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The privatization of prisons raises important issues with respect to liability in suits brought by inmates. If a private company operates the prison, the state likely will be directly involved in some aspects of prison life, such as using force when necessary or making quasi-judicial decisions, but it may not be directly involved in the day-to-day operation of the institution. This dichotomy of involvement may lead to confusion over responsibility and accountability when a violation of rights is alleged to have occurred.

When a private party, as opposed to a government employee, is charged with abridging rights guaranteed by the Constitution or laws of the United States, the plaintiff, in order to prevail under 42 U.S.C.

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The author served as the Reporter on Legal Issues for the National Institute of Justice's National Forum on "Corrections and the Private Sector" (Feb. 1985). He also authored the Report that accompanied a Resolution presented by the American Bar Association Criminal Justice Section to the ABA House of Delegates, recommending that "jurisdictions that are considering the privatization of prisons and jails not proceed . . . until the complex constitutional, statutory, and contractual issues are satisfactorily developed and resolved." The Resolution was passed by the House of Delegates at its February 1986 meeting. He is currently serving as Reporter for the ABA Criminal Justice Section's study on the privatization of corrections, under grants from the John D. and Catherine T. MacArthur Foundation and the National Institute of Justice. That project, which will include as one of its sections a modified version of this article, will culminate in late 1988 in the publication of a monograph on the legal aspects of prison privatization. Of course, the analyses, conclusions, and points of view expressed in this article do not necessarily represent the positions of the American Bar Association, the MacArthur Foundation, or the National Institute of Justice.

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section 1983, must show that the private party was acting "under color of state law"—that is, that there was state action. The reason for this is fundamental. The fifth and fourteenth amendments, which prohibit the government from denying federal constitutional rights and which guarantee due process of law, apply to the acts of state and federal governments, and not to the acts of private parties or entities.

The ultimate issue in determining whether a person is subject to suit for violation of an individual's constitutional rights is whether "the alleged infringement of federal rights [is] 'fairly attributable to the State.'" A person acts under color of state law "only when exercising power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'"

These concepts are crucial to prison privatization. One argument in favor of prison privatization is that it will reduce or eliminate government liability. Yet an examination of the state action issue indicates that this will not happen. If the state action requirement is not met, then the private company will not be liable under the Civil Rights Act. If the requirement is met, however, leading to the private company's liability, then the company's costs will increase, resulting in higher rates charged to the government. Privatization thus will be less attractive, both to the government (due to increased prices) and to investors.


   Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . .


3. See Shelley v. Kraemer, 334 U.S. 1, 13 (1948); Civil Rights Cases, 109 U.S. 3, 11 (1883). Throughout this article, the term "state action" refers to action at any level of government. See, e.g., 4 Encyclopedia of the American Constitution 1729 (L. Levy, K. Karst & D. Mahoney eds. 1986) (explaining that the term "state action" denotes action of any "unit or element of government"); 2 R. Rotunda, J. Nowak & J. Young, Treatise on Constitutional Law § 16.1, at 157 (1986) ("[A]ll problems relating to the existence of government action—local, state or federal—which would subject an individual to constitutional restriction come under the heading of 'state action.'"); L. Tribe, American Constitutional Law § 18-1, at 1688 & n.2 (2d ed. 1988) (utilizing the term "state action" when denoting "action by any level of government, from local to national").


5. Polk County v. Dodson, 454 U.S. 312, 317-18 (1981) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)); see also Evans v. Newton, 382 U.S. 296, 299 (1966) ("[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State . . . ").
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(due to greater risk on their investment).

My thesis is that, in the privatization situation in which the operation of an entire institution is contracted out to private hands, there is no doubt that state action is present. It is therefore clear that privatization will neither eliminate nor reduce the liability of the government or the private company for violations of an individual's rights.

I. INTRODUCTION TO STATE ACTION DOCTRINE

The progenitors of the fourteenth amendment\(^6\) established the state action requirement as a constitutional limit on the government, in order to protect individual rights.\(^7\) Despite the framers' efforts, however, the courts over the past half century have muddled the meaning of state action, failing to apply a consistent analysis for determining whether it is present.\(^8\) Perhaps not surprisingly, the development of the state action doctrine has depended on the composition of the United States Supreme Court and the interests that were involved in a particular claim.\(^9\) These interests included the public expectation of equality

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6. U.S. CONST. amend. XIV, § 1 provides in part:
   No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

7. See The Federalist No. 28, at 178 (A. Hamilton) (C. Russiter ed. 1961) (stating that federal and state governmental scheme is in place to check possible misdeeds); id. No. 46, at 294 (J. Madison) (positing that the rights reserved by the state government were designed to keep encroachment of federal government in check); id. No. 51, at 201 (J. Madison) (arguing that rights of citizens are protected by double security system of separate federal and state governments and three distinct governmental branches on both federal and state levels); id. No. 47, at 300 (J. Madison) (arguing that absence of separation of powers is equal to tyranny); see also Comment, Section 1983 and the Independent Contractor, 74 GEO. L.J. 457, 468 (1985) (examining constitutional limits on government and individual rights). The fourteenth amendment is also the vehicle through which constitutional limitations restrain the states. U.S. CONST. amend XIV (mandating certain limitations on government interference); see also Schneider, The 1982 State Action Trilogy: Doctrinal Contradiction, Confusion, and a Proposal for Change, 60 NOTRE DAME L. REV. 1150, 1153 (1985) (describing fourteenth amendment as limiting); Comment, supra, at 468 (arguing that fourteenth amendment serves to restrain state government as well as federal government). In addition to the protection of federalism, state action cases also concern the competing constitutional claims of the actors. See Note, State Action After Jackson v. Metropolitan Edison Co.: Analytical Framework for a Restrictive Doctrine, 81 DICK. L. REV. 315, 343 (1977) (discussing conflict between the right to be free from governmental interference and the fourteenth amendment).


