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“Under Color of Law”? Rogue Officials and the Real State Action Problem

LARRY ALEXANDER*

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It is black letter law that violations of section one of the Fourteenth Amendment can only be committed by “the state.”¹ For it is “the state” that the amendment commands not to abridge privileges or immunities of citizens, deprive persons of life, liberty, and property without due process of law, or deny persons equal protection of the law. And this prompts the question, how do we know when the state has acted?

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1. See *The Civil Rights Cases*, 109 U.S. 3 (1883).

One way the state acts is by legislating, by enacting rules of conduct. Lawmaking is a paradigmatically state action.

This state also acts by enforcing or implementing the laws that have been enacted, and by adjudicating disputes that arise under those laws. In such cases, the state acts through its agents—police, prosecutors, judges, and, indeed, all other public employees.

But what if one of these agents of the state acts, not in pursuance of the state's laws, but in contravention of those laws? Is this agent still acting as "the state"? Can such an agent violate the Fourteenth Amendment when, at the same time, he is acting contrary to the law of his state?

That is the question I mean to raise in this article. I mean to raise it despite the fact that the Supreme Court has answered it—although its more recent answer contradicts an answer it gave previously.

The issue that this question raises is what I call the real state action issue. It is different from what constitutional law casebooks and most constitutional law scholars call the state action issue, an issue that seems to bedevil both courts and scholars. I believe, however, that this latter state issue is misconceived. For if correctly analyzed, it is easily resolved. What will be difficult, if there be difficulty, will not be whether there is state action, but rather whether the state action that is present is violative of the Constitution. And I will attempt to demonstrate this before turning to what I think is the real state action issue.

I. THE BOGUS STATE ACTION ISSUE

Perhaps the case that best epitomizes the bogus state action issue is *Shelley v. Kraemer*.² In *Shelley*, the Missouri courts enforced the terms of a racially restrictive covenant that governed homes in a particular tract. Racially restrictive covenants, like most covenants dealing with real estate, were legal and enforceable under Missouri's laws of private ordering. But the United States Supreme Court held that the state courts' enforcement of the racially restrictive covenant violated the Fourteenth Amendment's Equal Protection Clause.

The Court's reasoning appeared to be as follows: (1) When the state courts enforced the terms of the covenant, they were acting as an arm of the state. (2) The Equal Protection Clause forbids a state's mandating racial discrimination in real property transactions. (3) Because, per (1), the state was acting in enforcing the racial discrimination effected by the covenant, the state violated the Equal Protection Clause.

The decision in *Shelley* was troubling. Most commentators thought proposition (1) was the source of concern. If the state is acting when it

2. 334 U.S. 1 (1948).

enforces private covenants, is it not also acting when it enforces a private landowner's racially discriminatory decision regarding whom to let cross his property, or whom to invite to dinner? And if so, does this mean that the state is constitutionally debarred from enforcing any racially discriminatory decision by a private party? An affirmative answer seems extreme and counter intuitive. Yet, given *Shelley*, how is an affirmative answer to be avoided?

The problem with *Shelley* was not proposition (1), however. It is beyond cavil that state courts, enforcing the state's laws, including its common law, are arms of the state. Law and its enforcement are perhaps "the state's" principal product.

Nor was the problem proposition (2). The problem was proposition (3). Merely because it is unconstitutional for the state to discriminate racially with respect to *its* property, or to *mandate* that private parties discriminate racially with respect to theirs, does not mean that it is unconstitutional for the state to *permit* private parties to discriminate racially and to back that permission with enforcement. For there are reasons of constitutional significance for the latter that do not exist with respect to the former, reasons sounding in respect for individuals' autonomy, privacy, and so forth.³

All private action has legal status. It is either legally required, prohibited, or permitted, and this by virtue of the state's laws, quintessential "state action." State action is always present in every legal dispute.⁴

The traditional state action issue is therefore not a jurisdictional issue about whether the state has acted and thus is subject to constitutional scrutiny. For the answer to that question will always be "yes." The traditional state action issue is, as it was in *Shelley*, really a mischaracterization of a *substantive* constitutional issue: Is it constitutionally legitimate to grant private parties various legal permissions (and to impose legal restrictions on others to protect those permissions)? This issue arises when the state permits private parties to do what the state, acting in its proprietary role, could not do (such as racially discriminate in allowing persons onto its property), or what the state could not *require* others to do (such as racially discriminate in selling property or holding dinner parties). The

3. See LARRY ALEXANDER AND PAUL HORTON, WHOM DOES THE CONSTITUTION COMMAND?, ch. 9 (1988); Lawrence A. Alexander, *Cutting the Gordian Knot: State Action and Self-Help Repossession*, 2 HASTINGS CONST. L.Q. 893 (1975). See also Larry Alexander, *The Public/Private Distinction(s)*, 10 CONSTITUTIONAL COMMENTARY 361 (1993).

