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## State Action and the Constitution's Middle Band

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# STATE ACTION AND THE CONSTITUTION'S MIDDLE BAND

Louis Michael Seidman\*

*On conventional accounts, the state action doctrine is dichotomous. When the government acts, constitutional limits take hold and the government action is invalid if those limits are exceeded. When the government fails to act, the state action doctrine leaves decisions to individuals, who are permitted to violate what would otherwise be constitutional constraints.*

*It turns out though that the modern state action doctrine creates three rather than two domains. There is indeed a private, inner band where there is thought to be insufficient government action to trigger constitutional constraints, but often there is also a public, outer band where there is too much state action for the Constitution to apply. The Constitution takes hold only in a middle band—the Goldilocks band—sandwiched between these two domains. For constitutional limitations to have force, the government must act just enough—but not too much.*

*This Article's first aim is to identify and describe this puzzling structure. It also examines a variety of doctrinal principles that produce and, perhaps, justify the state action doctrine's three bands. The Article then argues that these seemingly disparate principles are all related to the special constitutional problems produced by the emergence of the middle band of government regulation. Finally, the Article concludes with some brief speculation about whether the modern tripartite structure can survive.*

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#### INTRODUCTION

According to conventional accounts, the state action doctrine is dichotomous. When the government acts, constitutional limits take hold and the government action is invalid if those limits are exceeded. When the government fails to act, the state action doctrine leaves decisions to individuals, who are permitted to violate what would otherwise be constitutional constraints.<sup>1</sup> These accounts are linked to the conventional view about the primary purpose served by constitutional law. On this view, the Constitution's main function is to limit government power in order to protect individual freedom. As Robert McCloskey once wrote: “[T]he essential business of the Supreme Court is to say ‘no’ to government.”<sup>2</sup>

The state action doctrine serves this purpose by providing constitutional protections where they are needed most. The doctrine prevents judicial en-

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1. See, e.g., Larry Alexander, *The Public/Private Distinction and Constitutional Limits on Private Power*, 10 CONST. COMMENT. 361, 362 (1993) (“The Supreme Court has said on numerous occasions that key constitutional provisions . . . apply only to ‘state action’ and not to private action.”); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. L. REV. 503, 507 (1985) (“It is firmly established that the Constitution applies only to governmental conduct.”).

2. Robert G. McCloskey, *Introduction to ESSAYS IN CONSTITUTIONAL LAW* 5, 6 (Robert G. McCloskey ed., 1957); see also, e.g., Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1707 (2008) (“The underlying premise [of the Constitution], plainly, is that it is presumptively worse for legislation to be enacted than not enacted, largely because of the threat that legislation might violate individual rights, and that multiple veto points should therefore exist.”).

forcement of the Constitution from itself serving as an excuse for government intervention.<sup>3</sup> As Justice Byron White argued,

Careful adherence to the “state action” requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. . . . A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests.<sup>4</sup>

In short, the state action doctrine embodies the principle that government action—rather than action taken by private individuals—triggers constitutional limitations.

Many critics of the state action doctrine have attacked its coherence and normative attractiveness.<sup>5</sup> They have disputed the connection between the doctrine and individual freedom by pointing out that the absence of constitutional protections in effect authorizes private coercion.<sup>6</sup> Moreover, they insist that the government is always implicated in that coercion. In particular, they assert that the state action doctrine systematically ignores background, structural state action like common law tort, property, and contract rules that shape, limit, and legitimate private conduct.<sup>7</sup> That observation, in turn, has led some commentators to conclude that there is no real “state action” doctrine. Instead of asking whether there is “state action,” these commentators argue that courts should focus on the state conduct that is always

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3. As an illustration of the second function, imagine that the Free Press Clause was not subject to a state action requirement. In the absence of the requirement, the government would be required to tell newspapers what to publish so as to prevent them from “suppressing” speech that newspaper publishers disagreed with. *Cf. Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (invalidating “right of reply” law as violative of First Amendment principles).

4. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936–37 (1982); *see also, e.g.*, William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1845 (2016) (noting that “[t]he basic premise of our constitutional order is that government presents special dangers” and that “[f]or this reason, the Constitution imposes numerous restrictions on actions by government that it does not impose on private actors, a principle reflected in the so-called state action doctrine”); Frank I. Michelman, *W(h)ither the Constitution?*, 21 CARDOZO L. REV. 1063, 1076–77 (2000) (associating the state action doctrine with a theory focused on the fact that “the state’s monopoly of lawful force, its unique powers of lawful, direct coercion of persons, make it (most definitely) a power-source to be feared”).

5. For representative examples, see Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: “State Action,” Equal Protection, and California’s Proposition 13*, 81 HARV. L. REV. 69 (1967); Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296 (1982); Chemerinsky, *supra* note 1; Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982). For an unusual and insightful defense of the doctrine against its critics, see Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767 (2010).

6. The argument has its origins in Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923). For a modern articulation, see, for example, Chemerinsky, *supra* note 1.

7. *See, e.g.*, LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, *REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES* 66–67 (1996).

present and determine whether that conduct violates substantive constitutional norms.<sup>8</sup>

After several generations of contestation, these positions are now well understood. The argument has gone stale. Remarkably, though, no one has noticed that both sides misstate the fundamental structure of state action law.

The state action doctrine is not dichotomous at all. It has a tripartite structure that delineates three, rather than two, domains. First, there is a private, inner band where there is insufficient government action to trigger constitutional constraints. Second, there is a public, outer band where there is *too much* state action for the Constitution to apply. Third, there is a middle band—a Goldilocks band—where the level of government action is just right, and the Constitution takes hold. For constitutional limitations to have force, the government must act just enough—but not too much.

Two recent Supreme Court cases illustrate this basic structure. First, in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*,<sup>9</sup> the Sons of Confederate Veterans, Texas Division sought an injunction requiring the state to provide specialty license plates featuring a Confederate battle flag. The license plates were similar to other plates that the state had issued and that supported controversial causes, but state officials denied this request.<sup>10</sup> The organization sued, claiming that the denial constituted content discrimination that violated the free speech guarantee of the First Amendment.<sup>11</sup>

Writing for the Court, Justice Breyer detailed the extensive history of state involvement in the design and issuance of license plates.<sup>12</sup> Texas plate designs were “often closely identified in the public mind with the [state].”<sup>13</sup> As a legal matter, Texas owned the designs.<sup>14</sup> The state “maintain[ed] direct control over the messages conveyed on its specialty plates.”<sup>15</sup>

Consideration of factors like these is standard fare in state action cases, the outcome of which often rests on “the peculiar facts or circumstances present.”<sup>16</sup> A history of state involvement,<sup>17</sup> public identification of the activity

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8. See, e.g., Alexander, *supra* note 1; Robert J. Glennon, Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment “State Action” Requirement*, 1976 SUP. CT. REV. 221; Harold W. Horowitz, *The Misleading Search for “State Action” Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957).

9. 135 S. Ct. 2239 (2015).

10. See *Walker*, 135 S. Ct. at 2248; *id.* at 2257 (Alito, J., dissenting).

11. *Id.* at 2245 (majority opinion).

12. *Id.* at 2248.

13. *Id.* (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 472 (2009)).

14. *Id.*

15. *Id.* at 2249.

16. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 726 (1961) (plurality opinion).

17. See *Evans v. Newton*, 382 U.S. 296, 301 (1966) (noting that “[f]or years [a segregated park] was an integral part of the City of Macon’s activities” and that “[t]he momentum it ac-

with the state,<sup>18</sup> and state ownership<sup>19</sup> and control<sup>20</sup> are all factors that the Court has used to indicate the presence of enough state action to invoke constitutional scrutiny. For example, in *Burton v. Wilmington Parking Authority*, the Court relied on facts like these to hold that the state was implicated in the discriminatory conduct of a private restaurant leasing space in a public garage.<sup>21</sup>

Remarkably, though, the *Walker* Court thought that these factors cut the other way. Instead of demonstrating the extensive state involvement that triggered constitutional protections, these factors demonstrated that the involvement was *too extensive*, thereby entitling the state to constitutional immunity.<sup>22</sup> Taken together, the factors showed that the design on license plates was “government speech,” which, in the Court’s view, was checked by “the democratic electoral process” rather than by the Constitution.<sup>23</sup> Because state involvement was so pervasive, the Free Speech Clause lost its force. If the government had been less involved in license plate design and messaging, the speech might have been private and the Sons of Confederate Veterans might have had a constitutional right to the plate they desired.<sup>24</sup>

The point is driven home by comparing *Walker* with *Matal v. Tam*.<sup>25</sup> In *Matal*, the respondent argued that a section of the Lanham Act that prohibited the registration of trademarks that “disparage . . . or bring . . . into contempt[t] or disrepute” any “persons, living or dead” violated the Free Speech Clause.<sup>26</sup> The Court distinguished *Walker* and held that registration did not constitute government speech.<sup>27</sup> The Court reached this conclusion because:

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quired as a public facility is certainly not dissipated *ipso facto* by the appointment of ‘private’ trustees”).

18. See *Burton*, 365 U.S. at 720 (plurality opinion) (noting that building in which discrimination occurred was marked by “official signs indicating the public character of the building” and that state and national flags flew over it); cf. *Evans*, 382 U.S. at 302 (holding that discriminatory policy of privately run park was state action in part because park had previously been controlled by the city and had a “public character”).

19. See *Burton*, 365 U.S. at 723 (plurality opinion) (attributing racial discrimination of a private restaurant to the state in part because “[t]he land and building were publicly owned”).

20. See *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (holding that private school’s putative free speech violations were not attributable to the state in part because the actions “were not compelled or even influenced by any state regulation”).

21. *Burton*, 365 U.S. 715 (plurality opinion).

22. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250 (2015).

23. *Id.* at 2245.

24. Of course, the *Walker* Court did not use the phrase “state action.” It may, therefore seem odd to think of the case as involving state action principles. I address this objection *infra* in Part III.

25. 137 S. Ct. 1744 (2017) (plurality opinion in part).

26. *Matal*, 137 S. Ct. at 1751 (quoting 15 U.S.C. § 1052(a) (2012)).

27. *Id.* at 1760.

The Federal Government does not dream up these marks, and it does not edit marks submitted for registration. Except as required by the statute involved here . . . an examiner may not reject a mark based on the viewpoint that it appears to express. Thus, unless that section is thought to apply, an examiner does not inquire whether any viewpoint conveyed by a mark is consistent with Government policy or whether any such viewpoint is consistent with that expressed by other marks already on the principal register.<sup>28</sup>

Because the government's involvement was not sufficient to trigger the government speech doctrine, the First Amendment took hold and made the statute invalid. If the government had asserted more control over the marks, by "dream[ing] [them] up," editing them, or "reject[ing] [them] based on the viewpoint that [they appear] to express,"<sup>29</sup> they might have counted as government speech, and the statute would have been less vulnerable to constitutional attack.

A similar dynamic is at work in a much more famous dispute involving the constitutionality of the Affordable Care Act (ACA).<sup>30</sup> In *National Federation of Independent Business v. Sebelius*, the plaintiffs successfully argued that the ACA's "individual mandate," requiring certain individuals to purchase insurance, exceeded Congress's Commerce Clause powers.<sup>31</sup> Their argument rested on the common sense notion that the "commerce" referred to in Article I does not include the failure to engage in commerce by refusing to purchase insurance.<sup>32</sup> As Chief Justice Roberts put it, "The power to *regulate* commerce presupposes the existence of commercial activity to be regulated. . . . The language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated."<sup>33</sup>

There is much to be said for and against this argument,<sup>34</sup> and most of it has already been said. Still, commentators have not paid adequate attention to a paradox at the core of the Court's opinion.<sup>35</sup> Suppose that instead of re-

28. *Id.* at 1758.

29. *See id.*

30. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 5, 18, 20, 21, 25, 26, 28, 29, 30, 31, 35, 36 & 42 U.S.C.).

31. 567 U.S. 519, 558 (2012) (opinion of Roberts, C.J.).

32. *See Sebelius*, 567 U.S. at 555 (opinion of Roberts, C.J.).

33. *Id.* at 550 (opinion of Roberts, C.J.).

34. *Compare id.*, with *id.* at 610 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("This argument is difficult to fathom. Requiring individuals to obtain insurance unquestionably regulates the interstate health-insurance and health-care markets, both of them in existence well before the enactment of the ACA.").

35. *But see id.* at 589 (Ginsburg, J. concurring in part, concurring in the judgment in part, and dissenting in part) ("In the Social Security Act, Congress installed a federal system to provide monthly benefits to retired wage earners and, eventually, to their survivors. Beyond

quiring individuals to purchase private insurance, the government had established a government-run “single payer” system analogous to the Social Security System or Medicare and that individuals were required to pay for the insurance provided by that system. A program like this would involve much more extensive government intervention into health markets. In fact, for just that reason, the Obama administration elected not to push for it.<sup>36</sup> Yet this greater government involvement would have shielded the program from the constitutional attack that was successful in *Sebelius*. The constitutionality of forced involvement in government-run-and-mandated insurance programs like Social Security has been uncontroversial for almost a century,<sup>37</sup> and no one has suggested that the holding in *Sebelius* changes that understanding.

Conversely, suppose that the government “privatized” Social Security in a manner analogous to the program George W. Bush proposed in 2005.<sup>38</sup> If individuals were obligated to invest in private equities instead of paying a social security tax, the program would be vulnerable to challenge under *Sebelius*.<sup>39</sup> This program, like the ACA, would require individuals to purchase in private markets a product that they did not want. “Privatization” would move Social Security from the outer to the middle band—making it more, rather than less, vulnerable to constitutional challenge. That is because the government would be *less* involved with Social Security than it is currently and the level of government action would be just right to trigger constitutional scrutiny.

*Sebelius*, then, provides another illustration of the tripartite structure of state action. If government does too little, constitutional limits lose their force. A private employer who requires employees to purchase insurance faces no constitutional obstacles even if the government ultimately stands ready to enforce employment contracts. But if the government does too much—if it runs the program itself rather than relying on private insurance markets—then constitutional constraints again lose their force.<sup>40</sup> Even

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question, Congress could have adopted a similar scheme for healthcare. Congress chose, instead, to preserve a central role for private insurers and state governments.”).

36. See *Text: Obama's Speech on Health Care Reform*, N.Y. TIMES (June 15, 2009), <http://www.nytimes.com/2009/06/15/health/policy/15obama.text.html> (on file with the *Michigan Law Review*) (“There are countries where a single-payer system may be working. But . . . it is important for us to build on our traditions here in the United States. So, when you hear the naysayers claim that I’m trying to bring about government-run health care, know this—they are not telling the truth.”).

37. See *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937) (upholding federal unemployment compensation provisions of the Social Security Act).

38. See *Text of President Bush's 2005 State of the Union Address*, WASH. POST (Feb. 2, 2005), [http://www.washingtonpost.com/wp-srv/politics/transcripts/bushtext\\_020205.html](http://www.washingtonpost.com/wp-srv/politics/transcripts/bushtext_020205.html) [<https://perma.cc/3R66-GLHS>].

39. The hypothetical program is only analogous to the Bush proposal because the actual proposal provided for voluntary accounts. See *id.*

40. Cf. *Steward Mach.*, 301 U.S. 548 (upholding constitutionality of a federal tax to fund unemployment compensation system).



though the individual is similarly coerced, the government's deeper involvement vitiates constitutional protections. It is only when the government operates in the middle band—when it intervenes in the private sphere without altogether displacing it—that constitutional restrictions apply.

The results in *Walker* and *Sebelius* may seem anomalous, but the decisions themselves are not anomalies. As I detail below, the same structure applies across a broad range of constitutional doctrine.<sup>41</sup> Of course, the Court never characterizes the outer “too much government” band as implicating the “state action doctrine.” For example, as a strictly formal matter, the contrasting results under *Sebelius* and under a hypothetical “single payer” scheme are produced not by the presence or absence of state action but by reliance on different heads of congressional power that bring with them different doctrinal baggage.<sup>42</sup>

Readers obsessed with doctrinal categories or with constitutional law casebook chapter headings may therefore be confused when I assert that this article is about “state action.” It is emphatically not about “state action” as the Supreme Court has used the term. The Court never uses the words “state action” when it upholds government conduct because it is in the outer band. Moreover, when the Court finds that there is “no state action,” it holds that the Constitution does not *apply*. For example, if a private employer forces his employees to purchase health insurance, the Constitution has nothing to say about the matter. In contrast, when the Court finds that there is too much state action, it holds that the Constitution *applies* but is not *violated*. For example, if the federal government took over healthcare markets, no one would claim that the Constitution was inapplicable. Instead, the case would be conceptualized as one where applicable constitutional provisions were satisfied.

But we should not allow these distinctions to distract us from the central point. When I use the term “state action” in this Article, I mean to focus on the way the doctrine actually cashes out, not on the labels that the Court has used to describe the doctrine. Perhaps there is a conceptual distinction between violation and nonapplication,<sup>43</sup> but the distinction usually makes no difference in how cases are actually decided. My argument is about how cas-

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41. See *infra* Part II.

42. The Court upheld both the ACA and the Social Security Act under Congress's art. I, § 8, cl. 1 authority to tax and spend for the general welfare. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 563–71 (2012); *Steward Mach.*, 301 U.S. at 586–87. A majority of the Court held that Congress's art. I, § 8, cl. 3 power to regulate commerce among the states and art. I, § 8, cl. 18 “necessary and proper” power did not justify the ACA. See *Sebelius* at 547–61 (opinion of Roberts, C.J.); *id.* at 649–62 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

43. See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769 (2004) (“All rules—legal or otherwise—apply only to some facts and only under some circumstances. Even before we see what a rule *does*, we must make the initial determination of whether it *applies* at all—whether we are within its scope of operation.”).

es are actually decided.<sup>44</sup> It is about broader, mostly unrecognized, concerns that cross doctrinal boundaries. It would be wrong to ignore the technical niceties of doctrine,<sup>45</sup> but it is also a mistake to overemphasize them. However individual doctrines are defined or justified, the fact remains that constitutional protections often fail to take hold (either because the Constitution does not apply or because it is not violated) in both the outer and inner bands that surround the middle domain of constitutional protection.

This structure, in turn, raises fundamental issues about conventional arguments for the state action doctrine and about constitutional law more generally. If the state action doctrine is designed to “preserve[] an area of individual freedom by limiting the reach of federal law,”<sup>46</sup> as Justice White asserted, then how can it be that when the government acts more aggressively the Constitution constrains it less? If “the essential business of the Supreme Court is to say ‘no’ to government,”<sup>47</sup> as Robert McCloskey asserted, then why does the Supreme Court often change its answer from “no” to “yes” when the government does more? State action’s unnoticed tripartite structure therefore suggests that something is seriously wrong with the conventional account.

The first aim of this Article is to identify and describe this puzzling structure. That is the business of Parts I and II. Part I sets out the conventional dichotomous view of state action, and Part II complicates that view with many other examples, like *Walker* and *Sebelius*, where the law of state action has a tripartite structure. Part I argues that that the conventional view anachronistically assumes that there are only two spheres: a public sphere of police power and a private sphere of individual freedom. In fact, since the New Deal, there has also been a middle band that is neither fully public nor fully private but, instead, is the home for government regulation. The constitutional action takes place in this middle band.

This basic structure produces many outcomes that seem paradoxical when viewed through the lens of pre–New Deal constitutionalism: in a surprisingly large number of cases, the government is less constitutionally constrained when it acts more aggressively. Part II provides examples of this phenomenon. I hope to provide enough examples drawn from diverse areas of constitutional doctrine to convince readers that something important and counterintuitive is going on.

What accounts for this structure? A natural reaction to the examples detailed below is to disaggregate and normalize them. A critical reader might argue that the examples have nothing to do with a reconceptualization of

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44. Cf. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999) (attacking view that “judges and scholars should always be careful to distinguish the true constitutional right from judicial application of the right in the course of constitutional adjudication”).

45. I discuss some of them *infra* in Section III.A.

46. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

47. McCloskey, *supra* note 2, at 6.

state action and that there is no deep structure that explains them. Instead, they demonstrate only that different constitutional provisions or different doctrinal principles produce different results.

I take this objection seriously and pursue it in Part III, which examines a variety of doctrinal principles that produce and, perhaps, justify these results. Even if doctrinal principles were the whole story, we learn something significant from thinking about these principles against the general backdrop of tripartite state action. It turns out that the concern about government overreach often takes a back seat to other concerns that leave the government less constrained when it acts more aggressively.