9. See, e.g., Rendell-Baker v. Kohn, 457 U.S. 830, 840-43 (1982) (no state action found for due process claims of vocational counselor who was terminated by private school that received
and due process, and, conversely, the right to act without federal or state interference. Because these factors have caused inconsistencies in the doctrine, the state action inquiry has been labelled a "paragon of unclarity," a "protean concept," an "impossible task," and a "conceptual disaster area."

A. Historical Approaches to State Action: Four Traditional Tests

In the earlier cases, courts used several analyses to determine the existence of state action. In *Burton v. Wilmington Parking Authority,* for example, the Supreme Court articulated a symbiosis test, declaring that "[o]nly by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance." It found that state action was present because a symbiotic relationship existed between the private entity and the state. The Court emphasized that the entity—a restaurant in a build-

more than 90% of its operating budget from the state); *Burton v. Wilmington Parking Auth.,* 365 U.S. 715, 721-26 (1961) (finding state action where restaurant, which operated in premises leased from an agency of the State of Delaware, refused to serve blacks during civil rights era); *Marsh v. Alabama,* 326 U.S. 501, 505 (1946) (state action found because of preferred position of first amendment where company-owned town completely barred the distribution of religious literature on its sidewalk).

10. *See Note,* supra note 7, at 343 (discussing conflict between the right to be free from governmental interference and the fourteenth amendment); *see also supra* note 7 and accompanying text (posing question of whether due process or individual freedom ought to be held as most important right or fundamental right).


13. 365 U.S. 715 (1961). In *Burton,* the plaintiff brought suit against a restaurant that was located in a publicly owned and operated building and that refused to serve him on the sole basis of his race. *Id.* at 716. The plaintiff claimed that the restaurant violated his rights under the equal protection clause of the fourteenth amendment. *Id.*

14. *Id.* at 722.

15. *Id.* at 722-26. The Court used the least restrictive state action test, finding state action where a racially discriminatory restaurant leased space in a public parking garage. The Court reasoned that the state and restaurant were in a position of interdependence. *Id.* at 725. This interdependence theory became known as the symbiosis analysis, and was employed frequently in state action arguments. *See, e.g., Holodnak v. Avco Corp.,* 514 F.2d 285, 289 (2d Cir.) (applying the "symbiotic relationship" analysis enunciated in *Burton,* cert. denied, 423 U.S. 892 (1975); Howard Univ. v. NCAA, 510 F.2d 213, 217 (D.C. Cir. 1975) (stating that, if the government so
ing complex that included a public parking garage—was physically and financially integrated with the public activity such that it was an indispensible part of the state’s operation of the public facility.¹⁰

In Jackson v. Metropolitan Edison Co.,¹⁷ the Court discussed two tests—the close nexus test and the public function test. The Court stated that the inquiry under the close nexus test was whether the connection between the state and the challenged action was sufficiently close for the action to be treated as that of the state.¹⁸ Among the factors considered important to this analysis were state funding and state regulation.¹⁹ Alternatively, under the public function test, the Court required “the exercise by a private entity of powers traditionally exclusively reserved to the State.”²⁰

In Flagg Bros., Inc. v.
Brooks, the Court reiterated this test and noted that, although the government traditionally performed many functions, few functions were exclusively reserved to the state.

A fourth test that the Supreme Court applied in its early decisions involved state compulsion or significant encouragement. In Adickes v. S.H. Kress & Co., for example, the Court found that the state's compulsion of the challenged conduct by a statutory provision or custom having the force of law warranted a finding of state action. Similarly, in Flagg Bros., the Court found no state action because the state merely permitted the challenged conduct but did not compel it. The compulsion test has rarely been applied alone; it is usually applied in conjunction with another test.

B. The 1982 Trilogy: An Attempt at Clarification

In 1982, the Supreme Court reevaluated the state action analyses in Lugar v. Edmondson Oil Co., Blum v. Yaretsky, and Rendell-Baker v. Kohn, and attempted to articulate a clearer standard. In Lugar, the Court found state action under an analysis that required the challenged conduct to be fairly attributable to the state. The Court specified that conduct will be fairly attributable if it is "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" and if the acting party is "a person who may fairly be said to be a state actor."

Function was not enough; the function had to be traditionally the exclusive prerogative of the state. Id. at 352-53.

