

# TYRANNY BY PROXY: STATE ACTION AND THE PRIVATE USE OF DEADLY FORCE

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## INTRODUCTION

Over the past decade there has been considerable public debate over the wisdom of the so-called “stand your ground” laws that allow for the use of deadly force in self-defense, even if the actor could safely retreat and avoid the threatening aggressor.<sup>1</sup> Supporters of the law maintain that law-abiding citizens should not have to cower from those threatening serious bodily harm. Rather they should be allowed to confront the threat with deadly force.<sup>2</sup> Opponents maintain that these laws leads to vigilante justice<sup>3</sup> and the needless escalation of disputes that could have been avoided had one party simply walked away.<sup>4</sup> While Florida’s statute has garnered particular national

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1 Benjamin Levin, Note, *A Defensible Defense?: Reexamining Castle Doctrine Statutes*, 47 HARV. J. ON LEGIS. 523, 535–36 (2010) (exploring the various iterations of the castle doctrine); Zachary L. Weaver, Note, *Florida’s “Stand Your Ground” Law: The Actual Effects and the Need for Clarification*, 63 U. MIAMI L. REV. 395, 400–03 (2008) (criticizing certain aspects of Florida’s castle doctrine and making recommendations for amendments).

2 Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237, 243–44 (2008) (discussing the influence of the American ideal of the “true man” on the abandonment of the English duty to retreat in favor of the right to stand your ground in nineteenth-century America); see also Levin, *supra* note 1, at 524; Weaver, *supra* note 1, at 396.

3 P. Luevonda Ross, *The Transmogrification of Self-Defense by National Rifle Association-Inspired Statutes: From the Doctrine of Retreat to the Right to Stand Your Ground*, 35 S.U. L. REV. 1, 36 (2007) (suggesting that the stand your ground statutes create a vigilante atmosphere); Michelle Jaffe, Note, *Up in Arms over Florida’s New “Stand Your Ground” Law*, 30 NOVA L. REV. 155, 178 (2005) (citing *Armed and Dangerous: NRA-Backed Gun Bill Deadly for Florida*, DAYTONA BEACH NEWS-J., Mar. 14, 2005, at 04A).

4 Weaver, *supra* note 1, at 402–03. But see Christine Catalfamo, *Stand Your Ground: Florida’s Castle Doctrine for the Twenty-First Century*, 4 RUTGERS J.L. & PUB. POL’Y 504, 543–44 (2007) (disputing claims that Florida’s stand your ground law encourages violence).

attention,<sup>5</sup> stand your ground laws are neither new nor unique.<sup>6</sup> Currently, twenty-four states allow private citizens to use deadly force in self-defense without imposing a duty to retreat.<sup>7</sup> Furthermore, all states permit the police to use deadly force in self-defense without imposing a duty to retreat.<sup>8</sup>

Despite the widespread focus on stand your ground laws, the continued existence of the common law fleeing felon rule has gone almost unnoticed. Several states permit private persons to use deadly force to protect property or prevent the escape of a fleeing felon even when the felon does not impose a threat of death or serious bodily harm. Under the common law fleeing felon rule, both law enforcement officers and private citizens enjoyed the privilege of using deadly force to secure the arrest of felons, but neither could use the privilege to secure the arrest of misdemeanants.<sup>9</sup> Although the fleeing felon rule was once the prevailing view in most American jurisdictions, in *Tennessee v. Garner*, the Supreme Court held that a police officer's use of deadly force to prevent the escape of a suspected burglar violates the Fourth Amendment's prohibition against unreasonable seizures.<sup>10</sup> A police officer may constitutionally use deadly force only if the officer has probable cause to believe that the suspect poses a danger of serious physical harm to the officer or others.<sup>11</sup> Despite the Court's decision in *Garner*, some states continue to allow private citizens to use deadly force to protect property or prevent the escape of nonviolent fleeing felons.<sup>12</sup> In these states, a private

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5 Jaffe, *supra* note 3, at 178; Weaver, *supra* note 1, at 395–97.

6 Suk, *supra* note 2, at 243–44 (discussing the late nineteenth-century abandonment, by the majority of states, of the English duty to retreat in public places).

7 Weaver, *supra* note 1, at 397 (stating that 23 states have passed stand your ground laws similar to Florida's and naming most of them); Cora Currier, *The 24 States That Have Sweeping Self-Defense Laws Just Like Florida's*, PROPUBLICA (Mar. 22, 2012, 11:05 AM), <http://www.propublica.org/article/the-23-states-that-have-sweeping-self-defense-laws-just-like-floridas> (listing Alabama, Arizona, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nevada, New Hampshire, North Carolina, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, and West Virginia as states with statutory stand your ground laws).

8 Roger Roots, *Are Cops Constitutional?*, 11 SETON HALL CONST. L.J. 685, 703 n.107 (2001) (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW 461 (2d ed. 1986)).

9 Steven C. Day, *Shooting the Fleeing Felon: State of the Law*, 14 CRIM. L. BULL. 285, 286–87 (1978) (citing cases and 2 SIR MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 119 (1788)); see also *Tennessee v. Garner*, 471 U.S. 1, 12 (1985) (discussing the common law fleeing felon rule as to police officers).

10 *Garner*, 471 U.S. at 11–12.

11 *Id.*

12 Since the Court's decision in *Garner*, state court decisions in Michigan and South Carolina have expressly authorized private persons to use deadly force to stop nonviolent fleeing felons. See, e.g., *People v. Couch*, 461 N.W.2d 683, 684 (Mich. 1990) (holding that *Garner* did not modify the common law fleeing felon privilege of a private person to use deadly force); *State v. Cooney*, 463 S.E.2d 597, 599 (S.C. 1995) (“[W]e find the holding in *Garner* does not apply to seizures by private persons and does not change the State's criminal law with respect to citizens using force in apprehending a fleeing felon.”). Texas, by statute, authorizes the private use of deadly force, when necessary, to prevent the escape of many felons, including one suspected of committing theft during the nighttime when

person may shoot and kill a common thief to prevent his escape even though a police officer is constitutionally prohibited from using deadly force under the same circumstances.

The common law fleeing felon rule, as it applies to private persons, is arguably constitutionally permissible because of the state action doctrine.<sup>13</sup> The state action doctrine and its exceptions are among the most fundamental, important, and misunderstood principles of constitutional law.<sup>14</sup> Under the state action doctrine, most of the Constitution's protections of individual liberties restrict the conduct of government actors, but they do not restrict the conduct of private actors.<sup>15</sup> There are, however, two exceptions to the state action doctrine that, when they apply, provide constitutional protections from infringements by private persons to the same extent as government actors. The entanglement exception applies when the state commands, encourages, or facilitates private action that the government is constitutionally prohibited from doing itself.<sup>16</sup> The second exception, the public func-

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escaping with the private person's property. TEX. PENAL CODE ANN. § 9.42 (West 2011). A Missouri statute authorizes the private use of deadly force when "necessary to effect the arrest of a person who at that time and in his presence committed or attempted to commit a class A felony or murder." MO. REV. STAT. § 563.051.3(3) (West 2013). In Missouri, class A felonies include identity theft in excess of fifty thousand dollars, *id.* § 570.223.3(5), distribution of a controlled substance near schools, *id.* § 195.214.2, a park, *id.* § 195.217.2, or public housing, *id.* § 195.218.2. Several other jurisdictions have statutes that are ambiguous as to when deadly force may be used to stop or seize a non-dangerous fleeing felon and have no court decisions interpreting the statute post-*Garner*. See, e.g., IDAHO CODE ANN. § 18-4009.4 (West 2013) ("Homicide is also justifiable when committed by any person . . . in attempting, by lawful ways and means, to apprehend any person for any felony . . ."); OKLA. STAT. ANN. tit. 21, § 733.3 (West 2012) (same).

13 *Couch*, 461 N.W.2d at 684 ("*Garner's* pronouncements regarding the constitutionality of the use of such force are inapplicable to private citizens . . ."); *Cooney*, 463 S.E.2d at 599 (holding that *Garner* does not apply to private persons not acting as agents of the state).

14 See, e.g., Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 70 (1967) (describing the state action doctrine as the "most important" issue in constitutional law); G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 HOUS. L. REV. 333, 340-54 (1997) (discussing the history and fundamental importance of the state action doctrine in constitutional law); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 505-07 (1985) (suggesting that the doctrine should be abandoned, in part because of its incoherence); Alan R. Madry, *State Action and the Due Process of Self-Help*; Flagg Bros. *Redux*, 62 U. PITT. L. REV. 1, 48 (2000) (noting the widespread confusion surrounding the doctrine); Dilan A. Esper, Note, *Some Thoughts on the Puzzle of State Action*, 68 S. CAL. L. REV. 663, 663-77 (1995) (discussing the importance of the doctrine and the confusion surrounding it).

15 E.g., *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978). The Thirteenth Amendment, which directly prohibits both private and government actors from engaging in slavery or involuntary servitude, is the sole exception. U.S. CONST. amend. XIII.

16 See ERWIN CHEMEIRNSKY, CONSTITUTIONAL LAW 552 (3d ed. 2006) (discussing private actors).

tion exception, imposes constitutional restrictions on private actors when they perform certain functions traditionally and exclusively performed by the government.<sup>17</sup> Unfortunately, the Supreme Court decisions discussing the doctrine and applying the exceptions have not been a “model of consistency,”<sup>18</sup> and scholars have long regarded the exceptions as a “conceptual disaster area.”<sup>19</sup>

This Article seeks to clarify the state action doctrine by reconsidering the purpose of the doctrine and its exceptions and redefining the public function exception so that it better fulfills its purpose.<sup>20</sup> First, it critically scrutinizes the historical justification for the state action doctrine—enhancing federalism and individual autonomy<sup>21</sup>—and explains why these rationales are inadequate. Although the state action doctrine may enhance federalism and autonomy, its *raison d'être* can more generally be described as the prevention of government tyranny. Similarly, the exceptions seek to ensure that the Constitution's protections of individual liberties apply to all infringement attributable to the government, even if the most immediate cause of the infringement is the act of a private party. While the state action doctrine prevents direct abuse of government power, the exceptions to the state action doctrine prevent government abuse through the use of private proxies.

Second, the Article maintains that the “traditional and exclusive” state performance test of the public function exception improperly limits the application of the exception.<sup>22</sup> The definition freezes “into law a static conception of government” and formulates a judicial test for state action that “cease[s] to resemble contemporary experience.”<sup>23</sup> More fundamentally, the test improperly defines governmental functions, not by the nature of the activity, but by the historic exclusive governmental status of the actors performing the task. This test is sufficient only if the government has not histori-

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17 See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 358–59 (1974) (declining to recognize the provision of electric utility services as a public function because it is not traditionally the exclusive prerogative of the state); *Evans v. Newton*, 382 U.S. 296, 302 (1966) (finding the operation of a municipal park to be a public function); *Terry v. Adams*, 345 U.S. 461, 469–70 (1953) (plurality opinion) (holding that the duplication of election processes violates the Fourteenth Amendment); *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (disallowing a state-enabled company to run a town that violates liberties); *Nixon v. Condon*, 286 U.S. 73, 88–89 (1932) (holding that disallowing minority voting in primary elections was a way for the state to racially discriminate); CHEMERINSKY, *supra* note 16, at 552 (mentioning the exceptions when the government has a duty to protect).

18 *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991).

19 Black, *supra* note 14, at 95; see CHEMERINSKY, *supra* note 16, at 552 (describing the sharply different views of Supreme Court Justices in cases on the topic).

20 See *infra* Parts III–IV.

21 See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 306 (2001) (Thomas, J., dissenting) (mentioning individual freedom); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982) (discussing federalism).

22 See *infra* Section III.B.

23 *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 550 n.1 (1987) (Brennan, J., dissenting).

cally delegated basic governmental power or tasks to private actors. But in fact, the government has often delegated governmental functions, sometimes because of a lack of government resources to perform the tasks and sometimes because private actors could achieve the government's end free from constitutional limitations on the means.<sup>24</sup> Under the current test, neither law enforcement nor the private use of deadly force is a public function because the government has not traditionally and exclusively performed either task.

To correct the problems with the current test, this Article advances an alternative formulation of the public function exception that focuses on the governmental nature of the function being performed rather than the exclusive history of government performance.<sup>25</sup> I call this exception the non-delegable governmental duty exception because it is analogous to the non-delegable duty doctrine in tort law. It holds the government responsible for infringements of individual liberties caused by the delegation of certain governmental functions involving peculiar risks of abuse if those performing the function are not constitutionally constrained.<sup>26</sup> It utilizes social contract theory and the related concept of limited government to identify the non-delegable governmental functions. Social contract theory identifies law making, adjudication, and law enforcement as non-delegable government functions because these tasks create unique dangers when left in the hands of self-interested private parties. The peculiar dangers involved in the performance of these functions require that where the government allows private persons to perform these functions, the private person must act under the same limitations constitutionally imposed on government actors.

The Article begins in Part I with a discussion of the Supreme Court's opinion and holding in *Tennessee v. Garner*.<sup>27</sup> It then describes the continuing application of the fleeing felon rule to private actors despite the Court's holding in *Garner*.<sup>28</sup>

Part II describes the state action doctrine, examines its history, and clarifies its purpose. It explains why the Court's early focus on enhancing individual autonomy and federalism as the purpose of the state action doctrine was only partially correct. In fact, the doctrine enhances many of the familiar constitutional strategies for the prevention of tyranny including: separation of powers, democratic elections, jury trials, the Bill of Rights, equal protec-

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24 See *infra* Section III.B.

25 See *infra* Part IV.

26 The non-delegable duty doctrine is an exception to the general tort rule that a principal is not responsible for the torts of independent contractors. Non-delegable duties apply to activities that are inherently dangerous or create a particular risk of harm if special precautions are not taken. See DAN B. DOBBS, *THE LAW OF TORTS* § 337 (2000) (defining non-delegable duties); RESTATEMENT (SECOND) OF TORTS §§ 416, 427 (1965) (describing dangerous work).

27 471 U.S. 1, 11–12 (1985).

28 See *infra* Part I.

tion, due process, and federalism. The state action doctrine, in effect, turns the Constitution on and off to prevent government tyranny.

Part III describes the two exceptions to the state action doctrine—the entanglement exception and the public function exception—and applies them to the private use of deadly force. It demonstrates—through a review of applicable cases and hypotheticals—that the entanglement exception applies only to the relatively rare cases when the state plays an active role by commanding, encouraging, or facilitating the private use of deadly force. It also explains the flaws of the traditional and exclusive government performance test for the public function exception and why that test fails to encompass the private use of deadly force to seize criminal suspects.

