Epiphenomenal or Constructive?: The State Action Doctrine(s) and the Discursive Properties of Institutions

Allen C. Sumrall[*]

Critiques of the state action doctrine typically take two forms. Critics either point out that the doctrine itself is muddled, confused, and inconsistent, or argue, for either historical or doctrinal reasons, that the doctrine is not a necessary part of the Constitution. Both the state action doctrine and its critics, however, overlook the role of the American state in the construction of the identity categories typically at issue. An equal protection analysis cannot proceed, for example, without a finding of state action. However, the calculus does not account for how categories like race, gender, and sexuality have been in part constructed by the state. In short, both the state action doctrine and its critics take an impermissibly short time horizon. This is a mistake. To make this case, I first explain the state action doctrine itself and some of its flaws typically pointed to by critics, including the various iterations of "state neglect" or "state permissions" doctrines. Next, I draw from the literature on the development of the American state and point to several examples where the state has helped to shape and define identity categories in time. I argue that attuning to the discursive properties of state institutions uncovers a new critique of both the state action doctrine and its proposed alternatives. The analysis reveals that bringing these discursive properties in at the ground level opens up new areas of study of both the development and use of legal doctrine and the role ideas and discourse play in the development of American politics.

Introduction

The state action doctrine is one of several ways the Supreme Court has limited the scope of the Fourteenth Amendment. In the *Civil Rights Cases*[1] in 1883, the Court decided that the reach of the Fourteenth Amendment limited only "state action," rather than private conduct. The doctrine relies heavily on the state/nonstate or public/private distinction. As the argument goes, truly private actors (whoever they may be)—the ones who are not providing, or implicated in, any kind of public function—are not restrained

* Articles Editor, Volume 98, *Texas Law Review*; M.A., Government, University of Texas at Austin; Ph.D. Student, Department of Government, University of Texas at Austin; J.D. Candidate, University of Texas School of Law. Special thanks to Christina Bambrick, who provided valuable assistance at several stages of this project. Thanks as well go to Larry Sager, John Deigh, Jeffrey Tulis, H.W. Perry, Gary Jacobsohn, Bartholomew Sparrow, Stephen Engel, David Cummiskey, Cary Franklin, Thomas Bell, Tara Ginanne, Charles Zug, Kyle Shen, and Christine Bird. I also need to thank all the members of the *Texas Law Review*, who provided critical editing assistance and continue to provide valuable friendship. Any errors are mine.

1. 109 U.S. 3 (1883).

by the Fourteenth Amendment. But the public/private or state/nonstate distinction is notoriously hazy, and the Supreme Court has done little to make it clearer. As a result, the state action doctrine has received substantial criticism. This criticism has broadly taken two forms. On the one hand, critics point out that this leads to normatively bad outcomes—namely, private actors being allowed to discriminate on the basis of race, sex, gender, or another characteristic, mutable or immutable. It is in this realm that the Court's most confusing state action cases have fallen—*Shelley v. Kraemer*,[2] for example. On the other hand, scholars have pointed out that the state action doctrine is not a logical outgrowth of the Reconstruction Amendments. There are, they argue, good historical and legal reasons for eschewing the doctrine altogether in favor of a "state neglect" or "state permissions" doctrine.[3] For these scholars, the Reconstruction Amendments leave room for state intervention between private actors in certain cases.

Both the state action doctrine and the proposed state neglect or state permissions doctrine are concerned with drawing the line between when it is appropriate for the state to intervene to protect victims of discrimination and when it is not. Under the state action doctrine (all exceptions notwithstanding), it is only appropriate when the state was the one discriminating. Under the state neglect or permissions doctrine, though there are several variants, it is when the state has refused to intervene to stop an act of discrimination by a private actor. The state neglect doctrine and its variants, therefore, posit a greater scope of state intervention than does the state action doctrine. To be sure, though, even under the state neglect doctrine there would still be some situations in which state intervention in a private interaction is not appropriate.

The problem with this picture, though, is that its justification for refusing to intervene is based on an incomplete calculus. It sees the cost of obliterating any private sphere because of the watchful eyes of the state as too high to justify the benefit of eradicating discrimination in the private sphere. Though the state neglect doctrine and its variants treat more things as either state action (neglect counts as action) or as triggering a duty of state intervention (the state cannot grant permission for a private actor to discriminate), it still takes an unduly narrow view of the state's behavior. Both the state action and state neglect doctrines treat state intervention and

2. 334 U.S. 1 (1948).

3. I use these terms interchangeably unless specified. *See, e.g.*, PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION (2011); Pamela Brandwein, *A Lost Jurisprudence of the Reconstruction Amendments*, 41 J. SUP. CT. HIST. 329 (2016); Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387 (2003); Isaac Saidel-Goley & Joseph William Singer, *Things Invisible to See: State Action & Private Property*, 5 TEX. A&M L. REV. 439 (2018); Michael L. Wells, *Race-Conscious Student Assignment Plans After* Parents Involved*: Bringing State Action Principles to Bear on the De Jure/De Facto Distinction*, 112 PENN ST. L. REV. 1023 (2008); Lawrence Sager & Nelson Tebbe, Discriminatory Permissions and Structural Injustice 2–4 (2019) (unpublished manuscript) (on file with author).

private discrimination as separate and distinct. They treat the creation and maintenance of the groups who are often the target of "structural injustice" as natural or organic. This is a mistake. It is important to attend to the ways these groups have been constructed and made through state policy. Doing so, I argue, reveals that the state/nonstate, public/private, and state action, permission, or neglect dichotomies are premised on giving the state a pass for its hand in the formation of identity categories. In this Note, therefore, I argue that both the state action and so-called state permissions doctrines rest on an incomplete calculus. They both treat law and other actions and regulations by the state as epiphenomenal.[4] Though they are interested in the

4. The use of "epiphenomenal" here refers to its treatment in the political science literature on institutional change. A comprehensive discussion of the literature on institutional change could fill several libraries and is, partially as a result, beyond the scope of this Note. However, at the risk of doing injustice to the literature, a (brief) explanation is warranted. Historically, most explanations for institutional change, especially rational-choice institutionalism—though also some of the "new institutionalist" work (including sociological, historical, and discursive-institutionalist accounts)—relied heavily on assumptions about how rules and incentives structure behavior and channel preferences into formal institutional change. For example, many political scientists interested in institutions and institutional change were concerned with equilibria, or at least what the lack of frequent equilibria can tell us about how institutions affect politics. For paradigmatic examples of this treatment of institutions, see JOHN ALDRICH, WHY PARTIES?: A SECOND LOOK (1995); R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION (1990); KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING (1998); and William H. Riker, *Implications from the Disequilibrium of Majority Rule for the Study of Institutions*, 74 AM. POL. SCI. REV. 432 (1980). For an example of this older approach from the field of public law, see MARTIN SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE (1964). More recent work, however, has observed that these existing assumptions may not hold up. They downplayed the possibility that institutions often change in subtle ways—ways that the search for channeled incentives overlooks. Institutions are constantly changing, often in unanticipated ways. Decisions, rules, policies, actions, and other institutional outputs may explain later change, both institutional and noninstitutional. Political scientists who produced work making up the wave of new institutionalist approaches noticed this and sought to provide a theoretical foundation to support future work. *E.g.*, Peter A. Hall & Rosemary C. R. Taylor, *Political Science and the Three New Institutionalisms*, 44 POL. STUD. 936 (1996); Ellen M. Immergut, *The Theoretical Core of the New Institutionalism*, 26 POL. & SOC'Y 5 (1998); James G. March & Johan P. Olsen, *The New Institutionalism: Organizational Factors in Political Life*, 78 AM. POL. SCI. REV. 734 (1984).

