INTRODUCTION

Historically, public nuisance law provided government officials with the authority to enjoin or abate unreasonable conduct that interfered with the public’s health, safety, and welfare. While a public entity may not obtain monetary damages for the harmful conduct, a private plaintiff who can show that her injury from the public nuisance is different in kind from other members of the public may obtain damages. As a means of holding people accountable for offenses against the community, public nuisance law has expanded over time to address issues like environmental harms, the spread of infectious diseases, protests, gang activity, gun control, opioid abuse, global warming, and other “catch-all” categories.1

One doctrine that potentially affects the use of public nuisance law to address community harms is the state action doctrine. The doctrine enhances federalism and individual autonomy by protecting individual liberties against the abuse of government power, but allows private interference with constitutional rights.2 In the Civil Rights Cases, the Supreme Court held that state laws could not discriminate based on race, but private entities could.3 The first and second sections of the Civil Rights Act of 1875 were unconstitutional because they prohibited racial discrimination by private entities and under the Fourteenth Amendment “[i]t is State action of a particular character that is prohibited.” Private invasion of individual rights is not the subject matter of the amendment.4

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2 See Mark D. Rosen, Exporting the Constitution, 53 EMORY L. J. 171, 205 (2004) (noting that “[t]he second and third reasons courts have commonly given to justify the distinction between public and private—separation of powers and federalism—are institutional mechanisms for advancing the democratic ideal of limiting the reach of the judiciary so as to reserve space for political activity”).
3 The Civil Rights Cases, 109 U.S. 3, 11 (1883).
4 Id.
In accordance with the state action doctrine, courts have generally not allowed individuals to claim protection against private action that violates their constitutionally protected individual liberties. Common law claims brought under tort, contract, or property law are not generally subject to constitutional restriction unless the private action is attributed to the state under a recognized exception such as the entanglement or public function exceptions.\(^5\) In some circumstances, the Court has applied an expansive interpretation of state action by holding that a court’s own determination in private suits is adequate to find a state action. For example, the Court in *Shelley v. Kraemer*\(^6\) held that the lower court’s action of enforcing a racially restrictive private covenant constituted state action subject to constitutional scrutiny.

One purpose of this article is to reconcile why the Court has allowed speech tort defendants to use the First Amendment as a shield against private tort claims but has refused to allow defendants in contract and property lawsuits to use constitutional defenses against arbitration agreements, private covenants, trespass, and nuisance actions under the guise of the state action doctrine. This article rejects some of the confusing idiosyncrasies employed by the Court, but not the state action exceptions discussed in Part II.B., to distinguish which actions are subject to the state action doctrine. Instead, the article proposes a framework to help litigants and courts decide when to consider constitutional constraints in suits between private actors applying state law. The proposed framework does not differentiate between the court applying state common law or state legislation and, instead, views the court as a neutral arbiter in adjudicating private disputes based on state law.

Part I reviews the general contours of public nuisance from its early beginnings, when nuisance was a tool to address criminal and social harms such as storing explosives, obstructing public ways, dealing with diseased animals, and operating houses of prostitution, to some of its more current uses as a means of addressing climate change, gun violence, and opioid abuse. Part II focuses on the state action doctrine and describes its purpose, application, and its exceptions when private action is subject to constitutional limitations. This Part also proposes that a theory of state action based on its use as a sword or as a shield could bring clarity to the doctrine.\(^7\) Obviously, I am not the first to propose a theory to address the “conceptual disaster” of

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\(^6\) Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (holding that judicial action enforcing private racially restrictive covenant constitutes state action in violation of the Fourteenth Amendment even though such private agreements standing alone do not violate constitutional rights).

\(^7\) Mark Tushnet, *Introduction: Reflections on the First Amendment and the Information Economy*, 127 Harv. L. Rev. 2234, 2254 (2014) ("The state action doctrine has become complex and confusing because the courts and commentators have lost sight of the fact that in every state action case the core issue is whether the ‘state rule of law’—in New York Times Co. v. Sullivan, the state rule of law defining the contours of the right to reputation—is consistent with the Constitution.").
the state action doctrine. It is imperative to bring clarity to the state action doctrine as we confront issues such as restraining the speech of private media platforms or deputizing private parties in Texas “to cloak its attack on constitutionally protected rights behind a nominally private cause of action.” Clarifying the state action doctrine will also help in confronting the spectre of judicial takings from *Stop the Beach Renourishment*.

Part III explores judicial approaches to nuisance claims to determine the extent to which these state law actions have been subject to constitutional restrictions. Part IV examines how a reimagined state action framework, based on its use as a sword or as a shield, explains its use in some of the major decisions involving tort, contract, and property law, and suggests what changes will be needed in existing state action doctrine jurisprudence to normalize its application across multiple fields.

I. PUBLIC NUISANCE AND CONSTITUTIONAL LIBERTIES

A public nuisance is “an unreasonable interference with a right common to the general public,” such as public health, safety, welfare, or morals. A public nuisance does not necessarily involve land, unlike a private nuisance, which does require “a substantial and unreasonable interference with the use and enjoyment of the land of another.” Ironically, discussions about the early history of public nuisances suggest that the purpose of its original creation was to deal with interests in land. The Restatement (Second) of Torts makes it clear that an activity can be treated as both a public and a private nuisance, such as “when a bawdy house that interferes with the public morals and constitutes a crime also interferes with the use and enjoyment of land next door.”

Zoning has mostly supplanted common law nuisance as the means to control land use and regulate moral nuisances, but nuisance law

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8 See, e.g., Cody J. Jacobs, *The Second Amendment and Private Law*, 90 S. CAL. L. REV. 945, 968 (2017) (proposing a Core Right Theory to “provide guideposts that explain the courts’ willingness to place constitutional constraints on private law in some cases but not others”).
15 RESTATEMENT (SECOND) OF TORTS § 821B cmt. h (AM. L. INST. 1979).
still “serves as a back-up” to zoning “to provide direct legal remedies to injured landowners.”

Throughout the early 20th century, public nuisance law expanded to cover perceived social harms not satisfactorily addressed through legislative action at the local, state, or federal level. Such an expansion was the result of

new situations [] constantly being brought within the scope of equity’s restraining powers, and generally they are called public nuisances. This formal denomination patently comes as a kind of afterthought; it is obvious that the only real problem seriously considered either by court or legislature is the efficacy and social desirability of the quick remedy. Sometimes the new situations are factually comparable to old ones, which have been called public nuisances for a long time because equity had given specific relief against them for a long time. Sometimes the new situations are factually quite different from any of the old ones, yet they may be called public nuisances nevertheless because they are handled in the courts in the same way that the older public nuisances are handled.

The legislature can declare as unlawful an action that is wrongful to the public, and it has the power to call it a public nuisance. “As society develops, new dangers to the public welfare are constantly perceived, and new prohibitions are enacted by the legislature.” The legislature creates new statutory nuisances enabling the state to proceed against an offender, and permitting a private individual to bring an action if they have suffered a private injury from the public nuisance. For example, in the 1931 landmark case of Near v. Minnesota, the Court held that a state statute was unconstitutional as a prior restraint under the First Amendment as applied to the states through the Fourteenth Amendment. Under the guise of preventing a public nuisance, the statute allowed public officials and private citizens to seek injunctive relief against “producing, publishing or circulating . . . a malicious, scandalous and defamatory newspaper.” “Everything old is new again” as courts, litigants, and scholars deal with public nuisance claims against lead paint manufacturers, fossil fuel companies, opioid producers, and the gun industry.

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16 Nagle, supra note 12, at 307 (citing RICHARD A. EPSTEIN, TORTS 357 (1999)).
19 Id. (listing as examples “regulations of highway traffic, — the position of vehicles on the highway, the speed at which they may run, the conduct of railways at crossings; or building laws passed to lessen fire risks; or restrictions on the use of dangerous articles, such as the carrying of firearms by children, or the sale of poisons unlabeled, or handling explosives without specified precautions”).
20 Id. at 326–28.
22 Id. at 702.
23 PETER ALLEN & CAROLE BARYER SAGER, EVERYTHING OLD IS NEW AGAIN, ON CONTINENTAL AMERICAN (A&M Records 1974).
A. Public Nuisance as a Crime

Traditional common law viewed public nuisances as crimes, and state and local statutes have incorporated certain types of criminal conduct into legislative authority to proscribe such activities. Private plaintiffs may not bring a criminal prosecution, but they may supplement government enforcement against illegal activities, if the activities also constitute a private nuisance or if the plaintiff experiences a special injury that is different from the harm to other members of the public. Some have argued that recognizing private “standing” does not serve to supplement public official enforcement in order to vindicate public rights, but instead recognizes that the public nuisance action does not preempt the private plaintiff’s tort cause of action for an injury to a private right.

Public nuisance, unlike private nuisance, does not necessarily implicate the use of land and can instead be an unreasonable interference with public health, safety, morals, or welfare. The early moral nuisance cases supported both public and private nuisance claims and controlled “houses of prostitution, saloons, and gambling parlors.” Is public nuisance always a crime, or is it properly understood as tort, property, or all three depending upon the targeted conduct? Professor Thomas Merrill contends, “before the publication of the Restatement (Second) of Torts, public nuisance, even when brought as a civil action, was universally understood to be based on the defendant’s maintenance of a condition that was also a crime.” Hence, public nuisance is a public action, not a tort. This conclusion finds support in five features showing that public nuisance is dissimilar to tort law and is instead, public action:

(1) Public nuisance law protects public rights, not private rights. (2) Public nuisance liability was historically said to lie only for activity indictable as a crime. (3) Public nuisance is predominantly enforced by public officials, not private claimants. (4) Public nuisance has traditionally focused on the existence of a condition, not the defendant’s

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25 Merrill, supra note 14, at 11 (noting that public nuisance has traditionally only been a crime and that “civil liability for public nuisance lies only for conduct that is also a crime”); see also John G. Culhane & Jean M. Eggen, Defining a Proper Role for Public Nuisance Law in Municipal Suits Against Gun Sellers: Beyond Rhetoric and Expedience, 52 S. C. L. Rev. 287, 294 (2001) (noting that modernly, claims “may be brought under general criminal nuisance statutes, by authority of statutes criminalizing what had been common-law nuisances, or as civil actions”).

