The Washington Constitutional "State Action" Doctrine: A Fundamental Right to State Action

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I. INTRODUCTION

"State action" is a doctrinal development of recent vintage in Washington constitutional law. Before the 1970s, cases that

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1. This Article's discussion of "state action" theory in federal and Washington constitutional jurisprudence centers upon the dimension of the "state action" doctrine that ascribes liability to governmental bodies for constitutionally injurious conduct by "non-state" or "private" actors. Although the "state action" doctrine comprehends constitutionally violative conduct by "state" or "public" actors operating "under color of state law," see, e.g., Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) (42 U.S.C. § 1983), Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913), it is the doctrine's expansion beyond the scope of formally "public" action to reach nominally "private" conduct that has created what Professor Charles Black appropriately characterized as a "conceptual disaster area." Black, Foreword: "State Action," Equal Protection, and California's Proposition 14, 81 Harv. L. Rev. 69, 95 (1967).

As the reader will soon discover, whenever this Article alludes to the doctrine of "state action," the phrase will be found enclosed in quotation marks. This use of punctuation is neither an oversight nor a stylistic oddity of the author. Rather, the deliberate choice of form means to call the attention of the reader, at every encounter with the doctrine, to the conceptual distinction between action perpetrated by the machinery of government and nominally "private" action vicariously attributed to government by the legal fiction of "state action." This is a conceptual distinction with a difference, given the position of section V of this Article that the legal fiction cannot operate meaningfully and justly to dichotomize the sphere of "private" actions into those vicariously attributable to the state and those not attributable to the state. The quotation marks should prevent the reader from equating, either consciously or subliminally, the fiction of "state action" with action of the machinery of government. It may be interesting to note that other writers have employed this stylistic device in discussing the "state action" doctrine; this is not to suggest, of course, any necessary similarity in purpose. See, e.g., Henkin, Shelley v. Kraemer: Notes for a Revised Opinion, 110 U. Pa. L. Rev. 473 (1962); Silard, A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee, 66 Colum. L. Rev. 855 (1966). With apologies to the reader for any mental distraction caused by the "state action" punctuation, intellectual disturbance is precisely the objective.
identified "state action" as a necessary element of causes of action under the Washington Constitution examined direct and purposeful activity by governmental officers or agencies. In *Sutherland v. Southcenter Shopping Center, Inc.*, the Washington courts first recognized the justiciability of a claim of right under article I of the state constitution as against a nominally private party.

The fermentation of the Washington "state action" doctrine has been a relatively unimaginative phenomenon. As it has matured, the state constitutional doctrine has mimicked the substance and structure of its federal counterpart in the fourteenth amendment. There is nothing terribly surprising about the similar flavor of the two "state action" concepts. The state constitutional law cases that have shaped Washington's "state action" doctrine generally disposed of simultaneous claims under both federal and state bills of rights by construing the article I provisions as substantively identical to the corresponding federal guarantees. Having matched the federal and state sources of constitutional liberties, the Washington courts had

2. *See, e.g., Cornelius v. City of Seattle, 123 Wash. 550, 556, 213 P. 17, 19 (1923) (when a garbage collection contractor was deemed a public employee, a city ordinance granting an exclusive franchise to the collector was held not to violate federal and state constitutional due process and equal protection guarantees), overruled, Herriott v. City of Seattle, 81 Wash. 2d 48, 500 P.2d 101 (1972); State ex rel. Holcombe v. Armstrong, 39 Wash. 2d 860, 866-67, 239 P.2d 545, 549 (1952) (in requiring x-rays of students over their religious objections, the Board of Regents of the University of Washington exercised legitimate police power as state actor).*


4. *See infra § III text and accompanying notes. U.S. CONST. amend. XIV, § 1 provides in pertinent part:*

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5. *See, e.g., Long v. Chiropractic Soc'y of Wash., 93 Wash. 2d 757, 760, 613 P.2d 124, 127 (1980) (in holding that a reciprocal agreement between two chiropractic societies did not violate federal and state equal protection provisions for lack of state action, court found that the provisions were "substantially identical mandates"); Allied Sheet Metal Fabricators, Inc. v. Peoples Nat'l Bank of Wash., 10 Wash. App. 530, 539-40, 518 P.2d 734, 739-40 (creditor bank's seizure of debtor's bank account held not to violate federal and state constitutional due process provisions, no distinction being made between the substance of these guarantees), cert. denied, 419 U.S. 967 (1974); Sutherland, 3 Wash. App. at 846 n.5, 478 P.2d at 799 n.5 ("Any right of the Council preserved under the first amendment to the United States Constitution will also be preserved to them by article 1, section 5 of the Washington State Constitution . . . .").*
only to borrow from the full-bodied "state action" doctrine of the fourteenth amendment to establish the properties of the article I "state action" concept.  

In its current state of maturation, the Washington "state action" doctrine appears to have left a bitter taste in the mouths of a plurality of the present state supreme court justices. Alderwood Associates v. Washington Environmental Council, a recent analysis of the requisites of "state action" by Washington's highest court, exposes significant judicial discomfort with the unvarying application of federal "state action" principles to adjudicate claims against private individuals and entities arising under state constitutional guarantees. Alderwood Associates expresses the sentiment that the "state action" requirement of the fourteenth amendment may be responsive to national governmental concerns immaterial to its complement in the state constitution, and that parallelism in the Washington "state action" doctrine wrongly may have prevented greater state constitutional protection of civil liberties.  

6. For example, the Sutherland court found "state action" by applying the fourteenth amendment analysis of Marsh v. Alabama, 326 U.S. 501 (1946), and Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968), overruled, Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), in its determination that the private shopping center mall and surrounding sidewalks were functionally similar to public business districts and thoroughfares. Sutherland, 3 Wash. App. at 837-45, 478 P.2d at 794-99. Similarly, Allied Sheet Metal Fabricators, Inc. v. Peoples Nat'l Bank of Wash., 10 Wash. App. 530, 539-40, 518 P.2d 734, 739-40, cert. denied, 419 U.S. 967 (1974), used federal case law to support its conclusion that the creditor bank's seizure of debtor's deposits did not constitute "state action."  


8. The court in the plurality opinion in Alderwood Assocs. observed that the Washington Supreme Court has "often independently evaluated our state constitution and [has] concluded that it should be applied to confer greater civil liberties than its federal counterpart when the reasoning and evidence indicate such was intended and necessary." 96 Wash. 2d at 238, 635 P.2d at 113. Noting that prior state court opinions have relied upon both overruled federal precedent and principles that have not evolved with the changes in society, id. at 238-39, 635 P.2d at 113-14, the court stated that the "state action" requirement of the fourteenth amendment is "the product of several factors not relevant to state provisions." Id. at 241, 635 P.2d at 115. First, the United States Supreme Court must find "the lowest common denominator" when promulgating new rules, since the rules will be applicable to all the states: the Supreme Court must take into account the laws and policies of the states and promulgate a rule acceptable to each of them. Second, the new rules "must take a conservative theoretical approach to applying the Fourteenth Amendment" to preserve the states as laboratories for experimentation. These concerns require the Supreme Court to consider factors irrelevant to state constitutional lawmaking. Id. at 242, 635 P.2d at 115.
The time is ripe to establish the nature of the Washington "state action" doctrine and its theoretical purposes, and to evaluate its capacity to serve the functions justifying its existence. This Article will perform this exegesis. Section II describes the classical liberal legal underpinnings of the federal constitutional "state action" doctrine, explains the fourteenth amendment "state action" doctrine's requirements, and outlines the rationales developed by the United States Supreme Court to satisfy the requirements. Analysis of the fourteenth amendment "state action" jurisprudence is necessary to any examination of "state action" in the Washington Constitution because the Washington Supreme Court developed the "state action" doctrine of article I by adopting the fourteenth amendment "state action" requirements and rationales. Section III chronicles the complete incorporation of federal constitutional "state action" theory within the Washington Constitution and argues that such wholesale transference was not compelled by explicit commands of the state constitutional text, by a comparison of the relevant federal and state constitutional provisions, or by the substance and spirit of the state constitution in its entirety. Section IV characterizes the theoretical purposes for a "state action" doctrine in the federal Constitution, and explains the structural and substantive functions that the doctrine purportedly serves. Once again, it is essential first to understand the conceivable purposes for creation and maintenance of the doctrine in the fourteenth amendment to evaluate the justifiability of the Washington Constitution's incorporation of federal "state action." Section V establishes that the structural, or instrumental, functions for the federal "state action" doctrine have little or no relevance to Washington constitutional law declaration, and demonstrates that the federal and state doctrines cannot achieve their substantive, or normative, function of balancing liberty and security of rights in a meaningful and just fashion. Finally, Section VI proposes the dismantlement of the Washington "state action" doctrine and the recognition that cases involving competing private claims of state constitutional liberties present justiciable controversies that must be decided by conscious and comprehensive judicial investigation of the merits.

II. FEDERAL "STATE ACTION" THEORIES OF IDENTITY AND CAUSALITY

As a matter of substantive federal constitutional law, the "state action" doctrine is a judicial response to the notion that
most individual liberties guaranteed by the Constitution are protected only against infringement by governments.\textsuperscript{9} The development of the "state action" doctrine in fourteenth amendment jurisprudence\textsuperscript{10} depends at its core upon the dichotomy established by the United States Supreme Court in the 1883 \textit{Civil Rights Cases}\textsuperscript{11} between public and private deprivations of individual rights, only the former being subject to the prohibitions of the amendment.\textsuperscript{12} At its inception, this essential distinction

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  \item \textsuperscript{9} See, e.g., Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) (private parties who seize private property with the cooperation of state officials acting pursuant to state law may be characterized as state actors for purposes of the fourteenth amendment); Flagg Bros. v. Brooks, 436 U.S. 149 (1978) (threatened sale of furniture under New York statute permitting warehouseman to sell stored goods does not constitute "state action" and does not violate fourteenth amendment due process or equal protection); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (termination of electrical service by heavily regulated private utility not "state action" for purposes of fourteenth amendment).

  \item In \textit{Lugar}, emphasizing that a finding of "state action" is a prerequisite to the application of due process standards, the Court cited \textit{Flagg Bros.} for the proposition that the "state action" requirement "reflects judicial recognition of the fact" that most constitutional rights are protected only against governmental violation. 457 U.S. at 936 (quoting \textit{Flagg Bros.}, 436 U.S. at 156). In \textit{Flagg Bros.}, the plaintiff brought an action under 42 U.S.C. § 1983, which, the Court determined, required in part a showing that Flagg's action be "properly attributable to the State of New York." The Court observed that "most rights secured by the Constitution are protected only against infringement by governments." 436 U.S. at 156 (quoting \textit{Jackson}, 419 U.S. at 349; \textit{The Civil Rights Cases}, 109 U.S. 3, 17-18 (1883)). In \textit{Jackson}, the Court recognized "the essential dichotomy set forth in that Amendment between deprivation by the State . . . and private conduct however discriminatory or wrongful against which the Fourteenth Amendment offers no shield." 419 U.S. at 349 (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948)).

  \item This Article focuses solely upon fourteenth amendment jurisprudence to examine the federal constitutional "state action" doctrine. Of course, the concept of "state action" is important to analysis of other constitutional provisions, such as the second through the eighth amendments and the fifteenth amendment as applied to federal governmental conduct. The United States Supreme Court's interpretations of the fourteenth amendment, however, provide an adequately rich body of case law to explore fully the structure, substance, and functions of the federal "state action" doctrine.

  \item 109 U.S. 3, 11 (1883) (§§ 1-2 of the 1875 Civil Rights Act, prohibiting private discrimination by reason of race or previous condition of servitude and imposing sanctions for such discrimination, held to violate fourteenth amendment).

  \item In the \textit{Civil Rights Cases}, the Supreme Court held that the fourteenth amendment "does not invest Congress with the power to legislate upon subjects which are within the domain of State legislation . . . . It does not authorize Congress to create a code of municipal law for the regulation of private rights . . . ." Id. The fourteenth amendment, however, does empower Congress to enact legislation "to provide modes of relief against the operation of State laws, and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment." Id. The Court has reiterated this theme regularly in its fourteenth amendment analysis. See, e.g., Lugar v. Edmondson Oil Co., 457 U.S. 922, 936-37 (1982) (cites \textit{Civil Rights Cases} and \textit{Jackson} for the proposition that the fourteenth amendment encom-
between federally regulable public invasions of individual liberties and federally unregulable private wrongs of like nature was understood to preserve a realm of individual freedom beyond the reach of federal law, unless federal legislative and judicial power redressed constitutional violations committed by the state.¹³ The Supreme Court’s original understanding that the “state action” doctrine is fundamental to legal liberalism survives intact: in describing the consequence of the “state action” doctrine as requiring “the courts to respect the limits of their own powers as directed against state governments and private interests,” the Court in Lugar v. Edmondson Oil Co.¹⁴ confirms that “[w]hether this is good or bad policy, it is a fundamental fact of our political order.”¹⁵

The relationship between the fourteenth amendment “state action” doctrine and the tenets of legal liberalism perhaps is not evident. There is, however, a logical connection between the reservation of federal judicial power for correction of public wrongs and the classic tension in legal liberalism between liberty and security of right.

Legal liberalism seeks to promote two goals in tandem: the

 passes a “state action” requirement that renders private deprivations of constitutional rights not “fairly attributable to the State” judicially unreachable; Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974) (“the essential dichotomy set forth in that amendment between deprivation by the state, subject to scrutiny under its provisions, and private conduct . . . against which the Fourteenth Amendment offers no shield”).

13. The Civil Rights Cases, 109 U.S. at 14-15. The Supreme Court observed that, were it to construe the fourteenth amendment to permit Congress to lay down rules for the conduct of private individuals, the congressional power to prohibit certain state action would be tantamount to a general, affirmative federal police power:

It would be to make Congress take the place of the State Legislatures and to supersede them . . . . The truth is, that the implication of a power to legislate in this manner is based upon the assumption that if the States are forbidden to legislate or to act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such state legislation or action. The assumption is certainly unsound. It is repugnant to the Tenth Amendment of the Constitution, which declares that powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

The perception of the Court that the federal “state action” doctrine preserves a realm of individual freedom, regulated by constitutional state governance, beyond the reach of federal law remains unchanged today. See Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982) (“Careful adherence to the ‘state action’ requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power.”).


15. Id. at 936-37.
liberty of the individual to pursue personal ends, and the security of the individual from infringements by others of this liberty. The first goal presumes that the interest and value

16. The most celebrated philosophical statement of the tenets of classical legal liberalism is found in J.S. Mill, On Liberty (Oxford ed. 1946) (1st ed. 1863), in which the author examines the nature and limits of power that legitimate government can exercise in restraint of individual liberty. Mill’s thesis recognizes that the “struggle between Liberty and Authority” implicates the freedom of individual choice in ideas and practices:

[T]here needs protection also against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them; to fetter the development, and, if possible, prevent the formation, of any individuality not in harmony with its ways, and compels all characters to fashion themselves upon the model of its own.

Id. at 4. The struggle also implicates the security of the collectivity against injurious exercises of personal liberties: “power can be rightfully exercised over any member of a civilised community against his will . . . [only] to prevent harm to others.” Id. at 8-9. The polarities of liberty and security of right, moreover, define the ends of “good government.” Government must promote the liberty of the individual to pursue preferred objectives: “[t]here is a limit to the legitimate interference of collective opinion with individual independence: and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs, as protection against political despotism.” Id. at 4. At the same time government must interfere with the liberty of action for society’s “self-protection”: “the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection.” Id. at 8-9.

Mill’s political philosophy of liberty as an individual and of a social good was largely prefigured by the social contractarian theories of John Locke. In his Two Treatises of Government, Locke argues that individuals create government only for specific and limited ends in regulation for the public good. J. Locke, Two Treatises of Government, Second Treatise § 3 (P. Laslett ed. 1960) (probably written in 1681). The beginning of lawful government is the agreement among free men voluntarily to give up power to the majority. Id. § 99. In so doing, power is vested in government to legislate and execute law as the good of the collectivity requires. Id. § 131. The loss of some liberty, however, is sustained only to preserve the remaining individual rights to liberty and property. Consequently, the power of government goes no further than to safeguard the personal enjoyment of liberty and property and to secure the peace, safety, and integrity of the community.

The American revolutionary leaders clearly understood the duality principle in liberal governance. The American Whig political platform at its foundation recognized the dichotomy between liberty and governmental authority. See generally G. Wood, The Creation of the American Republic, 1776-1787, at 18-28 (1972). Although holding that the end of government, in sum, is the preservation of liberty, the American Whigs acknowledged that liberty has both personal and public components: individual liberty includes the “power which every Man has over his own Actions, and his Right to enjoy the Fruit of his Labour, Art and Industry[,]” id. at 21 (citation omitted), but also the right to participate in government and to live under the laws of the collectivity’s own making. Id. at 24. Thus, the confluence of personal and public liberty vests authority in government to serve dual purposes: to provide a “constitutional check upon the power to oppress[,]” id. at 25 (citation omitted), and to protect private liberties by “acting for the general interest.” Id.

For a comprehensive discussion of the evolution of classical analytical jurisprudence
choices of one individual cannot be determined by society or government to be inherently more worthy than the choices of another (that is, "presumption of liberty"). The liberty of each individual to pursue preferred interest and value choices is an inalienable element of "humanity," and no just government could fail to recognize and promote that liberty. The second goal presumes that the liberty of an individual to pursue preferred ends is only as strong as personal security from infringements on such liberty (that is, "presumption of security of right"). Security from infringements of liberty can be effectuated in various ways, the most obvious of which are self-help, negotiation, and the rule of law. No just government could fail to recognize an effective method of securing liberty whenever an individual claims a legal right to be free from substantial infringements upon personal capacity to pursue preferred ends.

