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Ronna Greff Schneider

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*Ronna Greff Schneider**

The Supreme Court declared in the *Civil Rights Cases* of 1883[1] that the limitations of the fourteenth amendment[2] only apply to actions of the state, and not actions of private individuals. Since then, the Court has struggled to give predictable meaning to the deceptively simple phrase "state action."

The state action doctrine has become, in the words of Professor Black, "a conceptual disaster area."[3] Although that statement was made in 1967, it is perhaps "even more apt today."[4] The Court itself has noted the confusion generated by its efforts to develop a

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* Assistant Professor of Law, The University of Cincinnati College of Law. I would like to express my appreciation to Thomas Donnelly and Marcia Jackson for their valuable help in preparing this article.

1 109 U.S. 3 (1883). Although the *Civil Rights Cases* are traditionally thought to contain the initial declaration of this principle, the Court had previously established the public/private distinction in United States v. Harris, 106 U.S. 629 (1882); *Ex parte* Virginia, 100 U.S. 339 (1879); Virginia v. Rives, 100 U.S. 313 (1879); and United States v. Cruikshank, 92 U.S. 542 (1875). The *Civil Rights Cases* have, however, been the most commonly cited and hence perhaps the most influential of these early decisions. *See* Yaeckle, *The Burger Court, "State Action," and Congressional Enforcement of the Civil War Amendments*, 27 ALA. L. REV. 479, 484 (1975).

2 The fourteenth amendment provides in part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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 . . . .
>
> Section 5. The Congress shall have power to enforce, by appropriate legislaton, the provisions of this article.

U.S. CONST. amend. XIV, §§ 1, 5.

3 Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967).

4 Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1290 (1982). Shortly before the Court's most recent state action decisions were announced, the University of Pennsylvania published a symposium on the public/private distinction. 130 U. PA. L. REV. 1289-1608 (1982). These articles presented a range of theoretical attitudes toward the state action requirement. Many of these articles indicated that the dichotomy between public and private has become perhaps increasingly meaningless. The article which is the most critical of the usefulness of the public private distinction is Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982); *see also* Casebeer, *Toward a Critical Jurisprudence—A First Step by Way of the Public-Private Distinction in Constitutional Law*, 37 U. MIAMI L. REV. 379 (1983).

coherent, yet flexible, test for determining state action.[5] The Court has also recognized, although not always clearly, that the state action doctrine cannot be monolithic. Thus, it has developed various formulations of the state action doctrine.[6] This is an attempt, at least implicitly, to acknowledge that different fact situations may present different policy considerations which dictate particular approaches to the state action question.[7]

These formulations, however, have not always been consistent, because the doctrinal objectives have not been constant nor always clearly identified. Instead, the doctrine has grown from its inception like a wild plant—without a definite form or direction, developing according to the factual exigencies of the moment. During this growth, the Court has paid relatively little attention to the impact of each decision on the doctrinal objectives of the state action concept.

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5 Lugar v. Edmondson Oil, Inc., 457 U.S. 922, 939 (1982). *See* notes 181-82 *infra* and accompanying text.

6 Many commentaries have advanced different explanations for the Court's state action decisions. *See, e.g.*, J. CHOPER, Y. KAMISAR & L. TRIBE, THE SUPREME COURT: TRENDS AND DEVELOPMENTS (1981-82 & 1982-83 eds.); L. TRIBE, Refocusing the "State Action" Inquiry: Separating State Acts from State Actors in CONSTITUTIONAL CHOICES 246-66, 421-29 (1985); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1147-74 (1978 & 1984 Supp. at 105); *see also* Ayoub, *The State Action Doctrine in State and Federal Courts*, 11 FLA. ST. U.L. REV. 893 (1984); Black, *supra* note 3; Brest, *State Action and Liberal Theory: A Casenote on* Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1296 (1982); Buchanan, *Challenging State Acts of Authorization Under the Fourteenth Amendment: Suggested Answers to an Uncertain Quest*, 57 WASH. L. REV. 245 (1982); Buchanan, *State Authorization, Class Discrimination, and the Fourteenth Amendment*, 21 HOUS. L. REV. 1 (1984); Casebeer, *supra* note 4; Choper, *Thoughts on State Action: The "Government Function" and "Power Theory" Approaches*, 1979 WASH. U.L.Q. 757; Friendly, *supra* note 4; Goodman, *Professor Brest on State Action and Liberal Theory, and a Postscript to Professor Stone*, 130 U. PA. L. REV. 1331 (1982); Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221 (1976); Henkin, Shelley v. Kraemer: *Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957); Kennedy, *supra* note 4; Leedes, *State Action Limitations on Courts and Congressional Power*, 60 N.C.L. REV. 747 (1982); McCoy, *Current State Action Theories, the Jackson Nexus Requirement, and Employee Discharges by Semi-Public and State-Aided Institutions* 31 VAND. L. REV. 785 (1978); Phillips, *The Inevitable Incoherence of Modern State Action Doctrine*, 28 ST. LOUIS U.L.J. (1984); Rowe, *The Emerging Threshold Approach to State Action Determinations: Trying to Make Sense of* Flagg Brothers, Inc. v. Brooks; 69 GEO. L.J. 745 (1981); Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?* 130 U. PA. L. REV. 1441 (1982); Thompson, *Piercing the Evil Of State Action: The Revisionist Theory and A Mythical Application to Self-Help Repossession*, 1977 WIS. L. REV. 1; Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action*, 1965 DUKE L.J. 219; Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974); Note, *State Action After* Jackson v. Metropolitan Edison Co.: *Analytical Framework for a Restrictive Doctrine*, 81 DICK. L. REV. 315 (1977); Note, *State Action and Chapter 766:* Rendell-Baker *and the Demise of the Public Function Doctrine*, 19 NEW ENG. L. REV. 237 (1983); Comment, *The Tower of Babel Revisited: State Action and the 1982 Supreme Court*, 10 N. KY. L. REV. 305 (1983).

7 "Only by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance." Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

Amidst this confusion, however, is the clearly discernible movement of the Burger Court away from the expansive state action concept of the Vinson and Warren Courts. The present Court is moving instead towards a concept of state action which resembles the more restrictive doctrine articulated earlier in the *Civil Rights Cases*.[8] The ramifications of this retreat are particularly important in view of the current trend to "privatize" aspects of the public sector.[9] It is increasingly common to allow private parties to perform tasks which the state could, or in the past has chosen to, perform itself.[10] The federal government, for example, paid a private firm to monitor the cease-fire line in the Sinai desert between Egyptian and Israeli forces, a task that traditionally would have been performed by a governmental military unit.[11] A private contractor has operated the Distant Early Warning line that is supposed to detect missiles coming over the Arctic Ocean toward North America.[12] On the local level, private firms are being used to provide refuse collection, ambulance service, police services, school bus transportation, and traffic light maintenance.[13] While the precise amount of money spent by municipal governments for contract services is unknown, the data available indicates that there is an incredibly diverse list of services which are available by contract from private firms.[14] Some of these tasks are mandated by statute; others are not. The public's interest in many of these privately performed

8 109 U.S. 3, 17-18, 23-24 (1883). Whether private actors performing tasks in lieu of or on behalf of the government should be saddled with the same limitations which would be applicable to the government were it actually doing the activity arises in contexts other than the state action problem. In the labor law field, for example, the question arises whether a private employer providing services which the government would otherwise provide should be subject to public sector labor law standards and restrictions. *See* National Transp. Inc., 240 N.L.R.B. 565, 566 (1979). In the international area, the International Court of Justice held that the initial taking of the American Embassy and American hostages by students was not the action of a state because the students were not charged by some competent organ of the Iranian state to carry out a specific operation. But the court found that the continued holding of the hostages, and official statements that the hostages would be held until the Shah was returned, created a fundamental change in the legal nature of the situation, thus transforming the acts of militants into acts of the state. *In re* U.S. Diplomatic and Consular Staff in Tehran, 1979 I.C.J. 7; 1980 I.C.J. 3; *see* Note, *The American Hostages in Tehran: The I.C.J. and the Legality of Rescue Missions*, 30 INT'L & COMP. L.Q. 717, 20-21 (1981); *see also* Christenson, *The Doctrine of Attribution in State Responsibility*, Int. Law of State Responsibility for Injuries to Aliens (1983).

9 *See generally* E. SAVAS, PRIVATIZING THE PUBLIC SECTOR, HOW TO SHRINK GOVERNMENT (1982); Private Party Liability; Vol. 1, No. 1 Police Misconduct and Civ. Rts. Rep. (Apr. 1983). *See also* note 102 *infra* and accompanying text.

10 Such privatization can be carried out in a variety of ways, including contracts for services, franchises, grants, or vouchers. E. SAVAS, *supra* note 9, at 60-73; *see also id.* at 74-75.

11 *Id.* at 60.

12 *Id.*

13 *Id.* at 61-65.

14 *Id.* at 62.

functions is, however, still sufficient to require government regulation, funding, or both. The reasons for such privatizing vary and include political, as well as economic factors.[15]

This privatizing phenomenon strikes at the very heart of the public's expectations and understanding of governmental power. The fourteenth amendment with its attendant state action requirement was designed to curb abuse of state power. Preventing such abuse is made more difficult by privatization, since some state responsibilities or functions may be transferred to private entities. This privatizing phenomenon, therefore, underscores the need for a coherent state action doctrine. I contend, however, that the Court's most recent pronouncements on state action demonstrate that the Burger Court's retreat from the expansive state action definition of its predecessors provides neither additional conceptual nor doctrinal clarity. By examing the trilogy of cases the Court announced on the same day in June 1982, this article will also demonstrate the need for a new analytical framework in this area.

In *Rendell-Baker v. Kohn*,[16] the Court held that the discharge of employees by a private school providing statutorily mandated special education for the state did not constitute state action, despite the extensive state funding and regulation of the school's programming and that in absence of the programming, the local public schools would otherwise have had to directly provide such education. The *Rendell-Baker* decision relied in part upon another case in the trilogy, *Blum v. Yaretsky*.[17] In *Blum*, the Court held that the decision to transfer Medicaid patients from one type of privately owned health care facility to a different type providing a lower level of service was not state action. Thus, the transfer decision was not subject to the due process requirements of the fourteenth amendment.[18] A statutorily established committee composed of private physicians and nursing home administrators made the transfer decisions.[19] Despite extensive regulations imposed on the nursing home by the state Medicaid system, the Court held that any change in the state's level of payment to the nursing home did not dictate the transfer decisions. Rather, the reimbursement decisions were made merely in *response* to the actual transfer decisions. Therefore, there was no state action since the plaintiffs had challenged only the transfer decisions and not the changes in the level of benefits they received.

