NYU JOURNAL OF LAW & LIBERTY

THE "TRADITIONAL STATE FUNCTION" DOCTRINE: A COMPARATIVE INSTITUTIONAL PERSPECTIVE

Christopher R. Edgar*

Abstract

Under the "traditional state function" doctrine, an entity is a "state actor" and thus subject to liability for constitutional violations if it performs a function traditionally performed by the government. Although much constitutional precedent endorses the doctrine, its purposes are rarely explored. Edgar infers from courts' and commentators' statements that the doctrine has three goals: ensuring that the public has access to goods and services it considers essential, preventing people's expectations concerning how certain service providers will behave from being frustrated, and preventing firms with market power from harming consumers. Edgar further argues, based on the framework for comparative institutional analysis developed by Neil K. Komesar, that legislatures rather than courts are best suited to make legal rules to serve these goals, and hence that the doctrine should be abandoned.

Introduction

Suppose that a town is considering privatizing its firefighting services. The town will pay a private company to fight fires, and will not control the company's day-to-day operations—*i.e.*, the amount it pays employees, the equipment it buys, its hiring decisions, and so forth. Consider the factors the decision-making body making this choice must take into account. On one hand, transferring control of firefighting to a private company may reduce the town's costs and result in more efficient service provision. For instance, poorly performing employees might be easier to fire without civil service protections applicable to government actors, and

* J.D., Stanford Law School, 2002. B.A., Haverford College, 1998. Special thanks to Dean Thomas J. Campbell for his many insightful comments.

the company might be able to buy equipment and facilities unrestricted by competitive bidding regulations and patronage. On the other hand, firefighting by a private company may raise concerns regarding the company's accountability to the townspeople, as the company is not as subject to the influence of elected officials as a government agency. Whatever the outcome, the decision-maker must project and weigh many costs and benefits. When one imagines this process, the image of a legislature holding hearings, reviewing studies, debating and voting comes to mind. This picture, however, is incomplete, as the courts play a significant role in privatization decisions.

Courts' authority over whether employees of an entity charged by the government with providing a service may be liable for constitutional violations influences legislatures' privatization decisions. An entity whose personnel can be liable under 42 U.S.C. § 1983,[1] the statute giving a cause of action to persons alleging deprivations of constitutional rights by state agents, will face higher operating costs than an entity whose personnel cannot. Even if the company never has to pay damages or obey an injunction, it must still pay litigation expenses if its employees are accused of constitutional violations. Moreover, even if no one sues its employees on such grounds, the company will spend time and money trying to obey constitutional requirements if it believes the courts will likely impose those norms on it. The higher costs associated with potential and actual Section 1983 liability will be reflected in the price the entity charges the government. This increase may affect the terms of the contract between the government and the company, and indeed whether the government is inclined to contract out at all.[2]

Whether a company's employee may be liable for constitutional violations depends on whether the employee was acting "under color of state law" at the relevant time.[3] That in turn depends on whether the employer is a state agent for Fourteenth Amendment purposes.[4] Courts design the test for whether a company is a state agent (the "state action" test), as they have final authority over constitutional interpretation.

---

[1] *See* 42 U.S.C. § 1983 (2005) (subjecting any person who, "under color of any statute . . . of any state or territory, subjects . . . any citizen . . . to the deprivation of any rights . . . secured by the Constitution and laws of the United States" to damages and injunctive relief).

[2] One might object that imposing Section 1983 liability on a private service provider should not affect governmental privatization decisions if private actors are really more efficient than the government, since the government will face identical Section 1983 liability-related costs even if it chooses not to privatize. That is not necessarily true, because undisputedly government actors have more procedural protections against constitutional liability and thus, in all likelihood, lower constitutional liability-related costs than private actors held to constitutional standards. For instance, private actors are not entitled to qualified immunity in Section 1983 actions. *See* Richardson v. McKnight, 521 U.S. 399, 412 (1997).

[3] Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 399 (1979) ("Section 1983 provides a remedy for individuals alleging deprivations of their constitutional rights by action taken 'under color of state law.'").

[4] Lugar v. Edmonson Oil Co., 457 U.S. 922, 928–29 (1982) ("The constitutional standard for finding state action is closely related, if not identical, to the Section 1983 standard for determining 'color of state law.'").

Given courts' and legislatures' relative abilities, courts' role in deciding whether a function should be privatized is ideally narrow. Courts' limited fact-finding capacity and isolation from political pressure make them ill-suited to weigh the costs and benefits of privatization. Determining whether efficiencies will result from having a private party provide a service requires study not generally possible in courts because — among other reasons — adversarial presentations are generally courts' sole basis for deciding issues, and the time parties have to present their views is limited by a court's need to decide cases with reasonable efficiency. For the most part, the test the Supreme Court uses for whether a person is engaged in "state action" and thus subject to Section 1983 reflects these concerns.[5]

Most of the test's factors seem designed to achieve two goals. First, some are supposed to police the *authenticity* of a legislature's privatization efforts — *i.e.*, ensure that the legislature is not purporting to delegate service provision to a nominally private entity while retaining full control over the entity's day-to-day operations in an attempt to act without constitutional restriction. The government might do this, for example, by creating a corporation and claiming it is independent of the government while stocking its board of directors with plainly governmental officials.[6] Since a legislature cannot effectively prevent itself from engaging in such gamesmanship, one can argue, policing the authenticity of privatization is a better task for courts, even assuming superior legislative fact-finding and cost-benefit analysis. Three factors in the test — the extent of the government's "entwinement" in the nominally private entity's operations;[7] the degree to which the plaintiff's injury arises from the "joint activity," or collaboration, of the government and the private entity;[8] and the extent to which the relationship between the government and the entity is "symbiotic," *i.e.*, more mutually beneficial than the usual relationship between the state and a business[9] — serve this goal. The government's supervision of a purportedly private entity, its concerted action with that entity, and its substantial benefits from the entity's operations suggest an attempt to control the entity without either (1) paying a higher price to compensate the entity for the risk of Section 1983 liability or (2) relinquishing day-to-day control and incurring a higher "agency cost" — *i.e.*, the risk that the entity will not carry out its functions as ordered — on the other.

---

[5] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n., 531 U.S. 288, 296 (2001).

[6] *See* Lebron v. Nat'l. R.R. Passenger Corp., 513 U.S. 374 (1995) (holding that, despite the federal government's characterization of Amtrak as private, it was a state actor under the Fifth Amendment because, *inter alia*, its board of directors consisted entirely of federal officials).

[7] *See Brentwood Acad.*, 531 U.S. at 296; *Lebron*, 513 U.S. at 400; McVarish v. Mid-Nebraska Cmty. Mental Health Ctr., 696 F.2d 69, 71 (8th Cir. 1982).

[8] *See Brentwood Acad.*, 531 U.S. at 296; Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 (1970); United States v. Price, 383 U.S. 787 (1966).

[9] *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 724 (1961) (holding that a restaurant within a state-owned parking garage was a state actor, due to the benefits to the government by virtue of the restaurant's presence).

The next factor ensures that when the government renders a person dependent on it for a service, the government cannot, by contracting that service out to a private actor, absolve itself of responsibility for that actor's constitutional violations even if the government does not closely supervise the actor. For instance, when a state imprisons someone, that person has no access to medical care outside prison, and thus the Eighth Amendment requires the state to serve the prisoner's medical needs during his imprisonment.[10] The state can give up day-to-day control over the doctors who treat the prisoner, but the doctors will remain state actors.[11] The courts have hence made whether the private entity has been tasked with discharging the state's constitutional obligations a factor in the state action test. Since legislatures have incentives to avoid the costs of meeting such obligations, some argue, courts should ensure that governments carry out their constitutional duties.[12]

The last factor in the test, however, appears designed to serve different objectives. This factor, the "traditional state function" factor, asks whether the purportedly private actor was performing a function "exclusively and traditionally" performed by the state when it committed the alleged constitutional violation.[13] Returning to the private firefighting example, the fact that the town fought fires in the past would make it more likely that a nominally private fire department would be subject to Section 1983. Several decisions involving suits against volunteer fire departments under contract with municipalities confirm this view.[14] The traditional state function factor cannot be easily explained by reference to the need to prevent legislative gamesmanship or the need to ensure that the government meets its constitutional obligations. Under this analysis, even if the governmental actor that privatized the service retains no detectable involvement in the private entity's affairs, the fact that the government *formerly* performed the service still weighs in favor of state action. Moreover, the government's provision of a service for a long time does not necessarily place citizens in an incarceration-like state of dependency. A town's operation of a public library, for instance, does not render citizens solely dependent

[10] Estelle v. Gamble, 429 U.S. 97, 103 (1976); Ancata v. Prison Health Servs., 769 F.2d 700 (11th Cir. 1985).
[11] West v. Atkins, 487 U.S. 42, 56 (1988); *see also* RESTATEMENT (SECOND) OF TORTS § 314A(4) (1965) ("One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a duty [of care] to the other.").
[12] This argument is advanced in the context of Section 1983 claims against private prisons and independent contractors providing services for state prisons. *See* Kevin J. Hamilton, *Section 1983 and the Independent Contractor*, 74 GEO. L.J. 457, 477 (1985) ("[I]t is no response" to the notion that companies operating private prisons may disregard the state's constitutional obligations "to argue that the government could regulate the behavior of its contractors. Such a position would deny the very purpose of section 1983: to provide a private right of action *against* government actors. Relying on the government to protect injured individuals is futile . . . when the government is satisfied with the challenged conduct.").
[13] *See Brentwood Acad.*, 531 U.S. at 296, 302–03; Evans v. Newton, 382 U.S. 296, 302 (1966); Medina v. O'Neill, 589 F. Supp. 1028, 1038 (S.D. Tex. 1984).
[14] *Goldstein*, 218 F.3d at 344–45; Janusaitis v. Middlebury Volunteer Fire Dept., 607 F.2d 17, 23–24 (2d Cir. 1979); Everett v. Riverside Hose Co., 261 F. Supp. 463, 468 (S.D.N.Y. 1966); Williams v. Rescue Fire Co., 254 F. Supp. 556 (D. Md. 1966); *but see* Yeager v. City of McGregor, 980 F.2d 337, 340–42 (5th Cir. 1993) (holding that a volunteer fire department does not perform a traditional and exclusive state function).

on the town for books, as the library's mere existence does not stop people from going to bookstores. Nonetheless, if the town contracted out the library's operations, the library would be considered a state actor because it performs a traditionally governmental function.[15]

Thus, the traditional state function factor is designed to serve goals distinct from those served by the other factors. As detailed below, courts and commentators ascribe three purposes to the factor: (1) ensuring that people have access to services essential to meaningful existence,[16] (2) honoring people's expectation that some services will be provided in accordance with constitutional rules,[17] and (3) preventing entities with market power— *i.e.*, the "ability . . . [to] profitably . . . raise prices significantly above competitive levels for a sustained period"[18] — from exploiting their positions to consumers' detriment.[19]

These may be worthy objectives, but that does not show that courts should be carrying them out. In this Article, I argue that legislatures rather than courts are best suited to enact legal rules serving the goals the traditional state function doctrine is designed to achieve. For example, I note that antitrust law recognizes legislatures' superior ability to design legal rules regulating anticompetitive activity by deferring to state legislation allowing practices that would otherwise violate judge-made antitrust doctrines, and contend that this deferential approach is in tension with courts' use of the traditional state function doctrine to regulate anticompetitive conduct. The courts, I argue, should abandon the traditional state function doctrine and focus the state action test on courts' areas of comparative advantage: preventing legislatures from engaging in nominal privatization and avoiding their constitutional duties to people whom the government has rendered dependent. Unless a purportedly private actor is under *de facto* government control or servicing a person whom the government has rendered dependent, as in the incarceration example, the courts should not treat it as a state actor. Legislatures rather than courts should decide whether the actor should be subject to requirements such as the need to afford notice and a hearing before denying service (which legislatures could impose, for instance, through public accommodations statutes). I take a purely "functionalist" perspective; this Article leaves the question of whether the text and structure of the Constitution mandate the traditional state function doctrine to other commentators.