The two goals of liberty and security of right inevitably exist in tension. The former seeks to increase an individual's power to affect others in order to achieve personal ends, and the latter seeks to diminish the individual's power to affect others in order to secure their interest and value choices. When, in a particular instance, two individuals cannot pursue their respective ends without "checking" each other's exercise of personal liberties, a determination must be made as to the "point of delineation" at which the presumption of liberty wanes and the presumption of security waxes for both parties, or vice-versa. The predominant problem of legal liberalism, therefore, is one of line-drawing: the perpetual re-establishment of the place at which a legitimate claim to liberty ends and a legitimate claim to security of right begins.\footnote{...}

\footnote{as a function of the endeavor to resolve the inherent tension between the major tenets of liberal legal theory, see Singer, \textit{The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld}, 1982 Wis. L. Rev. 975. Singer describes liberal legal theory as "founded on a contradiction." The "fundamental contradiction" exists "between the principle that individuals may legitimately act in their own interest to increase their wealth, power, and prestige at the expense of others and the principle that they have a duty to look out for others and to refrain from acts that hurt them." \textit{Id.} at 980. Singer labels the former the principle of "freedom of action" and the latter the principle of "security." \textit{Id.}

17. Translating the "contradiction between freedom of action and security" into the "contradiction between individual rights and state powers," Singer characterizes the "predicament of liberal legal theory" as "determin[ing] the extent to which individual freedom of action may legitimately be limited by collective coercion over the individual in the name of security." \textit{Id.} (citing J.S. Mill, \textit{On Liberty} 10-11 (Norton ed. 1975); Kennedy, \textit{The Structure of Blackstone's Commentaries}, 28 \textit{Buffalo L. Rev.} 205, 209-13}
The classical response to the predominant problem of legal liberalism has been that, at the very least, the presumption of liberty should prevail when an individual attempts to pursue personally preferred ends by actions that are "self-regarding," that are neither intended to injure, nor in fact result in any significant harm to, the efforts of others to pursue their interest and value choices. Conversely, the presumption of security of right should prevail, and government should ensure an effective recourse to protect the freedoms of potentially injured parties, when an individual's actions to pursue personally preferred ends are unduly "other-regarding," threatening significant harm to the interest and value choices of others.\(^{18}\)

Classical liberal legal theory understood that a complainant who sought governmental legal rectification of injury to an interest allegedly secured by law as a matter of right would claim, in essence, that law imposed a duty upon the defendant not to act in an unduly "other-regarding" fashion with respect to complainant's legally granted realm of freedom of action.\(^{19}\) In con-

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\(^{18}\) See J.S. Mill, supra note 16, at 8-9. Mill carefully developed the thesis that legitimate state regulation may be imposed only to control an individual's "other-regarding" conduct. Mill argued forcefully "[t]hat the only purpose for which power can be rightfully exercised over any member . . . against his will, is to prevent harm to others." The conduct must be intended to produce or have the primary effect of producing evil to another. Id. On the other hand, an individual's actions, even if morally unsound or rationally unwise, that affect only the actor himself or herself, provide no sufficient justification for state compulsion to alter behavior. "In the part which merely concerns himself, his independence is, of right, absolute." Over one's self, over decisions centrally concerning one's own body and mind, the individual is "sovereign." Id. at 9. See also Singer, supra note 16, at 980-81, 984-85, 995-1014 (classical analytical jurists, including John Stuart Mill, Jeremy Bentham, and John Austin, invented a "meta-theory based on the distinction between self-regarding and other-regarding acts," the purpose of which was to mediate the fundamental contradiction between freedom of action and security). The "self-regarding" and "other-regarding" distinction served as the rationalizing principle for liberal legal theory in American jurisprudence until the turn of the twentieth century, when the classical analytical school lost ground to the nominalists, particularly John Salmond and Wesley Hohfeld. Id. at 1042-56.

\(^{19}\) Classical liberal legal theory associates the imposition of legal duties not to act or to forebear with the creation of legally securable rights. Because legal rights provide governmental security from harm to recognized interests, liberal legal theory understands that legally granted rights or recognized liberties are correlated with legal duties not to trammel the secured freedoms of action. See Singer, supra note 16, at 998 (John Stuart Mill's theory understood correlative duties not to interfere with liberties); id. at 1005-07 (distinguishing legal liberties and uncorroborated liberties, Jeremy Bentham posited that both "coercive laws" and "permissive laws" are accompanied by either explicit or implicit corroborative duties); id. at 1009-11 (John Austin's analytical system understood "relative duty" as the basis and correlating expression of "right," and uncorroborated liberties as no legal right at all).
traposition, the defendant would assert either that law imposed no such duty to forebear from the action challenged or that law affirmatively empowered defendant so to act, or both; assuming such duty, defendant would argue that the challenged action was not or would not be unduly "other-regarding," or that such "other-regarding" action was not or would not be the cause of injury to complainant's alleged liberties. The decision that the presumption of liberty or the presumption of security of right should prevail in this scenario is based upon the possibility of making at least three crucial determinations:

(1) The allegedly violative action can be attributed to definite and particular actors with or without a legal duty not to act or to forebear;
(2) The allegedly violative action can be characterized as either "self-regarding" or "other-regarding";
(3) The allegedly violative action can or cannot be established as the "cause" of the injury challenged.

The dichotomy between "public" and "private" deprivations of individual rights in the federal constitutional "state action" doctrine can be explained in terms of the classical response to legal liberalism's internal conflict. The "state action" doctrine ensures access to government for protection of legally recognized rights against a category of activity that is clearly "other-regarding." When individuals congregate for the acknowledged purpose of governing the conduct of persons and entities in society, the governing body that represents the "state" is presumed to act uniformly in an "other-regarding" fashion. By characterizing the totality of the conduct of governmental institutions, officers, and agents categorically as "public action" that is "other-regarding" and all other conduct that cannot be imputed reasonably to governmental institutions, officers, and agents as "private action" that is "self-regarding," the "state action" doctrine eliminates the second inquiry necessary to federal judicial determination of the classical liberal resolution whether the presumption of liberty or security of right should prevail when a complainant alleges significant infringement of a constitutional liberty.\footnote{20} The "state action" doctrine
establishes that the presumption of security of right will control, to the extent that the federal judiciary will enforce constitutionally recognized liberties as against allegedly violative action, upon the possibility of making the following two determinations:

(1) The allegedly violative action can be attributed to definite and particular institutions or individuals that are identified as “state actors” with a federal constitutional duty not to deny or deprive recognized liberties;
(2) Whatever allegedly violative action is found attributable to “state actors” can be demonstrated to have “caused” the denial or deprivation of liberty in issue.

Having grounded the presumption of security of federal constitutional right upon these two determinations, the “state action” doctrine requires the federal judiciary to articulate the circumstances in, conditions under, and rationales for which allegedly violative action can be identified with the state and can be specified as the cause of injury to guaranteed freedoms. Perforce, the “state action” inquiries demand the formulation of a Theory of Identity that prescribes those circumstances, conditions, or rationales whereby challenged conduct may be identified with “state actors,” and the formulation of a Theory of Causality that prescribes those circumstances, conditions, or rationales whereby challenged conduct may be labelled as the “cause” of constitutional injury. The “state action” doctrine will empower the federal judiciary to secure constitutional liberties, therefore, only upon judicial determination that the complainant’s allegations have satisfied the requirements of a Theory of Identity and a Theory of Causality.

Fourteenth amendment jurisprudence unambiguously has acknowledged that federal justiciability of a cause of action requires satisfaction of both a Theory of Identity and a Theory of Causality in order that infringement of constitutional rights be assigned to “state action.” As articulated by the United

should prevail. Alternatively, the “state action” doctrine may be viewed as shifting to the appropriate legislature, be it the United States Congress acting under its authority to regulate private civil rights, see infra note 77, or the state legislature acting within its general police powers, the determination whether the presumption of liberty or security of right should prevail in the future in doctrinally and factually similar cases.

21. This Article describes the satisfaction of the Theory of Identity and the Theory of Causality as directed primarily to the question of federal justiciability of a cause of action under the fourteenth amendment of the federal Constitution. In current fourteenth amendment jurisprudence, of course, a finding of “state action” means a great
States Supreme Court in *Lugar v. Edmondson Oil Co.*:

Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State. These cases reflect a two-part approach to this question of "fair attribution." First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible . . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.\(^\text{22}\)

deal more: the private behavior alleged by the complainant to be violative of constitutional liberties will be subject to the same substantive restraints as governmental behavior. The Article's narrower focus upon "state action" as the threshold prerequisite to justiciability can be justified, however, for two reasons. First, the focus is appropriate in light of the instrumental functions theoretically served by the federal "state action" requirement. As explained fully in section IV, infra, the two major instrumental values advanced by the "state action" doctrine concern issues of the justiciability of the federal courts. Although a broader focus may be compelled by the doctrine's normative purpose described in section IV, the Article subsequently argues that the Theories of Identity and Causality cannot meaningfully discharge their normative function. See infra section V. Second, the focus is appropriate in light of the proposal for dismantling the "state action" doctrine in the Washington Constitution, examined in section VI, infra. This proposal does not conceive that state court justiciability of constitutional claims against private parties necessarily subjects private behavior to the same substantive restraints as governmental behavior in a determination on the merits. The state identity of the alleged wrongdoer may be a consideration for the judiciary in deciding the merits of the competing claims of right, and may even be the determinative factor for judgment in particular cases. See infra text accompanying notes 124-26. The proposal understands, however, that the presence of "state action" is not to be the *sine qua non* for judicial application of substantive restraints to private behavior, but does not promote the automatic submission of all private conduct to the standards of liability imposed upon governmental officers and institutions.

22. *Lugar*, 457 U.S. at 937. *See also* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351-52 (1974) (even if Metropolitan Edison can be identified with the State of Pennsylvania by the grant or guarantee of a monopoly status in utility services, there must be a sufficient causal relationship between the challenged actions of Metropolitan Edison and its monopoly status). Cf. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961) (racially discriminatory practices of private restaurateur violated fourteenth amendment on basis that private business and state agency entwined in a mutually economically beneficial enterprise). In finding an equal protection violation, the Court in *Burton* first examined the relationship between the state and the restaurant, and concluded that the restaurant was an "integral part of a public building." *Id.* at 724. The Court next reasoned that the state not only failed to require racially integrated service by the restaurant, but put its prestige and power behind the discrimination. *Id.* at 725. Without explicitly delineating the theories of the federal "state action" doctrine, the Court clearly identified the private restaurant with the state and demonstrated that the state itself perpetrated the constitutional violation.
Although addressed in the reverse of the order discussed above, the Theories of Identity and Causality are the essence of the federal court's two-part inquiry to establish "state action."

Under the Theory of Identity, the United States Supreme Court has struggled to formulate rationales that explain when and why injurious activity by a putatively nongovernmental actor is, in reality, the activity of the state. The Court has appeared to go about this task on an ad hoc basis by identifying a "status relationship" between the private party and the government, created or sanctioned by the government, so that the private party and the government reasonably could be held to have acted "as one."

The United States Supreme Court has found such "status relationships" in a variety of different contexts for which it has enunciated a corresponding number of formulae or tests.\(^{23}\) First, a status relationship may be identified when the private party "undertakes" the character, responsibilities, and benefits of a traditional governmental body with the evident authorization or recognition of the state. The Theory of Identity may be satisfied under this rationale when the state expressly has delegated powers or functions traditionally governmental in nature to be performed by the private party, thereby vesting the private party with actual or apparent authority as a state agent or instrumentality.\(^{24}\) The private party may also "undertake" a state identity

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23. The taxonomy of the Theories of Identity and Causality in the text classifies and describes the rationales developed over the evolution of the fourteenth amendment "state action" doctrine to distinguish "status relationships" of magnitude and intensity sufficient to attribute private wrongdoing to state government. At this point, it is necessary to caution that the current status of the federal "state action" doctrine may have substantially limited, if not totally defused, the force of any particular rationale. *E.g.*, *compare* Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) (entwinement in a mutually economically beneficial enterprise) *with* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351-52 (1974) (state-granted or -guaranteed monopoly status in utility services alone is not determinative of sufficiency of relationship between state and challenged actions of the private entity). For expository reasons, analysis of the recent doctrinal retrenchment in the Theories of Identity and Causality is reserved for discussion in Section V, *infra* text accompanying notes 94-114.

24. See, e.g., Terry v. Adams, 345 U.S. 461, 469-70 (1953) (election held by private political club in which blacks could not vote deemed "state action" violating fourteenth amendment since purpose of the election was to select, without minority participation, primary candidates to be ratified officially in the Democratic primary election); Smith v. Allwright, 321 U.S. 649, 663-64 (1943) (when state primary elections in Texas were run by the state Democratic Party but state statutes regulated the primary process, refusal by the party to permit a black vote in the primary election solely on the basis of race violated the fourteenth amendment). The Smith Court held:

We think that this statutory system for the selection of party nominees for
without the express state delegation of its powers, by "holding forth" as the functional equivalent of a state, with the evident knowledge and tacit acquiescence of the state.\textsuperscript{25}

Second, federal courts may identify a status relationship when the private party and the government coordinate or combine their respective efforts in a common enterprise to such a degree that their independent activities become intermingled and can no longer be distinguished as autonomous. Under this rationale, the Theory of Identity may comprehend an affirmative "entwinement" or "nexus" between the state and the private party in a proprietary relationship of mutual economic benefit when the state can be fairly held as a partner to the injurious conduct of that enterprise.\textsuperscript{26} Similarly, when the private party acts jointly with the state, or in conspiracy with the state, to achieve a purpose unattainable without significant governmental involvement, the private activity may be imputed to the state.\textsuperscript{27}

\begin{flushleft}
\textit{Id.}
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\textsuperscript{25} See, e.g., Marsh v. Alabama, 326 U.S. 501 (1946) (consistent with first and fourteenth amendments, state cannot impose punishment for distribution of religious literature in a company town when distribution is prohibited by regulations of the town's management). The Court noted that "the town and its shopping district are accessible to and freely used by the public in general, and there is nothing to distinguish them from any other town and shopping center except for the fact that the title to the property belongs to a private corporation." \textit{Id.} at 503. Thereupon, the Court reasoned that "[s]ince these facilities are built and operated primarily to benefit the public, and since their operation is essentially a public function, it is subject to state regulation[,]" and the state had permitted the corporation to operate a "business block." \textit{Id.} at 506-07. As a result, private corporate ownership of the property was held an insufficient defense to the charge that the state had deprived residents of the company town and members of the public of their constitutional rights. The Supreme Court reiterated the "holding forth" analysis, labelling it the "public function" test, in its examination of "state action" in \textit{Lugar}, 457 U.S. at 939 (citing \textit{Marsh} and \textit{Terry v. Adams}, 345 U.S. 461 (1953)).

\textsuperscript{26} See, e.g., Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) (by its financial dealings with the private restaurateur in establishing the public parking garage and restaurant, and by the financial benefit derived from its lease to the restaurant, "[t]he State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity").

\textsuperscript{27} See, e.g., \textit{Lugar}, 457 U.S. at 941 ("a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment"); \textit{Adickes v. S.H. Kress & Co.}, 398 U.S. 144, 170 (1969) (fourteenth amendment "state action" requirement met when segregation exists in private restaurant as a result of state compulsion of racial discrimination, either by statute or by community custom having the force of law).
Although particular actions of a private party may be ascribed to the government under one of the rationales satisfying the Theory of Identity, the fourteenth amendment "state action" doctrine will not recognize a claim of right as justiciable unless it also passes muster under the Theory of Causality. The Theory of Causality requires a colorable showing that the particular activity identified with the state affirmatively and proximately caused the deprivation of liberty alleged. Unless those dimensions of the private enterprise identified as "state action" substantially "committed" the injury complained of, the Theory of Causality will not assign liability to governmental decision-making or operations. The Theory of Causality functions to limit state responsibility to involvement that directly inflicts potentially unconstitutional injury, for which the state might be held atomistically "blameworthy."

The Supreme Court has proffered a number of rationales to elucidate the essential distinction in the Theory of Causality between "action-inaction" or "commission-omission" by the state. The state may be held to have involved itself affirma-

28. See, e.g., Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974) (approval by the state utility commission of a regulated utility company's general tariff, "where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmit a practice initiated by the utility and approved by the commission into 'state action'"); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (racially discriminatory guest policies of a private club do not violate the fourteenth amendment despite the fact that the state licensed the club to serve liquor). In Moose Lodge, the Court reasoned that the licensing laws of the state did not directly or indirectly foster the discriminatory practices of the club. As a result, "the operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the state in the discriminatory guest policies of the Moose Lodge to make the latter 'state action' within the ambit of the Equal Protection Clause of the Fourteenth Amendment." Id. at 177.

29. See generally Freeman, Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 MINN. L. REV. 1049 (1978). In his elucidating article, Professor Freeman explains fourteenth amendment jurisprudence as viewing racial discrimination from a "perpetrator perspective," from which one "sees racial discrimination not as conditions, but as actions or series of actions inflicted on the victim by the perpetrator." Id. at 1053. The law, therefore, will require the victim of discrimination to link the discrimination to the behavior of a perpetrator; it will address only the discrimination caused by the perpetrator, and then only action that in fact has a discriminatory effect. Id. at 1056. See also Lugar, 457 U.S. at 936 ("state action" requirement "avoids imposing on the state, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed").

30. Similar to the description of the Theory of Identity, the taxonomy of the Theory of Causality in the text highlights the rationales historically employed to distinguish between "state action" and governmental inaction, omission, or mere acquiescence. Again, a cautionary note is warranted to alert the reader that case precedents for partic-
tively and substantially with private wrongdoing if governmental activity has specifically authorized or approved the private practice that proximately caused a deprivation of liberty, so that the state fairly may be understood to have ratified the injurious conduct.\textsuperscript{31} Moreover, a positive commission may exist when the facts of the case establish such significant "encouragement" by the state for the private party's choice of action that the state may be considered to have requested or cooperated with the private infringement of liberty.\textsuperscript{32}

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III. PARALLELISM IN WASHINGTON'S "STATE ACTION" DOCTRINE

State court construction of the Washington Bill of Rights has evolved a "state action" doctrine that differs insignificantly from its federal counterpart. Washington's "state action" concept incorporates the fourteenth amendment's requirements of a Theory of Identity and a Theory of Causality and substantially subsumes the federal content of both theories. When the Wash-

ular rationales may no longer be persuasive authority in light of more recent developments in fourteenth amendment "state action" law. See infra notes 31-32 (comparing the "ratification" rationale of Public Utils. Comm'n v. Pollak, 343 U.S. 451 (1952), and the "encouragement" rationale of Reitman v. Mulkey, 387 U.S. 369 (1967), with the restrictive readings given these rationales in Jackson and Flagg Bros.). Discussion of the recent doctrinal retrenchment in the Theory of Causality is presented in Section V, infra.