The only decision of the 1982 trilogy where the Burger Court

15 *See id.* at 111-17.
16 457 U.S. 830 (1982).
17 457 U.S. 991 (1982).
18 *Id.* at 1002-12.
19 *Id.* at 1005.

found state action was *Lugar v. Edmondson Oil Co.*[20] There, the Court held that a private corporate creditor acted under color of state law in obtaining an ex parte writ of attachment for a debtor's property. The writ was issued from a clerk of the state court pursuant to a state statute, and the attachment was then executed by a sheriff.[21]

## I. The Need for a New Analytical Framework

Any viable state action formulation has two inherent sets of conflicts, each of which must be satisfactorily resolved. The first conflict is between the competing constitutional claims of the parties involved. The defendant's liberty of individual choice naturally conflicts with the aggrieved party's equality and due process rights. An expansive view of state action would protect the plaintiff's civil rights at the expense of the defendant's right to act without governmental interference.[22] A restrictive view of state action would achieve the opposite result.[23] The second conflict inherent in the development of a cohesive state action doctrine involves the competition between the power of the state and that of the federal government to regulate the actions of private individuals.[24]

Justice Harlan noted both of these sets of conflict in *Peterson v. City of Greenville*:

> Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference. This liberty would be overridden in the name of equality, if the structures of the amendment were applied to governmental and private action without distinction. Also inherent in the concept of state action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority.[25]

In the process of resolving these conflicts, two doctrinal objectives emerge. First, a balancing of the competing constitutional claims of the parties should be achieved. Reasonable public expectations that the conduct in question should or should not be subject to constitutional restraint will determine the outcome of such a bal-

20 457 U.S. 922 (1982).

21 *Id.* at 924.

22 *See* Note, *State Action After* Jackson v. Metropolitan Edison Co.: *Analytical Framework for a Restrictive Doctrine*, 81 DICK. L. REV. 315, 343 (1977).

23 *Id.*

24 *See Lugar*, 457 U.S. at 924.

25 373 U.S. 244, 250 (1963) (Harlan, J., concurring).

ancing. Thus, the question in a case posing a state action problem is whether there are grounds to support a reasonable public expectation that there should be constitutional protection of the specific activity involved. Accommodating such reasonable public expectations should be the first objective of any state action doctrine. Second, resolving the competition between the powers of the state and federal governments is the very essence of federalism. Therefore, in determining what conduct is subject to the constitutional limitations of the fourteenth amendment the second objective of a state action doctrine should be to safeguard the principles of federalism.

I contend that the Burger Court's retreat from the expansive state action concept of the Vinson and Warren Court eras is primarily attributable to its failure or unwillingness to acknowledge the relevance of public expectations as a doctrinal objective. Instead, the Court's major focus has been on federalism. Since this approach to the state action problem incorporates only one of the objectives outined above, it has led to erroneous conclusions regarding the existence of state action in those cases, like *Rendell-Baker*, which involve the privatization issue. The privatization phenomenon demands that courts consider public expectations in determining the state action question. To do otherwise allows the state to do indirectly what it cannot do directly. Strict adherence to form should not serve as a basis for determining state action.

The existence, as in *Rendell-Baker*, of a statutorily created obligation imposed upon the state to provide a particular service gives rise to reasonable public expectations that that activity will be constitutionally performed. This is so whether that obligation is performed directly by the state or indirectly by the state through a private delegate. That the activity performed in *Rendell-Baker* involved education, an "almost fundamental right,"[26] lends additional force to this argument. While a healthy respect for principles of federalism may result in some legitimate curtailment of the more expansive state action concept of the Burger Court's immediate predecessors, the Burger Court's failure to recognize the relevance and importance of public expectations has enabled states to use privatization to circumvent constitutional limitations. For situations like *Rendell-Baker*, I therefore propose an alternative conceptual and analytical framework for determining the state action question. This proposal, unlike the approach used by the Burger Court, is sensitive to *both* public expectations and federalism concerns.

In addition, I examine the other two decisions of the 1982 tril-

26 *See* Plyler v. Doe, 457 U.S. 202, 221-23 (1982); *cf.* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 29 (1973).

ogy in order to evaluate the nature of the Court's present state action doctrine. While the Court clearly either intentionally discounted or unwittingly ignored the relevance and importance of public expectations in its 1982 decisions, it has been less than clear in its overall analytical approach to the state action problem. This article attempts to discern some definitive patterns amidst this chaos. Identifying doctrinal objectives will not eliminate the impact of political and philosophical bias upon the judicial approach to the state action question. It will, however, allow the Court to openly and directly acknowledge those factors which affect its development of the state action doctrine, rather than attempting to untwist what has become an unnecessarily contorted theoretical approach to the state action question.

## II. The June Trilogy of 1982

All three cases handed down in June 1982 demonstrate a shared philosophical commitment to a continued retreat from the Warren Court's expansive view of state action.[27] However, the variety in approach taken by the Court in each of the three decisions indicates there is not yet any concensus about how best to achieve this result. Nevertheless, some common threads do emerge.

As I have noted above, none of these opinions examined public expectations. Additionally, unlike the Vinson and Warren Courts, the present Court seems to require some direct governmental involvement in the challenged action in order to establish state action. But neither government regulation nor funding of a private entity generally is sufficient, by itself, to trigger a state action finding and subjection to the constitutional limitations such a finding entails.[28] Nor will mere potential state coercion or power over the private entity justify a finding of state action. Such coercion or power must actually be exercised in order to hold the state responsible for the actions of the private party.[29] Finally, the Court defines the challenged activity as narrowly and specifically as possible. Thus, any potential for connecting the actions of the state and the challenged activity is greatly limited. This narrow definition also diminishes or even eliminates potential public expectations of con-

27 The Burger Court's restrictive approach in this area began in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); and Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978).

28 The Court has only considered regulation or funding which does not solely relate specifically to the challenged action. At least one lower court has distinguished Supreme Court precedent on this ground. *See* Milonas v. Williams, 691 F.2d 931, 940 (10th Cir. 1982).

29 *See Blum*, 457 U.S. at 1004; *see also* Rendell-Baker v. Kohn, 641 F.2d 14 (1st Cir. 1981).

stitutional protection. Therefore, the net impact of the June 1982 decisions is a continued contraction of the state action concept.

### A. Rendell-Baker v. Kohn: *Circumvention of Constitutional Restrictions*

In *Rendell-Baker v. Kohn*,[30] the Court decided the state action question presented by two separate cases which the United States Court of Appeals for the First Circuit had consolidated on appeal. Both cases involved similar actions by the same defendant. In the first of these suits, Sheila Rendell-Baker, a former vocational counselor at the New Perspectives School, filed a suit against that school. She alleged that the school, acting under the color of state law, fired her without due process in retaliation for her support of a student petition concerning school policy. Rendell-Baker named as defendants the members of the school's board of directors, and the chairman and former executive director of the Massachusetts State Committee on Criminal Justice. This latter group had funded Rendell-Baker's position at the school.[31]

The New Perspectives School was a nonprofit institution located on privately owned property in Brookline, Massachusetts. It was operated by a board of directors, none of whom was a public official or chosen by public officials. Kohn was the school's director. The school provided an educational program leading to a high school diploma certified by the town of Brookline. This program was designed for students who had difficulties in completing public high school for a variety of reasons, including drug or alcohol abuse and behavioral problems. Most of the students were referred to the New Perspectives School by town or city school committees or state agencies, pursuant to Massachusetts law.[32] The relevent statute, Chapter 766, obligated the state[33] to provide special education for the types of students attending New Perspectives. It also permitted the state to delegate to private schools, such as the New Perspectives School, the performance of this statutory obligation.[34]

Chapter 766 required extensive regulation of its mandated ed-

30 457 U.S. 830 (1982).

31 This Committee distributed in Massachusetts funds provided by grants from the Federal Law Enforcement Assistance Administration. As a condition of the grant funding Rendell-Baker's position, the Committee had to approve the school's initial hiring decision. "The purpose of this requirement is to insure that the school hires vocational counselors who meet the qualifications described in the school's grant proposal to the Committee; the Committee does not interview applicants for counselor positions." *Id.* at 833-34.

32 MASS. GEN. LAWS ANN. ch. 71B, § 3 (West Supp. 1981).

33 MASS. GEN. LAWS ANN. ch. 71B, §§ 3, 4 (West Supp. 1981); *see* 457 U.S. at 832 n.1.

34 MASS. GEN. LAWS ANN. ch. 71B, § 4 (West Supp. 1981) provides that school committees may "enter into an agreement with any public or private school, agency, or institution to provide the necessary special education" for these students. 457 U.S. at 832 n.1.

ucational programs.[35] Under the statute, the public school committee responsible for a child with special needs could assign that child to a private school. This assignment was subject to the consent of the child's parent or guardian,[36] and required the public school committee to pay for the education.[37] Since most of the students at New Perspectives were children placed there under chapter 766, ninety to ninety-nine percent of the school's operating budget was derived from public funds in the years just prior to the law suit.[38]

Once a child was placed in a private school pursuant to Chapter 766, the state was required to periodically review the placement decision, and monitor the child's progress.[39] A private school which accepted a child assigned under Chapter 766 had to agree to implement a special education program specifically designed for that child, and to comply with the detailed regulations promulgated under the statute.[40] Special procedures were established so that parents could object to such a program designed for their child.[41]

Rendell-Baker was discharged as a result of a dispute over the role of a student-staff council in the school's hiring decisions. Rendell-Baker had supported a student petition to the school's board of directors which sought greater responsibility for this council. The petition was opposed by the school's director, who shortly after voicing that opposition notified Rendell-Baker of her dismissal.[42] Rendell-Baker filed suit under 42 U.S.C. § 1983. The federal

35 MASS. GEN. LAWS ANN. ch. 71B, §§ 3-4 (West Supp. 1981). Boston and Brookline also regulated the school as a result of its Chapter 766 funding. 457 U.S. at 833.

36 MASS. GEN. LAWS ANN. ch. 71B, § 4 (West Supp. 1981).

37 457 U.S. at 832.

38 *Id.*

39 603 CODE MASS. REGS. § 28, ¶¶ 502.4(i), 804.2 (1979); Brief for Petitioner at 6.

40 MASS. GEN. LAWS ANN. ch. 71B, §§ 3, 4 (West Supp. 1981); 457 U.S. at 833. In the contract between New Perspectives and the Boston School Committee, the school is referred to as a "contractor." The contract also states that school employees are not city employees. Under this contract, the school must also agree to implement the individualized plan developed for each referred student. The school is also referred to as a "contractor" under the school's agreement with the Boston School Committee, which includes provisions governing the services to be provided. That agreement does not cover personnel policies, "[e]xcept for general requirements, such as an equal employment opportunity requirement . . . ." *Id.*

41 457 U.S. at 832; MASS. GEN. LAWS ANN. ch. 71B, § 3 (West Supp. 1981).