But formal doctrinal principles are not the whole story. Part IV argues that these seemingly disparate doctrinal principles are all related in whole or in part to the special constitutional problems produced by the emergence of the middle band of government regulation. Before the New Deal revolution, standard constitutional theory identified a public zone of police power and a private zone of individual freedom. Constitutional limits were thought to protect against expansion of the police power into the private sphere. The New Deal revolution legitimated that expansion. A sphere of more or less untrammelled public power and a sphere of more or less autonomous private freedom remained, but a middle, mixed sphere of government regulation emerged. Much of modern constitutional law consists of doctrines designed to remedy pathologies associated with the middle sphere.

The Article concludes with some brief speculation about whether the modern tripartite structure can survive. Contemporary approaches to constitutional law leave the boundaries between the bands porous and undefended. Our messy, atheoretical compromise has been good enough for periods of consensus and prosperity, but it is anyone's guess whether the structure is strong enough to withstand the coming assault.

Two final words of clarification are in order. First, I make no claim that this tripartite structure explains all the mysteries of American constitutionalism. Constitutional law is an immensely complicated social phenomenon. I describe no more than one view of the cathedral.<sup>48</sup> Second, what follows is only descriptive. I do not attempt to defend these structures and do not argue that they are coherent or free from contradiction. As Oliver Wendell Holmes famously claimed:

When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.<sup>49</sup>

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48. Cf. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

49. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

This Article counts some of the teeth and some of the claws. The killing or taming will have to await another day.

## I. THE CONVENTIONAL DOCTRINE AND ITS PROBLEMS

Surprisingly, both the modern state action doctrine and its difficulties are a direct consequence of the New Deal revolution in constitutional jurisprudence. This Part outlines the difficulties and then traces their origins to the disruptions produced by New Deal constitutionalism.

### A. *The Implausibility of the Conventional Approach*

Sometimes the modern Court pretends that the state action requirement can be read directly off the Constitution's text and the original public meaning of that text. A typical statement of this view appears in Chief Justice Rehnquist's opinion for the Court in *DeShaney v. Winnebago County Department of Social Services*,<sup>50</sup> where the Court held that the Constitution did not reach the failure of state welfare officials to prevent a parent from seriously harming his child:

[N]othing in the language of the Due Process Clause . . . requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.<sup>51</sup>

This purely textual argument does not withstand analysis. First, there is the obvious, if embarrassing, fact that the Fifth Amendment Due Process Clause, unlike its Fourteenth Amendment counterpart, uses the passive voice and does not textually limit the subjects controlled by its commands.<sup>52</sup> Yet neither Chief Justice Rehnquist nor any of his colleagues ever suggested that the Fifth Amendment, unlike the Fourteenth, applies to private actors.

Moreover, a straightforward reading of the Fourteenth Amendment would extend its reach to government failure to control private conduct. The text prohibits the state from "depriv[ing] any person of life, liberty, or property, without due process of law."<sup>53</sup> If *DeShaney's* allegations were correct, then the state's failure to intervene was a but-for cause of the child's injury. Saying that a failure to act that causes an injury "deprives" an individual of

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50. 489 U.S. 189 (1989).

51. *DeShaney*, 489 U.S. at 195.

52. Compare U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."), with *id.* amend. XIV, § 1 ("[N]or shall any State deprive a person of life, liberty, or property, without due process of law . . .").

53. *Id.* amend. XIV, § 1.

something she would otherwise have is fully consistent with the ordinary English usage. For example, a competent speaker of English might say that “Jim’s failure to fill out his application on time deprived him of a chance to get the job.”

Indeed, Chief Justice Rehnquist came close to acknowledging this fact. In a footnote, he conceded that “[t]he State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause.”<sup>54</sup> But if the state’s failure to protect against private violence can “deny” equal protection, why can’t the same failure “deprive” individuals of liberty? At least in this context, “deny” and “deprive” seem nearly synonymous.

The legislative history of the Fourteenth Amendment also cuts strongly against the modern state action requirement. That history makes plain that a central purpose of the Amendment was to shield the 1866 Civil Rights Act from judicial invalidation.<sup>55</sup> The Act, in turn, seemed to mandate positive government action to protect all people, at least where white people were already the beneficiaries of this action. By its terms, the Act guaranteed “full and equal benefit of all laws and proceedings *for the security of person and property*, as is enjoyed by white citizens . . . .”<sup>56</sup> It therefore protected the very sort of “security of person” that DeShaney was denied.<sup>57</sup> When the Supreme Court first interpreted the Fourteenth Amendment in the *Slaughter-House Cases*, it noted that the Amendment also had this purpose. In Justice Miller’s words, the Fourteenth Amendment was adopted because Congress believed that newly freed slaves “were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.”<sup>58</sup>

Given this understanding, it is not surprising that the Reconstruction Congress enacted the Ku Klux Klan Act under its Fourteenth Amendment authority. The Act criminalized conduct by private persons acting under color of not only “statute,” “ordinance,” or “regulation” but also under the “custom” or “usage” of a state.<sup>59</sup> That formulation pretty clearly mandates affirmative government action to control private parties, at least in circum-

54. *DeShaney*, 489 U.S. at 197 n.3.

55. For an account, see WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 104 (1988).

56. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (emphasis added).

57. *Id.*

58. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 70 (1873).

59. Ku Klux Klan Act, ch. 22, § 1, 17 Stat. 13, 13 (1871). The Supreme Court made clear that the Act reached private conduct in *United States v. Harris*, 106 U.S. 629, 639 (1883) (“Under [the Act] private persons are liable to punishment for conspiring to deprive any one of the equal protection of the laws enacted by the State.”). Under the influence of the post-New Deal state action settlement, *see supra* Section I.B, the Court eventually upheld the civil counterpart to the Act under Congress’s Thirteenth Amendment enforcement power. *See Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971). The Thirteenth Amendment has no state action requirement. U.S. CONST. amend. XIII.

stances where the private parties are acting in accordance with “custom” and “usage.” Similarly, the Civil Rights Act of 1875, enacted pursuant to Congress’s Fourteenth Amendment powers, banned private discrimination in public accommodations, thereby once again requiring affirmative public action that countered private conduct.<sup>60</sup>

While it is true that the Supreme Court subsequently invalidated or sharply limited these statutes,<sup>61</sup> many of those decisions rested on a theory that runs directly counter to the modern state action doctrine. In the *Civil Rights Cases*, which contain the Court’s first extended discussion of the state action problem, the Court held that the 1875 Civil Rights Act was beyond Congress’s Fourteenth Amendment power.<sup>62</sup> Importantly, though, it did so not because Congress had tried to control private conduct but because of a presumption that the states were meeting their affirmative obligation to control this conduct.<sup>63</sup> The Court reached its judgment against the backdrop of a widespread understanding that there was a clearly demarcated line between the “police power” and a private sphere. The “police power” included a rule requiring inns and public carriers to serve all customers.<sup>64</sup> On the Court’s view, the problem with the Act was that it applied to “States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws . . .”<sup>65</sup> Victims of private discrimination could not show that their rights were violated in circumstances where the state stood ready to vindicate those rights. Where a state remedy was available, a putative rights violator “cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefor[e] to the laws of the State where the wrongful acts are committed.”<sup>66</sup>

This position rested on the view, articulated more fully in the *Slaughterhouse Cases*,<sup>67</sup> that the Fourteenth Amendment was not intended to disrupt

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60. Civil Rights Act of 1875, ch. 114, 18 Stat. 335.

61. See *Civil Rights Cases*, 109 U.S. 3 (1883) (invalidating public accommodations section of the Civil Rights Act); *Harris*, 106 U.S. 629 (invalidating Ku Klux Klan Act as applied to private conspiracies); *Virginia v. Rives*, 100 U.S. 313 (1879) (holding that federal removal statute inapplicable when state official’s discriminatory action subject to state judicial correction); *United States v. Cruikshank*, 92 U.S. 542 (1876) (narrowly reading sections of The Enforcement Act); *United States v. Reese*, 92 U.S. 214 (1875) (invalidating sections of The Enforcement Act relating to right to vote). But see *Griffin*, 403 U.S. 88 (holding that application of the Act to private conspiracies was justified under the Thirteenth Amendment).

62. 109 U.S. 3.

63. *Civil Rights Cases*, 109 U.S. at 13. The Court made a similar argument when it struck down a federal removal statute in *Rives*, 100 U.S. 313. It pointed out that federal removal was not conditional on a showing that the state was failing to enforce federal rights. *Id.* at 319.

64. The Court expressly noted that “[i]nnkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them.” *Civil Rights Cases*, 109 U.S. at 25.

65. *Id.* at 14.

66. *Id.* at 17.

67. 83 U.S. (16 Wall.) 36 (1873).

the previous presumption that states stood ready to vindicate rights, with the federal government acting only as a backup.<sup>68</sup> Whether or not it constitutes a correct reading of the Amendment, this interpretation should not be confused with the modern interpretation that Chief Justice Rehnquist articulated in *DeShaney*. According to that interpretation, neither the state nor the federal government has a constitutional obligation to control private conduct.

Justice Bradley—the author of the *Civil Rights Cases*, and a contemporary of the authors of the Fourteenth Amendment—plainly disagreed. As he wrote in private correspondence, the Amendment:

[N]ot only prohibits the *making or enforcing of laws* which shall *abridge* the privileges of the citizen; but prohibits the states from *denying* to all persons within its jurisdiction the equal protection of the laws. [Denying] includes inaction as well as action. And denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection.<sup>69</sup>

It follows that when the modern Court reads the *Civil Rights Cases* as establishing “the essential dichotomy [between] deprivation by the State, subject to scrutiny under [the Fourteenth Amendment] and private conduct [against] which the Fourteenth Amendment offers no shield,”<sup>70</sup> it misrepresents both the holding of the *Civil Rights Cases* and the history that gave rise to it. As originally understood, the Amendment did not reach the private conduct itself, but it did reach state inaction that allowed the private conduct to occur. In contrast, as *DeShaney* illustrates, the modern doctrine gives the state a free pass when it fails to act.

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68. In the *Slaughter-House Cases*, the Court asked rhetorically whether “it [was] the purpose of the [F]ourteenth [A]mendment . . . to transfer the security and protection of all the civil rights . . . from the States to the Federal government?” 83 U.S. at 77. Its answer was that such a reading would “radically change[] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people” and that “no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.” *Id.* at 78.

69. Letter from Joseph Bradley, Assoc. Justice, U.S. Supreme Court, to William Woods, Circuit Judge, U.S. Circuit Court for the Fifth Circuit (Mar. 12, 1871), quoted in NELSON, *supra* note 55 at 196. Judge Woods closely paraphrased this language in *United States v. Hall*, 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871) (No. 15,282). For a discussion of Justice Bradley’s views, see Michael G. Collins, *Justice Bradley’s Civil Rights Odyssey Revisited*, 70 TUL. L. REV. 1979 (1996).

70. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974).

### B. *The Source of the Problem*

How, then, did the modern doctrine arise? Before the New Deal, there was no more than a smattering of state action decisions.<sup>71</sup> The modern state action doctrine flourished after the New Deal because it addressed a problem that the New Deal constitutionalism created. Briefly stated, the problem was how to limit the domain of constitutional law and, hence, judicial power in a world where natural barriers between public and private spheres had eroded.

In the period immediately prior to the New Deal revolution, it was widely thought that the public and private spheres were separated by an impermeable, categorical boundary defined by the Constitution. So long as the government remained within the public sphere of its police power, it was free to act, but the Constitution prohibited legislative invasion of the private sphere of individual choice.<sup>72</sup>

The *Civil Rights Cases* themselves enforced such a limit on Congress's legislative power under Section 5 of the Fourteenth Amendment. Moreover, these constitutional limits were not arbitrary or merely the product of historical happenstance. They reflected natural restrictions on government accessible to anyone ready to think about the problem in a rational and disinterested way. This limit did not mean that constitutional law fully embraced libertarianism. There was a large public sphere, defined by custom and the common law, where government control was entirely appropriate.<sup>73</sup> Importantly, though, this domain was bounded and limited by judicially enforced bright-line legal rules that were impervious to extension by analogical reasoning.<sup>74</sup>

If the government was prohibited from acting in certain spheres, then it obviously could not be constitutionally compelled to act within those spheres. It followed that the government was not responsible for harms in

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71. See, e.g., *Corrigan v. Buckley*, 271 U.S. 323 (1926); *Roman Catholic Church of St. Anthony of Padua v. Pa. R.R. Co.*, 237 U.S. 575 (1915).

72. For representative statements of this position, see *Munn v. Illinois*, 94 U.S. 113, 124–25 (1877), arguing that the “police power” includes regulation of “the conduct of . . . citizens one towards another, and the manner in which each shall use his own property when such regulation becomes necessary for the public good” but that it does not extend to “rights which are purely and exclusively private,” and CHRISTOPHER G. TIEDMAN, *A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES: CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT* 4 (St. Louis, F.H. Thomas Law Book Co. 1886), “the police power . . . is simply the power of the government to establish provisions for the enforcement of the common as well as civil-law maxim *sic utere tuo, ut alienum non loedas*. . . . Any law which goes beyond that principle, which undertakes to abolish rights, the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security, cannot be included in the police power of the government.” See also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960*, at 27–30 (1992).

73. See *infra* notes 310–315 and accompanying text.

74. See *infra* notes 310–318 and accompanying text.



domains outside its legitimate authority, not because it had failed to act but because it was banned from acting.

The New Deal changed all that. Both constitutional and political barriers to systematic government intervention eroded.<sup>75</sup> Although some scholars have recently made concerted efforts to reestablish the barriers,<sup>76</sup> the realm of legislative discretion remains very broad.<sup>77</sup> Many areas once thought to be purely private are now part of a mixed regime.<sup>78</sup> The modern regulatory state rarely ousts private choice from this regime, but the private decisions are subject to an overlay of government constraints and incentives.

The upshot is that the modern state action doctrine is about *judicial* rather than *legislative* power. Whereas the *Civil Rights Cases* limited the power of the Congress to act,<sup>79</sup> no one doubted that the Wisconsin legislature had the power to intervene in *DeShaney*. Put differently, the modern state action doctrine enforces a realm of political discretion where the government may (but need not) act, rather than a realm of mandated abstention, where constitutional law or widely held nonconstitutional norms prohibit action.

Creating this realm of discretion was consistent with the criticisms of judicial activism that were an important part of New Deal constitutionalism.<sup>80</sup> If the judiciary were not constrained by the state action requirement, there was a risk that the entire social sphere would be subject to constitutional review. We might have moved from a situation where the government was *prohibited* from acting to a situation where courts *required* the government to act. Now that the government *could* act to control private power, it

75. See, e.g., David P. Currie, *The Constitution in the Supreme Court: The New Deal, 1931-1940*, 54 U. CHI. L. REV. 504 (1987).

76. For leading academic efforts, see RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004), and DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (2011). For critical commentary, see, for example, Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527 (2015), and Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016).

77. See, e.g., *Armour v. City of Indianapolis*, 566 U.S. 673, 680–81 (2012) (upholding statute against equal protection challenge where there was plausible policy reason for it); *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (same); *Michael H. v. Gerald D.*, 491 U.S. 110, 129 (1989) (plurality opinion) (rejecting substantive due process challenge to statute providing that child born to married woman living with her husband is conclusively presumed to be child of the marriage).

78. See *infra* Part II.

79. See *supra* notes 62–63 and accompanying text.

80. See, e.g., ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* x–xi (1941) (arguing that by 1933 the Supreme Court had used its power “to cripple other departments of government and to disable the nation from adopting social or economic policies which were deemed inconsistent with the Justices’ philosophy of property rights”); see also *Ferguson v. Skrupa*, 372 U.S. 726, 729–30 (1963) (“There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. [That doctrine] has long since been discarded.”).

would be an easy step to read the text of the Fourteenth Amendment as saying that it *must* act where constitutional values were threatened. As I have argued above,<sup>81</sup> this reading is perhaps the most natural interpretation of both the text and the Amendment's legislative history. But many critics of *Lochner v. New York*<sup>82</sup> and related cases opposed those decisions because the decisions were thought to embody unrestrained judicial activism. These critics could hardly be happy with a reading of the Fourteenth Amendment that gave courts unfettered control of the private sphere.<sup>83</sup>

Something like the state action doctrine was therefore necessary to protect a realm of discretion where the political branches were neither required to nor prohibited from acting. Unfortunately, New Deal thinking not only created the necessity for such a doctrine but also damaged the intellectual infrastructure necessary to make the doctrine plausible. As New Deal critics of *Lochner* understood, private action always occurs in the context of background state action that molds and enables private choice. Bakery owners in *Lochner* could insist on long working hours for bakers only because of state contract and property law that allocated power to the owners. There was nothing "unnatural" about changing these laws so as to allocate the entitlement to workers. Similarly, the assault in *DeShaney* was facilitated by state child-custody laws that established and enforced the rights of parents over children.

In a world where there was a well-established boundary between the police powers of the state and a private sphere, this background state action posed no problem. If certain conduct is "naturally" private, then the state bears no responsibility for not making it public. On this view, background state action is not really state action at all, but merely a recognition of the state of affairs that preceded state intervention. Remnants of that world make *DeShaney* seem like a relatively easy case, at least insofar as state responsibility might be imputed from the existence of child-custody laws. There remains a widespread belief in a "natural," prepolitical right of parents to control the upbringing of their children.<sup>84</sup>

But New Deal thinking eroded the belief in natural barriers bounding areas of economic activity. The result is an unresolved contradiction. On the one hand, the "judicial activism" critique of *Lochner* requires some limit on the judiciary's power to constitutionalize the private sphere. On the other, when courts ignore background contract and property law that mold private action, they seem to embrace discredited *Lochner*-like thinking by treating

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81. See *supra* Section I.A.

82. 198 U.S. 45 (1905), *abrogated by Skrupa*, 372 U.S. 726..

83. Cf. Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779, 780 (2004) (arguing that Charles Black could not fully extend his criticism of the state action doctrine because doing so "was too much like a license for judicial discretion, which was the focus of concern in discussions of judicial review as 'countermajoritarian'").

84. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 66–67 (2000) (plurality opinion) (striking down state statute as applied because it interfered with parents' fundamental right "to make decisions concerning the care, custody, and control of their children").

the private sphere as “just there” and not created or structured by government intervention.

The upshot is an outcome that can satisfy no one. Sometimes, in post-New Deal fashion, the Court recognizes the mutability of the background rules and treats them as “state action” subjecting otherwise private activity to constitutional criticism.<sup>85</sup> But it has more frequently assumed that these rules are invisible for judicial purposes in the same way that the pre-New Deal Court assumed their naturalness and immutability for legislative purposes.<sup>86</sup> When the Supreme Court takes this latter stance, it never explains why *Lochner*-like reasoning remains acceptable in the judicial sphere but not in the legislative sphere.

Critics of the state action doctrine regularly seize on this incoherence to argue for abolition of the doctrine. Why not recognize the obvious, they say, and admit that the background rules reflect discretionary state decisions that are subject to constitutional challenge? Having made this admission, courts could then adjudicate the constitutionality of these rules. Many would be upheld, not because of the absence of state action but because the state action violates no substantive rights.<sup>87</sup>

Unfortunately, this move only restates the problem and does not solve it. Consider, for example, the background rule that allocates property rights to media companies like the *New York Times*, CNN, and Facebook. In an obvious way, these background rules substantially constrict the ability of many people to speak. For example, when Facebook takes down postings that it deems offensive, it censors speech almost as effectively as—sometimes more effectively than—a government licensing system would.<sup>88</sup> Without a state action doctrine, courts would need some substantive theory that reconciles this power with free speech guarantees. Implicitly or explicitly, the theory would necessarily involve a presumption that speech opportunities should be allocated by private markets. But that presumption ignores the background, public rules that structure private markets and, therefore, reintroduces *Lochner*-like thinking through the back door. Consequently, even a substantive theory that supposedly avoids the contradictions of the state action doctrine actually only replicates the contradictions.

For these reasons, the debate about the state action doctrine has reached an impasse. At least in the academy, there is widespread recognition that the

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85. See, e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Marsh v. Alabama*, 326 U.S. 501 (1946).

86. See, e.g., *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

87. See *supra* note 8 and accompanying text.

88. See, e.g., *Community Standards*, FACEBOOK, <https://www.facebook.com/communitystandards/> [<https://perma.cc/5MWM-DG3Q>] (providing guidance for when and how Facebook will remove user content).

doctrine is unsatisfactory,<sup>89</sup> but there is also no plausible way to get rid of it. The difficulty is part of a broader problem of formulating constitutional doctrine in the absence of natural law baselines. Of course, for modern libertarians who want to reestablish these baselines, this is not a difficulty at all; it only demonstrates the correctness of their position. For the rest of us, there seems no choice but to live with the incoherence.