Part IV, the final and most significant section, discusses the proposed alternative non-delegable governmental duty exception.<sup>29</sup> It puts theory to practice by applying the proposed exception to the private use of deadly force to seize non-dangerous fleeing felons.<sup>30</sup> It establishes that the use of deadly force to seize non-violent criminals is a non-delegable governmental function subject to constitutional limits even when private actors exercise that force.<sup>31</sup> It also demonstrates how the non-delegable governmental function exception helps to explain and unify the seemingly inconsistent and patchwork history of the Supreme Court's state action decisions.<sup>32</sup>

#### I. THE CONSTITUTION AND THE FLEEING FELON RULE: *TENNESSEE* *V. GARNER*

On the night of October 3, 1974, two Memphis police officers responded to a report of a prowler inside a residence.<sup>33</sup> When the officers arrived at the scene, a neighbor reported she had heard glass breaking next door and believed someone had broken into the home.<sup>34</sup> One officer ran to the back of the house where he heard a door slam and observed what he believed to be a small, teenaged male run across the backyard and stop at the base of a six-foot high chain-link fence.<sup>35</sup> The officer did not observe any weapons, and he was reasonably certain that the suspect was unarmed.<sup>36</sup> Despite a command to halt, the suspect began to climb the fence.<sup>37</sup> Believing that the suspect would escape if he got over the fence, the officer shot the boy in the back of the head.<sup>38</sup> The suspect later died on the operating

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29 See *infra* Part IV.

30 See *infra* Section IV.B.

31 See *infra* Section IV.B.

32 See *infra* Section IV.C.

33 *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.* at 4.

38 *Id.* at 4 & n.3. The officer stated that because he was wearing a lot of equipment and heavy boots, he thought he would have trouble getting over the fence and the younger suspect would have been able to outrun him. *Id.*

table.<sup>39</sup> The police discovered ten dollars and a purse taken from the house on the boy's body.<sup>40</sup> The suspect was a fifteen-year-old eighth-grader named Edward Garner, who stood just five feet, four inches tall and weighed a little over one hundred pounds.<sup>41</sup>

Garner's father sued the City of Memphis and the Memphis Police Department, asserting that the police officer's use of deadly force violated Garner's constitutional rights under the Fourth and Fourteenth Amendments.<sup>42</sup> The trial court partially dismissed the suit on the basis of a Tennessee statute that authorized police officers to "use all the necessary means to effect the arrest" of a suspect that fled or forcibly resisted arrest after notice of the officer's intention to arrest him.<sup>43</sup> The Court of Appeals for the Sixth Circuit reversed, holding that the killing of the suspect under the circumstances was an unreasonable seizure under the Fourth Amendment.<sup>44</sup> The Supreme Court subsequently granted the city's petition for certiorari.<sup>45</sup>

The defendants' primary argument before the Court was that the prevailing common law rule at the time of the adoption of the Fourth and Fourteenth Amendments allowed the use of deadly force if necessary to arrest a fleeing felon.<sup>46</sup> If the use of deadly force was permissible under the common law when the Fourth Amendment was ratified, the defendants argued, how could it be a constitutionally unreasonable seizure?

In a six to three decision, the Court rejected this argument as a mistaken literalism in light of the legal and technological changes that rendered the prior justification for the rule obsolete.<sup>47</sup> At the time the common law rule developed, suspected felons were generally regarded as dangerous by virtue of the crimes they allegedly committed and virtually all felonies were punishable by death.<sup>48</sup> Thus, the use of deadly force "merely [resulted in] a speed-

39 *Id.* at 4.

40 *Id.*

41 *Id.* at 4 n.2.

42 *Id.* at 4. Garner also sued the police officer, the director of the police department, and the mayor of the City of Memphis. The claims against the mayor and director were dismissed for lack of evidence, and the police officer was ultimately recognized as acting in good faith reliance on the Tennessee statute authorizing the use of force to prevent the escape, therefore enjoying qualified immunity. *Id.* at 5.

43 *Id.* at 4.

44 *Garner v. Memphis Police Dep't*, 710 F.2d 240, 246 (6th Cir. 1983).

45 *Garner*, 471 U.S. at 6–7.

46 *Id.* at 12–13 (citing 2 SIR MATTHEW HALE, *HISTORIA PLACITORUM CORONAE* 85 (1736)). Determining necessity requires a consideration of many factors, including: whether a warning or command to halt was given, the distance between the arrestor and arrestee, whether it was day or night, the weather, and obstructions preventing apprehension. Some jurisdictions also required that the suspect be a felon in fact, while others simply required a reasonable belief that the suspect committed a felony. Day, *supra* note 9, at 290–97.

47 *Garner*, 471 U.S. at 13.

48 *Id.* The Court also reasoned that the common law rule developed during a time when the primitive state of weapons dictated that the application of deadly force typically occurred during hand-to-hand struggles, which necessarily placed the arresting officer at a

ier execution of someone who ha[d] already forfeited his life” and was a danger to the community, albeit without the judicial finding of guilt and punishment.<sup>49</sup> Conversely, many felonies today do not carry the same inference that the alleged felon is dangerous, and only a few are punishable by death. The Eighth Amendment’s prohibition of cruel and unusual punishment prohibits the imposition of the death penalty even on those who have been proven guilty of serious crimes such as burglary,<sup>50</sup> robbery,<sup>51</sup> and rape.<sup>52</sup> Therefore, the Court held that the use of deadly force is reasonable only when there is probable cause to believe that the suspect poses a danger of serious physical harm to an officer or others, or when the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm.<sup>53</sup> Consequently, where the suspect poses no immediate threat to an officer or others, the use of deadly force violates the Fourth Amendment’s prohibition against unreasonable seizures.<sup>54</sup>

While the Court’s ruling limited the use of deadly force to prevent the suspect’s escape, it did not dramatically alter the policies of a vast majority of the nation’s police departments.<sup>55</sup> Most police departments had already implemented policies prohibiting officers from using deadly force to apprehend a nonviolent fleeing felon.<sup>56</sup> In fact, at the time *Garner* was decided, more than half of the states had statutes or case law that restricted the common law rule, limiting the use of deadly force to situations in which the officer reasonably believed deadly force was necessary to prevent the immediate danger of serious physical injury to the officer or others.<sup>57</sup> As a result, the Court’s ruling in *Garner* merely changed the practices of the few police departments that, like the Memphis Police Department, had retained the broad common law fleeing felon rule.<sup>58</sup>

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greater risk of harm. *See id.* at 14–15. Today, police officers are uniformly equipped with firearms that allow for the use of deadly force from a safe distance.

49 *Id.* at 14.

50 *See Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) (citing *Enmund v. Florida*, 458 U.S. 782 (1982)).

51 *Enmund*, 458 U.S. at 800–01 (holding that capital punishment violates the Eighth Amendment for felony murder during a robbery where codefendant committed the murders and defendant did not intend that deadly force be used).

52 *Kennedy*, 554 U.S. at 446–47 (rape of a child); *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (rape of an adult).

53 *Garner*, 471 U.S. at 11.

54 *Id.*

55 *Id.* at 18 (citing C. MILTON ET AL., *POLICE USE OF DEADLY FORCE* 45–46 (1977)).

56 *Id.*

57 *Id.* The Court noted that this limitation on the use of deadly force was required for accreditation by the Commission on Accreditation for Law Enforcement Agencies, Incorporated (CALEA). CALEA is a credentialing agency that primarily accredits law enforcement agencies and creates national guidelines for law enforcement officials. *See The Commission*, CALEA, <http://www.calea.org/content/commission> (last visited Nov. 24, 2013).

58 *Garner*, 471 U.S. at 18–19.



But while *Garner* made it clear that the Constitution restricts the use of deadly force by police officers, the decision did not determine whether the Constitution also prohibits private persons from using deadly force to prevent the escape of non-dangerous felons.<sup>59</sup> At common law, both law enforcement officers and private citizens were privileged to use deadly force to secure the arrest of felons.<sup>60</sup> Although the Supreme Court rejected the common law rationales for the fleeing felon rule, several states continue to allow private citizens to use deadly force to prevent the escape of a nonviolent fleeing felon.<sup>61</sup>

For example, a Houston homeowner was awakened around six o'clock in the morning on January 10, 2010, by his home security alarm system.<sup>62</sup> Looking out of his second-floor bedroom balcony, the homeowner observed a teenaged suspect walking away with his television set.<sup>63</sup> The suspect was not armed and the homeowner did not believe that he was in danger. Nevertheless, the homeowner shot the suspect, who dropped the television and jumped a fence before he collapsed and died from his wounds.<sup>64</sup> The homeowner reportedly stated that he did not want to kill the burglar but that he "didn't want him to get away" either.<sup>65</sup>

Despite his use of deadly force, the homeowner escaped criminal charges and civil liability because Texas law permits private persons to use deadly force if the actor reasonably believes the force is necessary to prevent a robbery or burglary suspect from fleeing with the actor's property.<sup>66</sup> In contrast, if a Houston police officer had shot the suspect under similar circumstances, he would have been liable for civil damages under federal law<sup>67</sup>

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59 See *People v. Couch*, 461 N.W.2d 683, 684 (Mich. 1990) ("*Garner's* pronouncements regarding the constitutionality of the use of such force are inapplicable to private citizens . . .").

60 Day, *supra* note 9, at 286–87 (discussing the history and requirements of the common law fleeing felon rule).

61 See *supra* note 12.

62 Anita Hassan, '*I Didn't Want Him to Die*'—*Man Who Shot Teen*, HOUS. CHRON. (Jan. 10, 2010), <http://www.chron.com/dispatch/story.mpl/metropolitan/6808245.html>.

63 *Id.*

64 *Id.*

65 *Id.*

66 TEX. PENAL CODE ANN. § 9.42 (West 2011). In pertinent part, the statute provides:

A person is justified in using deadly force against another to protect land or tangible, movable property: . . . (2) when and to the degree he reasonably believes the deadly force is immediately necessary: . . . (B) to prevent the other who is fleeing immediately after committing burglary, robbery, aggravated robbery, or theft during the nighttime from escaping with the property; and (3) he reasonably believes that: (A) the land or property cannot be protected or recovered by any other means . . . .

*Id.*

67 Section 1983 of Title 42 of the United States Code provides a federal civil cause of action for "deprivation of any rights, privileges, or immunities secured by the Constitution" caused by a person acting under color of state law. 42 U.S.C. § 1983 (2006). The plaintiff may name the individual state actor as a defendant as well as local public entities and

for his unconstitutional use of deadly force and might have faced criminal prosecution.<sup>68</sup> Although Texas and a few other states continue to permit private citizens to use deadly force to prevent the escape of fleeing nonviolent felons, whether this violates the constitutional rights of the suspect is a very complicated problem, the resolution of which is determined by the state action doctrine.

## II. THE STATE ACTION DOCTRINE: THE CONSTITUTION'S POWER SWITCH FOR THE PREVENTION OF TYRANNY

The state action doctrine provides that the Constitution's protections of individual liberties, as well as its requirements of due process and equal protection, constrain only government action.<sup>69</sup> The Supreme Court first articulated the doctrine in its decision in the *Civil Rights Cases*.<sup>70</sup> The Court held that the rights and privileges secured by the Fourteenth Amendment prohibit state laws and proceedings that discriminate on the basis of race, but they do not prohibit private racial discrimination.<sup>71</sup> Therefore, the Civil Rights Act of 1875, which prohibited racial discrimination by privately owned and operated inns, common carriers, theaters, and other places of public amusement, was unconstitutional because it directly prohibited private racial discrimination rather than invalidating or redressing discrimination by state or local governments.<sup>72</sup> The Court held that the Fourteenth Amendment only empowered Congress to remedy state action. It did not permit Congress to cure a state's failure to enact legislation to prevent private discrimination. To hold otherwise, the Court insisted, would permit Congress to supersede state law with its own "code of municipal law regulative of all private rights between man and man in society."<sup>73</sup>

This distinction between a state action that causes private harm and a state's mere failure to prohibit private conduct remains a touchstone of the state action doctrine, and courts have broadly applied the distinction in subsequent decisions.<sup>74</sup> Without this distinction, almost any private action that

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municipalities. *See generally* *Tennessee v. Garner*, 471 U.S. 1, 5 (1985) (naming the officer, the police department, and the City of Memphis as defendants). States however, are not "persons" that may be sued as a defendant under § 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). Where a federal official causes the violation of a constitutional right, the Court has created a common law remedy where Congress has not provided an adequate statutory remedy. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395-97 (1971).

68 *See, e.g.*, *State v. Mantelli*, 42 P.3d 272, 273-74 (N.M. 2002) (appealing police officer's conviction for voluntary manslaughter after shooting a suspect attempting to flee).

69 *E.g.*, CHEMERINSKY, *supra* note 16, at 507 & n.1 (noting that the "state action doctrine" is a misnomer as it applies to all levels of federal, state, and local government).

70 109 U.S. 3, 11 (1883).

71 *Id.*

72 *Id.* at 16-18.

73 *Id.* at 13.

74 *See, e.g.*, *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175-77 (1972) (declining to find state action where the Pennsylvania Liquor Control Board licensed a private club to

infringed on a person's liberty interests could be blamed on the government's failure to prohibit the offending conduct.<sup>75</sup> Unless an exception to the state action doctrine is applicable, the government is not constitutionally responsible for, and the Constitution does not prevent private interference with, liberty.<sup>76</sup> In order to determine when the exceptions should apply the Constitution's protection to nominally private interference with individual rights, we must clearly identify the purpose of the doctrine and the exceptions.

From its initial decision in the *Civil Rights Cases*, the Court has steadily maintained that the state action doctrine serves to enhance federalism and protect individual autonomy.<sup>77</sup> However, this rationale is at once both too broad and too specific. It is too broad because the state action doctrine does not necessarily result in a net increase in individual autonomy.<sup>78</sup> It is too specific because, as we will see, the state action doctrine enhances the Constitution's separation of powers between the legislative, executive, and judicial branches of government, as well as the division of power between state and federal governments.<sup>79</sup> It also protects the Constitution's other structural and procedural means of controlling government abuse of power, such as jury selection and elections.<sup>80</sup> The purpose of the state action doctrine is to prevent the abuse of government power, and it does so in ways that are obvious and direct and in other ways that are more indirect and obscure.

The state action doctrine can be thought of as an "on and off" switch for the Constitution's protection of individual liberties. When the government acts, the Constitution's protection of basic liberties and its guarantees of due

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serve liquor despite the club's racially discriminatory membership rules). In *Moose Lodge*, the state could have conditioned receipt of the liquor license on allowing membership to all races, but the state's failure to do so was not enough to find state action. *Id.*

75 See, e.g., CHEMERINSKY, *supra* note 16, at 570; Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296, 1301 (1982) (suggesting that legal "positivism potentially implicates the state in every 'private' action not prohibited by law").

76 See, e.g., *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982); see discussion *infra* Sections III.A–B and Part IV.

77 *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 306 (2001) (Thomas, J., dissenting); *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988); *Lugar*, 457 U.S. at 936; *Civil Rights Cases*, 109 U.S. at 9.

78 See Chemerinsky, *supra* note 14, at 536 (questioning whether the overall effect of the state action doctrine enhances individual liberty when it sacrifices the liberty interest of the victim of the private action protected by the state action doctrine); see also *infra* notes 86–87 and accompanying text (identifying the constraining effects of progressive expansion of Congress's legislative power).