4. See ALEXANDER AND HORTON, *supra* note 3, at ch. 9; Alexander, *Cutting the Gordian Knot*, *supra* note 3.

traditional state action problem is not a conceptual problem but, as in cases such as *Shelley*, a substantive one.⁵

Another source of state action confusion aside from that illustrated by *Shelley* arises when a private party, not an agent of the state, is sued in federal court for violating the plaintiff's constitutional rights. A good example is the case of *Flagg Brothers, Inc. v. Brooks*.⁶ There, Flagg Brothers stored Shirley Brooks' possessions in its warehouse after she had been evicted from her apartment. When she failed to pay the charges for the storage, Flagg Brothers threatened to sell the goods and recover what it was due from the sale's proceeds. Brooks then brought suit in federal court to enjoin the sale as violative of the Fourteenth Amendment.

The case arose in the state of New York, which had enacted § 7-210 of the Uniform Commercial Code. That section authorized bailees like Flagg Brothers to sell the property of bailors who have defaulted on their debts to the bailees. Brooks claimed this New York statute made Flagg Brothers an agent of the state and thus a duty holder under the Fourteenth Amendment.

The Supreme Court, in a 5-4 decision, disagreed. It held that Flagg Brothers was not an agent of New York and thus could not violate the Fourteenth Amendment. And the majority was, I believe, quite correct in ruling for Flagg Brothers.

But in its concluding paragraph, the majority said that Brooks' complaint not only did not establish that Flagg Brothers acted unconstitutionally but also did not establish that New York did.⁷ And that raises the following question: What if Brooks had sued Flagg Brothers, not in federal court alleging a violation of the Fourteenth Amendment, but in state court claiming that Flagg Brothers should be liable for conversion? If Brooks had done this, Flagg Brothers would have then defended on the basis of the permission granted by § 7-210. And then Brooks could have responded that § 7-210, a New York statute and paradigmatic state action, was unconstitutional. Brooks' claim would thus not be that Flagg Brothers was violating the Constitution, but that New York, a state, was. Brooks never got to raise the constitutionality of § 7-210 directly because she sued Flagg Brothers in the wrong court on the wrong cause of action.

Would Brooks have succeeded had she sued in state court for conversion? Would the Supreme Court have held § 7-210 to be unconstitutional? In some earlier cases in which agents of the state assisted creditors in repossessing items from debtors or garnishing their wages, the Court had held such actions deprived the debtors of property prior to a judicial

5. *Id.*

6. 436 U.S. 149 (1978).

7. 436 U.S. at 166.

determination in violation of the Due Process Clause.⁸ Although I find the Court’s reasoning in those cases to be unpersuasive—someone, either the debtor or the creditor, will necessarily be deprived of the property pending a judicial determination, and the equities do not clearly side with the debtors—if one takes them to be authoritative, what does that suggest about self-help remedies such as § 7-210? As far as I can see, if the state-assisted creditor remedies are unconstitutional, the self-help remedies are *a fortiori* unconstitutional. For the presence of the sheriff or some such official during the creditor’s repossession makes a repossession more, not less, reasonable than a purely self-help one. When an official comes along, there has more likely been some showing that the debt is due, and there is less likelihood of violence, than when the creditor acts alone. So if the Court would stand by its rulings in the creditor-assisted cases, then it should have ruled in Brooks’ favor had she sued Flagg Brothers for conversion in state court.

The bogus state action issue, the issue that has confused commentators, courts, and generations of law students, thus stems from two sources. Sometimes it stems from conflating the question of whether the state has acted with the question of whether the substance of its action is unconstitutional. That is the conflation of *Shelley v. Kraemer*. And at other times it stems from the failure, given the identity of the defendant and the court in which the defendant is sued, to get at the constitutionally problematic state action that is in the background. That is the failure of *Flagg Brothers v. Brooks*.

II. THE REAL STATE ACTION PROBLEM

There is a real state action issue, and it is one that is truly conceptual. Beyond making and enforcing its laws, regulations, and orders, when else does “the state” act? More specifically, does the state act when its putative agents act beyond their legal authority or in contravention of the state laws to which they are subject? Is “the state” acting when its agents go rogue?

A. Barney v. New York

The issue to which I refer was illustrated by a United States Supreme Court case that has receded into almost total obscurity, *Barney v. New*

8. See *North Ga. Finishing, Inc. v. Di-Chem, Inc.* 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

York.⁹ (You will look in vain for its mention, much less its more extended treatment, in constitutional law casebooks' chapters on state action.) In *Barney*, New York City was in the process of constructing its subway system. The Board of Transit Commissioners was required to file the subway's route plan with the local authorities for its approval and then to follow that plan if approved. The subway construction deviated from the approved route plan, and an adversely impacted property owner, Barney, sued in federal court to enjoin the construction on the grounds that the city was depriving him of property without due process of law, in violation of the Fourteenth Amendment.

