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THE ESTABLISHMENT CLAUSE, STATE ACTION, AND TOWN OF GREECE

Nathan S. Chapman

The Establishment Clause forbids the government from engaging in the same religious exercise that the law protects when performed by a private party. Thus, an establishment case often turns on whether religious activity is “state action.” Too often, however, courts ignore the state action analysis or merge it with the substantive Establishment Clause analysis. This muddles both doctrines and threatens individual religious liberty.

This Article argues that the state action doctrine should account for the government’s distribution of private rights. Accordingly, the Constitution applies to the government’s distribution of rights, but not to a private party’s use of those rights.

This account of state action sharpens the substantive constitutional question in a variety of constitutional contexts, but it is an especially powerful tool in religious liberty cases. For instance, in Town of Greece v. Galloway the Court focused on whether the prayers offered by chaplains before town meetings ran afoul of the Establishment Clause because either they were too “sectarian” or the setting was too coercive. The distribution principle, however, demands a more precise attribution of responsibility. Greece was responsible for hosting prayers and choosing chaplains. By contrast, the chaplains were responsible for the content of their prayers. The content of any given prayer—including whether it was too “sectarian”—should not have been attributed to the government. A better factual description of what occurred is this: Greece distributed the right to offer a ceremonial prayer. The proper constitutional analysis, therefore, would focus on whether that distribution comported with the Establishment, Speech, and Free Exercise Clauses.
INTRODUCTION

Establishment Clause cases often turn on a question the Supreme Court usually ignores: Is the religious exercise at issue attributable to the government or to a private party? The requirement of “state action,” which the Constitution applies only to government conduct,1 is especially important in cases involving religious exercise. “Precisely the same conduct—leading prayers, for example—is constitutionally valued and protected if engaged in by private parties, though unconstitutional if done by the government.”2

When religious exercise results from cooperation between the government and a private party, allocating responsibility can be challenging. Rather than asking which party is responsible for the religious exercise before applying substantive constitutional law, courts and theorists too often merge the issue with an Establishment Clause analysis.3 This muddies the substantive constitutional questions and unnecessarily jeopardizes the rights of private parties.4

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3 See, e.g., Zelman v. Simmons-Harris, 536 U.S. 639, 648–63 (2002) (merging the responsibility question into an Establishment Clause analysis of private school vouchers); see Developments in the Law—State Action and the Public/Private Distinction, 123 HARV. L. REV. 1248, 1279 (2010) [hereinafter State Action and the Public/Private Distinction] (arguing that the state action doctrine should replace most of the Lemon test); McConnell, supra note 2, at 682 (arguing that “emerging Establishment Clause jurisprudence can be seen as a specialized application of the state action doctrine”).

4 See, for example, the sources cited supra note 3.
For instance, in *Town of Greece v. Galloway*, the Court failed to allocate responsibility between the town board and the individual chaplains who offered “sectarian” prayers at the start of town board meetings. If the town was fully responsible for the prayers, then the decision is in tension with “[t]he clearest command of the Establishment Clause”—“that one religious denomination cannot be officially preferred over another.” If the chaplains were responsible for their own prayers, on the other hand, then the First Amendment may protect their speech. And if so, much of the Court’s analysis—including the dissenting Justices’s concerns about sectarian speech making religiously unaffiliated townspeople feel like outsiders—was constitutionally irrelevant.

Similarly, in *Burwell v. Hobby Lobby Stores, Inc.*, scholars argued that granting a religious accommodation to a for-profit corporation would violate the Establishment Clause by imposing burdens on the company’s employees. But those scholars, and the cases on which they relied, do not explain how the government

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5 134 S. Ct. 1811 (2014).
6 Id. at 1820–24.
8 See Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 845–46 (1995) (holding that student publications were not the speech of the University of Virginia and thus had First Amendment protections); Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392–97 (1993) (holding that religious film shown by church at a public school was not speech of the school and thus had First Amendment protections).
9 See infra Part III.
10 134 S. Ct. 2751 (2014).
could be constitutionally responsible for the results of a private party’s exercise of religion.  

These and other Establishment Clause puzzles lack an account of state action that applies the Constitution to the government’s distribution of rights, but not to the exercise of those rights by private parties. Despite seas of ink spilled over the state action doctrine, the literature is surprisingly silent about how courts should analyze the government’s distribution of rights. The Legal Realists of the early twentieth century rightly criticized the classical state action doctrine’s facile distinction between public and private; every private right, they argued, is shaped and enforced by government power. The Supreme Court, for its part, has not done the doctrine any favors. Sometimes, it seems, the government is constitutionally responsible for private race discrimination; other times it is not. Between the Legal Realists’s powerful conceptual critique and the Supreme Court’s inconsistency, commentators have largely concluded that the state action doctrine is incoherent. The doctrine has few defenders. Some have suggested it is useful as a “prudent” smokescreen for judicial activism, and many others have suggested reforming it to more accurately account for what the Court seems to be doing in “state action” cases—merging unstated constitutional values with a responsibility analysis.  

Recently, though, a handful of scholars have defended the doctrine on the ground that the Constitution was uniquely designed and is widely understood to constrain the government as the people’s agent. This justification suggests that courts and

for religious periodicals); Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) (invalidating a law forcing corporations to allow employees to take off on the Sabbath).

See Hobby Lobby, 134 S. Ct. at 2759.


See infra Part I.B.


Lillian BeVier & John Harrison, The State Action Principle and Its Critics, 96 VA. L.
commentators should more carefully apply principles of agency to distinguish between government and private conduct, since those principles are the very justification for the Constitution’s application to the former, and not to the latter. By directing attention to whether the government or a private party is responsible for a particular act, the constitutional agency approach to state action, though promising, has the potential to obscure the Realist insight that the government is responsible not only for the acts of its agents, but also for the background distributions of rights that permit and confine private action.

This Article suggests an account of state action that incorporates the insights of the Realists and of those who defend the doctrine on grounds of constitutional agency. It argues that the Constitution applies not only to each governmental act—each statute, rule, judicial decision, prosecution, and the like—but also to the government’s distribution of background rights to private parties. What the government is not responsible for is the way private parties use those rights in their own interest. Call this the “distribution principle.”

The principle says nothing about whether any given distribution of rights would violate the Constitution. Instead, by clarifying the action for which the government is responsible, the distribution principle brings the proper substantive constitutional questions into focus, allowing a more precise and productive debate about the range of possible answers to those questions.

The principle clarifies the relevant state conduct—and therefore the substantive constitutional holding—in some of the most befuddling cases. For instance, the conventional view of Shelley v. Kraemer is that the case stands for the proposition that the Equal Protection Clause forbids enforcing private racially restrictive covenants. This view merges the private action at issue (racially restrictive covenants) and the state action (enforcement). Instead, in light of the distribution principle, the best reading of Shelley is: (1) the state common law, by which the state distributed rights to enter into racially restrictive covenants, was state action; and (2) the Equal Protection Clause forbids states from allowing private parties to enter into racially restrictive covenants. Put inversely, the Fourteenth Amendment requires states to forbid private racially restrictive covenants. The difference between this account and the conventional one is more than grammatical: it clarifies that the government is responsible for distributing rights, not for the actions of private parties, and thereby

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22 334 U.S. 1 (1948).

23 Id. at 14; see Tushnet, supra note 18, at 383 (noting that the view that the state action and equal protection holdings are “identical” is “completely conventional among the commentators on Shelley”).

24 See Shelley, 334 U.S. at 20–22.
clarifies the substantive holding of the case. Debate about whether Shelley was rightly decided should attend to whether the Equal Protection Clause is persuasively read to require states to forbid certain private conduct, rather than whether the Fourteenth Amendment applies to private conduct and, if so, when.

Though the distribution principle promises to reshape cases across the constitutional spectrum, it is an especially important tool in religious liberty cases. Distinguishing between distributions of liberty and private religious exercise is crucial both for developing coherent and clear Establishment Clause doctrine and for protecting private religious freedom. This Article illustrates the implication of the distribution principle in Establishment Clause cases by considering how it redefines the substantive constitutional questions arising from the school voucher program in Zelman v. Simmons-Harris, the legislative prayers in Town of Greece v. Galloway, and religious accommodation statutes like the one at issue in Burwell v. Hobby Lobby Stores, Inc.

In Zelman, the Court merged the state action and establishment analyses, holding that a religiously neutral voucher program of “true private choice” is constitutional. Instead, the Court should have analyzed the voucher program as a distribution of liberty. Parents have a constitutional right to choose the manner of their child’s education. No one claimed that the parents were being coerced to use their vouchers on religious schools. They were exercising choice. That choice was not attributable to the government. The distribution of options, however, was attributable to the government. The constitutional question, then, was whether the government’s distribution of educational options violated the Establishment Clause. The only way the program could have violated the Establishment Clause, I suggest, would be if it created incentives to choose one school over another that unduly burden a parent’s constitutional right to direct a child’s education. The difficult constitutional questions, therefore, are familiar from the Court’s doctrine governing the right to an abortion: (1) what government action is relevant to determining the incentives and burdens placed upon the exercise of a constitutional right; and (2) what counts as an undue

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25 Id.
26 See, e.g., Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991) (holding under this view that the government may not permit a party to exclude jurors solely on the basis of race); Burton v. Wilmington Parking Auth., 365 U.S. 715, 726 (1961) (holding under this view that the Equal Protection Clause prohibits government contracts with racially discriminatory public accommodations).
29 134 S. Ct. 2751 (2014).
30 See Zelman, 536 U.S. at 648–49.
32 See Zelman, 536 U.S. at 648–49.
Regardless of the answers to these questions, separating the government conduct from the private conduct recasts the substantive constitutional questions, showing that they are as much about the individual rights of parents as they are about the government’s impermissible advancement of religion.\textsuperscript{34} In \textit{Town of Greece}, the Court failed to come to terms with who was responsible for the chaplain’s speech, focusing instead on whether the practice was too “coercive” or the speech too “sectarian.”\textsuperscript{35} Both questions were beside the point. Greece exercised no control over the content of each invocation—the chaplain was responsible for that.\textsuperscript{36} The government was responsible, however, for distributing the right to offer a ceremonial invocation, both in choosing to host an invocation and in choosing who would offer one.\textsuperscript{37} As in \textit{Zelman}, properly distinguishing the conduct for which the government was responsible and the conduct for which the private parties were responsible suggests that the case presented not only interesting Establishment Clause questions, but also questions about the scope of individual rights of speech and religious exercise.\textsuperscript{38}

By contrast, religious accommodation cases present a relatively simple state action analysis. The government is responsible both for the law that allegedly burdens religious exercise and the accommodation from that law. The government is not constitutionally responsible for whether and how a private actor chooses to exercise a right. The constitutional question, then, is whether the Establishment Clause prohibits an accommodation because of the private religious exercise it permits. Given the tension between the Supreme Court cases that bear on the question, Kent Greenawalt has described this issue as “[a]mong the most vexed . . . in the law of the religion clauses.”\textsuperscript{39} This Article, therefore, can do little more than suggest this state action analysis as a starting point for developing a “tenable theory . . . for drawing the line between permissible accommodation and impermissible establishment.”\textsuperscript{40}

This Article proceeds as follows: Part I argues for a reformation of the state action doctrine to incorporate the insight, prompted by the Legal Realists, that the

\begin{itemize}
\item \textsuperscript{33} See generally Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992) (“Only where state regulation imposes an undue burden on a woman’s ability to [decide to procure an abortion] does the power of the State reach into the heart of the liberty protected by the Due Process Clause.”).
\item \textsuperscript{34} See Freedom from Religion Found. v. McCallum, 324 F.3d 880, 882 (7th Cir. 2003) (upholding a program that allowed prisoners to choose a halfway house, among others, that taught Christianity); see also Alexander Volokh, \textit{Prison Vouchers}, 160 U. Pa. L. Rev. 779, 790–91 (2012).
\item \textsuperscript{36} \textit{Id.} at 1816.
\item \textsuperscript{37} \textit{Id.}
\item \textsuperscript{38} \textit{Id.}
\item \textsuperscript{39} 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTATBISHMENT AND FAIRNESS 336 (2008).
\item \textsuperscript{40} \textit{Id.}
\end{itemize}
Constitution applies to the government’s distribution of rights, but not to the exercise of those rights by private parties. Part II suggests that this understanding clarifies the Establishment Clause questions arising from the government’s distribution of school vouchers. Part III does the same for religious speech by examining the relative public/private responsibility in *Town of Greece* and suggests a doctrinal approach to the resulting constitutional questions. Part IV briefly shows that the distribution principle facilitates a more precise inquiry into the establishment limits on religious accommodations.