42 457 U.S. at 834. The Director had previously notified the State Committee on Criminal Justice of her intentions to dismiss Rendell-Baker. After Rendell-Baker demanded either reinstatement or a hearing, the school agreed to appoint a grievance committee to consider her claims. Rendell-Baker also complained to the State Committee on Criminal Justice. As a result of this complaint, the Committee requested and received from the school a written explanation of Rendell-Baker's discharge. The Committee also told the school it would not pay any damages Rendell-Baker might be awarded as a result of her discharge. The Committee, claiming it had no authority to order a hearing itself, told Rendell-Baker it would, however, refuse to approve the hiring of a replacement counselor if the school did not comply with its agreement to apply the new grievance procedure to her situation. *See* note 31 *supra*. The exact authority for all the Committee actions in this case is

district court held that there was not "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[43] The district court noted that "although the State regulated the school in many ways, it imposed few conditions on the school's personnel policies."[44]

In the second case consolidated on appeal, five other teachers at the school were fired eighteen months after Rendell-Baker. They were allegedly discharged as a result of their complaints, both public and private, concerning the school's educational environment and the students' free speech rights.[45] These teachers also filed a section 1983 suit against the school and its board of directors. The district judge in this second case, who did not preside in *Rendell-Baker*, denied the defendants' motion to dismiss, holding that there was "sufficient involvement by the state to meet the jurisdictional challenge."[46] This opinion stressed the extensive state regulation and funding of the employer-school. The court also noted that while education was not a uniquely public function, it was primarily a public function, and the town of Brookline itself did not maintain a school to serve the type of students attending New Perspectives.[47]

Leave to file an interlocutory appeal under 28 U.S.C. § 1292(b) was granted to the defendants, and the First Circuit then consolidated both suits. The appellate court agreed with the district court in the *Rendell-Baker* case, holding that both suits should have been dismissed.[48] Although the state regulated the school in many ways, the court found that it was not dominated by the state, especially regarding personnel discharge decisions.[49]

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somewhat unclear since there were no express provisions which provided for the Committee's intervention in a discharge decision. A dispute arose at this point as to the composition of the grievance committee and a hearing was apparently never held.

43 Rendell-Baker v. Kohn, 488 F. Supp. 764, 766 (D. Mass. 1980) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)).

44 *Id.*

45 457 U.S. at 835. The five teachers wrote a letter to the school's Board of Directors urging the discharge of the school's Director. When the Board supported the Director, students from the school picketed the home of the Board president. The students were then threatened with suspension. The five teachers wrote a letter to the editor of a local newspaper covering the story, claiming the picketing prohibition was unconstitutional. At the same time the five teachers told the Board president that they were forming a union. The school's Director discharged the teachers the next day.

46 The district court opinion was unpublished. *See also* Brief for Petitioner at 4; 457 U.S. at 836.

47 *See* 457 U.S. at 836.

48 Rendall-Baker v. Kohn, 641 F.2d 14 (1st Cir. 1981); 457 U.S. at 837.

49 641 F.2d at 28; 457 U.S. at 837. The court of appeals also separately considered and rejected the claim that Rendell-Baker was discharged under color of state law because her position was funded directly by the Committee on Criminal Justice. It reasoned that while the Committee had the power to ensure that those initially hired had the qualifications

The Supreme Court affirmed the First Circuit's holding that the school did not act under color of state law in discharging the plaintiff-petitioners.[50] The Court examined the claims using three different approaches to the state action question—symbiotic relationship, nexus, and public function—which were borrowed from earlier decisions. The Court broke the nexus test into two elements, state funding and regulation, and examined each independently. The Court also referred to each of the potential bases for finding state action as factors. The four factors considered by the Court were the two elements of the nexus test—funding and regulation—and two heretofore autonomous tests—the symbiotic relationship test and the public function test.

The Court seemed to have the least amount of trouble with the third factor, that is whether a symbiotic relationship existed. It summarily concluded that the state and school did not share a symbiotic relationship. Unlike the situation in *Burton v. Wilmington Parking Authority*,[51] the private entity here was located on private property and the state did not derive any financial benefit directly from the challenged activity.[52] *Burton* involved the refusal to serve the black plaintiff by a privately owned restaurant leasing space in a publicly owned building. The restaurant had purportedly acted pursuant to a state statute which allowed places of public accommodation to refuse service to "persons whose reception . . . would be offensive to the major part of [its] customers . . . ."[53] In *Burton*, the Court had looked at the cumulative impact of a myriad of facts which demonstrated the mutually beneficial contacts between the state and the private restaurant. Unlike the *Rendell-Baker* opinion, however, its focus was not limited to those contacts which directly concerned the challenged discrimination. Rather, the *Burton* Court concluded that the actions of the state and the private entity were

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which were set forth in the grant proposal, it did not have any other control over the school's personnel decisions. 641 F.2d at 27; 457 U.S. at 837.

50 457 U.S. at 837. The plaintiffs brought their action under 42 U.S.C. § 1983, which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1982). Note the Supreme Court's ease in finding similar criteria for both the fourteenth amendment state action requirement and the § 1983 statutory under color of law requirement, despite the Court's care in distinguishing the two in Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982), decided the same day.

51 365 U.S. 715, 723 (1961).

52 457 U.S. at 842-43. Arguably, it may have been financially more beneficial to allow specialized private schools to implement the statutorily mandated educational program than to require public schools to so provide such programs.

53 DEL. CODE ANN. tit. 24, § 1501 (1953); 365 U.S. at 717 n.1.

so intertwined as to establish a symbiotic relationship, thus subjecting the challenged conduct to constitutional scrutiny.[54]

Since it dismissed the existence of a symbiotic relationship, the core of the Court's reasoning in *Rendell-Baker* focused on the nexus and public function analyses. The Court declined to find state action on the basis of a nexus between the state and the employer school. It reasoned that the school's receipt of substantial public funding did not make the school's discharge decisions acts of the state.[55] The school was essentially like a private corporation whose business primarily depended upon its performance of contracts to build roads, bridges, dams, or ships for the government.[56] At least in the absence of coercion by the state, public funding alone would not support a finding of state action.[57] Funding could not automatically be equated with control by the state.[58] The Court analogized the school to the public defender in *Polk County v. Dodson*,[59] concluding that the relationship between the school and its teachers and counselors had not changed merely because the state paid the tuition of the students. As was true in *Blum*, an almost complete dependence on public funding did not transform the acts of the private entity into acts of the state.

The Court also held that state regulation of the school's educational program was not a sufficient connection with the state to establish state action. While the school's programs were extensively regulated, the state showed relatively little interest in regulating the school's personnel matters.[60] The Court here and in *Blum* essen-

54 365 U.S. at 725. The extent of the intertwining necessary to establish state action is difficult to assess because the Supreme Court has never found a symbiotic relationship other than that in *Burton*.

55 457 U.S. at 840.

56 *Id.* at 840-41.

57 According to the Court in *Rendell-Baker*, "a state normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Id.* at 840 (quoting *Blum*, 457 U.S. at 1004).

58 *Id.*

59 454 U.S. 312 (1981).

60 "Concerning personnel policies, the Chapter 766 regulations require the school to maintain written job descriptions and written statements describing personnel standards and procedures, but they impose few specific requirements." 457 U.S. at 833. This conclusion echoed that of the First Circuit. *See* 641 F.2d at 25. The only possible exception to this disinterest in personnel issues was the State Committee on Criminal Justice which had the power to approve persons, like Rendell-Baker, who would be hired as vocational counselors. The Court concluded that the Committee's "limited role" in Rendell-Baker's discharge was "not comparable to the role played by the public officials in *Adickes* and *Lugar*," noting that the Committee did not participate in Rendell-Baker's discharge but tried instead to use its leverage to aid her. 457 U.S. at 838 n.6. *Lugar*, along with *Blum* and *Rendell-Baker*, constituted the trilogy announced in June 1982. *See* text accompanying notes 158-84 *infra*. Adickes v. H. S. Kress & Co., 398 U.S. 144 (1970), held there was state action when a private entity conspired with a police officer to deprive the plaintiff of her constitutional

tially decided that the state did not regulate the precise conduct about which the plaintiffs complained.[61] Extensive regulation of other activities or aspects of the private entity were not relevant to establishing the requisite nexus for state action purposes.[62]

The Court readily acknowledged that the special education of the students at the New Perspectives School was a public function, but asserted that that was only the beginning of the inquiry.[63] The Court proceeded to determine whether the school's function was "traditionally the exclusive prerogative of the State."[64] It maintained that neither the legislative policy to provide special education demonstrated by chapter 766, nor the fact that the school's function served the public made the services the exclusive province of the state.

In *Jackson v. Metropolitan Edison Co.*,[65] the Court had severely limited the application of its public function analysis by imposing an exclusivity limitation. Previous decisions had indicated only that the activity under scrutiny had to be one traditionally performed by the sovereign.[66] In *Jackson*, the Court held that a privately owned but state regulated monopolistic utility's termination of service to a customer for nonpayment was not state action, and therefore was not subject to due process restrictions. The Court used both the nexus and public function analysis. Under the nexus analysis, the *Jackson* Court found no connection between the governmental action and the termination procedure. With regard to the public

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rights, thereby subjecting the private entity to liability under 42 U.S.C. § 1983. *See* text accompanying note 185 *infra*. In *Rendell-Baker*, the Committee's purpose or motive in acting should, however, have been of no consequence. *Cf.* Norwood v. Harrison, 413 U.S. 455 (1973).

61 The Court also separately considered and rejected Rendell-Baker's claim that she was discharged under color of state law since her position was funded directly by the Committee on Criminal Justice. 457 U.S. at 837, 841 (citing *Blum*, which in turn relied on *Jackson*, 419 U.S. at 350). *See also* Justice White's concurring opinion which addressed the Court's opinions in both *Blum* and *Rendell-Baker*. For him, the critical factor was the absence of any allegation that the employment decision was itself based upon some rule of conduct or policy set forth by the state. Justice White then cited the language in the majority opinion concerning the State's lack of regulations regarding personnel matters. 457 U.S. at 844 (White, J., concurring).

62 Even if the Court's analytical framework is proper, its conclusion that the discharge decision had no nexus with the state is incorrect. *See* Justice Marshall's discussion regarding the connection between the petitioners' discharge and the educational obligations of the state under chapter 766. 457 U.S. at 850-51 (Marshall, J., dissenting). *See* text accompanying notes 80-81 *infra*.

63 457 U.S. at 842. "Judicial enforcement is of course state action, but this is not the end of the inquiry." Peterson v. City of Greenville, 373 U.S. 244, 249 (1963) (Harlan, J., concurring).

64 457 U.S. at 842.

65 419 U.S. 345 (1974).

