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1. [INDIVIDUAL RIGHTS AND THE PENNSYLVANIA CONSTITUTION: IS THERE THERE A STATE STATE ACTION REQUIREMENT?, 67 Temp. L. Rev. 1051](#)

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# INDIVIDUAL RIGHTS AND THE PENNSYLVANIA CONSTITUTION: IS THERE THERE A STATE STATE ACTION REQUIREMENT?

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## Text

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[\*1051]

### Introduction

The rights embodied in the United States Constitution come with a limited guarantee. Individual rights of freedom of expression, privacy, and equality found in the Federal Constitution are protected only against abuses by the state and federal governments. <sup>1</sup> Where the rights of one private citizen conflict with those of another, the Bill of Rights generally affords no protection. <sup>2</sup> A right to privacy, for example, cannot be violated by a private party because there is no constitutional right to privacy against a purely private actor. Americans at odds with one another over such issues, acting out roles as students, as patients, or as employees, typically have no recourse under the Federal Constitution. Instead, any cause of action between private actors for violation of an individual right must be pursued under statutory or common law.

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<sup>1</sup> The First Amendment expressly protects speech and expression only against the government. [\*U.S. Const. amend. I\*](#). ("Congress shall make no law ... abridging the freedom of speech...."). Decisional privacy is a fundamental right and is protected against infringement by the state. [\*Griswold v. Connecticut, 381 U.S. 479 \(1965\)\*](#). Equality is guaranteed by the Fourteenth Amendment, which applies only to state action. [\*U.S. Const. amend. XIV\*](#).

<sup>2</sup> It is not entirely accurate to say that the Federal Constitution only provides protection against governmental actions. There are some instances in which the Constitution does, in fact, give rights to private actors. The Thirteenth Amendment, prohibiting slavery, is one example: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." [\*U.S. Const. amend. XIII, 1\*](#). See [\*Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 \(1968\)\*](#) (statute which bars all racial discrimination in sale or rental of public and private property is valid exercise of Congressional power to enforce Thirteenth Amendment).

Whether an individual constitutional right exists under the Federal Constitution is generally determined by the state action doctrine.<sup>3</sup> This restric [\*1052] tion of constitutional protection to cases in which the state (or some governmental entity) is involved derives from the language of the [Fourteenth Amendment of the United States Constitution](#).<sup>4</sup> The determination of state action is generally described as a unitary test, in that the single relevant inquiry is the level of state involvement with the challenged action.<sup>5</sup> Neither the specific constitutional value at issue nor the degree of impairment are considered. Where the government is not an actor, there is no cause of action under the Constitution.

The threshold question, then, in determining state action under the Federal Constitution is whether there is a connection between the government and the conduct or parties involved. In many instances, the connection is clear because the government is actively involved. However, where the connection is not directly apparent, the federal state action doctrine may be difficult to apply and may lead to unpredictable results.<sup>6</sup> Commentators have generally advocated abandoning the state action doctrine altogether and, instead, advocated addressing the claims of the individual parties directly on the merits.<sup>7</sup> The United States Supreme Court itself has acknowledged that state action is an imperfect analysis.<sup>8</sup> Justice Marshall once suggested that the doctrine could be improved by varying the degree of state action required for different constitutional claims.<sup>9</sup>

Despite its doctrinal flaws, requiring governmental action in order to trigger federal constitutional protection supports significant federal policies. [\*1053] State action serves an important function in federalism<sup>10</sup> by limiting the authority of the federal courts over the states.<sup>11</sup> Where the Federal Constitution does not apply to purely

<sup>3</sup> The first extensive articulation of the state action doctrine by the United States Supreme Court came in [The Civil Rights Cases, 109 U.S. 3 \(1883\)](#). A detailed analysis of state action is beyond the scope of this paper. Recent comprehensive articles include: Erwin Chemerinsky, Rethinking State Action, [80 Nw. U. L. Rev. 503 \(1985\)](#); Kevin Cole, Federal and State "State Action": The Undercritical Embrace of a Hypercriticized Doctrine, [24 Ga. L. Rev. 327 \(1990\)](#); John Devlin, Constructing an Alternative to "State Action" as a Limit on State Constitutional Rights Guarantees: A Survey, Critique and Proposal, 21 Rutgers L.J. 819 (1990). See also Laurence H. Tribe, Constitutional Choices 246-66 (1985); Robert F. Williams, State Constitutional Law: Cases and Materials (2d ed. 1993).

<sup>4</sup> The Fourteenth Amendment reads, in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." [U.S. Const. amend. XIV](#).

<sup>5</sup> There is no single test for determining whether the necessary level of state involvement is present. The Supreme Court has employed unitary analysis in developing several different tests. As catalogued by Justice White's majority opinion in [Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 939 \(1981\)](#), these include: public function test (finding state action where public services usually provided by government are provided by private agency); state compulsion test (private party conspiring with state official is state action); nexus test (finding state action where sufficiently close connection exists between the private party and the state); and joint action test.

<sup>6</sup> State action is a widely criticized doctrine. Professor Black's oft-quoted definition of state action as "a conceptual disaster area" is a representative comment. Charles L. Black, Foreword: "State Action," Equal Protection, and California's Proposition 14, 81 Harv. L. Rev. 69, 95 (1967).

<sup>7</sup> See, e.g., William Van Alstyne & Kenneth Karst, State Action, 14 Stan. L. Rev. 3 (1961). For a thorough discussion of critical commentary on the state action doctrine, see Cole, *supra* note 3, at 332, 348.

<sup>8</sup> [Lugar, 457 U.S. at 937](#). The Court stated: "Whether this is good or bad policy, it is a fundamental fact of our political order." *Id.*

<sup>9</sup> [Jackson v. Metropolitan Edison Co., 419 U.S. 345, 373-74 \(1974\)](#) (Marshall, J., dissenting).

<sup>10</sup> The first extensive articulation of the state action doctrine by the United States Supreme Court came in [The Civil Rights Cases, 109 U.S. 3 \(1883\)](#) (holding that private acts were outside scope of Fourteenth Amendment and emphasizing federalism as primary concern behind state action requirement).

private disputes, the states themselves are free to regulate these private actions. Federal state action also preserves individual freedom by limiting government intrusion into private conflicts.<sup>12</sup> Finally, the state action doctrine supports separation of powers. Where the courts cannot act because there has been no governmental involvement in the dispute, the state action doctrine preserves the power of Congress to regulate private conduct.

When the context shifts from federal to state constitutional protection of individual rights, the state action doctrine must be reevaluated. State constitutions certainly protect against state governmental infringement of individual rights in the same way that the United States Constitution protects against infringement by the federal government. However, while this is the only protection generally available under the Federal Constitution, state constitutions need not be so limited. State constitutions may be interpreted as extending greater protection than that provided by equivalent provisions of the Federal Constitution.<sup>13</sup> One of these greater protections may be that an individual's right to privacy or equal treatment or freedom of expression, for instance, is protected not only against infringement by the state, but also against the conduct of private parties. In some jurisdictions, courts have determined that specific provisions of their state constitutions do not require state action but, instead, provide for such a private right of action.<sup>14</sup>

In the state constitutional context, therefore, the threshold issue is no longer whether the state is sufficiently involved to allow a cause of action under a provision of the state constitution. Rather, the initial inquiry is the more basic question of whether a connection with the state is even necessary to trigger this protection. State courts need to decide whether a particular provision of a state constitution is restricted to governmental infringement - and thus contains a "state state action" requirement - or whether, instead, it protects the individual against both public and private violations.

When properly considered as a separate doctrine, the requirement of "state state action" under a state constitution is even less persuasive than the [\*1054] federal doctrine. Criticisms of the federal theory - that it is confusing and difficult to employ - are equally applicable in the state constitutional context. In addition, the important federalism and separation of powers justifications for the federal doctrine are absent at the state level.<sup>15</sup>

Furthermore, whereas the Bill of Rights applies to individuals only through the Fourteenth Amendment, there is no parallel channeling of constitutional protection in the state constitutional context. For example, the rights guaranteed by the Pennsylvania Declaration of Rights may have counterparts in similar guarantees in the Federal Constitution, but the state provisions apply directly to the citizens of the Commonwealth.<sup>16</sup> Certain provisions may expressly require state action, and others may be interpreted to include that requirement, but there is no inherent restriction of constitutional protection to governmental involvement as there is with the Bill of Rights.

<sup>11</sup> [Lugar, 457 U.S. at 936-37.](#)

<sup>12</sup> *Id.*

<sup>13</sup> See generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 *Harv. L. Rev.* 489 (1977). This premise was adopted by the United States Supreme Court in [PruneYard Shopping Center v. Robins, 447 U.S. 74 \(1980\)](#), and by the Pennsylvania Supreme Court in [Commonwealth v. Sell, 470 A.2d 457, 466-67 \(Pa. 1983\)](#).

<sup>14</sup> Of course, expanding the rights of one individual necessarily constricts the rights of the other party. A holding that a state constitution protects individual freedom of expression on the grounds of a private shopping center is also a determination that the owner of that property does not have an absolute right to exclude.

<sup>15</sup> Federal state action leaves the regulation of purely private disputes to the states. Thus, the states are free to regulate through any of the means at their disposal: through statutory regulation, the common law, or through direct application of state constitutional protection to the individual.

<sup>16</sup> The Declaration of Rights enumerates the rights reserved to the people of the Commonwealth under the Pennsylvania Constitution and limits the powers of state government. See generally R. Woodside, *Pennsylvania Constitutional Law* (1985); see also [Western Pa. Socialist Workers v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331, 1334 \(Pa. 1986\)](#).

