Notes on the Limits of* Shelley v. Kraemer, 18 RUTGERS L. REV. 811 (1964); Louis Henkin, Shelley v. Kraemer*: Notes for a Revised Opinion*, 110 PA. L. REV. 473 (1962).

58. Subsequent cases undermined this rationale. *See* Barrows v. Jackson, 346 U.S. 249 (1953).

59. *See* Reitman v. Mulkey, 387 U.S. 369, 381 (1967) (Douglas, J., concurring) ("We deal here with a problem in the realm of zoning, similar to the one we had in *Shelley v. Kraemer*."); Buchanan v. Warley, 245 U.S. 60 (1917).

60. *See, e.g.*, David A. Strauss, *State Action After the Civil Rights Era,* 10 CONST. COMMENT. 409, 414 (1993).

to the state action doctrine would eventually undermine or fundamentally transform the rule.[61] This never happened. While the Court rarely rejected a state action claim in the civil rights era, particularly when the constitutional claim involved racial discrimination,[62] the Justices ducked various challenging issues (such as discrimination in privately operated public accommodations) and consciously avoided defining limiting principles to the exceptions to the state action limitation.

Then, beginning in the 1970s, a new line of case law emerged, this one pushing against the trend of previous decades. During this period, when the Court limited the public functions exception, the Court also began to emphasize the limits to its expansion of the entanglement exception.[63] In 1972, when faced with a case of a policy of racial discrimination in a private club, the Court held that the mere fact that the club received a state liquor license did not constitute the requisite state involvement.[64] In a 1974 case involving a due process claim against a private utility company, the Court found that state licensing in addition to extensive state regulation failed to reach the "significant state involvement" threshold.[65]

This is pretty much where the state entanglement prong of the state action doctrine stands today. We have a collection of potentially expansive exceptions to the basic state action mantra, all of which were created in the middle decades of the century, most of which

61. *See* Christopher W. Schmidt, *The Sit-ins and the State Action Doctrine*, 18 WM. & MARY BILL OF RTS. J. 767, 781–84 (2010).

62. Black, *supra* note 1, at 84–91 (describing the lopsided nature of the case law).

63. A related contemporaneous development was the Court's growing resistance toward extending the reach of the Equal Protection Clause, evident in the sharpening of the distinction between de facto and de jure discrimination in its school desegregation jurisprudence, *see, e.g.*, Keyes v. School Dist. No. 1, 413 U.S. 189 (1973), and the rejection of racially discriminatory impact claims when there was no finding of racially discriminatory intent, *see, e.g.*, Washington v. Davis, 426 U.S. 229 (1976). Like the state action cases of this period, these equal protection cases demonstrated a Court that was less willing to extend constitutional constraints to private actors.

64. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). *Compare id.* at 184 (Brennan, J., dissenting) ("When Moose Lodge obtained its liquor license, the State of Pennsylvania became an active participant in the operation of the Lodge bar."), *with* Lombard v. Louisiana, 373 U.S. 267, 275 (1963) (Douglas, J., concurring) (holding that licensing might be state action), *and* Garner v. Louisiana, 368 U.S. 157, 181–85 (1961) (Douglas, J., concurring) (same), *and* Civil Rights Cases, 109 U.S. 3, 58–59 (1883) (Harlan, J., dissenting) (same).

65. Jackson v. Metro. Edison Co., 419 U.S. 345, 368 (1974).

involved racial discrimination. But we also have a somewhat smaller collection of holdings from the 1970s and beyond that push back against these civil rights era precedents. Considered strictly as a matter of doctrinal coherence, we seem to be left, as Charles Black put it, on "a torchless search for a way out of a damp echoing cave."[66]

C. "Facts and Circumstances"

Having provided an overview of the Court's path into the "damp echoing cave" of doctrinal confusion, I now return to the question with which I began this Part: What exactly does it mean to be in a state of doctrinal confusion? Although most references to doctrinal incoherence in judicial opinions and in scholarship simply assume the definition, here I attempt to extract from these critiques a more precise account of the characteristics of confusion.

With regard to the state action doctrine, one of the most consistently referenced markers of its confusion is that facts dominate law—decisions turn more on the facts particular to the cases than on generally applicable legal rules.[67] The fact-intensive analysis the Supreme Court has offered as the proper way to differentiate the state actors who are constrained by the requirements of the Fourteenth Amendment from the non-state actors who are not is regularly identified as a key indicator of the conceptual confusion of the doctrine. When the crux of a doctrinal standard turns on the word "significant"—is the state involvement in the private activity *significant*?[68]—or "fairly"—i.e., can the conduct "be *fairly*

66. Black, *supra* note 1, at 95.

67. *See, e.g.*, Perkins v. Londonderry Basketball Club, 196 F.3d 13, 18 (1st Cir. 1999) ("The line of demarcation between public and private action, though easily proclaimed, has proven elusive in application. And the Justices, mindful of the fact-sensitive nature of the inquiry, have staunchly eschewed any attempt to construct a universally applicable litmus test to distinguish state action from private conduct.").

68. *See, e.g.*, Blum v. Yarentsky, 457 U.S. 991, 1004 (1982) ("[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."); Reitman v. Mulkey, 387 U.S. 369, 380 (1967) (holding that state action requires that the state has "significantly involved itself with invidious discriminations").

attributable to the State"[69]—we are left, Charles Black noted, with an "almost total lack of resolving power."[70]

The *locus classicus* of the fact-intensive application of the state action doctrine is *Burton v. Wilmington Parking Authority*.[71] The 1961 case involved a challenge to racial discrimination in a privately operated restaurant that was located in a public parking garage. The key legal question was whether the local government and the restaurant operator were sufficiently connected such that the private business could be treated as a state actor and thereby be made accountable to the requirements of the Fourteenth Amendment's Equal Protection Clause.

What is the legal standard identified in this seminal state action case? State action will be found, explained Justice Clark, when "to some significant extent the State in any of its manifestations has been found to have become involved in it."[72] How is this "significant" involvement identified? "[T]o fashion and apply a precise formula for recognition of state responsibility under the *Equal Protection Clause* is an 'impossible task' which 'This Court has never attempted.' Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[73] By the conclusion of the decision, Justice Clark seemed to be practically wallowing in "facts and circumstances":

> Because readily applicable formulae may not be fashioned, the conclusions drawn from the facts and circumstances of this record

69. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982) (emphasis added); *see also* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991) (holding that state action is found when "the private party charged with the deprivation could be described *in all fairness* as a state actor") (emphasis added); *Lugar*, 457 U.S., at 936 (stating that the state action limitation "avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot *fairly* be blamed") (emphasis added); Rendell-Baker v. Kohn, 457 U.S. 830, 838–40 (1982) (applying *Lugar*'s "fairly attributable to the state" standard); Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974) (explaining that state action requires "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be *fairly* treated as that of the State itself") (emphasis added).

70. Black, *supra* note 1, at 84; *see also id.* at 88 ("[T]here were and are no clear and concrete tests of state action; the concept is notoriously, scandalously lacking in these; it is itself nothing but a catch-phrase.").

71. 365 U.S. 715 (1961).

72. *Id.* at 722.

73. *Id.* (citation omitted) (quoting Kotch v. Bd. of River Port Pilot Comm'rs, 330 U.S. 552, 556 (1947)).

> are by no means declared as universal truths on the basis of which every state leasing agreement is to be tested. Owing to the very "largeness" of government, a multitude of relationships might appear to some to fall within the Amendment's embrace, but that, it must be remembered, can be determined only in the framework of the peculiar facts or circumstances present. Therefore respondents' prophecy of nigh universal application of a constitutional precept so peculiarly dependent for its invocation upon appropriate facts fails to take into account "Differences in circumstances [which] beget appropriate differences in law."[74]

At this point, perhaps recognizing the potential scope of the rule he just suggested, Justice Clark basically limited the holding to the facts of the immediate case.[75]

The expansive ambiguity of Clark's opinion has been a frequent target of criticism. Writing in dissent, Justice Harlan took the majority to task: "The Court's opinion, by a process of first undiscriminatingly throwing together various factual bits and pieces and then undermining the resulting structure by an equally vague disclaimer, seems to me to leave completely at sea just what it is in this record that satisfies the requirement of 'state action.'"[76] Scholars[77] and judges[78] have echoed Harlan's critique.

Yet the facts-and-circumstances approach lives on at the heart of state action doctrine. It is a "necessarily fact-bound inquiry" the Court must engage in, explained the Supreme Court in *Lugar v.*

74. *Id.* at 725–26 (quoting Whitney v. State Tax Comm'n, 309 U.S. 530, 542 (1940)).

75. *Id.* at 726.

76. *Id.* at 728 (Harlan, J., dissenting).

77. *See, e.g.*, KURLAND, *supra* note 22, at 127 (describing *Burton* as "a rather murky opinion"); Brest, *supra* note 5, at 1325 (stating that Clark's approach "differs from Justice Stewart's famous 'I know it when I see it' standard for judging obscenity mainly in the comparative precision of the latter.") (citation omitted)); Williams, *supra* note 20, at 382 (describing *Burton* as "vague and obscure"). *See generally* Thomas P. Lewis, Burton v. Wilmington Parking Authority—*A Case Without Precedent*, 61 COLUM. L. REV. 1458 (1961).