66 *See* White Primary Cases, 273 U.S. 536 (1927); 286 U.S. 73 (1932); 321 U.S. 649 (1944); Marsh v. Alabama, 326 U.S. 501 (1946).

function analysis, the Court concluded that a function must be one which has not only been traditionally, but also exclusively performed by the state in order for it to be viewed as state action.[67]

The *Rendell-Baker* Court apparently presumed that both the "traditionally" and "exclusively" requirements imposed by *Jackson* must always be met whenever the public function approach is used. This conclusion, however, is inconsistent with the language of *Jackson* itself.

> If we were dealing with the exercise by Metropolitan of some power *delegated* to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one. But while the Pennsylvania statute imposes an obligation to furnish service on regulated utilities, it imposes no such obligation on the State.[68]

Thus, the *Jackson* decision had expressly recognized that if a state delegated to a private entity a service the state would otherwise be required to provide, then a different question would be presented. In a situation involving such a delegation, the exclusivity requirement need not apply. The statutory obligation to provide special education imposed on Massachusetts in *Rendell-Baker* stands in sharp contrast to the lack of any obligation on the part of Pennsylvania in *Jackson* to provide utility service.

The Court in *Rendell-Baker* failed to appreciate the state action implications of the state's delegation of the performance of the state's own statutory obligation to a private entity. Consequently, it rejected a finding of state action based on the public function test as it believed *Jackson* had defined it. Instead, the Court characterized the issue before it as "whether a private school, whose income is derived primarily from public sources and which is regulated by public authorities, acted under color of state law when it discharged certain employees."[69]

The state action inquiry in *Rendell-Baker* was thereby flawed from its inception. The issue should not have been whether extensive state funding and regulation of an otherwise private institution constituted a sufficient nexus to render that institution's actions state action. Rather, the focus of the inquiry should have been upon the statutory delegation and the precise nature of the task delegated. The Court should have framed the issue as "whether an ostensibly private school becomes subject to any constitutional constraints when it accepts the delegation of a major portion of the State's statutory obligation to provide public education."[70]

67 419 U.S. at 353.
68 *Id.* at 352-53 (emphasis added).
69 457 U.S. at 831.
70 Petition for Certiorari at 18.

The Burger Court's nexus analysis is arguably appropriate in cases where the state has only regulated or financed the conduct of the private actor, where the state has insinuated itself into the conduct of the private actor. It is inappropriate, however, in cases where the state has delegated a task or service to the private party which the state itself is statutorily required to provide.[71] Using the nexus test in this delegation context leads to an illogical result: the more effectively the state distances itself from the performance of its statutory obligations, the less likely that the intended beneficiary of that obligation will receive the constitutional protections the state would have been required to give if the state itself had provided the service directly.[72] The state can thus unilaterally "privatize" the performance of its duties, and relieve itself of the responsibility of acting within constitutional limits. The state should not be allowed to do indirectly what would be impermissible if done directly. Similarly, if the state action analysis focuses solely on the extent of state involvement, the private entity performing the state's obligation can also evade the limitations of the fourteenth amendment. Thus, an action based on the guarantees of the fourteenth amendment cannot be brought against either the state or the private actor.

In an incisive dissent in *Rendell-Baker*, Justice Marshall, joined by Justice Brennan, echoed similar dissatisfaction with the majority's analytical framework.[73] He, too, was concerned that the limited focus which the majority used in both its nexus and public function analyses would allow the state to improperly circumvent constitutional restrictions. Regarding the nexus test, Justice Marshall thus maintained that the state's delegation of a statutory obligation to a school which was both heavily subsidized and regulated constituted a nexus "so substantial that the school's action must be considered state action."[74] Justice Marshall agreed with the majority that neither state funding nor state regulation alone was enough for state action. He maintained, however, that when both these factors and other indicia of state action are present in the same case, state action may well be established.[75] Thus the majority fundamentally erred "[b]y analyzing the various indicia of state action separately, without considering their cumulative impact."[76]

71 Petition for Certiorari at 25.

72 "When, as here, the case concerns the state's delegation of its statutory duties to a private entity, the fact that there has been a total rather than a partial abdication of authority should not be a basis for rejecting a claim of state action." Petition for Certiorari at 26.

73 457 U.S. at 844-52 (Marshall, J., dissenting).

74 *Id.* at 844 (Marshall, J., dissenting).

75 *Id.* at 848 n.1 (Marshall, J., dissenting).

76 *Id.* (Marshall, J., dissenting).

Justice Marshall's reliance on a cumulative rather than a seriatim approach to the various indicia of state action is also reflected in his public function analysis. He stated that a finding of state action may be justified, even if the state has not traditionally and exclusively performed a function. Such a finding is justified when "a private entity is performing a vital public function," and other factors are present which show "a close connection with the state."[77] This cumulative approach advocated by Justice Marshall is not only supported by Supreme Court precedent,[78] but is preferable to the majority's approach if the state action doctrine is to accommodate public expectations. Only by focusing on the totality of the circumstances can such expectations be appreciated.

The obligatory nature of the services which New Perspectives performed for the state underscored the importance of such a cumulative approach. Since the state was statutorily required to provide special education for all children, it "should not be permitted to avoid constitutional requirements simply by delegating its statutory duty to a private entity."[79] If an entirely new analytical framework for these special delegation cases is not adopted, then at least applying Marshall's cumulative approach would discourage a state from avoiding its constitutional responsibilties by privatizing certain obligatory functions. The majority's analysis merely encourages this type of avoidance.

Finally, Justice Marshall concluded that a finding of state action would be justified in *Rendell-Baker* since the petitioners were fired because of their criticism of the school's educational policies—the same policies that were the responsibility of the state under chapter 766.[80] Citing a long line of Supreme Court cases "emphasiz[ing] the close relationship between teachers' free speech and the educational process,"[81] Justice Marshall concluded that the challenged personnel decisions were intimately related to the education program mandated by statute. The majority completely ignored or overlooked this point. The Court majority persisted in viewing the discharge decisions as strictly personnel decisions; divorced from the obligatory duties imposed by chapter 766.

Justice Marshall's dissent reflected a continuation of the traditional state action analysis which dominated the decisions of the

77 *Id.* at 849 (Marshall, J., dissenting).

78 *See, e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), discussed in text at notes 51-54 *supra*; Marsh v. Alabama, 326 U.S. 501 (1946), discussed in text at notes 143-45 *infra*; and White Primary Cases, 273 U.S. 536 (1927), 286 U.S. 73 (1932), 321 U.S. 649 (1944).

79 457 U.S. at 849 (footnote omitted) (Marshall, J., dissenting).

80 *Id.* at 850-51 (Marshall, J., dissenting).

81 *Id.* at 850 n.4 (Marshall, J., dissenting).

Vinson and Warren Courts. This approach required examination of the totality of circumstances, as the Court had done in the *White Primary Cases*,[82] *Marsh v. Alabama*,[83] *Burton v. Wilmington Parking Authority*,[84] and *Evans v. Newton*.[85] It also gave full credit to *Burton*'s cautionary command that flexibility and scrutiny of the facts and circumstances of a case are crucial to determining the state action question.

In contrast, the majority opinions in both *Rendell-Baker* and *Blum*, like the other decisions of the Burger era, narrowly defined the precise nature of the activity being challenged and drastically curtailed the Court's focus in ascertaining which types of connections between the state and the private entity should be scrutinized in determining the state action question. To the majority of the Burger Court, the primary concern has been to limit the scope of activities subject to scrutiny by the federal judiciary. This concern is not unlike that which predominated in nineteenth century state action theory.[86]

### B. *A New Analytical Framework*

The illogical result dictated by the majority's analytical approach in *Rendell-Baker* demonstrates the need to formulate a new analytical framework for determining the state action question when the state delegates the performance of a service or task to a private entity which the state itself would otherwise be obligated to perform. It is submitted that such a new analysis should shift the focus away from the nexus approach, with its emphasis on the degree of connection between the state and the private entity, to an examination of the particular nature of the challenged activity. In so doing, this proposal is similar to the public function analysis which also focuses on the nature of the function. But there are two principle differences between this new approach and the present public function doctrine. First, the *Jackson* exclusivity requirement is absent. Second, this new proposed approach would apply only where the state delegates to the private actor the provision of certain services or the performance of certain tasks which the state is otherwise obligated to perform itself.[87]

82 273 U.S. 536 (1927); 286 U.S. 73 (1932); 321 U.S. 649 (1944).

83 326 U.S. 501 (1946).

84 365 U.S. 715 (1961).

85 382 U.S. 296 (1966).

86 *See Civil Rights Cases*, 109 U.S. 3 (1883). *See* Schneider, *State Action: Making Sense Out of Chaos—An Historical Approach*, 37 U. FLA. L. REV.__(1985).

87 The proposal also suggests limitations regarding the types of services or tasks to which this new analysis would apply. *See* text preceding note 89 *infra* and text following note 100 *infra*. This formulation also requires an arguably new limitation with regard to whom the private actor's actions may be viewed as state action. *See* text accompanying note

This new analysis would achieve the same protection of federalism principles which the Burger Court has sought by contracting the scope of state action.[88] It would accomplish this, however, in a manner that is more consistent with justifiable public expectations, an objective virtually ignored by the Court's present mode of analysis. Thus, in contrast to the Burger Court's approach, this new analytical framework would achieve both of the objectives of the state action doctrine which I have identified and outlined above.

In order to achieve governmental efficiency, the state must be free to contract with various private persons to perform certain tasks, or to provide certain services. Thus, the state action question in the delegation context is of great importance in a political climate where the private sector is increasingly used to perform what had heretofore been functions performed by the public sector.[89] This new doctrinal formulation recognizes, however, that the private sector cannot and should not be subject to constitutional limitation every time it provides a service or performs some function for the government. The proposed analysis, therefore, ensures that there are some areas of private conduct which cannot be subject to federal constitutional restrictions. This new analytical approach, however, is also sensitive to public expectations. In other words, the proposal properly acknowledges that the performance of certain services or tasks, because of their particular nature, will give rise to the reasonable public expectation that such performance will be subject to constitutional limitations. This is true whether they are performed by the state itself, or by a private surrogate.

In order to achieve these goals, the new proposed state action formulation for this delegation context would require four criteria to establish state action. All four criteria must be met or state action will not be established. First, the state must have a legislative or constitutional mandate to provide a particular service, or to perform a particular task. In *Rendell-Baker*, for example, Chapter 766 required the *state* to ensure that specific educational services were provided. Second, the state must delegate to a private entity the provision of that service or the performance of that task which the state would otherwise be obligated to perform itself. Again, the Massachusetts statutory scheme in *Rendell-Baker* expressly allowed a school committee to delegate its obligations under Chapter 766,

93 *infra*. The Supreme Court expressed similar concerns within the context of its nexus analysis. *See* 457 U.S. at 841.

88 The purpose of the exclusivity requirement in public function analysis is to safeguard against finding state action whenever a private party performs any function which the state also performs, thereby opening the floodgates of litigation and completely eliminating any respect for the principles of federalism or the individual's freedom of choice.