### I. DISTRIBUTIONS OF RIGHTS AS STATE ACTION

The Legal Realists showed that the classical model of the state action doctrine depended upon a false conception of purely private action. Following suit, many legal scholars have concluded that the state action doctrine, at least as the Supreme Court has applied it, is incoherent. This Part proposes a modest reformulation of the state action doctrine that might make it a more useful tool for identifying conduct for which the government is constitutionally responsible, clarifying substantive constitutional doctrine and safeguarding private constitutional rights, especially in religious liberty cases. Building on the recent work of scholars who defend the basic contours of the state action doctrine as a way to ensure that the government is behaving as a faithful agent of the political community, this Part suggests that state action includes not only specific governmental acts, but also the government’s distribution of private rights. What it does not include is the way that private parties exercise those rights.

#### A. The Classical Model of State Action

The Supreme Court developed the state action doctrine in the late nineteenth century as a tool to analyze Congress’s authority to enforce the Fourteenth Amendment against the states.\(^1\) In relatively short order, the Court developed three enduring principles. First, “[t]he provisions of the Fourteenth Amendment . . . all have reference to State action exclusively, and not to any action of private individuals.”\(^2\)

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\(^1\) See *State Action and the Public/Private Distinction*, supra note 3, at 1250.

\(^2\) *Virginia v. Rives*, 100 U.S. 313, 318 (1879); see also *Civil Rights Cases*, 109 U.S. 3, 11 (1883) (“Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws.”); *United States v. Cruikshank*, 92 U.S. 542, 554 (1875) (“The fourteenth amendment . . . adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society.”).
Therefore, Congress’s power under Section Five of the Fourteenth Amendment extends only to enforcing that Amendment’s provisions against the States, not against conduct by private parties. Under this principle, the Court concluded that Congress lacks the power to criminalize the acts of private parties that interfere with the “due process” and “equal protection” rights of black citizens of the United States. In the Civil Rights Cases, the Court likewise rejected Congress’s power to prohibit race discrimination by a private party that operates as a public accommodation: “[U]ntil some State law has been passed, or some State action through its officers or agents has been taken . . . the prohibitions of the amendment are against State laws and acts done under State authority.”

The second and third principles arose from a pair of cases involving discriminatory jury empaneling practices in Virginia. The Court was prepared to hold that the Equal Protection Clause guarantees a jury composed without discrimination on the basis of race. Virginia’s law did not discriminate on the basis of race, but several county judges allegedly had done so. In Ex parte Virginia, the Supreme Court considered the constitutionality of Section Four of the Civil Rights Act and articulated the second principle of state action: the Fourteenth Amendment, and Congress’s power to enforce it, extends to any act of any state agent, not just to state laws.

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43 See Civil Rights Cases, 109 U.S. at 11–12 (“Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect.”).


45 Civil Rights Cases, 109 U.S. at 13; see also Harris, 106 U.S. at 639 (“When the State has been guilty of no violation of its provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the State, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress.”). The Supreme Court has since upheld Congress’s authority under the Commerce Clause to prohibit such discrimination. See, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 257–62 (1964) (upholding Title II, the “public accommodations” provision, of the Civil Rights Act of 1964); Katzenbach v. McClung, 379 U.S. 294, 304–05 (1964) (same).

46 Ex parte Virginia, 100 U.S. 339, 345 (1879) (citing Strauder v. West Virginia, 100 U.S. 303 (1879)).

47 Id. at 340.

48 Id. at 347 (“A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws.”).
The Court further articulated the principle by stating:

Whoever, by virtue of [his] public position under a State govern-
ment, deprives another of property, life, or liberty, without due pro-
cess of law, or denies or takes away the equal protection of the
laws, violates the constitutional inhibition; and as he acts in the
name and for the State, and is clothed with the State’s power,
his act is that of the State. This must be so, or the constitutional
prohibition has no meaning. Then the State has clothed one of its
agents with power to annul or to evade it.\textsuperscript{49}

The Court illustrated, without expressly articulating, the third principle in a case involving the removal statute. In \textit{Virginia v. Rives}, the Court addressed a claim by two black defendants who sought to remove their case to federal court on the ground that the county judge had selected an all-white grand jury and an all-white petit jury.\textsuperscript{50} In rejecting their argument that the Fourteenth Amendment requires states to provide a racially diverse jury, the Court implicitly distinguished between what a state does and what it does not do; in other words, between state action and state inaction.\textsuperscript{51}

Importantly, the Court did not say that the Fourteenth Amendment never applies to state inaction. Put differently, the Court did not say that the Fourteenth Amendment places affirmative duties on the states or vests citizens with “positive libert[y].”\textsuperscript{52} It more precisely held that the Fourteenth Amendment does not require states to guarantee a racially diverse jury.\textsuperscript{53} The Court’s quick dismissal of the argument, however, suggested a broader principle that the Fourteenth Amendment and the Bill of Rights provisions “incorporated” against the states ordinarily do not place affirmative duties on the government.\textsuperscript{54}

\textsuperscript{49} \textit{Id.}; see also \textit{Virginia v. Rives}, 100 U.S. 313, 318 (1879).
\textsuperscript{50} 100 U.S. at 314–15.
\textsuperscript{51} \textit{Id.} at 322–23 (“The privilege for which they moved, and which they also asked from the prosecution, was not a right given or secured to them, or to any person, by the law of the State, or by any act of Congress, or by the Fourteenth Amendment of the Constitution. It is a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them because of their color. But this is a different thing from the right which it is asserted was denied to the petitioners by the State court, viz. a right to have the jury composed in part of colored men. A mixed jury in a particular case is not essential to the equal protection of the laws, and the right to it is not given by any law of Virginia, or by any Federal statute.”).
\textsuperscript{53} \textit{Rives}, 100 U.S. at 322–23.
\textsuperscript{54} For the most part, the Constitution’s text does not place affirmative duties on the government. \textit{See generally} Currie, supra note 52, at 864–66. The Thirteenth Amendment is an exception. \textit{See} Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439–43 (1968) (holding that Congress has the power under Section Two of the Thirteenth Amendment to prohibit private
To summarize, under the classical model of state action, the Fourteenth Amendment applies only to the government, including any official act of a government agent, but it ordinarily does not require the government to engage in affirmative acts. These principles implicitly rely on notions of causation and human freedom familiar from the law of responsibility (criminal, civil, and fiduciary) to determine whether the government, or some private actor, is responsible for a given action. These “principles have become firmly embedded in our constitutional law.” Even when the Court has flirted with the notion that Congress may have the power under Section Five to “proscribe purely private conduct,” it has nevertheless maintained that “[t]he Fourteenth Amendment itself ‘erects no shield against merely private conduct, however discriminatory or wrongful.”

B. The Realist Critique

In the wake of the Reconstruction cases, and at the height of the laissez-faire movement against government interference in the labor market, American Legal Realists questioned the reasoning behind the classical state action doctrine. The Realists’s fundamental critique of classical legal reasoning was that the concepts and discrimination in the sale of real estate, because Congress could reasonably conclude that such discrimination is one of the “badges and incidents of slavery”). The Sixth Amendment right to “effective assistance of counsel” may be another. See Strickland v. Washington, 466 U.S. 668, 686 (1984) (recognizing that “the right to counsel is the right to the effective assistance of counsel)” (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970))). This Article, infra Part I.C, likewise addresses a handful of modern opinions that suggest that the Constitution places at least some affirmative duties on governments. See, e.g., Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 737–56, 776–78 (1996) (plurality) (discussing the FCC’s obligation to regulate obscenities on cable television); Reitman v. Mulkey, 387 U.S. 369, 378–81 (1967) (upholding a state court’s determination that the state may not encourage discrimination); Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (holding that state courts may not uphold a racially restrictive covenant).

Currie, supra note 52, at 864–65.

See, e.g., Civil Rights Cases, 109 U.S. 3, 17 (1883) (“The wrongful act of an individual, unsupported by any such [state] authority, is simply a private wrong, or a crime of that individual . . . .”).

Shelley, 334 U.S. at 13; see Flagg Bros. v. Brooks, 436 U.S. 149, 165 (1978) (asserting an “essential dichotomy” between public and private acts” (citations omitted)).

District of Columbia v. Carter, 409 U.S. 418, 424 n.8 (1973) (citing United States v. Guest, 383 U.S. 745, 762 (1966) (Clark, J., concurring); id. at 782–84 (Brennan, J., concurring and dissenting)).

Id. at 423–24 (quoting Shelley, 334 U.S. at 13). More recently, the Court seems to have dismissed its prior dicta suggesting that Congress has power under Section Five to prohibit acts that Section One does not. See United States v. Morrison, 529 U.S. 598, 624 (2000) (citing Civil Rights Cases, 109 U.S. at 18).

formalisms upon which it depended, concealed a vacuous metaphysics inconsistent with the objectivity of the emerging social sciences.\textsuperscript{61} Formal legal reasoning, they argued, was indeterminate, and therefore subject to the judge’s moral, psychological, political, and economic circumstances and beliefs.\textsuperscript{62} At the broadest level, this critique challenges the notions of causation, choice, and agency underlying the state action doctrine.

Moreover, several theorists sought to demonstrate that there was no meaningful distinction between public and private, and between government regulation and private contract.\textsuperscript{63} Their doctrinal concern was the Supreme Court’s “liberty of contract” jurisprudence, now known derisively as “Lochnerism,”\textsuperscript{64} by which the Court invalidated a variety of state and federal labor regulations under the Fifth and Fourteenth Amendment Due Process Clauses.\textsuperscript{65} The Court’s freedom of contract jurisprudence is long

\textsuperscript{61} See Felix Cohen, Transcendental Nonsense and the Functional Approach, 35 COLUM. L. REV. 809, 821 (1935) (“Legal concepts (for example, corporations or property rights) are supernatural entities which do not have a verifiable existence except to the eyes of faith.”); see also Felix Cohen, The Ethical Basis of Legal Criticism, 41 YALE L.J. 201, 214–15 (1931); Roscoe Pound, The Call for a Realist Jurisprudence, 44 HARV. L. REV. 697, 700 (1931) (“They mean by realism faithful adherence to the actualities of the legal order as the basis of a science of law.”).

\textsuperscript{62} Gary Peller, The Metaphysics of American Law, 73 CALIF. L. REV. 1151, 1224 (1985) (“In place of determinacy and necessity signified by a realm of law separate from politics, [one legal realist] approach emphasized contingency and open-ended possibilities as it exposed the exercises of social power behind what appeared to be the neutral work of reason.”).


\textsuperscript{64} See Jamal Greene, The Anticanon, 125 HARV. L. REV. 379, 419 (2011).

\textsuperscript{65} See Coppage v. Kansas, 236 U.S. 1, 26 (1915) (invalidating state law prohibiting “yellow-dog” contracts that prohibited employees from joining a labor union); Adair v. United States, 208 U.S. 161, 180 (1908) (invalidating a federal law that prohibited employers from firing employees for joining a labor union); Lochner v. New York, 198 U.S. 45, 63–64 (1905) (invalidating a state law prohibiting bakery employees from working more than ten hours a day and more than sixty hours a week); Allgeyer v. Louisiana, 165 U.S. 578, 593 (1897) (invalidating a Louisiana statute prohibiting business transactions with out-of-state marine insurers).
dead, but the Realist critiques continue to challenge the core concepts of the state action doctrine.

To undermine Lochnerism, the Realists attacked the conceptual foundations of “liberty of contract,” or the freedom of employers and employees to bargain without governmental interference. The notion depended on a conception of liberty widely held among nineteenth and twentieth century liberal thinkers—freedom from physical coercion. This conception of liberty met withering critique in the twentieth century. The critique holds that property is a government-granted and -enforced right to exclude. The right to exclude, in turn, is nothing other than a government-backed right to coerce another from sharing (or taking) property. Private rights, therefore, entail public coercion. The “liberty of contract” is not a government-free realm of private decision-making; instead, it is a web of complicated laws and policies that provide the terms upon which one may call on the state’s coercive power to exclude others. Having deconstructed the nineteenth-century notion of the liberty of contract, some scholars distinguished negative liberty—the right to be left alone—and positive liberty—the right to certain human goods. Some took the next logical step, arguing that the government’s duty goes beyond protecting the individual’s negative

67 See Duxbury, supra note 63, at 431.
68 See FRIED, supra note 60, at 29. Herbert Spencer was only the most recent in a line of thinkers, including Thomas Hobbes and John Locke, to advance a conception of liberty as freedom from governmental coercion. See HERBERT SPENCER, THE MAN VERSUS THE STATE 7–8 (Liberty Fund, Inc. 1982) (1884).
69 FRIED, supra note 60, at 37–39.
70 Cohen, supra note 63, at 12 (“[T]he essence of private property is always the right to exclude others.”).
71 Id. (“[T]he law of property helps me directly only to exclude others from using the things which it assigns to me. If then somebody else wants to use the food, the house, the land, or the plow which the law calls mine, he has to get my consent. To the extent that these things are necessary to the life of my neighbor, the law thus confers on me a power, limited but real, to make him do what I want.”).
rights to enforcing positive rights so that all members of society will enjoy the opportunity to flourish.