31. See, e.g., Public Utils. Comm'n v. Pollak, 343 U.S. 451, 463-65 (1952) (consistent with first and fifth amendments, the P.U.C. of District of Columbia may permit receipt and amplification of radio programs on railway system regulable under its statutory authority). The Court found federal governmental action in the general regulation of the railway system by an agency established by Congress, coupled with the fact that, after protests regarding the broadcast transmissions, the P.U.C. investigated, held hearings upon, and approved the practice. Id. at 462. Cf. Flagg Bros. v. Brooks, 436 U.S. 149, 164 (1978) (mere acquiescence by the state in a private sale of property under color of state law does not convert private conduct into "state action").

32. See, e.g., Reitman v. Mulkey, 387 U.S. 369, 378-79 (1967) (California constitutional provision that effectively repealed state anti-housing discrimination statutes and essentially permitted private discrimination in sale of residential housing held "state action" violative of fourteenth amendment). The Court cited the California Supreme Court's interpretation of the provision as expressly constitutionalizing the right to discriminate, in concluding that the provision would "encourage and significantly involve the State in private racial discrimination contrary to the Fourteenth Amendment." Id. at 375-76. Cf. Flagg Bros. v. Brooks, 436 U.S. 149, 165-66 (1978) (when state statute "merely announced the circumstances under which its courts will not interfere with a private sale[,]" denial of judicial relief held not sufficient encouragement to deem state responsible for private deprivations of property); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974) (private utility's exercise of choice of practice permitted by state law does not make its action doing so "state action" for fourteenth amendment purposes "where the initiative comes from it and not from the State").
Washington "State Action" Doctrine

...ingon doctrine diverges from federal constitutional jurisprudence, it does so grudgingly: the traditional elements of a "state action" inquiry to determine threshold justiciability resurface at a later stage in the judicial definition of a cognizable cause of action. The evolution of "state action" in article I of the Washington Constitution proves the adage "plus ça change, plus c'est la même chose."

With explicit reliance upon federal constitutional precedent, article I "state action" law developed by emulating the basic parameters of the fourteenth amendment's Theories of Identity and Causality. Construing article I, section 5 of the Washington State Constitution to protect rights of free speech as extensively as the first amendment of the United States Constitution, but only as against "state action," the Washington courts set a toehold for the Theory of Identity in the Washington Constitution by recognizing the "holding forth" and "public function" rationales in Sutherland v. Southcenter Shopping Center. Finding sufficient "state action" in the statutory authorization and summary official execution of prejudgment garnishment of private corporate assets, the Washington Supreme Court in Olympic Forest Products, Inc. v. Chaussee Corp. significantly fleshed out the Theory of Identity by adopting the "delegation" rationale to examine a due process claim under article I, section 3 of the Washington Constitution. The article I, section 3 due pro-

33. 3 Wash. App. 833, 478 P.2d 792 (1970) (entry without consent on private property in shopping center to solicit signatures for political initiative was protected by art. I, §§ 4, 5, & 9 of Washington State Constitution). The Sutherland court recognized the factual similarities between the political speech activities in the case at bar and the protected first amendment conduct in Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (picketing of private property in shopping center), overruled, Lloyd Corp. v. Tanner, 407 U.S. 511 (1972), and Marsh v. Alabama, 326 U.S. 501 (1946) (distribution of religious literature in company town), in relying upon the rationales that the United States Supreme Court established for the federal Theory of Identity. After an inquiry into the nature and use of the private property in the shopping center mall and surrounding sidewalks, the Sutherland court concluded that, analogous to the federal precedents, the property was the "functional equivalent of streets and sidewalks" and "serve[d] as a business block." Sutherland, 3 Wash. App. at 842-44, 478 P.2d at 798.

34. 82 Wash. 2d 418, 511 P.2d 1002 (1973) (prejudgment garnishment of a corporation's bank account without prior notice and opportunity for hearing violates the due process guarantee of the fourteenth amendment to the United States Constitution and of art. I, § 3 of the Washington Constitution).

35. Id. at 428, 511 P.2d at 1008. Relying on the United States Supreme Court decisions in Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), and Fuentes v. Shevin, 407 U.S. 67 (1972), the Washington Supreme Court held the corporate bank account to constitute a significant property interest, Olympic, 82 Wash. 2d at 429, 511 P.2d at 1010,
cess clause provided equally fertile ground for transplanting the “entwinement” and “nexus” rationales to determine that the necessary prerequisite of “significant state involvement” will not be found in nonjudicial self-help between private parties.\(^{36}\)

Apart from subsuming the fourteenth amendment Theory of Identity within the “state action” doctrine of article I, the Washington Supreme Court has established that a determination of constitutionally justiciable “state action” must involve a second and separate inquiry, which in essence models the federal

and found “state action” by virtue of the fact that, as in Fuentes, “the state has abdicated control over state power.” Id. at 434, 511 P.2d at 1012. Because the state statute authorized judicial issuance of a writ of prejudgment garnishment upon a creditor’s filing of an affidavit and bond, without any state review or evaluation of the substantive claims to right of replevin, the Olympic court concluded that “[t]he State acts largely in the dark.” Id. (quoting Fuentes, 407 U.S. at 93).

36. See, e.g., Allied Sheet Metal Fabricators, Inc. v. Peoples Nat’l Bank of Wash., 10 Wash. App. 530, 540, 518 P.2d 734, 740 (1974) (bank holding notes due and payable by a depositor may set off his indebtedness without procedural due process guarantees of the fourteenth amendment and art. I, § 3 of the Washington Constitution). The Allied court cited Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), and Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), to support its determination that private interactions between a borrower and a lending institution allegedly violating due process property rights, taken without seeking state help and without direct participation of state officials, do not involve the government “to some significant extent” sufficient for a finding of “state action.” Allied, 10 Wash. App. at 540, 518 P.2d at 740. In the first Washington Supreme Court case to extend the federal “entwinement” or “nexus” rationale to the Washington Constitution through art. I, § 3, Borg-Warner Acceptance Corp. v. Scott, 86 Wash. 2d 276, 278, 543 P.2d 638, 640 (1975) (self-help provision of the Uniform Commercial Code does not involve “state action” and is not subject to the due process requirements of the federal and state constitutions), the court relied upon its earlier analysis and decision in Faircloth v. Old Nat’l Bank of Wash., 86 Wash. 2d 1, 4, 541 P.2d 362, 363 (1975) (fourteenth amendment holding), to establish that, without more, the state does not significantly involve itself in private conduct when it merely codifies existing common-law rights and remedies. Thus, Borg-Warner recognized that private action does not come within the ambit of art. I, § 3 due process guarantees “unless significantly intertwined with state involvement[,]” as stated in Faircloth, 86 Wash. 2d at 3, 541 P.2d at 363 (citing Moose Lodge, 407 U.S. at 163). Borg-Warner, 86 Wash. 2d at 278, 543 P.2d at 640.

Theory of Causality. Upholding the Washington Trust Deed Act against a challenge on federal and state constitutional due process grounds, the Washington Supreme Court in Kennebec v. Bank of the West37 concluded that "state action" cannot be predicated upon the enactment of permissive state laws that merely authorize and, to that extent, encourage private conduct. For significant state involvement sufficient to constitute "state action," Kennebec required a showing of "active participation" by the state in the violative private conduct at issue. Although satisfying the Theory of Identity as action attributable to the state, the enactment of a permissive statute, without more, consisted of nonjusticiable "passive participation."38 The embodiment of the "action-inaction" dichotomy of the fourteenth amendment Theory of Causality in this distinction between "active-passive state participation" limited the federal "encouragement" rationale for purposes of the Washington "state action" doctrine to direct assistance or interaction of a state official or agency to further the authorized private conduct.39

The Washington constitutional "state action" doctrine reached complete incorporation of the federal Theories of Identity and Causality by 1980, as evidenced by the state supreme court's decision in Long v. Chiropractic Society of Washington.40 Viewing the equal protection clause of article I, section 12

37. 88 Wash. 2d 718, 565 P.2d 812 (1977) (foreclosure of deed of trust does not violate federal or state constitutional due process rights since state enactment of statute permitting private nondiscriminatory conduct is "passive" state involvement not constituting "state action").

38. For significant state involvement, active participation by the state in some manner must be found to constitute 'state action' for due process purposes . . . . [S]ignificant 'state action' cannot be predicated upon such passive involvement as the enactment of permissive state laws which merely authorize, and to that extent, encourage private conduct.

Id. at 722, 725-26, 565 P.2d at 815-16.


40. 93 Wash. 2d 757, 613 P.2d 124 (1980) (private agency authorized by state statute
of the Washington Constitution and the federal equal protection guarantee as "substantially identical mandates," the court applied a three-prong test to examine the question of "significant state action."\textsuperscript{41} The three-prong test reiterates the essence of the "entwinement" and "nexus" rationales of the Theory of Identity\textsuperscript{42} and the "omission" and "encouragement" rationales of the Theory of Causality.\textsuperscript{43} In effect, it insists that the complainant preliminarily satisfy a stringent examination of a "status relationship" between the opposing private party and the government so as fairly to attribute private action to the state and of a fact-specific "causal connection" so as to establish the nature of state action as the direct source of injury.\textsuperscript{44}

Recently, however, rumblings of judicial discomfort with federal "state action" parallelism in the Washington Bill of Rights have attained a seismographically significant level. In major deviation from synonymy with the federal "state action" doctrine, a plurality of four Washington Supreme Court justices to sponsor or conduct professional relicensing symposia does not violate federal or state equal protection guarantees by charging members of some organizations more than members of others).

\textsuperscript{41} The Long court relied on Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972), and Reitman v. Mulkey, 387 U.S. 369, 380 (1967), via the Washington Supreme Court's decision in Kennebec, 88 Wash. 2d at 721, 565 P.2d at 814, for the "state action" standard of "significant state involvement." Long, 93 Wash. 2d at 761, 613 P.2d at 127. The "three-prong" test used to establish the sufficiency of state involvement was borrowed from Aasum v. Good Samaritan Hosp., 395 F. Supp. 363, 367 (D. Or. 1975), aff'd, 542 F.2d 792 (9th Cir. 1976), and inquires: "(1) Was the state's involvement with the institution significant? (2) Is the state involved, not simply with some activity of the institution, but with the activity that caused the injury (the so-called nexus requirement)? and (3) Did the state's involvement aid, encourage or connote approval of the complained activity?" Long, 93 Wash. 2d at 761-62, 613 P.2d at 127.

\textsuperscript{42} The first prong of the Long test invokes the language of Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961), and Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351-52 (1974), to inquire as to the "significant involvement" of the state with the private conduct at issue. See generally supra notes 23-27 and accompanying text.

\textsuperscript{43} The second prong requires the affirmative and proximate causal link between the dimensions of the private enterprise identified with the state and the alleged injurious conduct, demanded in Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972), and Flagg Bros. v. Brooks, 436 U.S. 149, 165 (1978). See supra notes 28-29 and accompanying text. Similar to Reitman v. Mulkey, 387 U.S. 369, 380 (1967), Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974), and Flagg Bros., 436 U.S. at 165, the third prong looks to the character of the state involvement as encouraging or connoting approval of the complained activity.

\textsuperscript{44} Plaintiff's claims in Long failed the stringent three-pronged examination because the court found no substantive "nexus" between the relicensing symposium fee arrangement and the mandates of the authorizing state statute, and because the statute did not directly compel, encourage, or approve the challenged fee schedule and reciprocal reduction agreement. Long, 93 Wash. 2d at 762, 613 P.2d at 128.
endorsing the Opinion of the Court in Alderwood Associates v. Washington Environmental Council\textsuperscript{45} read the free speech and initiative guarantees in article I, section 5 and amendment 7 of the Washington Constitution "as not requiring the same 'state action' as the Fourteenth Amendment."\textsuperscript{46} Observing that neither article I, section 5 nor amendment 7 is by express terms limited to governmental actions, the plurality argued that the provisions should not be so interpreted. The inference of a federal "state action" prerequisite to justiciability of an article I, section 5 or amendment 7 claim may deny constitutional safeguards against private conduct interfering with important free speech interests and initiative processes, without fulfilling equally compelling countervailing purposes. The "state action" doctrine of the fourteenth amendment of the United States Constitution responds to institutional concerns of the federal judiciary that are irrelevant to state constitutional law declaration.\textsuperscript{47} The plurality proposed that a balancing approach, weighing all interests material to the conflicting claims of individual rights and of state police power necessities, would serve to determine whether state constitutional speech and initiative guarantees apply to the particular private conduct at bar, while freeing the state courts from the constraints imposed by the threshold inquiry that invokes the Theories of Identity and Causality to promote appropriate federal judicial self-restraint.\textsuperscript{48}

\textsuperscript{45} 96 Wash. 2d 230, 635 P.2d 108 (1981).
\textsuperscript{46} Id. at 243, 635 P.2d at 116.
\textsuperscript{47} Id. at 242, 635 P.2d at 115. See supra note 8 and accompanying text. For a discussion of the second factor mentioned by the Alderwood Assocs. court, i.e., the federal "state action" doctrine's function in preserving federalism, see infra notes 73-75 and accompanying text, and for a discussion of the immateriality of this rationale as a justification for the Washington "state action" doctrine, see infra notes 83-87 and accompanying text.

48. Among the factors considered relevant by the court in Alderwood Assocs. to balance the separate interests of the petitioner, the private shopping center, and the state, the plurality first examined the nature and use of the private property, observing that the owner enjoys a reduced expectation of privacy as it becomes the functional equivalent of a public forum. Id. at 244, 635 P.2d at 116. Second, the opinion regarded the nature of the speech activity, noting that the activity takes on added constitutional significance when the speech constitutes political advocacy. Id. at 244-45, 635 P.2d at 116. Finally, the court recognized that state regulation of speech activity may be legitimate when the activity violates free speech or property rights of others. Id. at 245, 635 P.2d at 116-17. The court opined that its approach to balancing is more advantageous for state constitutional law-making than strict application of the federal "state action" inquiry because the former methodology permits the court to be "more sensitive to speech and property interests in each case and, consequently, [the court] can strike a more just balance than that dictated by the Fourteenth Amendment." Id. at 244, 635
Alderwood Associates presents striking evidence of a gain in judicial sensitivity to the relevant factors for state constitutional adjudication. The plurality’s movement to the methodology of balancing competing private claims of constitutional right was propelled by a commendable insight that the traditional “state action” inquiry could not be justified as a threshold barrier to the justiciability of a cause of action against a nominally private party under article I, section 5 and amendment 7 of the Washington Constitution. Given the immateriality of the federal constitutional objectives purportedly advanced by the fourteenth amendment’s “state action” doctrine in the context of state constitutional law declaration, the plurality aimed to unseat the “state action” doctrine as the determinant of justiciable claims of rights of free speech exercise raised under article I.

Unfortunately, a close reading of the opinion of the court in Alderwood Associates may leave the reader wondering whether the plurality’s aim squarely hit the mark. Noting that “[s]ection 5 and amendment 7 could be interpreted as not requiring any ‘state action,’” the Alderwood Associates court refused to take this stance:

Although we read section 5 and amendment 7 as not requiring the same “state action” as the Fourteenth Amendment, that does not mean those provisions are applicable to all speech and initiative activities. If there were no limitations to their application, every private conflict involving speech and property rights would become a constitutional dispute . . . . Such an approach would deny private autonomy and property rights in the same way as the “state action” requirement of the Fourteenth Amendment denies free speech . . . . Instead, being sensitive to the competing speech and property rights, we conclude that section 5 and amendment 7 are applicable when, after balancing all the interests, the balance favors the speech and initiative activity.49

The plurality’s reasoning may mean that challenged private conduct will violate the Washington speech and initiative guarantees only if, after full consideration of the merits of competing private claims to constitutional property and privacy rights on the one hand and speech and initiative rights on the other, the balance must be struck in favor of the speech and initiative

P.2d at 116.
49. Id. at 243 n.8, 635 P.2d at 116 n.8.
activity. So understood, the plurality's balancing methodology succeeds in eliminating "state action" as a prerequisite to a litigable cause of action under article I, section 5 and amendment 7. It should be noted that the very first among the factors that the plurality would propose to weigh in the balance is the "use and nature of the private property": the strength of the privacy expectations in the use of property is a function of its identification as a "public forum." 50 Although resembling the classical analysis made for the "delegation" and "holding forth" rationales of the federal Theory of Identity, this examination would reintroduce the "state action" concept, if at all, to a significantly different end. Identification of the nature of private property with the public forum furnishes one relevant consideration to set off against several others in judging whether the claim to protection of speech rights will prevail on the merits. In this case, the criterion is not determinative of a cognizable constitutional claim of right.

A different understanding of the plurality's reasoning is quite possible, however, if the refusal to take a jurisprudential stance that would invite every private conflict involving speech and property rights to become a constitutional dispute is to be taken seriously. Although eliminating the justiciability hurdle to a claim of right against private action under relevant provisions of article I, the plurality's balancing methodology reasonably may be understood to reintroduce "state action" as a discrete and indispensable element of a cognizable cause of action. By defining the legitimacy of the constitutional property claim in terms of the property's functional equivalence to the public forum, the balancing methodology drives back the essential traditional considerations of "state action" theory as a realistically conclusive criterion in deciding a motion to dismiss for failure to state a constitutional claim or a motion for summary judgment.