This article will consider whether state state action must be present in order to trigger provisions of the Pennsylvania Constitution protecting freedom of expression, privacy, and gender equality. <sup>17</sup> Both the language of relevant sections of the Pennsylvania Constitution and the history of these provisions will be examined to assess whether state action was anticipated by the Framers. Applicable provisions in the constitutions of other states will be compared. Finally, the threads of state state action will be followed through relevant Pennsylvania case law to determine both where the Commonwealth currently stands on state state action jurisprudence, as well as where its courts appear to be headed. <sup>18</sup> [\*1055]

As this survey of cases will show, application of the state state action doctrine is as yet unclear in Pennsylvania. <sup>19</sup> Separate consideration of state constitutional claims is a fairly recent development, <sup>20</sup> and there are relatively few cases in the areas specifically addressed by this article. <sup>21</sup> However, the issue has been percolating in the lower appellate courts, and the number of cases in which a state state action inquiry may occur is on the rise.

The unsettled state of the law presents an excellent opportunity for the Pennsylvania courts to shape a state state action doctrine that is directly responsive to the constitution of the Commonwealth. A cause of action under a particular provision of the Pennsylvania Declaration of Rights will not necessarily require state state action. And even where it is clear that a provision of the Pennsylvania Constitution does require state state action, the courts need not simply import the flawed federal doctrine wholesale into Pennsylvania jurisprudence. Rather, the level of required government involvement may differ from that established under federal state action theory, and the state and federal courts may draw the lines between public and private conduct at quite different points. <sup>22</sup>

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<sup>17</sup> This article is not an evaluation of state action as a viable doctrine. Commentators have spoken on both sides of this issue. The argument presented here accepts federal state action doctrine, but contends that where provisions of the Pennsylvania Constitution are concerned, state state action must be independently addressed and need not necessarily apply.

<sup>18</sup> This article's analysis of Pennsylvania's state state action doctrine in part derives from, and attempts to conform with, the analysis promulgated by the Pennsylvania Supreme Court in [Commonwealth v. Edmunds, 586 A.2d 887 \(Pa. 1991\)](#), which set forth minimal criteria that must be addressed by litigants arguing a provision of the state constitution. According to this opinion, attorneys must brief and analyze four factors: "1) text of the Pennsylvania constitutional provision; 2) history of the provision, including Pennsylvania case-law; 3) related case-law from other states; 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence." *Id. at 895*. This approach seems equally well-suited to the determination of a possible state state action requirement in a particular provision of the state constitution. Other jurisdictions considering state action have analyzed provisions of their constitutions using similar criteria. See, e.g., [Cologne v. Westfarms Assocs., 469 A.2d 1201, 1202, 1208 \(Conn. 1984\)](#) (finding no private right of action under speech provision of Connecticut Constitution); [Woodland v. Michigan Citizens Lobby, 378 N.W.2d 337, 347-48 \(Mich. 1985\)](#) (speech and association provisions of state constitution do not reach private conduct).

<sup>19</sup> This is hardly surprising because a possible state requirement for governmental action is only raised where a claim has been made under a provision of the state - as distinct from the federal - constitution.

<sup>20</sup> Brennan, *supra* note 13, at 495.

<sup>21</sup> Whether a provision of the state's constitution has been so interpreted is not always easy to determine. Cases have sometimes been decided as if the state action doctrine applied, without the crucial distinction between federal and state state action ever having been squarely addressed. Furthermore, the Pennsylvania Supreme Court has sidestepped state state action by deciding appeals in relevant cases on other grounds.

<sup>22</sup> Such an approach has been used in other jurisdictions and is consistent with the greater protection of individual rights that may be provided by a state constitution. For example, in the area of due process jurisprudence, both California and New York provide greater protection under their state constitutions by requiring a lesser showing of state involvement to trigger constitutional protection. See, e.g., [Martin v. Heady, 163 Cal. Rptr. 117, 122, 123 \(Ct. App. 1980\)](#) (holding that involuntary sales of aircraft due to lien is state action even though not traditionally public function); [Sharrock v. Dell Buick-Cadillac, Inc., 379 N.E.2d 1169 \(N.Y. 1978\)](#) (state's participation in non-judicial foreclosure constitutes state action under New York Constitution even though it might not under Federal Constitution).

This article will use a two-part analysis in assessing state state action under the Pennsylvania Constitution. First, does the particular provision at issue require state state action in order for an individual right to be protected? And second, where it does, what is the nature of the requirement? In some instances, state state action may be interpreted as an absolute requirement, while in others it may be more flexible and may provide for a private right of action. Part I will consider freedom of expression under article I, section 7 and will evaluate the test emerging from the relevant cases. Part II will address article I, section 28, the Equal Rights Amendment, and the line of lower court decisions holding that state state action is not necessary to trigger this provision. Part III will focus on the right of privacy that [\*1056] has been found in article I, sections 1 and 8 and on the cases grappling with the question of when that right may be asserted.

### I. State State Action and Freedom of Speech

Is an individual's right of expression in Pennsylvania constitutionally protected over the rights of the owner of private property? <sup>23</sup> Freedom of expression is guaranteed by article I, section 7 of the Pennsylvania Constitution. <sup>24</sup> This broadly worded provision states an affirmative right of freedom of speech and contains no express requirement that only government action can violate that right.

The texts of most state constitutions include such an affirmative right to speech. <sup>25</sup> Many also include an express limitation requiring state state action for that right to be protected. <sup>26</sup> However, at least two states have held that a purely private right may exist, in certain circumstances, under their constitutions. <sup>27</sup> For example, in *Robins v. Pruneyard Shopping Center*, <sup>28</sup> the California Supreme Court held that high school students collecting signatures on a political petition in a private shopping mall had a limited right to freedom of [\*1057] expression under the California Constitution. <sup>29</sup> Similarly, in *State v. Schmid*, <sup>30</sup> the New Jersey Supreme Court held that

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<sup>23</sup> See generally James M. Dolliver, *The Washington Constitution and "State Action": The View of the Framers*, 22 *Williamette L. Rev.* 445 (1986); Jennifer Friesen, *Should California's Constitutional Guarantees of Individual Rights Apply Against Private Actors?*, 17 *Hastings Const. L.Q.* 111 (1989); Robert F. Utter, *The Right to Speak, Write, and Publish Freely: State Constitutional Protection Against Private Abridgment*, 8 *U. Puget Sound L. Rev.* 157 (1985); Alexander Wohl, *New Life for Old Liberties - The Massachusetts Declaration of Rights: A State Constitutional Law Case Study*, [25 \*New Eng. L. Rev.\* 177 \(1990\)](#); Note, *Private Abridgment of Speech and the State Constitutions*, 90 *Yale L.J.* 165 (1980).

<sup>24</sup> Article I, section 7 reads in pertinent part: "The free communication of thought and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty." Pa. Const. art. I, 7.

<sup>25</sup> Analogous provisions in the constitutions of Hawaii, Indiana, Oregon, South Carolina, Utah, and West Virginia expressly limit the protection of expression to incursions by the state. For example, the Oregon Constitution states: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever, but every person shall be responsible for the abuse of that right." Or. Const. art. I, 8. For a comparative analysis of comparable state provisions, see generally Jennifer Friesen, *State Constitutional Law* (1991). The text of each state provision is collected in Appendix 5A of that text.

<sup>26</sup> For example, the California Constitution reads in pertinent part: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Cal. Const. art. I, 2(a).

<sup>27</sup> Other states have found a private right of action by finding a nexus between the government and the private property such that state action was present. See, e.g., [Bock v. Westminster Mall Co.](#), [819 P.2d 55, 61 \(Colo. 1991\)](#) (state constitution protects individual right to expression because, in part, city had been financially involved in development of private mall). This is an unnecessary complication in the analysis of these cases. Where a court finds such a nexus, it need not address whether state action should even be required. The better approach is to ask whether state action is required under that provision of the state constitution. If it is, then the above inquiry would apply.

<sup>28</sup> [592 P.2d 341 \(Cal. 1979\)](#), *aff'd*, [447 U.S. 74 \(1980\)](#).

guarantees of speech and assembly contained in the state constitution protected the right of citizens to leaflet at Princeton, a private university.<sup>31</sup> The Schmid court found a limited private right of action under the New Jersey Constitution where some public use could be shown.<sup>32</sup> However, like *Pruneyard*, the constitutional right to access was not absolute and could be modified by reasonable time, place, and manner restrictions.<sup>33</sup>

Yet a third state has similarly addressed a private right of action for political speech in a case ultimately decided on other grounds. The Supreme Judicial Court of Massachusetts abandoned a unitary approach to state state action in *Batchelder v. Allied Stores International*,<sup>34</sup> a case involving private political speech at a private shopping center. However, the case was decided on the provision providing for freedom of elections rather than on the state constitutional provision concerning speech and expression.<sup>35</sup> The Massachusetts court grounded its analysis on the absence of express language limiting the scope of the elections provision to the government.<sup>36</sup> It refused to imply such a requirement simply "to force a parallelism with the Federal Constitution."<sup>37</sup> The *Batchelder* court left open the existence of a private right of action under the state constitutional provision protecting free speech.<sup>38</sup>

**[\*1058]**

In Pennsylvania, a private right of action for expression was recognized as early as 1921, in *Spayd v. Ringing Rock Lodge*,<sup>39</sup> a speech and right of petition case.<sup>40</sup> It was not until 1981, however, that the Pennsylvania Supreme

<sup>29</sup> *Id.* at 342, 347 (overruling *Diamond v. Bland*, 521 P.2d 460 (Cal. 1974)). On appeal, the United States Supreme Court held that under the Federal Constitution, there was no private right of access to the PruneYard Shopping Center for political solicitation. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 80-81 (1980) (citing *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972)). However, the Court held that state courts were free to construe provisions of their state constitutions broadly enough to require such access. *Id.* at 81.