I will prove my thesis in two steps. First, I will argue that the doctrine's purposes are as I described them above. The Supreme Court is not explicit about

---

[15] For a case applying the doctrine to a privatized municipal library, see *infra* notes 40–43 and accompanying text.
[16] *See infra* notes 25–44 and accompanying text.
[17] *See infra* notes 45–57 and accompanying text.
[18] George Hay, John C. Hilke & Philip B. Nelson, *Geographic Market Definition in an International Context*, 64 CHI.-KENT. L. REV. 711, 714 (1988).
[19] *See infra* notes 58–67 and accompanying text.

why it chose the state action test it uses. I infer the doctrine's rationales from the Court's dicta, the facts the Court considers important to establishing that an actor is performing a traditional state function, and commentators' observations on state action jurisprudence. Second, I will outline a method with which to critique the doctrine and apply it. I will critique the doctrine from a "comparative institutional" perspective. Comparative institutional analysis attacks a policy problem by asking, based on the strengths and weaknesses of each institution capable of addressing the problem (*e.g.*, the market, the courts, and legislatures) which institution is most able to do so. I base my approach on the framework developed by Professor Neil K. Komesar, which evaluates each institution's ability to address a policy question based on the information and organization costs facing interest groups seeking to enact their preferred policies through that institution's mechanisms.[20] I will apply this method by ascertaining the goals the doctrine is designed to serve and comparing courts' and legislatures' ability to further those goals.

Part I will extrapolate the traditional state function doctrine's purposes from courts' and commentators' statements. Part II will outline the prevailing views among comparative institutional analysis scholars regarding the strengths and weaknesses of courts and legislatures, focusing on the attributes most pertinent to serving the doctrine's objectives. Finally, Part III will apply the principles discussed in Part II, arguing that courts are worse than legislatures at serving the doctrine's goals.

I. Justifications for the Traditional State Function Doctrine

At the outset, we should distinguish between the rationales for the state action doctrine's *existence* and those for the state action test's *design*. The former are constantly discussed.[21] It is generally acknowledged that by erecting a boundary between governmental and private conduct, the state action doctrine serves three goals. First, it preserves citizens' autonomy by protecting certain activities from constitutional restriction.[22] Second, it allows regulatory experimentation by ensuring that states' regulation of certain private conduct cannot be trumped by constitu-

---

[20] *See infra* notes 70–77 and accompanying text.

[21] For arguments for abolishing the doctrine, *see, e.g.*, Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U.L. REV. 503 (1985); Robert J. Glennon, Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 261. For arguments for preserving it, *see, e.g.*, Kevin Cole, *Federal and State "State Action": The Undercritical Embrace of a Hypercriticized Doctrine*, 24 GA. L. REV. 327 (1990); William P. Marshall, *Diluting Constitutional Rights: Rethinking "Rethinking State Action,"* 80 NW. U.L. REV. 558 (1985).

[22] *See Lugar*, 457 U.S. at 936 ("Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power."); Peterson v. City of Greenville, 373 U.S. 244, 250 (1963) (Harlan, J., concurring) (contending that the state action doctrine is important because "freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference").

tional norms.[23] Third, it protects citizens' "constitutional rights against invasion by government or by action fairly attributable to government."[24]

The objectives of each factor in the test, however, are not discussed as often. The *factors* must have goals distinct from those of the *doctrine* because the doctrine's objectives tell us nothing about which factors should be used. It would not help to say that the line between governmental and private conduct should be drawn to maximize autonomy or federalism, because the logical result would be to eliminate the concept of "governmental conduct" and make all conduct "private" for constitutional purposes. Nor would it help to draw the line to ensure that constitutional rights get the most protection from "governmental invasion," because that would be circular—it is unhelpful to say we should minimize certain government action when we are still deciding what government action is. Thus, the doctrine's three common rationales only justify *some* line between governmental and private conduct. The location of that line must be independently considered.

In this Part, I attempt to discern the doctrine's purposes from courts' language and scholars' analysis. I conclude that the doctrine has three goals: ensuring public access to essential services; ensuring that when citizens come to expect that a service provider will comply with constitutional constraints, public expectations are not frustrated; and preventing entities with market power from exploiting their positions.

A. Preserving access to essential services

The first rationale, which I will call the "essential services" justification, has four premises. First, people need certain services to live meaningful lives. Second, private providers of these services sometimes deny them without good cause or fail to provide them at affordable prices. Third, the best way to ensure that people get these services affordably and without arbitrary treatment is to subject entities supplying them to the strictures placed on government actors by the Constitution. For example, if an essential service provider has to give notice and a hearing before ceasing to supply its service (as required by the Due Process Clause,)[25] and to provide the service without discriminating based on certain characteristics (as required by the Equal Protection Clause,) citizens will receive the services they need. One corollary is that the cost of the risk of Section 1983 liability, which will be passed on

---

[23] *See Peterson*, 373 U.S. at 250 (Harlan, J., concurring) ("[I]nherent in the concept of state action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority."); Cole, *supra* note 21, at 359 ("Th[e] allocation of decisionmaking authority [accomplished by the state action doctrine] might be defended as a way of achieving efficiency by promoting specialization on the parts of the federal judiciary and the states.").

[24] G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 HOUS. L. REV. 333, 339–40 (1997).

[25] Mathews v. Eldridge, 424 U.S. 319, 348 (1976).

to the taxpayer,[26] will not outweigh the benefits of subjecting the service provider to constitutional norms.[27] Finally, the essential-services justification presupposes that an entity's performance of a function traditionally the province of the state is a good proxy for its delivery of an essential service. If the government once provided a service, citizens likely consider that service integral to meaningful existence.

In holding that purportedly private entities are state actors based on their performance of traditional state functions, several decisions have explicitly relied on the essential-services rationale. These opinions go beyond addressing the question necessary to resolve the case — *i.e.*, whether the function is the traditional and exclusive province of the government — and include dicta emphasizing the function's essentiality to meaningful life.

The "white primary" cases,[28] in which the Court invalidated attempts by states and political parties to stop African-Americans from voting in primaries, are credited with giving rise to the traditional state function doctrine.[29] These cases also contained early articulations of the essential-services rationale. For instance, in *Terry v. Adams*,[30] a group called the Jaybird Association held elections that — as a practical matter — determined which candidates would be nominated in Texas Democratic Party primaries to run for county offices, and restricted its membership to white citizens. The plaintiff claimed that this policy violated the Fifteenth Amendment, which bans racial discrimination in elections,[31] and the Association responded that it was not a state actor. The Court held that the Jaybird elections were state action. The Court relied on the "state's traditional control over the electoral process" and the effect the Association's activities had on that process, basing its decision on the traditional state function doctrine.[32] However, the Court's dicta suggested that it also relied on the centrality of elections to citizens' protection of their interests and sense of self-governance. As the Court put it, the "Jaybird primary [had] become an integral part . . . of the elective process that determines who shall . . . govern in the county," and that process "intimately touch[ed] the daily lives of citizens."[33]

---

[26] For a discussion of these costs, see *supra* notes 1–2 and accompanying text.

[27] I do not mean to imply that privatizing a service and not treating the private service provider as a state actor is the only way to avoid this cost. A court could also achieve this goal by, for instance, holding that even undisputedly state institutions do not have to provide notice and a hearing before denying services.

[28] Smith v. Allwright, 321 U.S. 649, 662–64 (1944); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927).

[29] *See* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 692 (1974) ("The concept that private assumption of government power could constitute 'state action' was reinforced by . . . the famous White Primary Cases.").

[30] 345 U.S. 461 (1953).

[31] U.S. CONST. amend. XV, § 1.

[32] *Terry*, 345 U.S. at 467.

[33] *Id.* at 469.

Similarly, in *Evans v. Newton*,[34] the Court held that private trustees of a formerly municipal park were state actors because the park, "for years[,] was an integral part of the [c]ity's . . . activities," and thus the trustees performed a traditional state function in operating it.[35] Thus, the Equal Protection Clause forbade the trustees' racially discriminatory admission policy. Again, although the holding's overt basis was the trustees' performance of the traditionally governmental task of operating a park, the Court stated in dictum that "mass recreation through the use of parks is plainly essential to the maintenance of a public domain," emphasizing the need to give citizens a place to recreate free from constraints private actors can place on their property.[36]

More recent decisions follow a similar pattern. In *Perez v. Sugarman*,[37] the United States Court of Appeals for the Second Circuit held that private hospitals under contract with a city to administer health services to neglected children were subject to Section 1983 because — *inter alia* — they performed the "essential and traditional" state function of child welfare assistance, and thus the court based its decision on the traditional state function doctrine.[38] The court noted that this function was so essential that it "would have to be performed by the Government but for the activities of the" defendants — relying on the premise that the function was too important to entrust to parties unconstrained by the Constitution.[39]

Similarly, in *Chalfant v. Wilmington Institute*,[40] the Third Circuit faced the question of whether the plaintiff, a former employee of a corporation operating a library under contract with a city, could sue the corporation under Section 1983 alleging that she was terminated based on her gender in violation of the Equal Protection Clause and denied the pre-termination hearing the Due Process Clause guarantees public employees.[41] The court held that the defendant was a state actor because it performed a function traditionally the province of city governments.[42] The court further emphasized government's role in "assuring an informed citizenry through the maintenance of public libraries,"[43] focusing on the essentiality of the

---

[34] 382 U.S. 296 (1966).
[35] *Id.* at 301.
[36] *Id.* at 302–03. *See also Brentwood Acad.*, 531 U.S. at 297 (stating that one basis for *Evans* was the fact that "the park served the public purpose of providing community recreation").
[37] 499 F.2d 761 (2d Cir. 1974).
[38] *Id.* at 765.
[39] *Id. See also Janusaitis*, 607 F.2d at 23; Dobyns v. E-Systems, Inc., 667 F.2d 1219, 1220, 1226 (5th Cir. 1982) (holding that a nominally private corporation hired by the United States to create an "early warning system in the Sinai Peninsula" to monitor a "buffer zone" between two formerly warring countries performed the traditional state function of peacekeeping, and further observing that "[t]he private contract was set up solely to avoid a U.S. military or governmental employee presence in the area").
[40] 574 F.2d 739 (3d Cir. 1978).
[41] *Id.* at 742.
[42] *Id.* at 740–41.
[43] *Id.* at 740; *see also Janusaitis*, 607 F.2d at 24 (suggesting that *Chalfant* implicitly assumed that "the government's interest . . . in 'educating the public' . . . [is] sufficient . . . to support treating a library as an instrumentality of the state").

service. The dictum in *Chalfant* and the cases discussed above suggest that courts see protecting access to essential services as one of the doctrine's purposes.

Moreover, my thesis that courts use an actor's performance of a traditional government function as a proxy for its provision of an essential service draws support from some lower courts' creation of a "pure public function" or "essentially governmental function" test based on the decisions laying the foundation for the traditional state function doctrine.[44] Rather than asking the descriptive question of whether the purported state actor performs a function traditionally reserved for government, the public function test asks a normative question—whether the function is so important that the government, or an actor made to behave like the government due to its subjection to constitutional norms, *ought* to be performing it. These courts' belief that the traditional state function cases ground a "pure public function" doctrine may have resulted from their view that preserving access to essential services was one of the Court's objectives in establishing the traditional state function doctrine.