89 *See generally* E. SAVAS, *supra* note 9.

and such a delegation was in fact made to New Perspectives School. Third, the activity must be one which is traditionally, although not necessarily exclusively, performed by the state. Only those kinds of activities generate reasonable public expectations that constitutional limits should apply. Education is an excellent example of this type of activity. The Supreme Court has repeatedly acknowledged the importance of education in our society,[90] thus justifying the existence of public expectations that the obligatory provision of such an important service may well be within the purview of the Constitution. That education has been traditionally provided by the state is attested to by the existence of public school systems. On the other hand, the Court has held that private alternatives to the public system are constitutional.[91] Thus, any argument that education is within the exclusive province of the state has already been preempted. The Massachusetts statute in *Rendell-Baker* acknowledged that parents could unilaterally choose a private alternative to the state furnished education under Chapter 766.[92] If they exercised this option, however, the parents would have to pay for such an education.[93] Finally, under the new state action formula, the person complaining of the constitutional violation must be within the class of intended beneficiaries of the delegated activity.[94] The public's expectations that the performance of a certain service or task is subject to the restraints of the Constitution is a fundamental value underlying the concept of state action. It therefore follows that state action exists only when the private entity's actions are directed at those whom the state has intended to benefit by either providing the service directly, or by delegating the performance of such services. Only someone within that beneficiary class can have the appropriate expectation of constitutional protection essential for success in claiming state action.

The Court implicitly approved and followed a somewhat analogous argument in its nexus analysis in *Rendell-Baker*.[95] In reaching the conclusion that no nexus existed between the New Perspectives School and the state, the Court maintained that the state's involvement centered on the students, and not the employees of the school. Chapter 766 and its regulations were intended to benefit

90 *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 221-23 (1982); *cf.* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 29 (1973).

91 *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510 (1925).

92 457 U.S. at 832 n.1.

93 *Id.*

94 *Cf.* McCoy, *supra* note 6, at 822.

95 457 U.S. 830, 843-44 (1982) (White, J., concurring); *see also* McCoy, *supra* note 6, at 822.

the former and not the latter.[96] The *Rendell-Baker* Court, therefore, correctly noted that the act of delegating here, like the act of delegating to a private contractor the building of a bridge, does not automatically by itself make the act state action.[97] The Court, however, failed to recognize that this conclusion is proper only because the state does not intend to benefit employees of the bridge contractor when establishing the obligation to build a bridge. The state only intends to benefit members of the public who would use the bridge. Therefore, state action would exist only if the private contractor could arbitrarily deny access to the bridge to a particular group, such as all blacks. But state action would not exist as to the private contractor's actions towards his employees, even if racially motivated.[98]

Hampered by its own "pigeonhole approach,"[99] the Court has been unwilling to recognize that delegation cases deserve their own state action formulation. This article's proposed alternative analytical approach is premised on the theory that the state cannot delegate to a private entity the obligation to perform certain services or tasks without also delegating the responsibility to act within the parameters of the Constitution. The state's delegation must impose this responsibility on its delegate—the private party.

This approach is analogous to that taken in determining the tort liability of one who hires an independent contractor. Generally, one who hires an independent contractor is shielded from liability for the actions of that contractor.[100] However, certain tasks, due to their nature, are deemed nondelegable. Even though these tasks are actually performed by the independent contractor, the person who hires the independent contractor remains liable.[101] In the context of state action, it is submitted that nondelegable activi-

96 457 U.S. at 840-41. The Tenth Circuit based its decision in Milonas v. Williams on precisely this distinction. 691 F.2d at 940.

97 457 U.S. at 840-41. *But see id.* at 851 (Marshall, J., dissenting).

98 Other statutes might, however, render such conduct toward employees impermissible. *See, e.g.*, Title VII of the 1965 Civil Rights Act, 42 U.S.C. § 2000e (1982). My analysis responds to the problem raised by Justice Marshall at the end of his dissent in *Jackson* wherein he states: "Thus, the majority's analysis would seemingly apply as well to a company that refused to extend service to Negroes, welfare recipients, or any other group that the company preferred, for its own reasons, not to serve." 419 U.S. at 374 (Marshall, J., dissenting).

99 457 U.S. at 1014 (Brennan, J., dissenting).

100 W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 509 (5th ed. 1984); *see, e.g.*, Washington Metropolitan Area Transit Auth. v. L'Enfant Plaza Properties, Inc., 448 A.2d 864 (D.C. 1982); Soderback v. Townsend, 57 Or. App. 366, 644 P.2d 640 (1982); Fisherman's Paradise, Inc. v. Greenfield, 417 So. 2d 306 (Fla. Dist. Ct. App. 1982).

101 This nondelegable duty may be imposed by statute. The criterion used by the courts in discerning the nondelegable character of such duties is a judicial determination that the responsibility is so important to the community that the employer should not be permitted to transfer it to another. W. PROSSER & W. KEETON, *supra* note 100, at 511-12.

ties are those which the state is obligated to perform due to a constitutional provision or a statute, and which have been traditionally, although not necessarily exclusively, performed by the state. These are the same characteristics which should also give rise to a reasonable expectation by the public that such a function will be performed constitutionally.

Although the state may have a private actor performing the service due to practical considerations, the nondelegable nature of the service means that the state must remain responsible for the performance of that service. If the injured party seeks redress not from the state, as in *Blum*, but rather from the private party performing the service, as in *Rendell-Baker*, the analogy to an independent contractor must go one step further. The question then becomes whether the delegate should be bound by the same constitutional restrictions and limitations which bind the state delegator. The imposition of a statutory or constitutional obligation on the state to provide certain services creates a reasonable expectation on the part of the public that the service will be provided in accordance with constitutional guarantees. This is true whether the state performs that service directly or delegates that obligation to a private entity. Furthermore, when that private entity receives a benefit, such as funding, for performing the state's obligation, it is all the more reasonable to require that the delegation include the responsibility to perform the service subject to the same restrictions that the state would have. If the state action doctrine is to prevent the abuse of state power,[102] then the state cannot delegate to a private entity the performance of its own obligatory tasks without also delegating certain responsibilities with regard to the nature of that performance.

Neither of the two other cases in the 1982 trilogy, *Blum v. Yaretsky* nor *Lugar v. Edmondson Oil Co.*, involved the kind of delegation question which was present in *Rendell-Baker*. Neither involved the state's delegation of an activity which the state would have been otherwise obligated to perform. Therefore, the Court's analysis of the state action question in these two cases did not have to focus on the impact which privatization of the public sector may have on the state action doctrine. The reasoning in each of these decisions, however, raised other questions regarding the precise nature of the Burger Court's analytical approach to the state action problem.

102 "If the Fourteenth Amendment is to have its intended effect as a restraint on the abuse of state power, courts must be sensitive to the manner in which state power is exercised." 457 U.S. at 1012 (Brennan, J., dissenting); *see* text accompanying notes 9-10 *supra*.

### C. Blum v. Yaretsky: *Is State Action What the Doctor Ordered?*

At issue in *Blum v. Yaretsky* was whether the decisions by ostensibly private nursing homes to transfer Medicaid patients from one nursing home to another facility which provided a lower level of care were subject to the due process limitations of the fourteenth amendment.[103] The patients brought a class action suit against two state social service agencies. They alleged that the nursing homes had deprived them of due process by failing to give them adequate notice of either the transfer decision or of the patients' right to an administrative hearing to challenge those decisions. No private parties were named as defendants.[104]

As a participating state in the federal Medicaid program established by the Social Security Act, New York thus reimbursed the nursing homes for the reasonable cost of health care services provided to patients according to each patient's required level of care. As part of the Medicaid statutory and regulatory scheme, each nursing home is required to establish a utilization review committee ("URC") composed of physicians[105] who are to periodically assess whether each patient is receiving the appropriate level of care. This assessment is used to justify a patient's continued stay in a facility. The URC must notify the state agency responsible for administering Medicaid assistance if it determines that the patient should either be discharged or transferred to another level of care. Medicaid then adjusts its reimbursements accordingly.

In *Blum*, a URC informed the proper state officials that the plaintiff-patients should be transferred to a lower level of care.[106]

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103 457 U.S. at 993. While initially there was a challenge to transfers to higher levels of care as well as to lower levels, the Court concluded that the plaintiffs did not have standing to challenge transfers to higher levels of care, regardless of who initiated that transfer. *Id.* at 1002.

104 Perhaps because of the absence of any private party as a defendant, the Court was even less inclined to find state responsibility for the indirect private action. The Court expressly distinguished the case before it from those in which the defendant was a private party. 457 U.S. at 1003. *See, e.g.*, Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978); Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970). The Court also distinguished *Blum* from those decisions "in which the challenged conduct consists of enforcement of state laws or regulations by state officials who are themselves parties in the lawsuit . . . ." 457 U.S. at 1004. In those cases the issue often becomes "whether the private motives which triggered the enforcement of those laws can fairly be attributed to the State." *Id.* The Court commented, however, that these types of cases as well as those in which the private party is also a defendant are nevertheless helpful in resolving the state action question. *Id.*

105 These physicians cannot be directly responsible for the patient whose care is being reviewed. *Id.* at 995 n.4. These physicians are not employed by the state. *Id.* at 1006 n.16.

106 The opinion states that the URC made the initial decisions to transfer. However, the Court indicated some confusion on this matter. The Court stated that decisions to transfer patients:

The officials accordingly prepared to reduce or terminate payments to the nursing homes for the care of those patients. When the patients refused to be transferred, administrative hearings were held. State social service officials subsequently affirmed the decision to discontinue benefits unless the plaintiffs accepted transfers to a lower level of care. The patients then brought a class action suit.

The federal district court approved a consent decree which provided substantive and procedural rights "applicable to URC-initiated transfers to lower levels of care."[107] In addition, the district court found state action and a constitutional right to a pre-transfer evidentiary hearing regarding a patient transfer initiated by a facility or its agents.[108] Without elaborating on its reasons for this decision, the court granted injunctive relief.[109] The Second Circuit affirmed, and held that the New York "response" of adjusting the level of Medicaid benefits established a "sufficiently close 'nexus' between the State and either the nursing homes or the URC's to justify treating their actions as those of the State itself."[110] The Supreme Court granted certiorari on the state action question and reversed.

The Supreme Court began its inquiry by stressing that the plaintiffs were not challenging particular state regulations or procedures[111] nor the adjustment of Medicaid benefits,[112] but rather the actual discharge or transfer of patients to lower levels of care without adequate notice or hearings.[113] Thus narrowing its focus was a

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to lower levels of care initiated by utilization review committees are simply not part of this case . . . . [S]uch transfers were the subject of a consent judgment . . . . We are concerned only with the transfers initiated by the patients' attending physicians or the nursing home administrators themselves. Therefore, we have focused on regulations that concern decisions which are not the product of URC recommendations. As we explain in the text, those regulations do not demonstrate that the State is responsible for the transfers with which we are concerned.