22. Id. at 158. The Court concluded that the holding of elections is one function that traditionally has been reserved exclusively for states. The other circumstance that indicated a traditional and exclusive function was when a private corporation controlled a town and provided necessary municipal functions. Id. at 158-59 (citing Marsh v. Alabama, 326 U.S. 501 (1946)).
24. Id. at 171.
25. 436 U.S. at 164-66.
30. Lugar, 457 U.S. at 937. The Court stated that in its previous decisions it "insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State." Id.
31. Id. The Court further explained that a state actor is "a state official," a person who either
In *Blum* and *Rendell-Baker*, the Court used some of the "fairly attributable" language, but concentrated on the four traditional analyses for determining state action, concluding that satisfaction of any one of these analyses could lead to a finding of state action. The *Blum* Court discussed the close nexus test and noted that the relationship between the challenged conduct and the state must be such that the state was responsible for the conduct—that the state's exercise of coercive power or significant encouragement would warrant a finding that the state was responsible for a private decision. Additionally, if the private entity performed a function that was traditionally the exclusive prerogative of the state, a sufficient nexus would exist.

The *Rendell-Baker* Court concluded that neither the receipt of substantial public funds nor extensive state regulation was sufficient to establish a close nexus. The Court also stated that a fiscal relationship with the state, similar to the relationship that exists between the state and a contractor performing services for it, was not enough to establish state action by a symbiotic relationship, as in *Burton*.

"acted together with or has obtained significant aid from state officials," or a person whose "conduct is otherwise chargeable to the State." *Id.* According to the Court, the inquiries involving whether the deprivation was caused by a right or privilege emanating from state authority and whether the party charged with the deprivation was a state actor are separate issues when the constitutional claim is directed against a party without apparent state authority. *Id.*

32. *Blum*, 457 U.S. at 1004 (noting the fair attribution test but stating that the facts did not support the use of this inquiry because the case did not involve the "enforcement of state laws or regulations by state officials who are themselves parties in the lawsuit"); *Rendell-Baker*, 457 U.S. at 838 (stating that ultimate issue of whether person is subject to suit under section 1983 is whether infringement is fairly attributable to state). The *Rendell-Baker* Court, however, believed that the *Blum* Court used the fairly attributable analysis, *id.* at 839-40, and stated that, in *Blum*, "[t]he Court considered whether certain nursing homes were state actors for the purpose of determining whether decisions regarding transfers of patients could be fairly attributed to the State, and hence be subjected to Fourteenth Amendment due process requirements." *Id.*

34. *Blum*, 457 U.S. at 1004-05.
35. *Id.* at 1005.
36. *Rendell-Baker*, 457 U.S. at 840-41. The Court expressed that "[a]cts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts." *Id.* at 841. The Court also stated that, unless the extensive state regulation compelled or influenced the private party's decision, the decision would not be state action. *Id.* But see Schneider, supra note 7, at 1164 (stating that the nexus analysis of *Rendell-Baker* is inappropriate where a state delegates a task that it is statutorily required to provide).

37. *Rendell-Baker*, 457 U.S. at 842-43; see also Schneider, supra note 7, at 1160 (noting that in *Rendell-Baker* the Court summarily concluded that the state and the school did not share a symbiotic relationship). At least one court has construed *Rendell-Baker*'s discussion of the symbiotic relationship test as seriously impairing this test. See Frazier v. Board of Trustees, 765 F.2d 1278, 1287 (5th Cir. 1985), cert. denied, 476 U.S. 1142 (1986).
nally, the Court applied the public function analysis and concluded that the function must belong to the state—traditionally and that legislation providing for the state's performance of services does not render those services within the exclusive prerogative of the state. Instead, such legislation must explicitly state that the function may only be performed by the state in order for the "exclusive" requirement to be satisfied.

Despite the Court's attempt to clarify the state action doctrine in this trilogy of cases, it remains unclear what set of facts will establish state action and which analysis will be most persuasive. One point is clear, however: The 1982 trilogy established a restrictive standard for state action.

II. Development of the State Action Doctrine: The Application to Prison Privatization

Federal and state cases shed light on three of the state action analyses—public function, close nexus, and state compulsion—and suggest the possibility of combining all of these analyses into a fourth test for state action. In addition, the more recent cases illustrate how the courts have applied the holdings of the 1982 trilogy. Most important, the recent case law can help to determine the factors that will be important to the application of the state action requirement in a private prison context.

A. Public Function Test

The broadest application of the public function test came in 1946, in Marsh v. Alabama. In Marsh, the Supreme Court held the state to be in violation of the first and fourteenth amendments when the state enforced a privately owned town's regulation against the distribution of

38. Rendell-Baker, 457 U.S. at 842. The Court noted that, while the State of Massachusetts had made a legislative policy choice to provide education to maladjusted high school students at the public's expense, this decision in no way made these services the exclusive province of the state. The services in question had not been traditionally provided by the state, as evidenced by the fact that the state had only recently undertaken the service. Id.

39. Id. (the question is whether the function performed has been "traditionally the exclusive prerogative of the State").

40. See Schneider, supra note 7, at 1177 (opining that it is unclear whether all analyses must now be satisfied).

41. But see id. at 1166-70 (proposing new analyses for state action, shifting focus from nexus approach to examination of the particular nature of the challenged conduct).

42. See supra note 15 (noting demise of symbiosis analysis).

religious literature on the streets of its business block. In making its decision, the Court found that the private town served a public function, as if it were a municipality. The public's expectation regarding the constitutional protection of its first amendment rights was an important factor in the Court's decision. Simply because it was a privately owned town did not decrease the public expectation that the first amendment would be protected.