As Rogers Smith wrote in his groundbreaking work that explored the relevance of the new institutionalist work for the field of public law, this approach "preserve[s] the possibility that the actions themselves may not prove epiphenomenal to any combination of background factors, and that they may have unexpected significance for later events." Rogers M. Smith, *Political Jurisprudence, The "New Institutionalism," and the Future of Public Law*, 82 AM. POL. SCI. REV. 89, 103 (1988). That is, actions and institutional outputs themselves may not be simply and exclusively the byproduct of the institution or other social forces. The actions and decisions of an institutional actor may have a reciprocal impact on the institution itself, even if the actor did not intend it. Recently, however, political scientists have discovered that a similar dynamic may exist with ideas. As Robert Lieberman has observed, even many of the "new institutionalist" approaches treated ideas as "epiphenomenal, simply consequences of material (or structural or institutional) arrangements." Robert C. Lieberman, *Ideas, Institutions, and Political Order: Explaining Political Change*, 96 AM. POL. SCI. REV. 697, 699 (2002). As Lieberman pointed out, the challenge for scholars of institutional and political change was to "find a way to treat ideas as analytically consequential in accounts of political action, policy development, and institutional change, and to do so without falling into the characteristic traps," which include treating ideas as exogenous or parallel to institutional change. *Id.* My use of the word "epiphenomenal" is similar. In a way, I argue

ways the state has created injustice or done violence to members of specified groups, they implicitly treat those groups as organic. They fail to see that law and regulation have had and continue to have a reciprocal, discursive impact on the people they regulate. They ignore the ideological and discursive properties of state institutions. It is imperative to understand the role the American state has played in the creation, molding, and definition of identity groups.

This Note proceeds in four Parts. Part I explains the state action doctrine in more detail by providing some background on its origins and development. It also explains some of the confusion that surrounds the doctrine. Part II dives into the various iterations of what critics have suggested courts use to replace the state action doctrine—state neglect or permissions. It suggests that though it would leave greater room for the state's invocation of the Thirteenth and Fourteenth Amendments, it leaves much to be desired. Part III explains why the observation that law and state policy are not just epiphenomenal, but also have a reciprocal, constitutive impact on the people they regulate, is essential to understanding the trouble with both the state action and state permissions doctrines. It makes the traditional state action analysis look disingenuous at best and makes the state permissions doctrine look passive or even complicit. Part IV concludes by explaining my contributions to both the legal literature on the state action doctrine and the political science literature on the relevance of ideas and discourse to institutional change.

I. The Conventional View: The State Action Doctrine and the Public/Private Distinction

The state action doctrine is a complete mess. The doctrine holds that most constitutional provisions apply only to actions taken by the government, rather than by private actors. The Thirteenth Amendment is a notable exception.[5] Private actors, therefore, are free to do some things that the government is not. The problem, though, is the line between state action and nonstate action is often nearly impossible to spot. The Supreme Court has

that the existing doctrinal approaches to the state action and state neglect doctrines make the same error as the traditional approaches to the study of institutions. In the same way that Shapiro treated law as simply a product of social forces and failed to explore the possibility that it may have an impact on the institution that produced it or other institutions, I argue in this Note that courts and scholarly approaches to state action and state neglect have treated law and state behavior as simply a product of social forces—that is, as epiphenomenal. Law and state behavior has not just material consequences, but ideational and discursive ones. *See* discussion *infra* Part III. For more examples of research that explores the relevance of ideas for institutional and political change, see *infra* note 148 and accompanying text.

5. *See The Civil Rights Cases*, 109 U.S. at 20 (finding that the Thirteenth Amendment is "not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States").

done little to clean up the doctrine. In *Shelley v. Kraemer*,[6] the Court held the state action doctrine precluded judicial enforcement of a racially restrictive covenant, even though the restrictive covenant at issue only limited relations between private actors. In *Marsh v. Alabama*,[7] the Court found that a private company had violated the First Amendment (something only state actors can do under the state action doctrine) by arresting (with privately owned police forces) a Jehovah's Witness for passing out literature. The crucial fact was that the private company owned and ran the entire town, thereby serving a public function. Similarly, in *Terry v. Adams*,[8] the Court found that a private group could not exclude nonwhite voters from their straw-poll primary because in practice it determined the outcome of the Democratic Party primary and therefore served a public function. In *DeShaney v. Winnebago County*,[9] the Court held that the decision by several employees of a county department of social services to not remove a child from the custody of his violently abusive father did not amount to a violation of substantive due process because there was no state action. The decision to not intervene was, the Court held, not a state action.[10]

Legal philosopher Brookes Brown, in a nod to Charles Black, calls the state action doctrine a "disaster zone."[11] Given the conceptual muddle that even *Shelley*, *Marsh*, *Terry*, and *DeShaney* present, Brown's characterization is accurate. For Brown, the problems with the doctrine stem from the fact that "the concept of the state is itself incoherent."[12] It is not that there is no state at all, but that the Court has used multiple, inconsistent justifications to find "state action." Brown identifies the "entanglement test," the "public function test," and the "traditional state actor" test.[13] Charles Black suggested—prior, it is worth noting, to the *DeShaney* decision—that the state action doctrine is "little more than a name for a contention that has failed to make any lasting place for itself as a decisional ground, and that has failed of intellectual clarification."[14] A significant portion of the confusion can be attributed to the distinction between public and private spheres. While many political theorists, particularly early proponents of the social contract (and their progeny), take the separation as given, some legal theorists find the

6. 334 U.S. 1 (1948).

7. 326 U.S. 501 (1946).

8. 345 U.S. 461 (1953).

9. 489 U.S. 189 (1989).

10. *Id.* at 191.

11. Brookes Brown, *A Conceptual Disaster Zone Indeed: The Incoherence of the State and the Need for State Action Doctrine(s)*, 75 MD. L. REV. 328, 328 (2015); *see also* Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967) (pointing out that the state action doctrine is a "disaster area").

12. Brown, *supra* note 11.

13. *Id.* at 333–37.

14. Black, *supra* note 11, at 96.

distinction incoherent. The distinction may be somewhat clear in discussions of the social contract, but for courts it often is not.

Mark Tushnet and Cass Sunstein have each argued that the existence of any private sphere depends upon state acknowledgment that it should exist. Tushnet argues that a private act is only private because a public authority decided it should be so.[15] A decision not to regulate is a decision nonetheless. Sunstein argues that "state action is always present" because the state always has the ability to alter "background rules."[16] Similarly, Tushnet and Louis Seidman argue that a "moment's reflection makes clear that all private action ultimately rests on the state's willingness to enforce the civil and criminal rules that facilitate that action."[17] In a way, this is a point about state power. A modern state with high extractive capacity could always choose to alter the conditions that allowed private action to stay private.

Others have made similar versions of this argument. Drawing on ideas from property law, Isaac Saidel-Goley and Joseph William Singer propose reinterpreting the state action doctrine so that it is more capacious.[18] The existence of private property, they note, depends on the state's recognition of it. Because the state plays a role in regulating relationships, they would find state action "at least when (1) someone is arrested or prosecuted; (2) a court issues an order; (3) the government enforces or encourages a custom; or (4) the government makes an allocative decision."[19] But even this approach to the state action doctrine does not go far enough for Saidel-Goley and Singer. To actually ensure compliance with the Equal Protection Clause, "the analysis must be refocused on a more progressive conception of equal protection informed by contemporary understandings of equality and dignity foundational to a free and democratic society."[20] What matters, they argue, is not whether there was state action, but whether the state's laws "*provide for equal treatment* in the spheres of social life to which a free and democratic society guarantees access, liberty, and dignity."[21]

As these critics have implied, the state action doctrine's reliance on a clean distinction between state and nonstate behavior is unwise. Yet, the doctrine purports to do so nevertheless, despite the series of cases—*Shelley*, *Marsh*, *Terry*, and *DeShaney*—that muddies the waters. The doctrine still "attempts to demarcate the public/private distinction upon which it was

15. *See* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 172 (2008) ("One cannot *balance* a preexisting private property interest against some constitutional interest when the question at hand is, What is the proper scope of the background rules in light of constitutional norms?").