26 Nagle, supra note 12, at 307.

27 Id. at 307–08.

28 Merrill, supra note 14, at 14 (using a hypothetical where the defendant digs a trench that obstructs a highway, constituting a public nuisance, but the ditch also causes injury to a horse and rider, allowing a private suit for personal injury).

29 Nagle, supra note 12, at 273.

30 Id. at 276–77 (discussing moral nuisances based on morally objectionable activity as well as other harmful consequences).

31 Merrill, supra note 14, at 5.

32 Id. at 12.
conduct. (5) Public nuisance liability typically does not result in an award of damages, and never did so in actions brought by public authorities.33

Viewing public nuisance as a crime would make it state action subject to constitutional limitations on any civil liberties implicated. It would also preclude suits brought by private individuals, even if they had a special injury, since private actors cannot prosecute crimes. In Spur Industries, Inc. v. Del E. Webb Development Co., the court formulated a novel remedy when it enjoined the operation of Spur’s cattle feedlot as both a public and a private nuisance, but required the developer, Del Webb, to indemnify Spur for the reasonable cost of moving or shutting down.34 A private individual, Webb, brought the public nuisance claim based on an Arizona statute declaring conditions dangerous to public health to be a public nuisance.35 The condition relied upon in finding a public nuisance was “1. Any condition or place in populous areas which constitutes a breeding place for flies, rodents, mosquitoes and other insects which are capable of carrying and transmitting disease-causing organisms to any person or persons.”36 Under this statute, “an otherwise lawful (and necessary) business may be declared a public nuisance.”37 There is no doubt that the cattle feedlot constituted a public nuisance, harming the health of the citizens of Sun City. However, this otherwise lawful operation was not a prosecutable crime.

B. Public Nuisance and Social Harms

Public nuisance claims have filled in gaps left by the “perceived failures of legislatures and regulatory agencies” to address social harm through tort litigation.38 Professor Donald Gifford defines public interest tort litigation as having one of the following four characteristics:

1. Public interest tort litigation seeks to tackle large social problems instead of seeking to resolve disputes between individual parties (or involving carefully defined and circumscribed groups of plaintiffs or defendants, or both). In this manner, it is similar to any other public interest litigation, but unlike most tort litigation.

2. Public interest tort litigation is a collective action, most often filed on behalf of a collective plaintiff seeking to address harms sustained in the first instance by thousands or millions of individuals. Collective actions may be filed by states as parens patriae,

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33 Merrill, supra note 14, at 19.
35 Id. at 183–84 (citing A.R.S. § 36-601 regarding public nuisances dangerous to public health).
36 Id. at 184.
37 Id.
38 Donald G. Gifford, Climate Change and the Public Law Model of Torts: Reinventing Judicial Restraint Doctrines, 62 S.C. L. REV. 201, 204 (2010) (arguing that this public law model of tort litigation is “faux legislation” by the courts and that judges should use judicial restraint in addressing climate change claims).
municipal governments, or class action representatives. The substantive claim—most often public nuisance—conceives of the harm as a collective harm.

3. Unlike earlier genres of public interest litigation, this new form of litigation purports to derive its authority not from the Constitution or federal statutes, but from judge-made or common law, most often from the most vaguely defined tort, public nuisance.

4. The objective of public interest tort litigation is either to circumvent the regulatory structures already established by the political branches or to impose new regulation where legislative efforts have stalled or otherwise failed.39

Public nuisance served as a gap filler to address the increasingly damaging environmental harm from industrial pollution. The explosion of federal pollution legislation in the 1970s gradually preempted tort litigation and more effectively addressed this social harm. Recent public nuisance cases addressing social harms include lawsuits brought against asbestos manufacturers, lead paint manufacturers to abate or pay the cost of abating the hazards caused by lead paint in homes and buildings, and Monsanto for contamination from products containing polychlorinated biphenyls (PCBs). Litigation against tobacco-product manufacturers, gun manufacturers to hold them liable for gun violence, opioid producers to recover response costs to the opioid crisis, and major contributors to climate change has also relied on public nuisance law.40

II. STATE ACTION

A. The Purpose and Application of the State Action Doctrine

The state action doctrine shields private actions from claims of constitutional violations on the basis that individual liberties receive protection from government actions, not those of fellow citizens. “The Constitution applies only to governmental conduct, usually referred to as ‘state action.’ The behavior of private citizens and corporations is not controlled by the Constitution.”41 Detractors of the doctrine have argued that it is an incoherent doctrine because of “the difficulty of defining the difference between state action and private action and because the distinction is not a sufficient or coherent way to determine when constitutional norms should or should not apply.”42

40 See Lin, supra note 24, at 495–501 (briefly surveying public interest public nuisance cases, other than those involving public harms based on climate change).
42 Isaac Saidel-Goley & Joseph William Singer, Things Invisible to See: State Action and Private Property, 5 TEX. A&M L. REV. 439, 445–46 (2018) (arguing “that the state is always involved when it recognizes, promotes, or enforces a common law rule that regulates relationships”).
The state action doctrine came into being shortly after the ratification of the Fourteenth Amendment in 1868. Its ignominious beginning flowed from the horrific Colfax massacre in Louisiana involving a Southern mob of over 100 armed, white supremacists who massacred 150 African Americans and lynched two African American men, Levi Nelson and Alexander Tillman, who had tried to vote in a local election. The resulting 1875 Supreme Court decision in United States v. Cruikshank, has been castigated for “ensur[ing] that the most basic constitutional rights of Black citizens would be denied well into the 20th century” and leading directly to the race riots in East St. Louis in 1917 and in Omaha, Chicago and other cities two years later; to the abhorrent crimes committed in the 1921 Tulsa race massacre; to the criminal brutality unleashed on African-Americans in Selma and Birmingham, Ala., in the 1960s; to the present-day instances of police and white nationalist violence in Ferguson, Mo., Charlottesville, Va., and now Kenosha, Wis.; to the shameful, plain-sight attempts to suppress the Black vote in the 2020 elections.

The Cruikshank Court reviewed a federal jury’s guilty verdicts against three members of a lynch mob tried for violations of federal law under Congress’ act of 1870, including violating the victims’ “right and privilege peaceably to assemble together.” Federal prosecutors charged the defendants with conspiracy, but not murder since murder was a state, not a federal, offense and Louisiana officials chose not to prosecute. The United States Supreme Court interpreted Section 1 of the Fourteenth Amendment as limiting the scope of its constitutional protections to state action and the convictions of the three white defendants were rescinded. The Court continued to apply the state action doctrine in subsequent decisions to deny a Black defendant’s appeal from a conviction by an all-

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44 United States v. Cruikshank, 92 U.S. 542 (1875).
45 Briggs & Krakauer, supra note 43.
47 Id.
48 Id.
49 Saidel-Goley & Singer, supra note 42, at 448 (identifying the “key constitutional text underlying the state action doctrine” as Section 1, which stated “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”).
50 Briggs & Krakauer, supra note 43.
white jury based on equal protection\textsuperscript{51} and to find that Congress exceeded its authority when enacting the Civil Rights Act of 1875.\textsuperscript{52} As Professor Joseph Singer points out, the collateral damage of the doctrine to African Americans has been substantial, causing Professor Charles Black to observe, “‘Separate but equal’ and ‘no state action’ – these fraternal twins have been the Medusan caryatids upholding racial injustice.”\textsuperscript{53} It is impossible to close your eyes to the doctrine’s history in protecting private discrimination against constitutional scrutiny.\textsuperscript{54}

B. State Action Exceptions

Over time, the Court developed different ways to deal with the difficulties and complexities of applying the state action doctrine by developing three tests to determine whether private actors could be subject to constitutional limitations as a state actor. Some define these tests as follows:

(1) the public function test, which asks whether the private entity performed a function traditionally and exclusively performed by government; (2) the compulsion test, which asks whether the state significantly encouraged or exercised coercive power over the private entity’s actions; and (3) the joint participation test, which asks whether the role of private actors was “pervasively entwined” with public institutions and officials.\textsuperscript{55}

This article accepts that these state action exceptions remain in force, such that the theory proposed here only operates when there is not a state actor or a private actor does not fall within one of the exceptions. Described as the “most famous entanglement case, and perhaps the most famous state action case,” some have viewed \textit{Shelley v. Kraemer}\textsuperscript{56} as applying the joint participation test stated above.\textsuperscript{57} “[T]he Court held that judicial enforcement of private racially restrictive covenants constituted state action in violation of

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\item[51] Virginia v. Rives, 100 U.S. 313, 322–23 (1879).
\item[52] Civil Rights Cases, 109 U.S. 3, 25 (1883).
\item[53] Saidel-Goley & Singer, supra note 42, at 450.
\item[54] See id. at 452 (examining all of the ways in which “the Court’s invention of the state action doctrine played a fundamental role in the maintenance of private racial discrimination, undermining the rights and liberties of millions of African Americans for almost a century between the enactment of the Civil Rights Act of 1875 and the Civil Rights Act of 1964”); \textit{see also} John Fee, \textit{The Formal State Action Doctrine and Free Speech Analysis}, 83 N.C. L. Rev. 569, 576–77 (2005) (noting that the state action doctrine has had “harmful effects on the politically powerless” and recognizing its past and recent history “as a primary defense for private racist acts”).
\item[56] 334 U.S. 1 (1948).
\item[57] See Saidel-Goley & Singer, supra note 42, at 465.
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of the Equal Protection Clause.”

It is not clear that the Shelley decision fell within one of the recognized exceptions making private action into state action. If viewed instead as finding state action based on the judiciary’s enforcement of a private claim, Shelley put the viability of the state action doctrine in doubt as to when private state law actions in tort, contract, and property would be subject to constitutional scrutiny. In addition, it cleared the way for potentially finding a “judicial taking” when a court decides a case involving a change to common law that results in a diminution of private property values.