B. Respecting Citizens' Reliance Interests

The doctrine's second goal is to avoid disturbing citizens' settled expectations regarding how services traditionally administered by government will be provided. Citizens accustomed to government provision of a service will plan their activities expecting that the service will be provided in compliance with the Constitution — or, if it is not, that they will have a legal remedy. When the government privatizes a service and the provider acts contrary to constitutional rules constraining government actors, citizens' plans are disrupted. The harm this inflicts is analogous to the injury that contract-law "reliance damages" — losses caused because the plaintiff made investments expecting that the defendant would comply with the contract — attempt to redress. On this view, the volunteer fire department discussed above should be treated as a state agent because "citizens expect their government to protect them from the danger of fire," and allowing it to perform acts

[44] *See, e.g.*, Kia P. v. McIntyre, 235 F.3d 749, 757 (2d Cir. 2000) (holding that an otherwise private hospital's decision to (1) report the birth of a child with methadone in her blood to a welfare agency and (2) refuse to release the child as a result constituted state action because, in doing so, the hospital was "performing a function public or governmental in nature and which would have to be performed by the Government but for the activities of the private parties"); Baldwin v. Morgan, 287 F.2d 750, 755 (5th Cir. 1961) (holding that a private railroad station that racially segregated its waiting rooms was a state actor on the ground that, since it was "doing something the state deems useful for the public necessity or convenience," it was performing a "public function"); Jacobson v. New York Racing Ass'n., 41 A.D.2d 87, 91 (N.Y. App. Div. 1973) (holding that the decision by a corporation operating a racetrack to prevent the plaintiff from using its horse stalls was state action because "it is not entirely beyond reason to put racing into a form of a public function, given the revenue-raising purpose it serves for the State . . . . In short, racing can be reasonably viewed as an amusement now turned into a revenue-raising enterprise for the benefit of the State"). These cases looked only to the necessity of the service at issue, and not to whether the government had historically performed it.

that would violate the Constitution if done by the government would frustrate that expectation.[45]

Marsh v. Alabama[46] is perhaps the most well-known expression of the "reliance-interest" rationale. In *Marsh*, a Jehovah's Witness distributed religious literature in the square of a "company town" owned by a private corporation, refused to stop when the town's employees told her to, and was convicted of trespassing. She argued that the corporation violated the First Amendment by forbidding her to hand out literature, and the state replied that the town was not a state actor. In holding to the contrary, because the town's operation was an "essentially . . . public function," the Court emphasized that the town would be indistinguishable from a town operated by a municipal government to the average observer. [47] As the Court stated, "[t]he town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center," and "[t]he surrounding neighborhood . . . cannot be distinguished from [the company town] by anyone not familiar with the property lines."[48]

The importance of the town's appearance is explicable because it created the expectation that the town would be run like any other municipality. Hence, arresting people accustomed to speaking in the square of a government-operated town would disrupt their expectations.[49] This reading of *Marsh* also finds support in the cases the Court cited for its conclusion that the town was a state actor. The Court cited several precedents often described as "First Amendment easement" cases because they held that the government's permission, for some period of time, of unfettered expression on a type of governmental property gives the public a constitutionally protected expectation that the government will keep that property open to expression.[50] *Marsh*'s reference to these precedents suggests that, as in those cases, the Court meant to protect public expectations regarding expression allowed in the town square.

This rationale was echoed in *Edmonson v. Leesville Concrete*,[51] where the Court held that lawyers making peremptory challenges to prospective jurors in

---

[45] Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302, 331 (1995).
[46] 326 U.S. 501 (1946).
[47] *Marsh*, 326 U.S. at 506.
[48] *Id*. at 503. *See also* Lee v. Katz, 276 F.3d 550, 551 (9th Cir. 2002); Petersen v. Talisman Sugar Corp., 478 F.2d 73, 81–82 (5th Cir. 1973).
[49] *See* Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U. L. REV. 531, 584 (1989).
[50] *See Marsh*, 326 U.S. at 504 & n.1 (citing, *inter alia*, Schneider v. State, 308 U.S. 147 (1939); Hague v. C.I.O., 307 U.S. 496 (1939); and Lovell v. City of Griffin, 303 U.S. 444 (1938), for the proposition that "neither a State nor a municipality can completely bar the distribution of literature containing religious or political ideas on its streets, sidewalks and public places"). *Schneider*, *Hague*, and *Lovell* are described as "First Amendment easement" cases in Calvin Massey, *Public Fora, Neutral Governments, and the Prism of Property*, 50 HASTINGS L.J. 309, 314 & n.15, 316 & n.17, 316 n.24 (1999).
[51] 500 U.S. 614 (1991).

civil trials are state agents when doing so. The Court relied on the jury's status as a "quintessential governmental body," since it performs the traditional state function of administering justice, and reasoned that actors controlling the composition of such a body should also be considered state actors.[52] However, the Court's dictum exposed the rationale supporting its use of the traditional state function doctrine. The Court noted that citizens see a jury as a government institution and expect it to operate under constitutional constraints, observing that "[f]ew places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds."[53] Permitting racially motivated peremptory challenges — the activity challenged in *Edmonson*[54] — disrupts this expectation and makes citizens lose faith in the government's ability to impartially administer the law.

The Court reiterated this point in *Georgia v. McCollum*,[55] holding that a criminal defendant's racially discriminatory use of peremptory challenges is state action. The Court restated its view that since the jury performs a traditional state function, a person who determines its membership is also a state actor.[56] However, the Court went on to note its concern that even though the litigant using a peremptory challenge, rather than the judge, chooses the jurors to be excused, the "*perception* and the reality in a criminal trial will be that the court has excused jurors based on race, an outcome that *will be attributed to the state*."[57] The Court thus found it significant that people's expectations about the justice system's impartiality would be frustrated by allowing racially motivated peremptory challenges. As *Marsh, Edmonson* and *McCollum* suggest, courts seek to prevent the frustration of citizens' reliance interests by using an actor's performance of a traditional state function as a proxy for people's expectation that the actor will obey constitutional rules.

C. Regulating Actors with Market Power

The doctrine's third goal is to ensure that an entity with market power in the market for a service — *i.e.*, the ability to raise price significantly above competitive levels while retaining enough customers to stay profitable[58] — cannot exploit its position to consumers' detriment. Applying the Fourteenth Amendment guarantees of due process and equal protection to such entities, the argument runs, can protect people against this behavior where competition cannot. Say, for instance, that a town privatizes its library, the library has a monopoly in the market for books within the geographic area and the owner refuses to loan books to persons of a given race. Arguably, if the town had bookstores or competing libraries, people in that group could get books elsewhere and avoid the harmful effects of the dis-

[52] *Id.* at 624–25.
[53] *Id.* at 628.
[54] *See id.* at 616–17 (describing the racially discriminatory exercise of peremptory challenges at issue).
[55] 505 U.S. 42 (1992).
[56] *Id.* at 53.
[57] *Id.* (emphasis added).

crimination. However, since there are no competitors, the disfavored consumers cannot do so. Hence, assuming away public accommodations statutes for the moment, subjecting the library to Section 1983 is justified by the need to prevent members of the group from becoming unable to borrow books.

On this view, an entity's performance of a traditional state function is a proxy for its market power in the market for the service it provides. This premise might be justified on the ground that government actors tend to provide "public goods." An entity provides a "public good" when it cannot prevent people who do not pay from benefiting when the entity provides the good to paying customers. Say, for instance, that a town privatizes its police department and the company running the department offers residents crime protection for a fee. The police's presence will likely reduce the crime risk to residents who did not buy protection as well as to those who did. Thus, the company cannot prevent non-customers from benefiting from its services. Since a public good producer cannot be compensated by everyone it benefits, it has less incentive to produce the good than it would otherwise have. The government tends to provide these because, while there is demand for them, private firms lack sufficient incentives to produce the quantity the public wants.

A public good provider faces less competition than a firm providing a non-public good because other firms are discouraged from entering the market by the inability to charge all persons who benefit from the good.[59] A firm that does not face much competition is more able to discriminate in providing, or reducing the quality of, its services because it is not deterred from doing so by the prospect of customers turning to competitors. Thus, it can be argued that entities providing services the government formerly provided are more in need of judicial supervision than ordinary market actors.

Commentators have endorsed this rationale more explicitly than courts. Indeed, courts often deny that an entity's monopoly in the market for a service is enough to justify treating it as a state agent.[60] Commentators, on the other hand, still believe that the traditional state function doctrine is a covert attempt to subject otherwise private service providers with market power to constitutional norms.

For instance, Judge Winter interprets the *Terry v. Adams* and *Marsh v. Alabama* cases discussed above — although they overtly relied on the state's historical performance of the services at issue — as attempts to "regulate the exercise of cen-

---

[58] *See supra* note 18 and accompanying text.

[59] *See* Clayton P. Gillette & Paul B. Stephan, Richardson v. McKnight *and the Scope of Immunity after Privatization*, 8 S. CT. ECON. REV. 103, 105 (2000) ("[T]he public-goods nature of a service may mean that there exists a natural barrier to entry, which would give an effective monopoly to the firm that contracts with the government for the service's provision.").

[60] *See, e.g.*, Jackson v. Met. Edison Co., 419 U.S. 345 (1974); Mays v. Buckeye Rural Elec. Coop., Inc., 277 F.3d 873, 880–81 (6th Cir. 2002); Hadges v. Yonkers Racing Corp., 918 F.2d 1079, 1084 (2d Cir. 1990).

tralized power — the kind of power that might be consciously employed to foreclose individual competition in a free market."[61] Since the company town in *Marsh* did not face competitors operating public squares, and the Jaybird Association in *Terry* was not threatened by another organization capable of influencing primary outcomes, both could engage in harmful activities that an entity facing competition could not.[62] Similarly, Professor Choper's "power theory" of the doctrine casts it as an attempt to hold entities with "monopolistic, government-like control" over a service "to the constitutional responsibilities of the state."[63] Finally, Professor Ellmann views the doctrine as an attempt to regulate actors with "overweening power," much like the market power that in his view is wielded by multinational pharmaceutical companies in countries with little medical industry, despite the courts' unwillingness to expressly say so.[64] From these commentators' perspectives, courts use an entity's performance of a traditional state function as a proxy for its market power in the market for the service it provides.

Although the courts have not been as explicit in endorsing the market power-regulation rationale, they have adopted it in discussing analogous constitutional issues. Aspects of First Amendment jurisprudence illustrate this point. The Court has held that where the market in transmission of programming via a communications medium is highly concentrated — *i.e.*, few firms operate in the market, as in the case of broadcast television — actors in that market are less entitled to First Amendment protection against FCC regulation than actors in less concentrated markets.[65] Since broadcasters, in the Court's view, have near-monopoly power in their markets because the number of frequencies in the spectrum is limited and barriers to entry are high, they may be more heavily regulated, just as the market power-regulation rationale justifies subjecting entities with market power in the market for a service to constitutional regulation.[66] The analogy is imperfect, because Congress and agencies responsible for regulating broadcasters may choose not to regulate, whereas a court's decision that an entity is a state actor requires that it be subjected to constitutional norms. However, the broadcast cases[67] show courts' general willingness to consider market concentration in constitutional jurisprudence. Hence, it is plausible for the commentators discussed above to suggest that the market power-regulation rationale drives the traditional state function factor.

---

[61] Ralph K. Winter, *Changing Concepts of Equality: From Equality Before the Law to the Welfare State*, 1979 WASH. U. L. Q. 741, 756.

[62] *Id*. at 753.

[63] Jesse H. Choper, *Thoughts on State Action: The "Government Function" and "Power Theory" Approaches*, 1979 WASH. U. L.Q. 757, 781.

[64] Stephen Ellmann, *A Constitutional Confluence: American "State Action" Law and the Application of South Africa's Socioeconomic Rights Guarantees to Private Actors,* 45 N.Y.L. SCH. L. REV. 21, 61–63, 65 (2001).

[65] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Nat'l. Broadcasting Co. v. FCC, 319 U.S. 190, 226 (1943).

[66] *See Red Lion Broadcasting Co.*, 395 U.S. at 388–89.

[67] *See supra* note 65 and accompanying text.

Courts' dicta and commentators' arguments suggest that courts' use of the traditional state function doctrine is best explained by the essential-services, reliance-interest and market power-regulation rationales. The courts use an entity's performance of a traditional state function as a proxy for the need to subject the entity to constitutional constraints in order to serve these policy objectives. As I suggest below, however, this approach incorrectly assumes that courts are better able than legislatures to further the doctrine's goals. I will discuss the framework for comparative institutional analysis set forth by Professor Komesar and then apply that framework in arguing that legislatures are better situated to serve the doctrine's purposes.

II. Comparative Institutional Analysis

A. Overview

1. Defining the terms

Simply put, comparative institutional analysis is a method for finding the best way for society to resolve disputes. A "dispute," for our purposes, is a policy question contested by two or more interest groups that stand to gain or lose from its resolution. An example of a "policy question" would be the question of how the need to control pollution should be balanced against the need for industrial development.

Not everyone who has an interest in a given dispute outcome, and is thus a member of an "interest group," actively tries to prevail in the dispute — *e.g.*, by taking his or her case to court. Say that a plaintiff sues seeking to overturn an ordinance regulating door-to-door solicitation, claiming that it violates the First Amendment. Others may have an interest in overturning the ordinance — *i.e.*, there may be other solicitors whom it harms. The plaintiff's membership in this larger group is important because the group's size will affect his willingness to expend resources on the litigation. If the plaintiff cannot induce the other members to pay their pro rata shares of the cost, the plaintiff will not be compensated for the benefit he provides to the others, which will diminish his incentive to vigorously litigate. The larger the group, the more difficulty the plaintiff will have locating other members and persuading them to compensate him.

When presented with a dispute, comparative institutional analysis asks which institution or combination of institutions is best suited to resolve it. An "institution" is a complex process of decisionmaking.[68] For instance, the processes of adjudication in a court and enacting statutes in a legislature are institutions.