16. Cass R. Sunstein, *State Action Is Always Present*, 3 CHI. J. INT'L L. 465, 465 (2002).

17. LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 61 (1996).

18. Saidel-Goley & Singer, *supra* note 3.

19. *Id.* at 476.

20. *Id.* at 485.

21. *Id.* at 503.

originally premised."[22] It still relies on a sharp distinction between circumstances—discrimination or unequal treatment or outcomes, for example—that the state caused and those it did not. Chief Justice Roberts's opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*[23] illustrates this well. At issue in *Parents Involved* was a school-desegregation plan implemented by Seattle Public Schools, a district that had never operated legally segregated schools or been subject to court-ordered desegregation.[24] Yet, when certain public schools were oversubscribed, the district used the race of a student as the second tiebreaker—after whether the student had a sibling enrolled at the same school.[25]

Applying strict scrutiny while writing for the Court, Roberts explained that there are two relevant interests the Court has found to be "compelling."[26] The first is the "compelling interest of remedying the effects of past intentional discrimination," and the second is the "interest in diversity in higher education upheld in *Grutter* [*v. Bollinger*] . . . ."[27] The Court held that the district's plan did not serve a compelling interest[28] and was not narrowly tailored.[29] There was no compelling interest because there was no evidence of prior de jure discrimination. As Michael Wells argues, the de jure–de facto discrimination distinction was essential for the Court's analysis.[30] Roberts comes close to invoking the language explicitly when he explains that the "distinction between segregation by state action and racial imbalance caused by other factors has been central to our jurisprudence in this area for generations."[31] Justice Kennedy in his concurring opinion, however, goes further. Kennedy explains that prior cases relied on the "fundamental difference between those school districts that had engaged in *de jure* segregation and those whose segregation was the result of other factors."[32]

According to Michael Wells, the Court's version of the de jure–de facto framework rests on two distinct rationales.[33] The first comes from the "discriminatory purpose" framework in the line of disparate-impact cases, notably *Washington v. Davis*.[34] The second can be understood as a distance, attenuation, or chain-of-causality rationale. Here, Wells points to *Keyes v.*

22. *Developments in the Law—State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1251 (2010).

23. 551 U.S. 701 (2007).

24. *Id.* at 712.

25. *Id.* at 711–12.

26. *Id.* at 720.

27. *Id.* at 720, 722 (citing Grutter v. Bollinger, 509 U.S. 306, 328 (2003)).

28. *Id.* at 720–21.

29. *Id.* at 726.

30. Wells, *supra* note 3, at 1030.

31. *Parents Involved*, 551 U.S. at 736.

32. *Id.* at 794 (Kennedy, J., concurring in part).

33. Wells, *supra* note 3, at 1031.

34. 426 U.S. 229 (1976); Wells, *supra* note 3, at 1031.

School District No. 1.[35] At some point, the *Keyes* Court explained, the "relationship between past segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of de jure segregation warranting judicial intervention."[36] The question for the Court in *Parents Involved* can, according to Wells, be understood like proximate cause in a negligence claim.[37] How direct must the link be in order for the Court to find de jure segregation, as opposed to segregation that is simply the product of "private choices"?[38] So, segregation or discrimination may still count as de facto if a court can find no discriminatory purpose or if it decides the chain of causation is too attenuated. That is, if a court finds no de jure segregation, then there is no state action and thus nothing for a court to remedy.

The problem, though, is that this inquiry rests on an incomplete calculus. It fails to account for the effects of the state on the definition and meaning of the categories at issue—race, for example. In other words, it does not account for the power of discourse and ideology. This will be addressed in much greater detail in Part III. First, though, an exposition of another criticism of the state action doctrine is warranted.

II. The Alternative: State Neglect, Permissions, and Horizontal Rights

The state action doctrine does not follow directly from the Fourteenth and Fifteenth Amendments. Though it may correctly apply more squarely to other parts of the Constitution, many scholars have argued that there is room in the Fourteenth Amendment for a retooled approach to the federal government's role in protecting private actors from discrimination. Though they have various names, iterations, and justifications, I refer to them broadly here as the state neglect or state permissions doctrines. In a way, this (proposed—to be sure, it has not been adopted by the Court) doctrine tries to move away from the wooden public/private distinction. Instead, it offers room for state intervention in private affairs under certain circumstances. However, as I argue in the next Part, it too suffers from the same fault as the state action doctrine. Though it would offer more avenues for the state to quash discrimination or remedy structural injustice, it fails to account for how the categories have been in part constructed by the state through time.

The conventional wisdom is that in 1883, the Supreme Court in the *Civil Rights Cases* foreclosed one significant aspect of the Fourteenth Amendment's reach. Writing for the Court, Justice Bradley declared the first section of the Fourteenth Amendment "is prohibitory in its character, and prohibitory upon the States."[39] On the next page, he writes that "[i]t is State

35. 413 U.S. 189 (1973); Wells, *supra* note 3, at 1032.

36. *Keyes*, 413 U.S. at 211.

37. Wells, *supra* note 3, at 1033.

38. Freeman v. Pitts, 503 U.S. 467, 495 (1992).

39. The Civil Rights Cases, 109 U.S. 3, 10 (1883).

action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment."[40] The Fourteenth Amendment does "not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to."[41] Tying the state action doctrine to the judicial abandonment of blacks during Reconstruction, therefore, is tempting. It looks even more tempting when we recall the Court's decision in *United States v. Cruikshank*[42] to overturn part of the Enforcement Act of 1870, thus precluding punishment for Klansmen responsible for the Colfax Massacre.[43] Further, historian C. Vann Woodward's influential account of the "Compromise of 1877" makes this conventional story particularly appealing.[44] According to political scientist Pamela Brandwein, Vann Woodward's account makes it appear as if the Court's narrow construction of state action suggests they were "consolidating the political abandonment of blacks by the Republican Party."[45]

The story of the Court's abandonment of blacks and the Reconstruction project more broadly, however, may not be correct. In fact, according to Brandwein, the abandonment of blacks and of Reconstruction may have been more the result of failures of the Legislative and Executive branches than of the Judiciary.[46] The scope of the state action doctrine is a necessary part of this story. Brandwein's reading of the *Civil Rights Cases* is markedly different from the conventional view. She shows that the Waite Court "did not handcuff congressional power to protect blacks to the extent imagined by scholars."[47] Brandwein shows that Bradley's opinion in the *Civil Rights Cases* employed a more complex distinction between state actors and private actors than scholars typically believe. Essential to Brandwein's discovery is the Court's "explicit approval"[48] of the Civil Rights Act of 1866.[49] Bradley's discussion of the Civil Rights Act of 1866 elucidates the distinction between

40. *Id.* at 11.

41. *Id.*

42. 92 U.S. 542 (1876).

43. *Id.* at 566.

44. C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION (Oxford University Press 1991) (1951) (arguing, among other things, that the failure of Reconstruction was due in large part to the political deal struck between Democrats and Republicans to end the dispute over the 1876 Presidential election, which resulted in Republicans maintaining control of the White House in exchange for pulling federal troops out of the South).

45. Brandwein, *supra* note 3, at 330.

46. BRANDWEIN, *supra* note 3.

47. Pamela Brandwein, *A Judicial Abandonment of Blacks? Rethinking the "State Action" Cases of the Waite Court*, 41 LAW & SOC'Y REV. 343, 344–45 (2007).

48. *Id.* at 352.