79 See *infra* notes 97–108 and accompanying text; see also William P. Marshall, *Diluting Constitutional Rights: Rethinking "Rethinking State Action,"* 80 NW. U. L. REV. 558, 566 (1985) ("[A] doctrine of constitutional law that imposes judicially created parameters on private conduct places serious constraints on the ability of both the common law and legislatures to respond to social issues.").

80 *Lugar*, 457 U.S. at 936; see *infra* notes 105–07 and accompanying text; *infra* Sections IV.C.1–2.

process and equal protection turn on to prevent the abuse of government power.<sup>81</sup> In this way, the state action doctrine does protect individual autonomy. Conversely, when only private action is involved, turning off the Constitution, as the Court has recognized, also preserves an area of individual freedom from the constitutional constraints imposed upon government actors.<sup>82</sup> Turning off the Constitution also serves to enhance federalism by reserving the task of regulating private conduct to state and local governments.<sup>83</sup>

However, federalism does not necessarily increase individual autonomy.<sup>84</sup> The state action doctrine frees private conduct from constitutional constraint, but it has always been within the states' prerogative to restrict private conduct in the same ways that the Constitution restricts state actors.<sup>85</sup> To be sure, as a result of a progressive expansion of Congress's legislative powers, both state and federal governments possess the power to enact, and have enacted, laws that impose restrictions on private conduct that in many instances mirror the constitutional restrictions on state actors.<sup>86</sup> In fact, in some instances, private action is constrained by state and federal law far beyond the constitutionally imposed restrictions on government actors.<sup>87</sup>

Even in the absence of state and federal laws, the state action doctrine does not necessarily result in a net gain of individual autonomy. Private freedom of action fostered by the state action doctrine is often offset, to a greater or lesser extent, by the constraining effect the private action has on the free-

81 See, e.g., *Lugar*, 457 U.S. at 930; *United States v. Price*, 383 U.S. 787, 800 (1966).

82 See, e.g., *Brentwood Acad.*, 531 U.S. at 306 (Thomas, J., dissenting); *Tarkanian*, 488 U.S. at 191; *Lugar*, 457 U.S. at 936; *Civil Rights Cases*, 109 U.S. at 9.

83 See *Brentwood Acad.*, 531 U.S. at 306 (Thomas, J., dissenting); *Tarkanian*, 488 U.S. at 191; *Lugar*, 457 U.S. at 936.

84 See James S. Liebman & Brandon L. Garrett, *Madisonian Equal Protection*, 104 COLUM. L. REV. 837, 967–71 (2004) (discussing Madison's proposal, which was ultimately rejected, for a constitutional provision granting the federal government the power to veto state laws as a means of preventing tyranny of the majority at the state and local level).

85 See, e.g., Marshall, *supra* note 79, at 559.

86 E.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261–62 (1964) (upholding the constitutionality of Title II of the Civil Rights Acts of 1964, which included provisions outlawing private racial discrimination in places of public accommodation, as within Congress's Commerce Clause power); James Leonard, *The Shadows of Unconstitutionality: How the New Federalism May Affect the Anti-Discrimination Mandate of the Americans with Disabilities Act*, 52 ALA. L. REV. 91, 162–68 (2000) (concluding that the Americans with Disabilities Act's regulation of private employment is a permissible exercise of Congress's powers under the Commerce Clause); Marshall, *supra* note 79, at 559 (noting that the federal power to regulate is nearly coextensive with that of states).

87 Many aspects of tort and criminal law that are used to constrain private actors do not apply to some government actors as a result of sovereign immunity, judicial immunity, legislative immunity, quasi-judicial immunity, and related doctrines. See Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221, 225 (2003) (describing the immunity given to both legislators and their staff members); Jeffrey M. Shaman, *Judicial Immunity from Civil and Criminal Liability*, 27 SAN DIEGO L. REV. 1, 28 (1990) (“[J]udges possess a substantial degree of immunity from civil liability.”).

dom of others.<sup>88</sup> For example, the government may not punish a person who burns the American flag as an expression of his opposition to government policy because the First Amendment protects this type of speech.<sup>89</sup> A private employer, however, may fire or refuse to hire the flag burner because the employer disapproves of the message or the mode of expression.<sup>90</sup> The chilling effect of the employer's retaliation may more effectively silence the employee's political expression than the threat of a misdemeanor criminal conviction.<sup>91</sup> Nevertheless, the First Amendment does not directly apply to purely private action, even if the private action has the effect of interfering with free expression.<sup>92</sup> These conflicting private liberty interests result in the gain and loss of autonomy without constitutional oversight.

If maximizing individual liberty was the primary purpose of the state action doctrine, perhaps we should, as Professor Erwin Chemerinsky has suggested, abandon the doctrine in favor of direct judicial balancing of the private actors' conflicting constitutional liberties.<sup>93</sup> Under his proposal, private action that infringes upon constitutional rights would be subject to judicial balancing of the competing interests and would be permissible only upon proof of an adequate justification.<sup>94</sup> The degree of constitutional protection might vary depending upon whether the actor is a private party or a state actor, but the Constitution would apply to both.<sup>95</sup> In the case of the flag-burning protester, therefore, a court would balance the employer's freedom of association and speech—if discharging the employee is thought of as speech—against the employee's freedom of speech. And if the employee's rights were unjustifiably infringed, the employer's conduct would be unconstitutional. This approach would force courts to consider the relative weight of the conflicting liberties rather than sweep the entire conflict under the state action rug.<sup>96</sup>

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88 See, e.g., Chemerinsky, *supra* note 14, at 536 (“[E]very time a person’s freedom to violate a constitutional right is upheld, a victim’s liberty is sacrificed.”); Marshall, *supra* note 79, at 561–63 (discussing several examples).

89 Texas v. Johnson, 491 U.S. 397, 405–06, 420 (1989).

90 See, e.g., Patricia Sánchez Abril et al., *Blurred Boundaries: Social Media Privacy and the Twenty-First-Century Employee*, 49 AM. BUS. L.J. 63, 88–92 (2012) (discussing how restrictions on private employees’ off-duty speech squelches free expression).

91 *Id.*; David C. Yamada, *Voices from the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace*, 19 BERKELEY J. EMP. & LAB. L. 1, 21, 46–49 (1998) (discussing the increasing levels of private employer censorship and proposing federal legislation to protect freedom of expression). In this example, the loss of autonomy can be thought of as self-imposed because the employee may still burn the flag if he is willing to suffer the consequences of being fired by his private employer or suffer criminal sanctions. To a more limited degree, the same may be said with regard to any civil or criminal sanctions. Of course, if criminalized, that state might physically prevent the flag burner’s crime if the state knows of the protester’s intent.

92 See *Hudgens v. NLRB*, 424 U.S. 507, 521–23 (1976).

93 Chemerinsky, *supra* note 14, at 551.

94 *Id.*

95 *Id.*

96 *Id.* at 550–51.

What Chemerinsky overlooks, however, and what is commonly misunderstood, is that the state action doctrine has a profound impact on the Constitution's ability to prevent government tyranny, not simply by protecting individual autonomy, but by preserving the Constitution's separation of powers.<sup>97</sup> By turning off the Constitution's protections of individual rights when only private action is involved, the state action doctrine ensures that state and federal legislatures, rather than the judiciary through constitutional interpretation, regulate private disputes over conflicting liberties. This aspect of the state action doctrine is critical not because it promotes autonomy—although it often does—but because it safeguards the Constitution's separation of powers between the judicial, legislative, and executive branches.

Eliminating the state action doctrine in favor of a judicial weighing of competing private liberties through constitutional interpretation, as Chemerinsky proposes, is unacceptable because it fosters judicial tyranny.<sup>98</sup> Without the state action doctrine, almost all disputes between private persons over conflicting liberties would take on constitutional significance.<sup>99</sup> Judicial resolution of private disputes through constitutional interpretation would usurp

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97 The role of the state action doctrine in safeguarding the Constitution's division of governmental power was recognized by the Court in the *Civil Rights Cases*. See 109 U.S. 3, 11 (1883). However, the Court focused on federalism—the division of power between the state and federal governments—rather than the division of power between the legislative, executive, and judicial branches of government in both the state and federal system. As will be discussed in Section III.B, the original balance of power between the state and federal government fostered democracy's own unique form of oppression: tyranny of the majority. Indeed, inasmuch as the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution were necessary to correct flaws in the original distribution of power between the state and federal governments, the Court's focus on federalism should have been of secondary importance. See Randy E. Barnett, *Is the Constitution Libertarian?*, 2009 CATO SUP. CT. REV. 9, 24–26 (discussing how the Thirteenth and Fourteenth Amendments help to fix the original flaws in the Constitution—from a libertarian perspective—by expanding the power of Congress and the courts to protect against state infringements of individual rights); Liebman & Garrett, *supra* note 84, at 885–99 (discussing how the original Constitution contained a flawed notion of federalism because it could do nothing to prevent or cure infringements of minority rights at the hand of the majority in state and local governments).

98 Professor Chemerinsky rejects this argument by simply prioritizing the protection of individual liberties over separation of powers. He also insists that the judiciary would only act where the state and federal legislatures “failed to act to ensure the full protection of personal liberties.” Chemerinsky, *supra* note 14, at 553. Of course this really begs the question because the judiciary would decide if the legislature has failed to fully protect these new constitutional rights. Even when the legislature acts to protect these new constitutional rights, the innumerable variations on the ways private actors may infringe upon the rights of others will prevent anything more than very general legislative guidance that will require broad deference to judicial interpretation.

99 See Marshall, *supra* note 79, at 569–70. Marshall maintains that elimination of the state action doctrine will transform the Constitution from the protector of liberty from government abuse to a “vehicle of regulation and annoyance” in everyday life. *Id.*

much of the law-making function of state and federal legislatures.<sup>100</sup> It would also undermine the executive's role in enforcing legislation by permitting private persons to directly enforce their "constitutional rights" against fellow citizens through private lawsuits. By undermining the role of the political branches of government, eliminating the state action doctrine would place unprecedented power in the hands of the judiciary.<sup>101</sup>

Eliminating the state action doctrine would transform the Constitution from a shield against government oppression into an inflexible and petty micro-manager of private conduct. The Constitution protects citizens' basic liberties from government infringement and requires due process and equal protection of the law, even though it is often costly or inefficient to do so, in order to prevent the abuse of government power.<sup>102</sup> The Constitution tolerates this inefficiency only because of the unique risks associated with the scope and nature of government power.<sup>103</sup> Comparing and balancing the conflicting liberties of private persons involves policy concerns, including efficiency considerations, that are best left to the citizens' elected representatives in state and federal legislatures.<sup>104</sup> Legislation, rather than judicial resolution, allows for flexibility and experimentation in the laboratories of democracy.<sup>105</sup> Elected representatives, who serve as the voice of the people,

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100 See, e.g., Edwin Meese III, *Putting the Federal Judiciary Back on the Constitutional Track*, 14 GA. ST. U. L. REV. 781, 783–84 (1998) (criticizing the judiciary for increasingly deciding political issues through constitutional interpretation and thereby removing the most important social and moral issues from the democratic process and depriving the citizens of the "moral education that come[s] from resolving difficult issues and reaching a social consensus").

101 See Patrick M. Garry, *The Unannounced Revolution: How the Court Has Indirectly Effected a Shift in the Separation of Powers*, 57 ALA. L. REV. 689, 712 (2006) (arguing that private attorney general suits undermine the separation of powers by eroding the executive branch's duty to execute the law); Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1795–96 (1993) (arguing that private attorney generals are incompatible with democratic principles and the Constitution's creation of a unitary executive in Article II).

102 E.g., *United States v. Owens*, 484 U.S. 554, 571 (1988) (Brennan, J., dissenting) (stating that the Constitution "places a greater value on individual liberty than on efficient judicial administration"); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 346 (1979) (Rehnquist, J., dissenting) ("[A]s with other provisions of the Bill of Rights, the onerous nature of the protection [of a Seventh Amendment jury trial] is no license for contracting the rights secured by the Amendment."); *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) ("Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.").

103 See *Owens*, 484 U.S. at 571 (Brennan, J., dissenting).

104 See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (cautioning against the use of the Fourteenth Amendment's Due Process Clause as a tool for second guessing legislative efforts at economic regulations); Meese, *supra* note 100, at 783.

105 See *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose,

may repeal or change the laws to achieve a practical compromise between competing interests if circumstances change or a law proves unworkable.

Resolving private disputes over conflicting liberty interests through constitutional interpretation, rather than through the political process, also undermines democratic principles fundamental to American government.<sup>106</sup> Because the federal judiciary is not directly answerable to the people, enhancing judicial power significantly diminishes the people's ability to prevent government tyranny through the political process.<sup>107</sup> Eliminating the state action requirement would combine the executive, legislative, and judicial functions into a single entity insulated from the political process and transform the judiciary into the most dangerous branch of government.<sup>108</sup>

In short, the state action doctrine is essential to preserving the separation of powers between the legislative, executive, and judicial branches of government at both the federal and state level. Correspondingly, the exceptions ensure that the government cannot circumvent the constitutional limitations on its power by collaborating with, or delegating power to, private actors who are willing to do what the government is constitutionally forbidden to do.

### III. THE EXCEPTIONS TO THE STATE ACTION DOCTRINE: GOVERNMENT RESPONSIBILITY FOR PRIVATE ACTION

The basic state action doctrine is relatively simple and application of the doctrine is easy enough when the harm complained of is directly attributable to action at either extreme of the government-private continuum. But the nation has changed in ways unimaginable to both the Founding Fathers and the drafters of the post-Civil War amendments to the Constitution.<sup>109</sup> The size of the federal and state governments and the pervasive scope of government involvement in private life make it difficult to conceptualize two clearly

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serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

106 This concern is at the heart of the substantive due process debate. See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955) (“The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (deferring to legislative judgment in rejecting an economic substantive due process challenge to Washington’s Minimum Wages for Women Act); ROBERT H. BORK, *THE TEMPTING OF AMERICA* 43 (1990); see also *Lawrence v. Texas*, 539 U.S. 558, 603–04 (2003) (Scalia, J., dissenting) (criticizing the Court for deciding social issues under the guise of constitutional interpretation because it removes the issue from the democratic process and imposes the view of the “elite class” from which the Court is composed upon the entire nation); *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (same).

107 See, e.g., Meese, *supra* note 100, at 782–83.

108 See *supra* notes 99–101 and accompanying text.

109 See Richard Stengel, *One Document, Under Siege*, TIME, July 4, 2011, at 1, available at <http://content.time.com/time/nation/article/0,8599,2079445,00.html>.



distinct spheres—one governmental and the other private.<sup>110</sup> Accordingly, determining what action is subject to constitutional constraint becomes uncertain when the two spheres overlap.