50. The court explained that "[w]hen property is open to the public" and "becomes the functional equivalent of a downtown area or other public forum," a reasonable exercise of speech freedoms would be less intrusive on private property rights because "the owner has a reduced expectation of privacy and, as a corollary, any speech activity is less threatening to the property's value." Id. at 244, 635 P.2d at 116. This, of course, is the line of argumentation made in Marsh v. Alabama, 326 U.S. 501, 506 (1945), and Lloyd Corp. v. Tanner, 407 U.S. 551, 554-56 (1972), which the Alderwood Assocs. opinion cites as support for its proposition. Alderwood Assocs., 96 Wash. 2d at 244, 635 P.2d at 116. See supra notes 24-25 and accompanying text for a discussion of the "delegation" and "holding forth" rationales in the federal Theory of Identity.
Were this interpretation of the Alderwood Associates opinion to prevail, the plurality’s enlightenment regarding the inappropriate infusion of the federal “state action” concept into the Washington Constitution could have promised more than the court would be willing actually to deliver. On the seismographic scale, the early rumblings of judicial discomfort with “state action” parallelism would prove to be no more than a slight tremor. The Theories of Identity and Causality would still live on in the Washington Bill of Rights, and with fundamentally undiluted form and function.51

Such wholesale structural and substantive transference of the federal “state action” doctrine to the Washington Bill of Rights, however, does not appear to be compelled by explicit commands of the state constitutional text. The article I provisions that have spawned the Washington “state action” doctrine do not refer expressly to state governmental machinery as the subject of their prohibitions. The guarantees of due process rights,52 the right of petition and assemblage,53 the right of free speech and press,54 the right of personal privacy and sanctity of the home,55 and the right of religious conscience56 focus clearly only upon the beneficiaries of civil liberty protections, leaving totally ambiguous the identity of the agents constitutionally charged with liability for infringement.57 Therefore, it is as rea-

51. For a more recent case than Alderwood Assocs. that demonstrates the vibrancy of the “state action” doctrine for the threshold determination of the justiciability of claims under Wash. Const. art. I, see In re Colyer, 99 Wash. 2d 114, 660 P.2d 738 (1982). Colyer neither mentions Alderwood Assocs. nor uses the Alderwood Assocs. balancing approach to establish the justiciability of the art. I, § 7 privacy claim. Instead, the Colyer court applies the standard fourteenth amendment “state action” analysis. Colyer, 99 Wash. 2d at 121, 660 P.2d at 742.

52. Wash. Const. art. I, § 3 provides: “Personal Rights. No person shall be deprived of life, liberty, or property, without due process of law.”

53. Wash. Const. art. I, § 4 provides: “Right of Petition and Assemblage. The right of petition and of the people peaceably to assemble for the common good shall never be abridged.”

54. Wash. Const. art. I, § 5 provides: “Freedom of Speech. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.”

55. Wash. Const. art. I, § 7 provides: “Invasion of Private Affairs or Home Prohibited. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

56. Wash. Const. art. I, § 11 provides in pertinent part: “Religious Freedom. Absolute freedom of conscience in all matters of religious sentiment, belief, and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion . . . .”

57. This ambiguity is largely a function of the grammatical structure of the art. I guarantees. The consistent use of passive verb tenses in the commands of the provisions
sonable to construe the language of these prohibitions on their face as directed generally to both public and private actors as it is to presume that these provisions apply exclusively to governmental behavior.

The total absence in these provisions of any language that facially restricts their application to public actors stands in austerely contradistinction to the text of other article I provisions that manifestly address state officials and entities. Article I, section 12 is the first provision within the Washington Bill of Rights that is patently directed to state governmental machinery. Entitled "Special Privileges and Immunities Prohibited," section 12 states: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges and immunities which upon the same terms shall not equally belong to all citizens, or corporations." Similarly, article I, section 23 undeniably refers to the Washington Legislature in providing: "No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed." Finally, article I, section 31 speaks expressly to the general state government in mandating: "No standing army shall be kept up by this state in time of peace." A reasonable explanation for this variance in form is that the article I provisions that do not address state government in such specific fashions were intentionally drawn in general terms in order to apply to both public and private actors. Without presuming want of skill or negligence in the drafting of the Bill of Rights, the proponent of the Washington "state action" doctrine must otherwise account for these textual distinctions and, in light of them, defend the adoption of a comprehensive "state action" requirement for the entirety of article I as an inevitable judicial enterprise.

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obviates any explicit identification of the subjects of their dictates. For example, prototypical phrases include: "No person shall be deprived," WASH. CONST. art. I, § 3, and "shall be guaranteed to every individual," id. § 11.

58. While there are occasional references in WASH. CONST. art. I to "authority of law," see, e.g., id. § 3 (no deprivation of life, liberty, or property "without due process of law"); id. § 7 (no invasion of private affairs or home "without authority of law"), whatever emphasis is placed upon such qualifiers for support of a "state action" restriction in the prohibitions is totally misdirected. When the nature of the constitutional constraint is the extension of protection under the "law of the land," there is no necessary determination made as to the targets of the command.

59. WASH. CONST. art. I, § 12.
60. WASH. CONST. art. I, § 23.
62. The author recognizes that this argument for constitutional construction was
Similarly, fourteenth amendment "state action" parallelism in the Washington Constitution was not compelled by a comparison of the relevant federal and state constitutional texts. In contrast to those article I provisions that are not limited in raised by Chief Justice Marshall in Barron v. Mayor of Baltimore, 32 U.S. 243, 248 (1833) (fifth amendment to the federal constitution does not restrain state legislative power), and rejected in the Court's conclusion that the subject-nonspecific prohibitions of the federal Bill of Rights must be understood as applicable only to the national government. For support, Marshall relied upon a textual construction of the restraints on legislative power contained in art. I, § 9 clauses, which use language explicitly addressing Congress, and other clauses that are expressed in general terms. Despite the variation in form, Marshall established that the entire section is directed solely to the national government, given the express limitations upon state legislatures contained in the subsequent provision, art. I, § 10. By analogy, therefore, the general terms of the Bill of Rights apply only to the powers of the general government, since restrictions of state governmental action similarly would be presented in specific terms.

Without disputing the inherent logic of Marshall's reasoning, see, e.g., 2 W. Crosskey, Politics and the Constitution in the History of the United States 1049-82 (1953), one can safely assert the limited claim that the textual disparity between the explicit restriction of the first amendment to Congress and the general prohibitions on governmental power in the remainder of the first eight amendments could rationally support the converse of Marshall's facial construction of the Bill of Rights. Id. at 1056-58. No stronger position than this is argued with respect to art. I of the Washington Constitution. Moreover, it is clear that Marshall's interpretation of the general letter of the first ten amendments responded to the Court's understanding that the substance and spirit of the original federal Constitution were focused upon the creation of powers in a national government and the establishment of restraints upon the powers conferred. Barron, 32 U.S. at 247 ("The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument."). This Article proposes that sound reasons exist to reject such a narrow perspective for the substance and spirit of the Washington Constitution. See infra notes 67-72 and accompanying text.

63. The text criticizes "state action" parallelism in the Washington Bill of Rights by comparison to the fourteenth amendment. A counterargument may explain such parallelism by comparison, rather, to the second through eighth amendments in the federal Bill of Rights, the general language of which has been held to apply only to national governmental behavior. See supra note 62. Recognizing that the superior relevance of textual comparison cannot be determined in any conclusive manner, two reasons may be offered to justify a preference for linguistic cross-reference to the fourteenth amendment. First, the Washington "state action" concept was developed by conscious incorporation of fourteenth amendment jurisprudence, and the necessity for this transfer is more appropriately judged by the similarity of the terms of the "source" and "recipient" documents. Second, textual comparison to the original Bill of Rights may be inappropriate if any credence can be placed in the characterization of the political concerns underlying their framing given by the Barron Court that first established their limitation only to federal governmental action. Chief Justice Marshall argued that the Constitution and its first ten amendments were conceived primarily to delineate the boundaries of general governmental power vis-à-vis state sovereignty. Barron v. Mayor of Baltimore, 32 U.S. 243, 247 (1833). There is no suggestion that the issue of federal justiciability of causes of action between private parties under the original federal Bill of Rights was ever contemplated, much less disposed of, by the drafters.
explicit terms to state governmental actions, section 1 of the fourteenth amendment to the United States Constitution specifically restricts only state infringement of individual liberties guaranteed therein.\textsuperscript{64} Apparently, the plurality opinion of the court in \textit{Alderwood Associates} found this argument to be compelling in eliminating the "state action" requirement for justiciability of a claim of right against private parties under the state constitutional speech and initiative guarantees. Establishing that "our speech and initiative provisions do not expressly mention 'state action,'"\textsuperscript{65} the plurality opinion recognizes that the "state action" analysis of the Fourteenth Amendment is required by the language of the federal, but not the state constitution: "We have held in other contexts that where our constitutional provision is linguistically different from its parallel in the federal constitution, we are not bound to treat the state and federal constitutions as coextensive."\textsuperscript{66}

Moreover, the transplantation of the federal "state action" doctrine into article I does not appear to be compelled by the substance and the spirit of the document that emerged from the Washington constitutional convention of 1889. The fourteenth amendment "state action" doctrine attempts to maintain a coherent distinction between the realm of affirmative public governance and that of private exercise of liberty, the former alone the proper subject of federal judicial review. It is difficult to presume, however, that the Washington Constitution as a whole reinforces the same dichotomy between constitutionally justiciable public action and constitutionally nonjusticiable private action.

In substantial part, the text of the Washington Constitution

\textsuperscript{64} U.S. \textit{Const.} amend. XIV, § 1 provides in part:
No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

\textsuperscript{65} \textit{Alderwood Assocs.}, 96 Wash. 2d at 243, 635 P.2d at 116.

\textsuperscript{66} \textit{Id.} The \textit{Alderwood Assocs.} plurality relied expressly upon the decisions of the New Jersey Supreme Court in \textit{State v. Schmid}, 84 N.J. 535, 423 A.2d 615 (1980), and of the California Supreme Court in \textit{Robins v. Pruneyard Shopping Center}, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), which construed their respective state constitutional speech guarantees to reject the "state action" requirement of the fourteenth amendment. The plurality opinion states: "we choose to follow the approach of \textit{Schmid} and \textit{Robins which recognizes that the 'state action' analysis of the Fourteenth Amendment is required by the language of the federal, but not the state, constitution." \textit{Alderwood Assocs.}, 96 Wash. 2d at 243, 635 P.2d at 116.
expressly grants jurisdiction to the state courts to protect private economic, political, and civil liberty interests against abridgment by other private individuals or entities. Numerous provisions of article XII impose a battery of direct restrictions upon nonmunicipal corporate governance, many of which pertain particularly to the private banking and transportation industries.\textsuperscript{67} Article I, section 16, entitled "Eminent Domain," prohibits the taking or damaging of real property for public or private use without just compensation;\textsuperscript{68} as interpreted by the Washington courts, "[t]hat constitutional right, together with its corresponding responsibility, exists between two contesting private parties."\textsuperscript{68} Although addressing the state legislature, article II, section 28 mandates regulatory policy with regard to eighteen enumerated subject matters, several of which concern personal interactions between private individuals or entities.\textsuperscript{70}

\textsuperscript{67} See, e.g., WASH. CONST. art. XII, § 4 (limited stockholder liabilities); id. § 6 (limitations upon issuance of stock); id. § 8 (alienation of franchise not to release liabilities); id. § 13 (regulation of common carriers); id. § 15 (prohibition of discriminatory charges or grant of facilities for transportation); id. § 18 (legislative power to set reasonable transportation rates); id. § 19 (regulation of telegraph and telephone companies); id. § 22 (anti-monopoly and anti-trust provisions).

\textsuperscript{68} WASH. CONST. art. I, § 16.

\textsuperscript{69} Bay v. Hein, 9 Wash. App. 774, 776, 515 P.2d 536, 538 (1973). The Washington appellate court recognized that a property owner's right to lateral support from an adjoining landowner is founded not merely upon Washington common law, but also upon the guarantees of art. I, § 16 of the Washington State Constitution. In pertinent part, that section provides: "No private property shall be taken or damaged for public or private use without just compensation having been first made." The court observed that the guarantees of art. I, § 16 apply as against both public and private abridgment. Bay, 9 Wash. App. at 776, 515 P.2d at 538. In support for this proposition, the Bay opinion cited Kelley v. Falangus, 63 Wash. 2d 581, 388 P.2d 223 (1964) (private landowners may not escape responsibility for lateral support imposed by art. I, § 16 by delegation to private independent contractor the constitutional duty to avoid injury to adjoining private property). The Washington Supreme Court in Kelley relied upon its prior rulings in Hummel v. Peterson, 69 Wash. 143, 124 P. 400 (1912), and Knapp v. Siegley, 120 Wash. 478, 208 P. 13 (1922), to establish that the art. I, § 16 right of lateral support runs against private parties. 63 Wash. 2d at 584 n.2, 388 P.2d at 224 n.2.

\textsuperscript{70} WASH. CONST. art. II, § 28 prohibits the legislature from enacting any special or private laws in such particularized regulatory concerns as: changing the names of persons or constituting one person the heir at law of another, id. § 28, cl. 1; authorizing the sale or mortgage of real or personal property of minors or other legally incapacitated persons, id. § 28, cl. 4; and giving legal effect to invalid deeds, wills, or other instruments, id. § 28, cl. 9.

Reference to these clauses of art. II, § 28 may be made to support the propriety of federal "state action" parallelism in art. I. It may be argued that, contrary to the position articulated in the text regarding the "substance and spirit" of the Washington Constitution, the provision recognizes that state government has unique power over individuals, and it is precisely this power that the document was tailored to control. The author
state judiciary may enforce these constitutional provisions gov-
erning purely private behavior\textsuperscript{71} may not definitively establish justiciability to protect the individual liberties granted in article I against private injury. Such evidence of constitutional govern-
ance of private conduct, however, rebuts the proposition that the Washington Constitution is a document speaking solely to behavior of state governmental officers and institutions.\textsuperscript{72} Ulti-
agrees with this alternative reading of § 28 to the following degree: recognizing the broad power vested in the legislature to regulate private affairs, this provision constitutional-
izes specific statutory objectives to remove them from the realm of legislative discretion. See infra note 72. The author disagrees with the sentiment and conclusion of the alter-
native reading, however: it is not apparent that, by tailoring certain regulatory power of the state legislature, § 28 recognizes the governmental authority to control private affairs as "unique" to the state legislature, and such a conclusion does not follow inexorably from the function of § 28. The very presence of judicially enforceable constitutional restraints expressly directed to private conduct challenges the tenability of the alterna-
tive reading. See supra notes 67-69 and accompanying text.

71. WASH. CONST. art. I, § 29 ensures a cause of action for most constitutional prohibitions expressly directed to private conduct in the absence of state legislation granting state court jurisdiction in cases arising under these provisions. Entitled "Constitu-
tion Mandatory," § 29 states: "The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise." The clauses of art. XII regu-
late private corporate behavior, see supra note 67 and accompanying text, and art. I, § 16 make no such explicit requirement of substantive enforceability by legislative enact-
ment, except art. XII, §§ 11, 13, 18, 19, 20, and 22.

72. Whatever reliable evidence may be mustered to substantiate the collective pur-
poses of the delegates to the 1889 convention, that which exists supports the position that federal "state action" parallelism in art. I does not appear to be compelled by "framers' intent." Although the transcripts and notes of speeches given by and debates held among the delegates have been destroyed, the remaining sources for such testimony, including newspaper accounts of the proceedings and the journal of the Washington State Constitutional Convention, are all competently paraphrased and evaluated in D. JOHANSEN & C. GATES, EMPIRE OF THE COLUMBIA: A HISTORY OF THE PACIFIC NORTHWEST (1957), and W. Airey, A History of the Constitution and Government of Washington Territory (1945) (unpublished Ph.D. thesis available in Washington State Library, Olympia). See also THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889 (B. Rosenow ed. 1962).

Reportedly, the press and public generally perceived that the original document functioned as a statute, going far beyond the prototypically open-ended provisions of the federal Constitution, by incorporating the minutaie of regulation of important private interactions. One of the most controversial features of the Washington Constitution at the time of its adoption, apparently, was its length. See Stiles, The Constitution of the State of Washington and Its Effect upon Public Interests, 4 WASH. INST. Q. 281, 281 (1913); Airey, supra this note, at 451 & n.3. Critics characterized the Washington Constitu-
tion as "more of a law code than a constitution." Id. at 451 & n.2. See also Knapp, The Origin of the Constitution of the State of Washington, 4 WASH. INST. Q. 227, 230 (1913).

The efforts of the convention to incorporate crucial substantive regulation of private transactions into constitutional provisions have been explained as a function of the dele-
gates' distrust of a corruptible legislature, often articulated openly in debate. See D. JOHANSEN & C. GATES, supra this note, at 410 ("The legislature was particularly the target of constitutional restraint . . . . As one of the delegates remarked, 'If . . . a stran-
mately, the rebuttal weakens the viability of the argument that, situated in such a constitution, article I should be read as speaking solely to state governmental behavior.

IV. FUNCTIONS OF THE FEDERAL "STATE ACTION" DOCTRINE

To determine whether the Washington Constitution's incorporation of federal "state action" is justifiable, it is essential first to understand the conceivable purposes for creation and maintenance of the doctrine in the fourteenth amendment of the United States Constitution. Only by reference to the functions theoretically served by the federal "state action" requirement is it possible to consider a charge that the concept is irrelevant and unequal to meaningful state constitutional law declaration. Brief attention must be given, therefore, to the values promoted by the federal Theories of Identity and Causality, whether traditionally recognized in decisional law or abstracted from the doctrine's relationship to the tenets of legal liberalism.

Two major instrumental values are advanced by the "state action" doctrine that relate to issues of the justiciability of the federal courts. First, it is a long-established perception that the "state action" threshold of a litigable fourteenth amendment claim preserves the essential role of state government in the federalist system. By promoting redress only against "state action" adverse to the rights secured by the fourteenth amendment, the doctrine guarantees the independent police power of state government to regulate private civil liberties. In its first major pronouncement on Congress' power to enforce the substantive provisions of the fourteenth amendment, the United States Supreme Court in the Civil Rights Cases characterized the "state action" doctrine as delimiting the proper scope of federal authority. Such authority comprehended "not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting . . . such acts and proceedings as the States may commit or take, and which, by the Amendment, they are prohibited from committing or taking."73 The opinion explained:

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Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State Legislatures and to supersede them.\textsuperscript{74}

Underlying the evolution of the federal “state action” doctrine, therefore, is the judicial recognition that application of fourteenth amendment dictates to purely private action might supplant the states’ positive law governing socio-economic relations among individuals and threaten the traditional realm of state police power to regulate private civil rights.\textsuperscript{75} Second, the federal “state action” doctrine may be explained as furthering another, distinct instrumental purpose: it aims to secure the constitutional separation of powers among national governmental actors. Under this view, the “state action” inquiry derives from, and responds to, federal judicial concerns as to the courts’ proper institutional role vis-à-vis the legislative and executive departments in the supervision of state-regulated individual liberties. Seeking to prevent the federal judiciary from becoming a “super-legislature,” the doctrine reserves to the political processes important governmental decisions to expand federal protection of substantive constitutional rights against private infringement.\textsuperscript{76} Such institutional “angst” might be attributed to a confluence of constitutional doctrinal and jurisprudential developments. Recently, congressional authority to reach private violations of civil liberties under the commerce and spending

\textsuperscript{74} Id. at 13. Recent United States Supreme Court commentary reinforces its original perspective that the primary instrumental purpose of the “state action” doctrine is “to require the [federal] courts to respect the limits of their own power as directed against state governments and private interests.” Lugar v. Edmonson Oil Co., 457 U.S. 922, 936-37 (1982).