49. Civil Rights Act of 1866, Pub. L. No. 39-31, 14 Stat. 27 (1866).

state action and private conduct and provides insight into what Bradley had in mind. Section 2 of the Act states:

> *And be it further enacted*, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act [as outlined in Section 1 of the Act] . . . shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.[50]

In his opinion, Justice Bradley called this section "corrective in its character."[51] It was "intended to counteract and furnish redress against State laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified."[52] For Bradley, this Act "retains the reference to State laws, by making the penalty apply only to those who should subject parties to a deprivation of their rights under color of any statute, ordinance, custom, etc., of any State or Territory . . . ."[53] As Brandwein explains, the essential phrase here is "under color of law . . . or custom."[54] Though today the phrase "color of law" is interpreted narrowly,[55] that interpretation is at odds with Justice Bradley's view. According to Brandwein, Bradley's opinion suggests that "certain race-based wrongs committed by private individuals gain the color of law or custom if state authorities do not punish them."[56] Here is where we can see an opening for the state neglect doctrine. As Brandwein shows in her detailed analysis of the opinion, for Justice Bradley, the phrase "under color of" is "clearly associated with state action of some kind."[57] Importantly, however, Bradley's opinion suggests that "a state can deny rights by shielding, excusing, or protecting individual, race-based wrongs."[58] In other words, Justice Bradley does not draw the sharp distinction between state and private action that contemporary accounts of the state action doctrine typically assume. Bradley's language "does not require the active participation of state agents in order for that wrongdoing to have the color of law."[59] In a way, therefore, state neglect can count as state action for the purposes of the Fourteenth Amendment.

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50. *Id.* § 2, 14 Stat. at 27.

51. The Civil Rights Cases, 109 U.S. 3, 16 (1883).

52. *Id.*

53. *Id.* at 16–17.

54. Brandwein, *supra* note 47, at 352.

55. *See, e.g.*, United States v. Price, 383 U.S. 787 (1966); Monroe v. Pape, 365 U.S. 167 (1961); Screws v. United States, 325 U.S. 91 (1945).

56. Brandwein, *supra* note 47, at 353.

57. *Id.* at 356.

58. *Id.*

59. *Id.*

The contemporary story about the state action doctrine, it seems, is incorrect. While Brandwein's discovery has ramifications for understandings of the failure of Reconstruction and the abandonment of federal protection of black Americans by Congress and the Executive[60] in the late-nineteenth century, others have described a similar doctrine from a different standpoint. Stephen Gardbaum, for example, frames the issue as one of horizontal rights versus vertical rights.[61] Gardbaum, a comparativist, points out the distinction between the U.S. Constitution and the constitutions of several other countries, namely Ireland, Canada, Germany, South Africa, and the European Union.[62] While the United States, with the help of the state action doctrine, only applies constitutional rights to the (vertical) relationships between individuals and the government, these other countries also at times apply them to the (horizontal) relationships between private individuals.[63]

Gardbaum's argument, unlike Brandwein's, is not historical. Gardbaum does not claim to have uncovered an early, forgotten jurisprudential hole. Rather, Gardbaum argues that the traditional state action inquiry is misguided. To do so, he compares the United States's rigid state action inquiry process with the often-squishier inquiry in other countries. For Gardbaum, the "threshold search for state action in order to trigger a constitutional claim is entirely unwarranted and unnecessary."[64] In comparative constitutional law, the scope of application of various constitutional rights is often determined by appealing to a series of questions: "(1) Are individuals as well as government actors bound by constitutional rights? (2) Do constitutional rights apply to private law or common law? (3) Are courts bound by constitutional rights? (4) Do constitutional rights apply to litigation between private individuals?"[65] As Gardbaum explains, only the first question is asked in the traditional state action inquiry in the United States. Yet, as Gardbaum shows, the United States does not adhere to the strictly vertical approach as is often assumed. Rather, it looks more like the Supremacy Clause-type argument suggested by Justice Kriegler's dissenting opinion in the South African case *Du Plessis v. De Klerk*.[66] Justice Kriegler wrote that, "[u]nless and until there is a resort to law," private individuals are free to conduct their affairs as they please, including to discriminate on the basis of "race, gender, or whatever," but, and crucially,

60. *Id.* at 344–45.

61. Gardbaum, *supra* note 3, at 394–95.

62. *Id.* at 388.

63. *Id.*

64. *Id.* at 414.

65. *Id.* at 411.

66. 1996 (3) SA 850 (CC) (S. Afr.). In *Du Plessis*, the Constitutional Court held that although the South Africa Constitution's bill of rights did not have "general direct horizontal application," private litigants could nonetheless still "contend that a statute (or executive act) relied on by the other party is invalid as being inconsistent with the limitations placed on legislature and executive" by the Constitution. *Id.* at 48 para. 62, 35 para. 49.

none of those private individuals "can invoke the law to enforce or protect their bigotry."[67] Similarly, in the United States, all law is subject to the Constitution through the Supremacy Clause.[68] Every law, "whether public or private, whether statutory or judge-made, whether relied on in litigation between an individual and the state or between individuals—is directly, fully, and equally subject to the Constitution."[69] The only question, Gardbaum argues, should be whether that law is consistent with the Constitution.

Importantly, this would not mean transforming the United States from a strictly vertical to a wholly horizontal polity. Rather, it means that constitutional rights would have a greater indirect effect on the relationships between private actors. Gardbaum is careful to point out that though no constitutional duties are suddenly placed on individuals, constitutional rights would have a "substantial impact on (1) what individuals can lawfully be permitted or required to do, and (2) which of their interests, preferences, and actions can be protected by law."[70]

Gardbaum is not the only one to posit a more robust place in the United States for constitutional rights in private relationships. Saidel-Goley and Singer's argument, for example, is strikingly similar, though narrower, than Gardbaum's.[71] They take Gardbaum's point that common law is law too and should therefore be subject to constitutional protection, but they go deeper by focusing most directly on property law. Even common law rules require the state be present to enforce them. For the normal state action doctrine, state and society are separate and distinct. But as Saidel-Goley and Singer argue, the "problem with this picture of the relation between state and society is that it cannot accurately reflect the institution of private property."[72]

Larry Sager and Nelson Tebbe, too, have put forward a similar theory. They argue for a doctrine of "state permissions."[73] Starting from the same premise as some of the critics of the state action doctrine, namely the premise about state power and the state's background presence, Sager and Tebbe go one step further than Sunstein or Tushnet and Seidman. Properly understood, though, Sager and Tebbe's argument has nothing to do with the state action doctrine per se. Instead, they are concerned with state culpability. Their principal concern is the idea that "when a state permits private acts of discrimination against the victims of structural injustice and signals official

67. *Id.* at 93–94 para. 135 (Kriegler, J., dissenting).

68. U.S. CONST. art. VI, cl. 2.

69. Gardbaum, *supra* note 3, at 415.

70. *Id.* at 415.

71. Saidel-Goley & Singer, *supra* note 3.

72. *Id.* at 485.

73. Sager & Tebbe, *supra* note 3. For a similar theory, though one aimed more directly in conversation with the state action doctrine (from one of Sager's former students, no less), see David M. Howard, *Rethinking State Inaction: An In-Depth Look at the State Action Doctrine in State and Lower Federal Courts*, 16 CONN. PUB. INT. L.J. 221 (2017).

endorsement of such discrimination, it violates the equality provisions of the Constitution."[74] More precisely, their argument does not ask the typical question: Has the state acted? Rather, they reorient the analysis and ask: Has the state granted permission for this discriminatory act? If it has, they argue, the state may rescind that permission. In other words, the state may have the constitutional authority to ban actions like it.