C. Speech Torts and State Action

The First Amendment cases involving civil liability do not appear to fall neatly into any of the three tests, discussed above, to determine whether a private actor should be subject to constitutional limitations as a state actor. Instead, scholars have identified five approaches to resolve how to apply the First Amendment in civil liability cases:

1. the generally applicable law approach, where the First Amendment does not require scrutiny for civil liability imposed by laws of general applicability;
2. the consensual waiver approach, where instances in which people consent to relinquishing their right to free speech define the areas where the First Amendment does not require scrutiny;
3. the nature of the injury approach, where cases involving damages for reputational harm trigger full First Amendment protection;
4. the public concern approach, in which the First Amendment provides full protection when the information is of public concern; and
5. the First Amendment balancing approach, where all civil liability implicating free speech would trigger full First Amendment protection and all cases would be subjected to First Amendment scrutiny.

New York Times Co. v. Sullivan established the foundation for First Amendment protection against tort claims based on harmful speech, such as defamation, invasion of privacy, intentional infliction of emotional distress, the right of publicity, and negligence. In Sullivan, a public official brought
a libel action against those who criticized his official conduct. The Court held that the defendants, individuals who purchased an allegedly libelous advertisement and the New York Times as the publisher, could use the First Amendment as a valid defense to this civil lawsuit between private parties because the state court applied a state law, which imposes "invalid restrictions on [ ] constitutional freedoms of speech and press." The Court stated that "[t]he test is not the form in which state power has been applied, but, whatever the form, whether such power has in fact been exercised."

Finding that "the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials" was subject to First Amendment scrutiny, the Sullivan Court held that the Constitution protected an advertisement "as an expression of grievance and protest on one of the major public issues of our time." The federal rule established in Sullivan "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

Following the Sullivan decision, speech-tort jurisprudence sought to balance the opposing interests of the First Amendment’s protection of speech and the state’s imposition of tort liability. In Curtis Publishing Co. v. Butts, the Court extended Sullivan’s prohibition against a public official recovering for a speech tort into constitutional protection for libel claims raised by public figures. Eventually, the Court in Gertz v. Robert Welch extended at least some constitutional protection against libel claims raised by private figures. This further weakened any connection to government abuse concerns and the state action doctrine. Yet, in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., the Court limited constitutional constraints on defamation cases that involve private figures suing for allegedly defamatory statements of private concern. The Court later applied the defamation framework to other speech-tort cases, including false light invasion of privacy and intentional

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64 Sullivan, 376 U.S. at 256.
65 Id. at 265.
66 Id. (explaining further that "[t]he law matters not that the law has been applied in a civil action and that it is common law only, though supplemented by statute.").
67 Id. at 268.
68 Id. at 271.
69 Id. at 279–80.
70 David Han, Managing Constitutional Boundaries in Speech-Tort Jurisprudence, 69 DePaul L. Rev. 495, 504 (2020).
73 See Han, supra note 70, at 503 (contending that after Sullivan, "the Court’s rhetoric focused on the risk of undue chilling effects on public discourse rather than the risk of government abuse.").
74 Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985); see also Han, supra note 70, at 513–14.
infliction of emotional distress.\textsuperscript{75} Meanwhile, lower courts applied the framework to the “right of publicity and intentional interference with contractual relations and prospective economic relations.”\textsuperscript{76}

It has been difficult to understand how courts, including the U.S. Supreme Court, have applied the state action doctrine (or not) to civil liability cases.\textsuperscript{77} For example, in \textit{Cardtoons v. Major League Baseball Players Association}, the Tenth Circuit held that a company’s production of parody trading cards featuring active major league baseball players infringed the players’ right of publicity.\textsuperscript{78} However, in balancing Cardtoons’s speech rights against the players’ property rights, the court held that “the justifications for the right of publicity are not nearly as compelling as those offered for other forms of intellectual property.”\textsuperscript{79} Thus, when a court balances the players’ rights of publicity against the parody cards, which serve as “an important form of entertainment and social commentary,” the cards “deserve First Amendment protection.”\textsuperscript{80} Unlike some First Amendment cases involving speech tort liability, the \textit{Cardtoons} court explicitly established that state action was present in the case because Oklahoma, similar to California, codified the right of publicity and statutorily authorized a civil suit for infringement of that right:

Because the parody trading cards infringe upon MLBPA’s property rights, we must consider whether Cardtoons has a countervailing First Amendment right to publish the cards. The First Amendment only protects speech from regulation by the government. Although this is a civil action between private parties, it involves application of a state statute that Cardtoons claims imposes restrictions on its right of free expression. Application of that statute thus satisfies the state action requirement of Cardtoons’ First Amendment claim.\textsuperscript{81}

In another private tort suit for civil liability involving speech, the Court in \textit{Snyder v. Phelps} set aside a jury verdict imposing tort liability for the intentional infliction of emotional distress against the founder of the

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  \item \textsuperscript{75} Han, supra note 70, at 514 (first citing Time, Inc. v. Hill, 385 U.S. 374, 390–91 (1967); and then citing Hustler v. Falwell, 485 U.S. 46, 56 (1988)).
  \item \textsuperscript{76} \textit{Id.} at 514 & nn. 100–01 (citation omitted); see Jefferson Cnty. Sch. Dist. No. R-1 v. Moody’s Inv’rs Servs., 175 F.3d 848, 856–58 (10th Cir. 1999); Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1185–86 (9th Cir. 2001); Unelko Corp. v. Rooney, 912 F.2d 1049, 1058 (9th Cir. 1990).
  \item \textsuperscript{77} See Nathan B. Oman & Jason M. Solomon, \textit{The Supreme Court’s Theory of Private Law}, 62 DUKE L. J. 1109, 1113 (2013) (arguing “that the conception of private law as government regulation in Snyder arises from a combination of (1) the doctrinal tools that judges use in First Amendment cases, (2) the unitary nature of the state-action doctrine, and (3) the influence of instrumentalism, specifically in obscuring the plaintiff’s agency and the state interest in redress, and in privileging a particular view of compensation”).
  \item \textsuperscript{78} Cardtoons v. Major League Baseball Players Ass’n, 95 F.3d 959, 968 (10th Cir. 1996).
  \item \textsuperscript{79} \textit{Id.} at 976.
  \item \textsuperscript{80} \textit{Id.}
  \item \textsuperscript{81} \textit{Id.} at 968.
\end{itemize}
Westboro Baptist Church. The jury found in favor of a fallen soldier’s father for emotional distress and for intrusion upon seclusion caused by the church’s protests at his son’s funeral. However, the Court determined that Westboro’s “speech was entitled to ‘special protection’ under the First Amendment” because it “was at a public place on a matter of public concern.” Nowhere in the Court’s opinion did it mention the state action doctrine. Instead, the Court stated that the Free Speech Clause of the First Amendment “can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress.” Justice Roberts’ opinion ignored the doctrinal distinction between whether the plaintiff or defendant in a speech tort case is a public or private figure when addressing conflicts between the First Amendment and tort liability.

The Snyder Court used the traditional First Amendment approach applied to direct government regulation and analyzed the tort claim as “no different than direct government regulation.” In contrast, the trial court in Snyder responded to Westboro’s claim of absolute First Amendment protection and noted, “the First Amendment does not afford absolute protection to individuals committing acts directed at other private individuals.” Review of the trial court decision by the Fourth Circuit resulted in a reversal with the firm statement that “[i]t is well established that tort liability under state law, even in the context of litigation between private parties, is circumscribed by the First Amendment.”

While some have argued for the demise of the state-action doctrine, others posit “more attention ought to be paid to the genuinely private aspect of private-law actions” so that courts balance private interests and

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83 Id. The church protesters carried signs stating “God Hates the USA/Thank God for 9/11,” “America is Doomed,” “Don’t Pray for the USA,” “Thank God for IEDs,” “Thank God for Dead Soldiers,” “Pope in Hell,” “Priests Rape Boys,” “God Hates Fags,” “You’re Going to Hell,” and “God Hates You.” Id. at 448.
84 Id. at 458.
85 Id. at 451 (citing Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988) (finding that public figure may not “recover damages for emotional harm caused by the publication of an ad parody offensive to him.”)).
86 See Oman & Solomon, supra note 77, at 1147–48 (explaining that “it matters whether plaintiffs like Snyder are ‘public figures’ or not . . . . But Justice Roberts’s opinion ignores entirely this issue, despite the fact that it was the ground on which the district court ruled that the verdict should stand.”).
87 Han, supra note 70, at 516.
90 See generally Chemerinsky, supra note 41 at 556 (arguing for the elimination of the state action doctrine and stating “[t]his is certainly not the first article to propose the elimination of the state action doctrine.”).
constitutional values based on “the degree and kind of state involvement” implicated.\footnote{Oman & Solomon, supra note 77, at 1165 (emphasis omitted) (suggesting that “[i]f the state involvement consists of making available a common-law action and enforcing a jury verdict, then the constitutional concerns should be less significant than those raised in litigation involving a state statute, agency action, or direct action by government officials.”).} In addition, the identity of the plaintiff as a private or public figure should help determine the level of First Amendment protection provided to the speaker.\footnote{Id. at 1166.} State courts have subsequently interpreted Snyder as “categorically prohibiting tort liability when the allegedly tortious act in question is speech on a matter of public concern.”\footnote{Han, supra note 70, at 517–18 (citing Jeffrey Steven Gordon, Silencing State Courts, 27 WM. & MARY BILL RTS. J. 1, 32–45 (2018)).}

Typically, private parties bring tort suits, and the government is not involved. Thus, to find the state action necessary to justify constitutional scrutiny, some courts have theorized that applying a state rule of law constitutes state action.\footnote{Id. at 510–11 (citing Sullivan, 376 U.S. at 265).} The Court used this theory of state action for Shelley,\footnote{Shelley v. Kraemer, 334 U.S. 1, 18, 19, 20-21 (1948) (holding that state enforcement of a private covenant was a state action).} Sullivan,\footnote{New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) (holding that a private party, the New York Times, was entitled to protection under the Fourteenth Amendment for a speech tort).} and Cohen\footnote{Cohen v. Cowles Media Co., 501 U.S. 663, 668 (1991) (contending that the state-law doctrine of promissory estoppel may be applied to First Amendment claims through the Fourteenth Amendment).} to justify First and Fourteenth Amendment scrutiny of a private covenant violation, a speech tort, and a contract claim. However, in each of these cases, the state was providing recourse for private injury through private law, not directly enforcing government action.\footnote{See supra notes 95–97 and accompanying text; see generally Han, supra note 70, at 510–11 (“[T]he requisite state action comes only in the form of the court’s application of a state rule of law, rather than from a direct act of enforcement by the government upon an individual”) (citations omitted).} Courts should be viewed as an “impartial arbiter of the dispute, working within a doctrinal context” instead of as a governmental actor suspected of abusing constitutional liberties.\footnote{Han, supra note 70, at 521.} While there may be the potential for government abuse in tort cases by courts developing the common law, such potential abuse is not equivalent to direct state action given the “courts’ very different institutional roles as compared to the political branches.”\footnote{Id. at 522.}