78. *See, e.g.*, Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 57 (1999) (describing *Burton*'s "'joint participation' test" as "vague"); Crissman v. Dover Downs Entm't, 289 F.3d 231, 241 (3d Cir. 2002) ("The Supreme Court has had occasion in the more than 40 years since *Burton* was decided to consider state action in no less than a dozen cases, and while referring to and characterizing the *Burton* 'test' in several opinions, the Supreme Court has never relied upon it again to find state action. Nor, however, has it overruled it.").

Edmondson Oil Co.[79] "[W]hat is required," in these cases, Justice Brennan once wrote, "is a realistic and delicate appraisal of the State's involvement in the total context of the action taken."[80] Here is how the Third Circuit assessed the state of affairs in 1975:

> It would seem that we now have only to cull a clearcut definition of state action from relevant decisions dealing with this particular concept of state action. However, the Supreme Court's studied avoidance of any definitive state action formula can hardly be gainsaid. The Court admits to extreme difficulty in articulating an all-inclusive test and seems to emphasize that, within the confines of certain guidelines, the presence or absence of state action must be determined on a case-by-case basis.[81]

A distinctive feature of the state action doctrine, then, is general agreement on the doctrinal test to be applied, with the disagreement residing primarily in the area of the application of that test—in the relative weight to be given to the determinative facts and circumstances in each situation.[82] As a result, we regularly see cases in which both the majority and dissenting opinions agree on the basic contours of the doctrinal test to be applied but differ on the

79. 457 U.S. 922, 939 (1982). The majority opinion in *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001), the most significant of recent Supreme Court state action decisions, ignored *Burton*.

80. Blum v. Yarentsky, 457 U.S. 991, 1013 (1982) (Brennan, J., dissenting).

81. Magill v. Avonworth Baseball Conf., 516 F.2d 1328, 1332 (3d Cir. 1975) (footnote omitted).

82. Contrast this situation with the current state of Second Amendment doctrine. Following *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court thus far has left it to the lower courts to make sense of this new gun-rights jurisprudence, with only the vague, suggestive doctrinal standard of *Heller* and *McDonald* to work with. As a result, the courts have divided on how to even approach these challenges, differing on questions such as the level of scrutiny and the role of originalist inquiry in the analysis. The inconsistent results in Second Amendment cases are largely the product of disagreement on the doctrine that is to be applied. *See also* Joseph Blocher, *Second Things First: What Free Speech Can and Can't Say About Guns*, 91 TEX. L. REV. 37, 37 (2012) ("In the wake of the Supreme Court's landmark decisions in *District of Columbia v. Heller* and *McDonald v. City of Chicago*, courts and scholars remain deeply conflicted not only about the specific rules of Second Amendment doctrine, but about what even counts as a Second Amendment argument."). In the Second Amendment context, then, it is the doctrine itself that is inconsistent, whereas in the state action context it is the application of the doctrine to different fact patterns.

outcome of that test.[83] We also see tension between cases, i.e., leading precedents can be difficult to reconcile with one another, a fact that is regularly cited as evidence of the state action doctrine's confusion.[84]

Holdings that conflict, precedents without clear patterns, indeterminate doctrine—all of this is another way of saying that when applying the state action doctrine the courts perform an individualized assessment of the particular facts with only general guidance from the doctrine itself. The vagueness of the legal standard thus provides a contributing factor to the overall assessment that the doctrine is confused.

D. Complexity

Another commonly cited attribute of the state action doctrine's confusion is the complexity of the basic issue that the doctrine attempts to capture. Drawing the line between private and state activity, the core task the state action doctrine sets out for itself, may simply be a highly complex task. The difficulties making the doctrine clear, consistent, and coherent may be attributed, to some extent, to this fact.[85]

It is important to note that the state action doctrine need not be particularly complex. Its complexity is largely the result of the work judges have asked the doctrine to perform. Prior to the 1940s, when the courts limited state action to the formal activities of official state

83. "Perhaps most damning to any doctrinal argument is a dissent which relies on the same principle asserted in the majority." PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 204 (1982).

84. *See, e.g.*, Edmonson v. Leesville Concrete Co., 500 U.S. 614, 632 (1991) ("Unfortunately, our cases deciding when private action might be deemed that of the state have not been a model of consistency."); Braden v. Univ. of Pittsburgh, 552 F.2d 948, 956 (3d Cir. 1977) ("While the leading cases may serve as guidelines for our inquiry here, no attempt has been made by the Supreme Court, as of yet, to reconcile what may appear to be conflicting pronouncements on state action. Nor has the Court thus far sought to delineate a unitary theory of state action.").

85. For an examination of this point, see LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 71 (1996) ("The confusion [of state action opinions] is not the product of sloppy reasoning or unprincipled manipulation of doctrine. It is rooted in the fundamental difficulty in thinking about constitutional law in the legal culture we have inherited from the legal realists and the New Deal.").

actors, the doctrine was relatively easy to apply.[86] Nor need the abandonment of this formalistic conception of state action lead the doctrine into complexity. If the Court were to adopt some of the more radical proposals to basically abandon the entire state action limitation—it could, for example, recognize state action as pervasive and re-center the constitutional analysis on the substantive claim, with the extent of state involvement perhaps an element of the substantive analysis[87]—then the state action doctrine would be relatively straightforward again.

The complexity of the state action doctrine is thus the product of the particular task the courts have chosen to assign the doctrine: limning the boundaries between state responsibility and private initiative.[88] By some accounts, the difficulty of this task has only increased over the course of the history of the Fourteenth Amendment. This can be attributed to the raw fact of massive government growth—government at all levels plays more of a role in the lives of the people than it did in 1868, when the Amendment was ratified, or in the late nineteenth century, when the courts were first called upon to define the limits of state action.[89] It can also be attributed to the conceptual revolution of the nature of state responsibility that took place in the Progressive and New Deal eras and filtered into the world of law, in large part through the work of the Legal Realists.[90]

86. *See supra* Section I.B.

87. *See, e.g.*, Chemerinsky, *supra* note 10; Robert J. Glennon, Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement,* 1976 SUP. CT. REV. 221 (1976); Henkin, *supra* note 57; Horowitz, *supra* note 20.

88. On the complexities of the public-private distinction in the history of American government and law, see the sources cited *supra* in note 46.

89. *See, e.g.*, Flagg Bros. v. Brooks, 436 U.S. 149, 178–79 (1978) (Stevens, J., dissenting) ("[I]t is no longer possible, if it ever was, to believe that a sharp line can be drawn between private and public actions."); Braden v. Univ. of Pittsburgh, 552 F.2d 948, 956 (3d Cir. 1977) ("[T]he difficulties of drawing a line between state and private action are by now well-recognized. This is so because the realms of the government and the private sector are not as clearly defined as they were during the epoch in which the 14th and 15th Amendments . . . were adopted."). One should not exaggerate, however, the lack of government involvement in regulating the lives of the American people in the nineteenth century. See the sources cited in *supra* note 46.

90. *See, e.g.*, Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470

Modern American society thus presents a situation in which the core task of the state action inquiry is at once ridiculously easy and impossibly hard. The easy part is finding some line of connection or responsibility between the state and the private actor whose actions are being challenged. This simply requires, as Charles Black put it, "noting and clarifying yet another of the wonderfully variegated ways in which the Briarean state can put its hundred hands on life."[91] The hard part is not finding state responsibility—finding what Justice Frankfurter once described as requiring a showing "that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power."[92] The hard part—the confusion-inducing part—is figuring out which instances of state responsibility will be deemed to have the required *significance*. In these cases, what looks like state responsibility is not really state responsibility—or at least not the kind of state responsibility that will trigger constitutional constraints on private actors. Justice Harlan, a critic of the Warren Court's expansion of state action, recognized this difficulty. The critical question, he suggested, was not whether there is state action or not. It is "whether the *character* of the State's involvement in an arbitrary discrimination is such that it should be held *responsible* for the discrimination."[93]

The expansive nature of the kinds of constitutional claims with which state action deals multiplies the complexity of the analysis it requires. The state action limitation is trans-substantive: it functions as a gateway to all constitutional claims based on the Fourteenth Amendment. This includes not only equal protection and due process claims, but also any claim based on the protections of the Bill of Rights that have been applied to the states through the

(1923). *See generally* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 193–212 (1992).

91. Black, *supra* note 1, at 89; *see also* Peller & Tushnet, *supra* note 21, at 789 ("The state action doctrine is analytically incoherent because . . . state regulation of so-called private conduct is always present, as a matter of analytic necessity, within a legal order. There is no region of social life that even conceptually can be marked off as 'private' and free from government regulation. Every exercise of 'private' rights in a liberal legal order depends on the potential exercise of state power to prevent other private actors from interfering with the rights holder." (citations omitted)).