<sup>30</sup> 423 A.2d 615 (N.J. 1980), appeal dismissed sub nom. *Princeton Univ. v. Schmid*, 455 U.S. 100 (1982) (per curiam).

<sup>31</sup> *Id.* at 616-617, 628, 633.

<sup>32</sup> *Id.* at 628, 631. The three-part Schmid test balanced the normal use of the property, the extent to which the public had been invited to use it, and the purpose of the expressive activity. The court determined that free speech and assembly were part of the normal use of a university and that the public was encouraged to exchange opinions and ideas as part of the educational process. Furthermore, the purpose of the expressive activity at issue, distribution of political literature, was entirely consistent with both the private and public uses of the university. *Id.* at 615, 631-32.

<sup>33</sup> *Id.* at 633. Restrictions on the time, place, and manner of expressive conduct or speech have been upheld by the United States Supreme Court. Such restrictions are subject to strict scrutiny and must be narrowly tailored to serve a significant governmental interest; furthermore, they must not be directed at the content of the restricted speech, and alternative channels for such communication must not be available. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

<sup>34</sup> 445 N.E.2d 590 (Mass. 1983).

<sup>35</sup> *Id.* at 593. Article 9 of the Declaration of Rights of the Massachusetts Constitution reads: "All elections ought to be free; and all the inhabitants of this Commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments." Mass. Const. part I, art. 9.

<sup>36</sup> *Batchelder*, 445 N.E.2d at 593-94.

<sup>37</sup> *Id.* at 593.

<sup>38</sup> *Id.*

<sup>39</sup> 113 A. 70, 72 (Pa. 1921).

<sup>40</sup> *Id.* at 71. Article I, section 7 of the Pennsylvania Constitution then protected both speech and the right of petition. The right of petition is now found in article I, section 20. Spayd held that a union could not expel a railroad worker for signing a petition asking the state legislature to reconsider an act favored by the union. *Id.* at 72-73. The Court stated that the rights protected by

Court directly addressed the possibility of a private right of action under article 1, section 7, in a case involving speech alone.

In *Commonwealth v. Tate*,<sup>41</sup> the court weighed the rights of two private parties and found a limited private right to constitutionally protected speech.<sup>42</sup> Non-student protesters had entered the grounds of a private college to leaflet against the appearance of Clarence Kelley, Director of the FBI, at a college symposium. The protesters were arrested for trespass on private property. Justice Roberts, writing for the majority, held that such leafleting was protected by article I, section 7.<sup>42</sup>

The *Tate* court squarely addressed the dilemma of the conflict between rights raised by the protesters' right to speech and Muhlenberg College's competing constitutional right to possession and use of private property.<sup>43</sup> The court's holding was a narrow one. It concluded that "in certain circumstances, the state may reasonably restrict the right to possess and use property in the interests of freedom of speech, assembly, and petition."<sup>44</sup> To determine whether such circumstances exist, it declared, a court must balance the interests of the two private parties involved. In this case, the court balanced the private college's right to use of its property against the protesters' rights of expression and found that, on those facts, speech warranted the greater constitutional protection.<sup>45</sup>

The Pennsylvania Superior Court grappled with the *Tate* rule in two subsequent article I, section 7 cases. In *Western Pennsylvania Socialists v. Connecticut General Life Insurance Co. (Socialist Workers I)*,<sup>46</sup> the court applied the *Tate* balancing test and held that a property owner could exclude private expression from his property. Members of a political committee claimed the right to collect signatures on a gubernatorial nominating petition in South Hills Village, a privately owned shopping mall. The mall had an established [\*1059] policy which uniformly prohibited any type of political solicitation. The trial court denied injunctive relief, and a panel of the superior court affirmed.<sup>47</sup>

The superior court reviewed the history of the Pennsylvania Declaration of Rights and held that the private shopping center could ban political activity without violating the state constitution.<sup>48</sup> The three-judge panel interpreted *Tate* as protecting a private right of expression only because, as a public forum, Muhlenberg College was a quasi-state actor.<sup>49</sup>

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article I, section 7 could not be infringed, even momentarily, by individuals or by the state or by corporations or unincorporated associations. *Id. at 72.*

<sup>41</sup> [432 A.2d 1382 \(Pa. 1981\).](#)

<sup>42</sup> [Id. at 1390.](#)

<sup>43</sup> [Id. at 1388-89.](#)

<sup>44</sup> [Id. at 1390.](#) Justice Larsen's dissent advocated state adoption of [Hudgens v. NLRB, 424 U.S. 507 \(1976\)](#), which held that the United States Constitution provided no protection against abridgment of freedom of expression by a private party. *Id. at 1391.* He objected to balancing constitutional rights because such an approach would lead to confusion and uncertainty in the law for property owners. *Id.* Justice Larsen did not specifically analyze article I, section 7 of the Pennsylvania Constitution.

<sup>45</sup> *Id. at 1390.*

<sup>46</sup> [485 A.2d 1 \(Pa. Super. Ct. 1984\).](#)

<sup>47</sup> [Id. at 9.](#)

<sup>48</sup> [Id. at 4-5.](#)

<sup>49</sup> [Id. at 7.](#)

Similarly, in *Crozer Chester Medical Center v. May*,<sup>50</sup> a panel of the superior court upheld an injunction that prohibited pro-life protesters from demonstrating on private property that housed a clinic providing abortion services. The owners of that property had a firm no-solicitation policy.<sup>51</sup> Relying on *Socialist Workers I*, Judge Wickersham's opinion in *Crozer* upheld the lower court's decision that the protesters' rights to express their views did not outweigh the property owners' rights to protect their patients.<sup>51</sup>

Judge Brosky joined the majority opinion in *Crozer* but wrote separately to advocate the balancing approach used by the Supreme Court of New Jersey in denying public access to private property for the purpose of protesting abortion.<sup>52</sup> The New Jersey court relied on the three-prong test first formulated in *Schmid*, which balanced normal use of the property, the extent of public use, and the purpose of the expressive activity.<sup>53</sup> Judge Brosky found the New Jersey approach more precise and satisfactory than the rule that seemed to be straining to emerge from *Tate* and *Socialist Workers I*, because the test explicitly addressed the factors that were merely implied in the Pennsylvania cases.<sup>54</sup> Judge Brosky's concurrence is a clear indication that some members of the lower appellate courts are dissatisfied with existing article I, section 7 jurisprudence as it relates to state state action and are searching for a more precise analysis of when a purely private right of action may be recognized.

Since *Tate*, the Pennsylvania Supreme Court has contributed little analytical clarity regarding whether state state action is required before freedom of expression may be constitutionally protected. For example, in affirming *Socialist Workers I*, Justice Hutchinson, writing for a fragmented court in *Socialist Workers II*, held that the Pennsylvania Constitution did not protect public access to private property where the owner of that property uniformly [\*1060] prohibited any political activity.<sup>55</sup> In such cases, he reasoned, the prohibition on political activity precluded any use of the property as a public forum.<sup>56</sup>

Although the *Socialist Workers II* holding is clear, the supreme court's analysis in that case is not. The plurality opinion initially suggested that it was squarely confronting the state action issue. The court unambiguously addressed state action in a footnote early in the opinion and acknowledged the conflict between the right to possess and protect private property and the right to political expression.<sup>57</sup> The analysis, however, proceeded to ignore state action and, instead, faithfully applied the *Tate* balancing test. In other words, having said that the lack of state action made it unnecessary to balance these conflicting rights, the court proceeded to decide the case by balancing the rights involved.

In holding that the right of the shopping mall owner to determine the use of his property outweighed that of the Socialist Workers Party to collect signatures on a political petition, the plurality distinguished between two types of private property. First, some private property, like Muhlenberg College, is "private in name but used in fact as a forum for public debate."<sup>58</sup> Second, some private property, like South Hills Village, is never used for such public

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<sup>50</sup> [506 A.2d 1377 \(Pa. Super. Ct. 1986\)](#).

<sup>51</sup> [Id. at 1383](#).

<sup>52</sup> [Id. at 1383-84](#) (citing [Brown v. Davis, 495 A.2d 900 \(N.J. Super. Ct. Ch. Div. 1984\)](#), aff'd, [513 A.2d 974](#) (N.J. Super. Ct. App. Div.), and cert. denied, [526 A.2d 140 \(N.J. 1986\)](#)).

<sup>53</sup> See supra note 30 and accompanying text.

<sup>54</sup> [Crozer, 506 A.2d at 1383-84](#) (Brosky, J., concurring).

<sup>55</sup> [Western Pa. Socialist Workers v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331, 1333 \(Pa. 1986\)](#), aff'g [485 A.2d 1 \(Pa. Super. Ct. 1984\)](#) (*Socialist Workers II*).

<sup>56</sup> [Id. at 1333](#).

<sup>57</sup> [Id. at 1334 n.2](#). Justice Hutchinson wrote: "For the reasons set forth below, the absence of governmental action on this record makes it unnecessary for us to balance these interests...." *Id.*

purposes.<sup>59</sup> This distinction conforms with the first prong of *Tate* as a means of determining when those circumstances exist in which the state may restrict one private right in favor of another.<sup>60</sup> Where private property has been a forum for public debate, the court may allow access as it did in *Tate*. But where the owner of private property has acted to prevent debate of public issues, as the owner of South Hills Village did through a uniform policy preventing political solicitation of any kind, the court will not grant access.