D. Contract Claims and State Action

Civil liability with speech implications is also present in contract and property law, such as homeowner association and private media restrictions on speech.\footnote{Solove & Richards, supra note 61, at 1652.} However, some scholars have observed that the rules for
applying the First Amendment to civil liability implicating free speech are contradictory.\textsuperscript{102} While \textit{Sullivan} applied First Amendment protection to a tort claim against a newspaper involving speech, the Court in \textit{Cohen v. Cowles Media Co.},\textsuperscript{103} gave no First Amendment protection to a newspaper against a contract claim involving newsworthy speech.\textsuperscript{104} The \textit{Cohen} Court found that state action was present in the enforcement of the agreement, but it determined that the contract claim against the press did not merit a constitutional defense.\textsuperscript{105}

Indeed, the \textit{Cohen} Court first addressed “whether a private cause of action for promissory estoppel involves ‘state action’ within the meaning of the Fourteenth Amendment such that the protections of the First Amendment are triggered.”\textsuperscript{106} Relying on the rationale of \textit{Sullivan} and subsequent cases, the Court concluded (and the dissent agreed)\textsuperscript{107} that state action is involved because “the application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes ‘state action’ under the Fourteenth Amendment.”\textsuperscript{108} Nevertheless, the Court determined that the situation in \textit{Cohen}, involving a plaintiff’s promissory estoppel claim for damages against a newspaper for breaching a promise of confidentiality in exchange for newsworthy information, did not warrant First Amendment protection.\textsuperscript{109} It held that the Minnesota doctrine of promissory estoppel is a law of general applicability enforceable against the press, which holds no special immunity, and the level of scrutiny is the same as would be applied against other entities.\textsuperscript{110}

The \textit{Cohen} Court found state action in the Minnesota courts’ enforcement of legal obligations under a state-law theory of promissory estoppel. However, a Washington state court in \textit{State v. Noah} distinguished \textit{Cohen} as a situation where “the state created the duty before it enforced that duty.”\textsuperscript{111} \textit{Noah} involved a defamation suit between private individuals where the parties knowingly and voluntarily entered into a private settlement agreement.\textsuperscript{112} One of the parties, initially sued for defamation, renounced the agreement claiming that it was unconstitutional because “a person cannot contract away their First Amendment rights.”\textsuperscript{113} The \textit{Noah} court determined

\begin{itemize}
  \item \textsuperscript{102} Id.
  \item \textsuperscript{103} Cohen, 501 U.S. at 670.
  \item \textsuperscript{104} Solove & Richards, supra note 61, at 1653.
  \item \textsuperscript{105} Cohen, 501 U.S. at 668, 670.
  \item \textsuperscript{106} Id. at 668.
  \item \textsuperscript{107} Id. at 672 (Blackmun, J., dissenting) (“I agree with the Court that the decision of the Supreme Court of Minnesota rested on federal grounds and that the judicial enforcement of petitioner’s promissory estoppel claim constitutes state action under the Fourteenth Amendment.”).
  \item \textsuperscript{108} Id. at 668 (majority opinion).
  \item \textsuperscript{109} Id. at 665.
  \item \textsuperscript{110} Id. at 670.
  \item \textsuperscript{111} State v. Noah, 9 P.3d 858, 871 (2000).
  \item \textsuperscript{112} Id. at 864.
  \item \textsuperscript{113} Id. at 869.
\end{itemize}
that “[u]nlike Cohen, judicial enforcement of the settlement agreement does not require application of a state common law doctrine to create the duty enforced.”\textsuperscript{114} The court held that a First Amendment violation requires state action and that “[s]tate enforcement of a contract between two private parties is not state action, even where one party’s free speech rights are restricted by that agreement.”\textsuperscript{115} The Noah court also distinguished the state action in Shelley v. Kraemer as “more than mere judicial enforcement” of an agreement between two private parties.\textsuperscript{116} Because the racially restrictive covenants “did not merely involve two private parties: its exclusionary function against all African-Americans required state action.”\textsuperscript{117}

Arbitration agreements are private contracts, and their enforcement may not trigger constitutional protection under the Fourteenth Amendment.\textsuperscript{118} Many scholars adhere to the view that the state action doctrine is “a conceptual disaster area,”\textsuperscript{119} but some have argued that “conduct by private arbitrators during private arbitration proceedings” may constitute state action under the “public function” exception as binding conflict resolution controlled by the state.\textsuperscript{120} Nevertheless, courts have uniformly rejected the view that private arbitration constitutes state action and, consequently, the Fourteenth Amendment’s guarantee of procedural due process does not protect parties in arbitration from questionable arbitration procedures and arbitrator misconduct.\textsuperscript{121} For example, in Davis v. Prudential Securities, Inc., the Eleventh Circuit reviewed a challenge to an arbitration award and agreed “with the numerous courts that have held that the state action element of a due process claim is absent in private arbitration cases.”\textsuperscript{122}

Employees of religious institutions have filed breach of contract claims for termination without good cause. For example, in DeBruin v. St. Patrick Congregation, the plaintiff, hired by a Catholic church as the Director of Faith Formation, alleged that the church breached her employment contract by terminating her employment “without good and sufficient cause as that term is defined by the Contract of Employment.”\textsuperscript{123} The Wisconsin Supreme Court reasoned that, similar to the Shelley v. Kraemer decision, which

\begin{itemize}
\item \textsuperscript{114} Id. at 871.
\item \textsuperscript{115} Id.
\item \textsuperscript{116} Noah, 9 P.3d at 870.
\item \textsuperscript{117} Id.
\item \textsuperscript{119} Id. at 3036 (quoting Charles L. Black, Jr., The Supreme Court, 1966 Term – Foreword: “State Action,” Equal Protection, and California’s Proposition 14, 81 HARV. L. REV. 69, 95 (1967)).
\item \textsuperscript{120} Id. at 3036–37.
\item \textsuperscript{121} Id. at 3037–38 (citing CHRISTOPHER DRAHOZAL, COMMERCIAL ARBITRATION: CASES AND PROBLEMS 18 (3d ed. 2013)). See, e.g., Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc., 957 F. Supp. 1460, 1468 (N.D. Ill. 1997) (citing Davis v. Prudential Sec., Inc., 59 F.3d 1186, 1191 (11th Cir. 1995)) (“courts have consistently held that private arbitration lacks any element of state action”).
\item \textsuperscript{122} Davis v. Prudential Securities, Inc., 59 F.3d 1186, 1191 (11th Cir. 1995).
\item \textsuperscript{123} DeBruin v. St. Patrick Congregation, 816 N.W.2d 878, 883 (2012).
\end{itemize}
required state action by the Court to enforce a discriminatory private covenant, DeBruin’s employment claim would require “state courts to engage in activity that the Constitution prohibits.” 124 The Wisconsin court reviewed DeBruin’s complaint and observed, “[DeBruin] seeks court participation in enforcing a private contract against St. Patrick, as Kraemer did against Shelley.” 125 The court concluded that DeBruin’s complaint failed to state a claim because “the State is effectively enjoined by the First Amendment from interference with such ecclesiastical decisions.” 126 The DeBruin court relied extensively on the Shelley decision to find unconstitutional state action if a court enforces a private contract between a ministerial employee and a religious institution. 127

Private restrictive covenants are also private contracts that may “run with the land” as a property interest, but only the enforcement of racially restrictive covenants has constituted state action under the Shelley v. Kraemer view that court enforcement of a private covenant is state action that violates equal protection rights under the Fourteenth Amendment. 128 Private restrictive covenants that do not discriminate based on race are not subject to constitutional scrutiny unless viewed as a contract made in violation of public policy. 129

There are many examples of homeowners trying unsuccessfully to defend themselves against the enforcement of homeowner association rules (private covenants) by asserting constitutional liberties. 130 In Linn Valley Lakes Property Owners Ass’n v. Brockway, a homeowner association sought an injunction against the property owners requiring them to remove a “for sale” sign from their property because it violated one of developer’s

124 Id. at 885–86.
125 Id. at 887.
126 Id. at 890.
127 See id. at 885, 887. See also Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., 565 U.S. 171, 188–89 (2012) (without referring once to Shelley, the Court held that under the “ministerial exception,” grounded in the First Amendment, employment discrimination laws do not apply to employment disputes between a religious institution and its ministers).
128 See supra note 38 and accompanying text.
129 See, e.g., State v. Noah, 9 P.3d 858, 871 (2000) (citing RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. L. INST. 1981) for the rule that “[c]ontract terms are unenforceable on grounds of public policy when the interest in its enforcement is clearly outweighed by a public policy against the enforcement of such terms,” but noting that the law favors settlement of litigation disputes); Committee for a Better Twin Rivers v. Twin Rivers Homeowners’ Ass’n, 929 A.2d 1060, 1075 (2007) (restrictive covenants that violate public policy, such as those that unreasonably limit speech and association rights, may be void as unenforceable).
130 See, e.g., Jacobs, supra note 8, at 995–96 (noting that although the issue of HOA rules prohibiting the possession of firearms has not yet been litigated, an attempt to enforce such a restriction could be subject to a Second Amendment defense). See also, Timothy Zick, The Second Amendment as a Fundamental Right, 46 HASTINGS CONST. L.Q. 621, 626 (2019) (predicting that “[t]he right to keep and bear arms is likely to operate much as freedom of speech and other fundamental rights do—as a strong trump in some cases, but a right that is subject to certain limits in the name of other rights or public interests.”).
Declaration of Covenants and Restrictions that forbid signs from being “placed or maintained on any Lot.” The property owners relied on *Shelley v. Kraemer* and asserted that the enforcement of the restrictive covenant would constitute state action in violation of their constitutional rights of free speech. The Kansas Supreme Court distinguished the facts from those in *Shelley* and held that “a private agreement restricting signs in a residential neighborhood, and enforcement thereof does not constitute improper state action.”