92. Terry v. Adams, 345 U.S. 461, 473 (1953) (Frankfurter, J., concurring).

93. Peterson v. Greenville, 373 U.S. 244, 249 (1963) (Harlan, J., concurring) (emphasis added).

incorporation doctrine. One of the central reasons the Supreme Court clung so tenaciously to the state action principle even in the face of the civil rights era demands that it abandon or seriously curtail its application was a fear of the Pandora's Box of non-race related constitutional claims such a move might open.[94] For this reason, a single, "unitary"[95] doctrine must be applied to a seemingly endless variety of purposes. The Supreme Court has simplified this analysis by assuming that the state action operates the same for all possible Fourteenth Amendment claims. But this holds only as a formal matter. In practice, the state action doctrine has operated differently depending on the substantive right being claimed. Put simply, the Court has been more expansive in its definition of state action when confronting racial discrimination claims and less expansive when confronting due process and free speech claims.[96] The unitary or trans-substantive state action analysis, a judicial choice that simplifies the doctrine on a formal level, only multiplies its complexity in application.

94. *See, e.g.*, Paul A. Freund, *New Vistas in Constitutional Law*, 112 U. PA. L. REV. 631, 641 (1964) (warning that overturning the *Civil Rights Cases* would have "a momentum of principle that might carry it far beyond the issue of racial discrimination or public accommodations"); ARCHIBALD COX, THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM 31–41 (1968) (highlighting doctrinal and theoretical difficulties of sit-in cases and arguing against a definitive judicial resolution); ALEXANDER M. BICKEL, POLITICS AND THE WARREN COURT 170 (1965) (describing the resolution of sit-ins cases as being affected by "the extreme difficulty of the issue as a constitutional matter, the utter inconclusiveness of the usual materials of judgment, the grave doubt whether any judicially imposed rule could work satisfactorily in all parts of the country in great varieties of situations, the lack of any moral or ethical standard sufficiently clear cut, well tried, and widely accepted to support a distinction between places where access must constitutionally be free and those where the owner's prejudices may constitutionally prevail").

95. John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C. L. REV. 569, 578 (2005).

96. For example, Chemerinsky notes that *Jackson*'s holding that a utility company with a state-granted monopoly was not a state actor would have been far less defensible if the utility company was discriminating based on race, rather than refusing to extend procedural due process protections to its customers. Chemerinsky, *supra* note 10, at 539. Several courts have suggested that the threshold for locating state action is lower in cases involving racial discrimination than it is for other constitutional claims. *See, e.g.*, Yeo v. Town of Lexington, 131 F.3d 241, 254 n.15 (1st Cir. 1997), *cert. denied*, 524 U.S. 904 (1998); Lebron v. Nat'l R.R. Passenger Corp., 12 F.3d 388, 392 (2d Cir. 1993), *rev'd on other grounds*, 513 U.S. 374 (1995); Girard v. 94th St. & Fifth Ave. Corp., 530 F.2d 66, 69 (2d Cir. 1976); Weise v. Syracuse Univ., 522 F.2d 397, 405–07 (2d Cir. 1975).

E. Disconnect Between Doctrine and Norm

Another commonly cited attribute of the state action doctrine's confused condition is that the formalistic state-action-not-state-action evaluation obfuscates the substantive constitutional values that are really operating in these cases. Paul Freund described this as "a kind of cognitive dissonance" embedded in the state action cases, an "awkward theoretical fit."[97] Another scholar lamented the question being treated as "in the nature of a formula which is irrelevant to the interests involved."[98] "What is called for," wrote Freund in his assessment of the "incoherent state" of the doctrine, "is not so much an abandonment of the state-action doctrine as a more explicit assessment of the values involved in its application."[99]

The basic critique is that the doctrine lacks *coherence*. This critique can best be understood as identifying a problematic relationship between the constitutional norm or value that the state action principle is supposed to advance and the doctrinal tests that operationalize this principle.[100] I term this the *norm-doctrine disconnect*.

Commentators who have identified this norm-doctrine disconnect in the application of the state action doctrine argue that the doctrine's surface concern with the relatively mechanical, content-neutral linkages between official state actors and private actors fails to capture—or worse, obscures—the fundamental

97. Freund, *supra* note 3, at 12.

98. Williams, *supra* note 20, at 390.

99. Freund, *supra* note 3, at 12; *see also* Fee, *supra* note 95, at 579 (describing the state action doctrine as relying on "fictions" that "have a tendency to obscure rather than to assist the values served by the state action requirement"); Black, *supra* note 1, *passim*.

100. The need to differentiate constitutional norms and constitutional doctrine, and the implications of the gap between the two, has generated a large scholarly literature. In addition to the sources cited in *supra* note 15, see also, for example, Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004). The focus of this line of scholarship is not doctrinal confusion, however. The gap between doctrine and norm these scholars identify derives primarily from—and is defended primarily on the basis of—the institutional competency of the judiciary. *See, e.g.*, Sager, *supra* note 15, at 1213 (defining an underenforced constitutional norm as "those situations in which the Court, because of institutional concerns, has failed to enforce a provision of the Constitution to its full conceptual boundaries"). In contrast, the doctrine-norm gap at the root of my study of doctrinal confusion is traceable to a variety of factors, including but not limited to judicial competence. *See infra* Part II.

constitutional values at stake.[101] What then are these constitutional values or norms? On the one hand there is the substantive constitutional norm that is being claimed. In the cases involving challenges to acts of racial discrimination by private actors, the operative equal protection norm would be something like this: practices of racial discrimination in American public life violate the constitutional commitment to ensuring equal protection of the laws.[102] Although always contested, this particular reading of the Fourteenth Amendment achieved something approaching a functional consensus in American society during the height of the civil rights movement. It could be found at work in much of the Warren Court's civil rights jurisprudence; it was a guiding star for the civil rights movement; it was manifested in policymaking of all sorts, including, most notably, the Civil Rights Act of 1964.[103] This equal protection norm would need to be weighed against another constitutional norm the state action principle was designed to recognize: the liberty interest on the part of the private discriminator. This "right to discriminate" claim, usually sounding in a right to privacy, associational autonomy, or property,[104] would obviously be strongest in the most private of activities, such as a private dinner party, and weakest as when the activity was an integral part of public life, such as the operation of hotels and restaurants.[105] The concern for those who questioned the coherence of the state action doctrine was that the doctrine's test failed to center its analysis on the constitutional values that really were at issue, instead steering

101. *See, e.g.*, Robin West, *Response to State Action and a New Birth of Freedom*, 92 GEO. L.J. 819 (2004); Chemerinsky, *supra* note 10, at 537 ("The concept of state action completely ignores the competing rights at stake and chooses based entirely on the identity of the actors." (citation omitted)).

102. *See, e.g.*, Bell v. Maryland, 378 U.S. 226, 286 (1964) (Goldberg, J., concurring) ("[T]he Constitution guarantees to all Americans the right to be treated as equal members of the community with respect to public accommodations.").

103. *See* Schmidt, *supra* note 61, at 786–91 (citing examples of various public figures denouncing racial discrimination in public accommodations as a violation of the Constitution); *cf.* BRUCE ACKERMAN, THE CIVIL RIGHTS REVOLUTION (2014) (locating an "anti-humiliation principle" animating the Warren Court's civil rights jurisprudence).

104. *See generally* Christopher W. Schmidt, *Defending the Right to Discriminate: The Libertarian Challenge to the Civil Rights Movement*, *in* SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY (Sally Hadden & Patricia Minter eds., 2013).

105. *See, e.g.*, *Bell*, 378 U.S. at 252–55 (Douglas, J., concurring).

the analysis down a search for the requisite quantum of state involvement with the private activity.

So, for example, the question whether a racially discriminating restaurant violated the Constitution became an inquiry into the terms of its rental agreement with the local government[106] or the conditions of a liquor license,[107] or whether a sheriff criticized sit-in protesters,[108] or whether some unenforced segregation law lingered on the books.[109] When the Court expanded the scope of state action into some new realm of socio-legal relations—to cover, say judicial enforcement of certain private rights[110]—the Court's formal reasoning seemed to have more to do with some supposed recognition or discovery of state action rather than what really seems to be moving the doctrine, which is a recognition of the need for constitutional restrictions of this particular activity.[111] And when the Court refuses to expand the scope of state action in the face of a viable state action claim, the reasoning again relies on this somewhat mechanical exercise of identifying linkages between state and private actors, although in this case the linkages fail to achieve the necessary threshold for a finding of state action. In either case, for many who lament the confused state of the doctrine, its fundamental flaw is the disconnect between the doctrine and the constitutional values that are, or should be, guiding the analysis.[112] The state action analysis,

106. Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961).

107. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

108. Lombard v. Louisiana, 373 U.S. 267 (1963).

109. Peterson v. Greenville, 373 U.S. 244 (1963); Robinson v. Florida, 378 U.S. 153 (1964).

110. Shelley v. Kraemer, 334 U.S. 1 (1948); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964).

111. *See, e.g.*, Glennon & Nowak, *supra* note 87, at 232 ("[T]he process of sorting out proscribed activities has occurred under the guise of a formalistic search for an undefined minimum amount of state acts. In practice, when the challenged practice deserved state protection, the Court has ruled that state action is lacking, declaring in effect that the practice is compatible with the Fourteenth Amendment. When the harm to protected rights outweighed the value of the challenged practice, the Court has found sufficient state action . . . .").

112. And the most persuasive defenses of the state action doctrine similarly press beyond the surface search for the quantum of state authority in a given private action in order to engage with the underlying principle. *See, e.g.*, BeVier & Harrison, *supra* note 10.

