

FREEDOM  
FORUM



# The State Action Doctrine and the First Amendment

*Congress shall not...  
respecting an...  
religion, or pro...  
exercise thereo...*

# LESSON PLAN: THE STATE ACTION DOCTRINE AND THE FIRST AMENDMENT

## Lesson question:

What is the state action doctrine?

## Lesson summary

In this lesson, students begin by carefully examining the language in the First Amendment and learning the definition and purpose of the state action doctrine. Students will then look at three images and predict whether the First Amendment applies in the scenario. Students learn about the history and U.S. Supreme Court cases that further defined the extent of the First Amendment and the limits imposed by the state action doctrine. Students then dig deeper by learning about related Supreme Court cases that defined when private action could be considered state action. Students end by looking at several scenarios applicable to high school students' lives and apply their knowledge of the state action doctrine. Students then reflect on how knowing the difference between state and private action impacts their own lives.

## Lesson objectives

### Students will be able to:

- Understand what the state action and incorporation doctrines are and why they are important
- Explore and analyze Supreme Court cases and historical examples of the extent of the state action doctrine
- Apply their understanding of the state action doctrine to relevant high school scenarios
- Reflect on how knowing the difference between state action and private action can impact their lives

## Lesson materials

- Student handouts for introduction, activities 1-2 and wrap-up

## Lesson sequence

1. Introduce students to the lesson question: "What is the state action doctrine?" Ask students, "What do you think state action means?" Direct them to look at the image on the page and ask "What 'state action' is happening here?"
2. Distribute the **introduction handout**. Have students identify the first five words of the First Amendment and identify who is limited by those words. Then, read the introductory text.
3. Distribute the **handouts for Activity 1**. Have students look at each image and the description. Then have them work with a partner (or as a class) to answer the corresponding question. Students may not know the answer. Ask them to discuss or write down what they think.

4. Distribute the **Let's learn more! handout**. Read together or have students read on their own about how the 14th Amendment and Supreme Court cases helped to further articulate the extent and limits of the state action doctrine. Have students pause and reflect on the civil rights cases and the arguments written in the majority and minority opinions.
5. Distribute the **handouts for Activity 2**. Have students work with partners to analyze cases that extended the state action doctrine to certain private actions. The teacher could do the first case with students.
6. Distribute the **handouts for the wrap-up activity**. Have students analyze each scenario and decide if state action is involved. Then have them reflect on why state action matters to them.

## Introduction: The State Action Doctrine and the First Amendment

### Lesson question:

What is the state action doctrine?

### What does the First Amendment limit?

➡ **Circle** or highlight the first five words of the First Amendment.

**What does this tell us about what the First Amendment was intended to limit?**

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“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

### Introduction to the state action doctrine

The First Amendment begins “Congress shall make no law.” The text limits the work of *Congress*. It does not say “no one” shall make a law. This means the First Amendment, the first 45 words of the Bill of Rights, applies only when the government acts; it does not apply to private actors, be they private companies, private universities or people. This concept is called the state action doctrine.

Over time, the state action doctrine has come to include all levels of government and government actors. Ultimately, while the First Amendment reads “Congress shall make no law,” no official can infringe on the freedoms of religion, speech, press, assembly and petition. In short, all government officials (federal, state and local) from all branches of government (legislative, executive and judicial) are subject to the First Amendment. On the other hand, social media companies like Facebook, X or TikTok are not subject to the First Amendment because they are private companies, not the government.

In certain instances, a private actor or entity's actions can be considered "state action," but these generally require the private entity to act in ways traditionally reserved for the government or to jointly act with the government.

In other words, for the First Amendment to apply to a private entity's actions, that entity must be deeply entangled or entwined with the government – to the point that it is acting as or on behalf of the government in regulating one of the five freedoms.

### State action vs. private action

The term "state" in the state action doctrine refers to government actors.

This means that the First Amendment — as well as the other freedoms listed in the Bill of Rights — limit "state" action, not "private" action.

The First Amendment does not limit private employers, individuals or organizations.

But private actors may be held accountable under the law. Private businesses, employers and schools are governed by other laws, such as federal antidiscrimination statutes, but they are not directly restricted by the First Amendment.