To say an institution is "best suited" to resolve a dispute implies two principles of inter-institutional interaction. First, the best-suited institution should

[68] NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY 3 (1994).

promulgate rules to resolve the dispute. For example, if we decided that the judicial process is best suited to settle the conflict regarding the solicitation ordinance described above, a court might do so by holding that the Constitution protects the solicitation the ordinance seeks to regulate. Second, other institutions should not be allowed to override those rules. To illustrate, suppose we are asking which institution will best resolve the dispute between people who prefer that the government give parents vouchers to pay for private school tuition and allow religious schools to receive them, and people who prefer that the government not do so. If we concluded that the judicial process is most capable of settling the dispute, we would be saying the courts should attack the issue through judge-made law—*e.g.*, by deciding whether the Constitution permits religious schools to receive vouchers. Moreover, the courts should refuse to enforce conflicting legislative rules — which a court would do, for instance, if a legislature provided vouchers to religious schools and the court held that this was inconsistent with constitutional precedent. By contrast, if we decided that the legislative process is best suited, we would be saying that legislatures should address the problem by statute — *e.g.*, by passing a law permitting religious schools to receive vouchers. The courts should not invalidate those rules, perhaps by applying a forgiving standard of review when deciding their constitutionality. Regardless of which branch makes the rules, the courts will apply them in the final analysis because of their place in the governmental structure, but the question of which institution makes the rules obviously retains importance.

What it means for an institution to be "best suited" to settle a dispute varies according to one's worldview, since defining that term requires a normative judgment as to which interest groups one would like to prevail. For instance, if one defines one's goal as "economic equality," one will find the branches that will resolve disputes in favor of the less well-off best suited to resolve policy questions, at least until the conditions of equality one envisions obtain. Given the economic orientation of many comparative institutional scholars,[69] it is unsurprising that many are concerned with which institution is most able to achieve an "efficient" resolution. An "efficient" resolution occurs when the side with the higher total financial and psychological stake — *i.e.*, the sum of its members' stakes — prevails, and society is thus better off on net. As a simple illustration, say I live near a factory that pollutes my land. I seek an injunction against the factory's operation. I value being free from pollution at $1,000, and the factory values remaining able to produce its goods at $500. The best result from an efficiency perspective is for me to win, as society will

[69] *See, e.g.*, Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TECH. 569, 620 (2001)(using Komesar's framework to argue, on efficiency grounds, that "cyberspace intermediaries" — *i.e.,* internet service providers with the ability to prevent their customers from committing "serious defamation" online — should not be immune from liability for defamatory statements made by customers); Mark A. A. Warner, *Globalization and Human Rights: An Economic Model*, 25 BROOK. J. INT'L L. 99, 109 (1999) (using Komesar's framework in arguing that "the institutional choice of market economics has been revealed to be the best available alternative to achieve the chosen goals of economic growth and political freedom").

be better off on net (by $500) if I do. Although I do not deny that goals other than efficiency may be important, I will join what I see as the majority of comparative institutional scholars for the purposes of this Article and assume that the institution "best suited" to resolve a dispute is the one we can expect to settle it efficiently.

2. The "participation-centered" approach

Professor Komesar has outlined a useful model for comparing institutions' abilities to efficiently resolve a dispute.[70] Komesar's "participation-centered" approach[71] can be summarized as follows. The groups contesting an issue within an institution vie for the attention of the institutional decisionmakers — *e.g.*, judges and jurors, if the relevant institution is a court — and strive to convince the decisionmakers of their positions' merits. Interest groups get attention by expending resources – time, money, psychological conviction, and so forth. The resources a group is willing to spend on winning varies according to its stake — *i.e.*, how much it stands to gain. The side best able to persuade the decisionmakers will achieve the outcome it wants — for example, the invalidation of a law as unconstitutional, or the passage of legislation favoring its interests.

Ideally, the group with the highest stake — and thus willing to expend the most resources – would win. This would produce an efficient result, as a victory by the side that valued its preferred outcome most makes society better off. In the real world, the cost of persuading institutional decisionmakers varies according to the characteristics of the group seeking the institution's assistance, and this causes inefficient resolutions. For example, we might represent the success at persuading an institution that a group has achieved as the "participation units" it has acquired.[72] The cost of each additional unit (which we might call the "marginal cost of participation") may be only $1 for Group A, for instance, while it may be $5 for Group B, assuming for simplicity's sake that marginal cost of participation does not rise for each successive unit. If the marginal costs of participation facing the groups are sufficiently different, a group with a higher stake may not be able to get as many units as a group with a lower stake, causing the lower-stake group to prevail.

Komesar's analysis focuses on the factors determining a group's marginal cost of participation. In his model, "information costs" and "organization costs" determine a group's participation costs.[73] There are two basic types of information cost. First, there are costs a group must overcome to learn how to use an institution to achieve its objectives — *e.g.*, the costs of learning the law and procedures appli-

---

[70] *See generally* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY (1994). To be sure, Komesar does not endorse the normative proposition that efficiency is the only acceptable goal. *See id.* at 30.
[71] *See id.* at 7.
[72] Komesar does not use this term, but I find it useful for explaining his model in quantitative language. *See id.*
[73] *Id.*at 8.

cable in courts, which groups usually incur in the form of legal fees.[74] Second, there are the costs created by the limitations of an institution's information-gathering capacity. These create work for an interest group because they force the group to devise ways to overcome the institution's limitations. The time institutions can spend deliberating on a policy question is a simple example. Say a large group of people sues a company, claiming that a defect in the company's product harmed them. In an ideal world, the court would have time to permit each plaintiff to present evidence concerning the extent to which she was hurt, and each one would get the compensation (or lack thereof) she deserved. Given the undoubtedly crowded docket, however, the court will have a strong incentive to (1) dismiss the case pretrial or (2) encourage a settlement that may under- or over-compensate each plaintiff. Parties that do not want this result must incur additional costs trying to convince the court not to dispose of the case by one of those means. Note that the extent of this type of cost depends on both (1) the institution chosen to resolve the dispute — which in this case is important because of the inherent limits on a court's time to find facts and deliberate; and (2) the nature of the dispute — which has an impact here because the number of plaintiffs involved makes the court expend more resources determining what relief it should order than a small group would necessitate.[75]

The organization costs facing a group are the costs that members who want to take action, and want other members to contribute, must meet. To illustrate, if I dislike an ordinance regulating driveway width and want to lobby my town to repeal it, and I know some neighbors also oppose the ordinance, the costs I must incur to ensure that they contribute to my efforts are the organization costs facing our interest group.

Two factors determine a group's organization costs. First, organization costs increase with group size. Since it is harder to monitor a large group's members and convince them to pay their shares, it is harder to ensure that they do not free ride on the efforts of those who act. The more neighbors in the driveway ordinance example, the harder it will be to ensure that each pays his share of the cost of my efforts. Second, the size of each member's individual stake — *i.e.*, how much she stands to gain from winning — affects her inclination to organize her fellow members, and thus organization costs rise as individual stakes decrease. If I have a small stake in the ordinance dispute — *i.e.*, it would not cost me much to just comply with the ordinance — I have little incentive to bother soliciting contributions from neighbors.

Komesar's discussion of information and organization costs focuses on two ways in which a dispute resolution can be "biased," *i.e.*, rendered inefficient, by

---

[74] *See id.* at 127.

[75] Komesar makes this point in discussing courts' dispute resolution capacity, but his points are applicable to any institution. *See id.* at 22.

those costs. A resolution manifests "minoritarian bias" where a small group with high individual stakes convinces an institution to enact its preferred policy and thereby inflicts a greater cost on a large group with low individual stakes than the benefit to the small group.[76] Suppose a factory pollutes an area, causing a total of $10,000 of damage to many farms. It would cost the factory $5,000 to install a device that would cease the damage. The farmers jointly sue the factory seeking $10,000 in damages, but they recover nothing despite their greater total stake because the organization costs facing their group render them unable to amass enough funds to mount a successful suit.

A resolution reflects "majoritarian bias," by contrast, where a large group with low individual stakes prevails and thereby inflicts a greater cost on a small, high-stakes group than the benefit it obtains.[77] Suppose the cost to the factory of installing the device would exceed the damage the pollution does to the farms. Because the farmers are a larger group and can muster more votes than the factory owner, they convince the legislature to make the factory install the device and create an inefficient result. Once a dispute has been identified, the goal of comparative institutional analysis is to find the institution least likely to resolve that dispute in a manner reflecting one of these kinds of bias – *i.e.*, the institution where the group with the highest total stake is most likely to win.

3. Applying comparative institutional analysis in this context

I have spoken in terms of the goals courts use the traditional state function doctrine to serve, but I can redescribe those goals as disputes the courts use the doctrine to resolve. Courts' use of the doctrine to protect access to essential services, for instance, may be recast as an attempt to resolve disputes between entities that provide essential services and citizens who feel they have been unfairly denied access to those services. Hence, I have completed the first step in the comparative institutional inquiry — defining the disputes that I am seeking the best possible institution to resolve. Two steps remain. First, I must identify the information costs facing groups seeking to use the two institutions I have chosen for my discussion, courts and legislatures, to further their positions. Second, I must discuss the extent to which those costs affect the abilities of the adjudicative and legislative processes to resolve the disputes the traditional state function doctrine seeks to settle. I perform these steps below.

I will approach the first step by discussing (1) the relative information costs facing interest groups learning how to effectively participate in the adjudicative and legislative processes; and (2) the manner in which the fact-finding processes employed by the legislative and judicial branches affect the information costs faced by interest groups using those institutions.

---

[76] *Id.* at 55.
[77] *See id.* at 77.

B. Information costs associated with learning how to use institutions

A group using the courts to advance its position generally faces higher information costs than a group seeking legislative action. The higher costs facing litigants result from at least three factors. First, the formality of courts' procedures for taking evidence — *e.g.*, the prohibition on ex parte communications with judges and jurors[78] — make presenting one's position more complicated than propounding one's views to legislators.[79] A group seeking to use the legislative process may vote, write to legislators, attempt to influence others' votes, and so forth — all activities requiring less specialized knowledge than litigation. The second reason stems from the fact that a legislature can shift to the taxpayer costs associated with factual investigation that would otherwise fall on the groups before it. Legislators may do so in two ways: (1) by communicating with constituents to determine the issues regarding which they want legislative action;[80] and (2) by holding taxpayer-funded hearings.[81] By contrast, a group seeking to further its position in court must take the initiative, since courts lack the power to address issues that litigants have yet to submit;[82] and the group must bear the cost of collecting evidence supporting its position. Third, judges' isolation from public pressure — *e.g.*, the life tenure and salary protection enjoyed by federal judges — makes them hard to influence through lobbying and financial inducement.[83] Juries, the other main decisionmaker in the adjudicative process, have similar characteristics, since juries serve only a temporary role[84] and are barred from contact with parties to the dispute.[85]

C. Information costs resulting from courts' and legislatures' fact-finding procedures

The varying limitations of the fact-finding procedures used by courts and legislatures affect the information costs interest groups using them incur. The important difference for our purposes is that courts' procedures make them less suited than legislatures to learning public preferences regarding an issue—*e.g.*, determining whether the public would prefer a tax cut or view one as imprudent. This is true for three reasons. First, legislatures may hear evidence from any source regarding a policy's merits, while courts can only hear evidence from persons willing to submit disputes to them. Second, over the long term, courts' views on issues are likely to be shaped by presentations by the small, high-stakes groups that typically participate in litigation, and those groups' views may not be consistent with those

---

[78] *See id.* at 123.
[79] *See id.* ("[The judiciary's] independence, or at least insulation from unequal influence, is . . . increased by the manner in which information comes to judges and juries. Information reaching both judge and jury is largely funneled through the courtroom and the adversarial process.").
[80] *See id.* at 127.
[81] *See id.* at 126.
[82] *See id.* at 125.
[83] *See id.* at 124.
[84] *See id.* ("Juries are . . . walled-off from outside influence . . . . [because] [t]hey are chosen at random from the population and serve for only short periods—in general, for only a few trials or indictments.").
[85] *See supra* note 79 and accompanying text.

of the average person.[86] Third, the time-consuming nature of courts' evidence-gathering procedures and the limited resources available to them compared to those accessible to the political branches[87] prevent courts from conducting opinion research. These differences render legislatures more capable of acquiring sufficient information to make policies reflecting public preferences.[88]

The information costs associated with the judicial process make it best at efficient resolution where the interest groups are small and their members, on average, have high stakes (in Komesar's terms, the dispute is characterized by a "uniform high stakes distribution"). However, where (1) the groups are large and have low individual stakes (there is a "uniform low stakes distribution,") or (2) the dispute pits a small group with high individual stakes against a large, low-individual stakes group (there is a "skewed stakes distribution,") judicial resolution is less likely to be efficient.[89] The information costs of litigation, combined with the high organization costs facing dispersed groups, make such groups unlikely to use the courts. If they do, the result will likely favor the smaller group with high individual stakes even if the larger group has a higher total stake (and will thus manifest "minoritarian bias.") This, Komesar suggests, is a reason why the Court is reluctant to place constitutional limitations on statutes benefiting concentrated groups of producers of a product at the expense of dispersed groups of consumers. The skewed stakes distributions in disputes over such statutes' constitutionality make it probable that courts will resolve them in favor of producers, even when a statute inflicts a cost on consumers exceeding the benefit it confers upon producers.[90]

To be sure, two exceptions exist. First, where a "catalytic subgroup" — members with higher individual stakes than the average member — is in a large, low-stakes group, the subgroup members may have enough incentive to organize the others.[91] Suppose that a zoning ordinance harms both (1) a developer who wants to build in the area affected by the law and (2) potential housing buyers who must pay higher prices because of it. If the buyers alone were affected, their low stakes would prevent them from overcoming the organization costs facing the group, but the presence of a high-stakes entity like the developer may mobilize the

---

[86] *See* Neil K. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657, 696 (1988) ("The adjudication process is an important source of information for judges. Their view of the issues can be molded by what they are told and shown in the cases brought to them . . . . The more complex the issues and the less familiar the judges are with the given area, the more likely that they can be influenced by the information provided by the litigants.").