This expansive analysis was restricted by the Court's 1974 opinion in *Jackson v. Metropolitan Edison Co.* In *Jackson*, the Court held that a private utility can only be characterized as performing a public function if the activity traditionally is reserved exclusively to the state. Four years later, the Court in *Flagg Bros.* used the traditionally exclusive notion with the public function analysis. The plaintiff in *Flagg Bros.* had been evicted and had her belongings placed in a private warehouse for storage. Because the plaintiff did not pay the storage costs, the warehouse threatened to sell the stored goods to satisfy the debt. This sale was permitted pursuant to state statute. The plaintiff brought a section 1983 action against the private warehouse, alleging violation of her fourteenth amendment rights. Employing the traditionally exclusive language in conjunction with the public function test, the Court found that the settlement of disputes between debtors and creditors was outside the arena of state action.

The Court utilized a similar analysis in *Lugar*, one of the three salient public function cases decided by the Court on the same day in

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44. *Id.* at 509.
45. *Id.* at 508.
46. *Id.* at 507. Thus, the Court's holding in *Marsh* illustrates both the public expectation and federalism concerns that are inherent in state action litigation. *Id.* at 508 (the corporation "cannot curtail the liberty of . . . these people consistently with the purposes of the Constitutional guarantees, and a state statute . . . which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution").
47. *Id.* at 507. The Court stated that, "whether a corporation or a municipality owns or possesses the town, the public in either case has an identical interest in the functioning of the community in such a manner that the channels of communication are free." *Id.*
49. *Id.* at 352; see Comment, supra note 7, at 469 (stating that public function test was limited in *Jackson*).
In Lugar, a debtor filed a section 1983 action against a private creditor who had invoked a state statute permitting prejudgment attachment. Pursuant to this statute, the state court clerk issued a writ of attachment and the sheriff sequestered plaintiff debtor's property. Reversing the lower courts, the Supreme Court held that the creditor, Edmondson Oil, acted under color of state law by using the state-created attachment process. The Court posited that Flagg Bros. did not apply, as the court of appeals had concluded, because both the state statute and the state's direct action through its officials denoted state action. This analysis was similar to that used in Flagg Bros., although there was no direct state action through a state official in that case.

Unlike Lugar and Flagg Bros., which permitted a state action finding under a compulsion or public function characterization, the Court in Blum v. Yaretsky demanded satisfaction of the state compulsion, public function, and close nexus analyses before a claim for state action could prevail. Blum considered whether a private nursing home's transfer decisions denoted state action when the nursing home operated under a state contract. In Blum, the plaintiffs had been

56. See supra notes 27-41 and accompanying text; see also Schneider, supra note 7, at 1153 (characterizing the three 1982 state action cases as a trilogy).
57. Lugar, 457 U.S. at 924.
58. Id. at 924-25.
59. Id. Justice Powell dissented, arguing that, when a state is not responsible for a private decision, the private action ought not to be considered state action. Id. at 949 (Powell, J., dissenting).
60. Id. at 942.
61. 436 U.S. at 164-65. The Court in Lugar developed a two-pronged test to determine state action: “First, the 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”; and “[s]econd, the party charged with the deprivation must be a person who may fairly be said to be a state actor.” 457 U.S. at 937. The Lugar test was developed by comparing Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) with Flagg Bros., 457 U.S. at 937. In Moose Lodge, a private club licensed by the Commonwealth of Pennsylvania to serve alcohol practiced a racially discriminatory serving policy. 407 U.S. at 171. The Court found that the government did not in any way effect this discrimination. Id. at 175-76. Hence, regarding the first prong, the Court in Lugar stated that government regulation does not necessarily make all private entities' conduct state action. Lugar, 457 U.S. at 938.

The Court then turned to Flagg Bros. to develop the second prong of its test. Id. at 938. To be characterized as a state actor, according to Flagg Bros., one must have done something more than act pursuant to a state statute. 436 U.S. at 164. The second prong focuses on the question of whether a section 1983 defendant can correctly be classified as a state actor. Lugar, 457 U.S. at 941. The Lugar Court held this element to be met because the defendant received the aid of state officials. Id. at 942.
62. The Court referred to the three state action tests as “requirements.” 457 U.S. at 1004-05.
63. Id. at 1003.
transferred to a unit rendering a lower level of care.\textsuperscript{64} They claimed that these transfers were in violation of their fourteenth amendment rights.\textsuperscript{65}

The Court in \textit{Blum} established a three-part test to analyze whether state action existed: There must be a close nexus between the state and the regulated nursing home; the state must compel the private nursing home's transfer decision; and the private nursing home must function in a manner that was traditionally the exclusive prerogative of the state.\textsuperscript{66} Using this tripartite test, the Court held that the transfer decisions did not constitute actions under color of state law because the transfers were premised on independent medical standards that the state did not establish.\textsuperscript{67}

Neither \textit{Blum} nor \textit{Lugar} involved the delegation of activities that the state is normally obliged to perform. Because \textit{Rendell-Baker}, however, did involve such a delegation, and because its outcome is at odds with the public expectation of the state's responsibility,\textsuperscript{68} it has an impact on state action analysis with respect to the privatization of state functions—the privatization of prisons, for example.\textsuperscript{69} In fact, \textit{Rendell-Baker} is the most relevant Supreme Court privatization case to date that involves state action.\textsuperscript{70} This case concerned a privately owned, leg-