Their argument is not that there is an affirmative constitutional duty for governments to ameliorate all patterns of embedded social and economic inequality—what they call structural injustice. Theirs is not a deontological theory for government action. Rather, they draw a distinction between laws that signal the state's approval of acts of private discrimination and laws that do not. Sager and Tebbe operate from two key assumptions. The first is there is a "continuity between governmental and nongovernmental actors" that can serve to produce and maintain structural injustice.[75] Second, they believe there is a "continuity of state action in a world where the law is ubiquitous, and where that which is not prohibited is permitted by the state."[76]

Sager and Tebbe's paradigmatic example is Mississippi's H.B. 1523, otherwise known as the "Protecting Freedom of Conscience from Government Discrimination Act."[77] The Act prohibits the state from taking "discriminatory action," which, as defined in § 4 of the Act, includes most legal penalties,[78] against those with "sincerely held religious beliefs or moral convictions" when those religious beliefs require a religious organization to discriminate.[79] The religious beliefs in question include:

> (a) Marriage is or should be recognized as the union of one man and one woman; (b) sexual relations are properly reserved to such a marriage; and (c) Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth.[80]

Sager and Tebbe mean to suggest that this law does not do what its proponents say it does. That is, it does not simply carve out an exemption for those with closely held religious beliefs from legal penalties when they fire someone for being gay or having premarital sex. It is not simply a law designed to protect religious liberty. This law, for Sager and Tebbe, does more than "step aside" and let private actors with sincerely held religious beliefs act on those beliefs, even if it means treating gay couples or transgender individuals differently. Some laws like this one—some governmental permissions to discriminate—do more than just declare that the

74. Sager & Tebbe, *supra* note 3, at 53.
75. *Id.* at 60.
76. *Id.*
77. 2016 MISS. LAWS 427.
78. *Id.* at 430, § 4.
79. *Id.* at 428–30, § 3.
80. *Id.* at 428, § 2.

state will not intervene. Some laws "carry with them unmistakable approval of the discriminatory conduct, and thus encourage that conduct."[81]

Their conclusion should by now be clear. Sager and Tebbe argue that there are some situations in which the state's grant of permission is unconstitutional. When governments enact laws that do this—laws like, for Sager and Tebbe, Mississippi's H.B. 1523—they not only exacerbate the patterns of structural injustice, they violate the Constitution. To be sure, there is no question of state action in their argument. It is not a question of state neglect, but a question of state permission. The "permission" here is an action. Sager and Tebbe's argument is not just theoretical or normative, however. They also find sufficient precedent in a line of cases—notably *McCabe v. Atchison, Topeka & Santa Fe Railway Co.*[82] and *Reitman v. Mulkey*[83]—for justifying the application of the Equal Protection Clause to certain types of private discrimination.[84] Though the Supreme Court has, of course, never wholly endorsed the state permissions doctrine Sager and Tebbe posit, it has endorsed a reading of the Equal Protection Clause that prohibits state "authorizations."

It may appear that Sager and Tebbe are developing a theory that would expand the scope of the Equal Protection Clause without limit. They do suggest that because the state is sometimes responsible for the existence of patterns of structural injustice, "in the sense that it has actively contributed to its creation and perpetuation by its laws,"[85] it has the "constitutional duty to protect their citizens from the systematic and sustained failures of equal membership which they helped to create, and which they actively sustain by maintaining structures of law that permit and enforce private discrimination against the victims of those failures."[86] However, Sager and Tebbe are careful to outline limits on their theory. They tread the line that maintains the public/private distinction. First, they do not see all laws that allow religious exemptions, for example, as unconstitutional permissions. It is only "those permissions that signal approval of, and thereby encourage, discrimination" that "are subject to judicial invalidation."[87] Mississippi's H.B. 1523, for instance, was enacted as a direct response to the Court's decision in *Obergefell v. Hodges*[88] in 2015.[89] When looking to invalidate a state

81. Sager & Tebbe, *supra* note 3, at 2.

82. 235 U.S. 151 (1914).

83. 387 U.S. 369 (1967).

84. Sager & Tebbe, *supra* note 3, at 15–33.

85. *Id.* at 60.

86. *Id.* at 61.

87. *Id.* at 4.

88. 135 S. Ct. 2584 (2015).

89. Sarah Kaplan, *Mississippi's Senate Just Approved a Sweeping 'Religious Liberty' Bill that Critics Say Is the Worst Yet for LGBT Rights*, WASH. POST (Mar. 31, 2016, 1:45 AM), https://www.washingtonpost.com/news/morning-mix/wp/2016/03/31/mississippis-senate-just-approved-a-sweeping-religious-liberty-bill-that-critics-say-is-the-worst-yet-for-lgbt-rights/ [https://perma.cc

permissions law, a court would look for the law's "social meaning"—its background, history, and context—to determine if, to the "objective observer," the law was marking some as outsiders while protecting others as privileged insiders.[90]

Second, there are institutional limitations to the scope of the state permissions doctrine. They see their theory as "entirely consistent" with the public/private distinction.[91] Though they operate from the premise that state law and behavior are everywhere and therefore ubiquitous, they do not go so far as to argue there is no state/nonstate distinction. Additionally, they believe courts are poorly designed to deal with the problem of structural injustice. Though courts may have a role to play in invalidating laws that violate the Equal Protection Clause, they do not have the same duty to remedy structural injustice as legislatures. Federalism, too, complicates the picture.[92] Nevertheless, this "sharp division of constitutional labor" does not, for Sager and Tebbe, protect a state or the federal government from judicial intervention when it permits but subtly endorses discrimination.[93]

Though Sager and Tebbe's theory, like the other variants of the state permissions or state neglect doctrine, attempts to enlarge the scope of the Fourteenth Amendment, it fails to acknowledge that the groups at issue do not exist organically. Though it leaves room for the acknowledgment that the state, in granting permission to discriminate, may bear some of the responsibility for structural injustice, it overlooks the fact that the groups who are the subject of that structural injustice are themselves shaped by the state. It is not just that the state or private individuals may do material harm to vulnerable groups, but that the groups themselves—their own discursive meanings and social histories—have been shaped in part through state action through time. So, while the various expositions of a state neglect or state permissions doctrine—whether theoretical, doctrinal, historical, or some combination—all posit a greater role for constitutional rights in private relationships, they all suffer from the same shortcoming. This is the subject of the next Part.

III. Taking the Long Lens Approach

Both the traditional state action doctrine and the various iterations of the state neglect doctrine suffer from a similar problem. They both rest on an incomplete calculus. They all operate on the premise that the state is not a

/TN5L-2AS7]; Ron Maxey, *Five Things to Know About Mississippi's 'Religious Freedom' Law that Takes Effect Friday*, COM. APPEAL (Oct. 5, 2017, 8:57 AM), https://www.commercialappeal.com/story/news/2017/10/05/mississippi-religious-freedom-law-five-things-know/733042001/ [https://perma.cc/9SM3-PHT2].

90. Sager & Tebbe, *supra* note 3, at 20, 46–47.

91. *Id.* at 35.

92. *Id.* at 39.

93. *Id.*

cause of the actions of private discrimination. Rather, the state is simply choosing not to intervene. They assume that the drivers of discrimination in the private sphere and the perpetuation of structural injustice are separate and distinct from all state behavior. The state, in this calculus, is choosing not to jump in to remedy something that it never had a hand in. In a way, then, the state action and state neglect doctrines take a very nearsighted view. They both account only for the immediate role the state has or has not played in the violation of someone's or some group's constitutional rights.

Though the state can, for example, enact a racially discriminatory law that would be unconstitutional under either or both doctrines, they gloss over the important point that the identity categories at issue—here, race—do not exist organically. The calculus, however, looks dramatically different once we factor in the fact that the state *has* had a hand in the creation and maintenance of structural injustice. Further, the identity categories at issue were formed in part through actions the state has taken. Attuning to the discursive and ideological impacts of state behavior on the creation, maintenance, and reshaping of identity labels, categories, and groups, therefore, reveals the shortcomings of the doctrinal analyses.