### C. *The Middle Band Emerges*

All this assumes that the state action doctrine marks a boundary between a public and private sphere. It turns out that the assumption is wrong. The assumption was once right, at least in theory if not actual practice. According to a highly stylized and simplified version of late nineteenth-century constitutionalism, there were originally only two spheres: the public sphere of police power, where the government was free to act, and the private sphere of individual choice, where people could exercise freedom without government constraints. What most constitutional law amounted to was policing this boundary by protecting imperialistic invasions of the private by the public.<sup>90</sup>

This classical version still describes state action “doctrine,” if by this one means the accumulation of decisions in cases where the Supreme Court labels a constitutional problem as requiring a decision respecting “state action.” But the classical version of constitutionalism is no longer our official story in most of the rest of constitutional law. As the old view began to erode, the Court became more skeptical of constitutional tests that depended upon bright-line, categorical divisions between public and private. Its new approach is neatly captured by its statements that “there is no closed class or category of businesses affected with a public interest”<sup>91</sup> and that the legitimacy of federal regulation no longer turns on whether the activity’s “effect is what might at some earlier time have been defined as ‘direct’ or ‘indirect.’”<sup>92</sup> Instead of insisting on a categorical approach that sharply bounded public and private spheres and policing that boundary by constitutional fiat, the

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89. See, e.g., Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003); *supra* notes 5–8.

90. According to William J. Novak, this regime replaced a much more fluid regime of regulation that existed throughout most of the nineteenth century. See generally WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996). Novak's account emphasizes how the earlier regime, marked by an interweaving of power and liberty “in self-regulating, common law communities” was replaced by the late nineteenth century regime marked by a sharp division between the domains of power and liberty, with the two “kept in balance only through the magnetic genius of an ascendant American constitutionalism.” *Id.* at 241.

91. *Nebbia v. New York*, 291 U.S. 502, 536 (1934).

92. *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

Court permitted a messy intermixing of the two with indistinct and shifting boundaries delineated by the political process.<sup>93</sup>

This intermixing did not mean that the Court completely stayed its hand or that categorical approaches lost all of their force. It did mean, however, that there were now three bands of state action rather than the original two. The outer and inner bands of police power and individual freedom remained. Constitutionalism was relatively unimportant in these two bands, either because government power is justified (the outer, public band) or because it is perceived to be absent (the inner, private band). What changed was the emergence of a middle band that is neither fully public nor fully private. Within this band, private power remains, but it is disciplined by more or less stringent public regulation.

The middle band is where modern constitutionalism takes hold. Instead of enforcing boundaries between public and private spheres, much of modern constitutionalism deals with the special pathologies thought to be the product of the mixture of public and private.<sup>94</sup> Where the mixture is absent—where a domain is perceived as either purely public or purely private—the Constitution has little work to do.<sup>95</sup>

## II. THE CASES, THE DOCTRINE, AND THE MIDDLE BAND

State action's tripartite character is a feature of many disparate areas of constitutional law. I make no claim that the structure exists in every doctrinal domain. Nor do I claim that all the examples I provide below have precisely the same structure. For example, sometimes the government moves from the middle to the outer band by depriving more people of the putative

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93. I do not mean to claim that the merging of public and private institutions was unprecedented before the New Deal. It was not. But the importance and acceptance of the merger was new. See *infra* Part IV.

94. Concern about these pathologies has obvious ties to a republican conception of constitutional law, which sees the Constitution as providing protection of public institutions against the corrupting influence of private power. See, e.g., Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 32 (1985) (noting classical republican fear of corruption of public institutions by private power) [hereinafter Sunstein, *Interest Groups in American Public Law*]; cf. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1690 (1984) (arguing that the Constitution prohibits legislation based solely on "naked" private preferences and that this prohibition is rooted in the Framers' "fear that government power would be usurped solely to distribute wealth or opportunities to one group or person at the expense of another").

95. To be clear, I do not mean to reject the standard critique of state action doctrine that insists that public power is always present. See *supra* Section I.B. Just as the doctrine's critics claim, the inner band exists only because the Court assumes the "naturalness" of background state action in a fashion that is in tension with its rejection of *Lochner*-like reasoning. My claim is only about how the Court *perceives* the inner band when it ignores background state action.

constitutional right.<sup>96</sup> Sometimes, it gains the benefit of outer band status by invading the right in a more serious fashion.<sup>97</sup> On still other occasions, the state can free itself of constitutional constraints by regulating more vigorously activity not associated with the putative right.<sup>98</sup> My claim is only that the tripartite structure in different doctrinal domains is similar enough, paradoxical enough, and exists often enough to warrant notice and explanation.

This is not to say that the outer band of “too much state action” functions in exactly the same way as the inner band of “no state action.” For the most part, the inner band is transsubstantive. Private parties who are not assisted by the government in ways that register with conventional state action doctrine can do anything at all without encountering constitutional objection. The outer band is often more limited: when the government expands its power, it evades some, but often not all, constitutional constraints. The government might be able to force unwilling participants to obtain insurance if it took over the insurance markets, but it does not follow that the government could use racial classifications to set insurance rates.

But although the outer and inner bands are not perfect mirror images, it remains analytically useful to emphasize the symmetry between them. The fact is that the Constitution often loses (some of) its force not only when the government does too little but also when it does too much. That fact requires some explanation, and this Article attempts to provide it.

This Part builds the cumulative case for the phenomenon. It mostly ignores possible justifications and explanations for the outcomes it describes—a matter I turn to in Parts III and IV.

#### A. *Federalism Limitations*

In the healthcare context, we have already seen how the Constitution sometimes gives the federal government more power when it chooses to invade the private sphere more aggressively.<sup>99</sup> Other federalism principles follow a similar pattern.

The negative implications of the Commerce Clause provide the first example. It is well established that when states regulate private markets, they may not do so in ways that discriminate against out-of-state market participants.<sup>100</sup> A complex and not altogether consistent body of doctrine attempts to draw a line between legitimate regulation on the one hand and protection-

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96. For example, in some areas of Fourth Amendment law, the government can defeat a constitutional challenge by invading the privacy or autonomy of more people. *See infra* Section II.D.2.

97. Some Free Exercise and Takings jurisprudence has this structure. *See infra* Section II.C.2.

98. Some Commerce Clause and Self-Incrimination cases provide examples. *See infra* Sections II.A., II.D.1.

99. *See supra* notes 30–42 and accompanying text (discussing *Sebelius*).

100. *See, e.g.,* *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269 (1988); *Bos. Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977).

ist discrimination on the other.<sup>101</sup> But suppose that instead of regulating private markets, the state makes part or all of the market public. When a state acts as a “market participant,” all the Commerce Clause limitations that would otherwise exist fall away.

Consider, for example, *Reeves, Inc. v. Stake*.<sup>102</sup> For over half a century, South Dakota (an unlikely last bastion of American socialism) had owned and operated a cement plant.<sup>103</sup> The state insisted that it would provide no cement to out-of-state purchasers until it had met the needs of all its in-state customers.<sup>104</sup> Had the state attempted to impose this rule on private companies, its actions would have been unconstitutional.<sup>105</sup> But because it had entered an otherwise private market rather than merely regulating the market, its actions were immune from challenge.<sup>106</sup>

The market-participant doctrine therefore illustrates state action’s tripartite structure. If the state leaves a private business to its own devices, the case is in the inner band, and neither the state nor the business is constitutionally liable if the business discriminates against out-of-state customers. If the state instead regulates the business, it operates in the middle band and is subject to constitutional prohibitions on discrimination. But if the state takes over the business and runs it itself, then it is in the outer band and regains constitutional immunity from Commerce Clause attack.

An analogous principle governs doctrine concerning the mirror image limitations on the federal government. The “anticommandeering” principle prohibits the federal government from “comandee[ring] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.”<sup>107</sup> For example, Congress may not require states to regulate radioactive waste in the manner that Congress prefers,<sup>108</sup> to force state executive officials to conduct background checks before firearms can be

101. Compare, e.g., *Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978) (finding legitimate regulation), with *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994) (finding protectionist discrimination).

102. 447 U.S. 429 (1980); see also *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); cf. *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984) (plurality opinion in part) (prohibiting “downstream” restrictions based on state ownership). For an attempt to domesticate the doctrine by reducing it to a distinction between penalties and subsidies, see LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 145 (1985).

103. *Reeves*, 447 U.S. at 430.

104. *Id.* at 432–33.

105. See *id.* at 436–37 (“[T]he Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. . . . There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.”).

106. See *id.* at 440–41; see also *Alexandria Scrap*, 426 U.S. at 809 (“We do not believe the Commerce Clause was intended to require independent justification for such action.”).

107. *New York v. United States*, 505 U.S. 144, 161 (1992) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981)).

108. *New York*, 505 U.S. 144.

lawfully purchased,<sup>109</sup> or to require state legislatures to refrain from authorizing gambling.<sup>110</sup> This principle has the effect of constitutionally limiting the extent to which the federal government can jointly administer regulatory regimes. A cooperative approach advances federal policy goals on the macro level, while providing local officials with some discretion on the micro level as to how to achieve the federal objectives. Put differently, a cooperative approach is firmly situated within the mixed middle band of regulation. It lies between an outer band approach, under which the federal government runs the entire program, and an inner band approach, under which the federal government leaves the states entirely free from federal control.

Under current doctrine, constitutional restrictions that limit the federal government in the middle band disappear when the federal government moves to the outer band by completely displacing state authority. The Court has made clear that so long as Congress is acting within one of its delegated powers, it may preempt state law and regulate the activity directly.<sup>111</sup> There is therefore a sense in which anticommandeering doctrine limits the federal government more if it does less. As Justice White argued in a separate opinion, the doctrine “gives Congress fewer incentives to defer to the wishes of state officials in achieving local solutions to local problems.”<sup>112</sup> Complete displacement puts federal action in the outer band of discretion, while partial displacement puts the action in the middle band of constraint.

Despite the “anticommandeering” principle, the Court has allowed the federal government to “tempt” the states to manage federal programs with grants made under the spending power of Article I.<sup>113</sup> Even conditional spending may be unconstitutional, however, when “pressure turns into compulsion,”<sup>114</sup> and this is especially likely to occur when the “conditions take the form of threats to terminate other significant independent grants.”<sup>115</sup> The Court applied these principles to invalidate provisions of the

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109. *Printz v. United States*, 521 U.S. 898 (1997).

110. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018).

111. *New York*, 505 U.S. at 167 (“[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress’ power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.”).

112. *Id.* at 210 (White, J., concurring in part and dissenting in part). Even some defenders of the Court’s anticommandeering jurisprudence have recognized this paradox. See, e.g., Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 817–18 (1998) (“Federal demands that state and local officials implement federal policies at least preserve some role for such officials. By contrast, preemption eliminates their role entirely.”).

113. *New York*, 505 U.S. at 166 (Congress may “encourage a State to regulate in a particular way,” and “hold out incentives to the States as a method of influencing a State’s policy choices”).

114. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

115. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580 (2012) (opinion of Roberts, C.J.).



ACA that terminated all federal Medicaid funding if states declined to extend Medicaid benefits to a new group.<sup>116</sup>

This constitutional limitation adheres to the tripartite structure in a fashion analogous to the anticommandeering cases. If the federal government provides relatively unrestricted funding, leaving the states free to spend the funds as they wish, the case is in the inner band of constitutional discretion. There has been insufficient “state action” (actually, federal action) to trigger constitutional scrutiny. If the federal government displaces the states entirely and federalizes all decisions about Medicaid, it is in the outer band of constitutional discretion. The federal government has “acted” so forcefully that constitutional restrictions are again inappropriate. But because the Medicaid expansion portion of the ACA was in the middle band—providing some, but not enough, decisionmaking autonomy to the states—it was constitutionally vulnerable.<sup>117</sup>

### B. Separation of Powers

A similar principle structures some aspects of horizontal constitutional rules, although the connection of these rules to the state action doctrine is less obvious because the “state action” concerns a single branch of the government rather than the government as a whole.

In theory, Congress may not delegate its legislative authority to executive branch officials,<sup>118</sup> but in practice, the Court has permitted large-scale delegation under very broad standards.<sup>119</sup> Congress therefore has the choice of washing its hands of the problem and turning it over to an administrative agency or doing the job itself by enacting detailed statutory provisions. The first option amounts to insufficient state action (here congressional action)

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116. *Id.* at 575–85.

117. Of course, the fact that the program is vulnerable does not mean that it will necessarily be invalidated. In the *Sebelius* situation, matters were complicated by the fact that the middle band, itself, is segmented. If the federal spending is moderate, the state may only be “tempted” in a constitutionally permissible way. More extensive federal subvention might turn the “temptation” into unconstitutional “coercion,” as the Court in fact determined in *Sebelius*. The important point, though, is that this middle band of constitutional review is sandwiched between an outer band where the federal government altogether preempts state law and an inner band where the federal government does nothing to restrict state activity. In both the outer and inner bands, constitutional review does not take hold.

118. *E.g.*, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) (“The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.”).

119. *See, e.g.*, *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472–76 (2001); *Touby v. United States*, 500 U.S. 160, 164–69 (1991). *See generally* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002) (arguing that the nondelegation doctrine has been applied so sparingly that it doesn’t actually exist).

to trigger constitutional restraints.<sup>120</sup> The second option entails congressional action that is too vigorous to trigger these restraints. Suppose, though, that Congress chooses a middle position. Congress might want the agency to have primary responsibility, but it also might want to retain some control for itself by, for example, reserving the power to veto the agency's decisions or the power to appoint or dismiss agency officials. Although the Court has permitted both outer and inner band solutions, it has sharply restricted use of the middle band.<sup>121</sup> Even though a near total delegation is constitutionally permissible, a less aggressive solution that retains some congressional control violates the Constitution.

The Court has tied itself into knots trying to explain this paradox. Middle band solutions under which Congress retains some control are said to violate executive power.<sup>122</sup> But how could the power be "executive" when Congress might opt for the outer band solution of exercising the power itself?<sup>123</sup> Just as it is difficult to understand how state power is invaded when the federal government gives states some role in administering a federal program, so too it is hard to see how Congress is invading executive power when it delegates some, but not total, lawmaking authority to executive-branch officials.

But whether or not this doctrine makes logical sense, it responds to an intuition that Congress must either be all in or all out. It can "act" by taking full responsibility for legislating in an area or "not act" by turning it over to executive officials. A constitutional problem arises only when it opts for a middle band, mixed system where it has done a little bit of both.

### C. *The First Amendment*

1. *Freedom of speech.* Free speech cases provide especially dramatic examples of situations where more aggressive state intervention into a putatively private sphere serves to immunize government action from constitutional challenge.

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120. I am putting to one side the possible existence of a "major questions canon," *U.S. Telecomm. Ass'n v. FCC*, 855 F.3d 381, 422 (D.C. Cir. 2017) (Kavanaugh, J., dissenting in the denial of rehearing en banc), that limits, either as a matter of statutory construction or constitutional law, the ability of Congress to delegate a "question of deep 'economic and political significance' that is central to [a] statutory scheme." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)); *see also Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

121. *See, e.g., Bowsher v. Synar*, 478 U.S. 714 (1986) (removal); *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (veto); *Buckley v. Valeo*, 424 U.S. 1 (1976) (appointment).

122. *See, e.g., Bowsher*, 478 U.S. at 736 (statute "violate[d] the command of the Constitution that the Congress play no role in the execution of the laws").

123. *See id.* at 750–51 (Stevens, J., concurring in the judgment) (noting that the fallback position in the statute would grant to Congress itself powers granted to the Comptroller General).

Consider, for example, commercial speech doctrine. Beginning with its initial formulation of the modern doctrine, the Court has made clear that constitutional protection does not extend to commercial speech advocating “transactions [that] are themselves illegal in any way.”<sup>124</sup> Suppose, though, that the transaction is legal but might be made illegal. In *Posadas de Puerto Rico Associates v. Tourism Co.*, the Court upheld a statute that sharply restricted advertising of legal gambling.<sup>125</sup> Writing for the Court, Justice Rehnquist reasoned that because Puerto Rico could have outlawed gambling altogether, it could also:

take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising. It would surely be a Pyrrhic victory for casino owners . . . to gain recognition of a First Amendment right to advertise their casinos . . . only to thereby force the legislature into banning casino gambling . . . altogether. It would just as surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand.<sup>126</sup>

The *Posadas* Court rejected state action’s tripartite structure. It held that free speech protection should not vary depending upon the government’s choice between the outer and middle bands.

But *Posadas* was later disavowed by the Court.<sup>127</sup> The Court’s current position is that the government is subject to First Amendment strictures when it permits the underlying activity but may avoid them when the activity is outlawed. For example, the government could, if it wished, aggressively regulate private markets by outlawing the sale of liquor or tobacco products. If it did so, then it could also outlaw commercial speech encouraging the use of these products. But if the government chooses to act less aggressively and leave private markets alone, then there are heightened speech protections.<sup>128</sup>

Perhaps there are good First Amendment reasons for adhering to this position even if it produces “Pyrrhic victor[ies]” for those engaged in the underlying activity.<sup>129</sup> There can be no doubt, though, that the position re-

124. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976).

125. 478 U.S. 328 (1986).

126. *Posadas*, 478 U.S. at 346.

127. *See* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 510 (1996) (opinion of Stevens, J.) (“Because the 5-to-4 decision in *Posadas* marked such a sharp break with our prior precedent, and because it concerned a constitutional question about which this Court is the final arbiter, we decline to give force to its highly deferential approach.”).

128. *See* *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564–66 (2001); 44 *Liquormart*, 517 U.S. at 489; *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 478 (1995).

129. *See, e.g.*, Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 *Geo. Wash. L. Rev.* 429, 443–44 (1971)

flects state action's tripartite structure. If the government leaves the conduct entirely unregulated, conventional state action principles deprive First Amendment prohibitions of any force. If the government entirely outlaws the activity, the First Amendment similarly loses its force. Only when the case falls in the middle band, where the government permits the activity but regulates speech advocating it, does the First Amendment apply.

There are also other examples where the more the government invades the public sphere, the less the First Amendment protects speech. We have already seen how the *Walker* Court utilized the government speech doctrine to constitutionally immunize state action in the outer band.<sup>130</sup> In *Walker*, there was no claim that anyone was forced to fund government speech with which they disagreed, but it is obvious that no one has a right to avoid funding such speech. As Justice Kennedy wrote in *Board of Regents of the University of Wisconsin System v. Southworth*:<sup>131</sup>

It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens. The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties.<sup>132</sup>

The situation is dramatically different when individuals are compelled to support private speech. Although the doctrine is confused and inconsistent, in at least some situations, the First Amendment bars compelled funding when private individuals determine the content of the speech.<sup>133</sup> For example, although taxpayers have no right to abstain from paying for government speech that they oppose, government workers do have a right to refuse to pay union dues that support private political activity with which they disagree.<sup>134</sup>

On conventional state action premises, this result seems paradoxical. It means, for example, that if Texas "privatized" its licensing of automobiles, it might be subject to the constitutional strictures that it avoided in *Walker*. Similarly, in the union dues cases, the Court has upheld the right of individ-

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("[C]ommercial speech furthers legitimate first amendment purposes. When the individual is presented with rational grounds for preferring one product or brand over another, he is encouraged to . . . exercise his abilities to reason and think; this aids him towards the intangible goal of rational self-fulfillment."). *But cf.* R.H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 2 (1977) (noting the inconsistency when "government action. . . is regarded as incompetent and untrustworthy" in the marketplace of ideas and yet "efficient and reliable" in the marketplace of goods).

130. See *supra* notes 9–29 and accompanying text.

131. 529 U.S. 217 (2000).

132. *Southworth*, 529 U.S. at 229.

133. See, e.g., *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005) ("In all of the cases invalidating exactions to subsidize speech, the speech was, or was presumed to be, that of an entity other than the government itself."); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990).

134. *Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018).

ual objectors when the speech is by a private actor (the union).<sup>135</sup> The Court has even said that there are “serious” constitutional arguments that individual objectors have this right when the compulsion arises from a collective bargaining agreement between a private union and a private employer.<sup>136</sup> In contrast, government speech cases involve compulsion in the form of a statute and speech by a state agency. The First Amendment prohibits compelled support of private speech, perhaps even when the compulsion is applied by a private actor, but not public compulsion of public speech. The thoroughly public character of compelled support of government speech drives the case into the outer band and thus eliminates free speech protections.