\textsuperscript{75} Academic commentators generally perceive the fourteenth amendment “state action” doctrine to serve instrumentally to buttress federalism. See, e.g., Burke & Reber, \textit{State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment}, 46 S. Cal. L. Rev. 1003, 1014-16 (1973); Henkin, \textit{supra} note 1, at 475.

\textsuperscript{76} Several scholars have emphasized the “political process” rationale for the fourteenth amendment “state action” doctrine. See, e.g., Burke & Reber, \textit{supra} note 75, at 1017-18 (federal judiciary's restriction of further developments in fourteenth amendment substantive doctrine in favor of deference to congressional power to evolve legislative solutions); Goodman, \textit{Professor Brest on State Action and Liberal Theory, and a Postscript to Professor Stone}, 130 U. Pa. L. Rev. 1331, 1336 (1982) (“basic philosophy” of “state action” doctrine that conflicting interests of nongovernmental actors should be resolved through democratic political process rather than through judicial application of the fourteenth amendment).
powers and under the enabling provisions of the Civil War amendments has been expanded vastly. Furthermore, the separation of powers rationale may be buttressed by the contemporary school of legal thought that denies to the least politically accountable branch any major governmental responsibility for formulating social policy decisions.

77. For the doctrinal evolution of congressional authority to regulate private civil rights violations: (1) under the interstate commerce power, see Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (Congress may, pursuant to its power under commerce clause, prohibit discrimination in private restaurants that offer to serve interstate travelers or that serve food of which a substantial portion has moved in interstate commerce); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964) (under the authority of commerce clause, Congress may legislate against racial discrimination in places of public accommodation even if the lodging is purely local in character and privately owned and operated); (2) under the spending power, see Lau v. Nichols, 414 U.S. 563, 568 (1974) (pursuant to its spending powers, Congress may prohibit discrimination on the basis of race or national origin in private school programs that are federally subsidized when the children discriminated against are thereby precluded from effective participation in the school district's educational programs); (3) under U.S. CONST. amend. XIII, § 2, see Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438-39 (1968) (Congress may, under the authority granted it by § 2 of the thirteenth amendment, prohibit discrimination in the purely private sale of housing, the restraint of the right to purchase property being a badge or incident of slavery); (4) under U.S. Const. amend. XIV, § 5, see Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (Congress may, under the authority granted by § 5 of the fourteenth amendment, enact legislation to secure the right to vote for non-English speaking persons who were educated in American schools); United States v. Guest, 383 U.S. 745, 755 (1966) (§ 5 of the fourteenth amendment empowers Congress to enact criminal laws to punish conspiracies among private actors that interfere with rights protected under § 1); and (5) under U.S. Const. amend. XV, § 2, see City of Rome v. United States, 446 U.S. 156, 177 (1980) (pursuant to the powers granted by § 2 of the fifteenth amendment, Congress may prohibit voting practices that may have racially discriminatory impacts even if the discrimination is unintentional); South Carolina v. Katzenbach, 383 U.S. 301, 334 (1966) (pursuant to § 2 of the fifteenth amendment, Congress may remedy racial discrimination in voting by suspending literacy and other voting tests, and by imposition of various restrictions in state voting regulations).

It is significant to note that the doctrine developed to implement the Civil War amendments approves congressional legislation reaching private conduct and preventing potential future civil rights violations by state or nonstate actors. The Court has long acknowledged congressional power to secure against private interference a limited category of constitutional rights arising from the relationship of the individual to the federal government. See United States v. Williams, 341 U.S. 70, 81-82 (1951) (18 U.S.C. § 241 (1979) protects against private conduct that interferes with rights arising from substantive powers of the federal government).

Apart from these instrumental rationales, the federal "state action" doctrine theoretically may promote a normative purpose: ensuring the philosophic rationality and pragmatic operability of legal liberalism. Prior discussion established the logical connection between the doctrine's Theories of Identity and Causality and the classical distinction of "self-regarding" and "other-regarding" conduct offered to reconcile the conflicting tenets of legal liberalism. This relationship suggests that the "state action" doctrine may operate as a convenient jurisprudential tool to satisfy the line-drawing requirement of legal liberalism. The doctrine may control the judicial task of delineating the points at which the presumption of liberty wanes and the presumption of security waxes, or vice versa. By facilitating resolution of the tension between the goals of liberty and security of right, the "state action" doctrine may reinforce the viability of legal liberalism.

The function of "state action" as a line-drawing device is highlighted in the substantive doctrine of the fourteenth amendment of the United States Constitution. The fourteenth amendment is the source of substantive rights to life (to be), to liberty (to do), to property (to have), and to equal protection of the laws (equally) against deprivation or denial by a state. As understood, the fourteenth amendment due process and equal protection doctrines promote the premise of security of right, granting federal judicial access to individual claims of right to be free from external infringements upon substantive freedoms to be, to do, and to have equally. The premise of security of right is promoted, however, only to the extent of the lines drawn by the "state action" doctrine: beyond those lines, the premise of liberty prevails, recognizing the power of private individuals to affect, or even injure, the claimant's substantive freedoms to be, to do, and to have equally.

Therefore, the Theories of Identity and Causality delimit a justiciable constitutional claim to security of right. The extent of the "identity" of the "state" places limits on the persons or entities that may be charged under a claim to security of right. The scope of the concept of "deprivation" or "denial" defines the pre-existing duty owed by the "state" as the "duty not to act" so as to infringe unduly these substantive interests claimed, and thereby places boundaries upon the types of activity that can be

79. See supra text § II.
said to have "caused" the injury complained of. Together, the Theories of Identity and Causality ensure that the premise of security of right and the correlative right of access to the federal judiciary control for a category of activity that, in terms of legal liberal philosophy, is clearly "other-regarding"; whereas the premise of liberty and the correlative freedom from federal judicial interference control for other activities presumed "private" or "self-regarding."

V. INSTRUMENTAL AND NORMATIVE FUNCTIONALITY OF THE "STATE ACTION" DOCTRINE IN THE WASHINGTON CONSTITUTION

In light of the theoretical purposes for the federal "state action" doctrine, adoption of its identical counterpart in the Washington Constitution defies rational analysis. The Washington "state action" doctrine cannot be justified in terms of the instrumental rationales for the fourteenth amendment concept. The federalism and separation of powers considerations arguably appropriate to determinations of federal judicial self-restraint bear little, if any, relevance to the institutional competence of the Washington State courts. Neither can the substantive parallelism in the federal and Washington "state action" doctrines be justified for the normative purpose of reinforcing the operability of legal liberalism. The federal "state action"

80. Theoretically, it may be possible to explain the Washington "state action" doctrine as serving objectives different from those justifying the federal constitutional doctrine. Nothing in the history of the doctrine's evolution in art. I or in the nature of the doctrine itself, however, either identifies such objectives or suggests their existence. Rather, the Washington Supreme Court's adoption of the federal "state action" doctrine in a conscious effort to construe federal and state personal liberty guarantees as substantively identical (chronicled in section III of this Article) argues strongly against separate and distinct jurisprudential rationales for the Washington "state action" concept. Moreover, the indistinguishable form and content of the federal and state constitutional Theories of Identity and Causality challenge the credulity of any claim as to distinguishable operation or function.

Were the Washington "state action" doctrine demonstrated to respond to unique concerns not discussed in this section, such objectives are likely subsumed under the umbrella normative purpose of reconciling the conflicting tenets of legal liberalism. See supra note 79 and accompanying text. Alternative explanations for the federal and state constitutional "state action" doctrine may offer philosophical, political, or socio-economic reasons for which the "state action" concept operates as a line-drawing device between the realms of private and public action. For example, the doctrine may be viewed as serving a liberal philosophical purpose: recognizing the duties incurred upon the state as the "trustee" of public power, the "state action" doctrine reflects the more odious nature of injury to constitutional interests inflicted by governmental bodies or officials than by private parties. Also, the doctrine may be perceived to mirror a distinction in economic theory between the real-world power of private actors in competitive
doctrine itself suffers from a lack of operational content\textsuperscript{81} because the Theories of Identity and Causality can provide only indeterminate and arbitrary guidelines by which to distinguish discrete and separable spheres of “public” (that is, “other-regarding”) and “private” (that is, “self-regarding”) activity.\textsuperscript{82} Derivatively, the Washington “state action” doctrine faces the same operative dysfunctionality. Moreover, the justiciability requirement of “state action” in the Washington Constitution produces normatively inapposite results, since the premise of security of right is violated to the same degree whether “private” or “state” entities act directly and purposefully to deprive the claimant of an interest alleged to be secure as of right. Thus, the “state action” doctrine cannot function to balance the conflicting tenets of legal liberalism in any meaningful or just fashion.

\textsuperscript{81} “Lack of operational content” connotes that the “state action” doctrine does not easily allow “real-world particulars” to be accounted for by its theoretical directives, because the parameters and content of the doctrine do not classify empirical entities in any determinate manner. This concept is treated among many others in a taxonomy of prototypical reasoning errors found in American legal argumentation, collaboratively authored by Professor Pierre Schlag of the University of Puget Sound Law School and myself, which is soon to be published but currently on file with the University of Puget Sound Law Review. For the distinction between “normative significance” and “operational significance” that underlies the concept of “lack of operational content,” see Schlag, \textit{An Attack on Categorical Approaches to Freedom of Speech}, 30 UCLA L. Rev. 671, 698 (1983).

\textsuperscript{82} The terms “public” and “private” are used throughout section V of this Article in the same sense in which the words were employed in section II, which introduced the “public-private” distinction in the federal constitutional “state action” doctrine as a function of the “other-regarding/self-regarding” dichotomy in liberal legal theory. See supra notes 18-21 and accompanying text. “Public action” refers to the totality of the conduct of governmental institutions, officers, and agents, categorically defined as “other-regarding,” and “private action” refers to all other conduct that cannot reasonably be attributed to governmental institutions, officers, and agents. It is this understanding of “public” and “private” that promotes the normative rationale of the federal “state action” doctrine as a line-drawing device for liberal jurisprudence.
In the context of Washington constitutional adjudication, the “state action” doctrine’s federalism rationale is the most displaced. Whereas the fourteenth amendment’s jurisdictional prerequisite may be construed as preserving the traditional and independent police power of separate state sovereignty in the federal system, no such rationalization can be offered for the “state action” requirement in article I of the Washington Constitution. Although the Washington Constitution mandates the establishment of a system of county government and the creation and organization of municipal corporations by general state legislation, the constitution neither recognizes these legal subdivisions as coordinate sovereigns with the state nor guarantees attributes of governing authority that may not be impaired by state regulation. Since the Washington Constitution denies any essential governmental autonomy to subordinate political units, its “state action” doctrine cannot appropriately be vindicated as

83. See supra notes 73-75 and accompanying text. Apart from imputing a federalism safeguard to the fourteenth amendment, the United States Supreme Court has determined that the tenth amendment to the Constitution recognizes and guarantees the essential integrity and effective governing role of the states in the federalist system. National League of Cities v. Usery, 426 U.S. 833, 851-52 (1976) (1974 amendment to the Fair Labor Standards Act, imposing wage and hours regulations for state governmental employees, held invalid under tenth amendment). But see Federal Energy Regulatory Comm’n v. Mississippi, 456 U.S. 742, 769-70 (1982), and Hodel v. Virginia Surface Mining & Reclamation Ass’n, 452 U.S. 264, 290-91 (1981), which effectively place limitations upon the National League of Cities doctrine in attempts to distinguish it.

84. See Wash. Const. art. XI, § 3 (delimiting the establishment of new counties); id. § 4 (requiring state legislature to establish a uniform system of county government and to provide for township organization); id. § 5 (requiring state legislature to provide by general laws for the election and compensation of county officers, and to describe their duties).

85. See Wash. Const. art. XII, § 10 (requiring state legislature to provide for municipal incorporation by general laws); id. § 16 (permitting formulation of combined “city-county” corporations, but requiring no legislative authorization).

86. Wash. Const. art. XI, § 11, the sole provision of the Washington Constitution that directly addresses the legislative capacity of the state’s political subdivisions, explicitly denies any independent realm of regulatory authority that may not be superseded by state legislation or totally preempted by state governmental occupation of the field. See King County Council v. Public Disclosure Comm’n, 93 Wash. 2d 559, 562-63, 611 P.2d 1227, 1229 (1980) (charter county has as broad legislative powers as state except when limited by enactments of state legislature); Standow v. City of Spokane, 88 Wash. 2d 624, 633-34, 564 P.2d 1145, 1151 (1977) (power of municipalities to enact licensing ordinance may be abridged by state legislature); City of Union Gap v. Carey, 64 Wash. 2d 43, 46, 390 P.2d 674, 675 (1964) (city has right to regulate broad legislative areas so long as no conflict with state enactments or apparent attempt of state legislature to occupy the field); Gunther v. Huneke, 58 Wash. 494, 496-97, 108 P. 1078, 1079-80 (1910) (Wash. Const. art. XI, §§ 4, 11 subject townships, cities, and counties to state law, and management of their business is under control of the legislature).
safeguarding a variation of federalism.  

Similarly, the second instrumental purpose for the federal "state action" doctrine, maintaining a separation of powers in the national regulation of civil liberties, is inappropriate to state constitutional lawmakers. Considerations pertinent to the proper role of the judiciary in the tripartite division of federal powers are largely inconsequential to the potential function of the Washington courts in the evolution of individual rights guarantees.

Whereas primary responsibility for development of federal civil rights policy may be denied to the judiciary as the sole politically unaccountable branch of government, the justices of the Washington Supreme Court and the judges of the state inferior courts are elected officials, and theoretically they may be held responsible by the electorate for their decisions in adjudication. The voter's capacity to select state judicial candidates on their merits, or to register approval or disapproval of an incumbent's performance by re-election or replacement, must be assumed to be equivalent to the voter's capacity to elect other governmental officials. Therefore, there is arguably nothing more "counter-majoritarian" in the judicial invalidation of state legislation than in the gubernatorial veto of legislation passed by the state assembly. The political viability of any ruling is likely to

87. The federalist system places limitations upon state courts to interpret and enforce the civil liberty guarantees accorded by its own positive law, of course, in that protection of interests secured by state law may not impair federal constitutional or statutory rights. See Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) (California may exercise its sovereign right to adopt more expansive individual liberties under its constitution than those conferred by federal Constitution, resulting in free expression rights for students soliciting signatures for a political initiative in a private shopping mall). The Court in Pruneyard was careful to observe, however, that "[i]t is, of course, well established that a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision." Id. at 81. This aspect of federalism restrains state judiciaries in their "line-drawing function" between conflicting claims of right.

Federalism constraints in the balance struck between federal and state guaranteed liberties are distinct, however, from the federalism controls theoretically served by the "state action" doctrine. The federalism concern of "state action" does not address how a balance between substantive guarantees is to be struck, but whether the balance may be struck at all. Thus, the relevant issue is the constitutional and prudential competence of the federal or state court in view of the respect due to a coordinate sovereignty.

88. See WASH. CONST. art. IV, §§ 3, 5 (providing for election of judges to the state supreme and superior courts).

89. See WASH. CONST. art. III, § 12. For an opposing position, see Howard, State Courts and Constitutional Rights in the Day of the Burger Court, 62 VA. L. REV. 873,
be reflected in state judicial review, and the force of precedential authority a less salient inhibition to future modifications of constitutional holdings.\textsuperscript{90}

Moreover, the current doctrinal reservation of the federal regulation of individual liberties to the political branches does not characterize the role of the Washington courts in the creation and enforcement of private rights. Traditionally, state courts have defined civil liberties by common and constitutional decisional law. Of course, the judicial balance of competing claims of right, when articulated in common-law decisions, is subject to direct state legislative alteration. Such judicial balancing by constitutional ruling, however, is not immune from future political modification by positive enactments securing certain legal entitlements. State courts may understand the legislative protection of certain liberty interests to place more decisive weight in favor of claims to security of these interests when once again examined in the balance.\textsuperscript{91} Furthermore, the amendment

\textsuperscript{90} Properly understood, the separation of powers rationale for the federal and state constitutional "state action" doctrines responds to the jurisprudential concern for the constitutional competence of the judiciary in a majoritarian democratic system of governance. See supra notes 76-78 and accompanying text. This concern is distinct from, albeit related to, the functional issues of the institutional capacity of the judiciary to perform factfinding or policy decision-making suitable to a legislative or administrative body, or to develop manageable standards or criteria sufficient to resolve a particular case. In the context of federal constitutional law, these functional issues are central considerations of the "political question" doctrine. See, e.g., Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (challenge to training of Ohio National Guard held to present nonjusticiable issues under the fourteenth amendment due process clause); Baker v. Carr, 369 U.S. 186, 237 (1962) (challenge to Tennessee legislative apportionment scheme held to be a justiciable cause of action under the fourteenth amendment equal protection clause).

Apparently, the Washington Supreme Court has not followed federal precedent by developing an insular "political question" doctrine to define the institutional powers of the state courts under the Washington Constitution. Functional considerations similar to those accounted for under the federal "political question" doctrine, however, lie at the core of Washington Supreme Court decisions defining the scope of judicial review in economic substantive due process matters. See, e.g., Oil Heat Inst. v. Town of Mukilteo, 81 Wash. 2d 7, 11, 498 P.2d 864, 867 (1972) (tax); State ex rel. York v. Board of Comm’rs, 28 Wash. 2d 891, 904-05, 184 P.2d 577, 585 (1947) (issuance of franchise to electrical company); Bates v. McLeod, 11 Wash. 2d 648, 654-55, 120 P.2d 472, 475-76 (1941) (tax). In these cases, the Washington Supreme Court has recognized that the judiciary must defer to socio-economic policy choices of state and local legislative bodies when the choices involve political issues that the state courts are not capable institutionally to resolve. Therefore, the Washington courts are fully equipped doctrinally to respond to the functional concerns of judicial power without relying on the "state action" concept at all.