American Legal Realists, for the most part, advanced the foregoing critique of the liberty of contract; unlike some of their socialist counterparts, however, they did not advocate for the dissolution of property rights altogether.\textsuperscript{73} Realists contented themselves with the more modest point that, contrary to conventional liberalism, government regulation of the market was not an exogenous interference with an otherwise zone of privacy.\textsuperscript{74} The extant distribution of property rights was not the inevitable result of the state of nature taking its course; it was the result of state action over centuries, as legislation, common law, and custom variously entrenched, upset, tweaked, and re-entrenched regimes of private rights.\textsuperscript{75} The Court’s “liberty of contract” jurisprudence was based on a mistaken predicate. Descriptively, there was no such thing as a private sphere of freedom beyond the government’s regulatory power; there was only government action of different kinds that shaped the parameters of private choice. The key policy implication, Realists believed, was that “[w]hat the state had made in one form, . . . it could remake in another.”\textsuperscript{76} The Supreme Court, they argued, should get out of the business of reviewing the constitutionality of federal and state labor regulations. The key conceptual implication was that resorting to classical liberal concepts like liberty and property would never provide any direction for how the government should distribute rights. Policy makers should base their decisions about the proper distribution of rights on its expected effects and should decide which effects to pursue based on their ethical values.\textsuperscript{77}

In its strongest form, the Realist critique implies that the government has effectively deputized every property holder to exclude others on whatever terms the law

\textsuperscript{73} FRIED, supra note 60, at 43 (“[M]ost stopped short of calling for abolition of private property . . . .”).
\textsuperscript{74} Id. at 42–43.
\textsuperscript{75} Id. at 43–44.
\textsuperscript{76} Id. at 3.
\textsuperscript{77} Cohen, supra note 63, at 14, 17; see also FELIX S. COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS: AN ESSAY ON THE FOUNDATIONS OF LEGAL CRITICISM 7 (1933) (“Every final determination of the general end of law, the standard of legal criticism, . . . must reduce to the general form, ‘The law ought to bring about as much good as it can.’ Our problem is to give content to this formal principle by defining the nature of the good and indicating the extent of the law’s actual powers over that realm.”). One might still lament with Felix Cohen that “one looks in vain in legal treatises and law-review articles for legal criticism conscious of its moral presuppositions. The vocabularies of logic and aesthetics are freely drawn upon in the attempt to avoid the disagreeable assertion that something other is intrinsically better than something else.” Id. at 5. For the most part, the “moral presuppositions” of the Realists were drawn from social progressivism, with a special concern for the poor. Id. Morris Cohen, for instance, appealed to “the Hebrew-Christian view—and for that matter, the specifically religious view—that the first claim on property is by the man who needs it rather than the man who has created it.” Cohen, supra note 63, at 17.
permits and the property holder finds acceptable. There is no “public” or “private.” Every negotiation over property rights happens in the shadow of state action—past action in distributing individual rights and future action in enforcing them. Without this conclusion, the argument goes, the state action doctrine is hopelessly incoherent.

Like all vacuous legal concepts, courts and commentators should abandon it and focus on the real question: How ought the government distribute property rights to achieve whatever its goals ought to be?

C. A Refined Account of the State Action Doctrine

Most contemporary commentators advance some permutation of the Realist critique. The remainder of this Part addresses the following: (1) whether the state action doctrine, generally speaking, is defensible; (2) what ought to count as state action; and (3) how courts should evaluate whether an actor is a state actor.

1. A Defense of the Classical Model

Several theorists have recently offered a fresh defense of the state action doctrine. To side-step (without ignoring) the Realist critique of the public-private dichotomy, they turn to arguments about agency.

The Constitution applies to the government and not to private actors because constitutional law, unlike private law, restrains public agents, not private agents.

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78 See Hale, Law Making by Unofficial Minorities, supra note 63, at 452–53.
79 Id.
80 See, e.g., Alexander, supra note 14, at 363; Brest, supra note 14, at 1302 (arguing that to avoid “collaps[ing] the public/private distinction,” constitutional positivism must maintain “a substantive, normative theory of rights,” something current doctrine fails to do); Chemerinsky, supra note 17, at 506 (“I contend that by any theory of rights—natural law, positivism, or consensus—the state action requirement makes no sense.”); Peller & Tushnet, supra note 14, at 817 (“[T]he state action doctrine, and the liberal constitutional theories associated with it, stubbornly survive, despite their analytical incoherence.”); Phillips, supra note 17, at 683 (discussing a critique of the state action doctrine); Van Alstyne & Karst, supra note 14, at 7 (“[T]he traditional state action doctrine is unsatisfactory as a guide for judicial action because it directs attention to formal questions instead of the real interests which compete for constitutional recognition.”).
81 See, e.g., BeVier & Harrison, supra note 20, at 1785 (distinguishing between the motives of private individuals and government agents, and justifying the state action doctrine).
82 See generally id. at 1784–85; Turner, supra note 20 (describing an institutional theory of state action). Others defend the doctrine on the ground that it helps to protect individual liberty. See Marshall, supra note 14, at 559 (noting the need for the state action doctrine to protect individual rights).
83 See BeVier & Harrison, supra note 20, at 1786 (“Constitutional rules are almost all addressed to the government.”).
The people authorize the government to act on their behalf.\textsuperscript{84} The government and its "agents" are "agents of the people."\textsuperscript{85} As an agent of the political community, the government has peculiar strengths and weaknesses, or, perhaps more accurately, peculiar temptations to faithfulness. Constitutional law mitigates these temptations; it prevents the government from upending its role as a public agent and becoming a principal instead.\textsuperscript{86} Private law, by contrast, addresses different concerns—those that arise when individuals are entitled to act in their own self-interest.\textsuperscript{87} The constitutional agency defense thus does not deny that the government plays a role in distributing and enforcing private rights. Rather, it justifies applying unique rules to state action on the ground that the state is obligated to serve the political community, and private parties are not.

This theory of state action makes conceptual room for a meaningful space for private responsibility, and therefore freedom, without dismissing the Realist critique. Public responsibility and private rights are different. The government is obligated to pursue the public good; private parties are entitled to pursue the good as they see it, subject to law. Unlike the strong view of state action under the Realist critique, the government does not deputize private parties to act, clothed with governmental power; rather, the government allows private parties to act according to their own interests. Rather than collapsing the zone of private freedom, the constitutional agency account of state action preserves that zone without denying that it is subject to law enacted by the political community for the public good.

The constitutional agency account of state action may seem circular: "the Constitution applies only to governmental conduct" because the Constitution obligates only the government.\textsuperscript{88} Scholars have offered two rebuttals to the circularity objection. The first sounds in positive law: the Constitution’s text, for the most part, applies only to the government;\textsuperscript{89} the founding generation largely understood the Constitution to apply only to the government;\textsuperscript{90} and constitutional doctrine perpetuates that understanding.\textsuperscript{91} The state action doctrine, then, is supported by the same

\textsuperscript{84} Id. at 1791.
\textsuperscript{85} Id.
\textsuperscript{86} Id. at 1785.
\textsuperscript{87} See Turner, supra note 20, at 296 (“Because private and public lawmakers have different stereotypical strengths and weaknesses, the metalaw governing their law-making decisions will differ in response to these characteristics.”). See generally Christian Turner, Law’s Public/Private Structure, 39 Fla. St. U. L. Rev. 1003, 1028 (2012).
\textsuperscript{88} See Chemerinsky, supra note 17, at 507.
\textsuperscript{89} U.S. CONST. art. I, § 10 (beginning “No state shall . . . .”); id. amend. I (beginning “Congress shall make no law . . . .”). But see id. amend XIII (“Neither slavery nor involuntary servitude . . . shall exist within the United States . . . .”).
\textsuperscript{90} BeVier & Harrison, supra note 20, at 1792 n.52.
\textsuperscript{91} See Flagg Bros. v. Brooks, 436 U.S. 149, 165 (1978) (asserting an “essential dichotomy” between public and private acts” (citations omitted)).
positive law theory that supports the legitimacy of all law. The second rebuttal sounds in the fundamental nature of law: the division between the law that regulates public law-making and the law that regulates private law-making is a natural and entirely predictable (if not inevitable) product of the basic needs of human society.92 Both of these accounts provide conceptually coherent justification for applying the Constitution to the government, and not to private individuals.

A corollary of the positive law defense of the state action doctrine is that, as a practical matter, the doctrine rarely causes trouble. In the vast majority of constitutional disputes, the doctrine operates in the background, silently shaping the terms of argument. It emerges into the spotlight in only two instances: when it is unclear whether an actor is a government agent, and when it is unclear whether the Constitution requires the government to affirmatively prohibit a form of private conduct. Those issues, irreducibly matters of judgment, are what prompted Charles Black to declare the state action doctrine the “most important problem in American law.”93 If the doctrine can be wrestled into coherence, it may yet prove to be a relatively neutral tool for adjudicating disputes about government agency, illuminating the scope of disputes about affirmative constitutional duties and preserving conceptual space for private liberty.

2. The Government’s Distributions of Rights

The Realist critique’s greatest contribution to state action theory and doctrine is the notion that private action occurs in a complex web of law created and enforced by the government. The baseline is freedom under law, not freedom alone, and not coercion alone. The proper inference from this insight is not that private action is attributable to the government, but that all governmental distributions and enforcements of private rights are subject to constitutional evaluation. The constitutional inquiry ought to focus on what the government has done or has failed to do and whatever the institution or agent has done or failed to do, without exempting the existing legal baseline.94 This is the distribution principle.

Applying the Constitution to the government’s distribution of rights, including rights the government has declined to distribute, may sound like a dramatic departure from conventional understandings of constitutional law. But it is not. Once one has identified the relevant rights distribution, the question is whether the Constitution prohibits or limits that distribution. The distribution principle has nothing to say about the answer to that question. Traditionally, constitutional law has simply not focused

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92 Turner, supra note 20, at 284.
93 Black, supra note 14, at 70.
on distributions of rights. The Bill of Rights and the Fourteenth Amendment have little to say about the distribution of rights. They mostly create negative rights that the government may not infringe (such as rights of speech, press, and assembly) or place limits on how the government may deprive a person of non-constitutional rights (such as “life, liberty, or property”). As a result, most rights distributions do not raise a constitutional concern.

A handful of modern constitutional doctrines serve as exceptions that prove the rule that constitutional law rarely addresses distributions of rights. The “limited public forum” doctrine is one example. The government owns some property on which it may entirely prohibit private speech. When it decides to permit some private speech on that property, it has created a “limited public forum.” In the language of state action, the government has distributed the right to speak on the property. Because the forum is “limited,” the government need not allow any and every one to speak on the property. But the Supreme Court has held that the Free Speech Clause does place some stipulations on the distribution of the right to participate in a limited public forum. The distribution must be reasonably related to the forum’s purpose, and the government may not distribute the right on the basis of the speaker’s viewpoint. The limited public forum doctrine thus recognizes that the Constitution places some limits on the government’s distribution of private rights. The doctrine effectively holds that the Free Speech Clause puts conditions on the government’s distribution of the affirmative right to speak.