## Activity 1: What is the difference between state and private action?

**Directions:** Look at the images and read the captions underneath each of the protest scenarios. Can the people be asked to leave the property without a First Amendment violation occurring? What do you think and why?



(AP Photo/James A. Finley)

### Photograph #1

A group marches at a hotel and shopping mall in St. Louis to protest a mall policy on acceptable clothing, 2002.

When people protest in a shopping mall, can the mall ask them to leave without violating their First Amendment rights? What do you think?



(John Vachon, photographer)

### Photograph #2

Workers participate in a picket line at the King Farm strike near Morrisville, Pennsylvania, in 1938.

When workers protest on a company's private property, can the company ask them to leave the property without violating their First Amendment rights? What do you think?



(Photo by LAURE ANDRILLON/AFP via Getty Images)

### Photograph #3

People demonstrate during a protest against federal employee layoffs at Yosemite National Park, California, 2025.

When workers and their supporters protest in Yosemite National Park, can the park rangers ask them to leave without violating their First Amendment rights? What do you think?

## Let's learn more!

### Lesson question:

What is the state action doctrine?

### Putting the 'state' in state action

When first added to the Constitution, the five freedoms in the First Amendment had limited reach. The first five words of the Bill of Rights, "Congress shall make no law," limited the national government, but not state and local governments or private individuals.

In 1833, the Supreme Court case *Barron v. Mayor and City Council of Baltimore* further articulated that the Bill of Rights did not limit state and local governments, only the federal government.

#### **Barron v. Baltimore (1833)**

John Barron of Maryland owned a wharf in Baltimore. He alleged city construction had diverted water from the harbor and deprived him of access to deep waters, hurting his business. He argued the city owed him money under the Fifth Amendment's takings clause: "nor shall private property be taken for public use, without just compensation." At the time, the Supreme Court found that the Bill of Rights was intended to limit the national government, not state and local governments.

### How has the state action doctrine been further explained and expanded?

While the state action doctrine originally applied only at the federal level, today, it restrains government actors at all levels. In 1868, the 14th Amendment was added to the Constitution, which reads, in 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.***

The 14th Amendment explicitly limited certain actions of state governments and gave Congress the power to enforce the amendment. In the late 1800s, restaurants, theaters and other businesses open to the public openly discriminated against African Americans, refusing to serve them. Congress passed the Civil Rights Act of 1875 in response. Part of the law used the 13th and 14th amendments to require private businesses serving the public to serve everyone, regardless of race. Several African Americans sued businesses that continued to deny them service, claiming they violated the Civil Rights Act of 1875.

## Lesson Plan: The State Action Doctrine and the First Amendment

In the Civil Rights Cases of 1883, the Supreme Court overturned a section of the Civil Rights Act of 1875 that dealt with discrimination in public accommodations. The Supreme Court explained that the 14th Amendment applied only to state action and did not limit private businesses. Justice John Marshall Harlan dissented in the case, saying businesses open to the public should be considered state actors.

## What did the Supreme Court say about state action in the Civil Rights Cases (1883)

**Directions:** Read the selections below from the opinions in the Civil Rights Cases. Summarize and decide which argument is stronger.

“The first section of the Fourteenth Amendment ... is ... prohibitory upon the States. ... It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment. ... It does not authorize Congress to create a code of municipal law for the regulation of private rights.”

- Majority opinion, Justice Joseph Bradley

Summarize Justice Bradley’s argument about state action:

“In every material sense ... railroad corporations, keepers of inns, and managers of places of public amusement are agents of the State, because they are charged with duties to the public, and are amenable, in respect of their public duties and functions, to governmental regulation.”

- Dissenting opinion, Justice Harlan

Summarize Justice Harlan’s argument about state action:

**Pause and reflect:** After reading the excerpts above from the majority and dissenting opinions, which argument do you think is stronger and why?