The *Socialist Workers II* court spoke in generalizations, rather than giving specific guidelines for later courts to follow. For example, the opinion did not specifically discuss the relevant provision of the Pennsylvania Constitution, article I, section 7. Instead, it followed the superior court in considering the state constitution more generally, as providing a two-part framework of government<sup>61</sup> that first sets up a government and then limits its powers.<sup>62</sup> The plurality addressed the Pennsylvania Declaration of Rights in equally general terms.<sup>63</sup> Without analyzing article I, section 7, Justice Hutchinson stated that the Declaration of Rights served a dual role. First, it functioned **[\*1061]** as a restriction on state government,<sup>64</sup> which suggests that state action would be required to trigger its protection. At the same time, however, it provided rights "specifically reserved to the people,"<sup>65</sup> which implies that such rights are protected against any infringement whatsoever.

Furthermore, when the rights of private parties came into conflict, the plurality opinion found the common law, not the state constitution, provided a framework for resolving that dispute.<sup>66</sup> But the language used by the court acknowledged the conclusion reached in *Tate*: there may be occasions when these conflicts do rise to constitutional proportions.<sup>67</sup>

Justice Hutchinson's opinion in *Socialist Workers II* was joined by three concurrences and one concurrence/dissent. Justice Larsen's concurrence followed the logic set out in his dissent in *Tate*, taking the position that rights should not be balanced because a property owner has an absolute right to exclude others from his property.<sup>68</sup> Justice Zappala's separate concurrence voiced reservations about *Tate* and did not join the portion of the plurality opinion that followed its balancing; his own reasoning suggested that he would likely require state action.<sup>69</sup>

<sup>58</sup> [Id. at 1336.](#)

<sup>59</sup> [Id. at 1337.](#)

<sup>60</sup> [Id. at 1336-37.](#) See [Commonwealth v. Tate, 432 A.2d 1382, 1387 \(Pa. 1981\).](#)

<sup>61</sup> [Socialist Workers II, 515 A.2d at 1334.](#)

<sup>62</sup> *Id.*

<sup>63</sup> [Id. at 1335.](#)

<sup>64</sup> *Id.* The court stated: "This Court has consistently held this view, that the Pennsylvania Constitution's Declaration of Rights is a limit on our state government's general power." *Id.* But this is not the same as stating that limiting state government is the only function served by the Declaration of Rights.

<sup>65</sup> *Id.* The court stated: "We are not suggesting that the rights enumerated in the Declaration of Rights exist only against the state. These rights are specifically reserved to the people... They are not created by the constitution, but preserved by it." *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* The court acknowledged the possibility of constitutional protection of individual rights against infringement by a private party, as evidenced by its language: "The adjustment of these rights among private parties is not necessarily a matter of constitutional dimensions." (emphasis added).

<sup>68</sup> [Id. at 1340](#) (Larsen, J., concurring).

<sup>69</sup> [Id. at 1340-41](#) (Zappala, J., concurring).

The remaining two justices addressed state action head-on. Justice McDermott concurred only in the result. He rejected the application of the Tate balancing test to a commercial shopping center because a shopping mall is not a public forum and, therefore, not a venue for "speech making, petition signing, or cracker barrels...." <sup>70</sup> Because a shopping mall is not a state actor, its owner should not be required to admit the public for any purpose other than business. <sup>71</sup> Justice Nix, too, clearly rejected any state action requirement, but drew the appropriate distinction between the federal state action doctrine and the state state action doctrine, recognizing that the federal doctrine applied only to the United States Constitution and was irrelevant when considering a provision of the Pennsylvania Constitution. <sup>72</sup> **[\*1062]**

Socialist Workers II remains the Pennsylvania Supreme Court's strongest statement on state action and article I, section 7, but the rule emerging from it is far from clear. The decision holds that there is no individual right of access for political speech to a shopping center under the Pennsylvania Constitution where the owner of the property prohibits such activity. However, the test used balances purely private interests - the right to political expression and the right to exclude from private property - which suggests that a limited private right could exist under the Pennsylvania Constitution, although it did not on the facts of Socialist Workers. Furthermore, the holding of this decision is not based on the absence of state action but, instead, on the narrow ground that since the property owner has uniformly excluded all political activity from the shopping center, he cannot be required to provide a public forum as was Muhlenberg College.

The more recent superior court decision in Coatesville Development Co. v. United Food & Commercial Workers <sup>73</sup> evidences that the Socialist Workers II-Tate rule is still unclear. In Coatesville, the owners of a shopping center and a supermarket sought to enjoin union picketing. The trial court, relying on Tate, balanced the owner's right to possess property and the union's right of free expression and upheld the union's right to picket under article I, section 7. <sup>74</sup> A panel of the superior court reversed, finding no such right to individual access to private property in the Pennsylvania Constitution.

The union appealed for reconsideration, and, sitting en banc, the superior court reversed again, in favor of the union. However, the court found it unnecessary to reach the constitutional issue and held, under common law, that where an owner holds property open for public use and invites the public in, peaceful informational picketing cannot be enjoined. <sup>75</sup>

Judge Beck's concurrence in Coatesville agreed that the constitutional issue did not need to be reached. <sup>76</sup> But Judge Beck suggested that, under other circumstances, there might be an affirmative right to picket <sup>77</sup> and

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<sup>70</sup> [Id. at 1341 n.1](#) (McDermott, J., concurring).

<sup>71</sup> [Id. at 1341](#) (McDermott, J., concurring).

<sup>72</sup> [Id. at 1341-42](#) (Nix, C.J., concurring and dissenting). Chief Justice Nix wrote: "Thus, the limitation in federal constitutional decisions to matters involving "state action" is not applicable in an analysis where it is alleged that one of these rights conferred under our constitution has been violated." *Id.* Justice Nix here echoes his opinion in [Hartford Accident & Indemnity Co. v. Insurance Commissioner, 482 A.2d 542, 549 \(Pa. 1984\)](#).

<sup>73</sup> [542 A.2d 1380 \(Pa. Super. Ct. 1988\)](#).

<sup>74</sup> [Id. at 1383](#). The trial court denied the injunction, however, on other grounds. *Id.* See supra notes 41-45 for a discussion of Tate.

<sup>75</sup> [Coatesville, 542 A.2d at 1383](#). Before hearing the case en banc, the superior court requested supplemental briefs on the impact of the Pennsylvania Supreme Court's then-recent decision in Socialist Workers II. The majority, however, did not reach the constitutional issue of protected speech. [Id. at 1385](#).

<sup>76</sup> [Id. at 1387](#) (Beck, J., concurring).

emphasized the importance of allowing the union to communicate its message. <sup>78</sup> Judge Beck stressed the need for a framework that would balance the interests involved: those of the property owner, the store owner, the labor union, [\*1063] and the public. It is noteworthy that each of the interests Judge Beck sought to balance was a private interest. <sup>79</sup>

Judge Tamilia concurred in the judgment in *Coatesville*, but dissented in part because, for him, the access question had clear constitutional dimensions. Judge Tamilia would have upheld the trial court, which applied the Tate balancing test and found that the union had a right, under both the federal and state constitutions, to engage in peaceful picketing. <sup>80</sup>

*Socialist Workers II* was most recently cited in *Maylie v. National Railroad Passenger Corp.*, <sup>81</sup> a superior court case in which a railroad employee sued both his employer and a co-worker for violations of due process and equal protection under the Pennsylvania Constitution. <sup>82</sup> A panel of the superior court found that the issue was preempted by FELA, but added that under *Socialist Workers II* there would have been no cause of action because "the provisions of the Constitution do not reach the acts of purely private actors." <sup>83</sup>

The rule, however, seems less clear than that. State state action is required by *Socialist Workers II*, but the continued use of the Tate balancing test by both the Pennsylvania Supreme Court in *Socialist Workers II* and the superior court indicates that state state action remains less than an absolute requirement under article I, section 7. As long as the courts continue to balance purely private interests in at least some of their decisions, the implication is that at least a very narrow private right exists.

The question being worked out in the Pennsylvania courts appears to be this: When do circumstances exist that require the state to restrict the right to exclude others from private property? Is it only where, as in *Tate*, the private party refusing access has previously allowed access to some members of the public? In other words, is a policy of selective exclusion of some individuals and not others that which is unconstitutional under article I, section 7? Or is it more precise to consider a continuum of private venues? On such a continuum, a college would be closer to a public forum than would a shopping center because one of the traditional functions of a college is to encourage the exchange of political ideas. Where a private institution is close to being a public forum, it cannot constitutionally restrict access. But where the private venue falls near the other end of the continuum, as does a shop [\*1064] ping center whose only function is as a place of business, then access may be constitutionally restricted.

Under either of these formulations, the judgments in the preceding article I, section 7 cases would not be altered. But a more precise analysis would make it easier for both the parties litigating such a dispute and the courts required to resolve it to determine whether a private right exists. The broad, affirmative language of article I, section 7 and the absence of any direct requirement for state state action are consistent with the balancing test repeatedly used by the Pennsylvania courts. All indicate that, although the analysis remains imprecise, a limited private right to expression does seem to exist under the Pennsylvania Constitution.