Chief Justice Fuller, writing for a unanimous Court, rejected Barney's claim. His reason is what is of interest here. Fuller argued that the subway commissioners' act, in contravention of the approved route plan, could not be considered to be "state action." For the subway builders were violating their legal authorization, not acting in pursuance of it. Therefore, Fuller argued, the subway builders could not be viewed as an arm of the state. There was thus no "state" action depriving Barney of the enjoyment of his property without due process. There was only rogue action violative of the laws of New York and thus incapable of violating the Fourteenth Amendment.

Fuller's argument has considerable force. Political subdivisions of a state, such as cities, school districts, and transit authorities, are creatures of law. We can usually tell when someone—say, a mayor—is acting as mayor and when he is not by reference to the laws that define and limit his rule. If the mayor goes home at night and tells his wife to "shut up," he is not unconstitutionally enjoining her freedom of speech, for he is not, on that occasion, acting as "the mayor." He is just an obnoxious private person. Fuller believed that when the New York City subway commission deviated from its authorized route and was acting *ultra vires*, it was no longer a political subdivision of New York in so acting but merely a private entity potentially violating Barney's property rights.

Fuller's view fits with a certain conception of how constitutional rights should enter lawsuits, namely, as a counter to defendant's defense. If a state agent, *in pursuance of state law*, takes an action affecting the plaintiff adversely, the plaintiff might sue the agent, say, in tort. The defendant might respond that although his act would ordinarily be a tort, in this case it is not because it is legally authorized. The plaintiff would then respond that the law authorizing the defendant's act violates the Constitution. If the court finds that to be true, the defendant would be stripped of his defense to the tort suit. Indeed, this is the course the

9. 193 U.S. 430 (1904).

plaintiff (Brooks) in the Flagg Brothers case should have followed, as I argued above.

In *Barney*, the defendant subway commission, in successfully resisting the plaintiff’s constitutional claim, essentially admitted its tort (a nuisance) by pointing out that it was *not* authorized by law to construct the subway where it was doing so. Chief Justice Fuller thus concluded that no constitutional rights were at issue because the subway’s act was not the act of “the state”; therefore, federal jurisdiction over the suit did not exist. Barney should have been suing the subway commission in state court under state law. And the defendant would not be able to invoke legal authorization of its act as a defense. If, at the conclusion of the state court litigation, New York’s laws—their substance, their enforcement and adjudicatory mechanism, and the remedies they provide—prove to meet whatever standards the Constitution demands, then Barney will have received all the Constitution guarantees him. If New York’s laws fail that standard, the federal courts would be available to him.

The Court began retreating from *Barney* almost immediately. *Raymond v. Chicago Union Traction Company*,¹⁰ decided only three years after *Barney*, seems inconsistent with it, and Justice Holmes dissented on that ground. And six years after *Raymond*, in *Home Telephone & Telegraph Company v. City of Los Angeles*,¹¹ a unanimous Court all but overruled *Barney*. The Court held that illegality under state law did not deprive conduct of its state action character. The Court reasoned that if illegality under state law negated state action, illegality under the Constitution should do so as well. But that would mean no state act or law could ever be challenged in federal court on constitutional grounds. That result, the court opined, would be absurd. By analogy then, the Court reasoned, the claim that state law illegality strips state or municipal conduct of its state action status should be rejected.

Of course, one can (and should) argue that the Court’s analogy was flawed. State law illegality might be fatal to state action, but federal unconstitutionality might not be (and, of course is not when the act is *legal* under state law). Moreover, what the Court thought to be absurd—the preclusion of suits in federal court claiming constitutional violations—might look less absurd if one thinks that unconstitutionality was meant to

10. 207 U.S. 20 (1907).

11. 227 U.S. 278 (1913).

function as a bar to a defense of state authority rather than as itself the basis of a lawsuit.

In any event, after *Home Telephone & Telegraph*, *Barney* appeared to be for all practical purposes a dead letter. Yet, its ghost was not easily exorcised, and it made an appearance in two notable cases—*Screws v. United States*¹² and *Monroe v. Pape*.¹³

B. *Screws v. United States*

Screws involved a federal criminal prosecution under a section of the federal criminal code punishing anyone who, “under color of any law, statute, ordinance, regulation, or custom, will-fully subjects, or causes to be subjected, any inhabitants [of the U.S.] to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution. . . shall be fined . . . or imprisoned. . . .”¹⁴ *Screws* was a sheriff in a Georgia county, who along with two subordinates arrested Robert Hall, a black man, for stealing a tire. The three men then beat Hall severely, after which he died. There was evidence that *Screws* had a grudge against Hall and had previously threatened to “get” him.