The same pattern emerges in cases where government prohibits some, but not all, private speech. For example, in *Police Department of Chicago v. Mosley*,<sup>137</sup> the Court invalidated an ordinance that prohibited picketing near a school except for picketing of a school involved in a labor dispute. Obviously, a rule that left picketing entirely within the private sphere by not regulating it at all would not implicate the Constitution even if private actors made the picketing impossible.<sup>138</sup> Perhaps less obviously, the Court also suggests that a rule that prohibited all picketing near schools might survive constitutional attack.<sup>139</sup> But because the government prohibited some, but not all, picketing, it ran into constitutional difficulty.

*Mosley* is an early example of the Court’s preoccupation with the principle of content neutrality—perhaps the central analytic tool in modern free speech jurisprudence.<sup>140</sup> If regulation of speech is “content based,” then the speech is subject to strict scrutiny and is invalid unless narrowly tailored to serve a compelling state interest, at least if it falls in the “high value” category.<sup>141</sup> In contrast, if the regulation is “content neutral,” then it is subject to a less exacting balancing test.<sup>142</sup>

135. *E.g., Id.*; *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235–36 (1977).

136. *See Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 749, 765–70 (1961).

137. 408 U.S. 92 (1972).

138. *See Hudgens v. NLRB*, 424 U.S. 507 (1976) (private shopping center owner can constitutionally prohibit picketing).

139. *See Mosley*, 408 U.S. at 99 (suggesting that a city has “a substantial interest in stopping picketing which disrupts a school” so long as it does not discriminate).

140. *See* Elena Kagan, *The Changing Faces of First Amendment Neutrality*: *R.A.V. v. St. Paul*, *Rust v. Sullivan*, and *the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29; Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987).

141. *See, e.g., Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”).

142. *See, e.g., United States v. Albertini*, 472 U.S. 675, 687–88 (1985) (“Application of a facially neutral regulation that incidentally burdens speech satisfies the First Amendment if it ‘furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First

Once again, the government is less likely to be constitutionally constrained if it moves into the outer band by doing more. All else equal, content-based restrictions regulate less speech because they are targeted only at objectionable content. A content-neutral restriction sweeps more broadly by prohibiting all speech. By restricting more of the activity the Constitution seemingly protects, the government is subject to fewer constraints.

The same principle applies if a regulation of conduct is supported only by concern for the conduct's communicative content. The government may punish flag burning as part of a broader scheme that outlaws setting fires in public places,<sup>143</sup> but if it outlaws flag burning in order to suppress the views that the burning expresses, it runs afoul of the First Amendment.<sup>144</sup> From the flag burner's perspective, both laws prevent her from expressing her views by burning a flag, but only the first law, which controls the actions of more people, runs afoul of the First Amendment.

Content-neutrality doctrine intersects in a complex fashion with the Court's public forum rules. If the activity takes place in a "quintessential public forum[]" like public streets or parks, then, even if the regulation is content neutral, the government must show that the regulation is "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."<sup>145</sup> For present purposes, the more interesting categories are "designated" public fora and "limited purpose" public fora.<sup>146</sup> If a state voluntarily designates an area as open to expressive activity, then it has created a public forum subject to the same restrictive standards that apply to quintessential public fora.<sup>147</sup> If a public forum is "limited," then the state must permit speech that is relevant to the forum's purpose.<sup>148</sup> But the state can convert a designated forum into the "nonpub-

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Amendment freedoms is no greater than is essential to the furtherance of that interest.' " (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968))).

143. See Geoffrey R. Stone, Essay *Flag Burning and the Constitution*, 75 IOWA L. REV. 111, 117 (1989) (case invalidating flag burning ordinance does not control situation where a person burns a flag and is prosecuted under an open fire ordinance).

144. See *United States v. Eichman*, 496 U.S. 310, 315 (1990) ("Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted *interest* is 'related to the suppression of free expression.' " (quoting *Texas v. Johnson*, 491 U.S. 397, 410 (1989))).

145. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

146. See *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998) (describing designated public forum); *Rosenberg v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (describing limited public forum).

147. See *Perry Educ. Ass'n*, 460 U.S. at 45-46 (binding the government to "the same standards as apply in a traditional public forum" when it opens property for expressive activity).

148. See *Rosenberg*, 515 U.S. at 829 (holding that the state is permitted to "[confine] a forum to the limited and legitimate purposes for which it was created").

lic” status and can define the purpose of a limited public forum.<sup>149</sup> As a practical matter, this means that the government can “buy” more discretion to limit speech when it acts more aggressively to make the forum nonpublic or to limit its purpose. If the government restricts speech opportunities more by keeping all speakers out, or by more narrowly defining the purpose of a forum, its activities are in the outer band and subject to greater deference. If it permits more speech, then its activities are in the middle band of constraint and subject to enhanced constitutional scrutiny.

2. *Free exercise.* Finally, consider the First Amendment’s free exercise protections. In *Sherbert v. Verner*, a Seventh-day Adventist who had been fired by her employer because she would not work on Saturday was denied unemployment compensation on the ground that she lacked good cause to refuse suitable work.<sup>150</sup> The Court held that denial of the benefits impermissibly burdened the plaintiff’s free exercise of religion despite the fact that the plaintiff would have suffered the same burden if there had been no unemployment insurance at all.<sup>151</sup> If the state had done nothing, the plaintiff would have been no better off, but the absence of state action would have doomed her constitutional challenge; the state was under no constitutional obligation to dissipate pressure that her private employer put on her religious beliefs. The case would therefore fall within the inner band. If the state had provided funding for everyone, there would have been no burden on religion to complain about. The case would have been in the outer band. But because the state provided funding to some but not others, its actions were unconstitutional.<sup>152</sup>

In recent years, the Court has sharply limited the extent to which facially neutral statutes can be challenged on free exercise grounds.<sup>153</sup> But it has done so in two ways that once again conform to the tripartite structure.

First, the Court has distinguished between what the government itself does and what it forces individuals to do to themselves. In *Lyng v. Northwest*

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149. See, e.g., *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (allowing exclusion of topics and speakers from nonpublic forum “so long as [they] are reasonable in light of the purpose served by the forum and are viewpoint neutral”).

150. 374 U.S. 398 (1963).

151. *Sherbert*, 374 U.S. at 403–06.

152. See *id.* at 405–06. *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012 (2017) (plurality opinion in part), has a similar structure. There, the Court struck down the state’s refusal to provide a grant to a church to resurface its playground in circumstances where a secular institution would have received the grant. *Id.* at 2017–18. Despite the fact that the church would have been no better off if there had been no grant program in the first place, the Court held that the failure to award the grant unconstitutionally pressured the free exercise of religion. *Id.* at 2022.

153. See *Emp’t Div. v. Smith*, 494 U.S. 872 (1990) (individual religious beliefs do not excuse compliance with otherwise valid law prohibiting conduct that the state is free to regulate); *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988) (concluding that the Free Exercise Clause offers no protection against how the government conducts its internal affairs); *Bowen v. Roy*, 476 U.S. 693 (1986) (plurality opinion in part) (same).

*Indian Cemetery Protective Ass'n*, it rejected a challenge to the government's construction of a road in an area traditionally used by American Indians for religious rituals.<sup>154</sup> The Court acknowledged that "the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs."<sup>155</sup> Yet the First Amendment was not violated because "the affected individuals [were not] coerced by the Government's action into violating their religious beliefs."<sup>156</sup>

It seems to follow that a government program that offers individuals more choice is also more vulnerable to Free Exercise challenge. Suppose, for example, the government told an American Indian tribe that it would have to forego a tax exemption if it denied the government an easement to build a road over its sacred land. There is a sense in which this declaration leaves the tribe freer than they would be if the government simply built the road, as it did in *Lyng*. The tribe might still lose use of the land if they claimed the tax exemption, but at least they would have an additional option to keep the land and pay the price if that option seemed preferable. Yet somehow providing this option makes government action more vulnerable to free exercise challenge. In the Court's words, the option might cause the tribe to be "coerced by the Government's action into violating their religious beliefs."<sup>157</sup>

The second and more significant modern limitation on free exercise rights was announced in *Employment Division v. Smith*, where the Court rejected a free exercise challenge to a statute that criminalized possession of peyote as applied to a person who used the substance as part of a religious ritual.<sup>158</sup> The Court held that a neutral and generally applicable statute did not violate free exercise even if it was applied to an individual engaged in religious practice.<sup>159</sup> But *Smith* itself is subject to a limitation. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* the Court invalidated a statute that banned ritual slaughter as applied to animal sacrifices conducted for religious reasons.<sup>160</sup> The cases were different, the Court thought, because the *Lukumi* ordinance was "gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings."<sup>161</sup>

Taken together, *Smith* and *Lukumi* yet again illustrate state action's tripartite structure. The religious group harmed by the *Lukumi* ordinance would have been no better off if the state had controlled more private con-

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154. 485 U.S. 439 (1988).

155. *Id.* at 449.

156. *Id.*

157. *Id.*

158. 494 U.S. 872.

159. *Smith*, 494 U.S. at 878–79.

160. 508 U.S. 520 (1993) (plurality opinion in part).

161. *Lukumi*, 508 U.S. at 542.



duct by targeting secular as well as religious animal slaughter.<sup>162</sup> In that case, though, the statute would have been in the outer band and, under *Smith*, immune from a Free Exercise challenge. Because the state did less and banned only religious slaughter, it found itself in the middle band of constitutional constraint.

#### D. Criminal Procedure

Criminal procedure rules have not been a central battleground in the arguments over state action. Still, the Court has made clear that neither the Fourth Amendment protection against unreasonable search and seizure nor the Fifth Amendment privilege against compulsory self-incrimination reaches purely private conduct. When private individuals blew up someone's safe and stole his papers, the Supreme Court held that the Fourth Amendment posed no obstacle to government presentation of the papers to a grand jury.<sup>163</sup> In a case where a defendant claimed that his self-incrimination rights were violated because he felt compelled by the voice of God to confess, Chief Justice Rehnquist wrote that "however important or significant such a perception may be in other disciplines, [it] is a matter to which the United States Constitution does not speak."<sup>164</sup>

Less noticed, though, is the fact that Fourth and Fifth Amendment protections also evaporate when there is *too much* government activity.

1. *Self-incrimination*. It is black-letter law that in order to trigger the Fifth Amendment privilege, there must be both compulsion and incrimination.<sup>165</sup> Each of these requirements implicates government action. The compulsion must be applied by government agents, and the incrimination must be before government tribunals.<sup>166</sup> But the compulsion prong also means that the Constitution permits the government to avoid self-incrimination limitations when it chooses to act more, rather than less, aggressively.

For example, the presence of the self-incrimination privilege sometimes turns on whether the government has granted an entitlement to private persons or retained the entitlement itself. If an individual must prove something

162. It is possible that a court would invalidate even a broader ban if it thought that it, too, was a "gerrymander" infected by an unconstitutional purpose. The example in text assumes that the legislative purpose related to animal sacrifice rather than to religious belief. For a discussion of the relationship between legislative purpose and middle band analysis, see *infra* Section III.B.3.

163. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921).

164. *Colorado v. Connelly*, 479 U.S. 157, 170–71 (1986).

165. See, e.g., *Chavez v. Martinez*, 538 U.S. 760, 766–67 (2003) (plurality opinion)(compelling statement does not violate the Fifth Amendment unless statement used in criminal trial); *Garner v. United States*, 424 U.S. 648, 653 (1976) (holding that the use of statements in a criminal trial does not violate the Fifth Amendment unless the statements are compelled).

166. See *Chavez*, 538 U.S. at 767.

in order to get a benefit from the government, she cannot rely on the Fifth Amendment privilege to meet her burden of proof.<sup>167</sup> If the individual is already entitled to the benefit, then the government cannot take it away because the individual has invoked the Fifth Amendment privilege.<sup>168</sup>

This distinction, captured by the maxim that the privilege can act as a shield but not as a sword, entails a surprising conclusion<sup>169</sup>: it means that if the government has the power to shift the entitlement from the individual to itself, then it can avoid Fifth Amendment difficulties by asserting more government control. So long as there is a private entitlement, the threat to take it away unless a suspect incriminates himself counts as Fifth Amendment compulsion. The individual can “shield” himself from the deprivation by invoking his privilege.<sup>170</sup> But the government can achieve the outcome it wants by insisting that the initial entitlement is public.

A concrete example helps to elucidate the difference. Suppose that the government suspects that its employees are taking bribes. It might call the employees before a grand jury and threaten them with dismissal if they invoke their Fifth Amendment rights and refuse to answer questions. The Supreme Court has held that this tactic violates the Fifth Amendment: the grand jury testimony might be incriminating, and the threat of job loss counts as “compulsion” prohibited by the Self-Incrimination Clause.<sup>171</sup>

But this outcome seems to rest on the assumption that the employees have an entitlement to continued employment. Contrast that case with a situation where an individual has the burden of proving that he is entitled to a government benefit. No one supposes that a government employee could submit a request for reimbursement of expenses and be entitled to payment when she claimed the Fifth Amendment in response to an inquiry as to what the expenses were for.<sup>172</sup> Similarly, if the government made employees regularly prove their entitlement to their jobs, it would seem to follow that it

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167. See *McGautha v. California*, 402 U.S. 183, 212 (1971), *judgment vacated sub nom. Crampton v. Ohio*, 408 U.S. 941 (1972).

168. See *McKune v. Lile*, 536 U.S. 24, 65 (2002) (Stevens, J., dissenting).

169. See, e.g., *United States v. Rylander*, 460 U.S. 752, 758 (1983) (“We think the view of the Court of Appeals would convert the privilege from the shield against compulsory self-incrimination which it was intended to be into a sword whereby a claimant asserting the privilege would be freed from adducing proof in support of a burden which would otherwise have been his.”).

170. See, e.g., *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) (entitlement to public office); *Lefkowitz v. Turley*, 414 U.S. 70 (1973) (entitlement to contract with the government); *Gardner v. Broderick*, 392 U.S. 273 (1968) (entitlement to government employment).

171. See *Gardner*, 392 U.S. at 278–79.

172. Cf. *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998) (plurality opinion in part) (holding that self-incrimination privilege not violated by “voluntary” interview at which sentenced individual has burden of demonstrating that he is entitled to clemency); *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841 (1984) (holding Self-Incrimination Clause not violated by requirement that applicants for student loans certify that they have registered for the draft); *Rylander*, 460 U.S. 757–61 (holding that a person cannot meet burden of proof by asserting the privilege against self-incrimination).

could force them to meet their burden by testifying truthfully to a grand jury.<sup>173</sup>

Of course, the Constitution itself requires that some entitlements remain in the private sphere. The government could not make one prove that she was not a criminal in order to have the right to join a religion or stay out of prison. But the New Deal revolution gives the government the ability to keep many entitlements for itself. For example, it can make people prove that they are fit to engage in many common occupations<sup>174</sup> or receive a host of government benefits.<sup>175</sup> Whenever the government takes advantage of its discretion to expand the public sector, it can also eviscerate self-incrimination rights.

The preference for more aggressive tactics leads to similarly paradoxical results in other areas of Fifth Amendment law. Suppose the government has probable cause to believe that an individual possesses a gun used in a murder. At least in theory, a grand jury could subpoena the gun. Of course, the suspect would not be happy about receiving the subpoena, but from his point of view a subpoena has several advantages over a forcible search for and seizure of the weapon.<sup>176</sup> First, if he does not have the gun, he can so state and, if believed by a judge, be relieved of his obligation. Second, if he has the gun, he can produce it himself, thereby avoiding the disruption and invasion of privacy that would accompany a government effort to search for it and seize it. Third, if he has the gun but strongly prefers not to produce it, he can refuse to do so and submit to a contempt citation.

In light of all these rights available to the target of a subpoena, it is perhaps surprising that the suspect nonetheless has a constitutional right not to produce the gun. The subpoena clearly constitutes “compulsion” for Fifth

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173. Cf. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564 (1972) (holding that because untenured professor had no entitlement to continued employment, he was not entitled to hearing when his contract was not renewed).

174. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (holding that the government can limit persons permitted to engage in business of debt adjusting); *Williamson v. Lee Optical*, 348 U.S. 483 (1955) (holding that the government can limit persons entitled to duplicate or replace lenses in eye glasses).

175. See, e.g., *Califano v. Boles*, 443 U.S. 282 (1979) (holding that mother of illegitimate children has no entitlement to benefits received by widows and divorced wives of wage earners); *Dandridge v. Williams*, 397 U.S. 471 (1970) (holding that there is no entitlement to welfare).

176. Cf. *Zurcher v. Stanford Daily*, 436 U.S. 547, 573 (1978) (Stewart, J., dissenting) (noting that a search warrant, unlike a subpoena, permits ransacking of files “reading each and every document until [the police] have found the one named in the warrant”); Max Greenwood, *Trump Lawyer Labeled Manafort Raid ‘Gross Abuse’: Report*, HILL (Aug. 10, 2017, 12:07 PM), <http://thehill.com/homenews/administration/346047-trump-lawyer-manafort-raid-was-gross-abuse> [<https://perma.cc/W4J6-FZCF>] (reporting that President Trump’s lawyer called warranted search of Paul Manafort’s home “a gross of abuse of the judicial process” in part because of the failure to “exhaust less intrusive methods”).

Amendment purposes.<sup>177</sup> It turns out that satisfying the incrimination requirement is somewhat more complicated. Under current doctrine, a court would probably hold that the gun itself does not constitute an incriminating statement by the defendant.<sup>178</sup> By turning over the gun, however, the suspect implicitly states that the gun exists and that he has possession of it.<sup>179</sup> Unless these facts are a “foregone conclusion,” the statements risk incrimination.<sup>180</sup> Accordingly, the suspect’s motion to quash the subpoena on self-incrimination grounds would almost certainly succeed.

Fortunately for the government, though, it need not limit itself to polite requests. Under the right circumstances, government agents can break into his home at 2:00 a.m.,<sup>181</sup> terrify the suspect and his family,<sup>182</sup> and, if necessary, destroy the front door and much of the house in the process.<sup>183</sup> The agents can detain the defendant and other family members, perhaps at gunpoint, perhaps with physical constraints like handcuffs.<sup>184</sup> They can then ransack the house, searching through desks and dressers, breaking locks, and reading private papers.<sup>185</sup>

It turns out that none of this activity necessarily violates the Self-Incrimination Clause or indeed any other constitutional provision. None of

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177. See, e.g., *Fisher v. United States*, 425 U.S. 391, 410 (1976) (noting that “[t]he elements of compulsion are clearly present” in response to subpoena).

178. See *id.* at 409–10 (holding that papers produced in response to subpoena “cannot be said to contain compelled testimonial evidence”).

179. See *id.* (noting that production of object tacitly concedes the existence of object and its control by subject of subpoena).

180. See *id.* at 411–12 (noting that the existence of the subpoenaed papers was a “foregone conclusion” and their production did not involve testimonial self-incrimination); see also *United States v. Hubbell*, 530 U.S. 27, 44 (2000) (production may be testimonial and incriminating when existence of object produced is not a “foregone conclusion”).

181. See *Gooding v. United States*, 416 U.S. 430 (1974) (holding no special showing required for nighttime search). *But cf.* *Hummel-Jones v. Strobe*, 25 F.3d 647 (8th Cir. 1994) (holding 2:00 a.m. raid of small birthing clinic unreasonable under the circumstances).

182. See *Wilson v. Arkansas*, 514 U.S. 927 (1995) (plurality opinion in part) (holding that Fourth Amendment does not establish a “rigid rule” that police must announce their presence before entry and that announcement requirement can give way to “countervailing law enforcement interests”); *cf.* *Hudson v. Michigan*, 547 U.S. 586 (2006) (holding that the exclusionary rule does not apply to violation of knock and announce requirements).

183. See, e.g., *United States v. Ramirez*, 523 U.S. 65 (1998) (upholding the right of police to destroy property in order to conduct a search); *United States v. Weinbender*, 109 F.3d 1327 (8th Cir. 1997) (upholding removal of piece of drywall to conduct search).

184. See *Muehler v. Mena*, 544 U.S. 93 (2005) (holding that placing occupants of house in handcuffs and detaining them at gun point for two to three hours while house was searched was permissible under Fourth Amendment).