<sup>77</sup> *Id.* Judge Beck stated: "Apart from any affirmative rights which appellees may have to picket...." *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Judge Beck's concurrence identified three possible sources for such a framework: the constitution, the common law, and statutes. Judge Beck preferred a statutory solution and would have had the General Assembly authorize "reasonable public use of outdoor commercial property for communicative activity." *Id.* This approach thus bypassed the confusing *Tate-Socialist Workers* rule and, at the same time, avoided deciding whether such a private right existed under the state constitution.

<sup>80</sup> [Id. at 1388](#) (Tamilia, J., concurring and dissenting).

<sup>81</sup> [601 A.2d 308 \(Pa. Super. Ct. 1991\)](#).

<sup>82</sup> See *supra* notes 55-72 and accompanying text for a discussion of *Socialist Workers II*.

<sup>83</sup> [Id. at 312-13](#) (citing [Western Pa. Socialist Workers v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331 \(Pa. 1986\)](#)). The panel included Judges Wieand, Beck, and Hudock.

## II. State State Action and Equality: The Equal Rights Amendment

The Commonwealth of Pennsylvania has long been in the vanguard of constitutional gender equality. On May 8, 1971, it became the first state to add an Equal Rights Amendment ("ERA") to its constitution.<sup>84</sup> Similar amendments are now part of seventeen state constitutions.<sup>85</sup>

Pennsylvania is also the only state, to date, to permit a private right of action under the ERA.<sup>86</sup> The legislative history of article I, section 28 does not indicate that the legislature intended the amendment to apply only where the state was involved, and the language of the provision does not expressly require state state action.<sup>87</sup> Although the issue has not yet been definitively addressed by the state supreme court, there is strong evidence from lower court decisions that an individual right of action does exist.<sup>88</sup>

As there is no comparable provision in the Federal Constitution, whether state state action is required by the ERA can only be determined by analyzing the specific provision of the state constitution, entirely divorced [**\*1065**] from any comparable federal provisions and thus equally separate from any federal state action doctrine.<sup>89</sup> With regard to equality, the Pennsylvania courts have been able to consider whether this provision of the constitution required state state action without the confusion of any parallel federal doctrine.

The earliest cases litigated under the Pennsylvania ERA did not address state state action. These cases focused on discriminatory statutes and common law doctrines in which, through the legislature or the courts, the state was already involved.<sup>90</sup> Successfully litigated violations of the ERA included sex-based sentencing statutes,<sup>91</sup>

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<sup>84</sup> Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." Pa. Const. art. I, 28 (adopted May 18, 1971).

<sup>85</sup> See Bruce E. Altschuler, State ERAs and Employment Discrimination, 65 Temp. L. Rev. 1267, 1267 n.6 (1992) (listing state constitutional provisions that establish equality rights); Devlin, *supra* note 3, at 825 nn.103-04 (discussing various state constitutional provisions that guarantee equality of rights); Robert F. Williams, Equality Guarantees in State Constitutional Law, [63 Tex. L. Rev. 1195, 1212-13 n.125 \(1985\)](#) (noting that states now have amendments prohibiting sex discrimination). For specific commentary on the Pennsylvania ERA, see Margaret K. Krasik, Comment, A Review of the Implementation of the Pennsylvania Equal Rights Amendment, 14 Duq. L. Rev. 683 (1976).

<sup>86</sup> Altschuler, *supra* note 85, at 1270.

<sup>87</sup> Six states use language expressly limiting their ERAs to situations in which state action exists. These states are: Colorado, Hawaii, Illinois, Louisiana, New Hampshire, and Vermont. Compare Pa. Const. art. I, 28 with Colo. Const. art. 2, 29 (1972) ("Equality of rights under the law shall not be denied or abridged by the State of Colorado or any of its political subdivisions on account of sex."). The proposed federal ERA also contained language expressly requiring state action: "Equality of rights under law shall not be abridged by the United States or by any state on account of sex."

<sup>88</sup> See *infra* notes 118-29 and accompanying text.

<sup>89</sup> Cases arguing that the ERA provided a private right of action were brought just as the movement to litigate under specific provisions of state constitutions was gaining momentum, and so are likely to directly address the appropriate state constitutional issues. See Brennan, *supra* note 13, at 495 (noting trends in state law jurisprudence in late 1960s). Justice Brennan's article is generally credited with encouraging the use of state constitutional provisions to protect individual rights, thus beginning a renaissance in state constitutional law.

<sup>90</sup> For a comprehensive compilation of early cases in several jurisdictions, including Pennsylvania, see ERA Impact Clearinghouse: Index and References, ERA Impact Project, A Joint Project of the NOW Legal Defense & Education Fund and the Women's Law Project.

<sup>91</sup> [Commonwealth v. Butler, 328 A.2d 851 \(Pa. 1974\).](#)

gender-based spousal support,<sup>92</sup> child custody based on the tender years presumption,<sup>93</sup> and responsibility for child support.<sup>94</sup>

Application of the ERA to private parties arose through challenges to gender-based insurance premiums. In *Murphy v. Harleysville Mutual Insurance Co.*,<sup>95</sup> a male insurance holder sued his insurance company on the theory that gender-based car insurance rates violated the ERA.<sup>96</sup> In rejecting this argument, the trial court held that the amendment did not provide a private right of action.<sup>97</sup> On appeal, the superior court interpreted the new amendment for the first time.<sup>98</sup> The court focused on the text of the amendment and, particularly, on the phrase "under the law."<sup>99</sup> The court followed the lead of Texas and Washington and interpreted "under the law" to consti [\*1066] tute, in effect, a state state action requirement.<sup>100</sup> According to the *Murphy* court, the purpose of the Pennsylvania ERA was not to regulate the daily activities of citizens or to control their private affairs.<sup>101</sup> Rather, the purpose of the amendment was to eliminate gender discrimination in existing statutes and, at the same time, to establish a state policy against future enactment of gender-based legislation.<sup>102</sup> Accordingly, finding that the state action requirement was not present on those facts, the superior court in *Murphy* affirmed the trial court and denied the petition for appeal.

Four years later, whether state state action was required under the ERA was first directly considered by the Pennsylvania Supreme Court. The issue arose in *Hartford Accident & Indemnity Co. v. Insurance Commissioner*,

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<sup>92</sup> [Henderson v. Henderson, 327 A.2d 60 \(Pa. 1974\)](#). This case contains an early and oft-quoted Supreme Court determination of the purpose of the ERA:

The thrust of the Equal Rights Amendment is to insure equality of rights under the law and to eliminate sex as a basis for distinction. The sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal rights and responsibilities. The law will not impose different benefits or burdens upon the members of a society based on the fact that they may be man or woman.

[Id. at 62.](#)

<sup>93</sup> [Commonwealth ex rel. Spriggs v. Carson, 368 A.2d 635 \(Pa. 1977\)](#).

<sup>94</sup> [Conway v. Dana, 318 A.2d 324 \(Pa. 1974\)](#).

<sup>95</sup> [422 A.2d 1097 \(Pa. Super. Ct. 1980\)](#), cert. denied, **454 U.S. 896 (1981)**.

<sup>96</sup> [Id. at 1098.](#)

<sup>97</sup> [Id. at 1102.](#)

<sup>98</sup> *Id.* It found no relevant legislative history on whether state action was required to trigger equal rights. *Id.*

<sup>99</sup> [Id. at 1102-03.](#)

<sup>100</sup> [Id. at 1103-04.](#) Courts in both states had held, under similar language, that state action was required to trigger the protections of their Equal Rights Amendments. See, e.g., [Lincoln v. Mid-Cities Pee Wee Football Assoc., 576 S.W.2d 922, 925 \(Tex. Ct. App. 1979\)](#) (holding Texas ERA applies to state action or private action closely related in function with state action); [MacLean v. First Northwest Indus. of Am., Inc., 600 P.2d 1027, 1029 \(Wash. Ct. App. 1979\)](#) (holding state action as prerequisite for cause of action under Washington ERA), rev'd on other grounds, [635 P.2d 683 \(Wash. 1981\)](#). The Texas ERA states: "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin." Tex. Const. art. 1, 3a. The Washington ERA states: "Equality of rights and responsibilities under the law shall not be denied or abridged on account of sex." Wash. Const. art. XXXI, 1.

<sup>101</sup> [Murphy, 422 A.2d at 1106.](#)

<sup>102</sup> [Id. at 1105.](#)

<sup>103</sup> a case interpreting the Insurance Rate Act. <sup>104</sup> Section 3(d) of the Act prohibited rates that were "unfairly discriminatory." The Act was challenged by an unmarried male driver, whose annual premiums were substantially more than an unmarried female driver of the same age and driving record would have to pay. <sup>105</sup> The insurance company argued that the phrase "unfairly discriminatory" meant only insurance rates that were actuarially unfair, and that the rates at issue did not violate the Act because male drivers in that age group were statistically more likely to have automobile accidents than were female drivers. <sup>106</sup> The state insurance commissioner determined that gender-based premium rates were "unfairly discriminatory" and violated the Act. The commissioner's reasoning was based, in part, on the public policy against sex discrimination that was embodied in the ERA. <sup>107</sup>

Ignoring the superior court's prior decision in *Murphy*, Justice Nix's plurality opinion upheld the determination that gender-based rates were unfairly discriminatory. <sup>108</sup> In dicta, Justice Nix made a strong statement concerning the irrelevance of state action - as a federal test used to measure the extent of federal constitutional protection - to the state constitution. <sup>109</sup> However, [\*1067] despite this dicta rejecting any state action requirement to implement the ERA, Justice Nix did find state involvement in the case. He determined that the language of the ERA was controlling and held that "under the law" circumscribed the activities of government entities, which certainly included the insurance commissioner. <sup>110</sup> Therefore, the rates at issue were discriminatory. <sup>111</sup>

The *Hartford Accident* court was hardly in agreement on the question of state action. Justice Nix alone found the federal doctrine irrelevant to the state constitution, thus suggesting that purely private conduct was actionable under the ERA. <sup>112</sup> Justice Flaherty's concurrence, joined by Justice Hutchinson, did not address state action. <sup>113</sup> Justice Hutchinson's own concurrence, joined by Justice Flaherty, stated that there was no need to address potential federal questions regarding state action. <sup>114</sup>

Justice McDermott, in a lengthy dissent joined by Justice Zappala, concluded that the ERA did require state action. <sup>115</sup> His analysis cited both *Murphy* and a string of federal cases and concluded that the state and federal cases were identical because both the ERA and Fourteenth Amendment protected rights "under the law." <sup>116</sup> Justice

<sup>103</sup> [482 A.2d 542 \(Pa. 1984\)](#).