According to the conventional view of state action, "the effort to define and apply constitutional rights need not even begin unless the complaining party first demonstrates that some government entity was responsible for the violation of her rights."[94] This applies to the state permissions doctrine as well, but rather than "responsible for the violation of her rights," simply substitute "has the constitutional ability to rescind permission because it perpetuates structural injustice." The problem, though, is that law and state policy are not epiphenomenal—they are not just the product of societal interests and preferences.[95] They also have a reciprocal impact on the way people behave and the way identities are defined, regulated, and constructed. If the state's actions are seen to also be *a* (not the only) cause of structural injustice, then not only is the state declining to intervene in a situation of discrimination between private actors, but it is declining to intervene in a situation *it in part caused*. This seems even more morally problematic than simply granting permission or declining to intervene between private actors.

A. Epiphenomenal or Constructive?

Understanding the shortcomings of the state action and neglect doctrines from this perspective requires taking a step back. It requires temporarily setting aside the doctrinal frameworks in favor of a broader perspective. It requires engaging with the literature on the history and development of the American state. It means taking a broad perspective that is sometimes unfamiliar to lawyers and legal scholars. In the words of legal historian

94. SEIDMAN & TUSHNET, *supra* note 17, at 51.

95. Smith, *supra* note 4, at 103.

Robert Gordon, the point that law and society are "inextricably mixed" is not immediately apparent to legal scholars because they "sometimes restrict their view of what law is to a bunch of discrete events that occur within certain specialized state agencies . . . and therefore assume that the only question for a social history of law is the relation between the output of these agencies and social change."[96] Rather, if we restrict our analysis to see the only output of the agencies as "law," then how, Gordon asks, "are we going to characterize all the innumerable rights, duties, privileges, and immunities that people commonly recognize and enforce without officials anywhere nearby?"[97] We must, in other words, position ourselves to see the discursive patterns and ideational fluctuation that occurs as a result of law and state behavior. The real power of a state and its legal regime "consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live."[98]

Though a state's extractive and bureaucratic capacity are of course important, so too are the effects they have on societal consciousness, language, and identities. In a word, law is not epiphenomenal.[99] Rather, law, like all forms of state behavior, is constructive of action, discourse, ideology, and identity. Consider interpellation: though one need not accept Louis Althusser's version of interpellation to understand the broader argument, it can elucidate the point by offering a mechanism. How can the state construct discourse and identity? For Althusser, all state institutions are bound up with ideology;[100] there is no such thing as a nonideological state institution. Ideology is crucial to the reproduction of certain societal forms, and the "State Apparatus" acts as the vehicle that translates ideology into real, lived experience.[101] This in part relies on Althusser's definition of "ideology." For him, ideology represents "the imaginary relationship of the individuals to their real conditions of existence."[102] Ideology as a concept has no history and requires an individual to have meaning or relevance.[103] Ideology, therefore, operating through state institutions, "*hails or interpellates concrete*

96. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 107 (1984).

97. *Id.*

98. *Id.* at 109.

99. *See* Smith, *supra* note 4, at 103 (hypothesizing that the actions of political actors and institutions "themselves may not prove epiphenomenal to any combination of background factors, and that they may have unexpected significance for later events").

100. *See* LOUIS ALTHUSSER, *Ideology and Ideological State Apparatuses (Notes Towards an Investigation)*, *in* LENIN AND PHILOSOPHY AND OTHER ESSAYS 85, 97 (Ben Brewster, trans., with new introd. ed. 2001) (1971) ("I shall say rather that every State Apparatus, whether Repressive or Ideological, 'functions' both by violence and by ideology . . . .").

101. *Id.* at 106.

102. *Id.* at 109.

103. *Id.* at 107.

individuals as concrete subjects . . . ."[104] Ideology interpellates an individual by marking them as a subject—someone subject to the label given. By using a certain label, a state institution can mark someone and maintain a certain ideology through the reproduction of subjects. The individual becomes a *subject* because that individual "recognized that the hail was 'really' addressed to him, and that 'it was *really him* who was hailed' (and not someone else)."[105] For Althusser, then, the "existence of ideology and the hailing or interpellation of individuals as subjects are one and the same thing."[106] The reproduction of identity—the subject, how an individual is seen and (sometimes) sees him or herself—happens at least in part through ideology and state action.

The broader point is that the language often used in identity categories is not organic. Ideologies and the categories they employ often do not exist ontologically prior to the state. While certain characteristics may be immutable, it is quite a bit harder to describe the language used to discuss those characteristics, or the decision concerning who is seen to have the same characteristics (and is therefore lumped into the same category), as immutable. Teasing out the often-tenuous link between immutable characteristics and discursive forms is essential for the larger point. According to historian of sexuality Margot Canaday, the best work on the state "takes state institutions seriously, but incorporates rather than jettisons the 'society' or 'culture' side of the binary, blending social and cultural with legal and political history."[107] Blending discursive, societal, or cultural studies with studies of state institutions allows us to gain analytical leverage over the way the two interact.

B. Constructing Identity in Time

How has the American state interpellated individuals as various subjects? How have identity categories been constructed and molded through time by state action? This subpart addresses some of those questions by providing a series of examples, primarily from the literature on American Political Development (APD). To be sure, this is not an exhaustive list—far from it. Rather, these examples serve to illustrate the larger point about how the groups at issue—the groups who are often the targets of discrimination and whose constitutional rights often trigger a state action or state neglect inquiry—are shaped and delimited by the state through time and how this observation is omitted from the state action and state neglect analyses.

104. *Id.* at 117.

105. *Id.* at 118.

106. *Id.*

107. MARGOT CANADAY, THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA 5 (2009).

First, consider the issue of citizenship. Political theorist Iris Marion Young contends that the person or citizen is at least in part constructed in the eyes of another.[108] A political context is what distinguishes the citizen from the "other." Similarly, political theorist Judith Shklar argues "[w]hatever the ideological gratifications that the mnemonic evocation of an original and pure citizenry may have, it is unconvincing and ultimately an uninteresting flight from politics if [citizenship] disregards the history and present actualities of our institutions."[109] Focusing instead on the context in which a citizen is created or acknowledged by political institutions brings the focus from the citizen herself to the institutions. As political scientist Stephen Engel writes, focusing on how the citizen is constructed or made "shifts the operative focus of citizenship from the individual claiming citizenship to the set of institutions that recognize or confer citizenship status."[110] Engel argues for defining citizenship narrowly, as "recognition."[111] Doing so gives us more analytic leverage to explain how the actions of political institutions impact the creation and manipulation of citizenship as a fungible category.

Changing the focus from the individual citizen to the institutions that do the recognizing has uncovered not only how citizenship is constructed in the eyes of the state, but how identity is as well. It is imperative to understand that to "see like a state" means something distinctive.[112] Historian Margot Canaday, for example, uncovers how sexual identity was at least in part constructed through concerted state action. Canaday shows how World War II was a critical moment in the formation of the category of homosexuality in America. To be sure, it is not that same-sex attraction was somehow invented by the state. Rather, by focusing instead on how state policy was designed and implemented, we can understand how institutional action changed what it *meant to be homosexual*. State regulators and federal bureaucrats became more aware of sex and gender nonconformity during the war, and "they worried about those whose bodies or behaviors seemed perverse to them."[113] Homosexuality became explicitly linked to "perversion," which in turn was linked to "regulatory devices aimed at broader problems: poverty, disorder, violence, or crime . . . ."[114] As the state expanded during WWII, however, it "wrote this new knowledge into federal policy, helping to produce the category of homosexuality through

108. IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 60 (reissue ed. 2011).

109. JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 9 (Harvard Univ. Press 1991) (1990).

110. STEPHEN M. ENGEL, FRAGMENTED CITIZENS: THE CHANGING LANDSCAPE OF GAY AND LESBIAN LIVES 25 (2016).

111. *Id.*

112. *See* JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED 11 (1998) (showing, among other things, that states often engage in projects of "legibility" that require specific scientific knowledge and patterns of control).