Screws was convicted of violating the federal statute. The Supreme Court reversed the conviction. The majority opinion, written by Justice Douglas, was premised on an interpretation of the statute that required a defendant to realize that he was violating constitutional rights in order to be deemed to have “willfully” violated them.¹⁵ In the absence of that interpretation of willfully, Douglas thought the statute might be unconstitutionally vague.¹⁶ Because the district court had not submitted the question of whether *Screws* knew he was violating Hall’s constitutional rights to the jury, *Screw’s* conviction was reversed.¹⁷

Although *Screws’* conviction was reversed, Douglas rejected *Screws’* argument that because his act—murder—was illegal under Georgia law, his act was not taken “under color of law.” That issue had come before the Court four years earlier in *United States v. Classic*,¹⁸ in which some Louisiana election commissioners had altered and intentionally miscounted ballots in a primary election, thus interfering with the constitutionally-protected right to vote. The Court held that despite the fact that the commissioners did not comply with Louisiana law, their actions were

12. 325 U.S. 91 (1945).

13. 365 U.S. 167 (1961).

14. Now 18 U.S.C. § 242.

15. 325 U.S. at 103–04.

16. *Id.* at 98.

17. *Id.* at 106–07.

18. 313 U.S. 299 (1941).

nonetheless taken “under color” of law.¹⁹ This was true because the commissioners’ misconduct occurred well they were performing their duties under Louisiana law “to count the ballots, to record the results of the count, and to certify the results of the election.”²⁰

In *Classic*, only one paragraph had been devoted to this issue. When the issue was raised by *Screws*, Douglas, citing *Classic*,²¹ rejected the contention that acts illegal under state law could not be deemed to have been taken “under color of law.”

It is clear that under “color” of law means under “pretense” of law. Thus acts of officers in the ambit of personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it. If, as suggested, this statute was designed to embrace only action which the State in fact authorized, the words “under color of any law” were hardly apt words to express the idea.²²

Douglas analogized the facts in *Screws* to the facts in *Classic*, stating that in each case, “officers of the State were performing official duties; in each case the power which they were authorized to exercise was misused.”²³

We are of the view that petitioners acted under “color” of law in making the arrest of Robert Hall and in assaulting him. They were officers of the law who made the arrest. By their own admissions they assaulted Hall in order to protect themselves and keep their prisoner from escaping. It was their duty under Georgia law to make the arrest effective. Hence, their conduct comes within the statute.²⁴

Justice Roberts wrote a dissent, in which Justices Frankfurter and Jackson joined. Roberts based his dissent largely on statements made at the time the predecessor of § 242, § 2 of the Civil Rights Act of 1866, was being debated. He argued that the Fourteenth Amendment was intended to prevent rogue states from depriving persons of their civil rights, not intended to empower the federal government to prosecute rogue officers like *Screws* who violate the laws of compliant states, the laws of which protect those rights.²⁵ As for the Court’s statements in *Classic*, Roberts argued that the

19. 313 U.S. at 325–26.

20. *Id.*

21. 325 U.S. at 112.

22. *Id.* at 111.

23. *Id.* at 110.

24. *Id.* at 107–08.

25. *Id.* at 141 (Roberts, J., dissenting).

issue had received inadequate attention in that case and should not be deemed to have settled the matter.²⁶

Finally, Roberts mentioned *Barney* in passing, as well as *Raymond v. Union Traction Co.* and *Home Telephone & Telegraph v. City of Los Angeles*.²⁷ Notably, he pointed out that despite the latter two cases, *Barney* itself had never been overruled.²⁸ And *Barney* obviously supported the position of the dissenters.

C. *Monroe v. Pape*

Screws appeared to support federal authority to criminalize the acts of rogue state officials on the grounds that such acts can violate the Fourteenth Amendment despite their illegality under state law. In 1961, *Monroe v. Pape*²⁹ established federal authority to impose civil liability for such acts. The plaintiffs, a black family living in Chicago, alleged that Chicago police officers broke into their house without a warrant, ransacked it, made the family stand naked in the living room, and interrogated Mr. Monroe for ten hours without ever consulting a magistrate.³⁰ This, they claimed, violated their right against unreasonable searches and seizures as incorporated by the Due Process Clause of the Fourteenth Amendment.³¹ Civil liability for such a violation was based on 42 U.S.C. §1983, which provides that “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any [person] . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured. . . .”³² The district court dismissed the case against Chicago and the police officers, and the dismissal was affirmed on appeal.³³

The Supreme Court reversed the dismissal of the case against the officers. Justice Douglas, as he had in *Screws*, wrote the majority opinion, which garnered only one dissent, that of Justice Frankfurter. He rejected the defendants’ contention that “under color” of law “excludes acts of an official or policeman who can show no authority under state law . . . to do what he did.”³⁴

Douglas argued that when Congress passed the predecessor of § 1983, it intended to give persons a remedy against government officials who

26. *Id.* at 147 (Roberts, J., dissenting).

27. *Id.* at 148 (Roberts, J., dissenting).

28. *Id.*

29. 365 U.S. 167 (1961).

30. *Id.* at 169.

31. *Id.* at 170.

32. 42 U.S.C. § 1983.

33. 365 U.S. at 170.