185. See, e.g., *Ramirez*, 523 U.S. 65 (holding that police may destroy property during search); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (upholding search of photographic laboratories, filing cabinets, desks, and wastepaper baskets in newspaper office); *Andresen v. Maryland*, 427 U.S. 463 (1976) (upholding constitutionality of search taking several hours and reading private papers); *Warden v. Hayden*, 387 U.S. 294 (1967) (holding that police can search house in places where they believe evidence, and not merely contraband is located).

it “compels” the suspect to incriminate himself. The government’s actions are things done to the suspect, not things he is made to do to himself. As the Supreme Court has said many times, the Fifth Amendment protects against compulsion that incriminates, but not against incrimination itself.<sup>186</sup>

Moreover, because none of this activity is unconstitutional, the suspect is entitled to no compensation even if he is entirely innocent and the gun is never found.<sup>187</sup> In fact, the uncompensated disruption and destruction of property is likely to be more extensive if he is innocent. Police must terminate a search once they find what they are looking for,<sup>188</sup> but if the suspect is innocent, the police will have to search the entire house before satisfying themselves that the gun is not there.<sup>189</sup>

The contrast to the unconstitutional subpoena process is stark. An innocent suspect confronted with a subpoena can avoid further obligation by asserting that he does not possess the gun. He is then entitled to a judicial hearing at which the government must prove by clear and convincing evidence that he possesses it.<sup>190</sup> An innocent suspect confronted with a search has no right to be present when a magistrate issues a warrant, and the government need demonstrate no more than “probable cause” for the warrant to

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186. *E.g.*, *Andresen*, 427 U.S. at 473–74 (holding that introduction of seized records did not violate Fifth Amendment privilege because “petitioner was not asked to say or to do anything”).

187. *See, e.g.*, *Porter v. United States*, 473 F.2d 1329 (5th Cir. 1973) (taking does not occur when evidence seized); *Eggleston v. Pierce Cty.*, 64 P.3d 618 (Wash. 2003) (en banc) (holding no compensable taking when police, pursuant to search warrant, seized load-bearing wall, thereby making property uninhabitable).

188. *See Andresen*, 427 U.S. at 479–80.

189. Of course, the warrant must “particularly” describe the place to be searched, *e.g.*, *Marron v. United States*, 275 U.S. 192, 196 (1927); FED. R. CRIM. P. 41(e)(2)(A), but it is clear that if there is probable cause to believe that the gun is somewhere in a residence, specification of the residence as the unit of search satisfies the particularity requirement. *See e.g.*, *Maryland v. Garrison*, 480 U.S. 79 (1987) (upholding warrant authorizing the search of a third floor apartment even though, unbeknownst to the police, there were actually two apartments on the third floor); *United States v. Ross*, 456 U.S. 798, 821 (1982) (“[A] warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found.”). It does not follow that the police can search in places where it is not reasonable to believe that the object they are looking for will be, but in the case of a small object like a gun, the scope of the search can be very broad. *See, e.g.*, *United States v. Evans*, 92 F.3d 540, 543 (7th Cir. 1996) (“If they are looking for a canary’s corpse, they can search a cupboard, but not a locket. If they are looking for an adolescent hippopotamus, they can search the living room or garage but not the microwave oven. If they are searching for cocaine, they can search a container large enough to hold a gram, or perhaps less.”).

190. *See, e.g.*, *SEC v. Hyatt*, 621 F.3d 687, 692 (7th Cir. 2010) (“To prevail on a request for a contempt finding, the moving party must establish by clear and convincing evidence that (1) a court order sets forth an unambiguous command; (2) the alleged contemnor violated that command; (3) the violation was significant, meaning the alleged contemnor did not substantially comply with the order; and (4) the alleged contemnor failed to make a reasonable and diligent effort to comply.”).

issue.<sup>191</sup> Once it does, the suspect must stand by and watch as the police tear apart all of her possessions looking for a gun that they will never find.

What if the suspect is guilty and does have the gun? A subpoenaed suspect can refuse to produce it and accept the consequences, but the police can seize the gun after a search without having to worry about the Self-Incrimination Clause. One might have thought that if the suspect lawfully owns the gun, the Constitution's property protections would prevent government agents from taking it from him. But in fact, so long as the police have probable cause to believe that the gun might constitute evidence in a criminal case, they are permitted to vitiolate his property rights.<sup>192</sup>

This preference for more aggressive over less aggressive police tactics is built into the textual structure of the Fifth Amendment and means that, in many cases, the government is less constrained by the Amendment when it invades more rights.<sup>193</sup> If the police politely ask a motorist whether he has been drinking, he has a Fifth Amendment right to refuse to respond even if the police have probable cause to believe that he is drunk.<sup>194</sup> Denial of that right would mean that the defendant had been compelled to incriminate himself.<sup>195</sup> But if the police with the same probable cause tie the suspect down to a table, forcibly stick a needle in his arm to extract his blood, and then measure the blood's alcohol content, the Fifth Amendment loses its force.<sup>196</sup> Because the motorist is not incriminating himself, he has no right to resist.

Bizarrely, the same phenomenon holds when the government enters domains that in the pre-New Deal period were thought to be entirely off limits. Recall that in the pre-New Deal period, there was a widespread constitutional or quasi-constitutional presumption against government interference with private markets.<sup>197</sup> But in the modern period, this interference actually increases the government ability to avoid self-incrimination strictures. For example, if the government respects market allocations and leaves busi-

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191. See FED. R. CRIM. P. 41(d)(1) ("After receiving an affidavit or other information, a magistrate judge—or if authorized by Rule 41(b), a judge of a state court of record—must issue the warrant if there is probable cause to search for and seize a person or property or to install and use a tracking device.").

192. See *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (holding that police can seize "mere evidence" even if not contraband or the fruits or instrumentalities of crime).

193. I do not mean to deny here that there is a certain sense in which the Fifth Amendment invades more rights. If one values the dignitary interest in not being required to be the instrument of one's own destruction, Fifth Amendment compulsion is a special problem. I discuss this possibility *infra* in text following note 273.

194. See *Pennsylvania v. Muniz*, 496 U.S. 582 (1990) (plurality opinion in part).

195. See *id.* at 595–96. I put to one side here the constitutionality of "implied consent" laws that condition the use of a public highway on consent to tests that measure alcohol levels. See, e.g., MICH. COMP. LAWS ANN. § 257.625c(1) (West 2018). For a discussion of how the state can avoid Fifth Amendment difficulties by shifting entitlements, see *infra* notes 252–253 and accompanying text.

196. See *Schmerber v. California*, 384 U.S. 757 (1966).

197. See *supra* Section I.B.

nesses unregulated, a business owner may have a Fifth Amendment privilege not to produce his business records.<sup>198</sup> If the government instead regulates market outcomes by, for example, setting the price at which goods can be sold, it can then require the owner to keep records relating to the regulation and force the owner to turn over the records even if they incriminate her.<sup>199</sup>

The same structure applies even to child-rearing, where, as noted above,<sup>200</sup> a belief in the “natural” allocation of children to parents persists. If the government leaves child-rearing in the private sphere, a parent has a constitutional right not to provide the government with information that might indicate criminal abuse.<sup>201</sup> But if the government intervenes more forcefully by putting the child under state supervision, the Fifth Amendment right evaporates and a parent can be held in contempt for failing to provide the information.<sup>202</sup>

2. *Searches and seizures.* Similar paradoxes are a pervasive feature of Fourth Amendment doctrine. The amendment’s text prohibits “unreasonable” searches and seizures,<sup>203</sup> but sometimes a search or seizure becomes more reasonable when more privacy and liberty are invaded and when less evidence justifies the invasion.

Suppose that the police have a strong hunch that a motorist is driving with an expired permit, but the hunch does not amount to reasonable suspicion. Under current doctrine, a police stop of the motorist violates the Fourth Amendment.<sup>204</sup> But suppose that the police have no reason at all to suspect wrongdoing and, instead of stopping a single motorist, stop large numbers of motorists at a roadblock. These stops invade the privacy and liberty of more people on less evidence. One might suppose that they therefore constitute a more serious Fourth Amendment violation. Yet according to what Justice Rehnquist has derisively labeled the “misery loves company” theory of the Fourth Amendment,<sup>205</sup> they are constitutionally permissible.<sup>206</sup>

198. See, e.g., *United States v. Doe*, 465 U.S. 605 (1984). The statement in text is subject to two qualifications. First, businesses that are partnerships or corporations do not have self-incrimination rights. See, e.g., *Braswell v. United States*, 487 U.S. 99 (1988) (corporations); *Bellis v. United States*, 417 U.S. 85 (1974) (partnerships). Second, the Fifth Amendment takes hold only if the act of production is incriminating. See *Fisher v. United States*, 425 U.S. 391, 410 (1976).

199. See *Shapiro v. United States*, 335 U.S. 1 (1948).

200. See *supra* note 84 and accompanying text.

201. See *Balt. City Dep’t of Soc. Servs. v. Bouknight*, 493 U.S. 549, 561 (1990).

202. See *id.* at 559–62.

203. U.S. CONST. amend. IV.

204. See *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (requiring at least reasonable suspicion to stop an automobile for registration check).

205. *Id.* at 664 (Rehnquist, J., dissenting).

206. *Id.* at 663 (majority opinion) (suggesting questioning of “all oncoming traffic at roadblock-type stops” as alternative to stops of individuals on less than reasonable suspicion); accord *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990) (upholding similar roadblocks to

The Court has applied the same reasoning to validate drug testing of large numbers of public school students in the absence of any evidence of wrongdoing even as it has prohibited searches when a smaller number of students is singled out on the basis of some evidence.<sup>207</sup> Even odder is the Court's requirement of "administrative warrants" that can issue without individualized probable cause in direct contravention of the Fourth Amendment's textual requirement.<sup>208</sup> The very purpose of these warrants is to insure that the government is acting on the basis of a generalized scheme that targets more people.<sup>209</sup>

The Fourth Amendment also has an exception analogous to the Fifth Amendment's required-records exception that limits the necessity for even administrative warrants. Before the government can search an unregulated business, officials need to obtain a warrant although an administrative warrant may be sufficient.<sup>210</sup> But by invading more of the private sphere, the government can avoid the necessity of obtaining any warrant at all. If the government elects to "closely regulate," the business, then searches are permissible without a warrant of any kind.<sup>211</sup>

A similar anomaly applies to searches of automobiles. The Court has held that if the police have probable cause, there is no requirement that they obtain a warrant before searching an automobile in part because the government has chosen to heavily regulate automobiles and the expectation of privacy in them is therefore reduced.<sup>212</sup> It seems to follow that if automobiles were less heavily regulated, warrants might be required.

The warrant exception for automobiles does not mean that they can be searched without probable cause, but there are other exceptions that sometimes vitiate the probable cause requirement in this context. Under current doctrine, if an officer arrests a suspect in or near a car, even for a minor crime, the officer may automatically conduct a thorough search of the car's passenger compartment for evidence of the crime of arrest if there is reason

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test for drunk driving). *But see* *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (invalidating roadblock to search for narcotics).

207. *Compare* *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (upholding drug testing without suspicion of large numbers of school children), *with* *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (prohibiting search of individual school children on less than reasonable suspicion).

208. *See* *See v. City of Seattle*, 387 U.S. 541, 541–46 (1967); *Camara v. Mun. Court*, 387 U.S. 523, 534 (1967).

209. *See* *Camara*, 387 U.S. at 538 ("'[P]robable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.')

210. *See id.*

211. *See, e.g.,* *New York v. Burger*, 482 U.S. 691 (1987).

212. *United States v. Chadwick*, 433 U.S. 1, 12–13 (1977), *abrogated by* *California v. Acevedo*, 500 U.S. 565 (1991).



to believe that the evidence will be found.<sup>213</sup> But suppose the officer chooses to be less aggressive and not arrest the motorist. Then, her right to conduct the search evaporates.<sup>214</sup> Perversely, the law gives the officer an incentive to use more coercion because if she does so, she can avoid otherwise applicable Fourth Amendment limits on her actions.<sup>215</sup>

These cases raise issues about the applicability of the Fourth Amendment's warrant and probable cause requirements. Those requirements only take hold, however, if the government wants to conduct a search or a seizure. In recent years, the Court has used a test based upon "reasonable expectations of privacy" to determine whether there is a search.<sup>216</sup> On at least one interpretation, this test, too, can be controlled or substantially influenced by government activity that restricts the realm of freedom. When positive law recognizes privacy rights generally, it often creates a reasonable expectation that those rights will be respected. It follows that the police may not selectively violate those rights. But if the government instead chooses not to protect individuals generally, then those subject to police invasions may lack a reasonable expectation of privacy and, so, lose Fourth Amendment protections.<sup>217</sup>

Two recent cases have revived a property–physical trespass test for searches—an approach previously thought to have been interred by the Supreme Court's landmark decision in *Katz v. United States*.<sup>218</sup> The Court has held that the police violated the Fourth Amendment when they attached a

213. See *Arizona v. Gant*, 556 U.S. 332, 343–44 (2009).

214. See *Knowles v. Iowa*, 525 U.S. 113, 114 (1998).

215. Of course, the police may not arrest just anyone. In order to exercise their right to search incident to arrest, they must have probable cause to arrest. See *United States v. Robinson*, 414 U.S. 218, 227–28 (1973). There is nothing paradoxical about that requirement. What is paradoxical—and what produces perverse incentives—is that when the police have probable cause, their right to search turns on their taking the more aggressive action of actually effecting an arrest.

216. The test is often said to have its roots in *Katz v. United States*, 389 U.S. 347 (1967), although the phrase itself appears only in Justice Harlan's concurring opinion. *Id.* at 360 (Harlan, J., concurring). A majority of the justices endorsed the test in *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

217. The Court applied something like this test to authorize police aerial surveillance of private property in circumstances where the surveillance was not illegal for the general public in *California v. Ciraolo*, 476 U.S. 207, 213–14 (1986), and *Dow Chem. Co. v. United States*, 476 U.S. 227, 239 (1986). A plurality of the Court reached a similar conclusion in *Florida v. Riley*, 488 U.S. 445, 449–52 (1989) (plurality opinion), but importantly, the deciding fifth vote, provided by Justice O'Connor, relied on a test based on what people ordinarily did rather than on what the law permitted them to do. *Id.* at 452–55 (O'Connor, J., concurring in the judgment). Since then, the Court has moved toward Justice O'Connor's approach. See, e.g., *Bond v. United States*, 529 U.S. 334 (2000) (manipulation of bags placed in overhead baggage rack of bus is search because passenger does not expect that other passengers or bus employees will engage in this conduct). For a defense of the positive law approach, see Baude & Stern, *supra* note 4.

218. 389 U.S. at 353 (“[T]he reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.”).

GPS device to the bottom of the suspect's car without first securing a valid warrant.<sup>219</sup> Similarly, it held that the police violated the Fourth Amendment when officers walked up to the suspect's house with a drug sniffing dog.<sup>220</sup> In both cases, the holdings rested on the fact that the police activity constituted a physical trespass onto private property.

When the trespass test was first announced, it operated against the backdrop assumption that property rights were themselves fixed by constitutional command. The test therefore fit easily within the two-band schema. Searches were defined by property rights, which themselves were determined by whether public action impermissibly infringed on a naturalized private sphere.

Remnants of this world remain, especially with respect to real property. But in the modern regulatory context, many property entitlements find their source in discretionary state law.<sup>221</sup> For example, states might or might not recognize a license for private individuals to approach the front door of a house.<sup>222</sup> With respect to entitlements like these, the trespass analysis has radically different implications. If the state does nothing at all, private searches fail the conventional state action test. If the state acts aggressively by recognizing a private license and thereby restricting the homeowner's property right, it is similarly unconstrained by the Fourth Amendment's commands. But if the state is in the middle band by recognizing the homeowner's property right but nonetheless permitting its invasion when the police introduce a drug-sniffing dog onto the property, then the Fourth Amendment takes hold.

It turns out, then, that in a wide variety of circumstances, the extent of Fourth and Fifth Amendment constraints turns on the band within which the state is operating. If the state does nothing—if there is no “state action” that compels an individual to speak or invades his reasonable expectation of privacy—constitutional protections fail to take hold. But these protections are also unavailable if the state acts aggressively by, for example, retaining for itself an entitlement, declining to recognize property rights, or searching large groups of people. The Constitution matters most when the state oper-

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219. *United States v. Jones*, 565 U.S. 400, 406–07 (2012) (arguing that “*Katz* did not repudiate” the original understanding of the Fourth Amendment as “embody[ing] a particular concern for government trespass”).

220. *Florida v. Jardines*, 569 U.S. 1, 5–6 (2013) (holding that when government obtains information by personally intruding on persons, houses, papers or effects, it has conducted a “search” for purposes of the Fourth Amendment).

221. *See, e.g., Flagg Bros. v. Brooks*, 436 U.S. 149, 160 n.10 (1978) (noting that property “is not a monolithic, abstract concept hovering in the legal stratosphere. It is a bundle of rights in personalty, the metes and bounds of which are determined by the decisional and statutory law of the State”).

222. *Compare Jardines*, 569 U.S. at 16 (Alito, J., dissenting) (“The law of trespass generally gives members of the public a license to use a walkway to approach the front door of a house and to remain there for a brief time.”), *with id.* at 9 (majority opinion) (“The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose.”).

ates in the middle band by restraining itself in some ways (by, for example, recognizing a property right, providing for private entitlements, or restricting the numbers of people searched) but not in others (by, for example, compelling individuals to incriminate themselves or searching or seizing them).

### E. *The Fourteenth Amendment*

1. *Equal protection.* Equal protection doctrine is haunted by a well-known two-way-ratchet problem. The state can provide equal protection either by extending benefits to people who don't have them or by taking them away from people who do. If the state chooses the latter option, how is anyone made better off? Many commentators have noticed the problem,<sup>223</sup> but no one (to my knowledge) has seen its connection to the middle band phenomenon.

*Sessions v. Morales-Santana*<sup>224</sup> provides a useful example. Immigration law makes it easier for the child of an unwed American mother to obtain citizenship than for the child of an unwed American father.<sup>225</sup> The Court held that this discrimination violated the Equal Protection Clause.<sup>226</sup> One might have supposed that this holding would result in relief for the children of unwed American fathers, and indeed, this solution would remedy the equal protection problem. By receding from its discriminatory treatment, the government would be doing less and, therefore, escape constitutional difficulties. But, perhaps surprisingly, the Court held that the problem should be remedied by the government acting more forcefully.<sup>227</sup> Instead of merely restricting the citizenship rights of children of unwed fathers, the Court's decision required the government to restrict the rights of children of unwed mothers as well.<sup>228</sup>

The point is generalizable. When government action is challenged on equality grounds, constitutional law is indifferent as between a resolution that extends benefits to a broader class or a resolution that deprives a broader class of the benefits.<sup>229</sup> This means that it is always at least theoretically

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223. See, e.g., Pamela S. Karlan, *Race, Rights and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2027 (1998); Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1436 (1988); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

224. 137 S. Ct. 1678 (2017).

225. See 8 U.S.C. § 1409(c) (2012).

226. *Morales-Santana*, 137 S. Ct. at 1679.

227. *Id.* at 1686.

228. *Id.*

229. While “[t]he general assumption in contemporary equal protection law . . . is that . . . the state will remedy the inequality by providing the benefit to the previously excluded group . . . rather than by depriving the previously included group,” Karlan, *supra* note 223, at 2027, the ultimate touchstone is the supposed intent of Congress. The Court looks to “the in-

open to the government to resolve an equality problem by making things worse for a larger group. Suppose, for example, that capital punishment was successfully challenged on the ground that it was administered in a fashion that discriminated against African Americans. This constitutional problem could be resolved by more executions of people identified as belonging to other races.<sup>230</sup> Put differently, the Constitution applies only to a middle band, where some people are harmed but not others. The government has a choice of avoiding the constitutional difficulty by opting for either the inner band (where it acts less aggressively and harms fewer people) or the outer band (where it acts more aggressively and harms more people).

Some judges and commentators have thought that this feature of equality doctrine actually makes it more attractive. For example, Justice Jackson once argued that judicial enforcement of the Equal Protection Clause was more respectful of the political branches than due process enforcement because, instead of altogether prohibiting the government from acting, it permitted government intervention so long as it acted equally with respect to a larger group of people.<sup>231</sup> More recently, Justice Scalia has offered a similar argument.<sup>232</sup> Moreover, it is often true that when the government is put to the hard choice, it will make things better for everyone rather than worse for everyone.<sup>233</sup> Although the *Morales-Santana* plaintiffs lost in the short run, they can hope that if they are patient, Congress will eventually remedy the problem by extending benefits to a broader group.

This positive outcome, if it occurs, may vindicate the Jackson and Scalia view. In the next Part, I address more generally the normative case for and against the middle band structure. For present purposes, the important point is that the argument amounts to a defense of this structure. Both Jackson and Scalia thought it was a virtue that equal protection jurisprudence, like much of the rest of constitutional law, permits the government to satisfy constitutional commands by doing either more or less.<sup>234</sup>

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tensity of commitment to the residual policy and consider[s] the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.” *Heckler v. Mathews*, 465 U.S. 728, 739 n.5 (1984) (quoting *Welsh v. United States*, 398 U.S. 333, 365 (1970) (Harlan, J., concurring in the result)).