More than 80 years later, the 1964 Civil Rights Act would significantly limit private discrimination based on race, color, religion, sex or national origin by employers, federally funded programs, and public accommodations like hotels, stores and restaurants. Because the state action doctrine limited the reach of the 14th Amendment, Congress relied on a different section of the Constitution called the commerce clause to justify the limits on private actors. The Supreme Court upheld the Civil Rights Act of 1964 in *Heart of Atlanta Motel Inc. v. United States* (1964).

### The incorporation doctrine extends the reach of the First Amendment

The incorporation doctrine, based on the 14th Amendment, extended the Bill of Rights to state and local governments, although this didn't mean the First Amendment immediately applied to them. Over the course of the 20th century, the Supreme Court used the 14th Amendment to apply most parts of the Bill of Rights, including the First Amendment, to state and local governments and officials, case by case.

Which Supreme Court cases applied the First Amendment to state and local governments through the incorporation doctrine?					
Speech	Press	Assembly	Petition	Religion (free exercise)	Religion (establishment)
<i>Gitlow v. New York</i> (1925)	<i>Near v. Minnesota</i> (1931)	<i>DeJonge v. Oregon</i> (1937)	<i>DeJonge v. Oregon</i> (1937)	<i>Cantwell v. Connecticut</i> (1940)	<i>Everson v. Board of Education of the Township of Ewing</i> (1947)

### How has the incorporation doctrine changed First Amendment protections?

The incorporation doctrine extended the reach of the First Amendment beyond the federal government. This was important because people are far more likely to interact with state and local officials like police officers, teachers, and municipal and state officials. Some of the most important First Amendment cases in the 20<sup>th</sup> century – like *West Virginia Board of Education v. Barnette*, *Brandenburg v. Ohio*, *Near v. Minnesota* and *Edwards v. South Carolina* – involve the First and 14th amendments because the government actors involved were state or local officials.

**Incorporation provides double-protection for the five freedoms!**

Every state has its own constitution with a bill of rights, including similar protections for the five freedoms. If a person believes a state or local official has violated their religion, speech, press, assembly or petition rights, they can make a claim under the federal or state constitution, depending on the nature of the case. Incorporation gives people “double-protection” for the five freedoms.

## The incorporation doctrine and public schools

Without the incorporation doctrine, the First Amendment would not apply to public schools, which are typically run by state and local governments. Students have more rights because of incorporation, although public schools can limit students' First Amendment rights based on safety, offensive speech and promotion of illegal activities.

**Tinker v. Des Moines (1969):** A group of middle and high school students in Iowa planned to wear black armbands to protest the Vietnam War. School officials quickly banned armbands, and students who wore them despite the new ban were suspended. Christopher Eckhardt and John and Mary Beth Tinker sued, arguing their First Amendment rights were violated. The Supreme Court ruled in favor of the students, stating that students retain their constitutional rights in public schools. Schools can restrict student speech only if it causes a substantial disruption to the educational process or interferes with the rights of others.

**Check your understanding!**

Examples of state actors and state action	Examples of private actors and action
<p>Public school teachers, elected officials, police officers, public park rangers, ICE officers and other people acting in their official authority as government employees or representatives</p> <p>Private companies actively using government buildings or land</p> <p>A public park managed by private trustees</p>	<p>Actions by the NCAA, the Girls Scouts and Scouting America and other associations</p> <p>Private high schools, even if they receive public funds</p> <p>Businesses licensed by the government</p> <p>Social media companies enforcing their community rules and moderating content</p>

**Directions:** Decide whether the scenario described involves state action.

1. A police officer tells a crowd of protesters they must disperse.	<p><b>State action</b></p> <p><b>Private action</b></p>
2. A public school teacher tells a student to turn a shirt featuring a beer logo inside out.	<p><b>State action</b></p> <p><b>Private action</b></p>
3. A local restaurant removes a group of customers for being too loud.	<p><b>State action</b></p> <p><b>Private action</b></p>
4. A local newspaper editor chooses not to print an opinion letter that sharply criticizes the mayor.	<p><b>State action</b></p> <p><b>Private action</b></p>
5. A social media platform suspends a user for violating its community rules.	<p><b>State action</b></p> <p><b>Private action</b></p>
6. The city council president tells a community member they cannot speak during public comment.	<p><b>State action</b></p> <p><b>Private action</b></p>
7. A national park ranger tells visitors they have to leave because of the bumper stickers on their car.	<p><b>State action</b></p> <p><b>Private action</b></p>
8. The governor blocks someone from his official Facebook page.	<p><b>State action</b></p> <p><b>Private action</b></p>
9. A Transportation Security Administration agent at the airport instructs a group of people in the terminal to stop praying together.	<p><b>State action</b></p> <p><b>Private action</b></p>
10. The NFL suspends a player for two games for a hateful comment made on the field during a game.	<p><b>State action</b></p> <p><b>Private action</b></p>