*Id.* at 1007 n.17.

107 *Id.* at 997.

108 *Id.* at 997-98. The court also found such a hearing right with regard to patient transfers to a higher level of care. *Id.*

109 *Id.* at 998.

110 *Id.* at 998 (citing 629 F.2d 817 (2d Cir. 1980)).

111 *Id.* at 1003. Plaintiffs:

concede that the decision to discharge or transfer a patient originates not with state officials, but with nursing homes that are privately owned and operated. Their lawsuit . . . seeks to hold state officials liable for the actions of private parties, and the injunctive relief they have obtained requires the State to adopt regulations that will prohibit the private conduct of which they complain.

*Id.*

112 *Id.* at 1005.

113 *Id.* at 993. The court conceded that if the plaintiffs had asserted that the State "affirmatively commands" the summary discharge or transfer of Medicaid patients through its statutory and regulatory scheme, the issue before the Court would be quite different. *Id.* at 1001.

key to the Court's reasoning, since it allowed the Court to disassociate the state's involvement with the private entity from the particular action challenged by the plaintiffs.

The opinion set forth three "principles"[114] for analyzing the state action issue. First, the plaintiff had to "show that 'there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.' "[115] The purpose of this "requirement" was to ensure that state action is found only when the state was responsible for the challenged conduct.[116] Second, the state was "responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[117] Finally, "the required nexus [to establish state action] may be present if the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.' "[118]

The Court conceded that the state had *responded* to the URC decision by adjusting benefits. It concluded, however, that such a response did not "render it *responsible* for those actions."[119] After closely examining the relevant statutory and regulatory schemes and the forms which the state required the nursing homes to complete when transferring or discharging patients,[120] the Court concluded that the physicians alone determined whether the patient's care was medically necessary.[121] The state was not responsible for the physician's decision merely because it required the doctor to complete a form.[122] Therefore, the private parties decided to transfer or discharge a patient on the basis of medical judgments made

114 Some of the terminology used in *Blum* is new. For the first time, the Court characterizes state action tests as "principles" and "requirements." *Id.* at 1004-05.

115 *Id.* at 1004 (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)).

116 *Id.* at 1004.

117 *Id.* This would appear to effectively overrule that aspect of *Burton* which had been interpreted as holding that state inaction could justify a finding of state action. *See also* Buchanan, *supra* note 6, at 265.

118 457 U.S. at 1005 (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974)). Again apparently for the first time, the Court has, in its third principle, merged the nexus and public function tests. *Id.*

119 *Id.* (emphasis in original). "There is no suggestion that those decisions [by the private entity] were influenced in any degree by the State's obligation to adjust benefits in conformity with changes in the cost of medically necessary care." *Id.* "Adjustments in benefit levels in response to a decision to discharge or transfer a patient do not constitute approval or enforcement of that decision." *Id.* at 1010.

120 *Cf. id.* at 1006 n.15; *id.* at 1021 n.8 (Brennan, J., dissenting).

121 *Id.* at 1006.

122 *Id.* at 1006-07. The dissent and majority disagreed as to whether the physician and nursing home have discretion to act contrary to a particular conclusion dictated by the completion of mandated forms. *See id.* at 1008 n.19.

"according to professional standards that are not established by the State."[123] The Court compared such decisions to those made by the public defender in *Polk County v. Dodson*.[124] There the Court held that a public defender was not acting under color of state law as defined by section 1983 because she had acted according to professional standards rather than "any rule of conduct imposed by the State."[125]

The *Blum* Court also found that the state had not commanded the transfers by imposing penalties on nursing homes which had violated applicable regulations or had provided inappropriate care or services in substantial excess of the beneficiary's needs.[126] Since the regulations themselves did not dictate the transfer or discharge decision, the penalties imposed for violating those same regulations could not dictate such decisions.[127] The Court was also unpersuaded by the plaintiffs' alternative argument that the state bore ultimate responsibility for the transfer decision because the state subsequently approved or disapproved of the decision by reviewing it on the merits.[128] Noting that the state disclaimed any such responsibility, the Court narrowly construed the contours of the state's actions. It concluded that the state's obligatory review concerned only approval or disapproval of continued *payment of benefits* after a change in the beneficiary's need for services. Such adjustment in benefit levels did not constitute approval or enforcement of the transfer decision itself.[129]

The Court similarly rejected the plaintiffs' assertion that the state was a joint participant in the nursing home's discharges and transfers of the Medicaid patients.[130] This claim purported to be based on *Burton v. Wilmington Parking Authority*.[131] Assuming the nursing homes were licensed, extensively regulated, and substantially funded by the state, the Court nevertheless held that there was no state action when such "privately owned enterprises

123 *Id.* at 1008 (footnote omitted).

124 454 U.S. 312 (1981).

125 *Id.* at 321-22. The *Polk* Court, however, noted that a public defender may engage in some actions which are under color of state law. *Id.* at 325. It should be noted, however, that the physicians in *Blum*, unlike the public defender in *Polk*, were not directly employed by the state, although the existence of the URC on which they served was mandated by the state.

126 457 U.S. at 1009-10.

127 *Id.* at 1010. Since "those regulations themselves do not dictate the decision to discharge or transfer a patient, neither do the penalties so imposed for violating them." *Id.*

128 *Id.*

129 *Id.*

130 The Court characterized this contention as a "rather vague generalization." *Id.* The precise reasoning underlying the plaintiffs' assertion is not very clear.

131 *Id.* at 1010-11.

*provid[ed] services that the State would not necessarily provide.*"[132] The Court cited *Jackson v. Metropolitan Edison Co.* as support for this proposition. This presumably implies that a different result could occur if the services provided by a private entity similarly licensed, regulated, and funded by the state, were those which the state itself was obligated to provide. As previously noted, for the purposes of the state action analysis, *Jackson* itself drew just such a distinction regarding the character of services provided by the private entity,[133] although the Court in *Rendell-Baker* apparently failed to appreciate the significance of this distinction.

When the *Blum* Court concluded that the nursing home did not perform a function that has been "traditionally the exclusive prerogative of the State," it again emphasized that the private nursing homes provided a service which the state itself was not legally obligated to provide.[134] The Court reasoned that these requirements were not satisfied in *Blum*, since neither the state constitution nor the Medicaid statute required the state to actually provide nursing care services themselves. At best, they only provided for *funding*, and the plaintiffs had not challenged the funding function of the state.[135] Therefore, the private party was not performing any function which the state was required to perform. Consequently, the Court rejected the public function rationale as a basis for state action in this case. Since the state was not obligated to provide the nursing services, the Court apparently assumed that the "traditional and exclusive" components of the public function test articulated in *Jackson*[136] could not otherwise be satisfied. That assumption was correct under the facts of *Blum*.

The Court's reliance on the nonobligatory nature of the challenged activity, however, may signal a new requirement in the public function analysis—namely that the function so performed must be one mandated by the legislature.[137] If so, reading *Blum* together

132 *Id.* at 1011 (emphasis added).

133 *See* text accompanying note 68 *supra*.

134 457 U.S. at 1011 (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974)).

135 [The relevant New York constitutional provisions] do no more than authorize the legislature to provide funds for the care of the needy. *See* N.Y. CONST. art. XVII, §§ 1, 3. They do not mandate the provision of any particular care . . . . Similarly, the Medicaid statute requires that the States provide funding for skilled nursing services as a condition to the receipt of federal monies. 42 U.S.C. §§ 1396a(a)(13)(B), 1996d(a)(4)(A) (1982). It does not require that the States provide the services themselves.

457 U.S. at 1011.

136 *See* notes 65-68 *supra* and accompanying text.

137 Whether this is an accurate reading of the opinion or not, the language in this part of the decision distinguishes it from cases like *Rendell-Baker*, where the service performed by the private entity was one which the State was statutorily or constitutionally required to provide. Such a further blanket limitation on the vitality of the public function analysis,

with *Jackson* could lead to a new version of the public function test. *Jackson* had indicated that, even in the absence of the exclusivity requirement, the public function test might be met when the state has a positive duty to perform a particular service.[138] Thus it could be argued that the import of *Jackson* and *Blum* taken together is that a public function must be one which the state is obligated to perform, but which need not be performed exclusively by the state.

Unlike *Rendell-Baker*, *Blum* thus indicated some willingness by the Court to consider the relevance of the obligatory nature of the activity under question to the state action inquiry. Pragmatically, however, the *Blum* majority's implicit acknowledgment of the relevance of such a state obligation may be meaningless in view of the extremely narrow manner in which the Court defined the state's obligation in that case. Acknowledging the relevance of a state's obligation seemed to leave the door open for consideration of public expectations. But the scope of such expectations was so limited by the Court's narrow definition of the nature of the challenged activity in *Blum* that any such expectations became virtually nonexistent.

In a one sentence argument which cited no authority, the Court in *Blum* hastily concluded that even if the plaintiffs' assertion that the state had statutory and constitutional duties and obligations to provide nursing care was correct, "it would not follow that decisions made in the day-to-day administration of a nursing home are the kind of decisions traditionally and exclusively made by the sovereign for and on behalf of the public."[139] If the state has such a duty, it is difficult to accept the Court's conclusion, particularly in light of other indicia of state involvement such as funding, licensing, and regulation. Moreover, as already noted,[140] the existence of an obligation on the part of the state to provide such services should impose a different framework of analysis. Further, the *Blum* decision for the first time specifically couched the public function test in nexus terms.[141] Such language may indicate that the public function test now requires not only scrutiny of the precise nature of the activity being challenged,[142] but also some nexus between the

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however, is not dictated by precedent. Rather, it would reflect an evergrowing judicial dissatisfaction with a mode of analysis which, because of its potentially indeterminate scope, would allow for continued and unlimited expansion of the state action concept. The Burger Court's opposition to such an expansion has therefore encouraged the Court to erode the efficacy of the public function test at every possible opportunity.

138 *See* notes 65-119 *supra* and accompanying text.

139 457 U.S. at 1012.

140 *See* notes 87-102 *supra*.

141 457 U.S. at 1004-05.

142 *See* Jakosa, *Parsing Public From Private: The Failure of Differential State Action Analysis*, 19 HARV. C.R.-C.L. L. REV. 193 (1984).

state and that activity. If so, this would seem to be a major retreat from the Court's prior holding in *Marsh v. Alabama*.[143]

*Marsh* had held that the actions of the officials of a privately owned company town constituted state action. In that case, the officials had pressed trespass charges against a Jehovah's Witness for distributing literature on the sidewalk of the town's "business block." The *Marsh* opinion concluded that the privately owned town took on all the characteristics of a municipality. It also emphasized that the public's expectation that first amendment rights would be protected did not change simply because a private party had legal title to all of the town.[144] In *Marsh*, a public function analysis was used precisely because the state had no affirmative involvement with the Gulf Shipbuilding Company that owned and operated the company town of Chickasaw, Alabama. Nevertheless, *Marsh* was cited with approval in *Rendell-Baker*.[145] Thus, while it is clear that both *Rendell-Baker* and *Blum* demonstrate the Court's continued adherence to a severely restrictive public function test, both opinions also cast some uncertainty on the precise nature of that restrictive mode of doctrinal analysis.