<sup>104</sup> [Pa. Stat. Ann. tit. 40, 1183\(d\)](#) (1971).

<sup>105</sup> [Hartford Accident, 482 A.2d at 544](#).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> See *supra* notes 96-102 and accompanying text for a discussion of *Murphy*.

<sup>109</sup> The rationale underlying the "state action" doctrine is irrelevant to the interpretation of the scope of the Pennsylvania Equal Rights Amendment, a state constitutional amendment adopted by the Commonwealth as part of its own organic law. [Hartford Accident, 482 A.2d at 549](#).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> [Id. at 550](#).

<sup>114</sup> [Id. at 550-51](#). Justice Hutchinson's reference to potential federal questions of state action is confusing, but he hints at an understanding of the difference between federal doctrine and state law in alluding to whether Pennsylvania should adopt the Fourteenth Amendment standards for detecting state action. *Id.* This is a distinction that courts must make at the outset of any decision involving state action and the state constitution, and too few judges, to this point, have done so.

<sup>115</sup> [Id. at 551-56](#).

Zappala's dissent, joined by Justice McDermott, first stated that the ERA had no application to insurance rates.<sup>117</sup> He went on to state that "under the law" had long been interpreted to require state action. Thus, only three members of the Hartford Accident court concluded that state action was not required to implement the ERA. Two justices determined that the ERA applied only where the state was involved. The two concurring opinions did not reach the state action issue at all.

Since Hartford Accident, the question of whether the Pennsylvania ERA provides a private right of action has been revisited by both lower appellate state courts, which appear to agree that a private right of action does exist. In *Welsch v. Aetna Ins. Co.*,<sup>118</sup> the trial court had dismissed yet another challenge to gender-based insurance premiums on the grounds that there was no cause of action because the state was not involved.<sup>119</sup> A panel of the supreme [\*1068] rior court reversed and found that a private cause of action did exist under the ERA.<sup>120</sup> Judge Hester's opinion interpreted Hartford Accident as having firmly repudiated *Murphy*.<sup>121</sup> However, the trial court's decision was upheld for lack of jurisdiction because the appellant had failed to exhaust his administrative remedies.<sup>122</sup>

The Pennsylvania Commonwealth Court has also held that state action is not required to implement the state ERA. In *Bartholomew v. Foster*,<sup>123</sup> the parents of a young male driver challenged an amendment to the Casualty and Surety Rate Regulatory Act as violative of the ERA.<sup>124</sup> In an opinion written by Judge Colins and joined by four judges,<sup>125</sup> the commonwealth court held that the provisions of the ERA applied regardless of whether or not the state itself was an actor.<sup>126</sup> On appeal, the Pennsylvania Supreme Court skirted the pivotal issue. An evenly divided court affirmed the decision of the commonwealth court without elaboration.<sup>127</sup>

The present state of the law in Pennsylvania, based primarily on the Hartford Accident and Bartholomew decisions, thus seems to provide a private right of action under the state constitution where gender discrimination is at issue.

<sup>116</sup> [Id. at 555.](#)

<sup>117</sup> [Id. at 557.](#)

<sup>118</sup> [494 A.2d 409 \(Pa. Super. Ct. 1985\).](#)

<sup>119</sup> [Id. at 411.](#)

<sup>120</sup> The panel of the superior court also included Judges Brosky and Watkins. [Id. at 412.](#)

<sup>121</sup> [Id. at 411-12](#) (citing [Murphy v. Harleysville Mut. Ins. Co.](#), [422 A.2d 1097 \(Pa. Super. Ct. 1980\)](#)).

<sup>122</sup> [Id. at 412-13.](#)

<sup>123</sup> [541 A.2d 393 \(Pa. Commw. Ct. 1988\)](#), [aff'd](#), [563 A.2d 1390 \(Pa. 1989\)](#).

<sup>124</sup> The amendment, permitting gender to be used in setting insurance rates where backed by "sound actuarial principles," had been drafted in part in response to [Hartford Accident & Indem. Co. v. Insurance Comm'r](#), [482 A.2d 542 \(Pa. 1984\)](#) (gender-based insurance rates are unfairly discriminatory under the ERA). [Id. at 394-95.](#)

<sup>125</sup> Judge Crumlish concurred only in the result. [Id. at 398.](#)

<sup>126</sup> In order to invoke the provisions of the Pennsylvania Equal Rights Amendment, we conclude that there is no requirement of state action as arguably found under the proposed Equal Rights Amendment to the United States Constitution." [Id. at 396.](#)

<sup>127</sup> [Bartholomew v. Foster](#), [563 A.2d 1390 \(Pa. 1989\)](#) (per curiam). Justices Nix, Larsen, and Flaherty voted to affirm, while Justices McDermott, Zappala, and Papadakos voted to reverse.

One panel of the superior court and a majority of the commonwealth court have held that there is no state action requirement, and the Pennsylvania Supreme Court has affirmed the decision of the commonwealth court.<sup>128</sup>

Yet the insurance rate cases provide less-than-perfect doctrinal support for a private right of action under the state ERA because the state is so heavily involved in regulating the insurance industry.<sup>129</sup> The Pennsylvania Supreme Court may defer deciding whether such an affirmative private right exists until the facts present themselves in a less problematic venue. [\*1069]

### III. State State Action and the Right of Privacy

An individual's right of privacy, like her rights to expression and equality, is protected under the Federal Constitution only against infringement by the government, but, under the state constitution, a private cause of action may be allowed. In two key respects, however, the right of privacy differs from these other rights. First, privacy is not an enumerated right in the Bill of Rights. Second, there are two distinct strands to federal constitutional privacy jurisprudence.<sup>130</sup>

The right of privacy afforded by the Pennsylvania Constitution reflects the complexity of the federal doctrine. No provision of the state constitution speaks directly to privacy.<sup>131</sup> In Pennsylvania, privacy is also a penumbral right, with constitutional protection emanating from two distinct provisions of the Declaration of Rights. Article I, section 1, expressing the Inherent Rights of Mankind, is the source of protection against the disclosure of personal information.<sup>132</sup> Article I, section 8, freedom from search and seizure, provides a privacy interest in one's person as well as in one's possessions and effects.<sup>133</sup> Although neither provision includes express language regarding

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<sup>128</sup> Bartholomew has been cited in other jurisdictions for the proposition that a private right of action exists under the Pennsylvania ERA. Its holding has also been cited in a recent opinion by Judge Aldisert, writing for the [United States Court of Appeals for the Third Circuit. Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779 \(3d Cir. 1990\).](#)

<sup>129</sup> However, the United States Supreme Court has held that regulation, in and of itself, does not constitute state action in the federal context. [Jackson v. Metropolitan Edison Co., 419 U.S. 345, 358 \(1974\).](#)

<sup>130</sup> In addition to the privacy interest protected by the Fourth Amendment, a separate right to make fundamental personal decisions free from state interference is protected by the liberty clause of the [Fourteenth Amendment. Griswold v. Connecticut, 381 U.S. 479, 486 \(1965\).](#)

<sup>131</sup> An express right of privacy, structurally separated from other related protections, is constitutionally protected in five jurisdictions: Alaska Const. art. I, 22 ("right of the people to privacy is recognized and shall not be infringed"); Cal. Const. art. I, 1 (protecting privacy as an inalienable right); Fla. Const. art. I, 23 (protecting individual from government intrusion); Haw. Const. art. I, 6 (right of the people to privacy is recognized and shall not be infringed); and Mont. Const. art. II, 10 ("right of individual privacy is essential"). Note, however, that while California has construed its privacy protection to provide an independent affirmative right, [Luck v. Southern Pac. Trans. Co., 267 Cal. Rptr. 618](#) (Ct. App.), cert. denied, **498 U.S. 939 (1990)**, the Alaska courts have required state action. [Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123 \(Alaska 1989\).](#)

For a comprehensive analysis of the right to privacy under state constitutions, including the text of relevant provisions, see Ken Gormley & Rhonda G. Hartman, Privacy and the States, 65 Temp. L. Rev. 1279 (1992).

<sup>132</sup> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness." Pa. Const. art. I, 1.