Perhaps the most important way that the distribution principle hones the state action doctrine is by insisting that even government inaction is subject to constitutional

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95 U.S. CONST. amend. I.
96 Id. amend. V; see Chapman & McConnell, supra note 66, at 1681 (“[D]ue Process has from the beginning been bound up with the division of the authority to deprive subjects of life, liberty, or property . . . .”).
98 See infra notes 278–80 and accompanying text.
99 Perry Educ. Ass’n, 460 U.S. at 46 (noting that, in a nonpublic forum, such as the work mailboxes of government employees, the government “may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view”); see also Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 831 (1995) (noting that a public university’s use of funds for school publications created a limited public forum that could not discriminate based on viewpoint); Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993) (noting that, when a public school opened its buildings to the public for school meetings, it created a limited public forum and could not then deny access to a speaker based solely on the point of view of an otherwise included subject).
100 See, e.g., Perry Educ. Ass’n, 460 U.S. at 46.
101 Id. at 45 (“The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place.”).
Again, as with the government’s positive distributions of rights, the Constitution says very little about the government’s affirmative obligations, or, conversely, about positive individual rights. Very few of the constitutional rights provisions speak in terms of the government’s affirmative duties; almost all of them limit the government’s power to deprive a person of rights. Some that may put an affirmative duty on the government, such as the Guarantee Clause, have historically been considered outside the ken of the courts.

The distribution principle’s application to state inaction does, however, suggest a new way to understand a handful of perplexing Equal Protection Clause cases. In Shelley v. Kraemer, for instance, the Court said that a state court’s enforcement of a racially restrictive housing covenant constituted “state action.” The Court’s objective may have been to prevent an end run by private contract around its prior prohibition of racially restrictive zoning laws. Some commentators have understood the Court essentially to be advancing the strong form of the Realist critique: the homeowners were effectively state actors, and the law between them—the restrictive covenant—violated the Constitution. The distribution principle suggests that the holding in Shelley is not that courts are state actors—of course they are—or that private parties may magically become state actors—of course they do not—but that the Equal Protection Clause requires states to prohibit racially restrictive housing covenants. In other words, the Equal Protection Clause guarantees the “positive” right to be free from private racially restrictive covenants, a right that the clause requires the state to enforce. Under this view, it was the government’s distribution of the right to discriminate and its concomitant failure to distribute the positive right to be free of discrimination, that violated the Equal Protection Clause. The Court has elsewhere suggested that the Equal Protection Clause may require

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102 See Louis Henkin, Shelley v. Kraemer: Notes for a Revised Opinion, 110 U. PA. L. REV. 473, 481 (1962) (suggesting that a “State can violate the [Fourteenth] [A]mendment by ‘inaction’ as well as by ‘action’”).

103 See U.S. CONST. amends. I–IV; see also supra notes 95–96.

104 See supra notes 95–96.

105 U.S. CONST. art. IV, § 4.

106 See Luther v. Borden, 48 U.S. (7 How.) 1, 39 (1849) (holding that Guarantee Clause claims are nonjusticiable).

107 334 U.S. 1, 19 (1948); see also Henkin, supra note 102, at 475.

108 Buchanan v. Warley, 245 U.S. 60, 82 (1917) (invalidating a municipal ordinance restricting the sale of private property to someone of another race on the ground that it “interfer[ed] with property rights” without due process of law).

109 See, e.g., Turner, supra note 20, at 323–25.

110 Friendly, supra note 21, at 1295 (“Somehow I cannot escape the conclusion that it was Missouri’s maintenance of a rule of common law permitting the enforcement of racially restrictive covenants, not the action of its courts in enforcing that rule, that was the unconstitutional state action in Shelley.”).

111 Id.

112 Id.
certain distributions of rights or may provide certain positive rights.\footnote{See Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).} I take no issue with those opinions, nor do I have a view about the extent to which the Equal Protection Clause ought to be read to provide positive rights. The state action question, properly conceived, clarifies, but does not answer, the substantive question one way or the other.

Just as all private action occurs in the face of government action, it likewise occurs in the face of government inaction. \textit{Town of Castle Rock v. Gonzales}\footnote{545 U.S. 748 (2005) (holding that a plaintiff may not sue a town under Section 1983 for failing to enforce a restraining order, even though enforcement may have prevented a man from killing his children).} and \textit{DeShaney v. Winnebago County Department of Social Services}\footnote{489 U.S. 189 (1989) (holding that a state agency’s failure to protect a boy who was under state supervision from his father’s abuse did not violate the child’s constitutional rights).} are illustrative. When the government has begun to rescue one person from another, does the Constitution require the government to do so with a particular level of care? Rather than calling for an exception, these cases put a fine point on the rule: the government is constantly in the business of creating, distributing, enforcing, and, sometimes, \textit{not enforcing} rights. Once state action or inaction has been identified, the remaining questions are whether the Constitution restricts or requires that action/inaction, and, if so, whether the remedy is within the courts’ competence and authority.\footnote{See generally \textsc{Louis Michael Seidman} & \textsc{Mark V. Tushnet}, \textsc{Remnants of Belief: Contemporary Constitutional Issues} 26–48 (1996).}

Acknowledging that the Constitution applies to the government’s distribution of rights raises a separate, and difficult, question: What, exactly, is the relevant “distribution”? Most rights exist in a complicated web of entitlements and duties spread out over the population and over time. The government is constantly redistributing those rights, reallocating them through new legislation, administrative rule-making, common law developments, and the like. Furthermore, one regulatory program’s “distribution of rights” may overlap with, and even conflict with, another’s. Many Establishment Clause cases, for instance, are especially difficult because they involve regulatory programs that distribute overlapping and potentially conflicting rights.\footnote{See infra Part II.A.} There is no one-size-fits-all standard for determining the relevant distribution of rights. Context will suggest answers, and reasonable people may often disagree. As I explain more fully in the next Part, in general, it is probably best to determine the relevant distribution of rights for constitutional analysis by reference to the applicable constitutional rule. If the question is whether the government deprived someone of liberty without due process of law, the relevant state action is easy: the process the government did (and did not) give to the individual. If the constitutional question is whether the government impermissibly influenced private choice with the distribution of school vouchers, the relevant distribution, I argue,
includes all of the schooling alternatives the government made available. In both cases, what counts as state action versus private action has already been determined. The question is which state action is relevant to the constitutional analysis. Just like the application of any law to a set of facts, the applicable legal rule (in this case, the applicable constitutional rule) determines which facts are relevant.

One complaint about applying the Constitution to the distribution of rights may be that it appears to leave no room for natural rights. When James Madison proposed the Bill of Rights, for instance, he asserted that the right of conscience was a natural right that the First Amendment would merely enshrine. For the most part, modern constitutional law, however, does not purport to enforce natural rights. The Ninth Amendment prohibits “constru[ing]” an enumerated constitutional right “to deny or disparage others retained by the people,” but courts rarely, if ever, purport to enforce unenumerated natural rights. Indeed, rather than forthrightly enforce unenumerated natural rights, the Court has felt obligated to root substantive due process rights in “penumbras, formed by emanations from [the] guarantees” of the Bill of Rights.

In theory, however, the distribution principle does not foreclose a court from enforcing natural rights against the government. The court would simply include a natural right analysis in whatever constitutional limit it sought to enforce against the relevant state action.

3. Agency

A state action issue most often arises when it is unclear whether conduct is properly attributable either to the government or to a private party. Courts routinely rely on ordinary agency principles to determine whether the actor is a governmental agent. If the actor is an agent of the government, her conduct is attributable to the government as the principal, and it is subject to the Constitution. If the actor is entitled to act in her own interest, her conduct is private, and is therefore not subject to the Constitution.

118 See 1 ANNALS. OF CONG. 434–42 (1789) (Joseph Gales ed., 1834).
120 U.S. CONST. amend. IX.
122 See, e.g., Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972) (describing the “essential dichotomy” between state and private conduct); Civil Rights Cases, 109 U.S. 3, 11 (1883) (articulating the state action doctrine for the first time).
124 See, e.g., Brentwood Acad., 531 U.S. 288.
125 See, e.g., Blum v. Yarestsky, 457 U.S. 991, 1003–05 (1982) (holding that the fact that a private business was subject to state regulation did not mean that the business was a state
This approach has much to recommend it. First, it is easy to apply in the vast majority of cases. No one wonders whether a police officer walking a beat is a government agent or whether the homeowner selling his property is a private party. Applying formal agency principles carries into the hard cases the same reasoning that makes the easy cases easy.

Second, the approach attempts to distinguish the substantive constitutional question from the more mundane question of whether the person was a government agent. This promotes conceptual clarity, which renders constitutional decision-making more rational and open to internal and external critique.

Third, the approach accords with the rationale for the doctrine. The Constitution applies to the government and not to private actors because the government is an agent of the people. A government acts through human agents who are bound by law to pursue the government’s, and therefore the political community’s, interests. The state action question, therefore, is whether the person was obligated to act in the public interest, rather than his or her own. If so, his or her conduct is subject to the Constitution. Conversely—and this is a crucial point explored more fully below—where the individual has a constitutional right to choose among courses of action, the action cannot conceptually be attributable to the government. The background constitutional right shapes the contours of the government’s sub-constitutional distribution of rights.

Many theorists criticize the agency approach. They argue that robing the state action analysis in agency principles merely masks a judgment that is inevitably functional and driven by unstated constitutional values of whether the law ought to prohibit the conduct at issue. They propose alternative tests that would balance underlying constitutional values such as the defendant’s constitutional liberty, the plaintiff’s interest in justice, and the relative value of having different governmental institutions decide the scope of constitutionality. Some argue that whether a person is a state actor should depend on which constitutional doctrine is at issue.

By contrast to these proposals, the distribution principle would not change ordinary agency analysis. Rather, by opening the possibility that the relevant state action may be a distribution of private rights instead of a particular act or omission, the principle reduces pressure to contort agency principles past the point of plausibility.


126 See, e.g., Evans v. Newton, 382 U.S. 296, 301–02 (1966) (holding that a privately owned park managed in trust by a municipality could not discriminate by race).

127 See infra Part I.B.

128 See, e.g., Alexander, supra note 14; Chemerinsky, supra note 17; Turner, supra note 20; Van Alstyne & Karst, supra note 14; Michael L. Wells, Identifying State Actors in Constitutional Litigation: Reviving the Role of Substantive Context, 26 Cardozo L. Rev. 99 (2004).


130 Wells, supra note 128, at 118–19.

131 See id. at 113.
Burton v. Wilmington Parking Authority\textsuperscript{132} is a good example. In Wilmington Parking, a government agency leased space to a coffee shop.\textsuperscript{133} The coffee shop discriminated against African Americans.\textsuperscript{134} The question was whether the Equal Protection Clause prohibited that discrimination, which depended on whether the discrimination was attributable to the government.\textsuperscript{135} Under an ordinary agency analysis, the answer is no. The shop was not a government agent; it was a tenant, acting at arm’s length and entitled to pursue its own interests subject to the lease. But that analysis leaves many people dissatisfied because it underplays both the government’s role in making the coffee shop’s discrimination possible and the potential symbolic connection between the government’s property and the coffee shop’s discrimination.

The Court found that the Equal Protection Clause prohibits the discrimination, but it had to twist agency concepts to get there.\textsuperscript{136} Looking at all the facts behind the government’s real estate development and lease, the Court concluded that the coffee shop was sufficiently connected to the government action to be subject to the Equal Protection Clause.\textsuperscript{137} Under one of the balancing approaches proposed by scholars, the Court could have reached the same constitutional result by a more candid assessment of whether constitutional values, on balance, favored applying the Equal Protection Clause to the coffee shop’s discrimination.\textsuperscript{138}

This Article’s proposed account of the state action doctrine, by contrast, suggests another analysis that ignores neither ordinary agency concepts nor the government’s role in the coffee shop’s race discrimination. Delaware was not responsible for the coffee shop’s discrimination;\textsuperscript{139} the coffee shop was a private actor.\textsuperscript{140} Delaware did not obligate the shop to discriminate; the shop’s owners and managers chose to do so.\textsuperscript{141} Delaware was, however, responsible for distributing to the coffee shop the right to discriminate on the basis of race. The Wilmington Parking Authority, undoubtedly a government agent, distributed the lease rights to the coffee shop and did not withdraw those rights upon evidence that the coffee shop was engaging in racial discrimination.\textsuperscript{142} Then the Delaware Supreme Court interpreted a Delaware statute allowing restaurants to refuse service to those who would “offen[d] . . . the major part of [its] customers and would injure business”\textsuperscript{143} to permit the coffee shop

\begin{itemize}
  \item \textsuperscript{132} 365 U.S. 715 (1961).
  \item \textsuperscript{133} Id. at 719.
  \item \textsuperscript{134} Id. at 716.
  \item \textsuperscript{135} Id. at 716–17.
  \item \textsuperscript{136} See id. at 722–24.
  \item \textsuperscript{137} Id. at 717.
  \item \textsuperscript{138} Wells, supra note 128, at 118–19.
  \item \textsuperscript{139} See generally Wilmington Parking Auth., 365 U.S. at 719–21 (describing the leasing agreement between the State Authority and the coffee shop).
  \item \textsuperscript{140} Id.
  \item \textsuperscript{141} Id.
  \item \textsuperscript{142} Id.
\end{itemize}
to discriminate.\textsuperscript{144} The sum total was that Delaware, by a lease, a statute, and its interpretation of that statute, distributed to the shop the right to discriminate.\textsuperscript{145}

Under this analysis, therefore, the constitutional question was whether the Equal Protection Clause prohibits a state from generally distributing (through a statute) or specifically distributing (to independent government contractors) the right to engage in racial discrimination.\textsuperscript{146} Properly understood, the Court’s answer was yes.\textsuperscript{147} The remaining doctrinal questions are whether that is a plausible reading of the Equal Protection Clause and, if so, how far the principle goes.\textsuperscript{148}

In sum, the classical state action doctrine’s distinction between public and private action is sound, with an important caveat: the distribution principle. The Constitution does not apply to the way that private parties use their rights to further their own interests, but the Constitution does apply to the government’s distribution of those private rights. Furthermore, the distribution principle, in conjunction with an ordinary agency analysis, ensures a conceptual distinction between the government’s relevant conduct and whether the Constitution prohibits or requires that conduct. This distinction allows the substantive constitutional question to come into focus and maintains a conceptually coherent space for individual responsibility, and therefore, freedom.