34. *Id.* at 172.

abuse their authority “because by reason of prejudice, passion, neglect, intolerance, or otherwise, state laws might not be enforced and . . . the enjoyment of rights . . . guaranteed by the Fourteenth Amendment might be denied by state agencies.”³⁵ He concluded that the Congress that passed the law recognized that even when state laws appeared to comply with the requirements of the Constitution, there were instances when states were less than consistent and equitable in enforcement of their laws.³⁶ A federal remedy was thus thought necessary to redress constitutional violations because, for whatever reason, the putative state remedies were unavailing.

This purpose, “to provide a federal remedy when the state remedy, though adequate in theory, was not available in practice,”³⁷ was the basis for the decision that acts of state officials could be committed “under color of law” even though they were unauthorized by state law. And relying on the opinion in *Classic*, Douglas asserted that “[m]isuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law is action taken ‘under color of state laws’”³⁸

It is notable that the majority in *Monroe* did not consider the alternative to a federal cause of action to deal with situations when the constitutionally-adequate state law is not enforced or enforced discriminatorily, namely, a state civil suit that could test the adequacy of state law. If the civil suit proved constitutionally inadequate, the Supreme Court, on appeal, could mandate an appropriate remedy. That would be the course litigation would take if the defendant were a private person and not an official, but the state remedies for defendant’s acts were constitutionally inadequate.

Only Justice Frankfurter, the lone dissenter in *Monroe*, perceived the similarity between the rogue official and the rogue private person. He largely repeated the argument of Justice Roberts in Roberts’s *Screws* dissent. And he further argued that the historical evidence supported his position.

35. *Id.* at 180.

36. *Id.*

37. *Id.* at 173–74.

38. *Id.* at 184 (citing *United States v. Classic*, 313 U.S. 299, 326 (1941)).

[a]ll the evidence converges to the conclusion that Congress . . . created a civil liability enforceable in federal courts only in instances of injury for which redress was barred in the state courts because some “statute, ordinance, regulation, custom, or usage” sanctioned the grievance complained of The Fourteenth Amendment did not alter this basic aspect of our federalism.³⁹

He continued:

Only when the states, through their responsible organs for the formulation and administration of local policy, sought to deprive the individual of a certain minimal fairness in the exercise of the coercive forces of the State, or without reasonable justification to treat him differently than other persons . . . , was an overriding federal sanction imposed.⁴⁰

Frankfurter expressed his doubt that an unlawful intrusion by a policeman in Chicago [should] entail different consequences than an unlawful intrusion by a hoodlum.⁴¹ And he pointed out permitting the action against the policeman to be adjudicated by the federal courts would require the courts to determine federal constitutional issues despite the availability of state remedies that would obviate the need to make such determinations.⁴² Reading §1983 to authorize the federal courts to do this would make it “a law to regulate the quotidian business of every traffic policeman, every registrar of elections, every city inspector or investigator, every clerk in every municipal licensing bureau in the country.”⁴³

Frankfurter would read “under color” of law to mean by authority of law, which he says is the meaning it carried in the nineteenth century.⁴⁴ And near the end of his dissent, he writes the following:

Finally, it seems not unreasonable to reject the suggestion that state-sanctioned constitutional violations are no more offensive than violations not sanctioned by the majesty of state authority. Degrees of offensiveness, perhaps, lie largely in the eye of the person offended, but is it implausible to conclude that there is something more reprehensible, something more dangerous, in the action of the custodian of a public building who turns out a Negro pursuant to a local ordinance than is the action of the same custodian who turns out the same Negro, in violation of the state law, to vent a personal bias? Or something more reprehensible about the public officer who beats a criminal suspect under orders from the Captain of Detectives, pursuant to a systematic and accepted custom of third-degree practice, than about the same officer who, losing his temper, breaks all local regulations and beats the same suspect? If it be admitted that there is a significant difference between the situation of the individual injured by another individual and who, although the latter is an agent of the State can claim from the State’s judicial or administrative processes the same protection and redress against him as would be

39. *Id.* at 237 (Frankfurter, J., dissenting).

40. *Id.* (Frankfurter, J., dissenting).

41. *Id.* at 239 (Frankfurter, J., dissenting).

42. *Id.* at 241 (Frankfurter, J., dissenting).

43. *Id.* at 242 (Frankfurter, J., dissenting).

44. *Id.* at 244 (Frankfurter, J., dissenting).

available against any other individual, and the situation of one who, injured under the sanction of a state law which shields the offender, is left alone and helpless in the face of the asserted dignity of the State, then, certainly, it was the latter of these two situations—that of the unprotected Negroes and Unionists—about which Congress was concerned in 1871.⁴⁵

Although Frankfurter purported to be interpreting what Congress meant by “under color” of law in §1983, it is clear from his citations to *Barney* that his view rested on a conception of state action similar to that of Chief Justice Fuller, namely, that action by officials in contravention of state law is not action by the state. The rogue official is no different from any other law breaker for constitutional purposes.