230. See Kennedy, *supra* note 223, at 1436 (discussing “leveling up” solution).

231. *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) (“Invocation of the equal protection clause . . . does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact.”).

232. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) (“Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.”).

233. *But see Morales-Santana*, 137 S. Ct. 1678 (refusing to extend benefit to excluded class in light of equal protection violation).

234. Jackson and Scalia had somewhat different reasons for favoring the middle band solution. For Jackson, writing in the immediate wake of the fight over judicial restraint associated with the rejection of the *Lochner* approach, equal protection was preferable to due process because equal protection provided the political branches with more flexibility. See *Ry. Express*

2. *Procedural due process.* The Fourteenth Amendment's Due Process Clause prohibits deprivations of life, liberty, or property without due process of law.<sup>235</sup> The modern Court has interpreted the procedural branch of this guarantee as requiring some sort of hearing that allows a person threatened with the deprivation of a property or liberty right the opportunity to contest the factual basis for that deprivation.<sup>236</sup> This requirement, however, applies only to middle band cases. As *DeShaney* illustrates, if the government does less—if it merely allows a private person to deprive the victim of life, liberty, or property—the clause is inapplicable.<sup>237</sup> But it turns out it is also inapplicable if the government does more.

First, consider deprivations of property. In the pre–New Deal period, when property law was thought to be prepolitical, outer band cases were subject to constitutional constraints.<sup>238</sup> Today, as noted above, the Court has recognized that many property rights have their roots in positive law.<sup>239</sup> It follows that the state can avoid procedural due process constraints by eliminating the property right.

*Flagg Bros. v. Brooks* provides an example of how the inner and outer bands can work in tandem to deny constitutional protection.<sup>240</sup> When Brooks was evicted from her apartment, the city marshal arranged for storage of her possessions in a warehouse owned by Flagg Brothers.<sup>241</sup> Flagg Brothers claimed that Brooks had failed to pay for the storage and threatened to sell the possessions.<sup>242</sup> It relied on a state statute providing that a warehouseman could satisfy a lien on goods in his possession by selling them.<sup>243</sup> Brooks then sued, claiming that she was entitled to a hearing before the goods were sold.<sup>244</sup>

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*Agency*, 336 U.S. at 112 (Jackson, J., concurring) (“Invocation of the equal protection clause . . . does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact.”). For Scalia, writing in an age where process-based and “representation reinforcement” theories were influential, equal protection was preferable to due process because of equal protection’s capacity to generate political checks on government excess. See *Cruzan*, 497 U.S. at 300 (Scalia, J., concurring) (“Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.”). For a discussion of each of these justifications, see *infra* Section III.B.2.

235. U.S. CONST. amend. XIV, § 1.

236. See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (collecting cases).

237. *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989).

238. See *supra* Section I.B.

239. See *supra* Section I.B.

240. 436 U.S. 149 (1978).

241. *Flagg Bros.*, 436 U.S. at 153.

242. *Id.*

243. *Id.* at 156.

244. *Id.* at 153–54.

The Supreme Court rejected Brooks's claim. Flagg Brothers's sale of the goods was within the inner band. It was action by a private party that the state had no obligation to control.<sup>245</sup> But what of the statute that authorized the sale? As the Court recognized, the statute effectively modified the property rights that respondent had before the warehouseman gained possession of the property.<sup>246</sup> But, remarkably, instead of being an argument in Brooks's favor, this doomed her case. According to the Court, "[t]he validity of the property interest in these possessions . . . depends on New York law."<sup>247</sup> The statutory declaration that Brooks lacked the right to prevent the sale was undoubtedly state action in the conventional sense, but it was state action in the outer band and therefore free from constitutional scrutiny.

Cases involving government employment also illustrate how the outer band works. In *Cleveland Board of Education v. Loudermill*, a government employee who had been discharged complained that he was not provided with constitutionally adequate procedures to rebut the charges against him.<sup>248</sup> Under state law, the employee could be terminated only "for cause," but the same statute specified the procedures to be utilized to determine whether the "for cause" standard had been met.<sup>249</sup> The employer argued that whatever property interest the employee had was defined by state law, which included the specification of procedures, but the Court rejected this argument.<sup>250</sup> In the Court's view, accepting the state's argument would "reduce [due process] to a mere tautology."<sup>251</sup>

It follows that the state cannot put itself in the outer band simply by announcing in advance that it will not provide the procedures that the Due Process Clause otherwise requires. It does not follow, however, that the outer band is unavailable. The state can achieve its objective by shifting the entitlement in much the way that it can defeat self-incrimination claims.<sup>252</sup> If the state declines to create a property interest in employment, then the Due Process Clause loses force. For example, if the state specifies that an employee can be discharged at will, then the employee has no property interest in the job and no procedures are required.<sup>253</sup> By more aggressively restricting an

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245. The Court emphasized that the respondents "have named no public officials as defendants" and that there was a "total absence of overt official involvement" in the sale. *Id.* at 157.

246. *Id.* at 161 n.11 (noting that New York had "enacted a statute which provides that a warehouseman conforming to the provisions of the statute may convert his traditional lien into good title").

247. *Id.* at 160 n.10.

248. 470 U.S. 532, 535–38 (1985).

249. *Loudermill*, 470 U.S. at 539 n.6.

250. *Id.* at 539–41.

251. *Id.* at 541.

252. *See supra* Section II.D.1.

253. *Compare* *Perry v. Sindermann*, 408 U.S. 593, 602–03 (1972) (holding that an employee with "a legitimate claim of entitlement to job tenure" has a right to a hearing), *with* *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 578 (1972) (holding that an employee whose

employee's substantive rights, the state is permitted to extinguish his procedural rights as well.

Whereas the modern Court has insisted that property rights are a creature of state law, it continues to recognize "natural" liberty and life interests.<sup>254</sup> No one supposes that the government could make people free from imprisonment or death only "at will" and thereby avoid the necessity of criminal trials. Still, something like the same technique can put even criminal cases within the outer band. Suppose that the government makes it a criminal offense to provide material aid to any terrorist organization. In a criminal trial, the defendant would have a constitutional right to contest whether the organization she aided fit the statutory definition of "terrorist." But if the legislature itself specifies the organizations or delegates the specification to administrative officials and then outlaws giving material aid to the organizations so specified,<sup>255</sup> the defendant loses her procedural rights.<sup>256</sup> So long as it satisfies other constitutional requirements and acts rationally, Congress can define criminal conduct based upon its own determination of facts.<sup>257</sup> It follows that when Congress is more aggressive in asserting its legislative power, it reduces the number of facts that are relevant to the controversy and, so, shrinks the domain of procedural protection.<sup>258</sup>

To summarize and generalize the point: procedural rights are always parasitic on substantive rights. An individual has a right to a hearing only with respect to facts that as a substantive matter are relevant to the dispute. The state may avoid its procedural duties by making the facts irrelevant—that is, by diminishing the substantive rights that the individual enjoys. Because the state has acted more aggressively, the individual has fewer constitutional protections.

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appointment "secured absolutely no interest in re-employment. . . . did not have a *property* interest sufficient to require University authorities to give him a hearing").

254. See, e.g., *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) (recognizing liberty interest not grounded in positive state law); *Vitek v. Jones*, 445 U.S. 480, 494 (1980) (same).

255. For example, 18 U.S.C. § 2339B(a)(1) (2012) makes it a criminal offense to "knowingly provide[] material support or resources to a foreign terrorist organization." *Id.* § 2339B(g)(6) defines "terrorist organization" as "an organization designated as a terrorist organization under section 219 of the Immigration and Nationality Act."

256. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 120–21 (1989) (plurality opinion) (holding that when statute irrebuttably presumes facts to be true, procedural due process rights are not violated).

257. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–54 (1938) ("[W]e recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason . . . . But by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it.")

258. Cf. *Patterson v. New York*, 432 U.S. 197 (1977) (holding that due process is not violated when state makes defendant bear burden of proving "affirmative defenses").

3. *Substantive due process.* One might suppose that the techniques described above would not work when the Due Process Clause protects substantive rights. These rights, by definition, are not subject to state modification, and the state therefore cannot place itself in the outer band by the simple expedient of refusing to recognize them. But the tripartite structure sometimes reemerges when the state makes conditional offers concerning substantive rights.

Consider, for example, *Koontz v. St. Johns River Water Management District*.<sup>259</sup> The law required a landowner to obtain state permits before developing his land.<sup>260</sup> Neither party disputed that the government could have taken the more intrusive action of simply denying the permits. Instead, the government indicated that it would grant the permits if the landowner took certain actions to mitigate the environmental damage that the development would cause.<sup>261</sup> Remarkably, the Court held that this less intrusive offer might make the government's actions unconstitutional.<sup>262</sup> This was true even though the penalty for rejecting the offer—the denial of the permits—would have been constitutionally unproblematic if the offer had never been made.

Cases involving statutes that limit benefits when the recipient exercises a constitutional right have a similar structure. Suppose that a poor woman is unable to pay for an abortion. If the state provides no subsidies of any kind for healthcare, the case is in the inner band. The state has merely failed to act, and the woman's inability to terminate her pregnancy is attributable to private forces to which the Constitution does not speak.<sup>263</sup> If instead the state intervenes aggressively by providing extensive subsidies for abortions as well as for other services, it is in the outer band. Under current doctrine, state "distortion" of abortion markets violates no one's rights.

But suppose that the state generally provides extensive subsidies for a variety of medical services but refuses to provide any of the subsidies (including those unrelated to childbirth) to women who have abortions. In a certain sense, these women are no worse off than they would be if the state provided no medical subsidies for anyone. If market pressures do not count as state coercion when the government subsidizes no one, one might wonder how they become coercive when it subsidizes some but not others. Yet the Court has strongly suggested that cutting off all benefits to women who se-

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259. 570 U.S. 595 (2013).

260. *Koontz*, 570 U.S. at 600–01.

261. *Id.* at 600–02.

262. *Id.* at 619. The Court remanded the case to the Florida Supreme Court to determine whether the requirements of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. Tigard*, 512 U.S. 374 (1994), had been met. *Koontz*, 570 U.S. at 619.

263. See *Harris v. McRae*, 448 U.S. 297, 316 (1980) ("The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency."); cf. *Maher v. Roe*, 432 U.S. 464, 471 (1977) (noting that financial need alone does not identify a suspect class for equal protection purposes).



cure abortions violates their substantive due process rights.<sup>264</sup> True, the state does not have to fund abortions themselves, but failure to fund unrelated medical care because a woman chooses abortion unconstitutionally pressures the abortion right.

I do not mean to suggest that this distinction is incoherent or even paradoxical. There may well be sound reasons for making it<sup>265</sup>—reasons that I explore in the next Parts. As a descriptive matter, however, the distinction provides yet another example of state action's tripartite structure. In our example, the state has not been entirely passive by funding nothing, but neither has it been entirely active by funding everything. Only when it occupies the middle space by funding some things but not others does constitutional obligation take hold.

### III. EXPLANATIONS AND JUSTIFICATIONS: DISAGGREGATION

What explains the tripartite structure? There is no reason to assume a priori that there is a grand, unified theory that accounts for all the results. Individual outcomes may stem from the force of text, doctrinal path dependence, pragmatic concerns, or even idiosyncratic actions by individual justices. More broadly, the results might be explained by strands of general constitutional theory that have nothing to do with state action or the demarcation of private, public, and mixed spheres. In this Part, I explore these possibilities. In the next Part, I suggest ways in which these seemingly disparate justifications might nonetheless be linked to the modern state action problem.

#### A. Textual Explanations

Some of the anomalies described above seem to be linked to the fact that different constitutional provisions unsurprisingly produce different results. For example, the difference between the government's subpoena and search powers<sup>266</sup> might be taken to prove no more than that the Fourth and Fifth Amendments impose different textual requirements. Perhaps in some sense

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264. See *Maier*, 432 U.S. at 474 n.8 (“If Connecticut denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to the benefits . . . strict scrutiny might be appropriate . . .”); cf. *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (striking down law prohibiting any station that accepted government funds for editorializing even if the editorializing was not paid for by government funds).

265. For some well-known suggestions of reasons, see RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* (1993); Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1 (2001); and Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1304 (1984).

266. See *supra* Section II.D.

a subpoena is less invasive than a search,<sup>267</sup> but in another sense, the cases are simply not comparable. The Fourth and Fifth Amendments deal with different evils that are not readily measurable against each other. It is therefore not unsurprising that they yield different requirements.

Similarly, the distinction between the ACA and a purely public healthcare system<sup>268</sup> can be explained on the ground that the programs' legitimacy depends on different heads of power: The ACA's proponents justified it as an exercise of Congress's Commerce Clause powers. A fully public healthcare system would be justified under Congress's taxing and spending powers. The fact that a particular program fails when justified under one source of power says nothing about whether a different program should fail under a different source of power.<sup>269</sup>

Even when we are making intraclause comparisons, some results seem to be dictated by constitutional text. For better or worse, it is simply a fact that the Fourteenth Amendment protects equality. As others have argued,<sup>270</sup> the equality norm can produce counterintuitive results, but arguments based on those results demonstrate only that the equality requirement is controversial. Constitutional drafters might want to think hard about whether they should insert the guarantee into the text. But once it is there, the anomalies it produces are no more than a consequence of their choice.

### B. *General Constitutional Theories*

In other cases, paradoxical outcomes are less tied to the force of constitutional text, but it does not follow that they are necessarily related to the state action problem. For example, there is nothing in the text or history of the Fourth Amendment that suggests that the Amendment's requirements should be diluted when more people are searched for less reason. Nor does a straightforward reading of the Commerce Clause yield the conclusion that states should be freed from the Clause's negative implications when they operate a business on their own. Still, these outcomes might relate to one or more general theories of constitutional law with normative justifications unrelated to the state action problem. This Section discusses several of these theories.

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267. See *Zurcher v. Stanford Daily*, 436 U.S. 547, 573 (1978) (Stewart, J., dissenting) ("A search, unlike a subpoena, will . . . lead to the needless exposure of confidential information completely unrelated to the purpose of the investigation.")

268. See *supra* Introduction.

269. Cf. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 547–71 (2012) (opinion of Roberts, C.J. in part and majority opinion in part) (finding that the Affordable Care Act exceeded Congress's Commerce Clause powers but that it was a constitutionally permissible exercise of its taxing powers).

270. See, e.g., LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 444–49 (2002) ("A welfare economic evaluation would not . . . accord weight to equality if doing so would make individuals worse off, and we do not find in the literature a basis for rejecting this prescription."); Westen, *supra* note 223, at 542 ("Equality . . . is an idea that should be banished from moral and legal discourse as an explanatory norm.")

1. *Protection of dignity.* Some of the outcomes described above are attributable to a concern about a particular conception of dignity<sup>271</sup> and with a privileging of this conception over a particular conception of freedom. When the government does unwanted things to individuals against their will, it invades freedom, but at least some people think that an independent and perhaps greater harm occurs when the government forces or tempts individuals to use their will to do things to themselves.<sup>272</sup> A person who is incarcerated loses his freedom, but no one supposes that, say, Nelson Mandela lost his dignity when he was jailed against his will. Dignity is at risk only if the prisoner's will is coopted for purposes of the state. A prisoner made to grovel, to beg for forgiveness, or to admit his guilt has lost something important that is not captured by the idea of freedom.<sup>273</sup>

A preference for dignity over freedom sometimes explains the distinction between the middle and outer bands. It lies at the heart of the Self-Incrimination Clause. There are many explanations for the clause, but perhaps the most persuasive relies on the intuition that even though the state has the authority to deprive people of freedom, it lacks the authority to force people to implicate themselves in their own subjugation.<sup>274</sup> The state can do things to people, but it should not undermine their status as independent choosing and resisting agents, at least when it imposes a criminal sanction. It follows that, for example, the state violates the Self-Incrimination Clause when it forces a person to turn over a gun by an exercise of her will, but not when it takes the gun from her against her will.

Some First Amendment decisions that free the government from constitutional constraints when it operates in the outer band rest on a similar intuition. When the government builds a road through sacred tribal lands, it unquestionably harms those who believe the lands to be sacred, but at least the

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271. The conception that I describe here is not one of the conceptions that are most often described and defended in the literature. For important, different conceptions, see Martha Nussbaum, *Human Dignity and Political Entitlements*, in *HUMAN DIGNITY AND BIOETHICS* 351 (2008), and Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 *NOTRE DAME L. REV.* 183 (2011).

272. Cf. Oscar Schachter, Editorial Comment, *Human Dignity as a Normative Concept*, 77 *AM. J. INT'L L.* 848, 852 (1983) (asserting that human dignity is violated by “[p]sychiatric treatment that involves coercive means to change beliefs or choices that are lawful”).

273. Although his discussion is deeply problematic for other reasons, see Louis Michael Seidman, *The Triumph of Gay Marriage and the Failure of Constitutional Law*, 2015 *SUP. CT. REV.* 115, 120–21 (criticizing Thomas's dignity argument), Justice Thomas may have had something like this conception in mind when he wrote that “[s]laves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2639 (2015) (Thomas, J., dissenting).

274. See, e.g., Diane Marie Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 *UCLA L. REV.* 1201, 1287 (1998).

harm is not self-inflicted.<sup>275</sup> If American Indians are bribed to give up the land, they may find themselves alienated from their own beliefs. Providing them with the choice to accept the bribe gives them more freedom but risks their dignity. Similarly, the freedom of smokers would undoubtedly be infringed if the government outlawed cigarettes, but a different, perhaps more serious, interest is infringed if the government permits sale and possession of cigarettes but uses its control over speech to manipulate the will of prospective smokers.<sup>276</sup>

It may seem strange to worry about the dignity of institutions rather than individuals, but something like this idea also lies behind the Court's otherwise puzzling federalism and separation of powers decisions. Prohibition on commandeering, on "coercive offers" directed toward the states, and on congressional control of executive officers seem to rest on a concern about dignity rather than a concern about freedom.<sup>277</sup> For example, the federal government can invade the state's domain of freedom by operating in the outer band. It does so by completely preempting the field and enacting its own regulations that, under the Supremacy Clause, bind the states.<sup>278</sup> Similarly, Congress is free to legislate in the outer band when it passes statutes countermanding executive agency rules and regulating the activity itself.<sup>279</sup> But the federal government cannot impinge on the dignity of states by forcing states to cooperate,<sup>280</sup> and Congress cannot impinge on the dignity of the executive branch by controlling executive officers.<sup>281</sup> Middle band cases that preserve more freedom for the state or agency officials are nonetheless constitutionally vulnerable because they involve the kind of co-optation that is inconsistent with dignity.

Finally, both *Walker* and *Sebelius* reflect the shift from freedom to dignity. On this theory, the "government speech" category is immune from constitutional review because when the government speaks, it is not implicating the individual in its message in the same way it would be if it forced the individual to speak. Similarly, if the government nationalized healthcare markets and taxed individuals to pay for the program, the domain of market freedom would be restricted, but individual dignity would remain intact. People would be less free in the sense that they would be forced into a healthcare re-

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275. See *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

276. See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas, J., concurring in part and concurring in the judgment) ("In cases . . . in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, [the government] 'interest' is *per se* illegitimate . . .").

277. See Scott Dodson, *Dignity: The New Frontier of State Sovereignty*, 56 OKLA. L. REV. 777 (2003).

278. See *supra* notes 111–112 and accompanying text.

279. See Frederick M. Kaiser, *Congressional Action to Overturn Agency Rules: Alternatives to the "Legislative Veto"*, 32 ADMIN. L. REV. 667, 670–73 (1980) (collecting examples of Congress overturning or preempting federal agency rules).

280. *New York v. United States*, 505 U.S. 144 (1992); Dodson, *supra* note 277, at 827–28.

281. *Buckley v. Valeo*, 424 U.S. 1, 138–39 (1976).

gime that they opposed. They would not, however, be made to cooperate with that regime as they would be if the government operated in the middle band by requiring them to purchase goods they did not want.

2. *Politically imposed benchmarks.* Some outer band cases result from courts holding the political branches to standards that the political branches themselves have established. Equal protection cases provide the clearest illustration of this approach. The government is not required to establish any particular substantive standard, but when it establishes a standard, it is obligated to apply it consistently across cases that are relevantly similar. A necessary consequence of this approach is that the government can avoid equal protection condemnation by establishing a different substantive standard that, when faithfully applied, disadvantages more people.