It also remains unclear from the *Blum* decision whether the Court now demands that all three "principles" or "requirements"—nexus, coercive power or significant encouragement, and the traditionally exclusive public function—be satisfied in a single case to establish state action. If so, this presents an almost impossible burden to meet.[146] It would be a significant departure from precedent for the Court to now require that all three requirements be met in order to establish state action. In fact, the Court in *Flagg Brothers v. Brooks*, had implicitly recognized that state action could be found either under the compulsion rationale or *alternatively*

143 *See* 326 U.S. 501 (1946).

144 *Id.* at 507. In his concurring opinion, Justice Frankfurter expressed similar views regarding public expectations and state-defined property rights:

> A company-owned town gives rise to a network of property relations. As to these, the judicial organ of a State has the final say. But a company-owned town is a town. In its community aspects, it does not differ from other towns. These community aspects are decisive in adjusting the relations now before us, and more particularly in adjudicating the clash of freedoms which the Bill of Rights was designed to resolve—the freedom of the community to regulate its life and the freedom of the individual to exercise his religion and to disseminate his ideas. Title to property as defined by State law controls property relations; it cannot control issues of civil liberties which arise precisely because a company town is a town as well as a congeries of property relations.

*Id.* at 510-11 (Frankfurter, J., concurring); *cf.* Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968). *But see* the Court's subsequent decisions in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) and Hudgens v. NLRB, 424 U.S. 507 (1976).

145 457 U.S. 830, 849 (1982).

146 *See* Comment, *supra* note 6, at 327.

under the public function doctrine.[147]

At least one lower federal court has suggested that the *Blum* Court's analysis required the partial aggregation of requirements which had formerly been viewed as separate and individually sufficient bases for supporting a finding of state action.[148] The *Blum* Court was actually silent on the interrelationship between the three approaches. The aggregation question is somewhat more difficult to resolve because the *Blum* Court focused on the same fact—the decision to discharge or transfer patients—in order to conclude that none of the requirements for state action was met.[149] Since the benefit level was adjusted merely in *response* to this decision to transfer or discharge the patient, the Court was able to conclude that there was no nexus, no coercive action by the state, no affirmative command by the state, no joint participation with the state, and no delegation of a public function traditionally reserved to the exclusive prerogative of the state.

The dissent in *Blum* did not define the questioned conduct as narrowly as did the majority. The dissent cautioned that "a realistic and delicate appraisal of the state's involvement in the total context of the action taken"[150] is essential in deciding whether actions performed directly by nongovernment employees is state action. According to the dissent, by failing to subject the regulatory scheme at issue to anything other than a "perfunctory examination,"[151] the majority had "fail[ed] to perceive the decisive involvement of the state in the private conduct."[152] While the dissent did not expressly

147 436 U.S. at 157-66; *see also* Rowe, *supra* note 6, at 761 n.10; Comment, *supra* note 6, at 328.

148 In Watkins v. Reed, 557 F. Supp. 278, 283 (E.D. Ky. 1983), the court held that an airport taxicab association did not act under color of state law in suspending taxicab drivers from operating their cabs at the airport. The court held that two inquiries must be made in analyzing the state action question. First, is there mutual dependence—a symbiotic relationship—between the state and the private parties? Second, is there a close nexus between the challenged action and the state regulation which would make the state responsible for the specific conduct of which the plaintiff complains. *Id.* at 280. The district court maintained that both *Blum* and *Rendell-Baker* "tended to merge these inquiries and highlighted some of the factors to be considered in making these determinations." *Id.* at 281 & n.9. According to *Watkins*, the factors included regulation by the state, use of coercive power or provision of significant encouragement by the state, performance of a public function that is traditionally the exclusive prerogative of the state, state financial assistance or other cooperation which creates a symbiotic relationship between the state and the private entity. *Id.* The court concluded that "all of the factors unsuccessfully asserted in *Blum* in support of a finding of state action are present here and likewise unsuccessful." *Id.* at 282. Moreover, the court reasoned that various indicia of state action could not be aggregated because, as in *Blum*, the private entity operated in a completely independent fashion in its decision making process. *Id.* at 282-83.

149 *See also* Comment, *supra* note 6, at 328-30.

150 457 U.S. at 1013 (Brennan, J., dissenting).

151 *Id.* at 1014 (Brennan, J., dissenting).

152 *Id.* (Brennan, J., dissenting).

acknowledge the relevance of public expectations, the dissent impliedly acknowledged it by describing a totality of circumstances approach similiar to the approaches used in *Marsh* and *Burton*.[153]

Thus the dissent found that the overall impact of the regulatory scheme was the fiscal savings for the state. The majority had failed to recognize that decisions about a patient's level of care "have far less to do with the exercise of independent professional judgment than they do with the *State's* desire to save money."[154] To the dissent, the state had delegated a decision to reduce a public assistance recipient's benefits to a "private" party[155] by giving that party "the responsibility to determine the recipient's need."[156] Additionally, the state itself "suppl[ied] the standards to be used in making the delegated decision."[157]

### D. Lugar v. Edmondson Oil Co.: *Let the Attacher Beware*

Ironically, *Lugar v. Edmondson Oil Co.*,[158] the only decision of the trilogy finding state action, best illustrates the Burger Court's restrictive approach to the state action question. The decision appears to signal a return to that era in the development of the state action doctrine that required direct action by formal governmental actors.[159]

In *Lugar*, a debtor brought a section 1983 suit against a creditor. The creditor had obtained a prejudgment attachment on the debtor's property pursuant to a state statute that required the creditor to make certain allegations in an ex parte petition. In the petition, the creditor had to allege that he believed that his debtor was disposing of, or might dispose of, his property to escape paying his creditors. The clerk of the state court issued a writ of attachment which effectively sequestered the debtor's property. The county sheriff then executed the writ.[160] Subsequent to the execution in

153 *See* text accompanying notes 51-54, 143-45 *supra*.

154 457 U.S. at 1015 (Brennan, J., dissenting) (emphasis in original).

155 *Id.* at 1018-19 (quoting 629 F.2d 817, 820 (2d Cir. 1980)).

156 *Id.* at 1019.

157 *Id.*

158 457 U.S. 922 (1982).

159 *But see* Phillips, *supra* note 6, at 720, who asserts that:

> Restrictive as the [the Burger Court state action decisions] may be, however, these decisions do not yet signal a return to the strict formalism of the pre-1945 period . . . . At least in the area of regulation, however, the emphasis on the need for governmental compulsion of the specific private behavior challenged as unconstitutional in cases like *Jackson* and *Blum* . . . seem to tend toward the pre-World War II status quo. That is, under such tests a claimant attempting to make constitutional norms applicable to a private actor may be required to show a degree of formal governmental involvement sufficient to make the government's action unconstitutional.

160 457 U.S. at 924-25. The debtor remained in possession.

this case, however, a state trial judge dismissed Edmundson Oil Company's attachment of Lugar's property because the company had failed to establish the statutory grounds for the attachment as alleged in its petition.[161] Lugar sued, claiming that the company and its president had acted in conjunction with the state to deprive him of his property without due process of law. Lugar sought compensatory and punitive damages for the financial loss allegedly caused by the attachment. Edmundson Oil Company was the only defendant.

Relying on *Flagg Brothers*,[162] the federal district court held that Edmundson's actions did not constitute state action under the fourteenth amendment. Therefore, Lugar's complaint failed to state a claim upon which relief could be granted under section 1983.[163] *Flagg Brothers* had held that the sale of the plaintiff's stored goods by a private warehouseman pursuant to a state statute did not constitute state action. The Fourth Circuit, however, reasoned that there was state action here since the participation of state officials absent in *Flagg Brothers* was present in *Lugar*.

Nevertheless, the court of appeals dismissed the claim for failure to meet the statutory "under color of" state law requirement. The court decided that this requirement was different from the fourteenth amendment state action requirement. The court of appeals held that a private party acts under color of law "only when there is a usurpation or corruption of official power by the private litigant or a surrender of judicial power to the private litigant in such a way that the independence of the enforcing officer has been compromised to a significant degree."[164]

The Supreme Court reversed both lower courts, holding that Edmundson Oil acted under color of state law by taking advantage of state created attachment procedures, and by using state officials to deprive Lugar of his property.[165] The Court decided that the court of appeals erred in concluding, on the basis of *Flagg Brothers*, that in this case state action under the fourteenth amendment was not necessarily action under color of state law for purposes of section 1983.[166] It reasoned that *Flagg* had not reached this issue, since the Court in that case had found that the plaintiffs had failed to show any state action.[167] "Although the state-action and under-

161 *Id.* at 925. The state statute provided for the subsequent hearing on the propriety of the attachment.

162 Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978).

163 457 U.S. at 925.

164 *Id.* at 926; 639 F.2d at 1069.

165 457 U.S. at 942.

166 *Id.*

167 *Id.* at 930.

color-of-state-law requirements are 'separate areas of inquiry,' *Flagg Brothers* did not hold nor suggest that state action, if present, might not satisfy the § 1983 requirement of conduct under color of state law."[168]

The Court also recognized that *Sniadach v. Family Finance Corp.*[169] and its progeny[170] had found state action and had applied "due process" to garnishment and prejudgment attachment procedures when state officials and a creditor acted jointly to secure the disputed property.[171] The Court then reviewed the statutory history of section 1983, and observed that "Congress thought it was creating a remedy as broad as the protection that the Fourteenth Amendment affords the individual."[172] Therefore, it would be inconsistent with prior cases and the will of Congress in creating section 1983 to maintain that conduct satisfying the state action requirement of the fourteenth amendment did not also satisfy the statutory requirement of action under color of state law.[173]

The Court then examined the purposes of the state action doctrine. It identifed the need to safeguard individual freedom and the principles of federalism as purposes of the doctrine.[174] The Court

168 *Id.* There was no reason in *Flagg Brothers* to address the question whether there was action under color of state law. The *Flagg* Court expressly eschewed deciding whether that requirement was satisfied by private action authorized by state law. 436 U.S. at 156. Noting that *Flagg*'s two part approach in a § 1983 cause of action was derived from Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970), the *Lugar* court emphasized that nothing in the language of the *Adickes* opinion suggested that, at least when a private party acts in conjunction with a state official, there is any difference between the statutory requirement of acting "under color" of law and the constitutional standard of state action. 457 U.S. at 931 n.14. The *Lugar* Court noted that *Adickes* had relied on United States v. Price, 383 U.S. 787, 794 n.7 (1966), where the Court had concluded that state action and action under color of state law were the same. 457 U.S. at 932. The *Lugar* majority also criticized Justice Powell's dissent in *Lugar* for "confus[ing] the two counts of the complaint" in *Adickes*. *Id.* at 932 n.15. Only the first, the conspiracy count, relied on the joint participation theory. The second count was a "substantive" count in which the Court did not rely on a joint action theory but held that "petitioner would show an abridgment of her equal protection right, if she proves that Kress refused her service because of a state-enforced custom." *Id.* (quoting *Adickes*, 398 U.S. at 171). Noting that "the joint action count of *Adickes* did not involve a state law, whether 'plainly unconstitutional' or not," Justice White concluded that Justice Powell was, therefore, "wrong when he summarize[d] *Adickes* as holding that 'a private party acts under color of law when he conspires with state officials to secure the application of a state law so plainly unconstitutional as to enjoy no presumption of validity.' " *Id.* (citing *id.* at 954-55 (Powell, J., dissenting)).