113. CANADAY, *supra* note 107, at 3.

114. *Id.*

regulation."[115] Canaday reveals that the state did not "merely implicate but also *constituted* homosexuality in the construction of a stratified citizenry."[116] The state crafted military, immigration, and welfare policies that "crystallized homosexual identity, fostering a process by which certain individuals began to think of their sexuality in political terms, as mediating and mediated by their relationship to the state."[117] The state was *productive* of both difference and identity. It used certain labels and language to manipulate human conduct and behavior and construct the meaning of homosexuality.

A similar story can be told about race. Race is created, shaped, and given meaning by social and political context. Legal scholar Ian Haney López uncovers how court action was at the center of the construction of "whiteness" (and by extension, nonwhiteness).[118] Because Congress restricted naturalization to "white persons" in 1790, courts had to answer the question, "what *is* white?"[119] Courts could come up with no easy answer. Courts commonly looked toward either "common knowledge" or purportedly scientific data to support their assertions. But this, unsurprisingly, presented problems:

> The early reliance on scientific evidence to justify racial assignments implied that races exist as physical fact, humanly knowable but not dependent on human knowledge or human relations. The Court's ultimate reliance on common knowledge says otherwise: it demonstrates that racial taxonomies devolve upon social demarcations.[120]

In other words, race is not by definition a matter of physical appearance or biological ancestry but was and continues to be constructed through the actions of political institutions. Haney López explains that focusing on the role of law and state institutions in the construction of the category of race opens a massive range of inquiry. It places the focus on the examination of "the possible ways in which law creates differences in physical appearance, of the extent to which law ascribes racialized meanings to physical features and ancestry, and of the ways in which law translates ideas about race into the material societal conditions that confirm and entrench those ideas."[121] Racial categories are, Haney López writes, "a series of abstractions, but their constant legal usage makes these abstractions concrete and material."[122]

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115. *Id.*

116. *Id.* at 4.

117. *Id.* at 10.

118. IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 7 (10th anniversary ed. 2006).

119. *Id.* at 1–2.

120. *Id.* at 7.

121. *Id.* at 10.

122. *Id.* at 13.

The case of miscegenation laws illustrates this same point. State regulation and prohibition of interracial marriage created a problem for legislatures and courts. Namely, they struggled with defining "race." The result was deliberate state manipulation of the category and meaning of race. One of the most salient yet enduring fictions of miscegenation laws was the "popular notion that race actually existed, that it was a thing that could be measured, determined, gotten to the truth of."[123] Therefore, taking "race" as fixed groups that exist organically, as the state action and state neglect doctrines do, means ignoring enormous swaths of legal and political history.

The first law prohibiting interracial sex and marriage was passed in Maryland in 1664.[124] The last, Alabama's, was not repealed until 2000[125]—though it, of course, was unenforceable post-*Loving v. Virginia*[126] in 1967. Though miscegenation laws were often justified as protecting equality, they were, to be sure, a project steeped in white supremacy. As historian Peggy Pascoe shows, miscegenation laws acted in practice as a "kind of legal factory for the defining, producing, and reproducing of the racial categories of the state."[127] Both courts and clerks that issued marriage licenses had to confront the often-difficult problem of labeling people by their race. Often, they were guided by the text of miscegenation laws themselves, which typically listed the races at issue and often defined them by blood quantum. This problem was particularly prevalent in Alabama state courts between 1918 and 1928. As political scientist Julie Novkov uncovers, this decade in the Alabama state courts heavily featured one question: "What must be proven in order to establish that the defendants in a prosecution are of different races?"[128] There was a conflict between purportedly scientific definitions of race that relied on blood and heredity and definitions that relied on appearance. Witnesses that appeared in court to testify to someone's race often relied on more capacious or flexible definitions of race than the statutes did.[129] Ultimately, both state legislatures and, for example, the 1930 national census moved toward a more narrow definition of blackness, in part to try to split the difference between definitions of race rooted in social class, behavior, and appearance with those rooted in ancestry.[130]

Marriage-license clerks were confronted with a similar problem. And indeed, as Pascoe shows, a "seemingly natural documentary 'fact' of race

123. PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 8 (2009).

124. An Act Concerning Negros & other Slaues [sic], 1 Md. Archives 533–34 (1664).

125. ALA. CONST. art. IV, § 102 (amended 2000).

126. 388 U.S. 1 (1967).

127. PASCOE, *supra* note 123, at 9.

128. JULIE NOVKOV, RACIAL UNION: LAW, INTIMACY, AND THE WHITE STATE IN ALABAMA, 1865–1954, at 108 (2008).

129. *Id.* at 108–47.

130. *Id.* at 142.

was produced in marriage license bureaus."[131] Every state that had a miscegenation law in force needed clerks to declare couples' fitness to marry. By the turn of the twentieth century, marriage licenses had largely replaced earlier forms of less-regulated marriage, including common-law marriage. By 1931, every single American state had a marriage-license law on the books.[132] As a result, every state needed low-level bureaucrats to issue the licenses. As Pascoe shows, the rise of marriage-license requirements coincided with the development of new procedures and practices for determining who was fit to marry.[133] Proponents of these practices—typically "eugenicists, vital statisticians, and white supremacists"—put their faith in these low-level bureaucrats and required them to sort license applicants into a "wide, and increasing, number of categories, some racial, others physical or mental."[134] Consequently, by the 1920s, this flurry of activity mixing bureaucracy with eugenics had, according to Pascoe, "turned marriage license clerks [of which there were 6,070] into the gatekeepers of white supremacy."[135] It is important to recognize, therefore, the centrality of miscegenation laws to the production and definition of race in the United States.

The racial categories produced through the coercive power of the state were not, to be sure, only a matter of state record keeping. Race was not only a label used on forms, but had significant, lasting discursive and material effects. This is illustrated by the fact that the demise of miscegenation laws "did not lead to a colorblind utopia."[136] Not only does the state still categorize by race for other purposes, but the use of race in miscegenation laws in particular involved the state in a powerful act of interpellation. Prosecutors and county clerks involved in the enforcement of a miscegenation law were "engaged in a very powerful act of naming, categorizing, and defining."[137] Miscegenation law as a whole was, as Pascoe shows, a national project that was motivated by and reified white supremacy and white purity. It was a "key arena for the production of race in everything from language to criminal prosecution to the structuring of families."[138]

The two-pronged effects of miscegenation laws—(1) the structuring of families and (2) the language of race—roughly map onto the larger point about the nearsightedness of the state action and state neglect inquiries. At most, they can both account for only the former—the material impact of the law in action. They fail, however, to account for how the categories at issue

131. PASCOE, *supra* note 123, at 133.
132. *Id.* at 138.
133. *Id.*
134. *Id.*
135. *Id.* at 139.
136. *Id.* at 9.
137. *Id.* at 13.
138. *Id.* at 14.

are themselves a (partial) creation of the state. It is the *language* of race we must attune to. The language of race alone is a performative act, one that becomes real through use and practice.[139] The discourse of race on its own does work. As political scientist Lisa Wedeen reminds us, the use of certain words and patterns of words produces "specific logics and generate[s] observable political effects."[140] Taking into account the discursive work done by the state's use of race, gender, and sexuality highlights the crucial shortcomings of the frameworks employed by the state action and state neglect doctrines. The categories at issue are not organic. They are neither grounded entirely in immutable characteristics, nor are they only the creation of society (as distinct from the state). Rather, they have been defined and shaped with the help of the state. In seeking to regulate and define homosexuality and whiteness, state institutions gave new meaning and salience to those categories. They shaped not only how members of those groups came to be seen and marked in the eyes of the state, but also how persons given those marks came to see themselves, as well as how others came to see them.