Paul Brest once wrote, is but a "crude substitute" for actually engaging with the values the doctrine is supposedly protecting.[113]

F. Defining Doctrinal Confusion

Each of the preceding characteristics—vagueness, complexity, and incoherence—contribute to the state action doctrine's reputation as a doctrinal disaster area. The doctrine's notoriety as an exceptionally confused area of law stems from the potent convergence of all three factors. None alone fully capture the phenomenon.

Vagueness, in and of itself, does not constitute doctrinal confusion. There are many areas of law in which vague standards prevail over more sharply defined rules. Some of these are recognized as functioning reasonably well. Indeed, in an ideal sense, a system of legal standards is premised on an assumption of coherence—that is, an assumption that there is a relatively clearly defined underlying norm that is being implemented through a legal standard. As Kathleen Sullivan has described it:

> Law translates background social policies or political principles such as truth, fairness, efficiency, autonomy, and democracy into a grid of legal directives that decisionmakers in turn apply to particular cases and facts.
>
> . . .
>
> A legal directive is 'standard'-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation.[114]

The debate about the allowable or optimal level of vagueness in the law—the rules-versus-standards debate—only imperfectly maps onto the issue of doctrinal confusion. In some rough sense, clearer, less confused doctrine often relies on more rule-like systems, while confused doctrine tends to inhabit more standard-like systems. But a

113. Brest, *supra* note 5, at 1330.

114. Kathleen M. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57–58 (1992) (footnote omitted).

system that relies on vague standards does not necessarily need to be confused.[115]

Complexity also only partially captures the reasons the state action doctrine has become so mired in confusion. Much of the work of the law is in one way or another complex, but that does not necessarily mean that any time doctrine sets out on a complex task it is susceptible to falling into a state of doctrinal confusion. Like vagueness, complexity is best understood as either a symptom of some deeper cause of doctrinal confusion or a characteristic that amplifies the root cause.

Of the three characteristics of doctrinal confusion, the one that goes the furthest toward identifying what is really distinctive about doctrinal confusion is incoherence. Vagueness and complexity are common characteristics of legal doctrine. There is nothing necessarily *confused* about doctrine that has these characteristics. It is incoherence—the sense that the doctrine implements the relevant constitutional norm in a problematic fashion—that makes vagueness and complexity symptoms of doctrinal confusion.[116] Whether the doctrine relies on standards or rules, whether it is attempting to deal

115. A possible candidate for an area of law that is vague but not necessarily confused can be found in personal jurisdiction doctrine. To determine whether a defendant from one state can be subject to jurisdiction in a court in another state, the Court requires that "he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). This quite vague standard basically replicates the constitutional due process norm the doctrine is attempting to recognize. One may critique the doctrine for being too vague, but it is less susceptible to accusations of incoherence.

116. Establishment Clause doctrine would also seem to comfortably satisfy the three characteristics of doctrinal confusion. The legal standard is relatively vague, *see, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) (identifying "excessive government entanglement with religion" as a factor of the constitutional test), the task it performs is as complex as the state action analysis, *see, e.g.*, *id.* at 614 (describing the anti-entanglement test as attempting to draw "a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship"); Larkin v. Grendel's Den, Inc., 459 U.S. 116, 123 (1982) ("Some limited and incidental entanglement between church and state authority is inevitable in a complex modern society"), and many have criticized the doctrine for steering the analysis in the wrong direction in light of the constitutional values at play, *see, e.g.*, Marshall, *supra* note 13. Some have even suggested that the best fix for Establishment Clause doctrine would be to abandon the *Lemon* test and to apply the state action doctrine. *State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1278–91 (2010); Michael W. McConnell, *State Action and the Supreme Court's Emerging Consensus on the Line Between Establishment and Private Religious Expression*, 28 PEPP. L. REV. 681 (2001).

with a particular complex task or not, the root cause of doctrinal confusion lies in the disconnect between a doctrine and the legal norm it is supposed to advance.

Laurence Tribe has summarized the state action limitation as "a series of problems, whose solutions must currently be sought in perceptions of what we do not want particular constitutional provisions to control."[117] The state action doctrine engages this "series of problems" only indirectly, centering analysis not on "perceptions" of constitutional responsibility but on the extent of government entanglement with private actors. To the extent a doctrine seeks to guide decisions to enforce the underlying purposes of a norm, its failure to do so is a failure even if it is not due to vagueness or complexity in the doctrine itself.

II. EXPLAINING DOCTRINAL CONFUSION

Having established the three most salient characteristics of doctrinal confusion, I now turn to the explanatory question: What causes doctrine to reach a state of confusion?

A proper evaluation of this question requires some categorizing moves. One is to distinguish transitional disasters from durable ones. In periods of constitutional transformation, doctrine often goes through a temporary period of destabilization. This is *transitional* doctrinal confusion. This form of doctrinal confusion is relatively common and is relatively easy to explain.

But in some cases the confusion is lasting, the doctrinal disaster a *durable* one. This form of confusion is somewhat rarer than transitional disasters, and it is not so easily explained. Durable disasters may be attributed to several factors. One source of durable doctrinal confusion is durable social, political, and cultural contestation over constitutional values. Conceptual confusion in life maps onto conceptual confusion in law. Another reason for durable confusion is the multi-institutional nature of constitutional development. Confusion in the Court's treatment of constitutional issues may be only one part of a larger system in which constitutional values are realized and protected, one that includes not only courts but also legislatures and private actors. Understood in this way,

117. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1174 (1978).

doctrinal confusion may be only one piece in a larger puzzle, one that, taken as a whole, may have more coherence.

A. Transitional Confusion

Transitional doctrinal confusion is perhaps the most common form of doctrinal confusion.

How courts resolve a constitutional dispute at one point in time is no longer a clear indicator of how the court may resolve a similar dispute at another point in time, as new judicially enforced constitutional norms take shape. In many instances, this period of doctrinal uncertainty is temporary. Once the new constitutional norm displaces the older one, the doctrine moves from clarity to confusion and again to clarity.

Although the state action doctrine's notorious confusion is predominantly of the durable variety, certain aspects of the doctrine's development fit into the transitional category. As described above, the public function prong of the state action doctrine emerged from a period of suggestive uncertainty in the 1940s, 50s, and 60s. With the introduction of the exclusive and traditional requirement in the 1970s, this particular strand of state action doctrine is now reasonably determinate in application.[118]

Other well-known examples from constitutional law can help illustrate the common occurrence of transitional confusion. Consider the example of racial segregation of government-operated facilities—schools, parks, courtrooms, auditoriums, and the like. Following the Supreme Court's 1896 ruling in *Plessy v. Ferguson*,[119] racial segregation of public transportation (the issue in *Plessy*) was without question constitutional, and the Court quickly made clear that its reasoning applied to public facilities across the board. By the middle of the twentieth century, however, with the Court chipping away at the separate-but-equal doctrine, this presumption was no longer so clear. After *Brown v. Board of Education*,[120] what had been a clear constitutional determination was now a difficult one, and for a time immediately following *Brown*, the equal protection doctrine as

118. Although, as I note *supra* in note 46, the public function exception has its own potential confusions lingering not far below the surface.

119. 163 U.S. 537 (1896).

120. 347 U.S. 483 (1954).

applied to state-sanctioned racial segregation outside the schools was confused. This condition was fueled to some extent by the Court's reference in its famous Footnote 11 to African American psychological damage as a justification for its holding in *Brown*, which implied that *Brown*'s constitutional principle depended on the fact that it involved children and education.[121] Yet this was a temporary situation. In a 1956 ruling, the Supreme Court applied *Brown*'s anti-segregation mandate to public transportation.[122] The cumulative effect of this decision and a series of other per curiam extensions of *Brown*[123] meant that by the early 1960s this particular area of constitutional confusion was quite clear: state-sanctioned racial segregation was a violation of the Equal Protection Clause. The trajectory here was from clarity to confusion and then, in relatively short order, back to clarity. The period of confusion was a temporary one.[124]

We witnessed a similar dynamic in the 1970s with the development of heightened scrutiny for sex-based discrimination. In 1971 the Court for the first time struck down a sex-based classification as a violation of the Equal Protection Clause, but it did so under a rational basis review standard.[125] This raised a slew of questions about what exactly was irrational about this sex-based classification and whether all such classifications might be vulnerable to charges of irrationality or only some.[126] After Justice Brennan failed to secure a majority for a strict-scrutiny standard for sex-based classifications,[127] a majority coalesced behind the newly invented

121. *See, e.g.*, Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 429 (1960) (arguing that the Court in *Brown* would have done better to have taken a path of "a solid reasoned simplicity that takes law out of artfulness into art"); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31–35 (1959) (questioning the constitutional principle guiding the *Brown* decision).

122. Gayle v. Browder, 352 U.S. 903 (1956).

123. New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (per curiam); Gayle v. Browder, 352 U.S. 903 (1956); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam); Balt. City v. Dawson, 350 U.S. 877 (1955) (per curiam).

124. This raises but does not answer the obvious question of at what point temporary confusion becomes durable.

125. Reed v. Reed, 404 U.S. 71 (1971).

126. *See* Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C.D. L. REV. 527 (2014).