[87] *See* Komesar, *supra* note 86, at 663–64 (discussing the disparity between courts' and legislatures' fact-finding resources).

[88] *See* Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 578 (1994) ("A common justification for judicial deference to the legislature is the latter's unique expertise in performing the factfinding function essential to determinations of policy. . . . Legislatures, unlike courts, have substantial staff, funds, time and procedures to devote to effective information gathering and sorting.") (footnotes omitted); *see also* KOMESAR, *supra* note 68, at 141.

[89] *See* KOMESAR, *supra* note 68, at 133.

[90] *See id.*at 229.

[91] *See id.* at 72.

group.[92] Second, where the individual stakes of all members are very high — suppose the members are strongly committed to preserving the land on which the state seeks to permit development — the judiciary may be more capable than, or as capable as, the legislature at efficiently resolving the dispute. This is because each member's high stake gives him or her the incentive to ensure that the others pay their shares (*e.g.*, by forming a concerned citizens' association to litigate the permit issue and soliciting contributions to its efforts.)[93]

Of course, the same relationship between group size and likelihood of effective participation obtains in the legislative process. Lower organization costs make concentrated groups better able to influence the legislature through voting, lobbying, and financial inducements than dispersed groups. However, as noted above, meaningful participation by dispersed groups is easier (and thus more likely) in legislatures than in courts. Since large, low-stakes groups will be better able to overcome the information costs associated with the legislative process, legislatures are more likely to efficiently resolve disputes involving uniform-low and skewed stakes distributions than courts.

With these differences between the legislative and judicial processes and the comparative advantages they create in mind, I will now evaluate the impact these differences have on courts' and legislatures' ability to resolve the disputes the traditional state function doctrine is designed to settle.

III. Critique of the Rationales for the Traditional State Function Doctrine

A. Ensuring Access to Essential Services

As noted above, one of the doctrine's rationales is the need to protect the public's access to services it considers essential — or, as I rephrased that rationale above, the resolution of disputes between providers of essential services and consumers of those services. In this section, I contend that the legislative process, rather than the judicial process, is the institution best suited to efficiently resolve these disputes.

First, I argue that courts are ill-equipped by comparison with legislatures to determine which services people deem essential. I base this on the Court's rejection of the notion that it is competent to protect public access to essential services in other areas of constitutional jurisprudence. Second, I contend that skewed stakes distributions typify disputes between producers of essential services and their consumers, and thus suggest – for the reasons discussed above — that courts are not best-suited to efficiently resolve such disputes. Third, I contend that the fact that an actor performs a function traditionally the province of the state is an inadequate proxy for its performance of a service the average person views as essential. By

[92] This example is Professor Komesar's. KOMESAR, *supra* note 22, at 81–82.
[93] *See id.* at 72.

looking to the state's traditional provision of a service to determine whether that service is essential, the essential-services rationale accords more importance to the public's historical preferences than its current preferences.

1. Courts are less well-equipped than legislatures to determine which services the public views as essential.

The first task facing an institution seeking to protect access to essential services is determining which services are "essential" — meaning that the average person views them as integral to meaningful life.[94] The unique limitations on courts' fact-finding capacity render them less able to do this than legislatures. The determination that a service is "essential" requires knowledge not easily obtainable in an adversary proceeding. A litigant who sues a service provider's employee under Section 1983, claiming that the employee arbitrarily denied him the service, will obviously say the service is central to his existence, but it would plainly be incorrect for a court to infer from this that the public considers the service essential. Since a legislature has broader fact-finding powers and is subject to public pressure, it is better equipped to determine which functions are most valued.

The Court has already attempted to apply an essential-services test in two analogous areas of jurisprudence and rejected such a test because of the limits of its fact-finding capacity. These areas include (1) the application of the substantive component of the Fourteenth Amendment Due Process Clause to regulation of commercial transactions and (2) the application of the Tenth Amendment to federal regulations of state activity. In both such areas, the Court's rejection of an essential-services test rested on its determination that it lacked the fact-finding powers necessary to properly apply such a test.

From the late nineteenth century until the mid-1930s, the Court took the view that only transactions in goods and services "affected" or "clothed" with a "public interest" could be constitutionally regulated.[95] In *Wolff Packing Co. v. Court of Industrial Relations*,[96] the Court made a concerted effort to define the set of goods and services "affected with a public interest." A service is affected with a public interest, the Court explained, "when the public becomes so peculiarly dependent

[94] This definition of "essential services" roughly approximates the one that courts articulating the essential-services rationale use. *See, e.g.*, *Evans*, 382 U.S. at 301 (stating that the Court's finding of state action was "buttressed by the nature of the service rendered the community by a park," suggesting that the value of the park to the average townsperson underlay the Court's decision); *Terry*, 345 U.S. at 469–70 ("The effect of the whole procedure, Jaybird primary plus Democratic primary plus general election, is to . . . strip Negroes of every vestige of influence in selecting the officials who control the local county matters that intimately touch the daily lives of citizens."); *Chalfant*, 574 F.2d at 740 (grounding decision in part on the need to "assur[e] an informed citizenry through the maintenance of public libraries").

[95] The Court first recognized the "affected with a public interest" doctrine in its 1876 *Munn* v. *Illinois* decision, which upheld a state's price controls on grain storage against a Due Process Clause challenge on the ground that transactions in grain storage were affected with a public interest. *See* Munn v. Illinois, 94 U.S. 113 (1876). For a detailed description and history of this doctrine, *see* Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Era*, 78 B.U.L. REV. 1489, 1505–29 (1998).

[96] 262 U.S. 522 (1923).

upon [it] that one engaging therein subjects himself to a more intimate public regulation."[97] Moreover, the Court emphasized the "indispensable nature" of services properly subject to state control.[98] The Court's chosen test thus reflected a concern with preserving access to essential services.

As these cases accumulated, members of the Court became dissatisfied with the coherence of the doctrine. [99] Justice Holmes's dissent in *Tyson & Brother v. Banton*,[100] in which the Court invalidated a statute prohibiting theater ticket brokers from reselling tickets "at a price in excess of fifty cents in advance of the printed price,"[101] evidenced this trend.[102] Justice Holmes noted the public differences of opinion regarding which services are essential and ought to be subject to regulation: "if we are to yield to fashionable conventions," he argued, "it seems to me that theatres are as much devoted to public use as anything well can be," as "[t]o many people the superfluous is the necessary."[103] This reasoning was echoed in the 1933 case of *Nebbia v. New York*,[104] which abolished the "affected with a public interest" doctrine because it was "not susceptible of definition and form[ed] an unsatisfactory test of the constitutionality of legislation directed at business practices."[105] Determining which goods and services should be subject to regulation, the Court resolved, is the proper province of legislatures, as they have the fact-finding capacity to measure public views regarding the proper objects of regulation.

The affected with a public interest doctrine and the essential-services rationale for the traditional state function doctrine make similar assumptions. Just as the affected with a public interest doctrine assumed that courts are better at discerning the services upon which the public is "peculiarly dependent," the essential-services rationale assumes courts are best equipped to ascertain the services the average person considers essential.

For similar reasons, the Court rejected the notion that the question of whether the Tenth Amendment prohibits Congress from regulating a state activity should turn on whether that activity is an "essential governmental function." The Court's position on this issue shifted between the late 1960s and the mid-1980s. In the 1968 case of *Maryland v. Wirtz*,[106] the Court faced the issue of whether Congress, which had previously refrained from applying the wage and hour regulations in the Fair Labor Standards Act ("FLSA") to states and their subdivisions, could apply the FLSA to schools and hospitals operated by those entities. The Court upheld the

---

[97] *Id*.
[98] *Id*. at 540.
[99] *See, e.g.*, Williams v. Standard Oil Co., 278 U.S. 235 (1929); Ribnik v. McBride, 277 U.S. 350 (1928).
[100] 273 U.S. 418 (1927).
[101] *Tyson*, 273 U.S. at 420.
[102] *See, e.g.*, Post, *supra* note 95, at 1524–25.
[103] *Tyson*, 273 U.S. at 447 (Holmes, J., dissenting).
[104] 291 U.S. 502 (1933).
[105] *Nebbia*, 291 U.S. at 516.
[106] 392 U.S. 183 (1968).

relevant provisions, rejecting the states' argument that they exceeded Congress's Commerce Clause power "because that power must yield to state sovereignty in the performance of governmental functions."[107]

The Court changed direction in the 1976 case of *National League of Cities v. Usery*.[108] Congress amended the FLSA to "impose[] upon almost all public employment the minimum wage and maximum hour requirements previously restricted to employees engaged in interstate commerce."[109] The Court stated that this infringed states' "power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, [and] what hours those persons shall work," which was a "function[] essential to [the states'] separate and independent existence."[110] The Tenth Amendment, in the Court's view, prohibited federal regulation of such functions. Since the FLSA amendments at issue in *Wirtz* impeded the same state function, the Court overruled *Wirtz*.[111]

Finally, in *Garcia v. San Antonio Metropolitan Transit Authority*,[112] the Court overruled *National League of Cities* and held that the FLSA amendments did not violate the Tenth Amendment. *Garcia* characterized the *National League of Cities* test as asking whether the activity sought to be regulated was a "traditional governmental function."[113] It might thus appear that the Court, rather than reject a test that turned on whether the function was "essential," focused its critique solely on a test similar to the traditional state function doctrine. Importantly, however, the Court also refused to adopt a test "confin[ing] immunity" from regulation "to 'necessary' governmental services, that is, services that would be provided inadequately or not at all unless the government provided them."[114] The Court reasoned that "[i]t . . . is open to question how well equipped courts are to make this kind of determination about the workings of economic markets," again grounding its rejection of an essential-services test on the limitations on its fact-finding capabilities.[115]

As noted above, the essential-services rationale assumes that a private actor providing an essential service will sometimes deny that service arbitrarily or fail to offer it affordably. *Garcia*, however, explicitly denied that courts are best equipped to determine whether that premise is correct. Even assuming courts can discern which services the public considers essential, the Court argued, it may be that private actors would perform those functions affordably and on a non-discriminatory basis even if the state did not — or, at least, that the cost to the state of assuming day-to-day control over those services would exceed the cost imposed by private

[107] *Id.* at 195.
[108] 426 U.S. 833 (1976).
[109] *Id.* at 839.
[110] *Nat'l. League of Cities*, 426 U.S. at 845.
[111] *Id.* at 840.
[112] 469 U.S. 528 (1985).
[113] *Id.* at 538.
[114] *Garcia,* 469 U.S. at 545.
[115] *Id.*

providers' harmful behavior under the status quo. The Court believed it is better for legislatures, which have access to more information regarding the operation of the economy, to be responsible for making rules geared toward protecting essential services.