\textsuperscript{91} Naturally, the judicial inquiry limiting this potential for future legislative influ-
process reversing politically intolerable judicial constitutional interpretations is more accessible under the Washington Constitution than under the federal scheme.  

In addition to these distinctions in the institutional characters of the federal and Washington judiciaries, the function of Washington's "state action" doctrine in preserving a division of state governmental power in the regulation of private rights is highly questionable.  

92. Textual comparison of the federal and state constitutional amendment procedures exposes the vast differences in political logistics necessary for the two operations. Amendment of the Washington Constitution requires a two-thirds vote of each branch of the state legislature and approval by a majority of the electorate at the next general election. WASH. CONST. art. XXIII, § 1. Article V of the United States Constitution, on the other hand, requires not only a two-thirds vote of both houses of Congress or a request for a constitutional convention by two-thirds of the state legislatures, but also requires ratification by three-fourths of the state legislatures or three-fourths of the convention delegates. U.S. CONST. art. V. In addition to considerations of process, it is far more likely that political consensus may be reached among a relatively homogeneous population in one state than in the federal union of states, thus facilitating the alteration of the state constitution in the wake of a highly unpopular judicial interpretation. General observations regarding the fairly effective means of subjecting state constitutions to the popular will are made in Note, Project Report: Toward an Activist Role for State Bills of Rights, 8 HARV. C.R.-C.L. L. REV. 271, 295-96 (1973), and Developments in the Law—The Interpretation of State Constitutional Rights, 95 HARV. L. REV. 1324, 1350-55 (1982).

93. The concern that the demise of "state action" in state constitutional law might shift the balance of the police regulatory power from state legislatures to state courts, effected by state constitutional decision-making respecting legal disputes of private parties, is made in Deukmejian & Thompson, All Sail and No Anchor—Judicial Review Under the California Constitution, 6 HASTINGS CONST. L.Q. 975, 999-1006 (1979).
stitutional adjudication in Washington State's liberal legal system. The reason that the normative function for the federal "state action" doctrine cannot justify its incorporation within the Washington Constitution is that, simply, it does not work. The federal "state action" doctrine is capable of providing only arbitrary and indeterminate guidelines for delineating the judicially cognizable realm of public action from the judicially noncognizable realm of private interactions. As inherently arbitrary, the "state action" doctrine cannot resolve the line-drawing problem of legal liberalism; it cannot serve meaningfully, at the threshold determination of justiciability, to distinguish cases controlled by the premise of liberty from cases controlled by the premise of security of right.

In all permutations, the "status relationships" between state and private actor discoverable under the federal Theory of Identity are contingent upon two presuppositions that expose the theory's essential arbitrariness. First, the private party charged with injury has operated in an area in which government previously or simultaneously intervened to order a multitude of dimensions and terms of social relations or transactions. Second, the private party charged with injury has assumed authority, prerogatives, or capabilities for action that government previously had exercised and might be deemed to have delegated away overtly or covertly, or in which government acquiesced but legitimately might have demanded to exercise in full. 94

The first presupposition cannot rationally classify the universe of human affairs into mutually exclusive public and private spheres of action since, for better or for worse, government is intimately involved in the regulation of almost every facet of interpersonal relations. Since the evolution of the post-World War II American administrative state, 95 there are few forms of

94. These two presuppositions inhere in the fourteenth amendment "state action" decisions prior to 1974, albeit generally in implicit form. It is obvious that the categories of "undertaking" rationales (whether by "delegation" or "holding forth") and "entwine-ment" rationales (including "nexus" and "joint action") characteristically rely upon these underlying conditions to establish a sufficient "status relationship" between the state and the injuring party. See supra notes 24-27 and accompanying text (taxonomy of Theory of Identity). More recent decisional law elevates the extremities of these two presuppositions to the level of determinative criteria for a finding of "state action": Flagg Bros. v. Brooks, 436 U.S. 149, 157, 160-61 (1978), and Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352-53 (1974), require that the private actor operate within a realm of authority traditionally and exclusively reserved to the state.

95. In Federal Trade Comm'n v. Ruberoid Co., 343 U.S. 470 (1952), Mr. Justice Jackson commented on the extensive administrative interposition in ordinary social deal-
social interaction in which the federal and state governments have not intervened, separately or jointly, to order private conduct directly or to curb, control, or influence the processes whereby individuals order their ordinary affairs. Given that

ings as a judicially noticeable fact: "The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart." Id. at 487 (Jackson, J., dissenting).

96. See 1 C. DAVIS, ADMINISTRATIVE LAW § 1.02, at 7 (1st ed. 1958) for a remarkable list of the plethora of federal regulatory concerns substantiating the author's assertion that "the administrative process affects nearly everyone in many ways nearly every day."

During consideration of S. 1080, 97th Cong., 1st Sess. (1981) (Regulatory Reform Act to amend the Administrative Procedure Act requiring federal agencies to analyze the cost-effectiveness of rules and regulations), which passed the Senate but was never enacted into law, the accompanying Report of the Senate Committee on the Judiciary published evidence of the tremendous growth in and pervasive economic and social effects of federal administrative regulation. Whereas in 1965, 8.2% of the American gross national product was beholden to federal regulatory controls, by 1975 that figure had risen to 23.7%; from 1970 to 1979 alone, eight new federal regulatory agencies had been created and 80 major regulatory statutes enacted. S. REP. No. 284, 97th Cong., 1st Sess. 9-10 (1981).

The fact that S. 1080 was sponsored by 81 Democratic and Republican senators itself indicates a unity of opinion within the major American political parties that federal regulation permeates, and often burdens, most important dimensions of private economic and social activity. See also Statement of Senators Leahy, Kennedy, and Metzenbaum, id. at 179-84 (reform should result in less regulation in many areas, but it will also lead to strengthening regulation in others in order to ensure improved response to health, safety, and environmental problems of society); Presidential Campaign Speech of Ronald Reagan in Youngstown, Ohio (October, 1979), reprinted in id. at 8 ("[M]any regulations impair the ability of industries to compete, reduce workers' real income, and destroy jobs . . . . We must ensure that regulations are limited to those necessary to protect health, safety and the environment. However, we must not allow regulations to flourish for their own sake.").

The foregoing discussion, of course, does not address the morass of state and local administrative regulation for the licensing of professions and occupations, for the development of cities, and for the provision of health, safety, or moral necessities. See F. HEFFRON & N. McFEELEY, THE ADMINISTRATIVE REGULATORY PROCESS 6-8 (1983): State agencies, among other things, license physicians, barbers, lawyers, architects, cosmeticians, liquor dealers, and funeral directors, as well as regulate commerce within their boundaries and provide the regulatory framework for all levels of public educational institutions. Localities are charged with the responsibility of enforcing building codes, fire, health, and safety regulations and standards.

See also Silard, supra note 1, at 870 (transformation of "private sphere" into "public interest" evidenced in proliferation of governmental regulation influencing general availability of such fundamentals as food, clothing, shelter, employment, and education). Administrative regulation in the State of Washington extends to varied and unlikely fields for public concern. See, e.g., Restricted Noxious Weed Seeds, WASH. ADMIN. CODE § 16-300-020 (1983); Regulation and Practice of Hearing Aid Fitters and Dispensers, WASH. ADMIN. CODE ch. 308-50 (1983); Veterinary Code of Ethics, WASH. ADMIN. CODE ch. 308-150 (1983); Curriculum for Manicurist Course of Instruction, WASH. ADMIN. CODE § 308-24-360 (1983).
governmental interposition in all classifications of social relations runs the full gamut of degrees of involvement, it becomes rationally impossible to dichotomize the categories of "private" and "public" spheres of behavior.\(^9\) The choice of a stopping-place between degrees of governmental intervention, or differing choices for differing cases, is totally arbitrary when informed by no other theoretical justification than the need to select some point in the spectrum that runs from the individual to the collectivity.\(^9\)

The second presupposition also fails to circumscribe a sphere of private conduct characterized by direct or indirect governmental sanction. Legitimate state "police powers" are traditionally most extensive when exercised to regulate the private use and enjoyment of interests of relative communal scarcity,\(^9\)

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97. In counterargument, the following position may be asserted: granting an indeterminate, if not total, overlap between the spheres of public and private action, this does not mean that the interrelated strands of governmental and private behaviors contributing to a single enterprise cannot be distinguished, identified as discrete public and private elements, and evaluated separately for their causal connection to the alleged injury. This proposition characterizes, of course, the very analysis adopted by the United States Supreme Court in Flaggs Bros. v. Brooks, 436 U.S. 149 (1978), and in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

This Article regards the Jackson and Flaggs Bros. authorities as doctrinal retrenchment from the Court's prior rationales under the Theories of Identity and Causality. See supra notes 21-32 and accompanying text. For narrative purposes, examination of the indeterminacy of contemporary standards established by this retrenchment, and of the incongruity of such standards for a "state action" concept, is reserved for the critique on the Theory of Causality. See infra notes 106-15 and accompanying text.

To respond to the counterargument at this point, however, it suffices to claim that the Jackson and Flaggs Bros. analysis recognized implicitly the arbitrary nature of the preexisting Theory of Identity. By requiring the plaintiff to identify discrete dimensions or aspects of an integrated undertaking as "state-imprinted" or "nonstate-imprinted," see infra notes 112-14 and accompanying text, Jackson and Flaggs Bros. effectively conceded the essential arbitrariness of a judicial effort to define the whole of any private venture that is directly or indirectly regulated by state government as pertaining more to the "public" sphere of influence than to the "private," or vice versa.

98. This observation has been otherwise explained as a necessary conclusion of positive jurisprudence. See, e.g., Brest, State Action and Liberal Theory: A Casenote on Flaggs Bros. v. Brooks, 130 U. Pa. L. Rev. 1296, 1301 (1982) (private action derives from state, thus potentially implicating state in every private action not prohibited by law); Burke & Reber, supra note 75, at 1104 (every form of interpersonal human behavior has reference to the authority provided by state law). On separate theoretical grounds, this observation has been described as an inevitable stage of judicial process in the disintegration of legal liberalism. Kennedy, The Stages of the Decline of the Public/Private Distinction, 130 U. Pa. L. Rev. 1349, 1352 (1982) (concept of "continuumization").

99. The text uses the phrase "interests of relative communal scarcity" with the purpose of remaining at a high level of conceptual generality. The phrase is meant to include individual access to all things, which access is restricted by forces other than the individual's free will. In more accurate, but necessarily more theoretical terms, the
understood in American common and constitutional law to be private affairs "affected with the public interest," whether that scarcity is a function of natural causes or is created by the state's law itself.\textsuperscript{100} It is precisely in the contexts of relative com-

phrase includes all respects of, or relations to, tangible or intangible things that may concern or affect an individual in an advantageous, detrimental, or neutral fashion, viewed from the perspective of that individual, due to quantitative or qualitative conditions upon possession, use, or enjoyment, created by civil law, social interactions, or natural causes, or any combination of them. Such generality is justified by the probability that no taxonomy of individual interests meeting the stated qualifications is likely to be sufficiently comprehensive without being, at the same time, equally abstract.

100. Constitutional theorists generally agree that the American common law recognized the regulation of private affairs "affected with the public interest" to be a legitimate exercise of the governmental police power; the proper authority of state government comprehends the regulatory capacity to abridge individual interests when acting to promote the security, health, and comfort of the whole community rather than that of any particular sector. See W. Crosskey, supra note 62, at 1151 ("the courts maintained that, if the act... was not in fact—that is, not in the Court's judgment—promotive of 'the common good' or 'the public health, safety, morals, or welfare,' it was in excess of the legislature's power and, so, void and not a 'law.'"); L. Tribe, American Constitutional Law § 8-1, at 427-34 (1978); Rudolph & Rudolph, The Limits of Judicial Review in Constitutional Adjudication, 63 Neb. L. Rev. 84, 91-92 (1984) (function of judicial review is to ensure, in part, "that the agents of the community act in the interest of the whole community rather than in the interest of special sectors").

The United States Supreme Court's substantive due process doctrine, developed most fully after passage of the fourteenth amendment, cf. Graham, Procedure to Substance—Extra-Judicial Rise of Due Process, 1830-1860, 40 Calif. L. Rev. 483, 484 (1952) (pre-Civil War evolution of substantive due process doctrine), understood state governmental power to operate legitimately only for enhancement of the "general public welfare" in those concerns "affected with the public interest." In the seminal case of Munn v. Illinois, 94 U.S. 113 (1876) (legislation setting rates for warehouse grain storage in populous cities not violative of fourteenth amendment due process), the Court articulated the pre-1930s federal constitutional standard for legitimate state regulation of private enterprises "clothed with the public interest." Undertaking an exhaustive analysis of the history of state regulation of private businesses, the Court observed that early American state governments were permitted to control the behavior of their private citizens to prevent them from injuring one another. Id. at 124. This, according to the Court, was the source in American common law of the authority characterized as "the police powers" permitting governmental regulation of "the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good." Id. at 125.

Thus, state regulation of ferries, common carriers, bakers, millers, innkeepers, and the like rests "in England from time immemorial, and in this country from its first colonization" upon the principles of Anglo-American common law that when private property is "affected with a public interest, it ceases to be juris privati only." Id. at 125-26 (quoting Lord Chief Justice Hale, De Portibus Maris, 1 Hargrave's Law Tracts (Small ed. 1853)). The Munn Court understood that private property would become clothed with a public interest:

when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to
the extent of the interest he has thus created.
94 U.S. at 126. Finally, the Munn Court found that the plaintiff in error, a private grain warehouseman, exercised a “sort of public office” in the operation of a “virtual” monopoly that most certainly is clothed “with a public interest.” Id. at 131-32. The Munn opinion established the proposition that a private activity or resource in the control of one or a few property owners to which the public must or may resort essentially vests the activity with a public interest and subjects it to state regulation under the government’s police powers.

Prior to 1934 the United States Supreme Court invalidated numerous state laws on the basis that the legislation regulated areas of private concern not touched with the public interest. See, e.g., Adkins v. Children’s Hosp., 261 U.S. 525, 560-61 (1923) (statutory minimum wage for women laborers in hospital violated fifth amendment liberty to contract because business not clothed with the public interest); Lochner v. New York, 198 U.S. 45, 58 (1905) (state regulation of hours and wages of bakers violates fourteenth amendment right to contract because measure neither protected a class of laborers who were not sui juris nor directly promoted a legitimate public health, safety, or welfare objective); Allgeyer v. Louisiana, 165 U.S. 578, 585 (1897) (state may not limit right of citizen to contract with business outside the state) (“Individual liberty of action must give way to the greater right of the collective people in the assertion of well-defined policy designed and intended for the general welfare.”).

In contrast to the narrow construction of the concept “affected with a public interest” in these early decisions, post-1930s Supreme Court cases have extended the definition far beyond the categories of governmentally created or natural monopolies to emphasize the legitimacy of governmental power to regulate societal scarcities caused by detrimental private exertion of rights created by state law. See Nebbia v. New York, 291 U.S. 502, 523 (1934) (state regulation of minimum and maximum retail prices of milk to ensure stable income to milk producers and an adequate market supply of milk does not violate fourteenth amendment due process) (“[G]overnment cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest.”). The Nebbia Court defined “affected with the public interest” to mean “no more than that an industry, for adequate reason, is subject to control for the public good.” Id. at 536. Significantly, the Court also observed that “[n]o exercise of private right can be imagined which will not in some respect, however slight, affect the public.” Id. at 524-25. The Supreme Court reinforced the breadth of Nebbia’s understanding of the “public interest” concept in Day-Brite Lighting v. Missouri, 342 U.S. 421 (1952) (upheld state legislation requiring employer to permit employee paid time off to vote). In Day-Brite, the Court posited that the police power “extends to all great public needs,” id. at 424, but that “the public welfare is a broad and inclusive concept. The moral, social, economic and physical well being of the community is one part of it; the political well being another.” Id. at 425.

The United States Supreme Court’s most recent pronouncement on the “public interest” doctrine is a testament to the remarkable breadth of the state police powers in regulating interests of communal scarcity. The Court in Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321 (1984), upheld the Hawaii Land Reform Act of 1967, HAWAII REV. STAT. ch. 516 (1977), against a challenge under the “public use” clause of the fifth amendment of the United States Constitution, made applicable to the states through the fourteenth amendment. In order to reduce the concentration of 47% of the state’s land in the hands of 72 private landowners and trusts, the Land Reform Act created a land condemnation scheme whereby title in real property was transferred from lessor to lessee upon the determination of the Hawaii Housing Authority that the change of ownership would effectuate the public purposes of the Act. The Court determined that the scheme was a
munal scarcity that one individual’s exercise of freedom is more likely than not to conflict with another’s claim to security of an interest as of right. As a general proposition, then, the probability of actual, or potential and constitutionally legitimate, state governmental intervention in private interactions is proportional to the probability of competing individual claims of right in any societal context. Therefore, the second presupposition suggests an indeterminate overlap between the domain of private commerce and the genres of private powers delegated or constitutionally legitimate exercise of the police power of eminent domain in the public interest.

The Midkiff decision quoted extensively from the United States Supreme Court's opinion in Berman v. Parker, 348 U.S. 26 (1954) (District of Columbia Redevelopment Act of 1945, D.C. CODE ANN. §§ 5-701 to -719 (1981), held constitutional), to establish the standards for judicial review of a state legislature’s determination that the public interest justified use of eminent domain. The following statements are excerpts from these quotations:

Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia . . . or the States legislating concerning local affairs . . . . Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. . . . [T]he means of executing the project are for Congress and Congress alone to determine.

104 S. Ct. at 2329 (quoting Berman, 348 U.S. at 32-33).

Concluding that “the 'public use' requirement is thus coterminous with the scope of a sovereign’s police powers,” the Midkiff opinion recognized that courts still had a “role to play” in reviewing legislative judgment of public use in the exercise of the eminent domain power. Nevertheless, the Court observed:

But the Court in Berman made clear that [the role] is “an extremely narrow” one. . . . [T]he Court has made clear that it will not substitute its judgment for a legislature’s judgment as to what constitutes a public use “unless the use be palpably without reasonable foundation.”