III. *BARNEY* VERSUS *MONROE* AND *SCREWS*: WHEN DO OFFICIALS (AND OTHERS?) ACT AS “THE STATE”?

Can we identify acts of “the state” in a way that is independent of the legal status of these acts under state law? Are acts of “state officials” that are illegal or *ultra vires* still acts of “the state”? Are there persons other than state officials—-independent contractors for example—whose illegal or unauthorized acts can nonetheless be deemed to be acts of “the state”?

Even if we can identify state officials as a general matter, state officials are only state officials part of the time. The rest of the time they are spouses, parents, taxpayers, automobile drivers, club and union members, Presbyterians, and musicians. In other words, most of the time they are indistinguishable from private citizens, citizens who are not representatives of “the state.” Even if illegal acts of state officials are acts of the state, such officials can violate constitutional duties only insofar as they are acting in their capacities as officials; otherwise, they are ordinary folks who can behave illegally but not unconstitutionally.

It follows that if, as *Screws* and *Monroe* hold, and contra *Barney*, illegal acts of state officials can be state action, one needs a good test by which to distinguish, not only between “state official” and “private citizen,” but also between “state official acting in her official capacity” and “state official not acting in her official capacity.” Various tests have been suggested in the case law and commentary for creating this distinction between “(unconstitutional) illegal acts by state officials (acting as state officials)” and “(nonconstitutional) illegal acts by private citizens (including state officials not acting as state officials).” These efforts all boil down to variants

45. *Id.* at 254–55 (Frankfurter, J., dissenting).

of the following tests. The question is whether any of these tests is capable of accomplishing its purpose.

A. *Under Color of Law*

The use of the concept of “under color of law” can be traced back in English law to a Thirteenth century statute that forbade certain officials acting “by Colour of his Office” from seizing property without special authorization.⁴⁶ The concept referred to acts of government officials that had the appearance of being lawful but which lacked actual legal authority.⁴⁷ And “color” was associated with heraldic emblems and the authority of the one whose color it was, so that if an official bore the king’s color, the implication was that he acted with the king’s authority.⁴⁸

The phrase “under color of” came to the United States from England and often appeared in legal usage. It appears, for example, in the famous 1803 case of *Marbury v. Madison*, in which Chief Justice John Marshall wrote, “If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued. . . .”⁴⁹ And shortly after *Marbury*, in *United States v. More*, a justice of the peace was indicted for taking fees “under color of . . . office.”⁵⁰ The concept referred, as it had in England, to officials’ using their offices to violate the law.

David Achtenberg argues that “under color of law” was commonly used to describe acts contrary to law but committed with the pretended authority of law.⁵¹ In other words, it was synonymous with “under pretense of law.”⁵² But until the civil rights statutes enacted after the ratification of the Fourteenth Amendment, statutes that depended for their constitutionality on being directed at acts committed by states, the question of whether illegal acts of officials were also acts of the governments that employed them had not been necessary to resolve. So if, as seems plausible, “under color of law” means “under pretense of law,” the question that must be answered is whether this “pretense” makes officials’ illegal acts the acts of their employers.

46. See Steven C. Winter, *The Meaning of Under Color of Law*, 91 MICH. L. REV. 323, 327 (1992).

47. A similar phrase, “under color of title,” also connotes the idea of something lacking authority but which appears authoritative. *Id.* at 394.

48. *Id.* at 396.

49. 5 U.S. 137, 171 (1803).

50. 7 U.S. 159, 160 (1805).

51. David Achtenberg, *A “Milder Measure of Villainy”: The Unknown History of 42 U.S.C. § 1983 and the Meaning of “Under Color of Law”*, 1999 UTAH L. REV. 1, 59.

52. *Id.* at 56.

B. Pretense of Authority

The Supreme Court's "pretense of authority" test is traceable to Justice Douglas's statement in the majority opinion in *Screws*: "It is clear that under 'color' means under 'pretense' of law."⁵³

One problem with the "pretense of authority" test is that its source does not make clear what an act "under pretense of law" is. In *Screws* the defendants, who happened to be police officials, brutally murdered a black prisoner after arresting him. There was no indication in the case that the defendants ever pretended, either during the murder or afterward, that they had legal authority to commit the murder.

Another, perhaps fatal, problem with the "pretense" test is that its key is "pretense of authority" not "actual" or even "implied" authority. The "pretense" test requires us to examine an illegal act's "officiality-hence-unconstitutionality" from the perspective of those to whom "pretense" appears—victims, onlookers, or strangers (like courts) looking back upon the transaction. An odd implication is that state officials who are pretending to be *private citizens* while actually engaged in government business would not come under constitutional commands. The equally odd implication is that nonofficials, pretending to be officials who are legally authorized to take the actions in question, *would* come under constitutional commands. After all, if "pretense" rather than "actual" authority is what matters—as the "pretense of authority" test holds—then it would seem clearly to follow that a rapist who lures his victims by flashing a fake police badge would be the subject of constitutional commands, while a police officer who engages in illegal government surveillance while in plainclothes would be acting beyond the reach of those commands.