127. Frontiero v. Richardson, 411 U.S. 677 (1973).

standard of intermediate scrutiny.[128] Then, in a series of subsequent decisions, the meaning of this new standard took shape.[129] Out of a decade or so of doctrinal confusion emerged a relatively stable, predictable area of constitutional doctrine—one in which the judicially enforced constitutional standard roughly tracks societal sensibilities of the constitutional value of equal protection with regard to sex-based discrimination.[130]

Today, we seem to be seeing much the same development in the area of sexual orientation discrimination.[131] Key doctrinal issues related to sexual orientation are murky. The level of review is formally rational basis review, but in application the standard is clearly something more. Furthermore, the clarity of analysis is undermined by the obscuring mist of federalism, which seemed to play some role in the *Windsor* decision, but precisely what weight to give this factor is unclear.[132] We also have the recent same-sex marriage ruling in *Obergefell v. Hodges* in which Justice Kennedy decided the case on due process grounds, but in the process insisted that his reading of the Due Process Clause was informed by equal protection principles.[133] But even with all this doctrinal confusion, we know where this issue is going. As *Obergefell* made clear, we are approaching a world in which discrimination against people because of their sexual orientation is presumptively unconstitutional, whether by defining such discrimination irrational or motivated by

128. Craig v. Boren, 429 U.S. 190 (1976).

129. *See* Califano v. Goldfarb, 430 U.S. 199 (1977); Orr v. Orr, 440 U.S. 268 (1979); Califano v. Westcott, 443 U.S. 76 (1979); Wengler v. Druggist Mut. Ins. Co., 446 U.S. 142 (1980); Kirchberg v. Feenstra, 450 U.S. 455 (1981).

130. *See generally* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323 (2006).

131. *See* Romer v. Evans, 517 U.S. 620 (1996); Lawrence v. Texas, 539 U.S. 558 (2003); United States v. Windsor, 133 S. Ct. 2675 (2013); Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Calif. 2010); Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).

132. *See, e.g.*, Neil S. Siegel, *Federalism as a Way Station:* Windsor *as Exemplar of Doctrine in Motion*, 6 J.L. ANALYSIS 87, 91 (2014) ("*Windsor* is an exemplar of doctrine in motion during a period of social and legal transition . . . [T]he majority opinion uses federalism reasoning and rhetoric both to temporize and to facilitate constitutional change in the direction of marriage equality."); *id*. at 93 ("Overall, the majority opinion defies decisive interpretation. Indeed, the opinion appears designed to defeat domestication by disciplined legal analysis; even as it points in the direction of marriage equality, it seems to insist on preserving for itself a certain Delphic obscurity.").

133. 135 S. Ct. 2584 (2015).

illegitimate animus under the rational basis review standard or through the application of a heightened level of scrutiny. A period of doctrinal confusion is evolving into a generally predictable, coherent area of constitutional law.[134]

Faced with an instance of doctrinal confusion, it is of course hard to know whether one is looking at something that is transitional or durable.[135] Some commentators in the 1960s believed that the state action doctrine generally was transitioning toward some new, clearer foundation. They "forecast[ed]" the imminent "demise" of the traditional doctrine.[136] The doctrine was in its "twilight," they believed.[137] It was at a "way station" and further litigation would "push us forward."[138] But the incipient transformation of the state action doctrine stalled out.[139] Some points of doctrinal uncertainty were clarified—such as the public function prong—but the core issues of dispute were left largely unresolved and confused. This condition remains to this day.

134. Whether one categorizes a given area of constitutional law as confused or not often depends on how one delineates the boundaries of that area of law. Thus, even as the constitutional status of sexual orientation discrimination is trending toward a state of clarity, one could argue that the more general category of constitutional scrutiny under the rational basis review standard is becoming more confused. *See* Eyer, *supra* note 126. Furthermore, as Eyer's work on rational basis review demonstrates, there may be need to add a third category of doctrinal confusion: *periodic* confusion. The rational basis review standard was quite clear and predictable in the middle decades of the twentieth century, then it became less so in the 1970s as it was used to strike down various discriminatory policies. It then retreated again to a more predictable standard in the 1980s before returning to a more active, and some have said confused, status in service of the gay-rights revolution of the past twenty years. Thus, the rational basis review standard, if considered a discrete area of constitutional doctrine, might best be described as an example of periodic confusion.

135. The distinction between transitional and durable doctrinal confusion might ultimately be more a question of degree than a categorical differentiation. Some of the examples of transitional confusion I reference happen relatively quickly, such as the clarification of the scope of the application of *Brown* to government activity generally; some take somewhat longer, such as the evolution of intermediate scrutiny for sex discrimination or the still-unfolding development of doctrine related to sexual orientation discrimination; and some take decades, such as the reconfiguration of the public functions exception to the state action doctrine.

136. Silard, *supra* note 20.

137. Jerre S. Williams, *The Twilight of State Action*, 41 TEX. L. REV. 347 (1963).

138. Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 18 (1959).

139. I explore the reasons for this in Schmidt, *supra* note 61.

B. Durable Confusion

In cases of durable doctrinal confusion, the doctrine never coalesces around a new constitutional norm. Nor does it revert back to an earlier norm. The confusion reaches a point of relative stability.

The state action doctrine offers a paradigmatic example of a durable doctrinal disaster.[140] Prior to the 1940s, the state action requirement was relatively clear. The courts read it in a largely formalistic way, such that the Fourteenth Amendment applied only to actions by government officials.[141] Beginning in the 1940s, this changed as the courts responded to growing demands for federal protection of civil rights for African Americans and to the expansion of government regulatory authority throughout American society. Judges pushed and prodded the state action doctrine until it became a patchwork affair, filled with exceptions and context-intensive precedents that provided only suggestive guidance when applied to alternative fact scenarios. Unlike the question of racial segregation of public facilities, this doctrinal confusion was not temporary. If anything, in the aftermath of the civil rights revolution, it only became more and more confused as courts distinguished and limited potentially transformational racial discrimination holdings when considering non-race issues. After the 1960s, it is hard to discern any significant development in the contours of the state action doctrine. Its confused condition stabilized. Academics continued their efforts to produce a more coherent doctrine, judges still lamented the doctrine's confusions, but the courts seemed to have little interest in rethinking the doctrinal mess the Warren Court left behind. The situation remains much the same today. Any explanation of the causes of doctrinal confusion must thus account not only for their initial creation, but also, in some cases, for their persistence over time.

140. I identify other possible candidates of durable doctrinal confusion at *supra* note 13.

141. *See, e.g.*, Grovey v. Townsend, 295 U.S. 45 (1935); *Ex parte* Virginia, 100 U.S. 339, 346–47 (1879) ("[T]he prohibitions of the Fourteenth Amendment are addressed to the States . . . . They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. *A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way.* The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws." (emphasis added)).

The history of the state action doctrine suggests several factors that play a role in the formation and persistence of doctrinal confusion. They include: contestation over constitutional norms outside the courts; the distinctive agenda of the courts; and the availability of extrajudicial remedies for constitutional claims.

1. Contestation

The key to understanding the creation of durable doctrinal confusion is to focus on the dynamic, historically contingent factors that explain why the courts have chosen to create a doctrine that has reached such a confused condition. This requires an approach to understanding constitutional development that is not court-centered. A pluralistic approach to constitutional development recognizes the courts as a central actor, but not the only one. It recognizes constitutional doctrine as one among numerous factors that contribute to constitutional meaning. Constitutional norms are developed inside and outside the courts. Doctrine is best understood as a response to the demands of extrajudicial constitutional contestation. The Court sometimes follows, sometimes leads, but it is always enmeshed in an institutionally pluralistic constitutional dialogue.[142]

A crucial factor in the creation of durable judicial constitutional confusion is the existence of durable extrajudicial contestation over constitutional norms.[143] When society is divided on a constitutional principle, then constitutional doctrine that attempts to implement this principle often becomes muddled and difficult to predict. Understood in this way, doctrinal instability can be primarily attributed to change in the political, social, and cultural realms. External demands on the Court stress doctrine. Judges respond, modifying existing doctrine, but in a tentative, partial, or haphazard way. The theory or principle behind the change is disputed or not fully expressed. The result is some level of doctrinal confusion.

142. For a study of the state action doctrine that adopts an extrajudicial perspective, see, for example, Terri Peretti, *Constructing the State Action Doctrine, 1940–1990*, 35 L. & SOC. INQUIRY 273 (2010) (applying a "regime politics" approach to the development of state action doctrine).

143. For a discussion of contestation as a cause of legal indeterminacy, see Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL. L. REV. 509, 526–34 (1994).

One of the most contested issues of the civil rights revolution of the 1950s and 1960s was the question of state responsibility for the problem of racial inequality. Particularly after *Brown*, when schools and other public institutions were required to follow a racial nondiscrimination requirement, much of the legal debate was about the line between public institutions, where racial discrimination was constitutionally barred, and private ones, which courts historically did not hold to constitutional standards. One of the achievements of the civil rights movement was what Paul Freund described in 1964 as an "expanding notion of state responsibility."[144] This was, of course, an uneven, deeply contested process. And this contestation was reflected in the courts and their struggle with defining the limits of state action for equal protection claims. Freund recognized that the revolution about state responsibility taking place outside the courts was being mapped onto the Supreme Court. The justices treated state action in this period as an "unfolding concept."[145] Division in American society and politics thus contributed to an evolving, unstable, and, in the end, thoroughly confused doctrine.