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  \item \textsuperscript{64} \textit{Id.} at 995. The Court did not permit the challenge of transfers to a higher level of care. \textit{Id.} at 1002.
  \item \textsuperscript{65} Among other things, the plaintiffs claimed that they had not been afforded adequate notice of the transfer decisions and the reasons supporting them or of their right to an administrative hearing to challenge those decisions. \textit{Id.} at 996.
  \item \textsuperscript{66} \textit{Id.} at 1004-05.
  \item \textsuperscript{67} \textit{Id.} at 1012. The Court in \textit{Blum} compared the independent professional standards relevant to its holding to the adverse relationship that the lawyer has with the state due to the lawyer-client relationship. \textit{Id.} at 1008-09. The Court addressed the adverse lawyer-state relationship in \textit{Polk County} v. Dodson, 454 U.S. 312 (1981). In \textit{Polk County}, the Court held that a public defender's activities or functions did not constitute state action because the state had not developed the professional standards that govern a lawyer's conduct. \textit{Id.} at 321-22. The Court's reference to \textit{Polk County} in \textit{Blum} is interesting, because the Court in \textit{Polk County} contrasted the functions of the legal and medical professions. \textit{Id.} at 320. The legal profession, as described in \textit{Polk County}, is in place to ensure protection from harmful state action, whereas the medical profession, when institutional, assumes the same obligation and mission as does the state. \textit{Id.}
  \item \textsuperscript{68} \textit{See} Schneider, \textit{supra} note 7, at 1167-69 (delineating role of public expectation for finding of state action in privatization cases).
  \item \textsuperscript{69} Privatization cases involve at least two sets of interests: the aggrieved party's civil rights, and the private defendant's interest in freedom from governmental intervention.
  \item \textsuperscript{70} \textit{See also} West v. Atkins, 815 F.2d 993 (4th Cir.) (en banc), \textit{cert. granted}, 108 S. Ct. 256 (1987), discussed \textit{infra} at note 84. \textit{Rendell-Baker} presented two cases that were consolidated on appeal. The United States Court of Appeals for the First Circuit consolidated the cases after interlocutory appeal had been granted to the defendant under 28 U.S.C. § 1292(b). \textit{Rendell-Baker} v. Kohn, 641 F.2d 14 (1st Cir. 1981), \textit{aff'd}, 457 U.S 830 (1982).}
\end{itemize}
islatively established institution for maladjusted high school students.71 A vocational counselor at the school filed a claim under section 1983 after being dismissed for supporting a student petition.72 In a consolidated appeal of differing district court judgments, the United States Court of Appeals for the First Circuit ordered dismissal of the claim because the school did not act pursuant to color of state law in its termination decision.73 The United States Supreme Court affirmed, using the public function and close nexus tests together for the first time.74

The Court conceded that special education was a public function that state law delegated to a private entity, but the question remained whether special education was the traditional and exclusive prerogative of the state.75 The Court held that the state delegation statute, as well as the school’s public function, were not enough to prove that special education was an exclusive state prerogative.76

The requirement of an exclusive state prerogative was first applied to the public function test in Jackson v. Metropolitan Edison Co.,77 reflecting the concern of increasing litigation under section 1983.78 In Jackson, the plaintiff brought a section 1983 action against a monopo-

71. 457 U.S. at 834-35. Massachusetts law imposed responsibility on the state to provide special education. Mass. Gen. Laws Ann. ch. 71B, §§ 3, 4 (West Supp. 1981). This same statute permitted the delegation of special education to private schools. Id. § 3. The delegation statute also required extensive regulation, including periodic reviews of each student’s progress, specific education programs for each student, and reviews of the original placement decision. Id. The New Perspectives School that was involved in Rendell-Baker received ninety to ninety-nine percent of its budget from public funds because of the large number of students placed there pursuant to the Massachusetts delegation statute. Rendell-Baker, 457 U.S. at 832. But the Court concluded that dependence on public funding did not make the private acts public. Id. at 840.

72. Rendell-Baker, 457 U.S. at 834. The counselor, Rendell-Baker, requested a hearing or reinstatement. The school decided to appoint a grievance committee to consider her claims. Id. Several months later, five other teachers were dismissed due to their public statements regarding New Perspectives’ educational environment and the students’ rights to free speech. Id. at 835. The five teachers also brought suit pursuant to section 1983. Id.


74. 457 U.S. at 840-43. The Court in Rendell-Baker found that the fourteenth amendment and section 1983 were functionally similar. Id. at 838. This finding is to be distinguished from Lugar, in which the Court cautiously stated the differences between the two. Lugar, 457 U.S. at 927-28 & n.8.

75. Rendell-Baker, 457 U.S. at 842.

76. Id. at 841-42. Using the exclusivity clause imposed in Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974), the Court thus limited the public function doctrine.

77. 419 U.S. at 352.

listic private utility, claiming a violation of due process because service to her home had been terminated for failure to pay. Under the test formulated by the Court, the plaintiff could prevail if the utility functioned in a fashion traditionally and exclusively reserved for the state. Plaintiff's claim failed because the Court held the utility provision to be neither the traditional nor the exclusive function of the government.