Still, some states have adopted more expansive protection of constitutional rights than those recognized by the Federal Constitution. As discussed below, the U.S. Supreme Court in *PruneYard Shopping Ctr. v. Robins* allowed California to expand First Amendment protection under its state constitution to those expressing speech rights on private property open to the public. Likewise, New Jersey protects an individual’s freedom of speech, not only against state action, but also in situations where a private entity has unreasonably or oppressively restricted free speech. In *Mazdabrook Commons Homeowners Ass’n v. Kahn*, New Jersey extended First Amendment protection under its state constitution to a homeowner who violated a homeowner association rule by posting two political signs at his home in support of his candidacy for city council. After examining the three factors developed in *State v. Schmid* to determine whether the state constitution would protect private speech against private restriction, the court in *Kahn* found that “the Association’s sign policy, which prevented Khan from posting a political sign on his home, violates the State Constitution’s guarantee of free speech.”

The *Kahn* court relied, in part, on the Court’s decision in *City of Ladue v. Gilleo*, which invalidated a municipal sign restriction because it limited residential signs, which “have long been an...
important and distinct medium of expression”—“a venerable means of communication that is both unique and important.”

E. Property Rules and State Action

It appears that the Supreme Court has “rarely” applied First and Fourteenth Amendment restrictions to private actions involving property law. These rare examples include Marsh v. Alabama, where the Court subjected a company town to First Amendment limitations based on the town’s assumption of a public function when company agents attempted to exclude religious canvassers from public areas, and Shelley v. Kraemer, discussed above. The Shelley decision has subsequently been limited to its facts, as has the Marsh decision.

So why are certain forms of civil liability, such as tort law, subject to First Amendment scrutiny while other forms, such as contract and property law, are not? Adding confusion to the situation is the fact that the lines are blurry between tort, contract, and property law. Given that the Court in Snyder v. Phelps set forth “a broad rule that tort liability cannot be imposed with respect to speech on a matter of public concern,” is the difference that it is a tort involving expression versus a contract or property claim involving expression? On the other hand, could it be that private defendants may use the constitution as a shield against private actors bringing common law claims, but not as a sword by private plaintiffs alleging constitutional violations against private actors?

Trespass and nuisance are property-based torts and may provide guidance as to how courts should apply the state action doctrine. Courts have applied property rules to protect a private owner’s right to exclude others and restrict the exercise of alleged constitutional rights by non-owners. Before returning to a discussion of nuisance cases in Part III, this section will explore

139 Id. at 518 (quoting City of Ladue v. Gilleo, 512 U.S. 43, 54–55 (1994)).
140 Solove & Richards, supra note 61, at 1663.
142 Solove & Richards, supra note 61, at 1664; see also Moss v. Univ. of Notre Dame Du Lac, 2016 WL 5394493, at *4–5 (N.D. Ind. 2016) (refusing to dismiss claim alleging violation of the First and Fourteenth Amendments from denial of a promotion and a demotion on the basis of race based on lack of state action if plaintiff can show that Notre Dame, a private university, is a company town similar to the facts in Marsh v. Alabama).
143 Solove & Richards, supra note 61, at 1665.
144 Id.
145 Han, supra note 70, at 536 (suggesting that the Court should take “a more open-ended and contextualized analysis” to speech torts that could conclude that even though the speech is on a matter of public concern “the risks of government abuse and impermissible chilling effects in the case do not outweigh the state’s interests in imposing tort liability”).
how courts have applied the state action doctrine to protect private property ownership against trespass.

The trespass cases discussed in this Section fall into two different categories. The first category is where private property owners exclude private individuals from entry onto their property to exercise speech protected by the First Amendment. As discussed below, the U.S. Supreme Court allows a First Amendment defense against trespass only where the private property is serving as a company town. Otherwise, private individuals may not defend against trespass charges based on the First Amendment, even when the private property, such as a shopping center, is generally open to the public. However, California has interpreted its own constitution to allow trespassers to use First Amendment defenses to avoid liability for trespass, finding state action in the property owners opening property for public use.

The second trespass category is where the state, by regulation or other action, requires a private property owner to allow access to private individuals for more than an occasional trespass. The Court has found that such state-required access constitutes a *per se* physical taking requiring just compensation under the Fifth or Fourteenth Amendment. The state action in providing access to private property allows the private property owner to assert a constitutional defense against a trespasser’s claim of unfair labor practice and allege an inverse condemnation claim against the state action requiring such access.

The first category of trespass cases begins with *Marsh v. Alabama*, where a shipbuilding corporation owned the town of Chickasaw.149 However, the town was “accessible to and freely used by the public in general and there is nothing to distinguish [it] from any other town and shopping center except the fact that the title to the property belongs to a private corporation.”150 Upon entry to the town, security warned a Jehovah’s Witness that she could not distribute religious writings and arrested her for criminal trespass when she refused to leave the sidewalk.151 The Court noted that “[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.”152 It held that the State’s action in imposing criminal punishment for distributing religious literature limitation in a company-owned town was in violation of the First and Fourteenth Amendments.153 By opening up its property for the general public use, the

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150 *Id.* at 503.
151 *Id.* at 503–04 (she was convicted after defending against the claim based on her right to freedom of press and religion and appealed to the Supreme Court after the Alabama Court of Appeals affirmed her conviction and the State Supreme Court denied certiorari).
152 *Id.* at 506.
153 *Id.* at 508–09.
private entity could not restrict the First Amendment rights of those who used the property.

Subsequently, the Court in Lloyd Corp. v. Tanner and Hudgens v. N.L.R.B. abrogated Marsh and confined Marsh’s holding to situations such as a company town where the private entity acts as a municipality within the full scope of the police power. In Lloyd, a retail shopping mall in Portland, Oregon had a strictly enforced policy against distributing handbills in the mall to protect its shoppers from annoyance and litter. Individuals protesting the draft and the Vietnam War distributed handbills in the mall until security guards told them to either stop distributing the handbills or face arrest for trespassing. Subsequently, protestors filed suit seeking declaratory and injunctive relief and the Ninth Circuit Court of Appeals affirmed the trial court’s decision that “Lloyd’s ‘rule prohibiting the distribution of handbills within the Mall violates . . . First Amendment rights.’” On review, the Supreme Court determined that Lloyd did not dedicate its Fifth and Fourteenth Amendment rights as a private shopping center to allow First Amendment rights for all people, and reversed and remanded the case to the Court of Appeals to vacate the injunction.

In Hudgens, warehouse employees protested against a retail store located in a retail mall and the shopping center manager threatened them with arrest for trespassing. The union filed an unfair labor practice charge against the owner of the shopping center, and the case ultimately ended up in the Supreme Court after the Fifth Circuit remanded it to the National Labor Relations Board following the Court’s decision in the Lloyd case. The Hudgens Court found that, similar to the Lloyd decision where individuals distributing handbills concerning Vietnam did not have a First Amendment right to enter the shopping center, neither did the picketers in Hudgens have the right to enter the Hudgens mall to advertise their strike against a shoe retail store. Thus, the combined holdings of Lloyd and Hudgens established that the First Amendment does not protect individual speech rights against exclusion by private shopping centers, even though the centers were open to the public.

Some courts have similarly resisted a Second Amendment defense against a private property trespass claim by relying on the property owner’s right to exclude trespassers. For example, in Georgia Carry Org. Inc. v. Georgia, plaintiffs challenged the Georgia “Carry Law” that restricted gun owners from carrying a handgun in eight specific locations, including houses

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155 Id. at 556.
156 Id. at 556–57.
157 Id. at 570.
159 Id. at 509–510.
160 Id. at 520–21.
161 See Jacobs, supra note 8, at 994–95.
of worship, as violating both their First Amendment free exercise rights and their Second Amendment right to bear arms.\textsuperscript{162} First, the Eleventh Circuit concluded that plaintiffs did not state a Free Exercise claim because the factual allegations were not sufficient to allege “that the Carry Law imposes a constitutionally impermissible burden on one of Plaintiffs’ sincerely held religious beliefs” – their personal preference to carry a gun to act in self-defense is a secular purpose.\textsuperscript{163} Second, the conflict between private property rights and the Second Amendment is resolved in favor of the property owner, who has the right to determine whether to allow guns on its premises.\textsuperscript{164}

California courts treated First Amendment rights to private property space more expansively than did the U.S. Supreme Court, which eventually upheld California’s right to expand First Amendment rights under its state law.\textsuperscript{165} Beginning with \textit{Robins v. PruneYard Shopping Center} in 1979, the California Supreme Court relied on its state constitution to support a broad interpretation of the need to protect speech on private property.\textsuperscript{166} The \textit{Robins} court required a shopping mall to allow expressive activity on its property so long as it was speech activity protected by state law.\textsuperscript{167} While the California Supreme Court did not address the state action doctrine in \textit{Robins}, in \textit{Golden Gateway Center v. Golden Gateway Tenants Ass’n}, the court held that California free speech protection requires state action and allowing the public free and open access to the private property is the state action that meets the requirement.\textsuperscript{168} In \textit{Fashion Valley Mall, LLC v. NLRB}, the California Supreme Court again upheld the right to engage in expressive activity on private property and prevented a shopping center from requiring a permit to allow people to boycott in front of one of the mall’s stores.\textsuperscript{169}

The second category of trespass cases involves state regulation that requires a private property owner to grant access. In another case from California, \textit{Cedar Point Nursery v. Hassid} came before the U.S. Supreme Court in 2021 to determine whether a California regulation requiring agricultural employers to allow union organizers to access their private