2. The functions of judicial review

Another line of explanation for why the Court has historically allowed—and regularly continues to allow—a level of doctrinal incoherence draws on what Philip Bobbitt referred to in his classic book *Constitutional Fate* as the "functions of judicial review."[146] Expanding on Charles Black's insights,[147] Bobbitt identified four distinct functions of constitutional judicial review. There is the "checking" function, which is when the Court strikes down a policy so as to protect people from unconstitutional government activity.[148] There is the legitimating function, which is when the Court upholds a policy, thereby placing the judiciary's constitutional "stamp of approval" on that policy.[149] There is the cueing or signaling function,

144. Freund, *supra* note 94, at 639–44.

145. *Id.* at 639.

146. BOBBITT, *supra* note 83, at 190–223.

147. CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT 223 (1960) (describing legitimating and checking governmental action as the two primary functions of judicial review).

148. *Id.*

149. *Id.*

which is when the Court sends a signal to another branch of government that it should take more account of a particular constitutional value.[150] And there is the expressive function, which is when the Court seeks to initiate or join a national conversation about constitutional principles.[151]

Although the first two functions would seem to place high value on doctrinal clarity, the second two do not. The measure of an effective signal, whether directed at another governmental actor or to the nation as a whole, is not doctrinal coherence or consistency. Indeed, as I will discuss in more detail below,[152] these signals often come packaged in either bold or result-oriented rulings that work in precisely the opposite direction.

3. Constitutional development beyond the courts

But not all doctrinal confusion can be attributed to the distinctive agenda of the courts or to judicial recognition of societal contestation over the underlying constitutional issue. Doctrinal confusion can also be seen as the doctrinal residue of multi-faceted mechanisms of constitutional development. Here we need to consider alternative outlets by which constitutional principles may be instantiated in law and practice. When legislators and private actors respond to demands to recognize a constitutional principle, their actions may relieve pressure on the courts to construct a clearer, more coherent doctrine to protect that principle. This factor goes a long way toward explaining the durable confusion of the state action doctrine, especially when applied to issues on which American society has reached something approaching a consensus on the underlying constitutional disputes.

In the major state action debates of the civil rights era, the key issue was whether the constitutional nondiscrimination norm applied to private actors when they involve themselves in public or civic activities, such as operating restaurants or hotels, teaching children, or buying and selling property. On this question, society has come to a clear conclusion that racial discrimination in such activities violates the most fundamental constitutional principles of equal protection.

150. BOBBITT, *supra* note 83, at 191–95.

151. *Id.* at 196–223.

152. *See infra* Section III.B.2.

The central substantive constitutional issue that stressed the doctrine during the 1940s through the 1970s—the debate over the legitimacy of explicit racial discrimination in American life—was largely resolved by the ideological transformation of the civil rights movement.

Although the Supreme Court in the civil rights era significantly expanded the reach of the Fourteenth Amendment, finding many forms of private racial discrimination to fall within its ambit, the basic principle of the state action limitation remained.[153] Although stressed and stretched, the justices refused to abandon the doctrine even as they applied it in ways that that significantly differed from its nineteenth-century origins. The justices were wary of abandoning precedent. They worried that the courts lacked the institutional competency to manage the new world of constitutional decision-making that would be created by the abandonment of the state action doctrine.[154] And this led to a disconnect between constitutional doctrine and constitutional norm.

The Court reworked the state action doctrine on its margins while also adopting alternative methods of responding to the claims of civil rights activists. The justices reinterpreted existing statutes, decided cases on narrower grounds, and waited for political institutions and private initiative to deal with the issues.[155] Legislative action relieved pressure on the Court. Congress passed major civil rights legislation targeted at discrimination in public accommodations, employment, and housing in 1964 and 1968. Beginning in 1968, the Supreme Court revitalized the Civil Rights Act of 1866 as the basis for a sweeping federal remedy against discrimination in making contracts and buying or selling property.[156] The Court held that the modern descendants of the 1866 act drew on congressional authority under the enforcement clause of the Thirteenth Amendment, which had no state action requirement.[157]

153. *See supra* Part I.

154. *See generally* Schmidt, *supra* note 61.

155. *See, e.g.*, Bell v. Maryland, 378 U.S. 226 (1964); Garner v. Louisiana, 368 U.S. 157 (1961).

156. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). *See generally* GEORGE RUTHERGLEN, CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866, 137–51 (2013).

157. Runyon v. McCrary, 427 U.S. 160 (1976); Johnson v. Ry. Express Agency, Inc., 421 U.S. 454 (1975); Sullivan v. Little Hunting Park, 396 U.S. 229 (1969).

As a result of the civil rights movement, protection against overt racial discrimination in certain spheres of private life, such as public accommodations, employment, and housing, came to be recognized as a basic right of American citizenship, and federal civil rights law provided a panoply of protections in these areas. The judicial extension of the reach of the Fourteenth Amendment is best understood as playing a supporting role in these developments.

State, local, and private actors all contributed to the development of the norm against private racial discrimination. Even before Congress passed its landmark Civil Rights Act in 1964, a majority of the country already prohibited racial discrimination in public accommodations.[158] When a divided Court in 1972 refused to recognize a racially discriminating private lodge with a state liquor license as a state actor for purposes of an equal protection challenge,[159] Pennsylvania responded by amending its anti-discrimination law to apply to these kinds of private organizations.[160]

The history of the constitutional status of private racial discrimination during the civil rights movement highlights the possible larger conceptual coherence of state action when considered not just as a question of judicial doctrine but in its broader context, as a constitutional norm shaped by many actors, some operating through formal legal institutions, some working from the outside. Judicial conceptions of state action have responded to shifting extrajudicial norms of social justice and government responsibility.

Yet the evolving social norms behind the shifting limits of state action have another consequence, which can work to limit pressure on the courts to expand state action. On the major issues of contestation, such as discrimination in the housing market and in public accommodations, nonjudicial institutions and actors responded to an evolving constitutional norm, and thereby removed pressure from the courts to respond. What many saw at the time as an incipient state action revolution in the Supreme Court stalled out. A potential transitional disaster area became a durable one—even in

158. Bell v. Maryland, 378 U.S. 226, 284 (1964) (Douglas, J., concurring) (appendix listing state public accommodations laws).

159. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

160. JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW 1474 n.f (10th ed. 2006).

the face of an emerging extrajudicial constitutional consensus on the underlying constitutional principle.

III. DEFENDING DOCTRINAL CONFUSION

I now consider whether doctrinal disaster areas can ever be defended as a valuable component of constitutional development. Might there be certain instances in which doctrinal confusion is a good thing? I question the widespread assumption that doctrinal disaster areas are necessarily problems that require repair efforts. I question it as applied to the particular case of the state action doctrine. And I question it, albeit rather more tentatively, as a more general matter. Doctrinal clarity serves a role in the constitutional system, to be sure, but so does doctrinal indeterminacy. Conceptual coherence serves a role, but so does conceptual murkiness.

A. In Defense of Transitional Confusion

Transitional doctrinal confusion has often been defended as a necessary way station as constitutional doctrine evolves from one set of organizing principles to another.[161] There is a strong case to be made for some version of judicial minimalism,[162] for avoiding "jolts" to the legal system,[163] and for allowing common law methods of legal reasoning as a way of accruing knowledge during moments of legal transition.[164] In these cases, temporary doctrinal confusion might be defended as the price to be paid for protecting other important values in the legal system. As many legal scholars have defended

161. Siegel, *supra* note 130; Pollack, *supra* note 137, at 18 ("But for many—and perhaps most—present purposes there has been no compelling demonstration of the need to push the fourteenth amendment to the ultimate limits of its logic. We are at a way station. Case by case—as in other realms of constitutional adjudication—experience will push us forward.").

162. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

163. *Confirmation Hearings on the Nomination of John Roberts to be Chief Justice of the United States*, 109th Cong., 1st Sess., Sept. 12–15, 2005 (comments of John Roberts) ("An overruling of a prior precedent is a jolt to the legal system.")

164. *See, e.g.*, DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010) (describing and defending a common-law approach to constitutional interpretation); Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 UCLA L. REV. 66 (2013).

some variant of transitional doctrinal confusion, in this Part I focus on defending doctrinal confusion in its more puzzling durable form.

B. In Defense of Durable Confusion

1. Contestation

A defense of durable confusion can draw on the minimalist, common-law defenses that scholars have used to defend transitional confusion, but there are also distinctive justifications available. Consider, for example, doctrinal confusion that reflects societal divisions. When we as a society are divided over fundamental constitutional principles, then the courts tend to also be divided on these same constitutional principles. As a normative matter, a faith in democracy and judicial decision-making that is responsive to societal inputs should lead us to want court-generated doctrine to reflect these struggles. Uniformity, consistency, finality, and coherence have their value in the legal system. But when our courts are attempting to give meaning to contested, evolving constitutional principles, then fidelity to those principles may require a measure of doctrinal confusion.