Given its reliance on the Jackson holding, Rendell-Baker built upon the Jackson exclusivity test, which required that the delegated function be traditionally provided by the state. Yet the Massachusetts delegation statute, as well as the huge public school system, tended to show that the provision of education was a traditional state function. Nevertheless, the requirement of exclusivity in Rendell-Baker was said to follow from the Jackson decision.

Ignoring Jackson's requirement that a delegation of a traditional government function be found before applying the exclusive state action test, the Rendell-Baker Court couched the issue as whether a private school with public funding and regulation, when terminating employees, acts under color of state law. Given the statutory duty to provide special education, if the state had provided the service itself it would not be permitted to act outside the limits of the Constitution. The state should not be permitted to distance itself from its traditional and statutory duties through privatization.

Although cases in state courts and lower federal courts have addressed state action and the public function analysis, the number of

80. Id. at 353.
81. Id. Nevertheless, it is clear that Jackson did not intend the exclusivity limitation to apply whenever the public function test is used. Id.
82. Id.
84. Compare Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 703 (11th Cir. 1985) (holding that private health care provider to county jail may be liable under section 1983 for inadequate medical services to prisoners) and Ort v. Pinchback, 786 F.2d 1105, 1107 (11th Cir. 1986) (physician who contracts with state to provide medical care to inmates acts under color of state law) with Calvert v. Sharp, 748 F.2d 861 (4th Cir. 1984) (finding no state action where doctor merely cared for patients without a supervisory function or dependence on state funds), cert. denied, 471 U.S 1132 (1985).

In a 1987 en banc decision, the United States Court of Appeals for the Fourth Circuit declined to overrule Calvert. West v. Atkins, 815 F.2d 993, 994-96 (4th Cir. 1987) (en banc) (7-3 vote) (holding that physician who was under contract to provide orthopedic services to inmates at a state prison hospital did not act under color of state law for purposes of section 1983 when he allegedly provided inadequate medical treatment to prisoner). The United State Supreme Court granted certiorari in West. 108 S. Ct. 256 (1987). The case was argued on March 28, 1988. In an interesting question that may portend the Court's direction in the case, Justice Blackmun asked
these cases diminishes considerably when limited to the privatization issue involved in *Rendell-Baker*. The most pertinent post-*Rendell-Baker* federal case regarding privatization, especially of prisons, is *Medina v. O'Neill*. The federal district court in *Medina* considered the issue of whether the Immigration and Naturalization Service ("INS") was liable under state action theory after it had contracted for the incarceration of undocumented workers with a private detention corporation. Prior to deportation, sixteen Colombian inmates were incarcerated by that corporation for the INS. After recapturing the prisoners following an escape attempt, a private guard, untrained in the proper use of firearms, was using his shotgun as a prod when it discharged, killing one of the detained aliens and wounding another. The plaintiffs claimed, pursuant to section 1983, that they had been unconstitutionally deprived of due process and subjected to cruel and unusual punishment. They argued that state action existed because the INS had a duty to monitor their detention and had failed in this duty. The INS responded that there was no state action because the detained aliens were at all times in the custody of the private detention corporation.

The court held for the plaintiffs, finding "obvious state action" on the part of both the INS and the private company. The court noted that, although there was no precise formula for finding state action, the Supreme Court has recognized that the public function concept includes whether the function performed has been traditionally the exclu-
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sive prerogative of the state. The court in Medina then stated: "[D]etention is a power reserved to the government, and is an exclusive prerogative of the state. . . . [Thus,] it is evident that the actions of all the defendants were state action within the purview of the public function doctrine."194

Indicative of most state cases involving state action is Rathbun v. Starr Commonwealth for Boys. Like Rendell-Baker and Medina, Rathbun is a privatization case. In Rathbun, the plaintiff was an employee of a private institution that housed boys in the custody of the Michigan Department of Social Services. Because the plaintiff had been raped by one of the detained residents, she brought suit against the Department of Social Services under section 1983. The Michigan Court of Appeals stated that a private entity acted under color of state law pursuant to section 1983 when it performed a function that is essentially and traditionally public.199

This standard is obviously similar to the public function analysis employed in Rendell-Baker and Medina. Unlike Rendell-Baker, but just as in Medina, the Rathbun court found state action. The Rathbun holding is bothersome, however, because its fact pattern is much closer to Rendell-Baker than it is to Medina. But Rathbun and Rendell-Baker can be distinguished in that the facility in Rendell-Baker was primarily used for education. Education under Rendell-Baker was not an exclusive public function, whereas the Rathbun facility was only concerned with detention, a traditional and exclusive public function.

A distillation of these cases thus leads to the conclusion that the conduct of those who operate private prisons will be held to constitute state action under the public function test.

B. Close Nexus Test

The Burger Court primarily applied the close nexus test during its earlier years, perpetuating the prior Court's expansive view of the state action doctrine; the Court now uses this test much less frequently.100

93. Id. (citing Blum, 457 U.S. at 1011; Rendell-Baker, 457 U.S. at 842; and Jackson, 419 U.S. at 353).
94. Id. at 1038-39.
96. Id. at 312, 377 N.W.2d at 877.
97. Id. at 307, 377 N.W.2d at 874.
98. Id. at 308, 377 N.W.2d at 875.
99. Id. at 312, 377 N.W.2d at 877.
100. Schneider, supra note 8, at 760. The close nexus test is an "expansive approach to state
State action is found under this test if a substantial connection or nexus is established between the state and the private entity’s challenged actions. The critical question is whether the private party’s challenged action can be treated as that of the state. Courts usually examine the extent of the state’s funding and regulation of the private entity to determine if the required nexus is present. Although the determination of state action in a private prison context will turn on the facts of each case, the trend in the courts may shed light on what is required.