<sup>133</sup> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant." Pa. Const. art. I, 8.

an individual's privacy interest, it is well settled that these sections do provide a right of privacy under the state constitution.<sup>134</sup> **[\*1070]**

Whether state state action is required before privacy is protected by the Pennsylvania Constitution has not yet been addressed by the state supreme court.<sup>135</sup> Cases relevant to a state state action inquiry, where the conflict is between purely private parties, are few. Outside of Pennsylvania, issues raised under this prong of informational privacy have included termination of life support,<sup>136</sup> private sector employee drug testing,<sup>137</sup> and protection of personal records.<sup>138</sup>

One area in which the question of state state action and the right of privacy has been considered involved the rights of individuals detained by private security guards.<sup>139</sup> In *Commonwealth v. Corley*,<sup>140</sup> the defendant was convicted on charges of robbery and assault on evidence obtained by a private security guard.<sup>141</sup> The defendant argued that the evidence should be excluded from the trial. The superior court found that, although the exclusionary rule did not apply to actions by a private individual, it applied in this **[\*1071]** instance because the private security guard was acting as an agent of the state.<sup>142</sup>

<sup>134</sup> See, e.g., [Denoncourt v. State Ethics Comm'n](#), 470 A.2d 945, 950 (Pa. 1983) (court has recognized existence of a constitutionally guaranteed privacy right based on article I, section 1); [In re June 1979 Allegheny County Investigating Grand Jury](#), 415 A.2d 73, 77 (Pa. 1980) (privacy interest in avoiding disclosure of personal matters is protected by article I, section 1); [Commonwealth v. Edmunds](#), 586 A.2d 887, 897 (Pa. 1991) (article I, section 8 embodies strong notion of privacy); [Commonwealth v. DeJohn](#), 403 A.2d 1283, 1289 (Pa. 1979) (freedom from unreasonable search and seizure afforded by article I, section 8 includes implicit right to privacy), cert. denied, **444 U.S. 1032 (1980)**.

<sup>135</sup> Perhaps one reason for this gap in current law is that most privacy issues arise in the context of search and seizure cases, and thus, necessarily, already involve the state through police activity or a subpoena. This strand of privacy jurisprudence is not the focus of this article because where the government is already an actor the state state action analysis does not arise.

<sup>136</sup> See, e.g., [Bouvia v. Superior Court](#), 225 Cal. Rptr. 297, 301 (Ct. App. 1986) (right to refuse medical treatment is fundamental and part of right to privacy); [Bartling v. Superior Court](#), 209 Cal. Rptr. 220, 224 (Ct. App. 1984) (in California, adult of sound mind has right to exercise control over own body with respect to medical treatment); [John F. Kennedy Memorial Hosp. v. Bludworth](#), 452 So. 2d 921, 926 (Fla. 1984) (right of irreversibly comatose and vegetative patient to refuse treatment may be exercised by family member or guardian); [Rasmussen v. Fleming](#), 741 P.2d 674, 682-83 (Ariz. 1987) (right to privacy encompasses medical treatment).

<sup>137</sup> See, e.g., [Hill v. National Collegiate Athletic Ass'n](#), 865 P.2d 633, 641 (Cal. 1994) (holding Privacy Initiative of state constitution embodies right of privacy against non-governmental entities).

<sup>138</sup> See, e.g., [Porten v. University of San Francisco](#), 134 Cal. Rptr. 839 (Ct. App. 1976) (right to privacy under state constitution violated where private school disclosed academic records).

Yet in these cases, as well, a dispute between two private parties frequently develops a procedural posture that indirectly involves the state. A case that might turn on whether there is a private right of action under the state constitution may only arise where the government is involved. Thus, an action to prevent a private entity such as a bank or hospital from disclosing one's personal financial or medical records may actually arise only when such records are subpoenaed by the court. And, once the court itself is an actor, the question of state action does not come into play.

<sup>139</sup> For an article arguing that private security guards should be considered state actors for Fourth Amendment purposes, see John M. Burkoff, *Not So Private Searches and the Constitution*, 66 Cornell L. Rev. 627 (1981).

<sup>140</sup> [491 A.2d 829 \(Pa. 1985\)](#).

<sup>141</sup> [Id. at 830-36](#). Defendant petitioned for post-conviction relief due to ineffective assistance of counsel because his attorney had withdrawn a motion to suppress evidence which had been obtained by a private security guard. [Id. at 830](#).

<sup>142</sup> [Id. at 831-32](#). The court then held that, because the arrest had not been illegal, the evidence had been properly admitted. Corley's petition for post-conviction relief was denied. [Id. at 830](#).

The Pennsylvania Supreme Court reversed. It determined that the superior court had improperly applied the federal test for state action and wrongly decided that the security guard was a state actor.<sup>143</sup> Justice Zappala specifically criticized the lower court's application of the state action doctrine and stated that the issue of whether state state action is required to trigger an individual's privacy right remains an open question in Pennsylvania.<sup>144</sup>

The commonwealth court's recent decision in *Barasch v. Public Utility Commission*<sup>145</sup> addressed the private interests of consumers and the telephone company and held that an individual's right to privacy under the state constitution could be violated by the actions of another private party. At issue in *Barasch* was a caller identification service being offered by Bell of Pennsylvania.<sup>146</sup> In an opinion written by Judge Smith, five members of the commonwealth court held that "Caller\*ID" violated a provision of the Pennsylvania Wiretap Act that prohibited nonconsensual interception of electronic communication.<sup>147</sup> Four of the five judges also held that the device violated the caller's right of privacy under article I, sections 1 and 8 of the Pennsylvania Constitution.<sup>148</sup>

The claims raised and the decision handed down in *Barasch* present a confusion of state and federal constitutional analysis. All of those involved in this case, both parties and judges alike, would have benefitted from the framework for addressing state constitutional claims set forth in *Commonwealth v. Edmunds*.<sup>149</sup> In *Barasch*, the commonwealth court found state action but failed to employ the relevant state state action analysis.<sup>150</sup> Having found state action present in the involvement of the Public Utility Commission, the court proceeded to review the privacy claim under article I, sections 1 and 8 and found that those rights were violated by "Caller\*ID."<sup>151</sup> In

<sup>143</sup> The Pennsylvania Supreme Court affirmed the conviction but rejected the superior court's holding that the exclusionary rule did not apply to a citizen's arrest. [Id. at 833.](#)

<sup>144</sup> Acknowledging that the Fourth Amendment does not apply to conflicts between purely private parties but only protects the citizen against the powers of the state, Justice Zappala noted that "this Court has never ruled that the same result necessarily obtains under Article I 8... The Superior Court has so held and we have implicitly acknowledged the force of the argument, distinguishing cases in which we have applied the exclusionary rule by emphasizing the extensive police involvement in the search." [Id. at 831](#) (citation omitted).

In concluding that a security guard is not a state actor, Justice Zappala lost sight of the distinction between state and federal law and addressed both state and federal cases in his analysis. Finding that the private security guard was not a state actor allowed the court to decide the case without reaching the state action question. The court reasoned that because the purpose of the exclusionary rule was to prevent official misconduct, it did not apply to a private action such as a citizen's arrest. [Id. at 834.](#)

<sup>145</sup> [576 A.2d 79 \(Pa. Commw. Ct. 1990\)](#), aff'd, [605 A.2d 1198 \(Pa. 1992\)](#).

<sup>146</sup> Known as "Caller\*ID," the service was to be provided upon request by Bell, a private telephone company, to its customers. Customers using "Caller\*ID" would be able to identify the telephone number from which a call was being made. Bell promoted the technology as being valuable in curtailing abusive, obscene, or harassing telephone calls. [Id. at 82.](#)

<sup>147</sup> [18 Pa. Cons. Stat. Ann. 5704](#) (Supp. 1994).

<sup>148</sup> [Barasch, 576 A.2d at 87-89.](#)

<sup>149</sup> [586 A.2d 887 \(Pa. 1991\)](#). Petitioners argued, inter alia, that the use of "Caller\*ID" violated the right of privacy provided by the state constitution. Bell denied any state constitutional violation, but argued that even if there was such a violation under the United States Constitution, state action was required before a privacy right could be violated. Bell saw no state action present on these facts. The Public Utility Commission, however, argued that its very approval of "Caller\*ID" constituted state action, and the commonwealth court agreed. [Barasch, 576 A.2d at 86.](#)

<sup>150</sup> The court applied the federal state action doctrine, and supported its reasoning with a mixture of state and federal precedent. Applying the federal state action balancing test from [Jackson v. Metropolitan Edison Co., 348 F. Supp. 954 \(M.D. Pa. 1972\)](#), aff'd, [483 F.2d 754 \(3d Cir. 1973\)](#), and aff'd, [419 U.S. 345 \(1974\)](#), the court determined that the Commission's approval of an amended tariff that permitted Bell to put "Caller\*ID" into operation was state action.

dictum, the court strongly affirmed the important value given to protecting individual privacy by the state constitution.<sup>152</sup> Yet the threshold question of whether state state action was even necessary to trigger state constitutional protection of privacy interests was not raised.<sup>153</sup>

Judge Pellegrini concurred in the judgment, but dissented from the constitutional holding because he believed the court did not need to reach the privacy issue. Privacy questions should be decided on other grounds, he stated, because privacy remains an open issue in Pennsylvania.<sup>154</sup>

On appeal, the Pennsylvania Supreme Court unanimously affirmed the judgment on non-constitutional grounds, holding that the use of "Caller\*ID" violated the consent provision of the trap and trace section of the Penn [\*1073] sylvania Wiretap Act.<sup>155</sup> Neither the opinion nor the concurrence addressed Judge Pellegrini's reasoning that whether state state action applies to privacy under the Pennsylvania Constitution is as yet unsettled.