A primary defense of doctrinal confusion in the face of difficult legal issues is to acknowledge the value of judicial humility. In a short article with the nice title *Too Hard*, Frederick Schauer urges a recognition that "not all problems are soluble, that intractable quandaries are part of the human condition, and that only in the academic's perpetual fantasy is there necessarily an internally coherent and theoretically elegant answer to every question the world might throw at us."[165] When there is no easy answer to be had, there is something unrealistic, disingenuous, perhaps even constitutionally harmful to demanding conceptual and doctrinal coherence.[166]

Schauer makes a compelling case for accepting that theoretic elegance or coherence is not necessarily the appropriate goal for doctrine in all areas of law. A basic characteristic of these "too hard"

165. Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989, 989 (1995).

166. For one exploration of this theme, see Rosen & Schmidt, *supra* note 164, at 132–44.

areas of constitutional law is what I have described as the principle-doctrine disconnect, or what Schauer describes as a doctrine that, in the name of advancing a general principle, provides a "judicially workable way of dealing with part, but not all, of a larger problem."[167] Thus we have a subset of judicially enforceable solutions to a larger problem.[168] It is a disconnect, then, between the general principle driving the doctrine (in the case of state action, the principle might be said to ensure that the government not be responsible for infringing Fourteenth Amendment rights) and the narrower, more pragmatic, and institutionally-driven principle distinguishing those cases in which the courts intervene and those in which they do not.

Unstable legal norms, vague doctrine, or, to pick up a frequently referenced legal dichotomy, reliance on "standards" as opposed to "rules," have often been identified as issues primarily of judicial discretion.[169] These situations may offer inadequate guidance as to the line between legality and illegality; they may work to undermine the principle of the rule of law.[170] But if we take a step back and consider the way legal norms operate beyond the judiciary, legal uncertainty may also have its benefits. There can be "generative indeterminacies," in Frank Michelman's phrase.[171] Seana Shiffrin has written about "the salutary impact that superficial opacity [of legal standards] may have on citizens' moral deliberation and on robust democratic engagement with law."[172] Jeremy Waldron has noted that "sometimes the point of a legal provision may be to start a discussion rather than settle it."[173] Such statements would seem to be particularly true when there is a national debate taking place over the

167. Schauer, *supra* note 165, at 1000.

168. *Id.* at 1005 ("[T]he rationale behind the subset is, taken in one way, the same as the rationale behind the larger set. But there is often a rationale for having a subset, and in those situations, the rationale of 'about this much' may be just about as good as we can or ought to get.").

169. *See, e.g.*, Sullivan, *supra* note 114, at 26 (defining the debate over rules versus standards as about "whether to cast legal directives in more or less discretionary form").

170. *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Sullivan, *supra* note 114.

171. Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1529 (1988).

172. Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1214 (2010); *see also* Poirier, *supra* note 13.

173. Waldron, *supra* note 143, at 539.

relationship between moral beliefs and legal constraints.[174] Certain constitutional debates, I would suggest, may be more robust and ultimately more constructive when the Supreme Court avoids clarity. When the Court leaves certain basic questions unresolved, the always looming presence of the Supreme Court on questions of constitutional meaning looms just a bit less. And this is sometimes a good thing.[175]

2. The functions of judicial review

Although a primary analytical move I have urged in this Article is for a shift from a narrow analysis of constitutional doctrine to a broader conception of constitutional practice, it is also important to recognize that from the perspective of judges, doctrinal clarity is not the only value they are pursuing—nor should it necessarily be a primary one. Returning to the "functions" of judicial review discussed above, we can see that doctrinal confusion may also be defended by recognizing the distinct agendas courts pursue.

Take, for example, the signaling function, when the Supreme Court signals to other branches of government that it needs to give more attention to certain constitutional values. As a case study of the Court exercising this function, Bobbitt offers *National League of Cities v. Usery*,[176] a case in which the Court, for the first time since the New Deal, struck down a federal law as beyond the reach of the commerce power.[177] This case was something of a head-scratcher for many scholars, not to mention the four dissenting justices. It was hard to discern the doctrinal contours of this potentially transformative new direction for the Court. But, Bobbitt suggests, these critiques mistake the decision as primarily an exercise of the

174. *See, e.g.*, Freund, *supra* note 3, at 11 (noting that the chronic incoherence of the state action doctrine "is not outrageous in a subject such as this one, which in doubtful cases calls for a normative judgment, not mechanical observation").

175. *See, e.g.*, JAMES BRADLEY THAYER, JOHN MARSHALL 107 (1901) (noting the risk that an assertive practice of judicial review may "dwarf the political capacity of the people, and . . . deaden its sense of moral responsibility"); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027, 1040 (2004) ("The broader the reach of constitutional law, the more non-judicial actors are bound by the legal vision of the courts, and the more diminished is the space for the political creation of the Constitution.").

176. 426 U.S. 833 (1976).

177. BOBBITT, *supra* note 83, at 191–95.

Court's checking function when it is better described as an exercise of its signaling function. Under this view, *National League of Cities* "is not a major doctrinal turn but a cue to a fellow constitutional actor, an incitement to Congress to renew its traditional role as protector of the states."[178] As evidence of this reading, Bobbitt notes that in subsequent cases the Court avoided striking down congressional legislation based on *National League of Cities*. "We find virtually no development of this potentially major doctrinal change," he explains.[179] Considered strictly as a doctrinal matter, *National League of Cities* confused more than it clarified. (And indeed, this doctrinal confusion would contribute to the decision's short lifespan.[180]) But considered as an exercise of the Court's signaling function, the decision served a purpose. Arguably, some doctrinal confusion was a justifiable cost in the service of a larger agenda for the Court and for constitutional development more generally. The so-called "federalism revival" of recent decades might best be understood as providing further examples of the Court exercising its signaling function.[181] More recently, the Court's decision involving the Affordable Care Act's Medicaid expansion based on the conceptually tenuous "coercion" principle in its Spending Clause doctrine[182] also might best be understood as serving this kind of signaling function.

Similarly, when exercising its expressive function, the Court has an agenda that does not necessarily privilege doctrinal coherence. Under this function, the Court seeks to participate in a national conversation about constitutional values. When serving this function, Bobbitt writes, we would expect decisions that "characterize[] . . . society and its rules,"[183] that "give concrete expression to the unarticulated values of a diverse nation,"[184] but that do not necessarily present a full-blown rulebook for lower courts hoping to

178. *Id.* at 194.

179. *Id.* at 195.

180. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (overruling *Nat'l League of Cities*).

181. *See, e.g.*, Vicki C. Jackson, *Federalism and the Court: Congress as the Audience?*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 145 (2001).

182. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

183. BOBBITT, *supra* note 83, at 209.

184. *Id.* at 211.

apply the ruling to various situations. Here then we have another situation in which values other than doctrinal clarity might justifiably take precedence.

The history of the state action doctrine in the civil rights era was filled with instances of judicial signaling and expression. Supreme Court decisions that were roundly criticized for being doctrinally confused, such as *Shelley* or *Reitman v. Mulkey*,[185] which struck down a California referendum that prohibited state open housing law, provided powerful signals condemning racially discriminatory practices, regardless of the quantum of governmental involvement. In the sit-in cases, the justices stretched the doctrine in order to place the Court on the side of the lunch counter protesters and, more generally, the cause of non-discrimination in public accommodations. "Equal Protection Marches On" ran the headline of one approving newspaper editorial following another doctrinally confused round of sit-in cases.[186] Civil rights protesters understood the Court to be on their side in this particular battle.[187]

185. 387 U.S. 369 (1967).

186. Editorial, *Equal Protection Marches On*, WASH. POST, May 21, 1963, at A14. For a doctrinal critique of these decisions, see Thomas P. Lewis, *The Sit-In Cases: Great Expectations*, 1963 SUP. CT. REV. 101 (1963).

187. The students' confidence that their cause would be validated by the Supreme Court was reflected in the words of "I'll Be Waitin' Down There," a freedom song from Albany, 1962:

> If you come down to the pool room
> And you can't find me no where,
> Just come on down to the Albany Movement,
> I'll be waitin' down there.
>
> If you come down to the Albany Movement
> And you can't find me no where,
> Just come on down to the drug store,
> I'll be sittin'-in there.
>
> If you come down to the drug store,
> And you can't find me no where,
> Just come on down to the jail house,
> I'll be waitin' down there.
>
> If you come down to the jail house,
> And you can't find me no where,
> Just come on up to the court room,
> I'll be waitin' up there.
>
> If you come down to the court room

In addition to expressing the Court's commitment to a broad conception of equal protection to the civil rights community and their allies, the sit-in cases also gave the Court an opportunity to send a particular signal to southern states that continued to support segregation practices. When considered with this purpose in mind, what was often criticized as the incoherence of the state action doctrine actually provided a useful signaling tool for the Court. As described above,[188] the essence of the incoherence critique was the disconnect between the doctrinal tests, which focused on the connections between the state and the discriminating private actors, and the constitutional values that were ultimately at issue, namely the values of equal protection on the one hand and privacy or autonomy on the other. To be sure, this disconnect distracted attention from the weighing of the relevant constitutional norms, but it did so by centering its analysis squarely on the actions of the state. Even if this move risked obscuring the real harms of racial discrimination in the private sphere, it gave the courts a doctrinal tool with which to shine a spotlight on all the ways in which official state actors endorsed, encouraged, or strategically allowed private racial discrimination. This proved central to the reasoning of the key 1963 sit-in decisions in which the Court held that a sit-in conviction, even if based on an ostensibly private discriminatory choice, would be held in violation of the Equal Protection Clause whenever a state or local government had failed to repeal all its laws requiring segregation in public accommodations[189] or even whenever a state official expressed support for public accommodation segregation.[190] The Court thus used the very element of state action doctrine that most frustrated its critics—its incoherence—to incentivize southern states to get rid of

> And you can't find me no where,
> Just come up to the Supreme Court,
> I'll be winnin' up there.