## Activity 2: Using Supreme Court cases to understand when private action becomes state action

**Directions:** Read the Supreme Court case summaries below. For each case, determine whether the Supreme Court found that the private actor was considered “state action.” Explain what the case tells us about the state action doctrine.

### Case #1: Marsh v. Alabama (1945)

A Jehovah’s Witness named Grace Marsh distributed religious literature on the sidewalk of Chickasaw, Alabama. At the time, Chickasaw was a “company town” owned entirely by the Gulf Shipbuilding Corp., which meant Marsh was technically on private property. She was arrested for criminal trespass on private property. She argued her arrest violated the First Amendment. Because the company town was open for public use, she claimed it was different from typical private property ownership. The Supreme Court ruled in Marsh’s favor. A company town is not the same as, for example, a private school when it comes to preventing unwanted religious expression. Because the town was open for use by the public, Marsh and others were entitled to freedom of religion and speech. The court explained that when there are conflicts between property rights and constitutional rights, constitutional rights should most often prevail.

<b>State action</b>	<b>What does this case tell us about to whom the state action doctrine applies?</b>
<b>Not state action</b>	

### Case #2: Burton v. Wilmington Parking Authority (1961)

In 1958, William H. Burton, an African American man, entered the Eagle Coffee Shoppe in Wilmington, Delaware, and was denied service based on his race. The restaurant was leasing space within a parking garage operated by the Wilmington Parking Authority. The Parking Authority was a private corporation created by the city of Wilmington to manage the city’s parking facilities and was partially paid for by city funds. Burton filed a lawsuit arguing the Parking Authority and restaurant violated the equal protection clause of the 14th Amendment. The Supreme Court found the private restaurant and public parking garage, a government entity, were so intertwined that the coffee shop’s discriminatory actions were state action and violated the 14th Amendment’s equal protection clause.

<p><b>State action</b></p> <p><b>Not state action</b></p>	<p><b>What does this case tell us about to whom the state action doctrine applies?</b></p>
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**Case #3: NCAA v. Tarkanian (1988)**

In the 1980s, the NCAA, which governs college athletics, had about 960 member universities. The NCAA investigated the University of Nevada, Las Vegas for improper recruiting practices and found several violations, including by Jerry Tarkanian, the university's basketball coach. The NCAA imposed sanctions on UNLV and recommended suspending Tarkanian. Tarkanian argued the NCAA's actions were a violation of his 14th Amendment due process rights and that the actions of the NCAA were state action in part because UNLV is a public university. The Supreme Court held that the NCAA's actions leading to Tarkanian's suspension did not amount to state action prohibited by the 14th Amendment. The court noted the NCAA, an entirely private organization, had no governmental power to directly discipline Tarkanian. Even if UNLV felt compelled to comply with NCAA demands, this did not make the NCAA sanctions and recommendations "state action."

<b>State action</b>	<b>What does this case tell us about to whom the state action doctrine applies?</b>
<b>Not state action</b>	

**Case #4: Brentwood Academy v. Tennessee Secondary School Athletic Association (2001)**

The Tennessee Secondary School Athletic Association is a nonprofit membership group organized to regulate interscholastic sports for a large portion of the public and private high schools in Tennessee. The association imposed penalties on Brentwood Academy for "undue influence" on football recruits. At the time, all the voting members of the association were public school administrators, and the association had been long recognized by the state board of education. Brentwood claimed the rule's enforcement was state action that violated the First and 14th amendments. The Supreme Court ruled a high school athletic association is a state actor because it is "pervasively" intertwined with state school officials and public school institutions.