One might object that the notion that my critique of the essential-services rationale is supported by the Court's precedents assumes that the Court's reluctance to adopt an essential-services test in other contexts stemmed from an honest assessment of its competence. If we accept that a branch's decision to make deferential rules in a given area indicates that it is not most competent to make those rules, comparative institutional analysis is a waste of time, because we can expect the branches to allocate tasks among themselves according to their areas of competence without our intervention. By this logic, if the Court had chosen to keep the "affected with a public interest" test, we would have to conclude that the Court was competent to apply it.

However, the Court's stance on "economic due process," as expressed in *Nebbia*, and the Tenth Amendment, as set forth in *Garcia*, can be distinguished from the hypothetical situation in which the Court chooses to retain its essential-services tests in those areas. An institution's decision to make deferential legal rules in an area is a more reliable indicator of its competence than a decision *not* to defer to rules made by coordinate branches. We can accept that decisions like *Nebbia* and *Garcia* establish — or at least raise the presumption of — the judiciary's relative lack of competence to make rules in the areas of law covered by those cases, without accepting that the judiciary's decision to *implement* aggressive review in an area would mean that it was supremely competent in that area.

The idea that each branch has a strong incentive to expand its authority to the exclusion of that of others — *i.e.*, to adopt rules that override, rather than defer to, judgments of coordinate branches — is a premise of the scheme of separated powers, under which the branches' efforts to expand their powers are supposed to counteract each other and result in stability.[116] A corollary is that for a given area of law, each branch should be expected to make non-deferential rules unless it faces substantial barriers to obtaining competence. A branch that instead chooses to make deferential rules, thus allowing another to make the policy choices, likely does so because it anticipates that any non-deferential rules it might craft would become unworkable and thus diminish its legitimacy.

---

[116] *See* THE FEDERALIST NO. 51 (James Madison) (stating that the scheme of separated powers is intended to give each branch "the necessary constitutional means, and personal motives, to resist encroachments of the others"); Richard A. Champagne, Jr., *The Separation of Powers, Institutional Responsibility, and the Problem of Representation*, 75 MARQ. L. REV. 839, 842 (1992) (arguing that "an institutional will to power that arises from the ability of each political institution to dominate" is an essential "precondition for the effective functioning of the separation of powers doctrine").

I have thus sketched the argument that, when determining which institution is best suited to make rules regarding a subject, we should presume that those institutions that deem themselves incompetent to do so are correct in that assessment. When a branch makes a "non-deferential" rule, however, we should more closely examine its competence in the area of law at issue. More concretely, we should be more willing to trust the Court when it says it is ill-equipped to determine whether services would be adequately provided by the private sector than when it adopts a rule invalidating economic regulations that infringe freedom of contract.

2. Essential-services disputes are typified by skewed stakes distributions and thus ill-suited for judicial resolution

Even assuming courts are as well-equipped as legislatures to discern which services the average person views as essential, the skewed nature of the stakes distributions in many essential-service disputes renders those conflicts poorly suited for judicial resolution. I say "many" and not "all" disputes because the dispersed groups in some essential-services disputes have high individual stakes and are thus able to overcome the costs associated with the adjudicative process.

At the outset, I note that the disputes at issue in the essential-services cases discussed above[117] — assuming those cases typify disputes the essential-services rationale seeks to resolve — were between small and large interest groups. For example, the dispute in *Evans v. Newton* was between the trustees of a park and a large group of African-American persons affected by the park's discriminatory admission policies.[118]

The fact that the disputes in the essential-services cases pitted small groups against large ones does not, of course, show that courts cannot efficiently resolve all disputes that the essential-services rationale seeks to settle. In Komesar's model, although a large group faces high organization costs, it can meet those costs and effectively advocate its interests in litigation where (1) it contains "catalytic subgroups" whose members have individual stakes larger than the stake of the average member; or (2) most or all members' individual stakes are high. In essential-services disputes falling under such an exception, we should not expect the judiciary to arrive at a result reflecting minoritarian bias.

To illustrate, consider two hypothetical situations in which the essential-services rationale would justify Section 1983 liability. In both examples, State X has for some time operated public libraries. Recently, however, the state has assigned a private company to run the libraries. In the first hypothetical, the state charged customers no fee for borrowing books when it operated the libraries. However, since it

[117] *See supra* notes 25–44 and accompanying text.
[118] *See supra* notes 34–36 and accompanying text.

is concerned about customers' failure to return books even when threatened with late fees, the company institutes a policy requiring customers to put down a small deposit when they borrow. In the second example, the company refuses to lend to persons of a certain race. In both examples, a member of the harmed group files suit seeking to overturn the policy.

A dispute between a large group and a small one is present in both examples. However, the large groups have different average stake sizes, and we should expect this to affect the efficiency with which the judiciary resolves the dispute. In the "borrowing deposit" hypothetical, each borrower's stake is limited to the fees she (1) has paid and (2) expects to pay in the future if the policy is not overturned. If I am a borrower, it will not be worth it to sue individually to overturn the deposit rule, since the cost of litigating will outstrip my stake. Moreover, the cost I would incur to make others pay their shares probably exceeds the benefit I would get by winning. If I do sue, I am unlikely to succeed, because the company — which has a high stake given its interest in collecting deposits — will spend more on litigating than whatever contributions I can gather from other borrowers. Therefore, even if the borrowers have a greater aggregate stake, the judiciary's tendency toward minoritarian bias will likely cause an inefficient result. This conclusion is strengthened by the fact that the dispute resembles the sort of producer-consumer conflict the Supreme Court has disavowed any intention to resolve.[119] Like the consumers the Court sought to protect in its *Lochner*-era jurisprudence, the borrower group is so large and its members' individual stakes so small that the organization costs facing the group will keep the borrowers from winning. In the "discrimination" hypothetical, by contrast, the persons subjected to the policy suffer not only a diminished ability to get books, but also the psychological harms associated with racial discrimination. A victim is more likely to have a sufficient incentive to induce fellow borrowers to help litigate. We thus have more reason to expect the judiciary to reach an efficient result.

Now let us assume, like the Third Circuit in *Chalfant*,[120] that the public sees books as essential. In both examples, the essential-services rationale would justify protecting borrowers by subjecting the company's employees to Section 1983. Yet if we follow Komesar's model, it is only in the second case — where the average member's stake is high — that the courts can effectively protect the dispersed group, because the average library patron's high stake will help prevent an inefficient result.

Concluding that courts are ill-suited to resolve producer-consumer disputes does not complete the comparative institutional analysis. We must ask whether legislatures are better able to efficiently resolve producer-consumer conflicts. As noted above, the legislative process can reach at least two types of ineffi-

[119] *See supra* note 92.
[120] *See supra* notes 40–43 and accompanying text.

cient resolution: (1) a legislative act manifesting "minoritarian bias," meaning that through that legislation the minority inflicts more cost on the majority than it receives in benefit; and (2) a legislative act evincing "majoritarian bias," meaning the majority has a lower total stake than the minority but nonetheless wins. If leaving the task of protecting access to essential services to legislatures would lead to one of these results, society may be better off assigning that task to the courts despite the unlikelihood of effective judicial review.

It can be plausibly argued, however, that minoritarian bias does not prevent legislatures from protecting dispersed groups' access to services they consider integral to meaningful life, even when the group members have very low stakes. Congress, for example, regularly enacts statutes addressing disputes between dispersed consumer groups and concentrated producer groups — similar to the dispute between the library and the book borrowers — and resolving them in consumers' favor.[121] Consider Congress's resolution of conflicts between credit card holders and issuers concerning fee disclosure practices. The Truth in Lending Act[122] requires detailed disclosure of credit card companies' finance charges[123] and annual percentage rates.[124] The fact that Congress regularly passes legislation favoring dispersed groups over concentrated ones is telling, as Congress — out of all legislative bodies — is the one we should most expect to fall prey to minoritarian bias. One would anticipate that, when a dispute between a small high-stakes group and a large low-stakes group of the "borrowing deposit" variety comes before Congress, the dispersed group (as people nationwide will be affected by any legislation) will be so large as to create barriers to organization. Nonetheless, Congress continues to frequently resolve such "producer-consumer" conflicts in favor of the consumer. By contrast, the Court — through its decisions rejecting economic due process[125] — effectively renounced any intention to resolve producer-consumer disputes through judge-made law.[126] If we accept that an institution's decision to make deferential rules applicable to an area of private conduct indicates its lack of competence in that area,[127] we may conclude that the legislative rather than the judicial process is best suited to protect access to essential services.

The question of whether legislative attempts to protect access to essential services are more likely to manifest *majoritarian* bias is problematic. Consider the "borrowing deposit" example. The patrons clearly have a numerical advantage over the library. Hence, the consumers may be able to procure legislation reflecting

---

[121] *See* William N. Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 320–21 (1988); Herbert Hovenkamp, *Legislation, Well-being, and Public Choice*, 57 U. CHI. L. REV. 63, 88 (1990); Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 272 (1982).
[122] 15 U.S.C. § 1601 *et seq.* (2005).
[123] 15 U.S.C. § 1637(a)(3) (2005).
[124] 15 U.S.C. § 1637(b)(5) (2005).
[125] *See supra* notes 104–107 and accompanying text.
[126] *See supra* note 92.
[127] *See supra* note 116 and accompanying text.

majoritarian bias — for instance, affording consumers who feel harmed by the lending policies damages greatly exceeding the deposit (*e.g.*, treble or statutory damages). Whether the borrowers will succeed is uncertain, since – as Komesar points out — the tendency of greater numbers to foster majoritarian bias depends on the size and population of the jurisdiction.[128] The larger the jurisdiction, the more consumers in the dispersed group, and the greater the organization costs of getting the dispersed group's preferred legislation enacted.

Constitutional scholars, however, would not likely view essential service providers – such as, perhaps, the credit-card companies and the private library system in the above examples — as interest groups that judicial review is necessary to protect from oppression. To overgeneralize for brevity, constitutional theorists typically argue that minority groups whose members are subject to prejudice keeping them from enacting their preferred policies through the legislature are appropriate beneficiaries of judicial review.[129] Judicial intervention is warranted, for instance, to protect members of an ethnic group in a jurisdiction in which most people would not support a group member's candidacy for office, regardless of how appealing the public might otherwise have found her proposals and character. The mere fact that a group's members are in a given industry (*e.g.*, the credit card business,) the argument goes, does not subject them to this kind of prejudice.

The proposition that courts are better than legislatures at protecting access to essential services is questionable. The key difference between courts' and legislatures' capacity to protect access to essential services lies in legislatures' superior ability to protect dispersed groups' interests in "producer-consumer conflict" cases—*i.e.*, disputes in which dispersed group members have minimal individual stakes.

3. An entity's performance of a traditional state function is an inadequate proxy for the essentiality of that function

Thus far, I have argued that legislatures are better at protecting access to essential services than courts by focusing on the two branches' characteristics and inferring the comparative advantages that result from those characteristics. I have not, however, evaluated the methods those institutions have actually used to guarantee access to essential services — *i.e.*, the doctrines courts have propounded, and the statutes legislatures have enacted, for that purpose. Evaluating the methods courts and legislatures have used to achieve this goal is helpful insofar as those methods are evidence of the branches' relative abilities. Accordingly, my next argument compares the traditional state function doctrine — the judge-made approach to protecting access to essential services in the constitutional law context — with some approaches legislatures have used to accomplish that goal. I conclude

[128] *See* Komesar, *supra* note 86, at 663.
[129] *See, e.g.*, Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENTARY 257, 266 (1996); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2411–12 (1984).

that, even assuming courts can determine which services are essential, an entity's performance of a traditional state function is an inadequate proxy for the essentiality of the service it provides.

As commentators have noted in their critiques of the doctrine, some functions traditionally performed by the government may not be as essential to the public as they once were, and some functions considered essential by the public may never have been performed by the government.[130] By looking to tradition to see if a function is essential, the doctrine fails to accommodate changes in public preferences. The doctrine is thus subject to criticisms similar to those leveled at the Court's decision in *Lucas v. South Carolina Coastal Council*.[131] In *Lucas*, the plaintiff bought a plot of beachfront land and planned to build housing on it, but his plans were thwarted by a regulation enacted soon after that prohibited development to prevent coastal erosion. He sued the regulating agency, arguing that the regulation constituted a "taking of property without just compensation" in violation of the Fifth Amendment and thus that the state had to compensate him for his inability to build. The Court held that whether a regulation of a use of property amounts to a "taking" turns on whether preexisting common law would have permitted a private party to sue the owner for putting the land to that use.[132] If the plaintiff could be liable under common law for creating a nuisance by building on the beachfront, the regulation would not be a taking, but if common law did not allow such a suit the plaintiff's loss required compensation.[133]

Lucas's holding is problematic to many because common law principles evolve more slowly than statutory rules. Restricting the uses of property a state may regulate without compensation to those actionable at common law denies the state the ability to regulate in step with contemporary public preferences.[134] The public may care more deeply about coastal erosion today than common law nuisance doctrine rooted in nineteenth-century jurisprudence reflects.[135] The traditional state function doctrine has the same defect, because it discourages legislatures from allocating responsibility for services between the state and the private sector in accordance with current public preferences.