Something like this idea may lie behind equality requirements for other constitutional rights. Within very broad constraints, the government can establish standards for, say, outdoor fires or the slaughtering of animals, but when it writes special rules for flag burners<sup>282</sup> or minority religions,<sup>283</sup> it is violating its self-given general rules.

Other self-imposed benchmarks are unrelated to equality. Consider, for example, the required-records exception to the Self-Incrimination Clause,<sup>284</sup> the heavily regulated industry<sup>285</sup> and automobile exceptions<sup>286</sup> to the Fourth Amendment's warrant requirement, and the mandatory procedural protections dependent on discretionary government entitlements.<sup>287</sup> The benchmarks in these cases are formed by the government's own regulatory decisions, but the cases do not seem to be about equality. They are better explained by the intuition that individuals who know the benchmarks in advance and make "voluntary" decisions based on them have nothing to complain about when the previously announced rules are applied to them.<sup>288</sup>

Finally, in some cases, the benchmark satisfies constitutional requirements because it is perceived to be the product of more general societal norms. For example, individuals sometimes lose their Fourth Amendment expectation of privacy when the statutes permit private conduct analogous to

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282. See *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).

283. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (plurality opinion in part).

284. See *Shapiro v. United States*, 335 U.S. 1 (1948).

285. See, e.g., *New York v. Burger*, 482 U.S. 691 (1987); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

286. See, e.g., *California v. Acevedo*, 500 U.S. 565 (1991); *Carroll v. United States*, 267 U.S. 132 (1925).

287. See, e.g., *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564 (1972).

288. Cf., e.g., *United States v. White*, 401 U.S. 745 (1971) (plurality opinion) (holding that a person contemplating illegal activities assumes the risk that his companions will report activity to police). I am bracketing here the obvious problem of defining "voluntariness" in this context.

the challenged government activity.<sup>289</sup> Similarly, the government can evade First Amendment protections for commercial speech by prohibiting the underlying conduct.<sup>290</sup> In these cases, there is a sense in which the government is less restrained when it acts more vigorously. But that result seems less paradoxical if one thinks that the government action itself is constrained by prevailing social norms. Yes, the government could prohibit advertisements for intoxicating beverages if it outlawed consumption of the beverages, but as a practical matter, contemporary social norms make an outright ban politically infeasible. Norms like these impede the government from readily moving to the outer band, and perhaps that is constraint enough.

3. *Systemic regulation: Impermissible purpose.* In many instances, the outer band phenomenon seems to result from the Court's concern with systemic malfunction rather than with individual oppression. Instead of worrying about whether a particular individual has suffered a rights violation, the court might focus its attention on institutional or systemic problems that risk rights violations over a range of cases. Sometimes, this concern leads to an investigation of the general purpose of legislation rather than to a focus on its impact on particular individuals.

Consider, for example, the preoccupation with content neutrality in free speech doctrine. As already noted, the content-neutrality requirement can have the effect of decreasing First Amendment scrutiny when more individuals lose a speech opportunity.<sup>291</sup> Whereas a content-based restriction harms only speakers with certain messages, a content-neutral restriction targets a broader group.

But this result is perverse only if one assumes that the purpose of the exercise is to police individual outcomes rather than the process by which the outcomes are reached. Content-based restrictions are suspect because they lead to the inference that an impermissible purpose has polluted the process.<sup>292</sup> If the government permits speech with particular content while prohibiting other speech with different content, then perhaps the reason for the regulation is the desire to suppress the disfavored speech, rather than to achieve goals that are not speech related.

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289. See, e.g., *Florida v. Riley*, 488 U.S. 445, 450 (1989) (plurality opinion) (holding that government overflights of backyard did not invade reasonable expectation of privacy because FAA regulations did not prohibit them for private persons).

290. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771–72 (1976).

291. See *supra* Section II.C.1.

292. See, e.g., *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (“[T]he government’s ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace.”); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (“If a court were to attempt to devise easily manageable rules for ferreting out impermissible governmental motives in the First Amendment context, it first would create a distinction between speech regulations that are content neutral and those that are content based.”).

It is true that particular individuals whose speech is banned may well be indifferent to the reasons for suppression. People prohibited from using sound trucks to broadcast radical messages are equally prohibited from speaking whether regulators are motivated by a desire to reduce noise or opposition to the speech's content.<sup>293</sup> But if the concern is with distortion of the overall process rather than with individual outcomes, the motivation may be crucial. To the extent that ideas are in competition with each other, content-based restrictions may give one set of ideas an unfair advantage.<sup>294</sup> Even if the ideas are not in competition, discouraging content-based regulation changes the baseline from which harm is measured.

To see the latter point, suppose first that the choice is between content based and content-neutral regulation. From the regulator's perspective, the objective of suppressing the unwanted speech can be achieved at less cost with a content-based restriction. If we put aside cases where ideas are in competition, the disadvantaged speaker will be indifferent as between a broader or narrower prohibition. Either way, he is prohibited from speaking. From both perspectives, then, a narrower prohibition dominates.

But now suppose that we take content-based prohibitions off the table. In this world, the regulator must choose between no regulation at all and regulation that restricts speakers who are not his target. If his concern is with nonspeech related costs, he might well prefer the broader ban, in which case the disadvantaged speaker is still no better off. But if the regulator is motivated by opposition to the speech, he might prefer no prohibition at all to a prohibition that reaches speech he favors. Forcing a choice between no regulation and content-neutral regulation might move the regulatory regime from the middle to the inner band, thereby benefiting the disadvantaged speaker.

Something like this phenomenon is present in many other cases where state action has a tripartite structure. In many equal protection cases, for example, the hope is that if the government is forced to choose between the outer and inner band, it will select the inner band.<sup>295</sup> Yes, faced with the requirement that they enforce the death penalty in an even-handed fashion, there is a risk that officials will choose to execute more people, but perhaps it is more likely that they will choose to execute fewer people.

Otherwise paradoxical Fourth Amendment doctrine that provides less protection when more people are searched or seized rests on similar assumptions. If the police cannot single out individual motorists to stop on less-

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293. Cf. *Grayned v. City of Rockford*, 408 U.S. 104, 113 (1972) (“[A]ntinnoise ordinance does not permit punishment for the expression of an unpopular point of view, and it contains no broad invitation to subjective or discriminatory enforcement.”).

294. See David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 702–08 (1992).

295. See *supra* note 229.

than-reasonable suspicion, they might instead establish roadblocks and search everyone. But they might also forego the stops altogether.

Finally, this analysis also explains the “prediction” approach to unconstitutional condition cases.<sup>296</sup> Suppose the government offers to grant a development permit if the developer will agree to mitigate environmental damages.<sup>297</sup> If the government would otherwise deny the permit, and if the denial is legally permissible, then it is hard to see how the developer is made worse off by the offer. But suppose we predict that the government would grant the permit if it were barred from making the offer. Then, it is easy to see how its ability to make the offer leaves the developer worse off.

4. *Systemic regulation: Representation reinforcement.* The argument from improper motivation is closely tied to John Hart Ely’s famous defense of what he called “representation reinforcement.”<sup>298</sup> Ely’s core idea was that otherwise vague or ambiguous constitutional language could be given content without the problematic judicial value judgments that *Lochner* critics abhorred. Judges could eschew substantive value specification while reinforcing the procedural values of democratic self-government. Because value judgments should be left to the political process, courts acted appropriately when they policed the process to root out undemocratic defects.<sup>299</sup>

Perhaps Ely’s most important contribution was to elaborate on an older idea that prejudice against “discrete and insular minorities” was at the root of one such defect.<sup>300</sup> When this prejudice prevented minority groups from forming coalitions to protect their interests, they lacked fair representation in the pluralist, political marketplace. Judicial intervention to prevent discrimination against them was therefore not an insistence on contestable values. Instead, it did no more than correct a representational defect.<sup>301</sup>

Many otherwise paradoxical outer band cases can be explained by a theory along these lines. The cases seem paradoxical because constitutional provisions designed to limit government power lose their force when the government exercises power more aggressively. Fourth Amendment searches are less problematic when more people are searched, First Amendment restrictions are less severe when more people are silenced, and the death penalty is more legitimate when more people are killed.

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296. See Kreimer, *supra* note 265, at 1371–74.

297. Cf. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013).

298. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 77–87 (1980) (arguing for a “participation-oriented, representation-reinforcing approach to judicial review”) [hereinafter ELY, *DEMOCRACY AND DISTRUST*]. On the intersection between representation reinforcement and improper motive analysis, see John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *YALE L.J.* 1205 (1970).

299. See ELY, *DEMOCRACY AND DISTRUST*, *supra* note 298, at 103.

300. See *id.* (elaborating on *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

301. *Id.* For well-known critiques, see Bruce A. Ackerman, *Beyond Carolene Products*, 98 *HARV. L. REV.* 713 (1985); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *YALE L.J.* 1063 (1980).



What these outer band cases actually demonstrate is that there is sometimes a tension between concepts of economic efficiency on the one hand and protection of minority rights on the other. From an efficiency perspective, a “misery loves company” approach seems irrational. Why invade more people’s rights when the government can accomplish its objectives by invading the rights of fewer people? But from a representation reinforcement perspective, insisting on broader coverage makes good sense. As Ely expressly recognized, tying the interests of the minority to those of the majority is a good way to reinforce representation.<sup>302</sup> If the government is willing to disadvantage a broader group, we have some assurance that it is acting for a legitimate, public-regarding reason and that the regulation is not simply the product of the systematic devaluation of the welfare of an unpopular minority.

Other outer band cases, not rooted in Ely’s particular ideas about prejudice, are nonetheless explicable in terms of the more general aim of making the political branches democratically accountable. Consider, for example, the prohibition on federal government commandeering of state institutions. The Supreme Court has explicitly justified the prohibition on the ground that it encourages political accountability. When the federal government requires the states to do its dirty work, voters are left confused as to who is responsible for unpopular policies. On this theory an anticommandeering principle reinforces representation by preventing the federal government from evading responsibility for its actions.<sup>303</sup>

Opponents of the ACA can make a similar point about the distinction between an individual mandate enforced by a tax and a government-run health system enforced by a penalty. True, a complete government takeover of healthcare is more invasive of the private sphere, especially when people are penalized and not merely taxed for noncompliance. But for just that reason, it is also more politically transparent and therefore more likely to generate political opposition.<sup>304</sup> On representation reinforcement grounds, one might think that constitutional constraint is less necessary when the government acts more decisively and clearly.

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302. See ELY, *DEMOCRACY AND DISTRUST*, *supra* note 298, at 83.

303. See *New York v. United States*, 505 U.S. 144, 169 (1992) (“[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.”).

304. *Cf. Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 583 n.14 (2012) (opinion of Roberts, C.J.) (responding to Justice Ginsburg’s claim that spending problem with Affordable Care Act would evaporate if Congress ritualistically reenacted Medicaid with the extension by noting that “it would certainly not be that easy. Practical constraints would plainly inhibit, if not preclude, the Federal Government from repealing the existing program and putting every feature of Medicaid on the table for political reconsideration”).

The various explanations and justifications offered above suggest that the outer band is an optical illusion. It is true that the Constitution sometimes seems less constraining when the government does more rather than less. But all of the examples can be traced to a variety of disparate concerns that have nothing to do with the broader problem of state action.

#### IV. EXPLANATIONS AND JUSTIFICATIONS: REINTEGRATION

In this Part, I resist the conclusion that these disparate concerns have nothing to do with the broader problem of state action. It is important to understand, however, that resistance is not the same thing as outright rejection. All constitutional theorizing is reductionist, and the theory that I offer here is no different. Constitutional law is an immensely complex social phenomenon created by an indeterminate mix of doctrinal and textual path dependence; cultural, economic, historical, and political forces; and the random eccentricities of Supreme Court justices and other constitutional actors. No theory—including theories based on representation reinforcement, political benchmarks, systemic-purpose analysis, or protection of dignity that I discuss in the previous Part—can capture all of that.<sup>305</sup>

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305. Theories based on representation reinforcement, political benchmarks, systemic-purpose analysis, or protection of dignity are all prescriptive. They are exercises in justification. See David A. Strauss, *What Is Constitutional Theory?*, 87 CALIF. L. REV. 581, 582 (1999) (arguing that constitutional theory is “an effort to justify a set of prescriptions about how certain controversial constitutional issues should be decided”). On the difficulties of prescriptive constitutional theory, see Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1 (1998). On the necessity for such theories, see LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* 3–6 (2001), arguing that Posner’s supposedly atheoretical pragmatism is itself a theory, and Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 539 (1999) (“[Q]uestions of constitutional theory are not optional; they cannot be put off as merely academic pre-occupations, which have no necessary role in the work of judges and lawyers.”). In contrast, the theory that I offer here is descriptive. See *supra* Introduction. It claims to organize and explain data that otherwise might be puzzling, but it makes no claim that the organization and explanation justifies the outcomes that judges reach.

By advancing such a theory, I necessarily reject David Strauss’s assertion that if a theory does not “say something about how to approach controversial issues . . . there is little point in constructing [it].” Strauss, *supra*, at 584. Explanation can be valuable for its own sake. Moreover, a clear understanding of how a system actually operates can lay the necessary groundwork for developing a prescriptive theory. See *supra* Introduction.

Still, it is wrong to overstate the distinction between prescription and description. See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1192 (1987) (rejecting a sharp distinction between descriptive and normative theories). On the one hand, prescriptive theories are of little value if they are completely disconnected from existing practice. See Strauss, *supra*, at 584 (arguing that a prescriptive theory “cannot contradict any of the points of agreement within the legal culture that are absolutely rock solid”). Moreover, a prescriptive theory may be necessary to interpret and organize data that is conflicting and ambiguous. For a famous, book-length argument along these lines, see RONALD DWORKIN, *LAW’S EMPIRE* (1986). On the other hand, a thick description of a practice may gain prescriptive force for those who are operating within the practice. For an argument

If theorizing is to be defended, its ambitions must be more modest. The claim that I make for the unifying theory I advance in this Article is that it provides an illuminating and aesthetically pleasing way of organizing the raw material. To meet these ends, it must be consistent with most of that material, but it need not be consistent with all of it and need not be the only way that the material can be organized. Nor need it be “true,” in the sense that it explains all the actual motivations of actors who create constitutional law. Instead, it must show us something about the subject that is not otherwise apparent, make plausible connections between areas of the law that otherwise seem disparate, and explain outcomes that otherwise seem mysterious. If a theory does this much, then it pays for its oversimplifications in the coin of elucidation. That is my claim for the theory I advance here.

With these caveats in mind, this Part offers a way of reintegrating the disparate strands of explanation outlined in Part III around themes grounded in the state action dilemma. I have two strategies for doing so. The first involves confession and avoidance. Suppose that, when taken separately, none of the explanations offered in Part III directly relates to the state action problem. I argue that when taken together, they nonetheless tell us something important about that problem. The second strategy resists the premise that the explanations are unrelated to state action. Here, I argue that each of them is connected with the special problems produced by the disappearance of a naturalized boundary between a public and private sphere and the corresponding creation of the mixed middle band of government regulation.

#### A. *Arguments from the Number of Examples*

The first strategy relies in part on the sheer number of examples drawn from a wide variety of different doctrinal domains. Readers may reject some of the specific examples. For example, not everyone will agree with me that the government acts more aggressively when it searches an individual than when it subpoenas him<sup>306</sup> or that executing more white people leaves minority victims of the death penalty no better off.<sup>307</sup> Still, the large number of examples leaves room for error.

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in favor of our constitutional practices in this spirit, see PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982). But my aims are different from those of Bobbitt and Dworkin. Although their ambition is to utilize description in the service of prescription (Bobbitt) or prescription in the service of description (Dworkin), mine is to use description in the service of deconstruction. See generally Louis Michael Seidman, *The Secret History of American Constitutional Skepticism: A Recovery and Preliminary Evaluation*, 17 U. PA. J. CONST. L. 1 (2014).

306. See *supra* Section II.D.

307. Cf. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1534 (2000) (“The Court has struck down laws expressing contemptuous, hostile, and divisive attitudes simply for their expressive content, without requiring any demonstration of adverse causal consequences.”); Jeffrey S. Helmreich, *Putting Down: Expressive Subordination and Equal Protection*, 59 UCLA L. REV. DISCOURSE

Moreover, even if every one of the examples is explained by exogenous text, doctrine, or policy concerns, the number still tells us something important about the conventional state action story. That story makes protection of a private sphere from government intervention central to constitutional law. The dichotomous view equates “no state action” with “no constitutional violation” because state action is what the Constitution protects against.<sup>308</sup> But in many cases, arguments for limited government take a back seat to other concerns like the protection of a particular conception of dignity, the establishment of political benchmarks, the protection of minorities, or the avoidance of various forms of systemic malfunction. The mere existence of so many cases where the Constitution leaves the government less constrained when it acts more intrusively suggests that the standard story is too simple. At a minimum, the cases demonstrate that the Constitution balances multiple concerns, that constraint of government is only one of them, and that that concern is frequently outweighed by others.

### B. *Arguments from the Mixing of Public and Private*

All this assumes that the text, doctrines, and policy concerns are unrelated to the state action problem. But they are not. Here, my second strategy takes hold. In complex and not-always-obvious ways, each of the explanations I advance in the previous Part grows out of the special problem that the mixed, regulatory band has created. Briefly stated, the problem is associated with what classical republicans referred to as “corruption”—the intermixing of the private with the public.<sup>309</sup> On this view, the problem is not just the classical liberal concern that the public will dominate the private, thereby invading human freedom, but also the risk that public institutions will be captured by private interests, thereby undermining the public interest.

The pre–New Deal solution to this problem was to bound separate private and public spheres. Famously, beginning in the late nineteenth century, the Supreme Court protected a private sphere of market and, to some degree, personal freedom.<sup>310</sup> Less famously, it resisted “class legislation” thought to promote the welfare of special interests rather than the public as a whole.<sup>311</sup>

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112, 118 (2012) (“[A] government action can subordinate people because of their race or ethnic community without inflicting any tangible harm.”).

308. See *supra* Introduction, Section I.A.

309. See, e.g., Sunstein, *Interest Groups in American Public Law*, *supra* note 94, at 32 (describing republican fear that if “corruption occurs, groups seeking to use government power to promote their own private ends might come to dominate the political process”).

310. For a defense of *Lochner* that emphasizes the association between market and civil liberties, see BERNSTEIN, *supra* note 76.

311. See HOWARD GILMAN, *THE CONSTITUTION BESIEGED* (1993); cf. Barry Cushman, *Some Varieties and Vicissitudes in Lochnerism*, 85 B.U. L. REV. 881 (2005) (arguing that “neutrality” view of *Lochner* has considerable explanatory power, but that no single theory explains all the cases).

The two concerns were complementary in the sense that class legislation, outside the police power, invaded private rights for no good public reason.<sup>312</sup>

The justificatory rationale that supported this structure depended on the rule-like bright line that separated the public from the private. The point of late nineteenth-century jurisprudence was not that the Constitution demanded a night watchman state or that that it “enact[ed] Mr. Herbert Spencer’s Social Statics.”<sup>313</sup> As many constitutional historians have pointed out, the *Lochner*-era Court often upheld regulatory legislation.<sup>314</sup> Instead, the point was that the two bands were closed categories, separated by a clearly demarcated, judicially enforced, constitutional boundary.<sup>315</sup>

The Court was deeply suspicious of efforts to use analogical reasoning to break down this barrier. Regulation of the hours worked by miners was within the police power, but regulation of the hours worked by bakers was not.<sup>316</sup> When critics of the Court pointed to the arbitrariness of this boundary,<sup>317</sup> they missed the point. All formal distinctions are arbitrary, but that fact alone does not defeat the main argument for formalism. Recognizing a claim that bakers were “like” miners because both professions were dangerous

312. On the other hand, the two concerns might lead to divergent results regarding the existence of a separate outer band of state freedom. Gilman gives the following example: if a statute prohibits employers from docking the wages of an employee for taking time to vote, it might be treated as invalid class legislation that takes from A and gives to B in an unprincipled fashion. Suppose, though, that the legislature instead enacted a statute that closed all commercial entities on election day. From the “class” point of view, the statute might be considered more acceptable because the law is of general applicability, while from the public/private point of view, it might be more objectionable because it constrains more private behavior. See GILMAN, *supra* note 311, at 93–94. This difference, in turn, suggests that the “class” interpretation makes pre-New Deal reasoning more consistent with modern thought.

313. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), *abrogated by* *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

314. See, e.g., David E. Bernstein, *Lochner’s Legacy’s Legacy*, 82 TEX. L. REV. 1, 35 (2003) (noting that with “a few famous exceptions,” the *Lochner* Court upheld “regulatory laws that had real or potential redistributive consequences”).