<b>State action</b>	<b>What does this case tell us about to whom the state action doctrine applies?</b>
<b>Not state action</b>	

### **Case #5: Manhattan Community Access Corp. v. Halleck (2019)**

The case concerned a private corporation that oversaw the public access television channels in Manhattan, New York. Two documentary producers sued the company, alleging it violated the First Amendment by not airing their documentary and barring them from the channel. The producers argued the corporation was a state actor because it oversaw public access television channels. The Supreme Court ruled the corporation overseeing these public television channels was not a state actor but indeed a private corporation. The city did not own or operate these channels; it let the private corporation do that. It held there was no First Amendment violation.

<b>State action</b>	<b>What does this case tell us about to whom the state action doctrine applies?</b>
<b>Not state action</b>	

### **Case #6: Lindke v. Freed (2024)**

James Freed, a city manager in Port Huron, Michigan, used his private Facebook page for both personal and government messaging. Facebook user Kevin Lindke did not approve of Freed's policies, so he posted criticism on Freed's private Facebook page. Freed deleted Lindke's critical comments and ultimately blocked Lindke. Lindke sued Freed, arguing it was a First Amendment violation for a public official to block someone from their social media accounts. The Supreme Court found that when government officials moderate public comments on, or block commenters from, their social media pages, they can violate the First Amendment. It becomes more complicated if the social media page is the public official's *private* account. The court asks whether (1) the government official had actual authority to act on behalf of the government and (2) the government official attempted to act in an official capacity when engaging in the act of censorship. Factors such as whether the account appeared to be personal or official are considered. The Supreme Court sent the Lindke case back to the lower court, instructing it to apply this new test.

This case developed a two-part test to help judges determine when social media accounts and posts should be considered "state action." **Do you think this test will be easy to apply? Why or why not?**

## Wrap-up

### Know how far your rights go! State or private action and why it matters.

**Directions:** Read each scenario. Decide whether the person restricting your speech is a state actor or private actor. Identify whether the First Amendment applies. Then explain why it matters.

Your boss tells you she saw the video you posted saying something she finds offensive in front of a customer. The customer also calls and complains. Your boss suspends you for a month.

You're in the city park passing out information to anyone who wants it about an upcoming visit to the city by your favorite controversial social media influencer. A park worker tells you to stop and orders you to leave.

At lunch in your public school cafeteria, you and a friend listen to your favorite podcaster. Other students are also watching videos on their phones. A teacher walks by and tells you to turn it off. When you don't, he gives you detention, saying, "You clearly hate women if you listen to that."

State action	Does the First Amendment apply?	State action	Does the First Amendment apply?	State action	Does the First Amendment apply?
Private action	YES or NO	Private action	YES or NO	Private action	YES or NO

Why does knowing the difference between state and private action in these examples matter to you?

<p>After a basketball game, you go home and post nasty things about the other team on TikTok. You include videos of the other team and mock the players. The other team complains to TikTok about you posting videos of minors without their permission. TikTok suspends your account until you take the videos down.</p>		<p>During a soccer game, a player on the opposite team says they are going to destroy you.</p> <p>You call them weak and say "Have fun losing!" Then you tell them to "shut up."</p> <p>The opposing player responds, "You can't tell me to shut up! I have the First Amendment right to free speech."</p>		<p>Before an upcoming tournament game, you and your friends get together and make T-shirts with a meme making fun of the opposing team.</p> <p>When you arrive at your public school, the principal tells you to take them off. You disagree, saying the shirts don't say anything offensive and are just a joke to motivate the team.</p>	
<p><b>State action</b></p> <p><b>Private action</b></p>	<p>Does the First Amendment apply?</p> <p><b>YES or NO</b></p>	<p><b>State action</b></p> <p><b>Private action</b></p>	<p>Does the First Amendment apply?</p> <p><b>YES or NO</b></p>	<p><b>State action</b></p> <p><b>Private action</b></p>	<p>Does the First Amendment apply?</p> <p><b>YES or NO</b></p>
<p>Why does knowing the difference between state and private action in these examples matter to you?</p>					