To illustrate further, if a court holds that a customer may sue a private library operator for violating a constitutional right against arbitrary treatment, the

---

[130] Maimon Schwarzchild, *Value Pluralism and the Constitution: In Defense of the State Action Doctrine*, 1988 SUP. CT. REV. 129, 148; Jack M. Sabatino, *Privatization and Punitives: Should Government Contractors Share the Sovereign's Immunities from Exemplary Damages?*, 58 OHIO ST. L.J. 175, 184 (1997).
[131] 505 U.S. 1003 (1992).
[132] *See Lucas*, 505 U.S. at 1025.
[133] *Id.* at 1031.
[134] *See, e.g.*, J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89, 128 (1995); Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on* Lucas *and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 316 (1993).
[135] *See* Michelman, *supra* note 134, at 318 (making this point regarding the origins of common law nuisance doctrine).

litigation costs created by patrons' attempts to enforce that right will be passed from the company to the government and ultimately to the taxpayer. The public may see reducing this tax burden as more important than ensuring that library patrons have enforceable rights against arbitrary denials of services. However, imposing Section 1983 liability on actors performing traditional state functions prohibits legislatures from achieving those savings through privatization.

Of course, accepting this analysis would have consequences reaching far beyond the state action test. If our paramount goal is to serve public preferences, and the public's priority is avoiding the tax burden associated with Section 1983 litigation, indisputably state actors (who also pass their litigation costs on to taxpayers) should not be subject to constitutional limitations either. I do not mean to suggest that constitutional law should be revised in this manner, but simply to observe that, if courts are *attempting to serve public preferences through* the traditional state function doctrine, they are subject to the same critique as the *Lucas* Court.

B. Respecting Citizens' Reliance Interests

As noted above, ensuring that citizens' expectations regarding how service providers will act are not disrupted by arbitrary treatment is the traditional state function doctrine's second objective.[136] Suppose a town operates a park for many years and allows street musicians to play there. The musicians and their listeners come to believe the town will operate the park indefinitely, and thus expect that the park will always be run in accordance with constitutional constraints. However, the town sells the park to a private entity that prohibits the musicians from playing, disrupting the musicians' and the listeners' settled expectations. To protect those expectations, the reliance-interest rationale would justify imposing constitutional norms upon the park operator. The reliance-interest rationale assumes that courts are best equipped to resolve a dispute between citizens whose expectations about a service provider's behavior have been frustrated and the service provider itself. If we assume the cases I used to illustrate the reliance-interest rationale typify disputes of this kind, however, the idea that courts will most efficiently resolve reliance-interest disputes is subject to question.

As my discussion of the reliance-interest cases makes apparent, the majority of those cases had two characteristics. First, they resolved conflicts between concentrated and dispersed interest groups. For instance, in *Marsh* — the paradigm reliance-interest case — the dispute was between the company town and a large, amorphous group of (1) people who would have engaged in expression in the square but for the town's policies and (2) people who would have benefited by exposure to that expression. Although only the state and the Jehovah's Witness were before the Court — as *Marsh* arose out of a trespass prosecution — the defendant benefited the whole class of people described above by seeking a ruling that the

[136] *See supra* notes 45–57 and accompanying text.

restrictions on expression were unconstitutional. As such, the defendant represented a dispersed interest group. Since the company operating the town was a concentrated interest group, the organization costs were likely higher for the potential speakers and listeners than for the company.

To be sure, I am not saying disputes between concentrated and dispersed groups always end in victory for the concentrated side. *Marsh* would be an obvious counterexample, as the dispersed group won in that case. I am simply saying that if (1) the dispute in *Marsh* was characterized by a skewed stakes distribution and (2) reliance-interest disputes tend to resemble the conflict in *Marsh*, we should take the fact that such disputes involve skewed distributions into account in asking whether courts or legislatures are best suited to resolve them. Given that substantial scholarship supports the proposition that the outcomes of litigation involving skewed distributions generally favor small, high-stakes groups,[137] it is not unreasonable to expect that judicial resolutions of reliance-interest disputes will tend to favor such groups.

Second, the reliance-interest cases for the most part pitted people trying to disseminate and hear information against an entity attempting to stop the dissemination.[138] This is important because information is commonly characterized as a public good, as an information producer cannot ensure that she will be compensated by all who benefit from her product. If an author publishes a book, the book's buyers compensate the author for the information they get from the book through royalties, but those who get the information secondhand from the buyers pay the author nothing.[139] Professor Farber therefore suggests that information producers have insufficient incentives to protect their activities from governmental interference through the political process.[140] If we accept Farber's theory, we may surmise that the organization-costs problem is worse for dispersed groups which produce and receive information than for most dispersed groups. If I am in a large group of homeowners harmed by a driveway length ordinance, for instance, I will be better at identifying my neighbors and persuading them to help me litigate than the author of a banned book will be at motivating those who hear the information in his work secondhand to do so.

---

[137] *See supra* note 92 and accompanying text; *see also* Frank B. Cross, *The Judiciary and Public Choice*, 50 HASTINGS L.J. 355, 360–61 (1999); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y. REV. 95, 95 (1974).

[138] *See* Marsh v. Alabama, 326 U.S. 501 (1946); Lee v. Katz, 276 F.3d 550 (9th Cir. 2002); Venetian Casino Resort, L.L.C. v. Local Joint Exec. Bd., 257 F.3d 937 (9th Cir. 2001); Petersen v. Talisman Sugar Corp., 478 F.2d 73 (5th Cir. 1973).

[139] *See* Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 559–61 (1991) (explaining this theory); *see also* Maureen A. O'Rourke, *Rethinking Remedies at the Intersection of Intellectual Property and Contract: Toward a Unified Body of Law*, 82 IOWA L. REV. 1137, 1143 (1997).

[140] *See* Farber, *supra* note 139, at 561 ("Because sales of information do not fully reflect the ultimate social benefit of information production, the producers' financial stake — and thus the intensity of industry lobbying on behalf of consumers — does not reflect the full social value of the information.").

Which branch is better at efficiently resolving disputes with these characteristics? To address this, I will follow the sequence I used in discussing essential-services disputes — first looking at which branch is more likely to evince minoritarian bias in resolving reliance-interest disputes and then addressing the same question with respect to majoritarian bias. Examples of situations where legislatures and courts have tried to resolve reliance-interest disputes may point the way toward answering the minoritarian-bias question. I will examine how Congress and the courts have resolved disputes between "whistleblowing" private-sector employees — people who report violations of law and organizational policy by their superiors at work to law enforcement or corporate officers and want the law to protect their efforts — and the entities that employ such people, which would prefer to remain able to terminate employees at will.

This example helps answer whether the judicial or the legislative process will more efficiently settle reliance-interest disputes because such disputes share three important characteristics with conflicts concerning legal protections for whistleblowers. First, the stakes distributions in disputes regarding whistleblowing are similar to those in reliance-interest disputes. A person who reports misconduct by superiors not only benefits himself, but also a large group of others — *e.g.*, competitors, law enforcement, prospective employees and shareholders. Since disputes concerning protections for whistleblowing pit that dispersed group against the employer, they are likely characterized by skewed distributions. Second, whistleblowing employees are purveyors of information, which as noted above has attributes of a public good. An employee cannot compel all persons who benefit from the information he disseminates to help protect him from discharge. Third, laws protecting whistleblowers from discharge may be plausibly viewed as protecting employees' settled expectations, just as the reliance-interest rationale uses the traditional state function doctrine to protect citizens' expectations regarding service providers' behavior. Arguably, people generally expect to be able to report what they view as wrongful conduct by their superiors to persons in authority.[141]

Whistleblowing employees have sought protection under both statutory and judge-made law. Accordingly, examining disputes concerning legal protections for whistleblowers allows us to compare the manner in which courts and legislatures resolve conflicts analogous to the paradigm reliance-interest dispute described above. If legislative resolutions of such disputes exhibit less minoritarian bias than judicial ones, that suggests that minoritarian bias would less extensively affect the resolution of reliance-interest disputes by the legislative process.

---

[141] *See* Pamela H. Bucy, *Information as a Commodity in the Regulatory World*, 39 HOUS. L. REV. 905, 965 (2002) (theorizing that a "greater cynicism toward institutions and a greater expectation of participation by workers in the workplace than in prior generations" has caused the practice of reporting misconduct by superiors at work to become more socially acceptable today than it was in the past).

I turn first to legislatively enacted protections for whistleblowers. Congress has passed statutes that protect whistleblowers in specific types of industry – for instance, private-sector employees reporting violations of the Federal Water Pollution Control Act[142] and the Longshoremen's & Harbor Workers' Compensation Act[143] — from retaliation.[144] The fact that these statutes prioritize the interests of dispersed groups over those of concentrated ones suggests that Congress is not subject to overwhelming minoritarian bias in resolving disputes concerning whistleblowing. This suggestion is strengthened by the fact that, despite Congress's greater susceptibility to minoritarian bias than legislatures with authority over smaller jurisdictions, Congress has enacted such provisions.

By contrast, private-sector whistleblowers have lacked success in obtaining protection in the courts under the Constitution and state common law. Courts have held that because private employers are not state actors, the First Amendment does not protect their employees against discharge based on the content of their speech,[145] and state courts have generally held that common law protection for private-sector whistleblowers would be inconsistent with the principle that an employer may terminate employees at will.[146] The legislative process has thus been more responsive to efforts to protect private-sector whistleblowers than the adjudicative process. Given the strong similarities between the typical "reliance-interest dispute" and conflicts concerning legal protections for whistleblowers, this example suggests that legislatures are less likely than courts to resolve reliance-interest disputes in a manner reflecting minoritarian bias.[147]

As to whether the legislative process would be significantly affected by majoritarian bias in resolving reliance-interest disputes, there is little to add to my discussion beyond my remarks concerning the likelihood that majoritarian bias will affect legislative attempts to resolve essential-services disputes. Like purveyors of essential services, private entities that people expect to comply with constitutional norms are not the sort of entities that commentators view as excluded from the political process and in need of judicial protection. Businesses that operate company

---

[142] 33 U.S.C. § 1251 (2005).
[143] 33 U.S.C. § 901 (2005).
[144] 45 U.S.C. § 421 (2005).
[145] *See, e.g.*, George v. Pacific-CSC Work Furlough, 91 F.3d 1227, 1230–31 (9th Cir. 1996) (holding that a guard at a private correctional facility could not sue his employer under the First Amendment for discharging him in retaliation for criticizing its policies because the employer was not a state actor).
[146] *See* Lois A. Lofgren, *Whistleblower Protection: Should Legislatures and the Courts Provide a Shelter to Public and Private Sector Employees who Disclose the Wrongdoing of Employers?*, 38 S.D. L. REV. 316, 334 (1993) (collecting state court decisions).
[147] To be clear, I do not deny that courts may have sound textual or precedential reasons to hold that the Constitution and the common law do not protect whistleblowers from discharge. My discussion, and Komesar's "participation-centered" approach, assume that courts and legislatures — whatever the stated justifications for their behavior — resolve disputes based on which interest groups before them most effectively influence them (which is, again, a function of the information and organization costs facing those groups). Under this model, whether their reasoning is good or bad, a disproportionate share of rulings in favor of concentrated groups indicates courts' "minoritarian bias."

towns, migrant labor camps, shopping malls and thoroughfares abutting public facilities — the entities in the cases I used to illustrate the reliance-interest rationale — are not subject to prejudice sufficient to preclude them from effectively participating in the political process. Accordingly, there is little reason to think majoritarian bias would affect the legislative process's ability to resolve reliance-interest disputes to a greater extent than that of the courts.

To show the impact of these conclusions, I return to the hypothetical involving musicians in the privatized park. Under existing state action law, the courts would treat the proprietors as state actors because the town traditionally operated the park. The reliance-interest rationale justifies this on the theory that the townspeople have probably come to expect the park to be run in accordance with constitutional constraints. This theory assumes that courts are better able to protect the musicians' and listeners' interests than the town council. The above discussion, however, calls this assumption into question. The musicians and their would-be audience are a dispersed group disseminating and receiving information (after a fashion,) and thus face organization costs that make it hard for them to contend with the park proprietors in the courts. Since legislatures are better at efficiently resolving reliance-interest disputes, the musicians and audience members (assuming their total stake exceeds that of the private company) would be better off taking their grievance to the town council—whether ex ante, when determining whether privatization should occur, or ex post, when determining how the privatized entity should be regulated.