JAMES H. LAUE, DIRECT ACTION AND DESEGREGATION, 1960–1962: TOWARD A THEORY OF THE RATIONALIZATION OF PROTEST 195–96 (1989) (*reprint of* Ph.D. dissertation, Harvard, 1965).

188. *See supra* Section I.E.

189. Peterson v. City of Greenville, 373 U.S. 244 (1963).

190. Lombard v. Louisiana, 373 U.S. 267 (1963).

any hint of official segregation.[191] This doctrinally tenuous approach might have confused legal scholars but it served the critically important project of driving Jim Crow into the dustbin of history.[192]

Finally, the sit-in cases signaled to Congress judicial support for the principle of antidiscrimination in public accommodations but judicial wariness to take the lead on this issue.[193] By signaling to Congress its basic support for a broad reading of the constitutional equal protection norm while also signaling its hesitancy to take the lead in enforcing this norm to its fullest reaches, the Court placed the burden of responsibility on Congress. With the Civil Rights Act of 1964, Congress took the issue off the hands of the Supreme Court.

3. Constitutional development beyond the courts

The pluralistic conception of constitutional development that I use to explain the development of state action doctrine shows that doctrinal confusion does not always indicate durable constitutional contestation. During periods in which constitutional principles are evolving, doctrinal confusion can sometimes be ameliorated through processes only partly related to the actions of the courts. "In retrospect, it is interesting to see how many close questions of yesterday now seem obvious of solution," wrote Kenneth Karst and Harold Horowitz in a 1967 article on the state action doctrine.[194] "History—not the 'original understanding,' but tomorrow's history—will validate the decision as no satisfying doctrinal discourse could."[195] As I have suggested, the state action principle epitomized this dynamic: as a matter of judicial doctrine, it was only partially

191. *See, e.g.*, *A Victory for the Sit-Ins*, CHI. DEFENDER, May 22, 1963, at 14 ("[The Court] has swept aside with finality the old ordinances upon which Southern states had relied as legal devices since the Civil [W]ar to perpetuate racial segregation . . . . This landmark decision is a death blow to Jim Crow and its allied social evils."); Claude Sitton, *South Exhorted to Integrate Now: Regional Council Says Sit-in Ruling Offers Key Choice*, N.Y. TIMES, May 26, 1963, at 57 (describing a statement issued by a southern civil rights organization that urged the South to use the Court's sit-in decision as an "opportunity" to respond to desegregation demands).

192. *See* Schmidt, *supra* note 61, at 794–95.

193. *Id.*

194. Kenneth L. Karst & Harold W. Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 79 (1967).

195. *Id.*

transformed; as a matter of functional, governing principle, it was remade.

The sustainability—and perhaps the value—of doctrinal confusion becomes more evident when judge-produced constitutional law is understood as one element in a larger system of constitutional development, a system that includes not only courts but also political institutions, social movements, and popular expectations of the Constitution.[196] The predominant assumption in the legal academy and among the judiciary that doctrinal confusion is a problem often assumes a narrow conception of constitutional development. But when confused doctrine is just one part of a larger, more coherent constitutional system, the costs of doctrinal confusion may be relatively low. In the case of state action, these low costs should be weighed in the balance with the beneficial generative impact of doctrinal confusion on constitutional development in the civil rights era.

In assessing the state action doctrine in 1991, Paul Freund noted that "despite a certain awkwardness of appearance, the positive outcomes themselves have been operationally satisfying to the proponents of constitutional protection."[197] Freund himself had played a role some years before in encouraging this very development. He warned the Court against moving too boldly in reconsidering the state action limitation[198] and he urged Congress to justify the public accommodations provision of the 1964 Civil Rights Act on Commerce Clause rather than Equal Protection grounds so as to relieve pressure on the Court and the state action doctrine.[199] "It is not a matter of lack of sympathy for the moral claims asserted," Freund had explained in 1964.[200] "[T]he real problem is an *institutional* one, whether at the national level those claims are to be vindicated, in private relations, through processes of legislation

196. For a detailed case study that demonstrates this point, see Christopher W. Schmidt, *Divided by Law: The Sit-ins and the Role of the Courts in the Civil Rights Movement*, 33 L. & HIST. REV. 93 (2015).

197. Freund, *supra* note 3, at 412.

198. Freund, *supra* note 94, at 640–43.

199. *Id.* at 641 (arguing that a commerce power rationale for Title II of the 1964 Civil Rights Act is preferable because it "can be exercised in large or small measure, flexibly, pragmatically, tentatively, progressively").

200. *Id.* at 644.

under a congeries of powers (commerce, defense, spending), or whether they are to open up new areas of direct constitutional relationships which will call for judicial creativity and innovation on a formidable scale."[201] In situations where there is a relatively stable constitutional principle but lingering doctrinal confusion, the costs of doctrinal confusion may be relatively minimal.

CONCLUSION

So much of legal scholarship is premised on the assumption that messy doctrine—doctrine that is inconsistent, incoherent, unprincipled, conceptually murky—is a problem. And one of the roles of the legal academic is to clean up this kind of mess.[202] I have never fully accepted this assumption, at least not as applied to constitutional law. Indeed, if we push aside the easy temptation to condemn doctrinal confusion and consider the ways in which judges, lawyers, and social justice activists actually use constitutional law, we gain new perspective on this supposed problem. Many of what I would consider success stories of constitutional development are characterized by "messy" doctrine, often of the transitional variety and sometimes of the durable variety. Constitutional law is not a formula. It is a resource for organizing and implementing societal commitments and for orchestrating disagreements over them. Confused doctrine often reflects something important about the nature of these disagreements. It may even offer an invitation to join the debate.

My argument here is not intended to discount the values that are served by clear, coherent doctrinal rules. There is a need for doctrinal uniformity and predictability so lower courts, policymakers, law enforcement, and citizens know what they can and cannot do. There is a risk of excessive litigation when rules are unclear. There is the abstract principle of the rule of law. There is a need to constrain judges, and some believe clear, general rules help achieve this end. These are all values that deserve attention. In certain situations they

201. *Id.*

202. *Cf.* Schauer, *supra* note 165, at 995 (describing "the typical academic approach of identifying theoretically irreconcilable outcomes and announcing that existing doctrine was incoherent" and then "stumbl[ing] over each other in the race to identify the unifying and coherent approach" (citations omitted)).

surely should predominate. But we should not lose sight of the fact that these are not the only values at play. My goal in exploring the state action doctrine as an illustrative case study of doctrinal confusion is to draw attention to the fact that under some circumstances doctrinal confusion is not as significant a problem as many assume. And it might even benefit constitutional development.

Practically everyone seems to assume doctrinal breakdowns exist in one form or another. It has been the object of regular lamentations, some of which achieve an almost poetic effect rare in legal prose. And it has been used to justify countless works of scholarship. Yet exactly what it means to be a doctrinal disaster area has never been the direct object of scholarly inquiry. The case of the state action doctrine provides an initial inquiry into this question. Research into other areas of law that have been widely assumed to be confused will yield further insights into the larger phenomenon.

Although one must be careful generalizing from a single case study, some lessons can be extracted from an inquiry into the state action doctrine. One is that doctrinal confusion is not categorically a problem. Simply identifying inconsistencies in an area of law is not a sufficient justification for criticism and projects of doctrinal clarification. Normative critiques of a given area of law should not be obscured by framing them as neutral efforts to rationalize messy doctrine.

Furthermore, there are *reasons* doctrine gets confused—reasons that go beyond any supposed intellectual shortcomings of the people making the doctrine. These reasons have to do with the particular historical circumstances in which doctrine develops. They have to do with the fact that judges recognize that the role of the courts is not necessarily to craft elegant, clean doctrine—or at least this is not always the top priority for a judiciary. They also have to do with the actions of nonjudicial actors. Nonjudicial actors share in the project of giving meaning to the Constitution; the judicial gloss of doctrine is only one element in that shared project.

Doctrinal confusion can be explained, at least in part, by turning away from the judges, by focusing on the actions of people who reside on the fringes of our constitutional law casebooks. Sometimes the appropriate role for judges to play in the broader drama of constitutional development is a supporting role. They send signals to other constitutional actors, inside and outside the courts, highlighting constitutional priorities while also recognizing the

institutional limitations of the court. This role, in which doctrinal clarity is of only secondary concern, may frustrate those whose job is to teach and write about legal doctrine, but that does not mean that doctrinal confusion is necessarily a flaw in our constitutional system.