104 S. Ct. at 2329 (citations omitted).

Speculation on the ramifications of the Midkiff opinion in expanding the boundaries of the “public interest” concept and the accompanying “public use” doctrine has been dramatic. Professor Laurence Tribe of Harvard Law School, who acted as Special Deputy Attorney General of Hawaii representing the state in Midkiff, has been quoted as asserting: “The court is saying that any socioeconomic objective . . . will justify the state using eminent domain.” The High Court: This Property Is Condemned, NEWSWEEK, June 25, 1984, at 69. Professor Tribe “suggested that a state might interpret private art collections—for example, if a small, elite group of collectors owned all the masterworks of a Picasso or a van Gogh—as a substantial public harm and thereby force the sale of those treasures to a public museum.” Id.

101. As a corollary, it seems reasonable to presume that a charge of constitutionally violative private exercise of governmentally authorized prerogatives is more likely than not to arise in those arenas of interpersonal relations that the state previously has regulated in significant dimensions or legitimately might have regulated in full and proper use of its police powers.
properly exercisable by government.  

The United States Supreme Court's decision in *Shelley v. Kraemer* laid bare the inherently arbitrary nature of the federal Theory of Identity and, accordingly, the "state action" doctrine. The Court reasoned that state judicial enforcement of discriminatory private agreements must be viewed as "state action" inconsistent with prohibitions of the fourteenth amendment because effectuation of the substantive contractual terms "empowered" private individuals to impose injury to another's equal enjoyment of property rights. The holding in *Shelley*

102. The dysfunctional nature of the second presupposition certainly has not escaped scholarly notice. Commentators generally attack a distinction among degrees of governmental delegation/authorization of private power from a jurisprudential perspective, however, either (1) by arguing that "state action" is manifest whenever the law recognizes the validity and/or enforceability of private action, see, e.g., Alexander, *Cutting the Gordian Knot: State Action And Self-Help Repossession*, 2 HASTINGS CONST. L.Q. 893, 897 (1975) (state officials are the ones who enforce the rights and privileges granted by permissive actions); Black, *supra* note 1, at 98 (private discrimination exists because sanctioned and tolerated by law); Brest, *supra* note 98, at 1315 (state acts whenever law exists authorizing private action); Horowitz, *The Misleading Search for 'State Action' Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208, 209 (1957) (whenever state gives legal consequences to private transactions there is "state action"), or (2) by arguing that a public act is manifest whenever the law denies a private claim of right, see, e.g., Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment 'State Action' Requirement*, 1976 SUP. CT. REV. 211, 229-30 (state grants legal deference to challenged practice); Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action*, 2 DUKE L.J. 219, 232 (1965) (reviewable "state action" inheres in every state decision to deny something that a person claims as a matter of right). *Contra* Burke & Reber, *supra* note 75, at 1107 (no "state action" as long as law is permissive in nature and leaves decision for initiating action totally within the realm of private choice).


105. The Court stated:

These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights . . . . [Judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law
effectively undermines any distinction under the federal Theory of Identity between “public” power and legally cognizable “private” action, for it creates a “status relationship” between the state and a private party at the point at which the private party seeks judicial effectuation of a personal exercise of power. It is theoretically and functionally impossible for law to define a sphere of “private” action when jurisprudence does not recognize such action, if judicially enforceable, as “private.” Having equated judicially enforceable private action with state delegation or authorization of power, Shelley exposes the arbitrariness of any Theory of Identity that attempts to resurrect the spheres of private conduct and state involvement along the line of a less attenuated relationship.

Like the Theory of Identity, the Theory of Causality lacks operational content. Its contemporary rationales cannot distinguish in any determinate manner which among particular activities in a “status relationship,” those attributable or those nonattributable to the state, can be held to have caused allegedly unconstitutional injury. Recent doctrinal developments in the Theory of Causality unveil its inutility. Its requirements radically narrow the realm of liability-creating state behavior defined by the Theory of Identity, on the basis of unestablished or immaterial criteria. Even more important, its requirements challenge the viability of a “state action” doctrine.

The Supreme Court decisions in *Jackson v. Metropolitan Edison Co.* and *Flagg Brothers v. Brooks* turn upon the same rationale, which articulates the contemporary standard for the Theory of Causality. If one assumes a private actor sufficiently associated with the state under a Theory of Identity, then the particular activity proximately causing the allegedly unconstitutional injury cannot be ascribed to the state without evidence that the state affirmatively compelled or affixed its imprimatur on the side of the injurious conduct. Although the

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policy. Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement.

334 U.S. at 89-90 (footnote omitted).

106. 419 U.S. 345 (1974) (no “state action” in termination of electrical service by private utility company that was subject to extensive public regulation in many particulars).

facts in *Jackson* and *Flagg Brothers* presented strong cases for findings of "state action" under either the Pollack "ratification" rationale\(^\text{108}\) or the Reitman "encouragement" rationale\(^\text{109}\) for the Theory of Causality,\(^\text{110}\) the Court ruled that even explicit state approval or authorization of private action generally taken in a publicly regulated enterprise will not transmute specific private practices into "state action" when the initiative for the particular activities comes from the private party and not from the state.\(^\text{111}\)

As enunciated in *Jackson* and *Flagg Brothers*, the Theory of Causality works at cross-purposes to the Theory of Identity. The Theory of Causality's compulsion/imprimatur requirement disallows state accountability for significant degrees of governmental involvement with nominally private action stemming from the "status relationships" established by the Theory of Identity's rationales. "Delegation" and "holding forth" understand the state to incur responsibility for privately inflicted injury that it affirmatively enfranchised by delegation of govern-


\(^{110}\) The record in *Jackson* established that Pennsylvania law required the filing of a general tariff by a private electrical utility company, including a description of penalty terms that arguably might have applied to termination procedures, and authorized a 60-day notice period before the effective date of general tariff rule changes, in which time the Public Utilities Commission arguably had the power to veto unacceptable provisions. 419 U.S. at 355. Because Metropolitan Edison's termination procedures had been filed in its general tariffs for many years and reiterated in its most recent version filed as part of a rate increase proposal, *id.* at 354, the Commission's failure to overturn the company's practices might have been deemed specific or constructive authorization of the termination proceedings à la Public Utils. Comm'n v. Pollack, 343 U.S. 451, 462 (1952), upon which the company relied to injure petitioner. *Flagg Bros.*' characterization of the New York "self-help" provision as an announcement of the circumstances under which its courts will not interfere with a private sale, 436 U.S. at 166, is an explicit recognition that state law, in effect, had created an enforceable private right to action allegedly violative of respondents' due process rights, an "encouragement" in the style of Reitman v. Mulkey, 387 U.S. 369 (1967).

\(^{111}\) The Supreme Court determined that the harmful behavior alleged in both *Jackson* and *Flagg Bros.* constituted private action that the state, by legislation or regulation, may have permitted but did not compel. Because the Pennsylvania Public Utilities Commission had neither ordered, cooperated in, nor otherwise "put its own weight on the side of the proposed [termination] practice," Pennsylvania was not deemed accountable for Metropolitan Edison's actions in *Jackson*. 419 U.S. at 357. Because the "self-help" provision challenged in *Flagg Bros.* merely allowed, but did not compel, the private sale of stored goods, the warehouseman's unilateral execution of a lien was not action fairly attributable to New York State. *Flagg Bros.*, 436 U.S. at 166.
mentally exercised power or by authorization of conduct regulable within its legitimate police powers. The compulsion/imprimatur requirement, however, understands that any dimension or facet of private activity can be identified effectively with the state only by its official seal of approval or by evidence of its direct control. Moreover, compulsion/imprimatur virtually negates the "entwinement" rationales. Extensive state direction of a nominally private enterprise will not likely implicate the state in particular policies or practices complained of without the state's significant involvement in the promulgation and/or enforcement of these specific activities.

By refusing to attribute liability as necessarily coextensive with the identification of the state and private actor, the Theory of Causality invites the division of a "status relationship" into those dimensions that are state-imprinted or nonstate-imprinted, and further division of state-imprinted dimensions into facets that are injury-causative and injury-noncausative. This is all highly problematic. Decisional law simply does not begin to describe how an integrated private venture, series of private activities, or a single and continuous action should be sectionalized, or how the various dimensions are to be differentiated, as merely state delegated and approved, or as significantly bearing the state's "imprimatur." Assuming definitive rules for the first division, the compulsion/imprimatur requirement does not even address the central concern of a Theory of Causality. It provides no standards by which to prioritize the truncated dimensions of a "status relationship" as more or less directly and proximately causative of the injury complained of; nor does it suggest and justify a methodology to weigh these factors and to call the judgment of state liability.

112. "State-imprinted" and "nonstate-imprinted" are terms derived from the contemporary standard for the Theory of Causality articulated in Jackson and Flagg Bros. See supra text accompanying notes 106-11. "State-imprinted" action defines conduct that the state affirmatively compelled or affixed with its "imprimatur." "Nonstate-imprinted" action, of course, defines conduct that is not "state-imprinted."

113. The sole standard mentioned in Jackson, the source of initiative for action, 419 U.S. at 357, is insufficient to this division, if not totally irrelevant, since significant ratification or compulsion may as likely follow commencement of behavior as precede it.

114. The Article argues that the contemporary "compulsion/imprimatur" standard articulated by Jackson and Flagg Bros. for the Theory of Causality suffers gravely from a lack of operational content because decisional law implementing the standard provides no determinate and coherent guidelines for distinguishing the "injury-causative state-imprinted" dimensions of a private enterprise that may give rise to unconstitutional "state action." A legitimate objection to this argument is that the author's perspective
Even more devastating to the Theory of Causality than these definitional problems, however, is the challenge that the compulsion/imprimatur requirement poses to the very import of a "state action" doctrine. As the "state action" concept seeks to locate the point at which nominally private behavior must be deemed beholden to state power, and thereby subject to the presumption of security of right, the doctrine presupposes that

may be short-sighted: to demonstrate the lack of operational content in the Supreme Court decisions implementing the contemporary standard for the Theory of Causality is not to prove the standard itself as failing in operational content.

Ultimately, the objection points to a dispute over reasonable faith in the institutional competence of the federal courts. Is it more probable than not that the courts can and will develop cogent, comprehensive, and precise rules that can and will be applied uniformly and consistently to distinguish the interrelated strands of governmental and private behaviors contributing to all publicly and privately integrated undertakings, to identify the strands as discrete public and private elements, and to evaluate each separately for the nature, scope, and intensity of its causal connection to the alleged injury? Unless this necessarily speculative inquiry is reasonably answered in the affirmative, the distinction between the lack of operational content in doctrinal rulings and in the contemporary standard itself is an academic question, and likely of little interest even to academics.

The Supreme Court's track record in performing such feats of categorical analysis for comparable requirements of other federal constitutional doctrines is uninspiring, and it speaks for itself. Witness the utter failure of the Court, in the evolution of the interstate commerce clause doctrine, to articulate meaningful and serviceable distinctions between private control over the "transportation" of an item, legitimately reached by congressional exercise of the commerce power, and control by the same integrated private industry over the "manufacture" of the item, which eludes the constitutional reach of Congress' commerce power. Compare United States v. E.C. Knight Co., 156 U.S. 1, 15 (1895) (Congress cannot regulate a monopoly in "manufacture" as an exercise of its interstate commerce power); Carter v. Carter Coal Co., 298 U.S. 238, 310 (1936) (Congress cannot regulate maximum hours and minimum wages in coal mines because the effect of labor provisions falls primarily upon "production" and not upon "commerce" defined as "intercourse for the purposes of trade") with United States v. Darby, 312 U.S. 100, 117 (1941) (interstate commerce power extends to local activities in production or manufacture having substantial effect on commerce in the objects produced; Carter Coal doctrine expressly limited); Wickard v. Filburn, 317 U.S. 111, 127 (1942) (federal commerce power extends to regulation of wheat production intended solely for consumption on the farm) ("questions of federal power cannot be decided simply by finding the activity in question to be 'production' nor can consideration of its economic effects be foreclosed by calling them 'indirect'"). Similarly, re-examine the collapse of the Court's differentiations in the economic substantive due process doctrine between private enterprises "clothed with the public interest" that are legitimate subjects for state police power regulation and private activity not touched with the public interest and subject to control for the public good. See supra note 100.

Even conceding the possibility that the "compulsion/imprimatur" requirement could be made workable, a solution to the problem of operational content is only the advent to the central problem with this contemporary standard for the Theory of Causality. The more effective the operation of the "compulsion/imprimatur" standard, the stronger the negation of any purpose or meaning for a "state action" doctrine at all. See infra 115 and accompanying text.
complainant's injury was not caused by any purely governmental action.\textsuperscript{115} The compulsion/imprimatur requirement undermines this presupposition. At the point of explicit ratification or express order of private behavior, the state entity might be held itself to have executed the injurious conduct through an agent or deputy. With affirmative and direct state action in such instances, the "status relationships" defined by the federal Theories of Identity and Causality become confusing superfluities.

Washington's wholesale incorporation of the federal Theories of Identity and Causality opens its "state action" doctrine to the same attacks. For more than operational reasons, however, the Washington doctrine cannot serve the normative purpose of reinforcing legal liberalism. The "state action" doctrine in the Washington Bill of Rights determines whether a constitutional claim presents a justiciable question and a substantive cause of action on the basis of the identity of the alleged wrong-doer. The doctrine distinguishes between real-world harm to interests of constitutional significance (that is, harm that may or may not be found, after a hearing on the merits, to be actual injury to a constitutionally secured right) when imposed by state actors, only because they are state actors, and real-world harm of similar nature, scope, and intensity, to interests of constitutional significance when imposed by private actors, only because they are not state actors. Because the "state action" doctrine uses this distinction to establish both the state judicial cognizance of an article I claim and an indispensable substantive element of a cause of action under article I, the doctrine sabotages the very core of the liberal legal tenet of security of right.

Classical liberalism understood that a purely private exercise of liberty might tread too severely upon another individual's freedom to pursue preferred ends and that the balance between reasonable impositions (that is, socially tolerable by-products of primarily "self-regarding" activity) and unreasonable impositions (that is, socially intolerable effects of primarily "other-regarding" activity) is a decision that cannot be left to the self-interested private disputants, but must be made by government as the trustee of the public welfare.\textsuperscript{116} In order to discharge this duty satisfactorily, government in the liberal legal state must

\textsuperscript{115} See supra note 1.

\textsuperscript{116} See supra notes 16-19 and accompanying text (discussion of inherent tension between tenets of liberty and security of right, and classical resolution of conflict).
grant effective and meaningful access to its dispute resolution tribunals to a complainant who alleges that personal freedoms were infringed too severely by another's exercise of private power and alleges that, in this context, the complainant's freedoms should be secured by law.

The "state action" doctrine, however, barricades the threshold of the state courthouses to such a charge made under the Washington Bill of Rights. The doctrine defines as nonjusticiable any claim that private conduct may have imposed socially intolerable restraints on the scope or intensity of particular liberties that are expressly vested in the complainant by article I of the Washington Constitution. Even though governmental recognition and defense of enumerated liberties have been deemed so important as to be required in the state government's enabling charter, the "state action" doctrine empowers the judiciary to protect these liberty interests only as against governmental actors. The doctrine prevents justiciability of claims against private infringement by establishing the public identity of the alleged wrongdoer as a necessary and unconditional element of a substantive cause of action under article I. Invariably, the "state action" doctrine differentiates in the potential for real-world injury to constitutional liberties by means of the source of injury alone.

Finding a normative difference in injury to constitutional interests as a function of the identity of the source alone can be comprehended if private actors were never capable of imposing real-world harm to liberty concerns commensurate in kind and degree to harm inflicted by public actors. As the dispositive criterion for a substantive claim of right, the public or private identity of the alleged wrongdoer loses significant normative value if private conduct may be as realistically damaging in nature, breadth, or severity to another's freedoms as state conduct can be.

In the context of "state action" theory, to ask whether private persons may be conceived to cause essentially the same deprivations of liberty interests as governmental entities is, in effect, to answer the question. As prior discussion established, the rationalizing principle of the Theory of Identity is that private individuals and enterprises are functionally capable of "other-regarding" manners and resulting impacts characteristic
of public officials and institutions.\textsuperscript{117} Judicial efforts to formulate workable principles for the Theory of Identity attest to the perception that, under certain conditions or circumstances, private actors may exercise sufficient economic, political, or social power to perpetrate real-world injury to constitutional interests that is equivalent in type or effect to the harm possible by direct exertion of state governmental power by public actors. This judicial perception is certainly justified from the perspective of the injured right-holder: for example, it is unlikely that the Alderwood Associates plaintiffs would have viewed prohibitions on soliciting initiative signatures in the private shopping center as any less detrimental to their political speech interests than similar restrictions on petitioning in the public streets.\textsuperscript{118}

\textsuperscript{117} The rationalizing principle of the Theory of Identity was explained, in part, through analysis of the two presuppositions underlying the "status relationships" developed by the United States Supreme Court to find state accountability for private conduct. See supra notes 94-102 and accompanying text. The failure of the two presuppositions to circumscribe distinct realms of public and private behavior suggested an indeterminate overlap between the domain of private action and the genres of power legitimately exercisable by state government.

\textsuperscript{118} The text asserts that, from the perspective of the injured right-holder, individuals acting in their private capacities are as functionally capable of realizing the same injury to constitutional rights as public officials or institutions. This assertion may be faulted for begging the question of the nature of "right" safeguarded by, and the nature of "injury" prohibited by the Washington Constitution.

The critique might run as follows: the assertion defines constitutional "right" and "injury" in terms of the deprivation to the right-holder's being, action, or entitlements, and assumes the perspective of the right-holder to evaluate the character and dimensions of the deprivation suffered; whereas the concepts of constitutional "right" and "injury" might be defined in terms of the identity of the perpetrator of harm, and restricted to real-world deprivations suffered at the hands of an officer or institution of public government. Defining constitutional "right" and "injury" in this latter fashion, the text's assertion is incorrect as a matter of logic. Perforce, private parties are inherently incapable of "injury" to a constitutional "right" that can only be deprived by a public individual or entity. In conclusion, the presumption of security of constitutional "right" is understood in terms of the Washington "state action" doctrine and consequently cannot be undermined by its effective operation.