169 395 U.S. 337 (1969).

170 North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972).

171 457 U.S. at 932-33.

172 *Id.* at 934.

173 *Id.* at 935. The Court cautioned, however, that it did not follow from its holding that all conduct which satisfied the under color of state law requirement would necessarily always satisfy the fourteenth amendment requirement of state action. *Id.* at 935 n.18.

174 Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It

proceeded to articulate a two part approach to determine whether the conduct allegedly depriving the plaintiff of a federal right could be fairly attributed to the state.[175] First, the alleged deprivation must "be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible."[176] Second, a court must determine whether the party charged with the deprivation could properly be characterized as a state actor. "This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State."[177] The two tests merge when the defendant is a state official and diverge when the defendant is a private party.[178]

The Court illustrated the difference between the two inquiries by comparing *Moose Lodge No. 107 v. Irvis*[179] to *Flagg Brothers*. *Moose Lodge* focused on the first part of this inquiry—state policy. In that case, the Court held that governmental regulation or licensing of a private entity did not necessarily transform all actions taken by that entity into state action. In *Moose Lodge*, the Elks had a racially discriminatory policy about serving guests of members. The Court there held that no governmental decision which affected Moose Lodge was connected to the Lodge's discriminatory policies. *Flagg Brothers*, on the other hand, focused on the second part of this inquiry—the character of the defendant to the section 1983 action. In that case, the Court held that action by a private party pursuant to a state statute authorizing a warehouseman's self-help remedy, "without something more," would not justify characterizing that party as a state actor.[180] That "something more" might vary according to the circumstances.

The *Lugar* majority said that such variance was a recognition that the Court had "articulated a number of different factors or

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> also avoids imposing on the state, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order.

*Id.* at 936-37.

175 *Id.* at 937.

176 *Id.* The Court also characterized this first prong as requiring that the deprivation must have "resulted from the exercise of a right or privilege having its source in state authority." *Id.* at 939.

177 *Id.* at 937.

178 *Id.*

179 407 U.S. 163 (1972).

180 436 U.S. 149, 164 (1978).

tests in different contexts."[181] After listing the various state action formulations, the Court stopped short of identifying any common denominators in the state action theories and decisions by conveniently concluding that in the case before it, it did not have to resolve "[w]hether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact bound inquiry that confronts the Court in such a situation."[182]

Turning to the facts in *Lugar*, the Court acknowledged that state action produced the procedural scheme set up by the statute.[183] Since the state legislature had acted to create the scheme, it could be addressed in a section 1983 action, if the second part of the state action requirement—that the defendants were state actors—was also met.[184] The Court concluded that this second element was met because Edmundson Oil "invok[ed] the aid of state officials to take advantage of state-created attachment procedures."[185]

Relying on *Adickes v. S. H. Kress & Co.*,[186] the Court held that the private party's joint conduct with state officials in such seizures of disputed property was sufficient to make that party a state actor under the fourteenth amendment. The Supreme Court criticized the reasoning of the court of appeals, writing:

> The Court of Appeals erred in holding that in this context "joint participation" required something more than invoking the aid of state officials to take advantage of state-created attachment procedures . . . . Whatever may be true in other contexts, this is sufficient when the state had created a system whereby state officials will attach property on the *ex parte* application of one party to a private dispute.
>
> In summary, [Lugar] was deprived of his property through state action; [Edmundson was], therefore, acting under color of

181 457 U.S. at 939. The Court listed the public function, state compulsion, nexus, and joint action tests.

182 *Id.*

183 *Id.* at 941. The Court construed the complaint as challenging the state statute as being procedurally defective under the fourteenth amendment. Lugar's complaint actually presented three counts. Count three was a pendent claim based on state tort law which the Court did not address. Counts one and two were based on the due process clause of the fourteenth amendment. The Court concluded, however, that Count two did not state a cause of action under § 1983 since this count stated that the Edmundson Oil Co. deprived Lugar of his property through " 'malicious, wanton, willful [oppressive], [and] unlawful acts.' " *Id.* at 940. The Court reasoned that any conduct by a private person that was alleged to be unlawful under state law could not be an exercise of some right or privilege created by the state, and, therefore, was not fairly attributable to the state. *Id.* The only remaining count, Count one, was that which the Court construed as challenging the state statute.

184 *Id.* at 941.

185 *Id.* at 942.

186 398 U.S. 144 (1970). *See* note 60 *supra*.

state law in participating in that deprivation.[187]

*Lugar* was primarily concerned with the relationship between the section 1983 under color of state law requirement and the fourteenth amendment state action requirement. But the Court's willingness to hold that both requirements were met in the case was premised on the presence of the direct action taken by formal state officials.

The Court found state action on the basis of the challenged statute[188] and the overt actions of the state officials who aided Edmundson in attaching the property. Although the state officials' overt actions were not present in *Flagg*, the Court adopted reasoning not unlike that used in *Flagg*—despite that case's contrary result on the state action question. The *Lugar* Court premised its willingness to characterize the private party Edmundson as a "state actor," a necessary conclusion in its new two part fair attribution analysis, on the joint participation of government employees in the attachment process.

Finally, the *Lugar* Court officially laid to rest any notion that a private party's mere invocation of state procedures would automatically constitute sufficient joint participation with state officials to satisfy the under color of state law requirement. It did so by limiting the Court's analysis in *Lugar* "to the particular context of prejudgment attachment."[189] It would appear that this limitation presumed that some overt action by a state official had occurred in each of the Court's prior prejudgment attachment cases in which state action had been found.[190]

187 457 U.S. at 942.

188 The complaint did not clearly state whether the plaintiff had challenged the Virginia statute itself as being unconstitutional. The Court noted that it thought "resolution of this issue was essential to the proper disposition of the case." 457 U.S. at 940; *see also The Supreme Court, 1981 Term*, 96 HARV. L. REV. 1, 246 (1982). The Court then concluded that such a challenge had been made. This may have been another critical difference between *Lugar* and *Flagg*. *See also* J. CHOPER, Y. KAMISAR, & L. TRIBE, *supra* note 6, at 184.

189 457 U.S. at 939 n.21.

190 *But see id.* at 951 n.8, 952-53 n.10 (Powell, J., dissenting). Chief Justice Burger, the author of *Rendell-Baker*, dissented, contending that the inquiry under either § 1983 or the fourteenth amendment is the same, namely whether the alleged deprivation may be fairly attributable to the state. *Id.* at 943. Characterizing the majority opinion as "[r]elying on a dubious 'but for' analysis," he maintained that this case was no different from the situation where a private party brought suit against a defendant and obtained injunctive relief which may cause significant harm to that defendant. *Id.* Such invocation of the judicial process did not transform the actions of the private actor into those of the state. Lugar's remedy should lie in a suit for malicious prosecution. *Id.*

Justice Powell also wrote a dissent, in which he was joined by Justices Rehnquist and O'Connor. He would have framed the issue as the court of appeals did, namely whether a private party's invocation of a presumptively valid judicial process in pursuit of valid private ends is action under color of law. *Id.* at 947 n.4, 946-47. Justice Powell maintained that the majority had "inexplicably conflate[d] the two inquiries mandated by *Flagg Brothers*. *Id.* at 947. The majority had ignored the fact that there were two sets of actions involved in this

## III. Conclusion

In an analytical sense, the only thing *Lugar*, *Blum*, and *Rendell-Baker* have in common is their ambiguity of language and approach. This ambiguity is probably due to the fact that the decisions were each written by a different Justice. What remains clear, however, is that the Burger Court has stamped out any attempt to let the state action concept blossom as it did under the Vinson and Warren Courts.

The fact situations where *Lugar*, the only opinion from the trilogy finding state action, can apply are quite limited. Outside of the prejudgment attachment context, the scope of private party actions that will be subject to the strictures of the Constitution without the express direct imprimatur of offical action is thus greatly restricted, if not eliminated.

Beyond such generalities, there is little analytical guidance in the three opinions except that the nexus concept now appears to reign supreme. That none of the state action decisions from the bygone Vinson and Warren eras has been expressly overruled has no doubt contributed to what one commentator has called the "inevitable incoherence of modern state action theory."[191]

The analytical framework proposed here for cases like *Rendell-Baker* which involve the privatization phenomenon does not totally resolve this confusion. The proposal applies only to those cases where a statutory or constitutional obligation is imposed on the state to perform a particular task. It does not apply to those cases where the state has insinuated itself into the conduct of the private party through regulation or funding or both in the absence of such an obligation. Nor does it apply to the creation of a symbiotic relationship in the absence of such a mandatory obligation. Nevertheless, this new framework does suggest an appropriate state action formulation for a particular category of cases which deserve individualized attention. It will enable the state action theory to satisfy the

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case. The first was the defendant's filing a suit and an accompanying sequestration petition. The second was the state officials' issuance of the writ and execution of the lien. *Id.* According to Justice Powell, the question should have been whether the private parties acted under color of law in filing the petition and not whether they can properly be characterized as state actors. *Id.* When the inquiry is whether an action occurred under color of law, the dissent argued that the "joint participation" standard is not met when a private citizen merely "invoke[s] a presumptively valid judicial process in pursuit only of legitimate private ends." *Id.* at 948. The Court distinguished the situation in *Adickes* from that in *Lugar* by noting that the race discrimination involved in *Adickes* was "so plainly unconstitutional as to enjoy no presumption of validity." *Id.* at 955, 955 n.12. Justice Powell also acknowledged that the private creditor's action was "*followed* by state action, and that the private and state actions were not unconnected." *Id.* at 949 (emphasis in original). But, as in *Blum*, the state did not become responsible for private actions merely because it had responded to such private actions. *Id.*

191 Phillips, *supra* note 6, at 733.

public's expectations with regard to the applicability of constitutional limitations as well as to insulate from scrutiny by the federal judiciary those actions more appropriately left to the control of the private sector or state government.