Any discussion of discrimination or structural injustice needs to reckon with the role of the state in the construction and maintenance of the groups and categories that are now the target of injustice and discrimination. Both the state action doctrine and the state permissions doctrine do not include *these types of state actions* in their scope of inquiry. In looking for something the state has done or has refused to remedy, the doctrines overlook how groups targeted by structural injustice have been molded through time. They miss the discursive work of state institutions. This is a mistake. Including that category of state behavior radically changes the calculus of assessing whether there has been state action or state culpability. To be sure, I have not provided an exhaustive list of all the ways in which the state has done discursive work to shape identity groups. The sample provided here is only a tiny fraction.[141] Nevertheless, it shows how taking a longer lens approach, particularly one attuned to the impact on the enormous role the state has taken in American political and discursive development, can reveal the shortcomings of a doctrinal analysis.

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139. *See* LISA WEDEEN, PERIPHERAL VISIONS: PUBLICS, POWER, AND PERFORMANCE IN YEMEN 15 (2008) (emphasizing the importance of "performance" and "performativity," as initially invoked by J.L. Austin, for the creation and maintenance of identity and nationalism).

140. *Id.*

141. Consider, for example, Frymer's work on the impact of the idea of America as a white settler nation for the speed and style of American territorial expansion. *See* John A. Dearborn, *American Imperial Development*, 81 J. POL. e44, e48 (2019) (explaining the importance of Frymer's work and others to the study of ideas in the field of American Political Development). Homesteading policy during the mid-nineteenth century "provided a very conscious means of getting more and more white settlers onto lands populated with people perceived not to be white, enabling the government to manufacture demographics while expanding and incorporating these lands more easily and quickly." PAUL FRYMER, BUILDING AN AMERICAN EMPIRE: THE ERA OF TERRITORIAL AND POLITICAL EXPANSION 133 (2017).

Conclusion

The public/private distinction has troubled generations of political and legal theorists. Even if one prefers—from a normative standpoint—a "bigger" welfare state, it does not follow that anything and everything is fair game for the state. Intuition dictates that the state cannot, or perhaps should not, interfere with some decisions. Yet, the data does not tell as clear of a picture. While it seems that some actions or decisions are clearly off-limits for the state, the evidence indicates that the causal chain in one way or another reaches back to the state.[142] But what does this mean for the state action doctrine? When can we say that the government has violated the Equal Protection Clause, for example, when the state shapes so much of our lives, whether readily apparent or not?

For many critics, the existing state action doctrine is a complete mess. Not only has the Court invented a doctrine that does not necessarily follow from the text of the Constitution or the Fourteenth Amendment specifically, but it has failed to create a reliable rule to determine when there is state action generally. For these reasons, critics have mounted two types of critiques. On the one hand, critics like Brandwein have suggested how the existing state action doctrine does not follow from the text of the Constitution or from cases typically seen as foundational, and actually precludes important realms of enforcement of constitutional rights.[143] On the other hand, critics like Gardbaum, Sager, Tebbe, and others have argued that even the existing state action doctrine could be abrogated in favor of a more robust doctrine of state permissions or state neglect.[144]

However, as I have argued, even these critics do not go far enough. While they posit a greater place for governmental enforcement of constitutional rights, especially to protect historically underrepresented groups, they still treat the existence of those groups themselves as separate and distinct from the state. They do not account for the role the state has played in shaping and constructing those groups in time.

This Note, therefore, has offered two contributions. First, it has argued that both the current state action doctrine and its proposed critiques or replacements that I have referred to collectively as the state neglect or permissions doctrines omit a key variable in measuring what the state has done. However, it does not necessarily follow that the government has a duty to account for the impact of the discursive effects—both past and present—of political institutions in all future policymaking. For example, it is

142. *See, e.g.*, Suzanne Mettler & Andrew Milstein, *American Political Development from Citizens' Perspective: Tracking Federal Government's Presence in Individual Lives over Time*, 21 STUD. AM. POL. DEV. 110 (2007) (tracing the history of federal government involvement in social programs).

143. *See* discussion *supra* Part II.

144. *See* discussion *supra* Part II.

admittedly not clear exactly how taking into account the discursive effects of the state's regulation would reshape the Court's doctrinal calculus. Of course, it risks asking courts to do something they are unprepared to do: social-science research to measure the impact of the state's discursive praxis on an individual's situation. This task goes far beyond the institutional capacities of courts, even as Donald Horowitz has described them.[145] I offer no solution here. Rather, I merely argue that the existing frameworks ignore this category of state action and use an arbitrarily short time horizon.

Second, this Note contributes to our understanding of the relationship between law and political development. Legal scholarship has historically not engaged with work on political and constitutional development, though there has been some engagement in the other direction. More directly, though, this Note contributes to the literature on American Political Development by emphasizing the importance of discourse and ideas for political and legal change. The relationship between ideas or discourse on the one hand, and institutions on the other, has been tentatively explored by recent work in and outside APD.[146] However, existing work treats ideas as institutions as wholly separate objects of study but examines how they interact. With few notable exceptions, work in APD has not attended to the discursive properties of institutions themselves.[147] However, as I have suggested here, discourse is a necessary feature of political institutions. In fact, it may have important downstream consequences for political development itself. As Lisa Wedeen argued in her study of nationalism and state power in Yemen, "[b]y focusing on the logics of a discourse and its political effects in material practices, we can specify how ideas relate to institutions; how group identities are summoned into existence; and how publics—national, deliberative, pious, and transnational—get made."[148] As I

145. *See* DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977) (describing the limits of courts as institutions, namely that (1) judges are generalists; (2) the adversarial process limits and skews factfinding; and (3) courts are limited in their choice of remedy).

146. *E.g.*, JEFFREY K. TULIS & NICOLE MELLOW, LEGACIES OF LOSING IN AMERICAN POLITICS (2018); John A. Dearborn, *The Foundations of the Modern Presidency: Presidential Representation, the Unitary Executive Theory, and the Reorganization Act of 1939*, 49 PRESIDENTIAL STUD. Q. 185 (2019); Brian J. Glenn, *The Two Schools of American Political Development*, 2 POL. STUD. REV. 153 (2004); Suzanne Mettler & Richard M. Valelly, *Introduction: The Distinctiveness and Necessity of American Political Development*, *in* THE OXFORD HANDBOOK OF AMERICAN POLITICAL DEVELOPMENT 1 (Richard M. Valelly, Suzanne Mettler & Robert C. Lieberman, eds., 2016); Vivien A. Schmidt, *Taking Ideas and Discourse Seriously: Explaining Institutional Change Through Discursive Institutionalism as the Fourth 'New Institutionalism*,*'* 2 EUR. POL. SCI. REV. 1 (2010); Rogers M. Smith, *Ideas and the Spiral of Politics: The Place of American Political Thought in American Political Development*, 3 AM. POL. THOUGHT 126–36 (2014).

147. The one notable exception is Pamela Brandwein, *Law and American Political Development*, 7 ANN. REV. L. & SOC. SCI. 187 (2011).

148. WEDEEN, *supra* note 139, at 17. For a more detailed explanation of the importance of language for the study of politics, see HANNA FENICHEL PITKIN, WITTGENSTEIN AND JUSTICE (1972).

have argued, studying discourse not as epiphenomenal, but as a constructive, performative act itself—as a thing worthy of study because of its efficacy, or perhaps causal impact—reveals a new set of shortcomings for legal analysis. It reveals that the state action doctrine and its proposed alternatives, though frequently focused on the protection of constitutional rights for minorities (other applications of the state action doctrine notwithstanding), do not do as much as they claim. Critics of the state action doctrine, or even critics of the scope or enforcement of constitutional rights and inequality broadly, need to attend to the historical construction of identity categories like race and sexuality. Taking a longer lens approach that takes the state's discursive praxis into account uncovers new areas of political and legal inquiry.