Recently, state action has not been found under a pure close nexus test based on factors such as state funding and regulation; courts have considered other factors important and have used the nexus language in connection with other tests. The best example of the use of the close nexus test is in Milonas v. Williams. In this case, former students brought a section 1983 claim against a private residential school for youths with behavioral problems, alleging that the school’s behavior modification program violated their constitutional rights. Specifically, the plaintiffs claimed that the school administrators, acting under color of state law, had caused them to be subjected to antitherapeutic and inhumane treatment, resulting in violations of the cruel and unusual punishment clause of the eighth amendment and the due process clause of the fourteenth amendment. The court found that there was significant state regulation of the school’s educational program and action, which was acceptable in the context of racial discrimination, [but] was not as desirable in subsequent cases where race was not a factor.” Id. at 741. The decrease in racial discrimination litigation explains the Burger Court’s shift from reliance on this test to more restrictive tests.

101. Id. at 760 n.152. This source further states that the Burger Court used the nexus test to “replace the cumulative totality approach of Burton.” Id. It may be argued, however, that the Burger Court, and recent federal district and appellate courts, have returned to the use of a totality approach to state action, combining the exclusive public function test, the state compulsion test, and the close nexus test. See, e.g., Blum, 457 U.S. at 1004-05 (stating that the required nexus is present if the state is responsible for conduct because the conduct has a sufficiently close nexus with the state, if there is evidence of the state’s exercise of coercive power or significant encouragement, or if a private party exercises power that traditionally and exclusively has been that of state); Frazier v. Board of Trustees, 765 F.2d 1278, 1284-88 (5th Cir. 1985) (discussing nexus, public function, and encouragement analyses), cert. denied, 476 U.S. 1142 (1986); Thorn v. County of Monroe, 586 F. Supp. 1085, 1090-93 (M.D. Pa.) (analyzing facts under various tests for state action), aff’d, 745 F.2d 48 (3d Cir. 1984).


103. Id.


105. 691 F.2d 931 (10th Cir. 1982), cert. denied, 460 U.S. 1069 (1983).

106. Id. at 934.

107. Id.
substantial state funding of its students' tuition. According to the court, however, the critical factor was that the state, through juvenile courts and other state agencies, placed the students at the school without the students' consent. The court therefore concluded that state action was present because the facts established a close nexus between the state and the conduct of the school and school officials.

Similarly, state action was found in Woodall v. Partilla, a case involving a former inmate's labor claims against a private corporation that provided food service at a prison. The Illinois Department of Corrections had contracted with a private food service corporation to

108. Id. at 940.
109. Id. It was on this ground that the court distinguished Rendell-Baker. Rendell-Baker involved a private school's allegedly wrongful termination of an employee. 457 U.S. at 834. The United States Supreme Court found no state action sufficient to support a section 1983 claim, although there was state funding and regulation. Id. at 840-43. The involuntary nature of the placement of students at the school in Milonas and the fact that Milonas involved students, and not employees, allowed the court in Milonas to find that Rendell-Baker was not controlling. 691 F.2d at 940; see also Schneider, supra note 8, at 742 n.27 (discussing Milonas and distinguishing it from Rendell-Baker).
110. 691 F.2d at 939 ("[T]he state ha[d] so insinuated itself with the [school] as to be considered a joint participant in the offending actions."); see also Kentucky Ass'n for Retarded Citizens v. Conn, 510 F. Supp. 1233, 1250 (W.D. Ky. 1980) (upholding mentally retarded citizens' class action under section 1983 against privately operated residential facility and concluding that sufficient relationship existed between state and facility because state substantially funded facility and facility undertook duties traditionally within province of state), aff'd, 674 F.2d 582 (6th Cir.), cert. denied, 459 U.S. 1041 (1982).
112. Id. at 1069. The plaintiff joined another claim against the private corporation, one of its employees, and certain prison officials, alleging that disciplinary proceedings that had been brought against the inmate by an employee of the private corporation violated his constitutional rights. Id. at 1070. The court concluded that the private corporation's employee did not act under color of state law for the purpose of that claim, and that, as to the other defendants, no cause of action was stated concerning authorization of the disciplinary action. Id. at 1072-73. Therefore, state action did not exist with respect to any party's conduct regarding the disciplinary claim. Id.

This part of the holding in Woodall may be incorrect. The inmate complained about the conduct of an employee of the private corporation, or, as the court suggested, "a non-employee of the state," whose conduct was "analogous to that of a private citizen who acts as complainant in a criminal prosecution." Id. at 1071. Thus, the court's conclusion would serve to immunize the conduct of all employees of private corporations that contract with the state to provide a state function. The employee in this case was not acting as a private citizen. Her conduct instead was the product of work-related circumstances, and the work that was to be done—supplying food service—was a function that the state was obligated to provide. If the state had not contracted out its obligation, the employee would have been an employee of the state, and the conduct would have been state action. The state does not shed its responsibility for such conduct just because it contracts with a private party. See Frazier v. Board of Trustees, 765 F.2d 1278, 1287 n.20 (5th Cir. 1985) (noting that states cannot avoid constitutional obligations by delegating to private entities), cert. denied, 476 U.S 1142 (1986); see also infra note 169 and accompanying text.
prepare food for the prison using inmate labor. The plaintiff alleged that his federal and state constitutional rights had been violated because he worked for the food service in excess of the number of hours and below the wage level required by law. The court analyzed the question of whether the private food service acted under color of state law in order to support the plaintiff's section 1983 claim. It concluded that the requisite close nexus did exist between the state and the private corporation because the corporation paid the inmate's wages, directed the inmate's work, and compelled the inmate to work allegedly excessive hours. Therefore, the corporation exercised a typically state power and state action was established because there was a sufficient nexus alleged in the complaint.