The Supreme Court has created two exceptions to the state action doctrine that apply when the harm is most directly caused by a private actor, but responsibility for the harm is nevertheless fairly attributed to the government and thus subject to constitutional constraint.<sup>111</sup> These exceptions—the entanglement exception and the public function exception—seek to apply the Constitution’s protections of individual liberties to all infringement attributable to the government, even if the most immediate cause of the infringement is the act of a private party. Although both exceptions prevent the abuse of government power by private proxy, the public function exception applies only to activities that are governmental in nature,<sup>112</sup> while the entanglement exception applies when the joint action of government and private actors violates constitutionally protected rights regardless of whether the functions performed are governmental in nature.<sup>113</sup> These exceptions give guidance but do not provide a universal or talismanic test of state action, and frequently, more than one exception may apply to a given set of facts.<sup>114</sup> Therefore, the search for state responsibility is a question of “normative judgment” that must be determined on a case-by-case basis.<sup>115</sup>

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110 *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349–50 (1974) (“While the principle that private action is immune from the restrictions of the Fourteenth Amendment is well established and easily stated, the question whether particular conduct is ‘private,’ on the one hand, or ‘state action,’ on the other, frequently admits of no easy answer.”).

111 *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001) (“[S]tate action may be found if, though only if, there is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’” (quoting *Jackson*, 419 U.S. at 351)); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). The exceptions to the state action doctrine apply where “it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains.” *Id.*

112 See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 627–28 (1991) (recognizing as a public function the use of peremptory challenges to dismiss potential jurors); *West v. Atkins*, 487 U.S. 42, 56–57 (1988) (recognizing a prison physician as performing a public function); *Evans v. Newton*, 382 U.S. 296, 302 (1966) (finding the operation of a municipal park to be a public function); *Terry v. Adams*, 345 U.S. 461, 469–70 (1953) (plurality opinion) (recognizing primary elections as public functions); *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (holding the operation of a company town as public function); *Nixon v. Condon*, 286 U.S. 73, 88–89 (1932) (recognizing a public function with elections). *But see Jackson*, 419 U.S. at 358–59 (declining to recognize the provision of electric utility services as a public function because it is not traditionally the exclusive prerogative of the state).

113 *Brentwood Acad.*, 531 U.S. at 296 (“[The] activity may be state action when it results from the State’s exercise of ‘coercive power,’ when the State provides ‘significant encouragement, either overt or covert,’ or when a private actor operates as a ‘willful participant in joint activity with the State or its agents.’” (citations omitted)).

114 *Id.* at 295–96.

115 *Id.* at 295.

A. *The Entanglement Exception: Joint Public and Private Action*

The entanglement exception assesses government responsibility for infringement of a constitutionally protected liberty in the same way that tort law determines causation and apportionment of liability in a joint tortfeasors case.<sup>116</sup> The exception evaluates the government's role in the private action and applies when the state commands, encourages, or facilitates private persons to take an action that the government is constitutionally prohibited from directly doing.<sup>117</sup> Accordingly, the entanglement exception is not so much an exception as it is a means of determining whether the government's action is sufficient to hold it responsible for infringements of individual rights most directly caused by a private actor. As we will see, the entanglement exception applies only in the relatively rare cases where the state plays an active role in the private use of deadly force.

1. Government Compulsion

When the state commands or coerces the conduct of private actors, whether by statute or custom with the force of law, a court will attribute the private actor's conduct to the state.<sup>118</sup> Under such circumstances, the conduct is attributed to the state even if the private person would have taken the same action regardless of the state's direction because of the private person's personal motivations.<sup>119</sup> These are relatively simple cases because the private action is compelled by the state. Regardless of whether the private actor would have chosen the same action without the government's mandate, the government's command is sufficient to activate constitutional protections.<sup>120</sup> Even if a person abhors the law, he must comply with it or face state sanctions.

While some states allow private persons to use deadly force under circumstances in which it would be unconstitutional for the state to use such force, no state compels or commands citizens to use such force as a matter of course. Several states, however, do compel private citizens to assist police officers in making arrests when the police officer gives the citizen a direct command at the scene.<sup>121</sup> In these jurisdictions, if an officer directed an

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116 See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 26, 28 (2010); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 10 (2000).

117 See *Brentwood Acad.*, 531 U.S. at 296. The Court has also articulated a less rigid application when the private actor is “‘entwined with governmental policies,’ or when government is ‘entwined in [the private entity’s] management or control.’” *Id.* (quoting *Evans*, 382 U.S. at 299, 301).

118 *Peterson v. City of Greenville*, 373 U.S. 244, 248 (1963) (holding that when the state has compelled the action, whether by statute or custom with the force of law, it is state action even if the private person would have acted the same way in the absence of state coercion).

119 *Id.*

120 *Id.*

121 See, e.g., ALA. CODE § 13A-10-5 (2013); CAL. PENAL CODE § 150 (West 2012); GA. CODE ANN. § 17-4-24 (West, Westlaw through the end of the 2013 Regular Session); OR.

armed citizen to use deadly force to apprehend a nonviolent felon, the private use of force would presumably be attributed to the state regardless of the private citizen's desire to use deadly force independent of the officer's command.<sup>122</sup> Where the state compels the private citizen to act, the responsibility for the decision to use deadly force—whether the private actor finds the act abhorrent or gratifying—must be attributed to the state and not solely to the private citizen.

## 2. Government Encouragement

The Supreme Court has also stated that significant state encouragement of private action may justify holding the state responsible for a private actor's harm.<sup>123</sup> The government encouragement must be significant enough that the responsibility for the private action is properly attributable to the state.<sup>124</sup> Although the degree of government encouragement deemed significant will vary,<sup>125</sup> mere approval of, or acquiescence to, the private conduct is not sufficient.<sup>126</sup> Mere government knowledge of private action, without government inducement, that, by "happy coincidence," serves the government's purpose is insufficient to constitute state action.<sup>127</sup>

In the Old West, for example, the government occasionally encouraged the private use of deadly force by offering rewards for the capture of fugitives from justice "dead or alive."<sup>128</sup> These types of rewards predated the

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REV. STAT. ANN. § 206.050 (West 2011); S.C. CODE ANN. § 23-15-70 (2012); WIS. STAT. § 946.40 (2013). See generally, Gautham Rao, *The Federal Posse Comitatus Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America*, 26 LAW & HIST. REV. 1, 5–6, 10 (2008) (discussing the history and abuse of temporarily deputized citizens assisting law enforcement).

122 See *Peterson*, 373 U.S. at 248.

123 *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 166 (1978)); *Moose Lodge No. 107 v. Iris*, 407 U.S. 163, 173 (1972); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970)). But see *Flagg Bros.*, 436 U.S. at 165 (holding that state encouragement must involve more than mere inaction).

124 *Blum*, 457 U.S. at 1004.

125 *Norwood v. Harrison*, 413 U.S. 455, 468–70 (1973).

126 *Flagg Bros.*, 436 U.S. at 164–65.

127 *United States v. Shahid*, 117 F.3d 322, 324, 326–28 (7th Cir. 1997) (refusing to find state action in a mall security guard's search and seizure of a firearm from suspected shoplifter).

128 See, e.g., *Umatilla Cnty. v. Estes*, 208 P. 761, 761 (Or. 1922) (offering cash rewards for the capture, dead or alive, of fugitives who had killed the county sheriff). Many of the Old West's wanted posters were not issued by government entities but by private entities who sought the capture or death of fugitives. See, e.g., *Carr v. Mahaska Cnty. Bankers Ass'n*, 269 N.W. 494, 495 (Iowa 1936) (banking association offered reward of \$1000 for the capture, dead or alive, of bank robbers); *Hoggard v. Dickerson*, 165 S.W. 1135, 1136, 1140 (Mo. Ct. App. 1914) (enforcing private offer of \$5000 reward for capture, dead or alive, of the killer of a man's friend); *Madsen v. Dakota State Bank*, 114 N.W.2d 93, 93–94 (S.D. 1962) (granting reward to private citizen who provided information to the police that led to the arrest of bank robbers); see also John F. Galliher et al., *Abolition and Reinstatement of Capital Punishment During the Progressive Era and Early 20th Century*, 83 J. CRIM. L. & CRIMI-

Supreme Court's decision in *Garner*,<sup>129</sup> therefore, the Court never determined whether the private use of deadly force to collect government rewards constituted state action. Furthermore, these rewards were typically reserved for the capture of dangerous fugitives, where the use of deadly force might well have been justifiable even under the subsequent restraints imposed by the Court's decision in *Garner*.

If the state offered rewards for the apprehension of nonviolent fugitives "dead or alive" today, a court would likely attribute the private actor's conduct to the state.<sup>130</sup> Indeed, courts have held that a search conducted by private persons, which assists the government and is motivated by the prospect of a reward, must be treated as state action to effectuate the purposes of the Fourth Amendment.<sup>131</sup> To treat them otherwise would allow the government to circumvent the Constitution's limitations on state power through

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NOLOGY 538, 560–62 (1992) (discussing reward for the capture of an African-American charged with the murder of a white girl in Colorado after Colorado had abolished the death penalty).

129 *Tennessee v. Garner*, 471 U.S. 1 (1985).

130 In comparison, modern-day bounty hunters are not typically treated as state actors because they generally seek to collect rewards offered by private bail bondsmen rather than by the government, and there is a contractual relationship between the fugitive and the bail bondsman. Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 HOUS. L. REV. 731, 750–65 (1996). When a bail bondsman posts bond for a defendant, a private contract is created between the parties whereby the defendant implicitly consents to arrest by the bondsman or the bondsman's agent. *Id.* at 754–55, 764. In the absence of a party posting bail, the defendant remains incarcerated until trial. *See id.* at 758–61. When the prisoner is turned over to the bondsman, he remains under arrest and is subject to seizure by the bondsman without the need for a warrant or any additional government process. *Id.* at 751–52, 756–57. The seizure by the bondsman's bounty hunter is a continuation of the original, constitutionally reasonable state seizure. *Id.* at 751, 757. Bondsmen have prisoners "on a string, and may pull the string whenever they please" without implicating state action beyond the original arrest that led to prisoner's detention. *Taylor v. Taintor*, 83 U.S. (16 Wall.) 366, 371–72 (1872); *see also* Drimmer, *supra*, at 750–65 (discussing courts' analyses of the private contractual nature of the relationship between the bail bondsman and the defendant).

131 *United States v. Walther*, 652 F.2d 788, 790–93 (9th Cir. 1981) (holding that an airline employee's search of a woman's overnight case was state action where the employee was looking for illegal drugs and the DEA had encouraged his conduct through the possibility of cash rewards); *see also* *United States v. Feffer*, 831 F.2d 734, 737–38 (7th Cir. 1987) (discussing the circumstances under which a private actor becomes a government actor such that the Fourth Amendment's limitations apply and citing cases).

private proxies.<sup>132</sup> “The government may not do, through a private individual, that which it is otherwise forbidden to do.”<sup>133</sup>

### 3. Government Assistance and Symbiosis

While no deadly force cases are directly on point, courts have held that bail bondsmen are state actors when they are aided or assisted by a state actor. For example, in *Jackson v. Pantazes*, the plaintiff sued a bail bondsman and a police officer for using excessive force and unnecessarily damaging property in the course of a forcible entry and search of her home, arguing that her constitutional rights were violated.<sup>134</sup> The plaintiff’s son was a fugitive who failed to appear while out on bond, and the bondsman and two police officers went to the plaintiff’s home to look for him.<sup>135</sup> When the plaintiff “denied” the bondsman and officers “permission to enter” her home, the bondsman “shov[ed] the door into [the plaintiff]” and “forced his way into” her home.<sup>136</sup> One of the officers restrained the plaintiff while the bondsman kicked open interior doors and damaged her property as he searched the house.<sup>137</sup> The plaintiff asked the officer if the bondsman’s actions were lawful, and the officer told her that the bondsman “[could] do whatever he want[ed].”<sup>138</sup> Under these facts, the Fourth Circuit was satisfied that the assistance the police officer provided to the bail bondsman was sufficient to render the bondsman a state actor.<sup>139</sup>

The court also found, as an alternative rationale, that “the symbiotic relationship” between the bail bondsman and the state criminal justice system was sufficient “to render [the bondsman’s] conduct state action.”<sup>140</sup> The state created the bail bond system and provided bondsmen with the license upon which their livelihoods depended.<sup>141</sup> In return, the state relied

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132 See *Feffer*, 831 F.2d at 737–39 (finding state action only where “the government knew of and acquiesced in” the private conduct, and the private party’s purpose for conducting the search was the result of government inducement); see also *United States v. Avery*, No. 09-CR-196, 2010 WL 1541342, at \*11 (E.D. Wis. Apr. 19, 2010) (applying the *Feffer* rationale but finding no state action under the facts); *Matje v. Leis*, 571 F. Supp. 918, 921, 926–27 (S.D. Ohio 1983) (stating that an informant can be a state actor when the informant’s action is motivated by government payment or promise of leniency).

133 *Feffer*, 831 F.2d at 737.

134 810 F.2d 426, 427 (4th Cir. 1987).

135 *Id.*

136 *Id.* at 427–28.

137 *Id.* at 428.

138 *Id.*

139 *Id.* at 429.

140 *Id.* at 430. “[B]oth parts of the *Lugar* test are satisfied where the nature of the relationship between the state and private actors is one of interdependence, or ‘symbiosis.’” *Id.* (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961)).

141 *Id.*

upon bondsmen to “facilitate the pretrial release of accused persons,”<sup>142</sup> saving the state the expense of incarceration.<sup>143</sup>

It is unlikely, however, that the symbiosis rationale remains viable. Although the symbiosis rationale in *Jackson v. Pantazes* was based upon the Supreme Court’s decision in *Burton v. Wilmington Parking Authority*,<sup>144</sup> the Court has subsequently cast significant doubt upon the continuing vitality of this theory.<sup>145</sup> The Court has declined to expand the symbiotic relationship rationale in *Burton* beyond its specific facts, which involved private lessees of public property.<sup>146</sup>

While several courts have found that bail bondsmen are state actors when they are assisted by police officers,<sup>147</sup> no court has expressly followed the symbiosis rationale absent direct state assistance, and several courts have expressly rejected the symbiosis rationale.<sup>148</sup> Therefore, without some direct involvement by and assistance from a state actor, it is unlikely that a court would treat a private person’s use of deadly force to apprehend a nonviolent felon as state action based on this symbiosis rationale alone. Furthermore, under existing law, merely exercising a state-created right that may further a state interest, without more direct assistance from a state official, is insufficient to support a finding of state action under the entanglement exception. When the state is not commanding, encouraging, or otherwise actively facili-

142 *Id.*

143 Drimmer, *supra* note 130, at 758–60.

144 365 U.S. 715 (1961).

145 *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357–58 (1974) (noting that the holding in *Burton* was limited to lessees of public property). In *Burton*, a state-owned and operated parking facility rented out space to a coffee shop that refused to serve persons of color. *Burton*, 365 U.S. at 724–26. The state provided the coffee shop with a building and a prime location in exchange for rent payments and an increased demand for parking by the shop’s customers. *Id.* at 718–19, 724. The Court found that this mutually beneficial relationship between the state and the coffee shop was sufficient to attribute the responsibility for the discrimination to the state. *Id.* at 724–26.