315. The point is neatly illustrated by Ernst Freund’s monumental treatise on the police power. See ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* (1904). More than some of his judicial contemporaries, Freund was prepared to recognize that “the police power must continue to be elastic, [i.e.,] capable of development.” *Id.* at 3. Yet the very nature of his project reveals a faith in the ability to systematize, classify, and differentiate between purported exercises of the power. With obsessive detail, his eight hundred-page volume purports to accomplish that task.

316. The *Lochner* Court recognized that the nature of mining was “such as to make it reasonable and proper for the State to interfere to prevent the employé[s] [sic] from being constrained by the rules laid down by the proprietors in regard to labor.” 198 U.S. at 54. But analogies to these and other cases where regulation was upheld had to be rejected because “[i]t must . . . be conceded that there is a limit to the valid exercise of the police power by the State.” *Id.* at 56.

317. See, e.g., Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 457–58, 479–81 (1909) (accusing *Lochner* majority of “mechanical” application of rules).

risked the erasure of a clear boundary and, hence, the slow but inevitable expansion of government power into every phase of American life.<sup>318</sup>

The critics of formalism prevailed, at least partially. In a modern setting, this separate spheres approach is therefore anomalous. Of course, constitutional law is still filled with formal rules like the tiers of scrutiny in equal protection cases or the presumption against content-based speech regulation. But few modern judges believe that there is a comprehensive system of judicially enforceable rules that rigidly separates a public and private sphere. The result is that our polity is littered with public-private partnerships,<sup>319</sup> negotiated rulemaking,<sup>320</sup> outsourcing of public functions,<sup>321</sup> semipublic institutions,<sup>322</sup> and soft regulation that influences rather than commands private choice so as to achieve public objectives.<sup>323</sup>

This blurring of the line between public and private is far from unprecedented.<sup>324</sup> Concern about “corruption” of the public by the private originates with the birth of the country.<sup>325</sup> Nineteenth-century American governments “often blended the boundaries between the public and private spheres, grant-

318. As the *Lochner* Court put the point, the analogy had to be resisted because otherwise:

A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's, or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature . . . . No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid . . . .

*Lochner*, 198 U.S. at 59.

319. See, e.g., THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 54 (2d ed. 1979) (noting the “ethical and conceptual mingling of the notion of organized private groups with the notions of local government and self-government” and the fact that “direct interest-group participation in government became synonymous with self-government”).

320. See Negotiated Rulemaking Act, 5 U.S.C. §§ 561–70 (2012). Compare Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997) (criticizing negotiated rulemaking), with Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32 (2000) (defending negotiated rulemaking).

321. See, e.g., Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229 (2003); Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931 (2014).

322. See Lowi, *supra* note 319, at 67–91 (describing mixture of public and private in Departments of Agriculture, Commerce, and Labor).

323. See generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

324. See Minow, *supra* note 321 at 1237 (“During the nineteenth century, federal, state, and local governments used land grants, tax exemptions, and corporate and antitrust law to stimulate private efforts in the service of public aims.”).

325. See, e.g., GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787*, at 54–65 (1998).

ing public powers to private individuals”<sup>326</sup> and opposition to this blending has played an important role in outsider critique throughout our history.<sup>327</sup> It formed the backdrop for fierce political struggles, like the titanic battle over the Second Bank of the United States, which was fought largely because the Bank’s opponents objected to private control over what they thought should be a public institution.<sup>328</sup> Andrew Jackson’s famous veto message inveighed against “all new grants of monopolies and exclusive privileges, against any prostitution of our Government to the advancement of the few at the expense of the many.”<sup>329</sup> Still the very fact that the Bank was so controversial and was ultimately destroyed demonstrates how our political culture has changed. Today, public–private partnerships and cooperation are the norm rather than the exception. Instead of the source of political contestation, they are the way that business is done.<sup>330</sup>

Not surprisingly, this shift has produced a change in constitutional jurisprudence. It remains true that when decisionmaking is perceived to be fully public or fully private, constitutional constraints are not required. These spheres form the outer and inner bands of modern state action rules. But the primary purpose of constitutional law is no longer to enforce supposedly impermeable boundaries between these bands. Instead, much of constitutional law now consists of correcting pathologies associated with the vast middle band. These strategies must at once recognize and legitimate the blending of public and private and ward off the evils once addressed by the insistence on separate spheres. Each of the theories discussed in the previous part is designed to achieve these objectives.

1. *Dignity*. Consider first the version of dignity at stake when the government forces a defendant to incriminate herself, bribes people to abandon their religious convictions, or commandeers state officials. Of course, the Self-Incrimination Clause long predates the New Deal revolution; concern for dignity is hardly a twentieth-century invention. But Fifth Amendment doctrine produced by the intersection of self-incrimination and the regulatory state is a new development.<sup>331</sup> Although there are a few pre–New Deal antecedents of modern unconstitutional condition and anticommandeering

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326. Thomas Goebel, *The Political Economy of American Populism from Jackson to the New Deal*, 11 *STUD. AM. POL. DEV.* 109, 115 (1997).

327. See, e.g., *id.* at 110–12.

328. For an account, see ROBERT V. REMINI, *ANDREW JACKSON 163–98* (1999).

329. See *President Jackson’s Veto Message Regarding the Bank of the United States: July 10, 1832*, YALE L. SCH.: AVALON PROJECT, [http://avalon.law.yale.edu/19th\\_century/ajveto01.asp](http://avalon.law.yale.edu/19th_century/ajveto01.asp) [https://perma.cc/2MZ3-CWY4].

330. Cf. Minow, *supra* note 321, at 1241 (“[D]espite striking continuities, the new privatization marks important departures and generates strong objections.”).

331. For an account of how criminal procedure decisions at the turn of the twentieth century had roots in *Lochner*-like assumptions, see William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 *YALE L.J.* 393, 420–33 (1995).

doctrine,<sup>332</sup> these problems have taken on special importance because of the emergence of the middle band.

There are two interlocking reasons why dignity sometimes replaces freedom as a focus of concern in this setting. First, the traditional role of freedom in justifying the separation between spheres has lost some of its force in the modern era. The problem can be traced to early Legal Realist critiques of the old order. Recall that that order was premised on the existence of two separate spheres with freedom associated with one sphere and coercion with the other. Workers were “free” when government did not regulate their wages and hours, but they were coerced when legislatures intervened by enacting wage and hour legislation.<sup>333</sup> State governments were “free” to select their own policies when the federal government did nothing, but they were coerced by federal preemption.<sup>334</sup> Constitutional law consisted of efforts to prevent incursions by the public sphere of coercion into the private sphere of freedom.

Legal Realists systematically attacked this association. They argued that workers did not freely enter contracts that made them work long hours or prohibited them from joining unions.<sup>335</sup> Instead, these agreements were coerced by market conditions that left workers defenseless against private exploitation.<sup>336</sup> Similarly, when the Supreme Court eventually upheld federal power to enact national social-welfare programs, it did so by rejecting the view that states were acting freely when the federal government failed to act. Just as workers were “coerced” by competition from fellow workers into accepting substandard working conditions, so too, states were coerced by interstate competition into failing to enact measures that they otherwise would have preferred.<sup>337</sup>

Arguments like these provided a key justification for creation of the middle band of regulation. Because freedom was not a necessary feature of the private sphere, the standard arguments for constitutional protections

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332. On anticommandeering, see *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), holding that Congress had exclusive power to assist slave owners in securing the return of state slaves and striking down state regulations of the means by which slaves were delivered up. On unconstitutional conditions, see *Frost & Frost Trucking Co. v. R.R. Commission*, 271 U.S. 583 (1926), invalidating state law that allowed companies to use public highways only if they received certificate certifying that business was for the “public convenience and necessity.”

333. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905), *abrogated by Ferguson v. Skrupa*, 372 U.S. 726 (1963).

334. See, e.g., *United States v. Butler*, 297 U.S. 1 (1936).

335. For classic early realist texts making this point, see, for example, Morris R. Cohen, *Property and Sovereignty*, 13 *CORNELL L.Q.* 8 (1927), and Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, *supra* note 6.

336. See *supra* note 335.

337. See *Steward Mach. Co. v. Davis*, 301 U.S. 548, 588 (1937) (“But if states had been holding back before the passage of the federal law, inaction was not owing, for the most part, to the lack of sympathetic interest. Many held back through alarm lest, in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors.”).



against public encroachment lost much of their force. The result might have been the triumph of socialism in the form of a complete government takeover. The actual result, though, was the emergence of a mixed middle band where private property and market outcomes coexisted with various forms of government regulation.

But it does not follow that there are no pathologies requiring constitutional correction within this band. The second reason for dignity's emergence is that it corresponds to anxieties especially associated with the middle band. Even as older versions of freedom become less plausible, modern worries about dignity become more pressing. Dignity is all that remains when freedom loses its meaning.

If the government had totally displaced private conduct, freedom might have remained a relevant ground for critique, but that is not how the government typically behaves in middle band cases. Instead, it often operates through a complex and opaque system of bribes, nudges, incentives, and conditions.<sup>338</sup> Instead of displacing choice, government corrupts it. The risk is that the modern regime "helps create the sense that power need not be power at all, control need not be control, and government need not be coercive."<sup>339</sup> People use their "freedom" to make choices that they regret or that they do not even recognize as their own. They become alienated from their own commitments and values. So long as constitutional law was conceptualized as creating two entirely separate bands and preventing the infiltration of one by the other, this problem does not arise. It becomes a pressing concern only when freedom no longer does the work of keeping the bands separate and a mixed middle band emerges.

2. *Political benchmarks, systemic purpose, and representation reinforcement.* Just as protection of dignity is part of the substantive architecture of tripartite constitutionalism, the articulation of political benchmarks, concern about systemic purpose, and representation reinforcement are important components of the procedural architecture. As explained below, these modes of constitutional thought all respond to the erosion of naturalized boundaries that produced the middle band in the first place.

Pre-New Deal constitutionalism often assumed that one could deduce principles about the limits of government from uncontroversial postulates about freedom, consent, and individualism. New Deal constitutionalism complicated these assumptions. It opened space for regulatory and redistributive legislation by arguing that the location of the boundary between public and private amounted to a political choice and that labels like "free" and "individual" get attached only after the choice is made on political grounds.

The realization that background state action that constituted markets was politically chosen rather than natural opened up space for discretionary legislative decisions about the appropriate scope of government intervention.

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338. See *supra* notes 319–323 and accompanying text.

339. Lowi, *supra* note 319, at 55.

As outlined in Part II, however, this shift produced a serious dilemma for conventional state action analysis. On the one hand, it seems contradictory for the Court to treat background state action as natural in the judicial sphere even as it recognizes its discretionary character in the legislative sphere. On the other hand, a full embrace of its discretionary character in the judicial sphere would constitutionalize everything by recognizing that all private action results from government choice.<sup>340</sup>

The procedural architecture of tripartite constitutionalism offers a solution to this dilemma. It provides standards that guide and limit judicial intervention without relying on *Lochner*-like assumptions about natural boundaries protecting the private domain. When the Court holds the political branches to benchmarks that those branches themselves have established, it is not insisting that the benchmarks are immutable or constitutionally compelled. For example, if a legislature wants to overcome an equal protection objection, it can change the benchmark by applying the statutory scheme to more people.<sup>341</sup>

Similarly, systemic-purpose review permits the political branches to pursue the policies they prefer and to limit individual freedom when they do so. Individual flag burners and sound truck operators may have fewer speech opportunities when the government regulates public fires and noise, but they have no valid constitutional claim. The Court can respect the discretionary political nature of regulatory decisions while still maintaining a role for itself if it polices the decisions only for unconstitutional purpose.

Finally, representation reinforcement promises a role for the courts that legitimates rather than undermines discretionary regulatory decisions. In a world where there are natural limits on government power, the legitimacy of legislative decisions rests on whether the decisions accurately track those limits. But this is not our world. In the absence of an impermeable, naturalized boundary between public and private, we require a different source of legitimation. Ely saw that the democratic character of political decisions could do the trick while also providing a new role for judges.<sup>342</sup> Just because the legislature in our world has legitimate authority to decide when and where to regulate, the courts must be vigilant to ensure that the decisions are made democratically.

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I hope these observations are sufficient to demonstrate that the procedural and substantive techniques I have outlined above are closely tied to the emergence of middle band constitutionalism. To complete the argument, one final point must be emphasized: each of these techniques necessarily means that sometimes the government will be less constitutionally con-

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340. See *supra* Section I.B.

341. See *supra* Section II.E.

342. See *supra* note 298.

strained when it acts more aggressively. A preference for dignity over freedom *means* that some policies that give people more choices are more constitutionally vulnerable. Politically alterable benchmarks *mean* that the government can avoid constitutional constraints by changing the benchmark to restrict the freedoms of more people. Concern about systemic purpose *means* that individual rights claims take a back seat to cleansing the political process. Representation reinforcement *means* that government intervention is less problematic when majorities as well as minorities are constrained by it.

To generalize the point: conventional dichotomous state action analysis fails to take account of the ways in which expansion of government power can free the government from constitutional constraints. That blindness, in turn, stems from a failure to fully comprehend the emergence of a middle, mixed band of government regulation and the pathologies that the middle band is thought to create.

#### CONCLUSION

When asked about the political philosophy that underlay the new Tennessee Valley Authority, Franklin Roosevelt replied that it was “neither fish nor fowl.”<sup>343</sup> His quip characterizes the New Deal as a whole and the theoretical problems it left in its wake. Neither socialist nor capitalist, the New Deal produced a mixed economy with pervasive entanglement of public and private. With this new order came well-known worries about private, special-interest capture of the public and overbearing public domination of the private.

The ambition of New Deal constitutionalism is to domesticate the inevitable problems that result from this messy, atheoretical compromise. Domains that are perceived to be fully public or fully private do not present these problems—or at least the problems are not so obvious. New Deal constitutionalism finds its home in the middle band that the New Deal itself created, where constitutionalism’s constraining, legitimating, and sorting functions are most required.

In this conclusion, I offer some brief thoughts about whether this theoretical structure is stable. There are two kinds of risks. The first risk was the subject of Part II: survival of private rights in a publicly constituted sphere rests on a myth that New Deal constitutionalism itself destroyed. Because the boundary between public and private inevitably results from public decisions, the state can be seen as responsible for all private decisions. New Deal thinking might therefore lead to the constitutionalization of the entire social sphere.<sup>344</sup> The risk, in other words, is that the middle band will subsume the

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343. H.W. BRANDS, *TRAITOR TO HIS CLASS: THE PRIVILEGED LIFE AND RADICAL PRESIDENCY OF FRANKLIN DELANO ROOSEVELT* 338 (2008).

344. *See supra* Section I.B.

inner band and leave no room for a private realm free of constitutional discipline. This is the problem that the conventional modern state action doctrine was meant to solve. It attempted to preserve a limit on judicial expansion into the private sphere even as the barriers to legislative expansion eroded. By now, the contradictions, incoherence, and ineffectiveness of this solution are well understood.<sup>345</sup>

But there is also a second risk that has received less attention. Once we realize that there is also an outer band free of constitutional constraint, then the publicly constructed boundary between the outer and middle bands is also vulnerable. We need to worry that outer band thinking will result in the deconstitutionalization of the entire social sphere.

This second risk also derives from the perception that the dividing line between public and private is constructed, political, and contingent. Naturalized, nondiscretionary boundaries seem permanent and impermeable. Constructed boundaries are delicate and porous. If the sovereign can escape constitutional obligation in one domain, then why not in another? Sovereign powers may be separated between the political and judicial branches, but, when push comes to shove, it will still be a public entity that chooses whether to enforce constitutional limits against another public entity. The judiciary and the political branches are both public, and, if they form an alliance, there is nothing stopping them from marching around the phony Maginot Line that defends the middle band from outer band incursions.

There is plenty of evidence that push sometimes does come to shove. In addition to the outer band cases discussed above, we have legal rules like sovereign and qualified immunity,<sup>346</sup> the state secret privilege,<sup>347</sup> the political-question doctrine,<sup>348</sup> and justiciability requirements<sup>349</sup> that shield the sovereign from constitutional criticism when the need is great enough.<sup>350</sup>

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345. See *supra* Part I.

346. See, e.g., *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017) (plurality opinion in part) (qualified immunity); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (sovereign immunity). For critiques, see William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018), on qualified immunity; and Pamela S. Karlan, Lecture, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 188–95, on sovereign immunity.

347. For the humble origins of the privilege, see *United States v. Reynolds*, 345 U.S. 1 (1953). For an account of its metastatic spread, see Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77 (2010).

348. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality opinion); *Nixon v. United States*, 506 U.S. 224 (1993). For an analysis, see Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002), and Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441 (2004).

349. See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984) (standing); *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (mootness); *Laird v. Tatum*, 405 U.S. 1 (1972) (ripeness).

350. See generally Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1 (2015) (arguing that limiting of constitutional remedies is associated with judicial independence); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*,

And beyond the legal rules, we have the irrepressible possibility of sheer constitutional disobedience. We have Franklin Roosevelt's threat in his first inaugural address to employ extraordinary measures<sup>351</sup> and his internment of thousands of American citizens of Japanese descent.<sup>352</sup> We have the imprisonment of the leaders of the Communist party during the Red Scare<sup>353</sup> and the post-9/11 torture and warrantless surveillance programs.<sup>354</sup> In short, our constitutional system that protects individuals from government is delicate and subject to both legal and sociopolitical pressures.

It would be hyperbolic to suggest that these imperialistic invasions staged from outer band territory have conquered the middle band. There are plenty of instances where the government permits a mixed system to function and where constitutional rules govern the interaction. But I hope I have said enough to suggest that it is not constitutional theory that keeps the middle band intact. Once the idea of naturalized public and private domains has been destroyed, there is no reason *in theory* why the outer band cannot take over the middle or the middle take over the inner band. The contradictions inherent in New Deal constitutionalism are too blatant and obvious for it to do the work required of it.

So why does the middle band survive? After noting that the Tennessee Valley authority was "neither fish nor fowl," Franklin Roosevelt went on to observe that "whatever it is, it will taste awfully good to the people of the Tennessee Valley."<sup>355</sup> Roosevelt was famously pragmatic and resistant to theoretical abstraction.<sup>356</sup> As his comment suggests, he understood the power of material prosperity, shared values, and a sense of common purpose to overcome theoretical contradiction. That understanding, in turn, reflects an important strain in American Progressive thought articulated most forcefully

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99 COLUM. L. REV. 857 (1999) (arguing that the distinction between substantive rights and remedies is artificial).

351. See President Franklin Delano Roosevelt, First Inaugural Address (Mar. 4, 1933), in *Franklin Delano Roosevelt: First Inaugural Address*, AMERICAN RHETORIC (Feb. 25, 2017), <http://www.americanrhetoric.com/speeches/fdrfirstinaugural.html> [<https://perma.cc/3BH4-74YF>]. ("But, in the event that the Congress shall fail to take one of these two courses, in the event that the national emergency is still critical, I shall not evade the clear course of duty that will then confront me.").

352. See *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding exclusion order), *abrogated by Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

353. For an account, see GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 393–426 (2004).

354. For a book-length critique, see FREDERICK A.O. SCHWARZ JR. & AZIZ Z. HUQ, *UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR* (2007).

355. BRANDS, *supra* note 343, at 338.

356. See, e.g., JAMES MACGREGOR BURNS, *ROOSEVELT: THE LION AND THE FOX* 156 (1956) ("Everything conspired in 1932 to make Roosevelt a pragmatist, an opportunist, an experimenter.").

ly in earlier years by figures like John Dewey<sup>357</sup> and Oliver Wendell Holmes.<sup>358</sup> As Holmes put it: “The life of the law has not been logic: it has been experience.”<sup>359</sup>

For now, then, the contradictions in constitutional theory hardly matter. The contradictions provide tools for libertarian scholars on the right and critical scholars on the left who want to dismantle the current constitutional order. But for ordinary Americans, our messy mixed system surrounded by ill-defined inner and outer bands “taste[s] awfully good.”

Still, it is hard to escape the sense that the culture of compromise, tolerance, and restraint that has made the system work is beginning to fray and that the material prosperity that promotes that culture is slipping away. Will the middle band hold in this environment? Perhaps it will, but one thing is certain: no one should expect middle band constitutional theory to save us from the coming attack.

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357. On Dewey's relativist theory of democracy, see EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* 200–07 (1973).

358. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Chicago, Am. Bar Ass'n 2009) (1881).

359. *Id.*