II. PRIVATE CHOICE

The distribution principle clarifies cases involving government-issued vouchers. In \textit{Zelman v. Simmons-Harris}, the Court addressed a program that provided vouchers for private schools, including some religious schools.\textsuperscript{149} The Court decided that the program was valid because it was religiously neutral and allowed “true private choice.”\textsuperscript{150} This formula obscures the state action question. Applying the distribution principle, the Court could have concluded that the voucher program distributed educational liberty. This reveals a slightly different, more accurate, and probably more difficult constitutional question than whether the program was facially neutral: Did the government impermissibly incentivize parents to choose religious schools?

\textsuperscript{145} See Wilmington Parking Auth., 365 U.S. at 724.
\textsuperscript{146} Id. at 725.
\textsuperscript{147} See id. at 724–26.
\textsuperscript{148} Compare id. (holding that the state’s leasing of property to an independent coffee shop made it a joint participant in the coffee shop’s racial discrimination), \textit{with} Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (holding that the Equal Protection Clause does not forbid a government from issuing a liquor license to a private club that engages in racial discrimination).
\textsuperscript{149} 536 U.S. 639, 662 (2002).
\textsuperscript{150} See McConnell, \textit{supra} note 2, at 690–91 (discussing the plurality opinion in \textit{Mitchell v. Helms}, 530 U.S. 793 (2000)).
The Supreme Court has had a hard time articulating Establishment Clause limits on government spending that flows to religious schools. To some extent the endeavor has been doomed by disagreements about the history and purposes of the Religion Clauses and about the Court’s role in enforcing those clauses. For most of the latter half of the twentieth century, the Court’s Establishment Clause analysis of school aid was unstable and unpredictable—even incoherent. It is still somewhat unclear whether and when a court should apply various doctrinal formulae such as the Lemon test, the “pervasively secular” test, and the “endorsement” test.

The Rehnquist Court gradually articulated a different approach: that a religiously neutral governmental program that gives recipients vouchers to use on services provided by religious organizations is constitutional. The cases peaked in Zelman v. Simmons-Harris, where the Court upheld a program that gave parents a tuition voucher that they could assign to a private school, regardless of whether the school

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151 See Greenawalt, supra note 39, at 392–432.
was religious. The Court emphasized two aspects of the program that made it compliant with the Establishment Clause. First, the program was religiously neutral in light of all of the educational options the government subsidized, including public schools. Second, whether any money flowed to a religious school was entirely dependent upon a parent’s decision to claim a voucher and to spend it on a private school.

The dissenting Justices had two main objections. First, they believed the proper way to measure the program’s neutrality was by comparing schools on which parents could spend a voucher, not by comparing all of the government-supported schools a parent could choose. On this narrower view of government action, the program was less religiously neutral, because there were many more religious than nonreligious private schools, and, on average, the religious schools were far less expensive than the non-religious private schools. Second, the dissenters believed that the parents were less free to choose a religious school than they were to choose a non-religious private school. The government, the dissenters concluded, was responsible for the religious “indoctrination” that resulted.

The dispute between the majority and dissenting Justices in Zelman has ongoing implications for a swath of school voucher programs, social welfare programs, and faith-based initiatives where the government partners with religious organizations.

B. Rethinking Zelman and State Action

The Court in Zelman did not expressly connect the state action doctrine and the “private choice” component of the Court’s analysis. Doing so would have clarified the action for which the government was responsible and complicated the constitutional question. Properly understood, the government was responsible for distributing a variety of educational options to parents. Parents have a constitutional right to determine their child’s education. All of the alternatives the government makes available to parents, including schools entirely funded by the government, are therefore part of the relevant distribution of rights. The remaining constitutional

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158 Zelman, 536 U.S. 639.
159 Id. at 653–56.
160 Id. at 653.
161 Id. at 653–56.
162 Id. at 697–98 (Souter, J., dissenting).
163 Id. at 703–05.
164 Id. at 707.
165 Id. at 685.
166 See Colo. Christian Univ. v. Weaver, 534 F.3d 1245 (10th Cir. 2008) (invalidating a university scholarship program for being insufficiently neutral among religious colleges).
167 Freedom from Religion Found. v. McCallum, 324 F.3d 880 (7th Cir. 2003) (upholding a program that allowed prisoners to choose a halfway house, among others, that taught Christianity).
168 Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc., 509 F.3d 406 (8th Cir. 2007).
169 See Zelman, 536 U.S. at 652–53.
question is whether the government impermissibly coerced or incentivized parents to choose a religious school.

1. Two Ways to Misconceive the State Action Question

Courts and scholars have misconceived the state action question in school funding cases in two ways. The first denies that the program allows meaningful private choice; the second holds that the government is responsible for private decisions.

The dissenting Justices in Zelman advanced the first argument. The dissenters defined the relevant distribution of rights narrowly to include only the vouchers. The public school and home school options available to parents, thus, were not relevant to the dissenters’ calculus. The voucher distribution was facially neutral because it allowed a parent to choose a religious or nonreligious private school, but it was not substantively neutral because there were more religious schools to choose from and they cost less on average than nonreligious schools. The parents did not exercise private choice, the dissenters concluded, because the distribution of options was not substantively neutral. Without private choice in the equation, the government was responsible for the parent’s use of vouchers on religious schools. The parents, therefore, were nothing more than a conduit for government funds to religious schools. If the government may not give money directly to religious schools, it may not do so through a conduit. The dissenters were correct that the effect of the government program on private choice may be relevant to the Establishment Clause question, but they should not have collapsed private choice and the government’s distribution of rights. Doing so essentially reads the parents, their educational preferences, and their constitutional rights, out of the equation.

Several scholars have advanced the more nuanced position that the government is responsible for the private choice of voucher recipients. For instance, Laura Underkuffler argues that the government is responsible for the use of vouchers when the government “authorizes” private individuals to use vouchers to affect a public purpose, like education, and “anticipates” that recipients will use the vouchers on religious schools. To maintain a distinction between state and private action, \[\text{Id. at 703 (Souter, J., dissenting).}\]

\[\text{See id.}\]

\[\text{Id. at 703–05.}\]

\[\text{See id. at 698–707.}\]

\[\text{See id.}\]

\[\text{See Laura S. Underkuffler, The Price of Vouchers for Religious Freedom, 78 U. DET. MERCY L. REV. 463, 473 (2001) [hereinafter Underkuffler, The Price]; see also Laura S. Underkuffler, Vouchers and Beyond: The Individual Causative Agent in Establishment Clause Jurisprudence, 75 IND. L.J. 167, 170 (2000) [hereinafter Underkuffler, Vouchers] (“In these cases, there is no question about the existence of state action, since it is the government’s funding action (or other action) which is, itself, the potentially unconstitutional act.”).}\]

\[\text{See Underkuffler, Vouchers, supra note 175, at 170 (noting that the government “funding action (or other action) . . . is, itself, the potentially unconstitutional act”).}\]
Underkuffler relies on agency concepts—“authorize” and “anticipate”—to suggest that voucher recipients are effectively state agents because, in exercising their choice, they are merely putting into effect the state’s public purpose of education. Thus, the state, not the recipient, is responsible for a recipient’s school choice, the resulting distribution of money to that school, and the school’s use of that money for religious activities, including religious “indoctrination.” As we shall see, this description of the transaction neglects a parent’s constitutional right to pursue not only the state’s educational purposes, but also her own.

Similarly, Ira Lupu and Robert Tuttle argue that the “official awareness” that government ‘grantees’ foreseeable use of religious means to meet [public] goals should lead to an attribution of governmental responsibility for the use of such means. This is because the Establishment Clause forbids governments from “select[ing] or includ[ing] distinctly religious means to achieve public ends.” Even under the Lemon test—the most restrictive doctrinal formula that might apply—the issue is whether the government’s “purpose” and “effect” are to advance or inhibit religion, not whether the government advanced its own legitimate purposes with religion.

A “religious means” rule seems patently at odds with a number of Establishment Clause decisions and governmental practices. For instance, the Obama Administration has recently cooperated with local churches to distribute information about how to enroll in a government-run “Health Insurance Marketplace.” Under Lupu and Tuttle’s account, a church’s use of the “Second Sunday & Faith Weekend of Action Toolkit,” provided by the U.S. Department of Health and Human Services, would probably amount to the use of “religious means to achieve public ends,” in violation of the

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177 See Underkuffler, The Price, supra note 175, at 473.
179 Id.
180 See id. at 60–66.
181 See Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971); see also Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222 (1963) (“The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power . . . .”).
182 See, e.g., Town of Greece v. Galloway, 134 S. Ct. 1811 (2014) (upholding use of religious invocation before a town meeting to promote secular goal of civic unity); Van Orden v. Perry, 545 U.S. 677 (2005) (upholding a display of the Ten Commandments in proximity to a public building); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 842–46 (1995) (holding that the Free Speech Clause requires a university to make publication services equally available to religious groups); Walz v. Tax Comm’n, 397 U.S. 664, 676–80 (1970) (upholding a property tax exemption for worship centers to promote secular goals).
184 See id.
Establishment Clause. The Establishment Clause analyses proposed by Underkuffler, Lupu, and Tuttle all depend on a state action analysis that attributes the decisions of private parties to the government because it allows, and to some extent enables, those decisions. But government permission, anticipation, and even enabling of private action do not make it the government’s. If it did, then the vast majority of private decisions would be both attributable to the government and subject to the Constitution. The question is whether a private party is obligated to pursue the government’s purposes or entitled to pursue her own. As I explain below, parents are constitutionally entitled, within broad standards designed to promote a generally educated citizenry, to direct their child’s education according to their own moral views.

2. The Distribution of Educational Liberty

The Zelman Court should have analyzed vouchers as a distribution of educational liberty. Under ordinary agency principles, government-provided vouchers are government action; spending them is not. The government already provided public schools, including magnet schools, and permitted home-schooling. The vouchers simply represented another government-funded educational option.

The Court and the dissenting Justices muddled this analysis by couching the constitutional question as whether the government had deprived parents of “true private choice.” The two sides bickered over whether the relative cost and location of various schooling options overly burdened or incentivized parents’ behavior. But incentives only work on someone who is free. No one seriously contended that parents were deprived of their freedom. Furthermore, had the program actually deprived parents of educational choice, it would have violated their constitutional right to determine their child’s education. No one, including the dissenting Justices, suggested that the program went that far. The incentives created by the voucher program were relevant to the Establishment Clause question, I suggest, but not to the

185 See, e.g., Lupu & Tuttle, supra note 178, at 65.
186 Perhaps Underkuffler’s and Lupu and Tuttle’s accounts may be translated to present a “disparate impact” theory of the Establishment Clause: the government may be constitutionally responsible not for parents’ individual choices, but for the aggregate effect of the voucher program on those choices. In that case, their theories would be about the substantive constitutional requirements on governmental distributions. Even under that translation, however, their arguments still fail to explain how the government could be responsible for the effects of freely made private decisions.
188 See id. at 653–54.
189 See id. at 647.
190 See id. at 653; id. at 706 (Souter, J., dissenting).
191 See id. at 658–60 (majority opinion); id. at 707 (Souter, J., dissenting).
state action question. The action for which the government was responsible was distributing educational options, including school vouchers.