146 *See Jackson*, 419 U.S. at 358.

147 *Id.*; *see also* *Bailey v. Kenney*, 791 F. Supp. 1511, 1514, 1523 (D. Kan. 1992) (noting that the “active, concerted action of the police with [the bondsman]” allowed the court to find “sufficient facts from which a jury could find that [the bondsman] acted under color of state law for § 1983 purposes”).

148 *See, e.g., Landry v. A-Able Bonding, Inc.*, 75 F.3d 200, 205 n.5 (5th Cir. 1996) (“We are not persuaded by the Fourth Circuit’s finding that the relationship between bail bondsmen and the state criminal court system is such that the actions of the bondsmen may be fairly treated as [those] of the state itself.”); *see also* *Dean v. Olibas*, 129 F.3d 1001, 1006 n.4 (8th Cir. 1997) (rejecting the Fourth Circuit’s symbiotic relationship theory); *Ouzts v. Md. Nat’l Ins. Co.*, 505 F.2d 547, 555 (9th Cir. 1974) (“[T]he bail bondsman is in the business in order to make money and is not acting out of a high-minded sense of devotion to the administration of justice.”); *McGregor v. Shane’s Bail Bonds*, No. 10-CV-2099-JWL, 2010 WL 3155635, at \*13 & n.25 (D. Kan. Aug. 9, 2010) (rejecting the Fourth Circuit’s position), *aff’d sub nom. McGregor v. Snyder*, 427 F. App’x 629 (10th Cir. 2011); *Weaver v. James Bonding Co.*, 442 F. Supp. 2d 1219, 1228 (S.D. Ala. 2006) (rejecting the Fourth Circuit’s position); *McCoy v. Johnson*, 176 F.R.D. 676, 681 (N.D. Ga. 1997) (rejecting the Fourth Circuit’s position).

tating the private use of deadly force, a court will not find state action unless the public function exception applies.

*B. The Public Function Exception: The Dysfunctional Traditional and Exclusive Government Performance Test*

The public function exception is a true departure from the state action doctrine's action/omission distinction.<sup>149</sup> When it applies, a court will find state action even where the government has passively permitted a private person to perform certain governmental functions.<sup>150</sup> The difficulty with the public function exception is that it must distinguish between private action that is governmental in nature and government action that is private in nature.<sup>151</sup> It cannot operate like King Midas's touch<sup>152</sup> and transform every activity touched by the government into a governmental function subject to constitutional constraint. To be sure, the public function exception must be limited to certain governmental functions in order to prevent the Constitution from completely controlling private conduct. The Court aptly described the need for a limiting principle in *Evans v. Newton*:

The range of governmental activities is broad and varied, and the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions. While a State may not segregate public schools so as to exclude one or more religious groups, those sects may maintain their own parochial educational systems.<sup>153</sup>

In an effort to confine the public function exception, the Court has declared that it applies only to activities that were traditionally and exclusively performed by the state.<sup>154</sup> For example, in *Jackson v. Metropolitan Edison Co.*, the plaintiff sought to be guaranteed procedural due process from an electric utility corporation before her electrical services could be terminated.<sup>155</sup> Rejecting the petitioner's claim, the Court held that although the government did actually own and operate some utilities, privately operated

149 See *supra* notes 69–75 and accompanying text.

150 See, e.g., *Evans v. Newton*, 382 U.S. 296, 301–02 (1966) (attributing private operation of a city park to the state); *Terry v. Adams*, 345 U.S. 461, 475–76 (1953) (plurality opinion) (finding state action within discriminatory primary elections); *Marsh v. Alabama*, 326 U.S. 501, 502, 509–10 (1946) (holding that Gulf Shipbuilding Corporation, which operated a corporate town, was a state actor); *Nixon v. Condon*, 286 U.S. 73, 88–89 (1932) (holding discriminatory elections to qualify as state action).

151 See *Evans*, 382 U.S. at 301.

152 In Greek Mythology, King Midas prayed for and was granted by the gods the power to turn everything he touched into gold. According to the myth, he died from hunger as everything set before him was turned to gold. ARISTOTLE, *POLITICS* 68 (Benjamin Jowett trans., 1943).

153 *Evans*, 382 U.S. at 300 (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925)).

154 *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352–58 (1974).

155 *Id.* at 347–48.

utilities do not perform a public function because the operation of a utility is not an activity traditionally and exclusively performed by the state.<sup>156</sup>

While application of the traditional and exclusive government performance test does limit the public function exception, the Court's focus on a history of exclusive performance is ill conceived for three reasons. First, it limits the application of the public function test to very few activities because of the historically small scale of government, particularly compared to the enormous and diverse entity familiar to us today.<sup>157</sup> Second, the test incorporates and perpetuates the flaws in the original Constitution, which were only remedied by constitutional amendments and relatively recent Court decisions interpreting those amendments.<sup>158</sup> Third, the test does not focus on the purpose of the state action doctrine: the prevention of tyranny. To prevent tyranny through delegation to private actors, the public function test must focus on the function of the activity rather than a history of exclusive government performance.

A lack of government resources often necessitated that private parties perform activities that, from a functional perspective, were clearly governmental in nature. For example, resource concerns led to the inclusion of a provision in the United States Constitution that authorized the government to issue Letters of Marque to privateers.<sup>159</sup> Letters of Marque permitted these privately owned warships to attack enemy shipping, allowing the government to conduct naval warfare without the commitment of vast public resources.<sup>160</sup> Likewise, in England, the victims of crimes, or private organizations, were once primarily responsible for the criminal prosecution of their offenders because of a "reluctance to raise taxes to support public prosecutions."<sup>161</sup> Yet surely, from a functional perspective, waging war and criminal prosecutions must be regarded as governmental functions subject to constitutional constraint because of their potential for tyrannical abuse.

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156 *Id.* at 351 n.8, 353. The Court also rejected the petitioner's argument that the essential nature of the service provided by the utility corporation was sufficient to convert the corporation into a state actor. *See id.* at 353–54. Defining the public function exception by the essential nature of the activity involved could transform every action of "[d]octors, optometrists, lawyers, Metropolitan, and Nebbia's upstate New York grocery selling a quart of milk" into that of the state. *Id.*

157 *See* *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 550 n.1 (1987) (Brennan, J., dissenting) ("Such a limitation would be most imprudent, for it would freeze into law a static conception of government, and our judicial theory of government action would cease to resemble contemporary experience.")

158 *See* Barnett, *supra* note 97, at 24–26; Liebman & Garrett, *supra* note 84, at 885–99.

159 U.S. CONST. art. I, § 8, cl. 11.

160 *Id.* The practice became unfeasible and unnecessary as modern standing militaries became standard and was abolished by the Paris Declaration Respecting Maritime Law of April 16, 1856. *See* Sean Watts, *Reciprocity and the Law of War*, 50 HARV. INT'L L.J. 365, 391 n.144 (2009).

161 Michael Edmund O'Neill, *Private Vengeance and the Public Good*, 12 U. PA. J. CONST. L. 659, 667–69, 749 (2010).



Similar government resource shortages prevented modern police forces from becoming commonplace in America until the mid-nineteenth century.<sup>162</sup> Private persons and organizations—such as the Pinkertons—played an important and often notorious role in apprehending criminals.<sup>163</sup> In fact, despite our modern state and federal law enforcement organizations, private individuals and private security agencies continue to play an important role in apprehending criminals.<sup>164</sup> Because of the Court’s history-based definition of the public function exception, private persons are not subject to the same constitutional restrictions on the use of deadly force that restrict government law enforcement personnel.

Moreover, the Court’s current public function test—the traditional and exclusive government performance test—perpetuates the effects of early constitutional failures.<sup>165</sup> Federalism was intended to be a tool to prevent tyranny, but the Constitution’s original distribution of power between the federal government and the states facilitated the rise of tyrannical political majorities in state and local governments.<sup>166</sup> The functions that the government exclusively engaged in, shared with private parties, or left completely in the hands of private parties were influenced by these original constitutional failures.<sup>167</sup> This problem is particularly troubling because the public function exception plays a critical role in preventing tyranny of the majority. It prevents the government, selected by political majorities, from delegating governmental functions back to private actors as a means of circumventing today’s broad constitutional protections for “discreet and insular minorities”<sup>168</sup>—the very groups historically subject to oppression by both state and private actors because of the original constitutional defects.

The Founding Fathers were aware of the dangerous potential of a tyrannical majority in the new democracy they were creating, and James Madison offered the following warning in *The Federalist No. 51*:

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162 David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1207–09 (1999).

163 *Id.* at 1211–17.

164 *Id.* at 1221–25.

165 See *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 550 n.1 (1987) (Brennan, J., dissenting).

166 See Liebman & Garrett, *supra* note 84, at 885–99; Thurgood Marshall, Commentary, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987) (“I do not believe that the meaning of the Constitution was forever ‘fixed’ at the Philadelphia Convention. Nor do I find the wisdom, foresight, and sense of justice exhibited by the framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, that we hold as fundamental today.”).

167 See Adam B. Wolf, *Fundamentally Flawed: Tradition and Fundamental Rights*, 57 U. MIAMI L. REV. 101, 101–05 (2002) (explaining how the use of history in fundamental rights analysis legitimizes and perpetuates prior discrimination and is contrary to the purpose of the Fourteenth Amendment).

168 *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. . . . If a majority be united by a common interest, the rights of the minority will be insecure. . . . In a society under the forms of which the stronger faction can readily unite and oppress the weaker, *anarchy may as truly be said to reign as in a state of nature* . . . .<sup>169</sup>

Madison assumed that the vast diversity of interests and classes of citizens in the new republic made it unlikely that any majority would become so secure in its power as to be able or willing to deprive another group of its fundamental rights.<sup>170</sup> Unfortunately, history proved Madison's approach unjustifiably optimistic. Because the Constitution's protection of individual liberties in the Bill of Rights did not originally apply to the states,<sup>171</sup> the political process was the primary check against the abuse of state power. However, most Americans were denied the right to vote, to serve on juries, or to otherwise participate in the political process.<sup>172</sup> Of course, the greatest abuse, slavery, was expressly sanctioned in the Constitution and led to the costliest war in American history.<sup>173</sup> Even the Civil War did not rein in the oppression of the political majorities that controlled state and local governments.<sup>174</sup>

The post-Civil War amendments did end slavery, and they might have corrected the most atrocious violations of individual liberties by state and local governments. Certainly, the text of the Fourteenth Amendment could have, and probably should have, been interpreted to apply the first eight amendments of the Constitution to the state and local governments as "privileges and immunities of citizenship."<sup>175</sup> Yet, in the *Slaughter-House Cases*,<sup>176</sup> the Court rejected this interpretation in order to preserve for the states the

169 THE FEDERALIST NO. 51, at 323–24 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

170 *Id.* at 324–25.

171 *See, e.g.,* *Baffon v. Mayor of Balt.*, 32 U.S. (7 Pet.) 243, 250–51 (1833) (holding that the Fifth Amendment constrains the federal government but not the states).

172 *See* STEPHEN BREYER, *ACTIVE LIBERTY* 32 (2005).

173 *See* *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 451 (1857) (“[T]he right of property in a slave is distinctly and expressly affirmed in the Constitution.”); MARK E. BRANDON, *FREE IN THE WORLD* 6–7, 202 (1998).

174 *See generally* 4 RACE, LAW, AND AMERICAN HISTORY 1700-1990: THE AGE OF JIM CROW (Paul Finkelman ed., 1992) [hereinafter THE AGE OF JIM CROW] (surveying the post-Civil War laws passed to subordinate African-Americans).

175 *See, e.g.,* *McDonald v. City of Chi.*, 130 S. Ct. 3020, 3058–88 (2010) (Thomas, J., concurring) (acknowledging that the Second Amendment is fully applicable to the states but reaching that conclusion by rejecting the *Slaughter-House Cases* and applying the Bill of Rights to the states through the Privileges or Immunities Clause of the Fourteenth Amendment); Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1136–38, 1147 n.444, 1149 (2000).

176 83 U.S. (16 Wall.) 36 (1873).

primary role of governing their citizens, free from both constitutional censure and congressional control.<sup>177</sup>

In *The Civil Rights Cases*, the Court continued its misplaced focus on federalism when it should have focused on preventing tyranny of the majority. Although the Court held that the states have no duty to prevent private discrimination in public accommodations, the Court presumed that existing state laws would provide a remedy against private interference of other, more basic constitutional rights, stating:

The wrongful act of an individual, unsupported by any such [state] authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and *may presumably be vindicated by resort to the laws of the State for redress*. An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; *he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the State where the wrongful acts are committed*.<sup>178</sup>

If, however, the Constitution does not compel the states to take affirmative measures to remedy private violations of constitutional rights, how can the Court assume that the states will provide redress through state civil and criminal laws?

Apparently, the Court expected that the political process would ensure that the states would provide legal redress. If this was the Court's assumption, it learned few lessons from the majority's use of the political process to visit abuse upon minorities leading up to the Civil War, and the decisions in *The Slaughter-House Cases* and *The Civil Rights Cases* perpetuated the problem. For nearly a century after these decisions, many states actively passed legislation that deprived or infringed upon the right to vote, hold property, sue in the court, and serve on juries.<sup>179</sup> Jim Crow laws were unquestionably state action, but generations of African-Americans suffered under their tyranny and oppression before selective incorporation and federal legislation gradually eradicated them.<sup>180</sup>

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177 See *id.* at 81–82. Despite continuing scholarly and judicial criticism of the *Slaughter-House Cases*' narrow interpretation of the Fourteenth Amendment, the Court has never overruled this aspect of the case.

178 *Civil Rights Cases*, 109 U.S. 3, 17 (1883) (emphasis added).

179 See generally THE AGE OF JIM CROW, *supra* note 174 (surveying the post-Civil War laws passed to subordinate African-Americans).

180 See Voting Rights Act of 1965, 42 U.S.C. § 1973 (2006); Civil Rights Act of 1964, 42 U.S.C. §§ 1981–1997j, 2000a–2000h-6 (2006).