C. Regulating Actors with Market Power

The traditional state function doctrine's objective of preventing arbitrary denial of services by an entity that does not face significant competition is subject to criticisms analogous to those I leveled against the essential-services justification. These objections include (1) the stakes distribution in a dispute concerning the behavior of entities with market power (the ability to profitably raise price above competitive levels) militates against regulating such entities' conduct through judge-made law; and (2) an actor's performance of a service traditionally provided by the state is a bad proxy for that actor's market power. The second objection does not appreciably differ from my similar objection to the essential-services rationale. The first, however, is worthy of discussion because addressing it permits a useful contrast between antitrust law — a significant legislative method of regulating actors with market power — and the traditional state function doctrine, a judge-made method of doing so.

The stakes distribution in the typical dispute about the conduct of an actor with market power suggests that legislatures are better equipped to efficiently resolve such disputes than courts. On one side of a dispute concerning an entity's allegedly anticompetitive conduct stand the consumers of the entity's good. The consumers likely have low individual stakes, since each consumer suffers a small

loss due to the price increase above the competitive level.[148] One might argue that competitors, who take larger losses than consumers due to the entity's conduct, are "catalytic subgroups" that can overcome organization costs facing consumers. However, competitors are imperfect advocates of consumers' interests because they want to recover profits they would have obtained but for the offending entity's conduct and "in most cases there is absolutely no useful correlation between the amount of [a competitor's] lost profits and the profitability of the antitrust violation to the defendant."[149] It is thus misleading to cast consumers and competitors as part of the same interest group. Consumers paying supracompetitive prices probably face the high organization costs to which the paradigm large, low-stakes interest group is subject.

On the other side is the entity with market power, which has a larger stake than the consumers since it can collect large revenues from a small price increase. The fact that the typical dispute about the behavior of an entity with market power pits a large, low-stakes group against a small, high-stakes group, for reasons discussed above, militates against efficient judicial resolution. Such a dispute is better resolved by a legislature, where dispersed groups' information costs are lower. Of course, the legal rules made by legislatures must ultimately be applied to factual situations by courts, just as the federal courts are required to apply the antitrust statutes. My point is that although courts must enforce those rules as a matter of governmental structure, they are not best suited to make them as an initial matter — for instance, by crafting judge-made rules of conduct for entities with market power based on common law or the federal Constitution.

The Court has recognized legislatures' superior capacity to resolve disputes concerning the behavior of entities with market power by enacting the "state action" exception to the federal antitrust laws.[150] Under the antitrust state action exception, a private party cannot be liable for engaging in anticompetitive practices if it does so pursuant to a "clearly articulated and affirmatively expressed state policy" and the state "actively supervises" its conduct.[151] For instance, in *Southern Motor Carriers Rate Conference v. United States*,[152] the Court held that since a group of states had authorized trucking companies to agree on transportation prices and submit them to regulatory agencies, the companies could engage in conduct that would otherwise be prohibited price-fixing.[153] Like the entities the traditional state function doctrine's market-power regulation rationale seeks to constrain, the trucking companies could harm consumers by setting supracompetitive prices.

---

[148] *See* William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 672 (1983).
[149] Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 5 (1989).
[150] Parker v. Brown, 317 U.S. 341, 350–51 (1943); s*ee also* Thomas M. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 CAL. L. REV. 227, 228 (1987).
[151] Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978).
[152] 471 U.S. 48 (1985).
[153] *See Southern Motor Carriers*, 471 U.S. at 65–66.

At first glance, the antitrust state action doctrine's rationale seems entirely rooted in "vertical" separation of powers concerns (issues of federal-state relations) rather than the "horizontal" ones (issues regarding relations between coequal branches of the same sovereign) primarily at issue in this Article. To be sure, ensuring that states rather than Congress control regulation of anticompetitive conduct is a concern behind the antitrust state action doctrine. Scholars argue that giving states free reign to regulate anticompetitive conduct will make them compete to achieve the most efficient regime, and that states with less efficient systems will ultimately follow the more efficient ones.[154]

However, commentators' statements suggest that the antitrust state action doctrine also assumes that legislatures are generally better than courts at efficiently resolving disputes between concentrated and dispersed interest groups. Since legislatures have the comparative advantage, state legislatures' decisions to authorize activity that would otherwise violate the Sherman Act should receive deference from the courts. It may seem misleading to speak of the antitrust state action doctrine as affirming superior legislative competence, since the Sherman Act to which the doctrine creates an exception is, of course, a legislative act. It is generally acknowledged, however, that the Sherman Act's language (which prohibits, for instance, "contracts . . . in restraint of trade")[155] — is so vague that it delegates the regulation of competition to courts.[156] Since antitrust law is primarily judge-made, it makes sense to speak of the antitrust state action doctrine as predicated on the "horizontal" rationale that legislatures are better suited to resolve disputes concerning anticompetitive conduct.

Two scholars' comments on the antitrust state action doctrine support the "horizontal" view of its objectives. Professor Spitzer's critique[157] of Professor Wiley's proposed reforms to the antitrust state action doctrine[158] recognizes the obstacles that would face courts seeking to narrow antitrust state action immunity to deter state legislation authorizing price-fixing. Wiley's proposal would prohibit private conduct that would otherwise violate the Sherman Act even if done in compliance with state law and under state supervision, where the state law at issue (1) "does not respond directly to a substantial market inefficiency" and (2) "originated from the decisive political efforts of producers who stand to profit from its competitive restraint."[159] Wiley would not, however, use antitrust law to invalidate

---

[154] *See* Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. LAW & ECON. 23, 29 (1983); *see also* Herbert Hovenkamp & John A. Mackerron III, *Municipal Regulation and Federal Antitrust Policy,* 32 U.C.L.A. L.REV. 719, 725 (1985); Paul E. Slater, *Antitrust and Government Action: A Formula for Narrowing* Parker v. Brown, 69 NW. U. L. REV. 71, 84–85 (1974).

[155] 15 U.S.C. § 1 (2005).

[156] *See* 1 P. AREEDA & D. TURNER, ANTITRUST LAW 14–15 (1978); Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CALIF. L. REV. 266, 267 (1986).

[157] Matthew L. Spitzer, *Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory*, 61 S. CAL. L. REV. 1293 (1988).

[158] John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713 (1986).

[159] Wiley, *supra* note 158, at 743.

inefficient legislation procured by dispersed groups of consumers — *e.g.*, rent control ordinances, which benefit a dispersed group of renters at the expense of a concentrated group of landlords and are widely viewed as inefficient.[160]

Wiley's approach, Spitzer essentially contends, targets legislation manifesting minoritarian but not majoritarian bias. Wiley's proposal would invalidate inefficient legislation favoring producers (likely to be small, high per-capita stakes groups) but not inefficient legislation favoring consumers (probably large, low per-capita stakes groups.)[161] However, Spitzer argues, there is no principled basis for distinguishing between inefficiencies created by minoritarian and majoritarian bias.[162] If anything, the extensive protections against majoritarian bias in the Constitution suggest that it should be of greater concern to courts.[163] Yet an approach to antitrust law that prohibited anticompetitive conduct done pursuant to both state laws evincing minoritarian bias *and* laws manifesting majoritarian bias would not be feasible. As Spitzer puts it, a rule invalidating "all anticompetitive, inefficient regulations" would "be quite intrusive, invalidating a tremendous amount of local regulation and shifting the balance of power in our federal system."[164] Although Spitzer does not base an alternative antitrust state action doctrine on this observation,[165] his view could justify a deferential approach, as he recognizes that the potential cost of judicial efforts to prevent anticompetitive regulation might outweigh the cost of allowing some to exist.

Similarly, Professor Page has defended the antitrust state action doctrine in its current form on the ground that legislatures are better suited than courts to determine whether regulation benefiting concentrated groups at the expense of diffuse ones will be socially beneficial on net.[166] Like Spitzer, Page critiques the theory that since "[t]he free-rider problem hinders large, diffuse groups in protecting their interests" and "the stake of each" member of such a group "is normally too small to justify his or her individual investment in political activity," judicial scrutiny of apparently anticompetitive legislation is warranted.[167] This view "ignores . . . the concern with institutional competence" that underlies courts' approach to the antitrust state action doctrine: "legislatures displace competition for a host of reasons, and it is beyond judicial competence to isolate good from bad anticompetitive

---

[160] Wiley, *supra* note 158, at 768; *see also* Edgar O. Olson, *Is Rent Control Good Social Policy?*, 67 CHI.-KENT. L. REV. 931, 940–44 (1991).
[161] *See* Spitzer, *supra* note 157, at 1310–11.
[162] *See id.* at 1313.
[163] *See id.* at 1316.
[164] *Id.* at 1313.
[165] Spitzer sketches several possible alternative formulations of the antitrust state action doctrine, but does not firmly advocate one. *See id.* at 1318 ("First, we could preempt state and local regulation only if it were inefficient. Second, we could preempt regulation only if it transferred substantial amounts of wealth from consumers to producers.").
[166] William H. Page, *Interest Groups, Antitrust, and State Regulation:* Parker v. Brown *in the Economic Theory of Legislation*, 1987 DUKE L.J. 618 (1987).
[167] *Id.* at 623.

schemes."[168] For example, Professor Page argues that courts should exempt a city's decision to restrict the number of taxicab licenses it makes available – and thus to curtail taxicab competition — from antitrust scrutiny because the "displace[ment of] taxicab competition" may be necessary "to avoid congestion and fraud."[169] Although they acknowledge the costs facing consumer groups, Spitzer and Page both counsel deference to state legislative judgments concerning regulation of anticompetitive activity — suggesting that they, like Komesar, view legislatures as better than courts at efficiently resolving disputes involving skewed stakes distributions.

As this discussion indicates, commentators justify courts' approach to the antitrust state action doctrine on the ground that state legislatures are better suited than federal courts to resolve disputes between producers and consumers. If we accept the premise articulated above that an institution's decision to make deferential legal rules in a given area suggests its lack of competence in that area,[170] courts' decision to refrain from second-guessing state economic regulation suggests that legislatures rather than courts are best equipped to resolve disputes concerning legal controls on anticompetitive conduct.

The market power-regulation rationale, however, necessarily assumes that courts are better than legislatures at efficiently resolving "producer-consumer" disputes. The volunteer fire department example above illustrates this.[171] Say that a town that has traditionally controlled firefighting within its borders contracts it out to a volunteer fire department. The department now has "market power" in the market for fire protection services in the sense that, if it charged a fee for fire protection, it could raise the fee above competitive levels. The market power-regulation rationale justifies subjecting the department to Section 1983 on the theory that the lack of competition allows the department to deny service to citizens on arbitrary grounds. Yet this theory assumes that the legislature is incapable of protecting the townspeople, since the department's lower organization costs will allow it to win in the political process. The theory justifying the department's state-actor status thus contravenes the antitrust state action doctrine's premises, as it assumes that courts are best suited to efficiently resolve disputes between actors with market power and consumers.

Conclusion

The traditional state function doctrine is an anomaly in state action jurisprudence, as it cannot be justified by reference to the goals underlying the other factors courts consider in determining whether an entity is a state actor. Unlike the state action test's other factors, the doctrine does not serve the goals of policing the authenticity of privatization efforts and protecting persons whom the government

---

[168] *Id.*
[169] *Id.* at 667.
[170] *See supra* note 116 and accompanying text.
[171] *See supra* note 14 and accompanying text.

has rendered dependent. Instead, courts and commentators justify it by reference to the objectives of preserving citizens' access to essential services, ensuring that citizens' expectations regarding the behavior of entities performing certain services are not frustrated, and preventing actors with market power from exploiting their positions. As I have argued, courts are ill-equipped to achieve these goals, since (1) courts lack the fact-finding resources and are insufficiently accountable to the public to perform the measurements of public preferences necessary to serve those objectives; and (2) the stakes distributions involved in the disputes the doctrine is intended to address do not lend themselves to effective judicial review. As the judiciary is not the appropriate institution to further the goals underlying the doctrine, I contend that the courts should excise the doctrine from the state action inquiry. This reform would allow legislatures to make the complex cost-benefit determinations for which they are best suited.