The Pennsylvania Supreme Court also considered privacy between private parties in *Stenger v. Lehigh Valley Hospital*.<sup>156</sup> Again, the court avoided holding on constitutional grounds. Ms. Stenger received a transfusion of HIV-tainted blood while hospitalized after an accident, unknowingly spread the infection to her husband and young son, and later died from AIDS.<sup>157</sup>

Again, the court avoided holding on constitutional grounds. In such a proceeding between two completely private parties, with privacy issues raised under both the federal and state constitutions, the question of whether state state

<sup>151</sup> [Barasch, 576 A.2d at 87-88.](#)

<sup>152</sup> This Court will unhesitatingly uphold the judicial tradition of "jealous regard for individual privacy'... In the framework of a democratic society, the privacy rights concept is much too fundamental to be compromised or abridged by permitting Caller \*ID." [Id. at 89.](#)

<sup>153</sup> This court showed much clearer understanding of state action two years earlier in [Bartholomew v. Foster, 541 A.2d 393 \(Pa. Commw. Ct. 1988\)](#), aff'd, [563 A.2d 1390 \(Pa. 1989\)](#). Here, the court automatically (and erroneously) assumed that it could not consider a possible violation of the state constitution without first assessing state action under the federal doctrine. However, when the constitutional provision at issue was the ERA, having no federal parallel, the court looked directly at the state provision and held that state action was not required to bring a cause of action.

<sup>154</sup> [Barasch, 576 A.2d at 95.](#) In this context, Judge Pellegrini also noted that because the state supreme court has only applied privacy protection under the state constitution in cases where the government has been directly involved, "it is an open question whether that protection is applicable to regulations or adjudications made by state agencies." [Id. at 94 n.5.](#) With this logic, the question certainly remains open regarding private actors as well.

Judge Pellegrini's assessment of state action was particularly cogent: "State action doctrine is a jurisdictional prerequisite prior to federal courts invoking federal protections and is irrelevant to the application of state constitutional rights." [Id. at 94 n.5](#) (citing [Hartford Accident & Indem. Co. v. Insurance Comm'r, 482 A.2d 542 \(Pa. 1984\)](#) and [Bartholomew v. Foster, 563 A.2d 1390 \(Pa. 1989\)](#)). He would not have found state action merely in the fact that the Public Utility Commission, a state agency, was required to approve the process.

<sup>155</sup> [Barasch v. Public Utility Comm'n, 605 A.2d 1198, 1203 \(Pa. 1992\)](#). Justice McDermott concurred in the judgment of the court and agreed with Justice Papadakos's majority opinion that the constitutional question need not be reached.

<sup>156</sup> [609 A.2d 796 \(Pa. 1992\)](#).

<sup>157</sup> Eight months after her release, the Blood Center that had supplied the blood learned that one of the donors had tested positive for the AIDS virus. The Blood Center waited ten months before notifying the hospital of possible contamination. The hospital then held the information for six more months, until Donna Stenger sought treatment there for a respiratory infection. Tests showed she had the AIDS virus, and the hospital then notified her that she had received contaminated blood. In preparing its lawsuit against the hospital and the Blood Center, Ms. Stenger's estate sought discovery of the source of the transfused blood, whether it had been used in other patients, and the results of any HIV tests done on those recipients. [Id. at 798-99.](#)

action is required under article I, sections 1 and 8 ought to have been addressed. Justice Nix, who had so eloquently stated elsewhere that state action does not apply when determining the protection of the state constitution, wrote the majority opinion.<sup>158</sup> Yet, he did not employ such an analysis in *Stenger*.<sup>159</sup> He did, however, suggest that there might be a private right of action under the state constitution, stating that the right to privacy is not absolute and "must be balanced against weighty competing private and state interests."<sup>160</sup> Upon balancing, Justice Nix allowed disclosure of the information.<sup>161</sup> [\*1074]

Thus, the availability of a private right of action under article I, sections 1 and 8 remains very much a mystery. Although lower courts, as in *Barasch*, may simply assume that state action alone triggers state constitutional protection in the area of privacy, the state's highest court has thus far been unable to squarely reach the issue. The *Stenger* court suggests that a private right of action may exist in Pennsylvania. Under Judge Pellegrini's analysis, the issue is not yet ripe for review because the cases in which a purely private right of action can be evaluated are not, to date, coming before the courts. Yet, when such cases do arise, as in *Stenger*, the purely private nature of the privacy rights at issue goes unaddressed.

### Conclusion

As the previous analysis of Pennsylvania case law shows, there is strong evidence that the state constitution may provide, in some instances, for a private right of action. To determine when a provision of the state constitution provides a private right of action, it may be helpful to think of government involvement sufficient to trigger a state constitutional provision as "state state action" rather than "state action." Cases in the areas of privacy, speech, and equal treatment show how easily the courts have confused federal state action doctrine and state law. If state constitutional claims are to be adequately addressed, the crucial distinction between the two theories must be kept firmly in mind. By simply structuring a semantic distance between the federal doctrine and the state constitutional provision at hand, courts might take a first step towards focusing on the specific requirements of the state constitution. A systematic approach which is patterned on the test laid out in *Commonwealth v. Edmunds* would provide the necessary framework and should be the threshold inquiry whenever a right is asserted under the state constitution.<sup>162</sup>

This inquiry will necessarily lead the Pennsylvania courts to one of three conclusions. Courts may decide that a provision is triggered only by state state action and thus does not provide a private cause of action. In other instances, however, courts may determine that a provision does not include a state state action requirement and

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<sup>158</sup> See [Western Pa. Socialist Workers v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331, 1341-42 \(Pa. 1986\)](#) (Nix, C.J., concurring) (state action is not applicable in analysis where state constitution is being considered); [Hartford Accident & Indem. Co. v. Insurance Comm'r, 482 A.2d 542, 549 \(Pa. 1984\)](#) (state action doctrine is irrelevant to interpretation of scope of Pennsylvania ERA).

<sup>159</sup> The court first found state action necessary under the Federal Constitution and then determined that state action was present in court-ordered discovery. [Stenger, 609 A.2d at 801](#). Justice Nix stressed that the Pennsylvania Constitution offered even greater protection to its citizens than did the Federal Constitution, yet he did not address state state action in connection with that heightened protection. *Id.*

<sup>160</sup> [Id. at 800](#).

<sup>161</sup> Justice Nix thus implicitly adopted the balancing test adopted by the United States Court of Appeals for the Third Circuit in [United States v. Westinghouse Elec. Corp., 638 F.2d 570 \(3d Cir. 1980\)](#). As applied in *Stenger*, the test balanced a number of factors, including the type of record requested, the potential for harm, the adequacy of safeguards to prevent unauthorized disclosure, the need for the information, and whether there is an express statutory mandate or public policy favoring disclosure. [Stenger, 609 A.2d at 801](#).

<sup>162</sup> See *supra* note 18 and accompanying text for a discussion of the framework for constitutional analysis set forth in [Commonwealth v. Edmunds, 586 A.2d 887 \(Pa. 1991\)](#).

that a private right of action does exist. Such claims would be addressed directly on the merits. To date, the Pennsylvania courts appear to have reached this conclusion on claims brought under the ERA.<sup>163</sup>

In a third category of cases, including those involving state constitutional protection of speech and privacy, the decisions are not so clear, yet there appears to be at least a limited private right of action. In article I, section 7 **[\*1075]** jurisprudence, the holding of *Tate* as modified by *Socialist Workers* provides, under certain circumstances, for a such a private right. In the area of privacy, Justice Zappala has acknowledged that the initial state state action inquiry remains an open question.<sup>164</sup>

Speech and privacy jurisprudence point up the key difference between the federal state action doctrine and state state action: Federal state action is a bright line requirement, whereas state state action, consistent with the greater protection that a state constitution may afford its citizens, may be more flexible. And where a state state action requirement exists but is not absolute, the state courts have some discretion to determine which cases should be heard as constitutional claims between purely private parties.

The rule emerging from *Socialist Workers II-Tate* suggests such a flexible view of state state action. In some instances, as in *Tate*, article I, section 7 allows private access to public property. Yet in other circumstances, such as the shopping mall at issue in *Socialist Workers II*, there is no such right. It appears that the greater the connection one party has with the public, the more the court should recognize a private right of action.<sup>165</sup>

The law on state state action and the Pennsylvania Constitution is still evolving. The analysis set forth in this article would provide a framework for assuring that the threshold inquiry of whether state state action is required by a particular state constitutional provision is made and articulated in every case. Furthermore, acknowledging that the state state action doctrine that is emerging from the relevant case law is, in fact, a flexible requirement would mean that courts could cease trying to fit decisions within the more restrictive federal state action theory. By so doing, Pennsylvania courts could move on to develop the parameters of a more flexible doctrine, providing in some circumstances for a private right of action consistent with the requirements of the Pennsylvania Constitution.

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<sup>163</sup> The Pennsylvania Supreme Court has not ruled directly on the issue, but a divided court has affirmed a commonwealth court decision holding that state action is not necessary to implement the *ERA*. *Bartholomew v. Foster*, 563 A.2d 1390 (Pa. 1989) (per curiam), aff'g 541 A.2d 393 (Pa. Commw. Ct. 1988).

<sup>164</sup> *Commonwealth v. Corley*, 491 A.2d 829, 831 (Pa. 1985). Furthermore, Justice Nix has suggested that the right of privacy is not absolute but, at times, must be balanced against other competing private interests. *Stenger*, 609 A.2d at 800.

<sup>165</sup> The three-pronged test articulated by the New Jersey Supreme Court and advanced by Judge Brosky in *Socialist Workers* is one useful approach to determine when a private right of action should be recognized. A test that posits a continuum of private venues, moving from having a purely private identity to functioning as a public forum, is another possibility.