State and local governments also found more subtle ways to achieve similar deprivations of rights without taking direct action. Political majorities, through governmental inaction, effectively delegated governmental functions to private persons free from the constitutional restraints designed to protect individual rights.<sup>181</sup> Private actors controlled primary elections, operated segregated parks, prevented the sale of property to minorities, and excluded minorities from jury service. Even law enforcement was delegated to private thugs and organizations such as the Pinkertons and the Ku Klux Klan, who were free to seek vigilante justice without constitutional constraint.<sup>182</sup> The public function exception became necessary to address the failure of the political process to provide criminal and civil redress for private interference with basic constitutional rights by those performing delegated governmental functions.<sup>183</sup>

The traditional and exclusive governmental function test forces the Court to confine its search for public functions to an examination of a distant and troubled past. Going forward, the scope of the public function exception must be defined by the nature of the function performed rather than by the traditional and exclusive status of the actor performing the function. Otherwise, the traditional and exclusive governmental function test will perpetuate the effects of our flawed constitutional history.<sup>184</sup>

#### IV. A FUNCTIONAL ALTERNATIVE: THE NON-DELEGABLE GOVERNMENTAL DUTY EXCEPTION

To determine which governmental functions must be subject to constitutional protection even when performed by private actors, it is useful to draw an analogy to tort law's non-delegable duty doctrine. The non-delegable duty doctrine is an exception to the general rule that an employer of an independent contractor is "not liable for the negligent acts of [the] independent contractor."<sup>185</sup> Under the non-delegable duty doctrine, the employer of an independent contractor is liable for the negligence of the contractor when the work involves a "peculiar risk of physical harm" that requires the

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181 Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479, 524–25 (2012) (discussing the historical problem of delegation of law enforcement to groups like the Ku Klux Klan who were free to seek vigilante justice without constitutional constraint).

182 *Id.*

183 Similarly, the entanglement exception sought to apply constitutional constraint to those instances where the government commanded, encouraged, or facilitated private parties' efforts to achieve ends that the government was prohibited from seeking directly. See discussion *supra* Section III.A.

184 See *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 550 n.1 (1987) (Brennan, J., dissenting) (objecting to the strict application of the traditional and exclusive governmental function test because it would "freeze into law a static conception of government").

185 *Pusey v. Bator*, 762 N.E.2d 968, 972 (Ohio 2002). See generally DOBBS, *supra* note 26, § 337 (discussing non-delegable duties).

exercise of “special precautions.”<sup>186</sup> The employer may delegate the work to an independent contractor, but she cannot delegate the responsibility or duty to take the special precautions.<sup>187</sup>

Similarly, the public function exception ensures that special precautions are taken to prevent violations of constitutional liberties when private persons perform certain governmental functions.<sup>188</sup> When the power or function is governmental in character, the government cannot, like Pontius Pilate,<sup>189</sup> wash its hands of the responsibility by delegating the task to private actors who are not constitutionally constrained.<sup>190</sup> The government may delegate the task but not the responsibility, and the private actor performing that governmental function must act within the constitutional limitations that apply to the government.

186 RESTATEMENT (SECOND) OF TORTS § 416 (1965); *see, e.g.*, *Myers v. United States*, 652 F.3d 1021, 1023–26, 1034–38 (9th Cir. 2011) (holding that the government had non-delegable duty to ensure contractor hired to remove soil contaminated with dangerous compounds from military bases and dispose of it in a landfill did not expose those living adjacent to the landfill to harmful levels of contaminated soil dust).

187 *Pusey*, 762 N.E.2d at 972–73 (holding that an “employer may delegate the *work* to an independent contractor, but he cannot delegate the *duty*”).

188 *See, e.g.*, *Terry v. Adams*, 345 U.S. 461, 462–63, 469 (1953) (plurality opinion) (finding state action where the state permitted a duplication of its election process by private party seeking to exclude African-Americans from voting in violation of the Fifteenth Amendment).

189 Pontius Pilate was the governor of Judea from twenty-six to thirty-seven AD. COLUM HOURIHANE, PONTIUS PILATE, ANTI-SEMITISM, AND THE PASSION IN MEDIEVAL ART 11 (2009). His responsibilities included serving as the judge who oversaw the trial of Jesus for sedition and treason. Although the details are controversial and disputed, the analogy I draw is based upon the following version of events. Pontius Pilate determined that the evidence was insufficient to convict Jesus and believed he was innocent of the charges against him. Although Pontius Pilate had the authority to determine guilt or innocence and to release or punish Jesus, he delegated the decision to the mob, which demanded that Jesus be crucified. Pilate then symbolically washed his hands in a golden basin of water and proclaimed “my hands are clean of this man’s blood.” *See* PAUL L. MAIER, PONTIUS PILATE 219–38 (1968) (providing a factual, but fictional account of Pilate’s life). *But see* ANN WROE, PONTIUS PILATE 221–84 (1999) (suggesting that Pilate did not struggle with the decision to condemn Jesus and did so without equivocation or delegation). Of course, if the power to judge the case was Pilate’s, he cannot wash the responsibility away by delegating the authority to an angry crowd and allowing them to condemn an innocent man. The responsibility was his, and delegating the act to the crowd did not eliminate his responsibility for the crucifixion. I often think of the governmental function exception as the “Pontius Pilate Principle”: some functions are the sole responsibility of government, even if the government delegates the performance of the function—actively or passively—to private actors.

190 *Rendell-Baker v. Kohn*, 457 U.S. 830, 849 n.3 (1982) (Marshall, J., dissenting) (“A State may not deliberately delegate a task to a private entity in order to avoid its constitutional obligations. But a State’s decision to delegate a duty to a private entity should be carefully examined even when it has acted, not in bad faith, but for reasons of convenience. The doctrinal basis for the state action requirement is that exercises of state authority pose a special threat to constitutional values. A private entity vested with state authority poses that threat just as clearly as a state agency.” (citation omitted)).

The difficulty is identifying which governmental functions present special dangers that require constitutional constraint, even when performed by private actors.<sup>191</sup> To solve this problem, the proposed non-delegable governmental duty exception looks to social contract theory and our Constitution's structural and procedural means of limiting government power under the social contract.

*A. The Constitution, Social Contract Theory, and Limited Government*

It has become commonplace in constitutional dialogue to trumpet the protection of individual liberty as the Constitution's primary purpose. This sentiment is expressed by a popular quotation commonly, although perhaps erroneously, attributed to Patrick Henry: "The Constitution is not an instrument for the government to restrain the people, it is an instrument for the people to restrain the government."<sup>192</sup> While this idea clearly resonates with many Americans, it is in fact only a half-truth.<sup>193</sup> Firstly and foremostly, the Constitution created a federal government and contemplated state and local governments capable of subjecting the people to government-created laws, judicial process, and executive power.<sup>194</sup> The government, created by the consent of the people, is, in turn, constitutionally limited to ensure that life, liberty, and property will not be subject to the equally destructive tyranny of an all-powerful government.<sup>195</sup> In *The Federalist No. 51*, Madison explained the delicate balancing act assigned to the Founding Fathers in creating the new government and in drafting the Constitution:

But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.<sup>196</sup>

This dichotomy—the need to impose government power on the people while also controlling the government in order to protect individual liberty—

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191 *See id.*

192 While this quotation is often attributed to Patrick Henry—especially on the internet—there is considerable doubt that it was ever said by Patrick Henry. *See* Thomas S. Kidd, *Misquoting Patrick Henry: The Internet and Bogus Sayings of the Founders*, BAYLOR INST. FOR STUDIES OF RELIGION (Feb. 2, 2012), [www.baylorisr.org/2012/02/misquoting-patrick-henry-the-internet-and-bogus-sayings-of-the-founders-by-thomas-s-kidd/](http://www.baylorisr.org/2012/02/misquoting-patrick-henry-the-internet-and-bogus-sayings-of-the-founders-by-thomas-s-kidd/).

193 *See, e.g.*, Stengel, *supra* note 109 (discussing constitutional debates surrounding current events).

194 U.S. CONST. arts. I–III, amend. X.

195 *Id.* at amends. I–X.

196 THE FEDERALIST NO. 51, *supra* note 169, at 322 (James Madison); *see also* THE FEDERALIST NO. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961) ("No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.").

is the great problem that the Constitution sought to solve.<sup>197</sup> And social contract theory—as articulated in the works of Thomas Hobbes,<sup>198</sup> Jean-Jacques Rousseau,<sup>199</sup> and John Locke<sup>200</sup>—largely informed the Founding Fathers in solving this problem. Social contract theory postulates that people consent to government power in order to escape the lawlessness of the state of nature where life, liberty, and property are subject to constant threats from others.<sup>201</sup>

Locke’s work particularly influenced the Founding Fathers.<sup>202</sup> Locke identified three defects in the state of nature that necessitated the formation of government. Firstly, there is an absence of “established, settled, known law.”<sup>203</sup> Secondly, the state of nature lacks “a known and indifferent judge, with authority to determine all differences according to the established law.”<sup>204</sup> Finally, there is a lack of “power to back and support” the law and enforce judgments.<sup>205</sup> To remedy these defects, each person willingly surrenders some autonomy to the government.<sup>206</sup> In return, the government is “obliged” to secure the life, liberty, and property<sup>207</sup> of the people “by provid-

197 THE FEDERALIST NO. 51, *supra* note 169, at 322 (James Madison).

198 THOMAS HOBBS, *LEVIATHAN* (Oxford Univ. Press 1929) (1651).

199 JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Ernest Rhys ed., Everyman’s Library, 1938) (1762).

200 JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT*, *reprinted in* THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION (J.W. Gough ed., Basil Blackwell 1948) (1690).

201 Thomas Hobbes is generally credited with first articulating the social contract theory of government formation. In his seminal work, *Leviathan*, Hobbes painted an unappealing picture of life in the state of nature, free of government restraint. HOBBS, *supra* note 198, at 96. Hobbes believed that humans are fundamentally antisocial beings, motivated by personal gain and self-preservation. *Id.* Without government power to maintain order, mankind would live in a constant state of war with one another. *Id.* Hobbes famously described life in this lawless state of nature as “solitary, poore, nasty, brutish, and short.” *Id.* at 97. The desire to escape this uncertain and primal existence was the impetus that drove men to submit to the authority of government. *Id.* at 100. Locke had a more generous view of human nature, believing men were fundamentally social creatures capable of rationally discovering natural laws. LOCKE, *supra* note 200, §§ 124–31. Like Hobbes, he believed that in the state of nature, man’s ignorance, bias, and self-interest obscured the discovery of natural law and colored its application. *Id.*

202 So great was Locke’s influence on Jefferson that he considered Locke to be one of the three greatest men in history. See Earl Johnson, Jr., *Will Gideon’s Trumpet Sound a New Melody? The Globalization of Constitutional Values and Its Implications for a Right to Equal Justice in Civil Cases*, 2 SEATTLE J. SOC. JUST. 201, 206 n.22 (2003) (citing a letter from Thomas Jefferson to American painter John Trumbull in 1789, “referring to John Locke, Francis Bacon, and Isaac Newton” as “the three greatest men that have ever lived” and ordering their portraits).

203 LOCKE, *supra* note 200, § 124.

204 *Id.* § 125.

205 *Id.* § 126.

206 *Id.* § 127.

207 *Id.* § 131.

ing against [the] three defects above-mentioned that made the state of nature so unsafe and uneasy.”<sup>208</sup>

Although Locke and Hobbes agreed that government was created to impose law and order on the state of nature, they disagreed about the ideal form of government and the extent of its power. According to Hobbes, the people completely surrendered government control to the collective political body of the all-powerful Leviathan. Once created, the power of Hobbes’s Leviathan was absolute and irrevocable.<sup>209</sup> In return, the sovereign controlled the natural domineering ambitions of its subjects and provided security and peace.<sup>210</sup>

Locke rejected Hobbes’s Leviathan, refusing to substitute an all-powerful tyrant for the many petty tyrants of the state of nature. Rather, Locke envisioned a limited government empowered to correct the three defects of the state of nature by performing legislative, judicial, and executive functions but constrained by the terms of the social contract.<sup>211</sup> However, if the government became tyrannical—by exceeding the power granted to it by the social contract<sup>212</sup>—the people had the right to dissolve the government, by violent revolution if necessary, and replace the people in charge or the form of government.<sup>213</sup>

Just as Madison sought to prevent the anarchy of the state of nature and the tyranny of an all-powerful Leviathan government in drafting the Constitution, the public function exception must be formulated to prevent these two forms of tyranny. Firstly, the non-delegable governmental function exception must protect against the many petty tyrants of the lawless state of nature. When private persons perform legislative, executive, or judicial functions, they must be subject to the same constitutional restrictions that apply to state actors. Social contract theory identifies these tasks as non-delegable govern-

208 *Id.*

209 HOBBS, *supra* note 198, at 133–39.

210 *Id.*

211 LOCKE, *supra* note 200, §§ 143–48.

212 *Id.* § 199.

213 *Id.* §§ 212–20. Thomas Jefferson breathed life into Locke’s theory in *The Declaration of Independence* by rejecting the tyranny of King George III, who was the personification of Hobbes’s Leviathan, in favor of a government limited to the powers expressly granted by the people:

W[e] hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.

THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).



mental functions because they create distinct risks of abuse when left in the hands of self-interested private parties.

Secondly, the public function exception must also apply when private action threatens to circumvent the structural and procedural means by which the Constitution constrains the government to protect individual liberty. For example, as demonstrated in Part II, the state action doctrine plays an important role in preserving the Constitution's separation of powers by ensuring that the political branches of government—through legislation and law enforcement, rather than the judiciary, through constitutional interpretation—perform the initial task of balancing the conflicting liberties of purely private actors.<sup>214</sup> This also enhances the ability of our democracy to fight government tyranny through the electoral process because the legislature and the executive are elected, but the federal judiciary is not.<sup>215</sup> However, for elections to serve as a constraint on the government abuse of power, elections must also be considered a non-delegable governmental function.<sup>216</sup> In addition to elections, other methods of selecting people for participation in legislative, judicial, or executive functions, such as jury service, must also be treated as governmental functions subject to constitutional constraint.<sup>217</sup> There are undoubtedly other constitutional structures and procedures that are also non-delegable governmental functions.

The non-delegable governmental duty exception ensures that the Constitution fulfills its goal of empowering the government to remedy the three defects of the state of nature while ensuring that the government is limited to those powers assigned to it. By focusing on the nature of the function performed, rather than on the exclusive and traditional history of the function, the non-delegable governmental function exception identifies those functions that must be subject to constitutional constraint because of their special risks of abuse.

### B. *The Use of Deadly Force Is a Non-Delegable Government Function*

When a state allows private persons to use deadly force to seize nondangerous criminal suspects, the private persons must be treated as state actors because the state delegates judicial and executive functions that, under social contract theory, cannot be entrusted to self-interested private actors. Delegation of this power to private actors also circumvents many of the Constitution's procedural and structural protections against an abuse of

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214 See *supra* Part II.

215 See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–23 (2d ed. 1986) (“The root difficulty is that judicial review is a counter-majoritarian force in our system.”); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) (“A democratic society does not . . . need constitutional guarantees to insure that its laws will reflect ‘current values.’ Elections take care of that quite well.”).

216 See *Terry v. Adams*, 345 U.S. 461, 469 (1953) (plurality opinion) (“For a state to permit such a duplication of its election processes is to permit a flagrant abuse of those processes to defeat the purposes of the Fifteenth Amendment.”).

217 *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 627–28 (1991) (jury selection).

judicial and executive power, the maintenance of which is fundamental to the preservation of our constitutionally limited government.