A more difficult question was determining the relevant distribution of rights for purposes of constitutional analysis. The majority believed the analysis should include all the educational options provided by the government, including government-funded schools; the dissenting Justices focused their analysis on only the vouchers. For the reasons I explain below, the answer depends on the applicable constitutional rule.

3. The Substantive Question: Impermissible Incentives?

The Court evaluated whether the government’s total distribution of educational opportunities was religiously neutral and permitted “individuals to exercise genuine choice.” Given that the government fully funded a variety of schools, including magnet schools, and that vouchers did not fully cover the cost at any private schools, the Court concluded that the government’s total distribution of educational alternatives was religiously neutral and that parents had a true choice about which alternative to choose.

Unfortunately, the Court baked the parents’ freedom of choice into the constitutional standard, which muddied its analysis. Whether parents have a choice is an empirical question. Ordinarily, courts assume that people who are legally free to choose among alternatives have a choice. What the Court was struggling to analyze was not whether parents actually had a choice, but whether the government’s distribution of educational options impermissibly incentivized parents to choose a religious school. The logic underlying the Court’s analysis, therefore, assumes that: (1) the Establishment Clause prohibits the government from incentivizing private parties from choosing religious schools; (2) courts can articulate a principled standard for evaluating government incentives; (3) the relevant government action for evaluating those incentives includes all government-funded educational options; and (4) courts can measure the influence of a particular government program on private choices made for a variety of private reasons. Each of these assumptions is contestable.

It seems uncontroversial to say that the Establishment Clause prohibits the government from coercing individuals into religious activity. And it is not unreasonable to believe this principle extends beyond direct coercion to encompass government rules or policies that incentivize or pressure individuals to engage in religious activity. Such a notion underlies the Constitution’s prohibition on religious tests for public office and the Supreme Court’s school prayer cases. At the same time, however, the government has a wide variety of policies that place modest pressure

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193 See Zelman, 536 U.S. at 662.
on private parties to engage in one form of religious activity over another. Though the Court does not tolerate student-led prayers before a public high school football game,196 it protects clergy-led invocations before town board meetings and state legislative sessions.197 Likewise, the Court has never suggested that the government’s long-standing practice of closing offices on Sundays and Christian holidays violates the Establishment Clause, though it makes it easier to practice Christianity than Judaism or Islam.198 The question, then, is what burdens and incentives the Establishment Clause prohibits.199

Assuming that the Court could articulate a principled “impermissible incentives” standard, a remaining question is the relevant scope of government action to which that standard applies. In Zelman, the Justices disputed the relevant scope of government action. Once the government action (the distribution of vouchers) has been distinguished from private action (spending the vouchers), and the substantive constitutional question has been clarified (has the government impermissibly incentivized private religious activity?), the relevant scope of government action becomes more obvious: whatever action is relevant for determining whether the government has impermissibly incentivized private religious activity. In Zelman, the relevant government action was the government’s distribution of education benefits, including government-funded schools, vouchers for private schools, and the option of homeschooling. All of these options were relevant for accurately weighing the incentives and burdens placed on private choice by the voucher program, for all of them were mutually exclusive options available to parents.

Once a court has identified the relevant distribution of rights, there remains a difficult question about whether the distribution did in fact incentivize or burden private choice. In Zelman, the Justices analyzed the voucher program as though the quantum of influence that a government program has on private choice can be measured with a straightforward cost-benefit analysis. In some situations that may be the case. But a court is unlikely to have the granular level of information that would be necessary to account for why parents choose one educational alternative over another for their child. One parent may value proximity to her workplace;  

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another may choose one school for one child and another for a different child based on extracurricular interests; another parent may choose a school based on its test results; and another may simply choose the least expensive option (which would ordinarily be the government-funded school, not a private school that is partially subsidized by a voucher). All of these decisions could be made within a voucher program like the one in Zelman, and none of them have anything to do with the religiosity of the school. And measuring the religious effects—positive and negative—on sending a child to a school with a religious curriculum is even less prone to principled empirical analysis.

These are hard constitutional and empirical questions. Perhaps the Court merged the state action and Establishment Clause analyses in Zelman to avoid confronting them. A more accurate account of state action at issue—the distribution of educational rights—would have at least clarified the difficult constitutional questions, rather than perpetuating a doctrine that merges the state action and Establishment Clause analyses.

III. RELIGIOUS SPEECH

Some of the most difficult state action questions arise when the government and private actors collaborate to speak. Especially when the speech is religious, the answer to the “agency” question is often determinative for the substantive constitutional analysis: though individuals enjoy broad speech and free exercise rights, the Establishment Clause limits the government’s religious speech.200

In a handful of cases, the Supreme Court has applied agency principles, without invoking the state action doctrine, to determine whether religious speech is attributable to the government or to a private speaker.201 But the Court has failed to grasp the threat to individual liberty of an agency analysis that gives insufficient consideration to the role of private choice in shaping the speech at issue.

200 See Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1989) (“[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”); Caroline Mala Corbin, Mixed Speech: When Speech Is Both Private and Governmental, 83 N.Y.U. L. REV. 605, 616 (2008) (“The establishment clause bars the government from endorsing religion and religious beliefs or otherwise commenting on religious truth.”); McConnell, supra note 2, at 682 (“Precisely the same conduct—leading prayers, for example—is constitutionally valued and protected if engaged in by private parties, though unconstitutional if done by the government.”).

201 See, e.g., Pleasant Grove City v. Summum, 555 U.S. 460, 481 (2009) (concluding that a Ten Commandments monument in a public park was government, not private, speech); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 317 (2000) (concluding that the government was responsible for an elected student chaplain’s invocation before a football game); see also Johanns v. Livestock Mktg. Ass’n, 544 U.S. 550, 560–62 (2005) (applying agency principles to determine whether an advertising campaign was attributable to the government or participating companies); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 762–69 (1995) (debating whether the “endorsement” test applies to private speech on public property).
In *Town of Greece v. Galloway*, for example, rather than clearly distinguish between the town’s conduct and each chaplain’s responsibility for the specifics of his or her own speech, the Court applied the Establishment Clause to the whole coordinated effort.\(^{202}\) The result was a muddled and unsatisfying Establishment Clause analysis that gave insufficient attention to private speech rights.\(^{203}\) The Court should have applied Establishment Clause principles to the town’s distribution of the right to give an invocation. The substantive questions that emerge are whether the government: (1) may pick and choose chaplains on the basis of religion; (2) must engage in religious affirmative action; and/or (3) must take steps to declare that the “sectarian” speech of each chaplain is the chaplain’s, and not the town’s.

### A. Town of Greece

The Greece, New York, town board has monthly meetings at which it handles public business, including rule-making and adjudicating individual variance requests.\(^{204}\) About ten years ago, it decided to open board meetings with an invocation by a “chaplain of the month.”\(^{205}\) To select chaplains, a volunteer staff member consulted a list of ministers in a publication by the Greece Chamber of Commerce.\(^{206}\) All of the ministers listed were clergy in a Christian denomination.\(^{207}\) Greece has almost no non-Christian houses of worship, though there are synagogues and mosques in neighboring Rochester.\(^{208}\) The staff member called every institution on the list to invite the minister to be a chaplain of the month.\(^{209}\) Those who accepted the first invitation were put on a list of rotating chaplains of the month.\(^{210}\)

Greece did nothing to shape the content of the individual prayers.\(^{211}\) “The town instead left the guest clergy free to compose their own devotions.”\(^{212}\) Until litigation ensued, all of the invocations were offered by various sorts of Christian clergy.\(^{213}\) Some prayers included language unique to Christian theology,\(^{214}\) and at least one expressed gratitude that Greece’s leaders were pious by Christian standards.\(^{215}\)

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\(^{202}\) See 134 S. Ct. at 1818.

\(^{203}\) See id. at 1851–52 (Kagan, J., dissenting).

\(^{204}\) Id. at 1825 (majority opinion).

\(^{205}\) Id. at 1816.

\(^{206}\) Id. at 1839–40 (Breyer, J., dissenting).

\(^{207}\) Id. at 1816 (majority opinion).

\(^{208}\) See id. at 1839 (Breyer, J., dissenting) (noting the existence of a Buddhist temple in Greece).

\(^{209}\) Id. at 1816 (majority opinion).

\(^{210}\) Id.

\(^{211}\) Id.

\(^{212}\) Id.

\(^{213}\) Id. at 1816–17.

\(^{214}\) Id. at 1816–17, 1824.

\(^{215}\) See id. at 1824.
A meeting began with an invocation immediately followed by a variety of civic housekeeping, including awards for civic duty, announcements, etc. The chaplain faced the public audience with the board members behind him like a preacher in front of a choir. Sometimes the chaplain asked the audience to stand for the invocation.

After the plaintiffs told them that the overt Christian language in one or more of the prayers "gave them offense and made them feel excluded and disrespected," the town made efforts to include non-Christian chaplains. "[T]he town invited a Jewish layman and the chairman of the local Baha’i temple to deliver prayers," and also allowed a Wiccan priestess to do so. Since the Court issued its judgment, the town has also hosted an atheist "invocation." The plaintiffs were unsatisfied with the town’s newfound pluralism and sued.

The Court, in a 5–4 decision, held that Greece’s invocation practice did not violate the Establishment Clause because it did not “denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion,” nor was it too “coercive.” Remarkably, none of the Justices questioned the enduring validity of Marsh v. Chambers, which upheld, over Justice Brennan’s strenuous objection, the Nebraska legislature’s chaplain program. Nebraska paid a local Presbyterian minister to offer an invocation before each legislative session. In Town of Greece, the dispute between the majority and dissenting Justices was whether the invocation practice in Greece was meaningfully different.

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216 See id. at 1825; id. at 1829 (Alito, J., concurring).
217 See id. at 1848 (Kagan, J., dissenting).
218 Id. at 1826 (majority opinion).
219 Id.; id. at 1848 (Kagan, J., dissenting).
220 Id. at 1826 (majority opinion).
221 Id. at 1817. But see id. at 1848 (Kagan, J., dissenting) (“[A]fter a brief spell surrounding the filing of this suit . . . the Town resumed its practice of inviting only clergy from neighboring Protestant and Catholic churches.”).
222 Id. at 1817 (majority opinion).
224 See Town of Greece, 134 S. Ct. at 1817.
225 Id. at 1823 (rejecting the proposition that legislative prayer must be nonsectarian because it would cause the government to become too involved in religious speech, but noting the speech cannot proselytize).
226 See id. at 1827 (“But in the general course legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate.”).
228 Id. at 793–95; see id. at 795–822 (Brennan, J., dissenting).
229 Id. at 784–85 (majority opinion).
230 See Town of Greece, 134 S. Ct. at 1827; id. at 1842 (Kagan, J., dissenting).
In effect, Marsh creates a baseline that demands a case-by-case review of invocations anytime they happen outside the context of a state legislature. This becomes particularly difficult as America becomes more religiously diverse. In Town of Greece, the Court provided some guidelines: the government’s legislative prayer practice may be neither coercive nor too sectarian.\(^{231}\)

This standard provides more guidance than Marsh, but it still calls for a case-by-case factual analysis and relies heavily on each judge’s personal view of how much Jesus-talk and how much pressure is too much.\(^{232}\) Given the Court’s scant case law on the topic, it would be difficult for a government or court to know how far would be too far (at least outside the context of an elementary or secondary school).\(^{233}\)

More problematically, the Court’s analysis does little to account for the constitutional difficulty posed by the facts in Town of Greece and presumably many other governmental invocation practices.\(^{234}\) The government is at least approving, if not engaging in, religious speech in a context that is likely to make townspeople who do not share the chaplain’s faith feel like political outsiders.\(^{235}\) This would be intolerable under prevailing Establishment Clause doctrine were it not for Marsh and a long tradition of legislative prayers.\(^{236}\) On the other side of the ledger, however, Greece was not directing the content of each individual prayer, and sponsoring an official invocation has long been understood, at least in part, as an accommodation of many citizens’ religious beliefs that government should humbly rely on the support of a higher power.\(^{237}\)

Importantly, the dissenting Justices’s proposals would do little to solve either the “sectarian” or “coercive” problem in Town of Greece or a similar case, nor would they likely reduce the net total of townspeople who feel like political outsiders.\(^{238}\) Requiring chaplains to tone down the religion-specific aspects of their prayers, although satisfying some, would ostracize others. A Trinitarian Christian is unlikely to condone a prayer “to whom it may concern,” and an atheist certainly would not. Furthermore, such a policy would potentially interfere with the chaplain’s speech and free exercise rights.\(^{239}\) The second proposal—doing more to facilitate a rotating cast of religious perspectives—would likewise be unsatisfactory. Few people are regulars at town board meetings. An attendee’s immediate experience with a chaplain from another faith will determine whether he or she feels like an outsider. It will not matter that

\(^{231}\) Id. at 1825 (majority opinion).
\(^{232}\) See generally Town of Greece, 134 S. Ct. 1811; Marsh, 463 U.S. 783.
\(^{233}\) See Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 313–17 (2000) (concluding that the government was responsible for an elected student chaplain’s invocation before a football game); Lee v. Weisman, 505 U.S. 577, 586–99 (1992) (holding that clergy who offer a prayer as part of a public school graduation ceremony violate the Establishment Clause).
\(^{234}\) See, e.g., 134 S. Ct. 1811.
\(^{235}\) Id. at 1841 (Kagan, J., dissenting).
\(^{236}\) See Marsh, 463 U.S. at 795.
\(^{237}\) See id. at 792.
\(^{238}\) See Town of Greece, 134 S. Ct. 1811.
\(^{239}\) See, e.g., id. at 1816.
someone from his or her church gave the invocation last month. If anything, it would render the entire practice even more religiously incoherent than it already is, ensuring that each attendee feels equally like an outsider.