A complete response to this critique must demonstrate that the normative objectives of legal liberal theory are satisfied more fully by defining the presumption of security of constitutional "right" for purposes of the "state action" doctrine from the perspective of the potential right-holder. Such a response is beyond the scope of this Article, and will be attempted in a forthcoming article on the federal "state action" doctrine. It must suffice here to recognize the existence of the critique, and to offer the mere skeleton of a partial response.

Liberal legal theory justifies the existence of government as the means to enhance "ordered liberty": personal powers of self-help against private wrongdoers are exchanged in theory for personal security against private wrongdoers under the rule of law. No just government can deny access to its instrumentalities for resolution of grievances at the same time that it prohibits all effective alternative means of fending off real-world
Once conceding that private persons conceivably realize harm to constitutional interests of other private parties that is functionally similar to that possible by governmental action, the public or private identity of an alleged wrongdoer is normatively suspect when it operates as a determinate element of a substantive claim under the Washington Bill of Rights. If public or private identity cannot serve meaningfully to distinguish natures and degrees of real-world injuries to constitutionally secured freedoms, it does not serve justifiably as a sine qua non for a substantive cause of action alleging deprivation of these freedoms. By raising the issue of public or private identity to the level of an indispensable condition to a cognizable claim of right under article I, the Washington "state action" doctrine restricts the constitutional authority of the state courts to secure personal liberties as against private infringements realistically as severe as public infringements. Because it conclusively establishes both justiciability and the substantive sufficiency of a constitutional claim of right on an indeterminate measure for harm, the "state action" doctrine is normatively underinclusive in its purpose to attain legal liberalism's promise of security of right.

All this is not to say that the public or private identity of the alleged wrongdoer is normatively irrelevant to a decision on the merits of an article I case. In the context of any particular harms. To define the "right" presumably secured by government in terms of the public identity of the wrongdoer, however, is to tolerate the likelihood of denying personal security to victims of nonstate harm; unless the law authorizes self-help measures or otherwise affords appropriate relief by enforcement of statutory or common-law remedies, the "state action" doctrine forecloses the sole remaining legal avenue in the Washington Constitution for promoting "ordered liberty." On the other hand, when "right" and "injury" are defined in terms of the deprivation to the right-holder's real-world interests, the presumption of security is fostered to its fullest theoretical extent; the acceptance or rejection of a claim of security as of right will be based upon a consideration of all potentially relevant factors for balancing conflicting claims of liberty and security, and not prejudiced automatically by the single factor of the public or private identity of the wrongdoer.

In light of this explanation, the proponent of the "identity of perpetrator perspective" for the Washington "state action" doctrine's definition of constitutional "right" and "injury" must demonstrate why liberal legal theory should regard state-inflicted harm as categorically more repugnant than nonstate-inflicted harm. Conceivably, the proponent may attempt to prove that state machinery is more prone to inflicting real-world deprivations than nonstate actors, that such deprivations are likely to be more devastating to the victim physically, emotionally, or psychologically when inflicted by the state, or that these deprivations are recognized uniformly by society as desirable means to achieve some greater normative end. Unless some such rationale is asserted and substantiated persuasively, the "identity of the perpetrator perspective" should be rejected as a normatively unjustified and inappropriate viewpoint.
controversy, the state courts may justify a more stringent standard of liability for a state official or entity than for a private individual or organization on the normative basis that the governors of the body politic are held to a higher level of responsibility in certain instances than are mere members of its constituency. It is one thing, however, for the courts to ascribe independent significance to the public nature of a defendant when weighing opposing claims to security of a constitutional right and to a legitimate exercise of power; it is quite another for the courts to search for public identity so that a private conflict may be adjudicated as a constitutional dispute.

The bitter irony in this normative deficiency is that the "state action" doctrine originally evolved in federal constitutional law with the understanding that state law would provide adequate recourse to determine the validity of, and due redress for, alleged violations of civil liberties secured by state statutes and common law, or guaranteed by the state constitution. With respect to the normative underpinnings of the federal "state action" doctrine, the Washington constitutional "state action" doctrine operates counter-intuitively. When state statutory and common law does not provide an adequate remedy for alleged injury to civil liberties guaranteed by the state constitution, the claimant's only recourse is under the constitution itself. The injured party should not be denied access to a governmental determination of the validity of a claim to a secured right and to redress because the injuring party is not itself the state.

119. This is not to propose, however, a smuggling back of the "state action" inquiry as an indispensable and conclusive determinant on the merits, in the manner of "definitional balancing" portrayed in one of the possible readings of Alderwood Assocs. See supra notes 49-51 and accompanying text (critique of the balancing approach to establish a cognizable cause of action under art. I, § 5 of the Washington Constitution, endorsed by the plurality opinion of the court).

120. Mr. Justice Bradley's majority opinion in the The Civil Rights Cases, 109 U.S. 3 (1883), based the Court's invalidation of the 1875 Civil Rights Act, in part, on the rationale that

[i]t applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment. In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the State or its authorities.

Id. at 14.

121. Examination of the rationally unjustifiable reconstruction of both the Theory
VI. Dismantling the Washington "State Action" Doctrine: Recognizing a Fundamental Right to State Action

Washington's Bill of Rights declares the raison d'être for state government. Two provisions of article I direct the institutions of state government to aspire to the quintessence of legal liberalism:

Article I, Section 1. POLITICAL POWER. All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.122

Article I, Section 32. FUNDAMENTAL PRINCIPLES. A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.123

Sections 1 and 32 of article I jointly mandate the duality in liberal governance; at the same time that state government maintains the realm of individual liberty, it must meaningfully protect and secure the fruits of individual rights exercised.

Undoubtedly, these provisions have been regarded by the Washington judiciary as essentially platitudinal, and as platitudinal, essentially ignored. The unimaginative transplantation of the federal "state action" doctrine into the state constitution certainly reflects such an attitude. In the context of claims to constitutionally secured rights, however, sections 1 and 32 may be infused with fresh and vibrant meaning. The Washington courts should recognize that the two provisions warrant a fundamental right to state action for protection of constitutional liberties against private infringement. So recognized, the fundamental right to state action requires the dismantling of the Washington "state action" doctrine as a barrier to justiciability of constitutional claims against private parties.

Sections 1 and 32 certify that state government exists for the purpose of protecting individual civil liberties. In addition to private entitlements vested as matters of right by state statutory, regulatory, and common law, civil liberties are enshrined in

of Identity and the Theory of Causality in recent United States Supreme Court decisions, and analysis of the normative unjustifiability of the federal "state action" doctrine, will be pursued fully in a forthcoming article by this author on the internal and external corrosion of the federal "state action" concept.

122. WASH. CONST. art. I, § 1.
123. WASH. CONST. art. I, § 32.
the state constitution, a majority of which are enumerated in the remainder of article I. When a litigant sues a private party under the Washington Constitution, the litigant claims, in essence, that state government is required by its enabling document to protect the entitlement to civil liberty granted therein. Washington State government is compelled to provide protection because the defendant, a private individual or entity, allegedly has acted in a fashion adversely affecting the constitutional civil liberties to be secured to all citizens by the state. The fundamental right to state action in the context of constitutional litigation, then, is the guarantee that the judiciary will resolve the line-drawing problem of legal liberalism by a full and fair hearing of the competing claims of the private parties invoking its power. The state courts must determine by examination of the merits of the constitutional claims whether the constitution secures an interest as of right to the complainant and whether this interest has been injured unduly by the private opponent’s exercise of an alleged liberty.

The state courts cannot qualify this fundamental right to justiciability of constitutional causes for private injury by the traditional “state action” requirement. Doing so, the state government itself will have acted affirmatively and deliberately not to secure the individual liberties allegedly vested in the claimant. Because of the operational and normative bankruptcy of the “state action” theories, the state judiciary cannot employ the doctrine at the threshold of constitutional litigation to perform meaningfully the sensitive task of balancing competing private substantive concerns. Adherence to the “state action” inquiry as a formalistic tool to strike the balance would amount to active state denial of due process in failing to secure constitutional rights. Only by a conscious and thorough weighing of the merits of conflicting private claims to liberty and to security of right can the state judiciary discharge its constitutional duty to maintain liberalism’s duality.

To establish that a fundamental right to state action requires the dismantling of the Washington “state action” doctrine, of course, is not to assert that state courts are forbidden constitutionally to regard the public or private identity of an alleged wrongdoer as a relevant factor in reaching particular judgments on the merits. As prior discussion in section V con-
firmed, a party’s affiliation with state government may be normatively significant in resolving a dispute between competing private constitutional claims. It is conceivable that the success of a litigant’s cause may be influenced, even decisively, by the strength of the nexus between the public or private identity of the adversary (or, perhaps even more relevant, the public or private character of the activity for which the adversary seeks constitutional protection) and the core value of the constitutional guarantee asserted by the adversary, relative to the strength of the nexus between the personal interests alleged and the core value of the constitutional provision relied upon by the litigant. Assuming that the judiciary considers the public or pri-

124. See supra note 119 and accompanying text.

125. For example, all other considerations being equal, a female complainant may be more likely to prevail on a claim to equal protection in the right of expressive association, as against a challenge by the defendant on the basis of the right of intimate association or privacy, in Case 1 than in Case 2:

Case 1: Female complainant seeks admission to a state electoral candidate debate sponsored by a male-only private social club, this particular event being held open with nominal charge to male members of the general public.

Case 2: Female complainant seeks membership to the same private social club, which engages in diverse state and local civic activities generally restricted to the club’s members, the activities varying in political, business, charitable, and social natures.

Arguably, the nexus between the complainant’s alleged interests and the judicially recognized value of the constitutional guarantee for expressive association is stronger in Case 1 than in Case 2. If the freedom of expressive association is construed to be a correlative right to substantive speech liberties, then its core value is implicated more greatly when the complainant seeks to engage in primarily political speech activity than when she seeks involvement in functions that may be primarily social, commercial, or charitable in nature. Moreover, arguably the nexus between defendant’s alleged privacy interests and the right of intimate association is stronger in Case 2 than Case 1. If the freedom of intimate association protects personal relationships that exhibit seclusion from the public at large, a high degree of selectivity in affiliation, and human enrichment from close ties to a limited number of individuals, then its fundamental value may be dissipated as the private organization opens its functions to the general public, the sole criterion for admission being male gender, with the expectation that many participants may not share the sex-segregated preferences of the club members. For further guidance in evaluating the relative strength of competing private claims to associational rights in the context of federal constitutional law, see Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984) (enunciates a theory of first amendment rights of intimate and expressive association and analyzes the “interface” between the right of association and equal protection doctrines).

It is well beyond the scope of this Article to propose a comprehensive scheme for judicial weighting of public or private status in deciding the merits of conflicting private constitutional claims. Nevertheless, at the risk of introducing meaningless generalizations, one may inquire cautiously whether the importance given the factor of identity should not correlate in some prototypical fashion with other determinations indispensable in state constitutional adjudication. For example, all other variables remaining con-
vate status of parties or particular activities material at all to judgment on the merits of a specific controversy, strands of reasoning first evolved in the traditional “state action” doctrine possibly will re-emerge through judicial attempts to characterize such status.\textsuperscript{126} Provided that the issue of public or private identity of parties or activities does not become an independent and categorically conclusive determinant of the merits of private constitutional disputes, judicial use of the familiar “status relationship” rationales is not problematic. The rationales then serve only to define and characterize a variable (or a set of variables) that will be ascribed significance only in relation to other factors material to a final judgment on the merits.

Though Washington’s repudiation of the “state action” doctrine is theoretically and realistically justified, it would likely be perceived as a highly progressive, if not radical, maneuver in state constitutional jurisprudence; to date, no state has abandoned the “state action” requirement for all constitutional causes of action against private parties. Washington’s achievement would be foreshadowed, however, by important movements in sister states to construe their respective constitutions as a source of rights against certain forms of private behavior that cannot be identified with the states themselves.

Following the lead of California in \textit{Robins v. Pruneyard Shopping Center},\textsuperscript{127} several states have found the rights of free speech and association, guaranteed under their constitutions,

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\textit{Washington “State Action” Doctrine}
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\textsuperscript{126} Although not inevitable, judicial reliance upon the traditional “status relationship” rationales to establish the public or private status of parties or their activities is quite possible, as evidenced by the Washington Supreme Court’s decision in \textit{Alderwood Assocs.}. In evaluating the strength of the shopping center’s privacy expectations in the use of property, the \textit{Alderwood Assocs.} plurality engaged in analysis resembling the “delegation” and “holding forth” rationales developed under the Theory of Identity. See \textit{supra} note 50 and accompanying text (discussion of \textit{Alderwood Assocs.} balancing methodology).
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\textsuperscript{127} 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979) (California Constitution protects rights of speech and petition, sensibly exercised, in privately owned shopping centers), aff’d, 447 U.S. 74 (1980).
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protectable not only against public violation, but under some circumstances against purely private infringements as well, particularly in the context of political advocacy. In Robins, the California Supreme Court read the state constitutional liberties of speech and petition more expansively than their federal counterparts, permitting reasonable governmental restrictions on the property rights of private shopping centers. Rather than characterizing the center as "holding forth" as a public forum under the "state action" doctrine, the court assessed the merits of the competing private claims by balancing the actual intrusion to legitimate expectations of privacy of the property owner against the primary value accorded constitutionally to political speech activities and the state's traditional police power to condition the private rights of property use for the public welfare.128 New Jersey129 and Pennsylvania,130 relying centrally on Robins, have recognized similar judicial power under their state constitutions to qualify the exercise of private property rights in the promotion of public policy favoring the personal liberties of speech, association, and petition.

An even more notable harbinger of the death of the state constitutional "state action" doctrine is the recent evolution in Pennsylvania law of constitutionally implied common-law causes of action against private parties. The Pennsylvania inferior courts have allowed nonstatutory wrongful discharge claims in tort and contract raised by at-will employees to survive motions for nonsuit, on the rationale that an employer's property and liberty interests may be circumscribed, regardless of state governmental action or inaction, when a termination violates a clear mandate of public policy derived from state constitutional guarantees of personal liberties.131 In effect, the Pennsylvania courts

128. Id. at 908, 592 P.2d at 346, 153 Cal. Rptr. at 859.
129. See State v. Schmid, 84 N.J. 535, 567-69, 425 A.2d 615, 632-33 (1980) (although not engaged in "state action," Princeton University, a private institution of higher learning, is subject to reasonable state regulations to protect state constitutional speech and assembly rights against oppressive restrictions in access to property generally committed to public use).
130. See Commonwealth v. Tate, 495 Pa. 158, 175, 432 A.2d 1382, 1391 (1981) (private college, which had assembled a public audience to hear a lecture by the director of the Federal Bureau of Investigation, could not, consistent with state constitutional guarantees of speech, assembly, and petition, invoke standardless permit requirements to prevent distribution of leaflets outside of the lecture hall in an area normally open to the public).
understand that the explicit enumeration of individual rights in the state constitution vests these specific liberties with particular public importance, and that their abridgment by private action legitimately may generate a state common-law cause of action.

Not only does Pennsylvania authority support the dismantlement of Washington’s "state action" doctrine, but it also argues for judicial discovery of the fundamental right to state action under the Washington Constitution. There is no essential difference between Pennsylvania’s constitutional implication of common-law actions to protect public policy against private threats and Washington’s recognition of a constitutional right to judicial securement of personal liberties against private infringement. The former approach merely introduces the public policy doctrine as a mediating principle to rationalize the jurisprudential objective of the latter approach, the justiciability of actions for private invasion of constitutionally declared individual rights. The doctrinal advantages in the approach proposed for the Washington Constitution cannot be overstated, however. By subscribing to the fundamental right to state action, the state judiciary announces in a forthright and clarion fashion its commitment to meaningful security of state constitutional liberties.

VII. Conclusion

Efforts of the Washington Supreme Court in Alderwood Associates to enlighten state constitutional doctrine revealed that the bench largely perceived a campaign to foretake the "state action" concept as revolutionary.132 Judicial renunciation

wrongful discharge of private employee resulting from performance of jury duty); cf. Hunter v. Port Auth., 277 Pa. Super. 4, 12, 419 A.2d 631, 635 (1980) (in recognizing the nonstatutory wrongful discharge claim of the public employee, the court noted that Pennsylvania law permits direct causes of action under the state constitution despite legislative inaction).

Sitting in diversity jurisdiction in Novosel v. Nationwide Ins. Co., 721 F.2d 894, 898 (3d Cir. 1983), the United States Court of Appeals for the Third Circuit interpreted Pennsylvania law to acknowledge a tort and contract common-law cause of action against a private employer for termination of complainant’s employment, allegedly a retaliation for the complainant’s refusal to support the company’s political lobbying efforts. The Third Circuit took into consideration the importance of the political speech and associational freedoms secured by the federal and state constitutions to find a cognizable expression of public policy sufficient to sustain a cause of action for wrongful discharge under Pennsylvania law.

132. Lest this statement be regarded as hyperbolic, note the language and tone of Justice Dolliver’s separate opinion in Alderwood Assocs., concurring in the result but not
of the "state action" justiciability barrier in the Washington Constitution would not be a reaction to a cry for revolution, but the response of an appeal to reason. Since the "state action" doctrine fulfills no instrumental or normative function appropriate to state constitutional law decision-making, its abandonment is dictated by reason.

No revolution, this!

The reasoning of the plurality opinion of the Court. His concurrence states, in pertinent part:

[T]his is the first time the court has held the Declaration of Rights in our constitution is designed not just to protect the individual from government but that it may also be used by one individual against the other. It is constitution-making by the judiciary of the most egregious sort. . . . This court, however, should not expand its views of the fundamental meaning of the constitution—and thus the power of the court—at the expense of the will of the people. As it articulates constitutional rights it "chooses" to declare, the majority also arrogates to the court powers undreamed of by those who wrote and those who adopted our constitution. . . . Now there is no limit to the range of wrongs which this court may right—subject only to the court's notion of balancing interests. With acceptance of the majority position, the need for a statute will become secondary and the "encourage[ment] in American life" of the "private structuring of individual relationships and [the] repair of their breach" can be set aside for the beneficient guardianship of the state courts.

Today, the term "imperial judiciary" takes on new meaning.

96 Wash. 2d at 248-51, 635 P.2d at 118-20 (Dolliver, J., concurring) (citations omitted).