Allowing private actors to use deadly force, where the government is prohibited from using such force itself, revives two of the three defects in the state of nature that necessitated the formation of government. The state of nature lacked a “known and indifferent judge” with authority to resolve disputes according to established law, and it lacked the executive power to enforce a just sentence.<sup>218</sup> As Locke explained, self-interested individuals are incapable of exercising the objectivity, restraint, and discretion required by the judiciary and the executive:

For every one in that state, being both judge and executioner of the law of nature, men being partial to themselves, passion and revenge is very apt to carry them too far, and with too much heat in their own cases, as well as negligence and unconcernedness, to make them too remiss in other men’s.<sup>219</sup>

The private actor’s bias and self-interest may lead the actor to use deadly force where an objective observer would exercise restraint. The private actor simply cannot exercise the same objectivity as trained police officers, and the actor is certain to make mistakes in judgment as to the suspect’s guilt and the necessity of using deadly force to accomplish the arrest.<sup>220</sup> Even if the suspect is guilty, the victim may use deadly force in the heat of the moment when he otherwise would have exercised restraint given time for reflection and calm deliberation. Whether the suspect lives or dies is entirely dependent upon the unpredictable temperament and predilections of a single person. Certainly, race, gender, and religious beliefs—which cannot be considered by the state in issuing punishment—will often play a part in the private actor’s decision to use deadly force.<sup>221</sup> People consent to government power to avoid this “irregular and uncertain” use of force by self-interested private actors.<sup>222</sup> James Madison echoed this view in *The Federalist No. 10*, when he said, “[n]o man is allowed to be a judge in his own cause,

218 LOCKE, *supra* note 200, §§ 125–26.

219 *Id.* § 125.

220 Under the common law, the use of deadly force is privileged only to the arrest of a felon in fact, although the use of force need only *appear* necessary rather than be actually necessary. Day, *supra* note 9, at 288–91.

221 GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE* (1988) (discussing the impact of race on the Bernhard Goetz shooting of four African-American men on the New York subway and his successful assertion of self-defense); Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 781 (1994) (discussing the effects of racial stereotypes on the reasonable person standard of self-defense); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 438–52 (1996).

222 LOCKE, *supra* note 200, § 127.

because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.”<sup>223</sup>

The private actor’s use of deadly force also disrupts the Constitution’s separation of power by consolidating the judicial and the executive functions in the hands of private actors. The private actor serves as constable, prosecutor, jury, and judge. She gathers the evidence, pronounces guilt, and issues a punishment all in a split-second decision. The basic functions of the judiciary and the executive cannot be combined and delegated to private actors unless those private actors are also subject to constitutional constraint.

Moreover, a private actor’s use of deadly force deprives the suspect and society of all of the Constitution’s procedural protections inherent in the judicial process and critical to a free society. The right to counsel, confrontation, trial by jury, and proof beyond a reasonable doubt are all rendered immaterial by the state’s delegation of power to the private actor. Even assuming the private actor could establish that the suspect was guilty beyond a reasonable doubt, the Constitution simply does not permit the death penalty for nonviolent crime. The Eighth Amendment’s prohibition on cruel and unusual punishment prohibits the imposition of the death penalty for even serious and violent crimes such as burglary,<sup>224</sup> robbery,<sup>225</sup> and rape.<sup>226</sup> Even for murder, the death penalty is constitutional only after careful consideration of mitigating and aggravating factors.<sup>227</sup> The protections of our basic charter would be rendered meaningless by delegating the power to determine guilt and punishment to private citizens enraged by a threat to their property.

Indeed, many consider the defining characteristic of the modern state to be its monopoly on the legitimate use of coercive force.<sup>228</sup> The sovereign monopoly on the legitimate use of coercive force is recognized by the courts and is the basis for several familiar legal principles.<sup>229</sup> German philosopher

223 THE FEDERALIST NO. 10, *supra* note 196, at 79 (James Madison); *see also* Pilla v. Am. Bar Ass’n, 542 F.2d 56, 58 (8th Cir. 1976) (“It is axiomatic that no man should sit in judgment of his own case.”).

224 *See* Kennedy v. Louisiana, 554 U.S. 407, 421 (2008) (citing *Enmund v. Florida*, 458 U.S. 782 (1982)).

225 *Enmund*, 458 U.S. at 800–01.

226 *Kennedy*, 554 U.S. at 420–21 (rape of a child).

227 *See* Wiggins v. Smith, 539 U.S. 510, 537–38 (2003) (holding that the Sixth Amendment’s guarantee of effective assistance of counsel includes an obligation on counsel to uncover and present mitigating evidence during the penalty phase).

228 *See* 2 ANTHONY GIDDENS, A CONTEMPORARY CRITIQUE OF HISTORICAL MATERIALISM 121 (1987); 1 MAX WEBER, ECONOMY AND SOCIETY 56 (Guenther Roth & Claus Wittich eds., 1968); MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 156 (Talcott Parsons, ed., A.M. Henderson & Talcott Parsons trans., Oxford Univ. Press 1947) [hereinafter WEBER, SOCIAL AND ECONOMIC].

229 *See, e.g.,* Saudi Arabia v. Nelson, 507 U.S. 349, 359–61 (1993). The restrictive theory of foreign sovereign immunity provides that a state is immune from the jurisdiction of foreign courts when it exercises “powers peculiar to sovereigns,” but not where it exercises powers also possessed by private citizens. *Id.* at 360 (quoting *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 614 (1992)). The enforcement of penal law has been universally

Max Weber—the most celebrated champion of the state’s monopoly on the use of coercive force—recognized that the state may delegate that use of force to others.<sup>230</sup> Of course, in our constitutionally constrained government, the government can logically delegate only the power that it actually possesses. If the government is constitutionally prohibited from using deadly force to seize fleeing felons, it cannot delegate that power to private citizens free from similar constitutional constraint.

If the Constitution does not apply to this delegation of governmental power, the government may achieve an end—through private proxy—that it is constitutionally prohibited from achieving directly. The state cannot impose the death penalty for the crime of theft, and it cannot use deadly force to prevent the escape of non-violent criminals.<sup>231</sup> Under the current traditional and exclusive government performance test, however, the state may privilege private actors to use deadly force to stop non-violent criminals and achieve this unconstitutional end through private proxy. The non-delegable governmental function test prevents the delegation of unconstitutional force because it involves a special risk of abuse that must be subject to constitutional constraint.

### C. *Applying the Non-Delegable Government Function Test to Existing Precedent*

The functional, non-delegable duty rationale provides a stronger explanation, both descriptively and normatively, of many of the Supreme Court’s state action cases than does the current traditional and exclusive performance test. In some cases, the private actor is exercising a Lockean governmental power and thwarting the Constitution’s structural or procedural

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regarded as a classic example of a uniquely sovereign power from which the state is absolutely immune from the jurisdiction of foreign courts. See *id.* at 359–61; see also *Fuentes v. Shevin*, 407 U.S. 67, 91–93 (1972) (finding that seizure of property pursuant to a *writ of replevin* initiated and obtained by self-interested private party, without any state official review of the basis for the claim to repossession or the need for immediate seizure, constitutes an unconstitutional abdication of the state’s monopoly on the legitimate use of force and violates the procedural due process requirements of the Fourteenth Amendment); *Arsberry v. Illinois*, 244 F.3d 558, 566 (7th Cir. 2001) (“States and other public agencies do not violate the antitrust laws by charging fees or taxes that exploit the monopoly of force that is the definition of government.”); *State ex rel. D.D.H. v. Dostert*, 269 S.E.2d 401, 409 (W. Va. 1980) (“State imposed retribution has historically been the *quid pro quo* of the State’s monopoly of force and its proscription of individual retribution.”).

230 See MAX WEBER, *POLITICS AS A VOCATION* 2 (H.H. Gerth & C. Wright Mills trans., Fortress Press 1965) (1946); WEBER, *SOCIAL AND ECONOMIC*, *supra* note 228, at 156.

231 *Tennessee v. Garner*, 471 U.S. 1, 21 (1985). In *Garner*, the Court noted that at common law, deadly force was permissible in the apprehension of a felon but was condemned as disproportionately severe when used to apprehend a misdemeanant. *Id.* at 12. This may have been sensible when distinction between felonies and misdemeanors was “broad and deep” and felons were typically much more dangerous than perpetrators of lesser crimes. *Id.* at 14 (citation omitted). Today, however, the distinction between misdemeanors and felonies often has very little to do with the danger posed by the crime. *Id.* For example, the drunken driver—a misdemeanor offense—creates a far greater danger to the public than does the white-collar criminal—a felony offense. *Id.* at 14 n.12.

means of government control at the same time. In each case, the non-delegable duty test ensures that the government cannot use private proxies to circumvent the carefully crafted constitutional limitations on government power.

## 1. Jury Selection

The non-delegable governmental duty analysis better explains the Constitution's prohibition on the use of discriminatory peremptory challenges in the jury selection process. One of the defects of the state of nature was the lack of disinterested judges to resolve legal disputes. In the American judicial system, juries provide a unique check on the exercise of government power by resolving disputed questions of fact and applying the law to the facts.<sup>232</sup> All citizens that qualify for jury service have a constitutional right to participate without regard to race or gender.<sup>233</sup> Furthermore, the Equal Protection Clause guarantees that the state will not exclude members of the defendant's race from the jury simply on account of race.<sup>234</sup> If those selecting the jurors are not constrained by the Constitution, then the adjudicators of disputes may not be impartial. When government prosecutors use peremptory challenges to exclude jurors on the basis of race or gender, they violate the Equal Protection Clause.<sup>235</sup> Of course, prosecutors are the quintessential state actor.

The Court, however, has also held that private civil litigants exercising peremptory challenges are state actors when they exercise peremptory challenges and are therefore prohibited by the Equal Protection Clause from striking jurors on the basis of race or gender.<sup>236</sup> Even criminal defense attorneys, the adversaries of the government's prosecutorial power, are subject to constitutional limitations when exercising peremptory challenges. They may not strike jurors on the bases of race or gender.<sup>237</sup> Although much of the Court's rationale in the jury selection cases focuses upon the government entanglement in the process, these cases may also be properly thought of as non-delegable governmental function cases. The government delegates to private persons the power to select the members of a "quintessential governmental body," which is a "critical governmental function[ ]."<sup>238</sup>

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232 The jury also serves as a check on the executive and legislative branches because they possess the power, if not the express right, to nullify the law where its application offends their collective sense of justice in the particular case, or they believe that the government has abused or exceeded its power. See Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 34–37 (2003) (discussing the constitutional role of jury nullification as a check on governmental power).

233 *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994).

234 *Strauder v. West Virginia*, 100 U.S. 303, 312 (1879).

235 *Batson v. Kentucky*, 476 U.S. 79, 89 (1986).

236 *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 626 (1991).

237 *Georgia v. McCollum*, 505 U.S. 42, 54–55 (1992).

238 *Edmonson*, 500 U.S. at 624.

Though the motive of a peremptory challenge may be to protect a private interest, the objective of jury selection proceedings is to determine representation on a governmental body. Were it not for peremptory challenges, there would be no question that the entire process of determining who will serve on the jury constitutes state action. *The fact that the government delegates some portion of this power to private litigants does not change the governmental character of the power exercised.*<sup>239</sup>

If the government is constitutionally prohibited from discriminating on the basis of race when selecting a jury, it cannot delegate that power to private persons without similarly constraining the private actors.

The fact that the government may not desire the private person to use the peremptory strike in a discriminatory manner, or that the private actor is not seeking to further a state objective, is not determinative, although the danger of delegation is certainly magnified when the government desires an unconstitutional end and permits like-minded private persons, free from constitutional constraint, to do the government's "dirty work." Under such circumstances, the danger of tyranny is particularly acute; private parties achieve the government's desired but unconstitutional result. This is precisely what occurred in a series of cases out of Texas known as the "white primary cases."

## 2. The Right to Vote

In our democracy, the right to vote is perhaps the single most important safeguard against the government's abuse of power. It is the act that consummates the social contract by selecting our lawmakers, executives, and, directly or indirectly, the judges that perform the basic functions of government. It confers legitimacy on the law and the power exercised to enforce it. It is the right that is "preservative of all rights,"<sup>240</sup> and the Constitution requires that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."<sup>241</sup> The government cannot circumvent this basic structural protection against tyranny by passively allowing private parties to interfere with, or deny others, the right to vote.

In the "white primary cases," nominally private political parties prohibited African-American voters from participating in party primary elections in Texas. In the first case, *Nixon v. Herndon*, Nixon, an African-American physician, challenged the constitutionality of a Texas statute that expressly prohibited African-Americans from voting in the Democratic Party primaries.<sup>242</sup> African-Americans were able to vote in the general elections, but at that time, the Democratic Party candidate selected in the party primary was almost certain to win the general election. Therefore, excluding African-Americans from voting in the primary effectively disenfranchised them. The Supreme

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239 *Id.* at 626 (emphasis added).

240 *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

241 *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 667 (1966) (quoting *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964)).

242 273 U.S. 536, 539-40 (1927).

Court had no difficulty finding that the discriminatory statute violated the Equal Protection Clause of the Fourteenth Amendment.<sup>243</sup>

In response, the Texas legislature repealed the law and enacted a new statute that delegated the task of specifying the qualifications of Democratic Party members to the State Executive Committee of the Democratic Party.<sup>244</sup> To no one's surprise, this private group chose to exclude African-Americans from membership in the party, thereby denying them the right to vote in the primary.<sup>245</sup> A determined Nixon brought a second suit, *Nixon v. Condon*, and alleged that the Executive Committee's decision violated rights secured to him by the Constitution.<sup>246</sup> This presented a more difficult state action question because the decision to discriminate was made by the Executive Committee rather than the Texas legislature. The defendant maintained that the exclusion of African-Americans from the primary was not attributable to the state because the effect of the statute was merely to restore to the private political parties the inherent power of voluntary associations to determine their membership.<sup>247</sup>

Rather than confront the more difficult question of whether political parties may determine membership without constitutional constraint, the Court found direct state action in the statutory scheme that empowered the Executive Committee to determine membership. The Committee acted under authority conferred by law, which made the discriminatory policy binding upon the judges of election.<sup>248</sup> But the language of the opinion suggested that the rationale for applying the "great restraints of the Constitution" was the function performed, not merely the statutory delegation.

They [the Executive Committee] are not acting in matters of merely private concern like the directors or agents of business corporations. They are acting in matters of high public interest, matters intimately connected with the capacity of government to exercise its functions unbrokenly and smoothly. Whether in given circumstances parties or their committees are agencies of government within the Fourteenth or the Fifteenth Amendment is a question which this court will determine for itself.<sup>249</sup>

Despite this promising rationale, just three years later in *Grovey v. Townsend*, a unanimous Court held that an identical policy of racial exclusion adopted by the representatives of the Democratic Party, who were assembled in their convention rather than as a statutorily empowered Executive Committee, did not constitute state action subject to constitutional constraint.<sup>250</sup> Thus, African-Americans were again denied participation in the Democratic Party primaries—the only vote that was of significance in Texas at that time.

243 *Id.* at 541.