\textsuperscript{162} GeorgiaCarry.org, Inc. v. Georgia, 687 F.3d 1244, 1248–49 (11th Cir. 2012).
\textsuperscript{163} \textit{Id.} at 1258-59.
\textsuperscript{164} \textit{Id.} at 1266. \textit{But see}, Ramsey Winch, Inc. v. Henry, 555 F.3d 1199, 1202, 1211 (10th Cir.) (Oklahoma law “hold[ing] employers criminally liable for prohibiting employees from storing firearms in locked vehicles on company property” was not a violation of Plaintiffs’ due process right to exclude others from private property as it was rationally related to increasing safety and expanding the right to bear arms) (citing \textit{PruneYard}, 447 U.S. at 81 for the proposition “that the state may exercise its police power to adopt individual liberties more expansive than those conferred by the Federal Constitution”).
\textsuperscript{166} \textit{Id.}; \textit{Robins v. PruneYard Shopping Ctr.}, 592 P.2d 341 (Cal. 1979).
\textsuperscript{168} \textit{Golden Gateway Ctr. v. Golden Gateway Tenants Assn.}, 29 P.3d 797, 810 (Cal. 2001).
\textsuperscript{169} \textit{Fashion Valley Mall, LLC v. Nat’l Lab. Relts. Bd.}, 172 P.3d 742, 749, 754 (Cal. 2007); \textit{see State Action and the Public/Private Distinction, supra} note 164, at 1306–09 (illustrating how some other states have also recognized limited expressive rights in private shopping malls).
property “constitutes a per se physical taking under the Fifth and Fourteenth Amendments.” The Court relied on previous decisions where private property owners alleged per se takings based on the physical occupation of their property. While “[t]he Board and the dissent argue[d] that PruneYard shows that limited rights of access to private property should be evaluated as regulatory [under Penn Central] rather than per se takings,” even the dissent noted that the Loretto Court viewed “the ‘invasion’ in PruneYard as ‘temporary and limited in nature.’”

The Cedar Point Court distinguished between a trespass and a taking based on the difference between “a mere occasional trespass” and the consideration of factors such as “the duration of the invasion, the degree to which it was intended or foreseeable, and the character of the land at issue.” In this case, the employer was able to defend itself against an unfair labor practice based on its Fifth Amendment right to just compensation for a physical invasion of its private property by a state regulation requiring access by union organizers. This state-imposed access constituted more than a trespass because of the duration and character of the access. Unlike the PruneYard decision, where the shopping mall allowed the public on its property, the growers in Cedar Point did not allow the public on its property.

The Cedar Point Court’s reliance on Kaiser Aetna v. United States was particularly persuasive as the Kaiser Aetna Court held that the appropriation of an easement to allow public access to a private marina because it had connected to navigable water was determined to be a taking. The dissent, in contrast, argued that the access regulation should be analyzed under Penn Central instead of Loretto, because Kaiser Aetna “applied a Penn Central, not a per se, analysis.” Please note, the per se analysis was adopted by Loretto almost three years after Kaiser Aetna was decided; thus, Kaiser Aetna could not have relied upon Loretto’s per se takings analysis. Instead, Kaiser Aetna relied on the physical invasion cases of United States v. Causby and Portsmouth Co. v. United States, the same cases relied upon by the Cedar Point majority, and not the Penn Central analysis as the dissent asserted.

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172 Id. at 2076 (disagreeing that the PruneYard facts are similar to the growers’ properties because PruneYard “was open to the public, welcoming some 25,000 patrons a day”).
173 Id. at 2084 (Breyer, J., dissenting) (citing Loretto, 458 U.S. at 434).
174 Id. at 2078–79 (discussing Arkansas Game and Fish Comm’n v. United States, 568 U.S. 23 (2012), which involved a temporary government-induced flooding).
175 Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2073 (citing Kaiser Aetna, 444 U.S 164 (1979)).
176 141 S. Ct. at 2086 (Breyer, J., dissenting).
177 U.S. v. Causby, 328 U.S. 256 (1946).
This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners’ private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina . . . And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation.\footnote{179 Kaiser Aetna, 444 U.S. at 180.}

These two categories of trespass cases involving constitutional rights illustrate how the Court does not allow a private actor to assert a First Amendment or other constitutional defenses against a common law trespass claim by a private landowner.\footnote{180 California courts have allowed a First Amendment defense against trespass claims finding state action in the owner’s act of opening the property to the public. See Golden Gateway Ctr. v. Golden Gateway Tenants Ass’n, 29 P.3d 797, 810 (Cal. 2001).} However, when state regulation requires a private entity to open its property to private actors, the private entity may defend its property rights under the Fifth Amendment, if the access required is substantial and more than a mere trespass. Thus far, we have seen that while a private actor may use the First Amendment as a shield to defend against speech torts, the same shield is not available to a private actor seeking to use their constitutional rights as a shield against a trespass tort.

Private litigants have attempted to use the First Amendment as a sword against private media entities to claim that the private media is restricting and censoring private speech. Courts have held that private media entities are not subject to First Amendment restrictions as they are not state actors.\footnote{181 See, e.g., Prager Univ. v. Google LLC, 951 F.3d 991, 999 (9th Cir. 2020) (holding that “state action doctrine precludes constitutional scrutiny of YouTube’s content moderation” and dismissing PragerU’s First Amendment claim).} Relying on property access concepts, rather than speech torts, the Court has allowed private entities operating public access channels to exercise discretion in deciding who has access to their property and what they may say. In Manhattan Community Access Corporation v. Halleck,\footnote{182 Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921 (2019).} the Court relied on Hudgens, which said “to hold that private property owners providing a forum for speech are constrained by the First Amendment would be ‘to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country.’”\footnote{183 Id. at 1931 (quoting Hudgens v. NLRB, 424 U.S. 507, 517 (1975)).} Instead, private property owners and lessees should have the right to exercise control over the speakers and speech that occurs on their property without constitutional constraint.\footnote{184 Id. at 1930–31.} The Halleck Court determined that receiving a government license, contract, or monopoly “does not convert a private entity into a state actor–unless the private entity is performing a traditional, exclusive public function.”\footnote{185 Id. at 1931.} It concluded that Manhattan Neighborhood Network (MNN), designated by New York City to operate public access
channels, is a private actor and is not constrained by First Amendment rights in deciding who speaks and what they say on its public access channels.\textsuperscript{186} The \textit{Halleck} dissent argued that MNN should be subject to First Amendment restrictions because the City delegated to MNN the administration of a public forum and MNN discriminated against speech based on viewpoint.\textsuperscript{187} However, the majority rejected this attempt to invoke the state action exception based on the public function test, which asks whether the private entity performed a function traditionally and exclusively performed by government.\textsuperscript{188} Instead, the Court found that New York City has no property interest in the public access channels that it could delegate and thus, MNN cannot be a state actor under the public function exception.\textsuperscript{189} Because MNN is not a state actor, the producers of public access programming cannot use the First Amendment as a sword to gain access to MNN’s private media platform.\textsuperscript{190} This setting differs from the situation where a private defendant asserts a violation of constitutional rights as a shield against a private plaintiff’s cause of action.\textsuperscript{191}

III. PROTECTING CONSTITUTIONAL LIBERTIES FROM NUISANCE CLAIMS

In addition to exploring state action in relation to property claims, one of the purposes of this Article is to determine the extent to which courts have used the state action doctrine in public nuisance cases to subject statutory or common law tort claims to constitutional scrutiny. Both public and private nuisance have historically relied on property law. Therefore, the blurred line between tort law, with First Amendment limitations, and property law, where courts have not generally applied the First Amendment to civil actions enforcing property rules, may prove to be problematic when deciding whether First Amendment scrutiny or other constitutional limitations apply to civil liability under nuisance law.

\textsuperscript{186} Id. at 1931, 1933.
\textsuperscript{188} Id. at 1934 (majority opinion).
\textsuperscript{189} Id. at 1933.
\textsuperscript{190} Id.; see also Prager Univ. v. Google LLC, 951 F.3d 991, 999 (9th Cir. 2020) (holding that “state action doctrine precludes constitutional scrutiny of YouTube’s content moderation” and dismissing PragerU’s First Amendment claim).
\textsuperscript{191} See, e.g., CompuServe Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1026 (S.D. Ohio 1997) (defendants could not raise a First Amendment defense against a trespass action by CompuServe to restrict access to its private computer systems from unsolicited commercial e-mail sent by defendants) (citing Lloyd Corp. v. Tanner, 407 U.S. 551, 567 (1972)). Based on the theory put forth by this article, Cyber Promotions should be able to raise a First Amendment defense as a shield against a trespass action that affects speech.
A. Nuisance Claims and State Action

State or local regulations may declare that particular conditions constitute “per se” public nuisances and thus decidedly place them within the state-action classification. Public nuisance actions brought under common law tort by public officials are also state action. However, in a case in which a public nuisance claim is brought by a private individual who has an injury that is different in kind from other community members, such claims should not necessarily evoke the state action doctrine.

Public officials in People ex rel Gallo v. Acuna, brought a nuisance claim against gang members for nuisances they created by making the community “a staging area for gang-related violence.” The California Supreme Court affirmed that public nuisances interfering with the community’s public values “are enjoinable as civil wrongs or prosecutable as criminal misdemeanors. . . .” In evaluating the defendants’ constitutional defenses, the court first held that the First Amendment did not protect gang activities based on freedom of association. It then refused to recognize defendants’ “overbreadth” claim as to the protected speech or communicative conduct by others who might suffer an abridgement of their rights. Finally, the court concluded that the injunctions were not unconstitutionally vague under the Fifth Amendment and that the conduct enjoined “consists of threats of violence and violent acts themselves” and is therefore not protected by the First Amendment.

The First Amendment and other constitutional liberties may restrain criminal trespass and public nuisance enforcement by public officials, but extending this restraint to private trespass and private nuisance seems problematic under the state action doctrine, even though courts have broadly extended First Amendment restraint to speech and privacy tort actions. In the Article, When Religion Becomes a Nuisance: Balancing Land Use and Religious Freedom, I argued that zoning ordinances impacting First Amendment rights, such as free exercise of religion, constitute a prior...
To avoid the problem of prior restraint and provide a less restrictive means of controlling religious land use, I proposed that nuisance law could stop conduct that might interfere with the use and enjoyment of the neighbors. In analyzing whether the conduct was unreasonable, I suggested the court place a heavy thumb on the religious use side of the scale when balancing the gravity of the harm to the residential landowner against the utility of the conduct of the religious institution, such as feeding the homeless. At the time I proposed this approach, I wondered whether the Shelley v. Kraemer interpretation of state action would apply to a private nuisance lawsuit and subsequently explored the issue in a later article.