A more precise application of the agency principles of the state action doctrine would have clarified who was responsible for the various aspects of each invocation, thereby making it easier to tell whether the Court should have focused the Establishment Clause inquiry on the prayers themselves or on the way Greece distributed the right to offer an invocation.

B. Whose Speech, Which Speaker?

The Court has never provided a conceptual framework for attributing speech to the government or to a private person. Most scholars considering the issue have proposed that the Court create a special test that merges agency and substantive constitutional values. This muddies the analytical waters and fails to safeguard the private exercise of rights. The Court should apply ordinary agency principles with a close eye to whether the government or a private speaker controls the content of the speech.

Robert Post has offered one of the most sophisticated approaches to government-subsidized speech. His proposed analysis turns on the government’s objective—whether the government is attempting to promote public discourse or its own ends. When the government attempts to promote public discourse, the Free Speech Clause should protect the individual speaker from too much governmental interference. When the government is pursuing its own ends, the government should have more leeway to impose conditions on government-subsidized speech and to discriminate among content.

The Court has never drawn the distinction that Post recommends, and it would be difficult to maintain in practice. What if promoting public discourse is one among several managerial goals of a government program? Such is probably the case with a university’s limited public forum for student speech. As Post acknowledges elsewhere, the university’s end, to some extent, is public discourse. More problematic
still is that Post’s approach merges the agency question with the substantive constitutional question, giving more private speech rights to those who participate in “public discourse” over those who participate in the government’s “managerial” domain—even when the private speech may otherwise be protected as religious exercise. A clearer approach would disentangle, rather than merge, the agency question, the substantive constitutional questions, and the constitutional values that the answers to those questions should approximate.

Caroline Mala Corbin’s proposal likewise submerges constitutional values by commingling an agency and substantive constitutional analysis. In a close case, the Court should give up trying to attribute responsibility to either a private speaker or the government. Instead, the Court should conclude that the case involves “mixed speech” and should apply intermediate scrutiny. Corbin’s proposal thus splits the baby. Ordinary government speech and private speech would both be less protected under intermediate scrutiny. Ordinarily the government may say what it likes, and ordinarily the government may neither force private parties to say something nor regulate their speech on the basis of its content. As to religious speech in particular, Corbin’s approach would dissolve the public and private distinction between Establishment Clause prohibitions on the government’s religious speech and First Amendment protections of private religious speech. As Corbin acknowledges, her proposal would upend much free speech doctrine.

A revolution is simply unnecessary. Corbin’s analytical device presumes that no matter how many facts point in one direction, so long as one fact points in another,

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249 See Post, supra note 242, at 156 (“[T]he categorization of the status of a speaker will ordinarily be a very specific, context-bound judgment, informed by the particular First Amendment considerations relevant to determining the boundaries of public discourse.”).

250 See id. at 166.

251 See Corbin, supra note 200, at 626–27.

252 See id. at 628.

253 See id. at 676.

254 See Thomas I. Emerson, The System of Freedom of Expression 699 (1970) (identifying four potential limits on the government’s prerogative of speaking for itself); Helen Norton, Not for Attribution: Government’s Interest in Protecting the Integrity of Its Own Expression, 37 U.C. Davis L. Rev. 1317, 1349 (2004) (noting that the government is not forced to support a speaker it disagrees with); Steven D. Smith, Why is Government Speech Problematic?: The Unnecessary Problem, the Unnoticed Problem, and the Big Problem, 87 Denv. U. L. Rev. 945, 949 (2010) (arguing that “the no viewpoint discrimination doctrine does not apply when the governments are speaking”).


256 See, e.g., Sable Commc’ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (holding that content restrictions on private speech are subject to strict scrutiny).

257 See Corbin, supra note 200, at 692.

258 See id. at 628 (“This definition [of mixed speech] cuts a wide swath and will significantly change First Amendment jurisprudence.”).
a decision in the first direction is unsound.259 The legal tradition relies on the opposite assumption—that a court may exercise judgment to weigh and evaluate potentially conflicting evidence case by case. Corbin is right that courts should apply neutral criteria to the facts of a case to determine who is speaking.260 She is also right that there are genuinely hard cases. But there is no need to abandon ordinary agency principles in a vast array of speech cases.261 They are the most neutral legal principles available because they do not depend upon hotly contested views of the meaning and values underlying the First Amendment. And they are far more precise than “intermediate scrutiny.”

Corbin’s proposal raises an important doctrinal question: For purposes of attributing responsibility for speech—not for purposes of substantive constitutional analysis—is it relevant whether a reasonable observer would attribute the speech to the government?262 The Court has been somewhat equivocal about this.263 Under the “endorsement” test, the question is relevant to determining whether the government has violated the Establishment Clause.264 But it is unnecessary to bake the endorsement

259 Id. ("Speech may be mixed when . . . one factor points to a private speaker and another to a government speaker, such as when the literal speaker is private but the government funds the message . . . .").

260 Cf. id. at 627 (suggesting five factors to help classify speech as private, governmental, or mixed).

261 Corbin considers the following to be examples of “mixed speech”: art subsidized by the government; religious speech in private schools that receive government funds; speech by private individuals on government property; private advertisement on public transportation; student articles in public school newspapers; private solicitation in a government charity drive; (often) speech by government employees; “an invocation by a member of the clergy invited to a high school graduation”; “postage stamps on private letters”; “vanity license plates”; “and government ad campaigns that feature celebrity spokespeople.” Id. at 624–26, 626 n.113.

262 Corbin’s “five interrelated factors” are: “(1) Who is the literal speaker? (2) Who controls the message? (3) Who pays for the message? (4) What is the context of the speech (particularly the speech goals of the program in which the speech appears)? [and] (5) To whom would a reasonable person attribute the speech?” Id. at 627; see also Norton, supra note 254, at 1318–20 (asserting that the government “should be held responsible only for its own views, and not those of others mistakenly attributed to it”).

263 Compare, e.g., Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) (“In this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration.”), with Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 766 (1995) (“Private religious speech cannot be subject to veto by those who see favoritism where there is none.”).

264 See, e.g., Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring) (“Endorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”); see also County of Allegheny v. Am. Civil Liberties Union of Greater Pittsburgh, 492 U.S. 573, 614–16 (relying on the endorsement test to distinguish between the constitutionality of two religious displays), abrogated by Town of Greece v. Galloway, 134 S. Ct. 1811 (2014). Commentators have been critical of the test.
question into the agency analysis to determine who is responsible for speech. In fact, doing so tilts the analysis against the freedom of individual speech.

Suppose the ordinary agency principles apply. Under those principles, it does not matter whether an observer would reasonably attribute some conduct to the government. The government is not responsible for a robber impersonating a police officer. Now suppose that there is a close case about religious speech. Observers reasonably attribute the speech to the government, but the government has neither exercised control over the speech nor authorized an agent to engage in the speech on the government’s behalf. The government is not constitutionally responsible for the speech. But the appearance of government responsibility may still have a role to play in the substantive constitutional analysis. Perhaps the Establishment Clause prohibits the government from permitting the private speech, or perhaps it requires the government to engage in supplemental speech to make it clear to reasonable observers who is speaking. Weighing against these establishment questions, however, are new questions about the speaker’s free speech and free exercise rights. Those substantive questions, and their potential conflict with the Establishment Clause question, emerge only when the endorsement test has not influenced the analysis about who is actually responsible for the speech.

C. Ceremonial Public Prayer as a Very Limited Public Forum

In *Town of Greece*, the Court assumed that every aspect of the invocation practice was attributable to the town. Had the Court done an agency analysis instead, the following would have been clearly attributable to the government: (1) choosing to have invocations before town board meetings; (2) the procedure used to select a chaplain of the month; and (3) the procedure for each invocation.

By contrast, under an ordinary agency analysis, the content of each prayer was attributable to the chaplain, not to the town. The town invited the chaplain to pray, but put no restrictions on the content of her prayer. Unlike in *Marsh*, the town did not select one clergy member of one Christian denomination and give him a

See, e.g., Thomas C. Berg, *What’s Right and Wrong with “No Endorsement,”* 21 WASH. U. J.L. & POL’Y 307, 307 (2006); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266, 268 (1987) (describing the “no endorsement” test as a “doctrinal dead end”). Justice Kennedy never endorsed the test, and its survival is unclear. See *County of Allegheny*, 492 U.S. at 674 (Kennedy, J., concurring and dissenting) (“Either the endorsement test must invalidate scores of traditional practices recognizing the place religion holds in our culture, or it must be twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past, while condemning similar practices with no greater endorsement effect simply by reason of their lack of historical antecedent.”).

265 *Town of Greece*, 134 S. Ct. at 1827.
266 *Id.* at 1846–47 (Kagan, J., dissenting).
267 *Id.* at 1816 (majority opinion).
268 *Id.*
salary. Rather, the Greece chaplains represented a variety of theological traditions within Christianity; the chaplains and other members of their traditions may or may not consider themselves interchangeably “Christian.” Furthermore, unlike in *Santa Fe Independent School District v. Doe*, the town did not create a majoritarian process for electing a “chaplain of the year.” The town invited every clergy member with a congregation within the city limits, it never declined a chaplain’s request to pray, and it never declined to reinvite a chaplain who had already offered an invocation. In short, the town showed no interest in, or control over, the particular content of the prayers. All it cared about was having an invocation of some kind. The chaplain was an agent for the generic purpose of an invocation, but was not an agent for the purpose of any particular “sectarian” speech. As to the individual speech, the facts uniformly suggest that the chaplain was on his or her own recognizance.

The foregoing analysis has important implications. The Establishment Clause questions do not vanish; rather, they are recast as questions about whether Greece’s invitation procedure was fair and whether Greece was obligated to engage in supplemental speech to clarify its role.

New constitutional questions, however, largely ignored by the Court, emerge. What are the chaplains’ rights? Does the First Amendment prohibit Greece from discriminating among chaplains based on their religious views? If so, does it place an affirmative duty on Greece to include a wider range of religious views? Here we are in uncharted constitutional waters. Perhaps courts would be well served by borrowing some concepts from another context in which the government distributes a right of private speech: the “limited public forum” doctrine.