244 *See Nixon v. Condon*, 286 U.S. 73, 81–82 (1932) (discussing this development).

245 *See id.* at 82 (elaborating on this act).

246 *Id.* at 81.

247 *Id.* at 83.

248 *Id.* at 85.

249 *Id.* at 88–89.

250 295 U.S. 45, 55 (1935).

Nine years later, in *Smith v. Allwright*, the Court overruled *Townsend*.<sup>251</sup> While the critical facts had not changed, the Court had, in the interim, recognized that the party primaries were an integral part of the “machinery for choosing” state and national officials in the general election.<sup>252</sup> The determinative issue was not whether the Democratic Party was a private voluntary association, but whether Texas had permitted private organizations to control critical aspects of the election process. The Constitution grants all citizens the right to vote without regard to race.<sup>253</sup> States cannot directly deny this right, as Texas did in *Nixon v. Herndon*, and they cannot delegate the dirty work to private parties free from constitutional constraint.<sup>254</sup> The right to vote is a vital constitutional check on government power. States are constitutionally responsible for conducting elections, regardless of the nominally private character of the persons to whom the state delegates the function. “Constitutional rights would be of little value if they could be thus indirectly denied.”<sup>255</sup>

Finally, in *Terry v. Adams*, the Jaybird Democratic Association held its elections prior to the official county elections but limited the elections to “white” voters on the county official list.<sup>256</sup> The successful Jaybird candidate, selected by the Anglo-only vote, would then run, often unopposed, in the official Democratic Party primary, which was open to all voters regardless of race.<sup>257</sup> Of course, the only vote that had any value was the Jaybird primary; the Democratic primary was of little consequence because the candidate selected by the Jaybirds was almost always elected.<sup>258</sup> There was, however, a critical difference between the election of a Jaybird candidate and the Democratic primary in *Smith v. Allwright*. In *Smith v. Allwright*, Texas law controlled much of the Democratic Party primary process. In *Terry*, the Jaybirds avoided state regulation of their elections by conducting them before the official primary.<sup>259</sup> State law did not control any aspect of their primary, and the Jaybird candidate did not enjoy inclusion as a separate party on the official general election ballot.<sup>260</sup> The Jaybird candidate, however, did appear on the Democratic primary ballot, often unopposed, and inevitably became the nominee.<sup>261</sup> As a result, the Jaybird candidate appeared on the general election ballot as the Democratic Party candidate. In this case, the Court was squarely presented with a case of state inaction—failure to regulate this once-removed step in the election process—rather than state action.

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251 *Smith v. Allwright*, 321 U.S. 649, 666 (1944).

252 *Id.* at 664.

253 U.S. CONST. amend. XV, § 1.

254 *Smith*, 321 U.S. at 664.

255 *Id.*

256 *Terry v. Adams*, 345 U.S. 461, 463 (1953) (plurality opinion).

257 *Id.*

258 *Id.*

259 *Id.* at 464.

260 *Id.* at 465 n.1.

261 *Id.* at 463.



Despite the state's lack of affirmative action, the Court found this distinction was a matter of form and not substance; the Constitution prohibits the state from achieving the unconstitutional result it desired—racial discrimination in elections.<sup>262</sup> The state had used its power to regulate the primary process. Rather than regulate or prohibit the Jaybirds's candidate selection process, the state left open a path for like-minded private persons to achieve the constitutionally prohibited end. Although the state was passive, the Court held the state responsible and concluded that a state violates the Fifteenth Amendment when it *allows* “the use of any device that produces an equivalent of the prohibited [discriminatory] election.”<sup>263</sup> In short, ensuring the constitutionality of the election process is a governmental function even when the state allows private entities to perform the functional equivalent of the election process. The constitutional restrictions apply to the private political party primaries not because of government entanglement with the primaries, but because of the importance of the right to vote as a means of controlling the government and protecting individual rights. If the government cannot deny citizens the vote on the basis of race, it cannot passively allow private parties to achieve the same constitutionally prohibited result. This is particularly true where, as here, the state government and the private actors apparently desired the same unconstitutional end.

### 3. Legislative Function, Property Ownership

The non-delegable governmental function exception also accounts for what many consider to be the Court's most controversial state action decision—*Shelley v. Kraemer*.<sup>264</sup> In *Shelley*, the Supreme Court of Missouri enforced a private restrictive covenant that prohibited the sale of a single-family home to African-Americans.<sup>265</sup> Private parties negotiated the racially restrictive covenant, and the state did not have an active role in the initial discrimination.<sup>266</sup> Nevertheless, the Supreme Court held that the state's later use of judicial powers to enforce the covenant and enjoin a willing homeowner from selling his home to a willing buyer constituted state action, thus violating the Equal Protection Clause of the Constitution.<sup>267</sup> As the Court explained:

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

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262 *Id.* at 465 n.1, 469–70.

263 *Id.* at 469.

264 334 U.S. 1 (1948). The Court actually considered two cases. *Id.* at 7. The second case involved a substantially similar racially restrictive covenant enforced by the Supreme Court of Michigan. *See Sipes v. McGhee*, 25 N.W.2d 638 (1947) (addressing the Michigan case).

265 *Shelley*, 334 U.S. at 6 (citing *Kraemer v. Shelley*, 198 S.W.2d 679 (Mo. 1946)).

266 *Id.* at 11.

267 *Id.* at 20.

deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. . . . 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. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms.<sup>268</sup>

The criticism of *Shelley* is that its rationale leads to the conclusion that all judicial resolutions of private disputes result in state action.<sup>269</sup> For example, if a private homeowner utilizes state trespass laws to exclude another private person from his property based on race, a civil lawsuit for trespass or a state prosecution for trespass becomes an unconstitutional state action. However, such private use of neutral trespass laws does not constitute state action.<sup>270</sup> As the Court held in *Washington v. Davis*, as long as the law is facially neutral, the discriminatory impact from enforcement of the law does not violate the Equal Protection Clause.<sup>271</sup> In other words, a racially discriminatory purpose must be traced back to a government actor as opposed to the private actors simply seeking enforcement of a facially neutral law.<sup>272</sup>

However, when *Shelley* is thought of as a non-delegable governmental function case, it is easy to distinguish it from the private use of trespass law. The restrictive covenant in *Shelley* prevented the sale of property from a willing seller to a willing purchaser. The use of the restrictive covenants controlled the conduct of third parties—in this case the willing seller and purchaser—and effectively prohibited the sale of private property to racial minorities in the same manner as racial zoning by state or local governments.<sup>273</sup> The regulatory effect of the restrictive covenant on the conduct of a willing seller and buyer converted the private action into government regulation. The danger of delegation is particularly great in racially restrictive covenants because, like the white primary cases, state actors had previously sought to prohibit private sales of real estate to minorities through racial zoning.<sup>274</sup> Without the exception to the state action requirement, the state

268 *Id.* at 19–20.

269 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1697 (2d ed. 1988); Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 CAL. L. REV. 451, 484–91 (2007) (criticizing the constitutional rationale in *Shelley* and suggesting that the Court could have reached the same decision through the application of federal statutes).

270 See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 12.3 (8th ed. 2010) (discussing state encouragement or commandment of private actions); TRIBE, *supra* note 269, at 1702 (elaborating on *Shelley v. Kraemer*); see also *Bell v. Maryland*, 378 U.S. 226, 253–54 (1964) (Douglas, J., concurring) (explaining that the home is a private area not subject to public use without just compensation).

271 426 U.S. 229, 242 (1976).

272 *Id.*

273 See *Shelley*, 334 U.S. at 18–21 (stating that the state provided coercive power to individuals).

274 *Buchanan v. Warley*, 245 U.S. 60, 81–82 (1917) (striking down a city ordinance that prohibited African-Americans from occupying houses in predominately white neighborhoods).

could unconstitutionally discriminate by delegating the state's regulatory power to like-minded private citizens who are free to discriminate without constitutional constraint.<sup>275</sup>

#### 4. The Company Town

The non-delegable governmental function test nicely explains the Court's decision in *Marsh v. Alabama*,<sup>276</sup> perhaps the most famous state action case. In *Marsh*, the Gulf Shipbuilding Corporation owned and controlled the town of Chickasaw, Alabama, located not far outside of Mobile.<sup>277</sup> Although it was a company town, Chickasaw was indistinguishable from other small towns and included a business district with company-owned roads and sidewalks.<sup>278</sup> A Jehovah's Witness was arrested and convicted of trespassing after refusing the company's demand that she stop distributing religious literature on Chickasaw's sidewalks.<sup>279</sup> Had Chickasaw been a municipal corporation rather than a company town, the conviction undoubtedly would have violated the First and Fourteenth Amendments' protections of freedom of speech and religion.<sup>280</sup> However, because the town was privately owned, the state court held that the company could control the conduct of its guests to the same extent as any homeowner.<sup>281</sup>

The Supreme Court reversed the trespass conviction, holding that the First Amendment's protections applied to those in the company town just as it would to any municipal corporation.<sup>282</sup> The Court clearly explained that the result would have been the same whether the company operated the town under an express state franchise or the state merely acquiesced to the private use of the property as a town.<sup>283</sup> The distinction between the private homeowner and the company town was the broad impact of the town's power on free expression. While a homeowner's private infringement of liberty leaves plenty of room for the free flow of information, the company town wields the tyrannical law-making power of the government. In this instance, the company's use of the state trespass law amounted to a delegation of law-making power. Although the defendant in *Marsh* was convicted of trespassing in violation of Alabama law, she was deemed a trespasser only because the

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275 In this respect it is very similar to *Terry v. Adams*. Texas was constitutionally prohibited from denying participation in primaries based upon race, but Texas permitted, through inaction, the duplication of the discriminatory process. 345 U.S. 461, 469 (1953) (plurality opinion). Similarly, Missouri was constitutionally prohibited from imposing racial segregation in housing, but permitting and enforcing racially restrictive covenants, while prohibiting most private restraints on alienability, allowed private citizens to achieve the result the state was prohibited from achieving directly. See *Shelley*, 334 U.S. at 18–21.

276 326 U.S. 501 (1946).

277 *Id.* at 502.

278 *Id.* at 502–03.

279 *Id.* at 503.

280 *Id.* at 503–04.

281 *Id.* at 505–06.

282 *Id.* at 509.

283 *Id.* at 507.

company had created the equivalent of its own city code that prohibited the distribution of religious literature. If the state could delegate the task of running city governments to private persons, the Constitution's limitations on the exercise of government power could be thwarted under the guise of private action.

It is tempting to think of *Marsh* as an entanglement case because the state actively participated in the violation of First Amendment liberties. Although the arresting officer was employed by the company, the officer was also a deputy of the Mobile County Sheriff's Office—a state actor.<sup>284</sup> Moreover, the defendant in *Marsh* was prosecuted in a state court by a government prosecutor for violating the state's trespassing law.<sup>285</sup> It is clear, however, that the mere enforcement of a state trespass law against a person who refuses to leave a private residence when commanded by the homeowner does not convert the homeowner into a state actor.<sup>286</sup>

The critical difference in *Marsh* is that the company town exercised the equivalent law-making power of a municipal government. Legislative power was given to the government as part of social contract. This power cannot be delegated to those not constitutionally constrained any more than the executive or judicial power may be delegated to private actors without also imposing constitutional constraint on the private actors. Certainly, if Alabama allowed company-employed prosecutors and judges to prosecute trespassers in a private Chickasaw City Court owned and operated by the Gulf Shipbuilding Corporation, and then sentenced to imprisonment in a company-owned jail, the Court would find that the company employees were state actors. The legislative, executive, and judicial functions are non-delegable governmental duties subject to the Constitution's protection of individual rights, equal protection of the law, and due process, even when the government permits these tasks to be performed by private actors.

#### CONCLUSION

The Constitution seeks to strike a balance between providing a government capable of constraining the people to avoid the lawlessness of the state of nature and constraining the government to prevent tyrannical power. This Article's proposed non-delegable governmental duty model, based upon the social contract theory, ensures that the state cannot "delegate" to private persons a "power which the state itself is absolutely and totally prohibited from exercising."<sup>287</sup> Under this functional approach, where the state dele-

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284 *Id.* at 502.

285 *Id.* at 503–04.

286 See NOWAK & ROTUNDA, *supra* note 270, § 12.3 (discussing state encouragement or commandment of private activities); TRIBE, *supra* note 269, at 1702 (elaborating on private individuals' actions); see also *Bell v. Maryland*, 378 U.S. 226, 253–60 (1964) (Douglas, J., concurring) (explaining that African-American defendants' convictions should have been overturned because the restaurant that refused to serve them was a state actor).

287 *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 69 (1976) (explaining that if the state cannot prohibit a woman's decision to terminate a pregnancy, it cannot

gates executive, legislative, or judicial functions to private actors, they are subject to the same constitutional restrictions that apply to state actors.<sup>288</sup> Not only does this prevent a partial return to the anarchy of the state of nature, but it also prevents the state from selectively delegating governmental functions to private actors in order to circumvent the constitutional constraints placed upon the government's direct use of power.

This reformulation of the public function exception does not prohibit the government from delegating some legislative, executive, and judicial functions, or from enlisting the aid of private persons in the performance of these functions. Although non-delegation would eliminate the need for a public function exception, it would needlessly deprive the government of flexibility. In some cases, exigent circumstances may necessitate that the government enlist the aid of the public in performing these and other governmental functions rather than performing them exclusively through formal state actors. In other cases, it may be more efficient to delegate the task to private actors.<sup>289</sup>

When private persons participate in these core governmental functions, however, the constitutional restrictions on governmental power must apply to private actors as well as the government. Without this exception, the two tyrannies the Constitution sought to prevent—the bias and self-interest of the state of nature and the tyranny of unlimited governmental power—coalesce in the hands of a private actor. If the government is constitutionally prohibited from acting, it cannot delegate the same task to a private person who is free to do the government's dirty work. A police officer's use of deadly force to seize non-dangerous criminals is unreasonable under the Fourth Amendment; therefore, the state cannot "permit a duplication" of this unconstitutional practice by permitting private persons to flagrantly abuse the Fourth Amendment. Seizure by means of deadly force deprives the suspect of his life—the most fundamental of the protected individual interests.<sup>290</sup> As the Court reasoned in *Garner*, "It is not better that all felony suspects die than that they escape."<sup>291</sup> Tyranny by private proxy is no more tolerable than direct governmental tyranny.

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"delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising" (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 392 F. Supp. 1362, 1375 (E.D. Mo. 1975) (Webster, J., concurring in part and dissenting in part)) (internal quotation marks omitted).

288 Similarly, under tort law minors are held to an adult standard of care, rather than that of a child of similar age, intelligence, and experience when performing activities that are generally appropriate only for adults because of the judgment required and the dangers involved. RESTATEMENT (SECOND) OF TORTS § 283A cmt. c (1965).

289 See *supra* notes 188–91 and accompanying text.

290 See *Tennessee v. Garner*, 471 U.S. 1, 9 (1985) (discussing seizure by deadly force).

291 *Id.* at 11.