In her Article, Property and Projection, Professor Molly Brady examines a new form of protest by means of projecting light messages onto buildings. While these projections, “also known as projection bombing or guerrilla projections,” have primarily targeted the sides of commercial buildings with political messages, it is possible that light projections could point to residences or homes and display advertisements or other unwanted messages. There are various theories used to support property owners’ efforts to prevent these targeted projections, such as trespass, nuisance, and ordinances on light pollution or graffiti, but there is “a glaring lag in the property torts” using nuisance law as a remedy. In analyzing how private nuisance and the First Amendment should interact, the “initial puzzle [is] . . . where the state action occurs.” Some of the light projection cases involving nuisance claims have weighed First Amendment rights in determining whether the interference from the projection is substantial and when balancing the gravity of the harm against the utility of the conduct to determine unreasonableness. Should we put a heavy thumb on the side of conduct implicating the First Amendment, such as free speech or free exercise, when determining whether the conduct is unreasonable? Alternatively, should “a property owner who suffers dignitary, privacy, and appropriative harms [be] prevented from asserting those harms as a basis for

202 Id. at 512 (suggesting using nuisance instead of zoning to regulate religious land uses and avoid the problem of prior restraint).
203 Id.
206 Id. at 1145.
207 Id. at 1145–47.
209 Id. at 1202.
210 Id. at 1204.
a nuisance claim [?]." 211 The court would doubly penalize the plaintiff by "consider[ing] the speech values twice: first, in the utility calculus affecting the decision whether the conduct is tortious in the first instance, and then again, in considering whether the First Amendment should be a defense to the tort." 212

Nuisance law may also intersect with the Second Amendment when a public official brings a nuisance claim against a gun range. 213 When a private plaintiff brings a nuisance action, the gun range may not be able to assert a defense under the Second Amendment because state action is lacking. Just as a court must consider First Amendment rights in determining the unreasonableness of speech or religious exercise under the Restatement Second (Torts) balancing test, a court could consider Second Amendment rights when determining the unreasonableness of a gun range. 214 Alternatively, under the reimagined state action theory, since the gun range might seek to use the Second Amendment as a shield, it should have the opportunity to assert a constitutional defense.

It is unnecessary to examine the unreasonableness of a defendant’s conduct to decide whether there is a nuisance when state or local government has declared that a particular activity constitutes a public nuisance. Thus, the court need not take into account any constitutional considerations regarding the utility and social value of the targeted conduct in determining unreasonableness and, instead, the defendant in a public nuisance case will be able to defend against liability by reference to its constitutional rights. 215

The remainder of Part III explores public and private nuisance claims brought by private entities to determine when such claims are subject to constitutional limitations or are sheltered from constitutional scrutiny.

211 Id. at 1214. I have argued that courts should take the First Amendment into account in determining unreasonableness, while Professor Brady argues the First Amendment should be considered in one place, as a potential defense to a nuisance claim, just as in other tort contexts. Nevertheless, Brady advocates in favor of applying the typical rule that "property rights define communicative entitlements, and individuals do not have rights to speak on or from private property that they do not own." Id.

212 Id.

213 Cody J. Jacobs, The Second Amendment and Private Law, 90 S. CAL. L. REV. 945, 990 (2017) (citing Ezell v. City of Chicago, 651 F.3d 684, 708–09 (7th Cir. 2011) (City of Chicago in banning firing ranges "must establish a close fit between the range ban and the actual public interests it serves, and also that the public’s interests are strong enough to justify so substantial an encumbrance on individual Second Amendment rights").

214 Id. at 990–91 (proposing Second Amendment rights be considered in evaluating the social value of gun range and its suitability to the character of the locality based on the availability of other gun ranges in the area).

215 See, e.g., Near v. Minnesota, 283 U.S. 697, 716 (1931) (noting that liberty of the press requires immunity "from previous restraint of the publication of censure of public officers and charges of official misconduct" under the guise of public nuisance).
B. Public and Private Nuisance Claims Brought by Private Parties

There are not extensive examples of public or private nuisance claims brought by private parties that involve constitutional rights, but my research into nuisance cases with constitutional implications is not exhaustive and may not have captured all the reported cases. Nonetheless, this Section focuses on nuisance cases where parties have asserted constitutional claims or defenses. Some cases involve the right of privacy when anti-abortion protestors and clinics obstruct public spaces, allegedly creating public nuisances.

For example, in *Kuhns v. City of Allentown*, anti-abortion protesters sufficiently alleged a public nuisance based on clinic obstruction of a public street to shield patients from protesters.\(^{216}\) The protesters alleged that the clinic violated their civil rights by imposing an impermissible content-based restriction on speech, a specific injury giving plaintiffs the right to bring the public nuisance action.\(^{217}\) The *Kuhns* court held that the plaintiff protesters sufficiently alleged a conspiracy with public officials to establish that the private actor defendants operated under the color of law.\(^{218}\) The court concluded that plaintiffs sufficiently pled claims under § 1983 for violation of free speech and religion under the First Amendment, as well as a private claim for public nuisance.\(^{219}\) In *Planned Parenthood League of Mass., Inc. (PPLM) v. Bell*, an anti-abortion protester was the defendant charged with creating an actionable public nuisance by making uninvited and harassing contact with an abortion clinic’s patients.\(^{220}\) The court found that PPLM alleged a special injury to its patients allowing it to sue for a public nuisance, and “factual characteristics of Bell’s activity place it outside the realm of constitutionally protected speech.”\(^{221}\)

An abortion clinic sued abortion protesters in *Lovejoy Specialty Hospital, Inc. v. The Advocates for Life, Inc.* for trespass and private nuisance resulting in property damage, lost business, and physical altercations.\(^{222}\) The court affirmed the plaintiff’s award of compensatory and punitive damages, even though some expressive activity accompanied the trespass and nuisance. The court agreed that even if “some of defendants’ conduct was expressive, that conduct is not necessarily protected.”\(^{223}\) It concluded, “[w]here expressive and non-expressive elements are combined in the same course of conduct, the conduct can be regulated if a sufficiently important governmental interest justifies an incidental limitation on First Amendment

\(^{217}\) Id. at 434.
\(^{218}\) Id. at 431–32.
\(^{219}\) Id. at 438.
\(^{221}\) Id. at 578–80.
\(^{223}\) Id. at 164.
freedoms. The governmental interest must be unrelated to the suppression of
free expression.”224 Similarly, in Saint John’s Church in the Wilderness v.
Scott, demonstrators against abortion and homosexuality near a Church
during services created a private nuisance.225 In assessing whether the
demonstrators were entitled to defend against the private nuisance action
based on their constitutional free speech rights, the court concluded “that
entering the Church’s property and obstructing access to the Church are not
inherently expressive acts” protected by the First Amendment.226 However,
the court then considered whether the restrictions on picketing and noise
restricted defendants’ free speech rights and concluded that it was unable “to
determine whether the restrictions burden more speech than necessary to
protect the relevant government interests.”227

Religious demonstrations and religious exercise have also been subject
to private nuisance challenges. In Liberty Place Retail Assocs. v. Israelite
School of Universal Practical Knowledge, members of a religious sect held
public sidewalk demonstrations outside a shopping center.228 The court
rejected the shopping center’s trespass claim, and held that the center failed
to prove that the demonstrations constituted a public nuisance.229 Thus, the
court did not address the issue as to whether “the First Amendment provides
a defense to these claims.”229 The court in Devaney v. Kilmartin dismissed a
pro se complaint against a Town for common law private nuisance because
there was no allegation that the Town was responsible for the noise created
by the bell ringing of two local churches.231 The court found that the
plaintiff’s Establishment Clause claim was “fatally deficient” because it did
not prove that the secular bell exemptions to the noise ordinance constituted
an impermissible establishment of religion.232 In addition, the court
recommended, “that all of the constitutionally grounded claims against the
Churches and the Bishop be dismissed” because such action is not “state
action.”233 As private actors, the church defendants cannot be liable for
unconstitutional action such as nuisance.234

Finally, private plaintiffs have brought public nuisance actions against
gun manufacturers, distributors, and dealers based on the intentional
distribution of firearms that has unreasonably interfered with public safety,
health, and welfare.235 For example, in *Ileto v. Glock Inc.*, surviving victims and a surviving relative of a shooting victim that began at the Jewish Community Center in Granada Hills, California in 1999 sued firearm defendants for public nuisance and negligence claims.236 The Ninth Circuit concluded that the private plaintiffs had standing and alleged sufficient facts to bring a public nuisance cause of action.237 However, Congress enacted the Protection of Lawful Commerce in Arms Act (PLCAA) in 2005, which required the court to dismiss the victims’ claims in *Ileto* against federally licensed manufacturers and sellers of firearms, but not those claims brought against an unlicensed foreign manufacturer of firearms, China North Industries Corp.238

As these nuisance cases illustrate, when plaintiffs claim that a private actor has violated their constitutional rights in creating a nuisance, the state action doctrine will protect them from liability as a private actor,239 unless considered a state actor under an exception to the doctrine.240 In contrast, defendants in a nuisance action may be able to offer constitutional defenses for their actions, even though they may not ultimately prevail under these constitutional defenses.241

IV. REIMAGINING STATE ACTION

Combine the “conceptual disaster area”242 of the state action doctrine with the “impenetrable jungle”243 of nuisance law and you have an opportunity to come up with a theory that cannot possibly make matters worse “so it really doesn’t matter.”244 Notwithstanding this challenge, I propose a reimagined state action framework that should apply in state law