At the outset, it is important to note the differences between ceremonial invocations and the ordinary application of the limited public forum doctrine. A “limited public forum” is ordinarily a place, real or virtual, that the government voluntarily makes available for a class of persons to engage in private speech. It is not ordinarily a place where the government invites one person at a time to speak (although it may be). The government may restrict the speech in a limited public forum to be sure it reasonably relates to the government’s purpose in opening the forum, but the

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270 *Town of Greece*, 134 S. Ct. at 1816.
271 *Id.*
273 *Town of Greece*, 134 S. Ct. at 1816.
274 *Id.*
275 *Id.*
276 *Id.* at 1818.
277 For further analysis, see *infra* Part III.D.2.
government may not engage in “viewpoint discrimination.” Restricting a forum to ceremonial invocations may be a reasonable way to solemnize the event, a permissible government purpose. But allowing only “invocations” is itself a form of viewpoint discrimination. In ordinary language usage, an “invocation” presumes some higher authority (divine or not) to which the invocation is addressed. Requiring the private speech to be an “invocation” therefore discriminates against the religious viewpoint that there is no higher authority, or no such authority that pays attention to town board meetings. The town could attempt to extend the forum to nonreligious “invocations” such as hortatory speeches of civic unity. But that would restrict the viewpoint that the town is or should be disunified. Ceremonial invocations are a square peg to the limited public forum doctrine’s round hole.

Nevertheless, the limited public forum doctrine, I suggest, offers the best template for guiding government invocation practices. The doctrine balances the government’s interest in reasonable limits on government-subsidized speech and the individual speaker’s free speech and free exercise interests in religious nondiscrimination. The doctrine is one of the few that addresses not just negative rights, but constitutional limits on the distribution of positive rights. In that respect, it aptly fits the scenario where the government distributes liberty to engage in speech, albeit speech of a peculiar kind—in this case, speech that is uniquely religious and political.

How do the “reasonably related” and “viewpoint neutral” tests translate to the peculiar “forum” of ceremonial invocations? The “reasonably related” restriction might provide some guidance about how the government may go about selecting chaplains. Permitting only those who live in the jurisdiction to offer an invocation, for instance, would be fairly analogous to permitting only university students and staff to participate in a limited public forum on university property. That seems to have been the underlying rationale for the Court’s consideration of whether Greece was obligated to invite religious leaders from nearby Rochester to achieve more diversity. A modified limited public forum analysis would make that reasonableness requirement explicit.

What about restricting the chaplains to “clergy” as Greece did? This is arguably unreasonable given the forum’s purpose of offering a ceremonial invocation—a number of religious groups believe in prayer, but do not have clergy. And a number of religious people who may want to offer an invocation are not part of an organized religious group. The clergy restriction, therefore, is not a reasonable proxy for religious sincerity, authority, or representation. To the extent the clergy requirement operates to exclude chaplains on the basis of their religious viewpoint, the requirement also would probably run afoul of the “viewpoint neutrality” requirement.

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280 Rosenberger, 515 U.S. at 829.
282 Some also consider the doctrine incoherent. See Timothy Zick, Speech and Spatial Tactics, 84 TEX. L. REV. 581, 615 n.230 (2006).
A prohibition on derogatory language about other religions would likely be reasonable. Derogating another religious view is unnecessary for an invocation, and it is likely to undermine the unity rationale of a ceremonial invocation by inflaming adherents of the derogated religion. Distinguishing between a prayer that expressly derogates other religions from one that merely vaunts the speaker’s religious beliefs is easy enough: the former mentions another’s religious belief or tradition; the latter does not.

What could “viewpoint neutral” possibly mean when the forum itself is premised on a “viewpoint”—either religious or political, or both? Perhaps the “viewpoint neutrality” requirement, translated into the context of ceremonial public prayer, would require neutrality among religious viewpoints.\textsuperscript{283} The government may not discriminate on the basis of the chaplain’s religious views, including whether the chaplain believes in God (or gods). A non-theistic hortatory speech that advances both civic reflection and unity would pass this test—Ralph Waldo Emerson made a career of it.

Greece seems to have complied with this standard. It invited clergy from Greece, a reasonable limitation.\textsuperscript{284} It did not discriminate on the basis of the chaplain’s religious views.\textsuperscript{285} And besides an array of Christians, Greece has allowed a Jewish Rabbi, a Wiccan, and an atheist to deliver invocations.\textsuperscript{286}

The limited public forum doctrine is in many ways a poor fit for public invocations. But translating it for the \textit{Marsh} framework, which appears to be here to stay, would guide judicial review of the government’s authority to distribute the freedom to lead ceremonial public prayers.

\textbf{D. The Remaining Questions}

The remaining questions are whether the Establishment Clause places affirmative duties on the government when it invites people to offer a public invocation, and, if so, what duties.

\textbf{1. Religious Affirmative Action?}

Does the Establishment Clause or perhaps the Equal Protection Clause require a town board to engage in religious affirmative action to ensure that the chaplains, and therefore the invocations, reflect a wider array of religious traditions? Greece had a facially non-discriminatory selection policy and did not deny any volunteer the opportunity to deliver an invocation.\textsuperscript{287} But Greece’s selection process limited the range of religious traditions represented by the chaplains, and, until others spoke up, all of them were Christian.\textsuperscript{288}

\textsuperscript{283} Good News Club, 533 U.S. 98 (holding that denying access to a club based on its religious viewpoint ran afoul of viewpoint neutrality).
\textsuperscript{284} Town of Greece v. Galloway, 134 S. Ct. 1811, 1816 (2014).
\textsuperscript{285} \textit{Id.} at 1840 (Breyer, J., dissenting).
\textsuperscript{286} \textit{Id.} at 1817 (majority opinion).
\textsuperscript{287} \textit{Id.} at 1816.
\textsuperscript{288} \textit{Id.} at 1816–17.
Under the limited public forum doctrine, the government may not discriminate against speakers based on their viewpoint, but it has no affirmative obligation to ensure counter-speech within the forum or to make sure that every viewpoint is represented. Perhaps the Establishment Clause, which articulates a particular evil for the government to avoid, puts a higher burden on the government than the Free Speech Clause does. Scholars and courts could reasonably disagree about these questions.

The Establishment Clause may place a modest affirmative duty on governments to guarantee that everyone who wants to participate in public invocations has an equal opportunity to know about that opportunity and to take it. But who should be responsible for articulating and policing this duty? I am dubious that the courts’ attempt to enforce this duty would yield net constitutionality. It runs the risk of devolving into innumerable disputes over trivial minutiae. (For instance, how many plastic reindeer and talking wishing wells in a town’s holiday display are sufficient to balance out a crèche?) In my view, governments ought to proactively seek to avoid the appearance of religious allegiance, but the primary doctrinal check should be a prohibition on facial religious discrimination, not an affirmative duty to eliminate unequal participation by private speakers.

2. A Duty of Supplemental Speech?

Another difficult Establishment Clause question is whether the government, when the provenance of religious speech is unclear, is obligated to clarify that the speech is a private party’s, not the government’s. Some have suggested this approach in cases that present a close question on whether the government or a private party is responsible for the speech at issue. In Rosenberger, the Court emphasized the importance for its analysis that the government required forum participants to declare that they were speaking for themselves, and not for the government. In addition, the Establishment Clause standard that the government should not be perceived as endorsing a religious belief suggests that even when the government allows private

289 See, e.g., Joseph Blocher, Viewpoint Neutrality and Government Speech, 52 B.C. L. REV. 695, 701 (2011) (arguing that the government speech “defense” might be available for viewpoint discrimination when the government “affirmatively provides equal alternatives for private speakers against whose viewpoints it has discriminated”).


291 See Town of Greece, 134 S. Ct. at 1818 (noting the lower court’s opinion that Greece might have avoided the issue if it had advertised the invocation opportunity more widely).


293 See, e.g., Norton, supra note 254, at 1332–33.

religious speech, it may be responsible for failing to ensure that observers would not attribute that speech to the government.\(^\text{295}\)

Affirmative duties are rare in constitutional law, but I think the Establishment Clause principle that the government should not engage in religious favoritism is clear enough, and well-entrenched enough, in our law to justify a governmental duty to clarify whether religious speech is the government’s or a private individual’s.\(^\text{296}\) Disavowals are relatively easy to make, and they are easy to investigate and enforce. In cases like *Greece*, a disavowal would merely put a fine point on the government’s involvement: the government endorses ceremonial public invocations, but it does not endorse any particular theological viewpoint.

IV. RELIGIOUS ACCOMMODATION STATUTES

The Establishment Clause requirements for statutory religious accommodations, like the one in *Burwell v. Hobby Lobby Stores, Inc.*,\(^\text{297}\) is another doctrinal area that would benefit from reframing the question to focus on the government’s distribution of religious liberty. The Supreme Court’s inconsistent approach to religious accommodation statutes has produced one of “the most vexed questions in the law of the religion clauses.”\(^\text{298}\) Although the Court has invalidated a couple of religious accommodation statutes for violating the Establishment Clause,\(^\text{299}\) it has upheld or applied without question many others.\(^\text{300}\) Accordingly, the Court has neither articulated nor applied a clear substantive principle that would guide lawmakers and courts seeking to provide religious accommodations without violating the Establishment Clause. Governments and advocates are left to divine such a principle from the few cases on point, from prior history, or from broader constitutional values.

The distribution principle would help courts and scholars distinguish between the conduct for which the government is constitutionally responsible when it enacts and enforces a religious accommodation statute, and the conduct that is rightly attributed to

\(^{295}\) See supra notes 287–89 and accompanying text.

\(^{296}\) See supra note 264.

\(^{297}\) 134 S. Ct. 2751 (2014).

\(^{298}\) GREENAWALT, supra note 39, at 336.


private religious exercise. This distinction will hopefully pave the way for a more precise and fruitful discussion among courts and scholars about what the proper Establishment Clause principles ought to be, and how they ought to apply in any given case.

The Supreme Court has debated whether the results of religious accommodations are attributable to the government or to the religious exercise of a private party. For instance, in Corporation of Presiding Bishop v. Amos, the Court unanimously concluded that the Establishment Clause permits a statutory exemption from Title VII’s religious discrimination prohibition for religious nonprofits, even when the job at issue is “secular.” Along the way, the Justices bickered about who was responsible for the burden on employees—the government for authorizing the religious discrimination or the employer for engaging in it. The answer is obviously crucial. If the government is responsible, the Court must decide whether the Constitution prohibits the government from creating such a burden on the basis of the private exercise of religion. If a private party is responsible, then the Constitution is silent with respect to the result of any given private employment decision. The question instead would be whether the Establishment Clause prohibits the government’s distribution of a private right to discriminate on the basis of religion, not whether the Establishment Clause prohibits the particular discrimination at issue.

Is a private party who exercises religion pursuant to a legal accommodation a state actor? Put this way, at least, it does not seem like a difficult question. Religious accommodation statutes by definition exempt regulated parties from an obligation to pursue the government’s regulatory goals so that they can pursue their own religious interest. They are not government agents.

Why, then, did the Court bicker over this issue in Corporation of Presiding Bishop? Perhaps because the Justices were struggling to understand the relationship between the government’s distribution of religious liberty and private exercise, but lacked the conceptual tools to do so. The government is not constitutionally responsible for the specific burdens that someone’s religious exercise places on a third party, but it is certainly responsible for the distribution of religious liberty that

302 483 U.S. at 338–40.
303 Id. at 340 n.1 (Brennan, J., concurring) (“An exemption by its nature merely permits certain behavior, but that has never stopped this Court from examining the effect of exemptions that would free religion from regulations placed on others.”); see, e.g., id. at 347 (O’Connor, J., concurring) (explaining that because of the exemption, “[t]he Church had the power to put [the employee] to a choice of qualifying for a temple recommend or losing his job because the Government had lifted from religious organizations the general regulatory burden imposed by [Title VII].” (emphasis added)); United States v. Lee, 455 U.S. 252 (1982); Wisconsin v. Yoder, 406 U.S. 205 (1972); Walz, 397 U.S. at 669.
304 Corp. of Presiding Bishop, 483 U.S. at 337 n.15.
305 See generally id.
allowed those burdens in the first place. When the Court writes that a law authorizes private parties to place burdens on others, it is not saying that the law deputizes them to do so. Rather, the law allows them to do so. An accommodation does not make an agent of the religious exerciser. A religious accommodation is neither more nor less than a governmental distribution of religious liberty. Hopefully, this clarification offered by the distribution principle will help courts and scholars develop principles for determining whether a given distribution of religious liberty violates the Establishment Clause.

CONCLUSION

In the United States, religion and public life have always been entwined. The Establishment Clause was never intended to keep religion out of the public square. Those who enter that square carry their religious commitments with them. And that is precisely as it should be: the Religion Clauses complement one another, ensuring that the religion that affects our shared life arises from private exercise, and not from the government. To enforce that principle, courts must have a better tool for distinguishing between governmental and private conduct. This Article has argued that a reformed concept of the state action doctrine that applies the Constitution to distributions of private rights clarifies existing Establishment Clause doctrine and safeguards private religious liberty.