C. Agency

The second test that has been suggested for purposes of "acting in official capacity" goes like this:

A state official will be deemed to be subject to constitutional commands if her acts, despite being illegal, are within the scope of her government employment; and "scope of government employment" is defined according to the common law of agency.

53. 325 U.S. at 111.

One serious problem with “agency” as the measure of state action is that no principled test has yet been developed for determining when an agent who is disobeying her principal’s orders is still acting on behalf of the principal. I doubt that such a test can be developed, largely because the underlying notion of a legally authorized yet illegal act is incoherent.

A second serious problem with the “agency” test is that its common law design is addressed primarily to questions of the principal’s liability, not to questions about whether the agent violated a command (constitutional or otherwise). By hypothesis, in most instances in which a state official has violated a constitutionally required state law, the principal (the state) has not violated the Constitution in its capacity as promulgator of laws; instead, it has enacted the laws permitted or required by the Constitution that the agent has then violated. The fact that, under agency doctrine, the state as principal might be vicariously liable on constitutional grounds does not prove—but rather assumes to be the case—that the agent was a constitutional duty bearer.

As I said, the law of agency, with its distinction between “frolics” and “detours,” is primarily concerned with when principal, who have committed no wrongs themselves, can be held civilly liable for wrongs committed by their agents. Principals can be held liable if the agents’ wrongs were “detours,” but not if those wrongs were “frolics.” This distinction between frolics and detours is quite vague and depends largely of whether the agents’ wrongs were, at least to some extents, committed to further the principals’ interests.⁵⁴ But in cases in which the principal—here, the state—has given the agent—the state official—explicit instructions *not* to commit the act in question, it is hard to argue that the official who acts illegally is furthering the interests of the state.

These problems with the “agency” test—whether taken singly or in combination—present insurmountable barriers for its cogent use in making the crucial distinction between those rogue, state law violating state officials who are subject to the Constitution’s commands and those who are not.

D. Abuse of Authority

The third test, which I shall label the “abuse of authority” test, derives from Chief Justice White’s majority opinion in *Home Telephone & Telegraph*:

[T]he settled construction of the [Fourteenth] Amendment is that it presupposes the possibility of an abuse by a state officer or representative of the powers possessed and deals with such a contingency. It provides, therefore, for a case where one who is in possession of state power uses that power to the doing of the wrongs which the Amendment forbids even although the consummation of the

54. 2 HARPER AND JAMES, THE LAW OF TORTS § 26.8.

wrong may not be within the powers possessed if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer. That is to say, the theory of the Amendment is that where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power.⁵⁵

The question becomes: If we assume that the “abuse of authority” test is in fact different from both the “pretense” and “agency” tests—and thus avoids the precise problems that those tests entail—then how are we to go about construing it?

One possibility is to begin by focusing on the “made possible or is efficiently aided” language of *Home Telephone & Telegraph*, and then to argue that state officials—by virtue of that status—are unique in their capacity to harm constitutional values, even when they are acting contrary to state law. The problem with such an argument is that it is just not true.

Sometimes, perhaps, state officials may have a unique capacity, by virtue of their official position, to harm constitutional values. More often, however, their capacity to do so is not unique at all. Moreover, the ability to harm constitutional values through illegal acts that state officials possess by virtue of their legal status, as a general proposition, is no different either in kind or in degree from the ability of private citizens to harm constitutional values through illegal acts that they possess by virtue of *their* legal status and rightful authority. For example, when state laws prohibit self-help remedies and require resort to the courts, private citizens who are wrongfully in possession of the property of others—property they have acquired through violations of state laws—can harm the constitutional values connected with property rights by asserting their legal right to resist self-help attempts and to demand judicial process as a prerequisite of dispossession.

In the preceding paragraph I referred to harm to constitutional *values*. But strictly speaking, the question is whether the rogue state official, who is violating the constitutionally proper laws of his state, has, by virtue of his position, a unique ability to violate constitutional *commands*. But notice that put this way, any argument to this effect will be question begging. For one can only violate constitutional commands directed at the state if one is acting as the state. And the question at issue with respect to rogue

55. 227 U.S. at 287.

state officials is whether they *are* acting as the state, a question the answer to which must be established rather than assumed.

In using the “made possible or is efficiently aided” language, Chief Justice White more likely was asserting that acts of state officials have some presumptive legality under the law, even if those acts turn out to be illegal; and that this presumptive legality poses a special threat to constitutional values because it precludes citizens from resisting or ignoring such acts. After all, the Los Angeles ordinance at issue in *Home Telephone & Telegraph* (which set telephone rates), if in fact illegal under the California Constitution as alleged, *and if entitled to no presumption of legality*, could just as easily be ignored by the telephone company as could an “order” to lower telephone rates that was issued by a “private citizen.”

The problems with this form of the “abuse of authority” argument, however, are that it proves too little and proves too much. First, not all illegal acts of state officials carry some legal presumption of legality that makes them less easily resisted than ordinary illegal acts can be. Hall could have legally resisted the beating by Screws. Second, some illegal acts of nonofficials carry a similar legal presumption of legality, as the example regarding the legal requirements for dispossessing one illegally possessing another’s property illustrates.