236 *Ileto v. Glock Inc.*, 349 F.3d 1191, 1194 (9th Cir. 2003) (en banc hearing denied *Ileto v. Glock Inc.*, 370 F.3d 860 (9th Cir. 2004)).
237 *Id.* at 1215; see also Johnson v. Bull’s Eye Shooter Supply, 2003 WL 21639244 *4 (denying defendant firearm distributor’s motion to dismiss plaintiffs’ public nuisance claim); City of New York v. Bob Moates’ Sport Shop, Inc., 253 F.R.D. 237, 242–43 (E.D.N.Y. 2008) (holding that settlements of public nuisance claims by New York State and City against gun retailers were reasonable and enforceable under the Protection of Lawful Commerce in Arms Act).
238 *Ileto v. Glock Inc.*, 565 F.3d 1126, 1129–30 (9th Cir. 2009).
239 See Devaney, 88 F. Supp. 3d at 34.
240 See Kuhns, 636 F. Supp. 2d at 431.
241 See PPLM, 424 Mass. at 573; Lovejoy, 121 Or. App. At 160; *Saint John’s Church in the Wilderness*, 194 P.3d at 475.
243 WILLIAM PROSSER, PROSSER ON TORTS 615, 616 (5th ed. 1984).
actions involving private litigants. First, when a private plaintiff alleges that a private actor violates constitutional rights, the state action doctrine should preclude the plaintiff’s use of the constitution as a sword against a private defendant, unless the defendant’s conduct is attributable to the state. Second, when a private plaintiff brings a state law claim against a private defendant, the state action doctrine will not prevent the private defendant from using the constitution as a shield. By using this framework, it should no longer be necessary to ascribe state action to the court’s action in enforcing private rights to satisfy the state action requirement in a lawsuit between private actors.245

A. State Action Bars the Constitutional Sword Against Private Actors.

The state action doctrine originated in situations where a plaintiff (or in the Cruikshank case, a federal prosecutor) claimed that a private actor or actors violated constitutional rights.246 In Cruikshank, the state action doctrine barred the federal government from punishing private actors for violating the constitutional rights of others.247 In Rives, the Court applied the state action doctrine to prevent the appeal of a conviction based on the defendant’s claim that an all-white jury violated his rights under the Equal Protection Clause.248 Finally, in the Civil Rights cases, the Court disallowed private plaintiffs from claiming that private actors violated their equal protection rights by discriminating against them based on race in providing public accommodations.249

A more recent decision in which private individuals unsuccessfully asserted their constitutional rights as a sword against a private entity is Rendell-Baker v. Kohn.250 In Rendell-Baker, discharged employees filed a section 1983 action against a private school alleging First, Fifth, and

245 See, e.g., Cohen v. Cowles Media, 501 U.S. 663, 668 (1991) (addressing “whether a private cause of action for promissory estoppel involves ‘state action’ within the meaning of the Fourteenth Amendment such that the protections of the First Amendment are triggered”). The Cohen court relied on the rationale of Sullivan and subsequent cases to conclude that state action is involved because “the application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes ‘state action’ under the Fourteenth Amendment.” Id. at 672 (Blackmun, J., dissenting) (“I agree with the Court that the decision of the Supreme Court of Minnesota rested on federal grounds and that the judicial enforcement of petitioner’s promissory estoppel claim constitutes state action under the Fourteenth Amendment.”). See also Shelley v. Kraemer, 334 U.S. 1 (1948), DeBruin v. St. Patrick, 816 N.W.2d 878 (2012), and Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, 560 U.S. 702 (2010) (stating that the court action itself constitutes state action).

246 See United States v. Cruikshank, 92 U.S. 542, 547 (1875), Virginia v. Rives, 100 U.S. 313 (1879), and the Civil Rights Cases 109 U.S. 3 (1883).

247 Cruikshank, 92 U.S. at 547.

248 Rives, 100 U.S. at 313.

249 Civil Rights Cases, 109 U.S. at 3.

Fourteenth Amendments violations. The Court affirmed the First Circuit’s determination that although “the school’s funding, regulation, and function show that it has a close relationship with the State,” the private school was not acting under color of state law when it discharged employees. After reviewing the factors that could make a private entity a state actor, the Court concluded that the action of the private school was not state action subject to constitutional considerations.

The Court in Halleck disallowed a First Amendment claim filed by private plaintiffs producing public access programming against a private media platform for excluding them from participation based on their views. While the dissent argued that the private media platform was a state actor because it performed a public function, the majority found that New York City did not have a property interest in public access channels that it could delegate to a private actor. Similarly, in Prager University (PragerU) v. Google, the Ninth Circuit found that YouTube is a private forum, not subject to judicial scrutiny under the First Amendment, and relied on the Halleck decision to affirm the dismissal of PragerU’s complaint alleging that YouTube violated its First Amendment rights. Again, the PragerU court found that YouTube is not a state actor because it did not perform a public function.

B. State Action Allows the Constitutional Shield Against Private Actors.

Beginning with New York Times v. Sullivan, private defendants in speech tort actions have been able to use their First Amendment rights as a shield against private plaintiffs. As detailed in Part II, Section C, tort law developed to the point where the Court in Snyder v. Phelps, without ever referencing the state action doctrine, avowed that the Free Speech Clause of the First Amendment “can serve as a defense in state tort suits, including suits

251 Id. at 2769.
252 Id. at 2769–70 (noting that the color of law issue under Section 1983 is the same question as to whether state action exists to justify constitutional scrutiny of the claim asserted) (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)).
253 Id. at 2770–72 (analyzing the three factors used by the Court in Blum v. Yaretsky, 457 U.S. 991, 1005 (1982)—1) dependence on the State for funds; 2) extensive regulation by the State; and 3) performance of a public function—to determine whether “certain nursing homes were state actors for the purpose of determining whether decisions regarding transfers of patients could be fairly attributed to the State”).
255 Id. at 1934 (Sotomayor, J., dissenting).
256 Prager University (PragerU) v. Google, 951 F.3d 991, 995 (9th Cir. 2020).
257 Id. at 998.
for intentional infliction of emotional distress."\(^{259}\) While at first the *Cohen v. Cowles Media* decision may look incongruous with the other Free Speech press cases, the Court did recognize that state action was present in the enforcement of the agreement, but it determined that the contract claim against the press did not merit a constitutional defense.\(^{260}\)

Courts enforcing other contract claims between private parties have not found state action to allow constitutional defenses. As discussed in Part II, Section C, courts have denied private parties the right to assert constitutional defenses as a shield against the enforcement of contract settlement claims,\(^{261}\) arbitration agreements,\(^{262}\) employment contract claims against religious institutions,\(^{263}\) and private restrictive covenants, other than in *Shelley v. Kraemer*.\(^{264}\) My reimagining of the state action doctrine would require courts to allow constitutional defenses in contract enforcement litigation, except, perhaps in the religious institution employment context, which seems to have a framework outside of the state action doctrine as illustrated in *Hosanna Tabor*. Accordingly, arbitration agreement enforcement would allow constitutional defenses, as would private restrictive covenant enforcement. New Jersey already allows private landowners in covenant enforcement actions by HOAs to use the state constitution as a shield. Instead of viewing *Shelley v. Kraemer* as an outlier, applicable only to racially restrictive covenants, or as support for a rule that court action is state action, all restrictive covenants would be subject to constitutional restrictions.\(^{265}\) Such a reimagining would also reduce the need to rely on public policy restrictions against covenants that violate constitutional rights.

Private defendants facing property claims of trespass and nuisance have also confronted state action barriers when asserting their constitutional rights as a shield against private actors. Part II, Section D, reviews the development of trespass litigation involving constitutional liberties beginning with *Marsh v. Alabama*, which allowed trespassers in a company town to defend against claims by using their First Amendment rights as a shield.\(^{266}\) Like *Shelley*, *Marsh* was an outlier, subsequently restricted to its facts. Later, a U.S.


\(^{260}\) Cohen v. Cowles Media, 501 U.S. 663, 668, 670 (1991); see Solove & Richards, *supra* note 61, at 1662–63 (explaining different scholars’ opinions about the impact of *Cohen*).


\(^{262}\) See Davis v. Prudential Securities, Inc., 59 F.3d 1186, 1191 (11th Cir. 1995).


\(^{264}\) Shelley v. Kraemer, 334 U.S. 1 (1948); see Solove & Richards, *supra* note 61, at 1700–01 (contending that *Shelley* is an outlier from restrictive covenant cases).

\(^{265}\) This reimagining is in direct conflict with my previous writings that attempted to resolve the state action dilemma by viewing *Shelley* as an outlier, no longer necessary to protect against racial discrimination. See Shelley Ross Saxer, *Shelley v. Kraemer’s Fiftieth Anniversary: “A Time for Keeping; a Time for Throwing Away”*? 47 U. KAN. L. REV. 61 (1998).

Supreme Court decision barred private defendants from using the Constitution to defend themselves against trespass claims brought by private shopping centers, otherwise open to the public. In *PruneYard Shopping Center v. Robins*, the Court upheld California's expansion of state constitutional defenses against trespass claims involving private litigants. The California Supreme Court found the state action necessary for constitutional defenses in the fact that a private shopping center opened its doors to the public. Federal courts should return to a standard that allows private defendants in trespass suits to use constitutional rights as a shield.

Finally, private defendants should be able to use constitutional principles to defend against nuisance claims brought by private actors. Part III examined several nuisance actions implicating constitutional rights. These cases illustrate that when plaintiffs claim that a private actor has violated their constitutional rights in creating a nuisance, the state action doctrine will protect the private actor from liability. Alternatively, defendants in a nuisance action may constitutionally defend their conduct, even though they may not ultimately prevail. The constitutional protection of their conduct should serve as a defense, not just as a factor in determining the unreasonableness of their conduct that constitutes a nuisance.

**CONCLUSION**

*New York Times v. Sullivan* was originally an outlier in state action jurisprudence. However, federal courts extended *Sullivan* to allow, without question, First Amendment defenses to speech tort liability. The federal courts did not similarly extend *Shelley* to allow constitutional defenses to contract enforcement and they did not extend *Marsh* to allow constitutional defenses to trespass. While there is not a similar outlier in nuisance litigation, state and federal courts should continue allowing constitutional defenses against nuisance claims. Reimagining state action to bar the constitutional sword against private actors, while allowing the constitutional shield against state law claims between private actors, will help bring clarity to this “conceptual disaster area.”

268 *See Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742, 749, 754 (Cal. 2007).
270 *See generally Han, supra* note 70.