So far I have been addressing the problem of classifying the illegal acts of employees of the government. But consider independent contractors dealing with the government, or the recipients of government funding. Suppose the Constitution demands that, say, private schools receiving publicly funded vouchers, or privately run prisons, not racially discriminate. And suppose the state does impose a nondiscrimination clause in its school vouchers and prison contracts. Finally, suppose these private entities violate that clause. Are their acts of discrimination “state action”? If the answer is “yes,” then the boundary between state action and private action is effaced. Any time a private party acts in a way that the Constitution requires the state to forbid, the private party is acting as “the state.” On the other hand, if the answer is “no,” tremendous weight is placed on the distinction between a government “employee” and a “contractor.”

E. Analogies

This problem of illegal acts of state officials is similar to a problem noted by Matthew Adler and Michael Dorf.⁵⁶ If, to be “law” under the Constitution, the process described in Article I, section 7—passage by a majority in both the House of Representatives and the Senate and concurrence

56. Matthew Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105 (2003).

by the President—then why are not the other parts of the Constitution that limit the legislative powers of Congress also conditions on the law’s very existence? In other words, if a “law” passed by only one house of Congress is not a law, why is not the same also true of a law violative of, say, Article 1, section 9, or a law beyond Congress’s enumerated powers? Why is the idea of an unconstitutional law not oxymoronic?

The problem is also similar to one noted by Evan Lee and me.⁵⁷ Orthodox federal sovereign immunity doctrine has it that the federal executive is immune from lawsuits for acts that are illegal but not for acts that are unconstitutional. But the federal executive has only those powers that the Constitution grants it, or that Congress, consistently with the Constitution, grants it. If the executive violates a statute, and if the executive cannot claim constitutional authority to violate it, then the executive’s act is not merely illegal but is constitutionally *ultra vires*. And because the act is constitutionally *ultra vires*, the executive is either a mere private law violator or is an official acting unconstitutionally. In other words, acts of the executive that are illegal but not unconstitutional are a null set.

The real “state action” problem is similar to these to problems. An official is an official by virtue of the laws and rules that make him so and prescribe how he shall and shall not act. When the official goes beyond his legal authority—when he goes rogue—can he still be an agent of “the state” he is defying?

IV. FINAL THOUGHTS

There is no clear winner on the question of whether an act of a governmental official that violates state law is nonetheless an act of the “state” for constitutional purposes. On the one hand, the government acts only through its officials. On the other hand, an official is an official only by virtue of the laws that so define the role and its limitations.

The good news here is twofold. First, the question might be resolvable without resolving the conceptual question of when an official acting beyond his legal authority is acting as the state by recourse to the intent of those who authored the constitutional prohibitions on state action. I know of no

57. Larry Alexander & Evan Tsen Lee, *Is There Such a Thing as Extraconstitutionality? The Puzzling Case of Dalton v. Spector*, 27 ARIZ. ST. L.J. 845 (1995). And for a conceptual issue comparable to that in *Dalton v. Spector* as well as to the general question of when is an official acting as an official, see Daphna Renan, *The President’s Two Bodies*, 120 COLUM. L. REV. 1119 (2020).

evidence that is determinative of that intent, but that does not mean none exists.

Second, in the absence of such evidence, resolution of the issue is far less consequential than it might appear. For it logically affects only whether the aggrieved party has a federal cause of action under the Constitution or only a state (or local) cause of action, and perhaps whether the cause of action, if only state (or local), is cognizable in federal court. *It should not affect whether the aggrieved party should prevail on the merits or what his remedy should be.*

Why should it not affect the merits or remedy? For this reason: If, were the defendant's act "state action," the plaintiff would have a meritorious constitutional claim against the defendant and would, as a matter of constitutional law, be entitled to remedy R, then the state law should entitle the plaintiff to prevail on the merits and to receive remedy R. If state law did not so entitle the plaintiff, then the state law itself would be inadequate under the federal Constitution—and state *law* is surely "state action" if anything is.

To be more concrete, had Justice Frankfurter's views prevailed in *Monroe v. Pape*, the aggrieved parties should have had a state cause of action against the offending officials, with a remedy available that was comparable to the remedy in *Monroe*. If Illinois did not recognize that cause of action, or did not provide a remedy comparable to that in *Monroe*, the laws of Illinois would not measure up to what the Constitution required of them. Illinois would then be violating the parties' constitutional rights, and the latter would have a federal claim in federal court. If, however, the laws of Illinois were constitutionally adequate, then the aggrieved parties could bring suit under those laws in state court and anticipate the same relief they obtained in *Monroe* in federal court.

So the real state action problem is a problem and at one level is a conceptual problem. Yet it is either resolvable practically (by reference to authorial intent) or else is unresolvable but not necessarily consequential.