In the event that such a claim is brought against a private prison that contracted with the state for operation of an entire institution, and not just for provision of a single service, these cases strongly suggest that state action would be found under a close nexus analysis. A privately operated prison would be significantly funded and regulated by the state or federal government. In addition, state and federal courts would place prisoners at such prisons. Moreover, courts using the nexus language, but applying the public function test, may find a close nexus because the private entity, in operating the prison, would wield a typically state power, as in Woodall.

Several recent cases, however, have not found state action under a close nexus test, even when the governmental involvement was almost as apparent as it would be in the private prison context. In Graves v. Narcotics Service Counsel, Inc., for example, an inmate brought a section 1983 claim against a halfway house for improper treatment of his drug addiction. A private nonprofit corporation operated the halfway house, which served as a drug and alcohol rehabilitation facility and employment facilitator for federal and state inmates. The federal district court determined that the halfway house was subject to state regulation because it was required to have the certification of the Department of Mental Health before it was entitled to receive state

113. 581 F. Supp. at 1076.
114. Id.
115. Id.
116. Id.
117. Id. Although the court believed that the allegations gave rise to a finding of state action, the labor claims were determined to be without merit. Id. at 1077-78.
119. Id. at 1286.
referrals. The halfway house also received substantial funding from both the state and federal governments: the federal government reimbursed the halfway house for all of the costs incurred in treating federal inmates and the state paid ninety percent of the costs for state inmates. Nevertheless, the court held that the plaintiff did not allege sufficient facts to establish state action and support a claim under section 1983.

In a short opinion, the court examined the analyses in Rendell-Baker and Blum and concluded that public funding and regulation were insufficient factors to establish a close nexus. The court interpreted the two cases to mean that the close nexus must exist between the state and the challenged activity, and not just the actor. Since there were no facts in Graves alleging that the government was involved in the treatment policy or detoxification program, there was thus no nexus between the state and the challenged activity.

Other courts have reached a similar result under equally compelling facts. In Gilmore v. Salt Lake Community Action Program, the United States Court of Appeals for the Tenth Circuit found no state action under the close nexus standard. In this case, a former director of a community action agency, organized as a private nonprofit corporation, brought a section 1983 claim against the agency, challenging his termination. The plaintiff claimed that the termination decision constituted state action because there was extensive state involvement in creating, funding, operating, and regulating the agency. The court noted that, in light of recent United States Supreme Court decisions, state funding and regulation were not enough to establish state action.

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120. Id.
121. Id. In addition, the state reimbursed the halfway house for sixty percent of the costs of treating non-inmate patients. Id.
122. Id. at 1287.
123. Id. The Graves court compared the halfway house to the private school in Rendell-Baker and the nursing home in Blum, both of which had been publicly funded and regulated. Id.
124. Id.
125. Id.
126. 710 F.2d 632 (10th Cir. 1983).
127. Id. at 632-35. Gilmore also alleged that he was deprived of a property interest without due process of law and that the termination constituted government action. Id. at 633. He asserted that government action was established because of significant federal funding and regulation. Id. at 636. The court analyzed this issue separately from the state action issue and concluded that these factors, in the absence of others, were insufficient to establish government action. Id. The court found particularly important the fact that the federal government did not exercise influence or control over the agency’s employment decisions.
128. Id. at 635.
action.\textsuperscript{129}

The plaintiff, however, stated that other factors supported a finding of state action. For example, state officials substantially participated in the creation of the agency and the state chose to designate the agency as a private organization rather than as a public organization or a political subdivision.\textsuperscript{130} More significantly, one-third of the agency’s governing board was composed of local public officials who were extensively involved in operating the agency and who had veto power over the agency’s programs.\textsuperscript{131} These facts, according to the court, warranted a finding that the agency was a state actor but did not necessarily mean that the conduct was state action.\textsuperscript{132}

The court applied the two-part test established in \textit{Lugar}, requiring that there be a state actor and that the challenged activity be state action.\textsuperscript{133} Although the agency was a state actor, the court concluded that the termination decision did not result from “the exercise of a right, privilege, or rule of conduct having its source in state authority.”\textsuperscript{134} The court determined that no facts established that the agency’s personnel decisions were a product of state policy or decision, even though members of the governing board were public officials.\textsuperscript{135}

\textit{Gilmore} represents a trend in the courts that sets an extremely high standard for state action. Not only must the state fund and regulate an entity, but it must also have a policy governing the challenged decision or conduct; state action will not be established if the state merely has officials participating in the decision-making process.\textsuperscript{136}

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\textsuperscript{129} \textit{Id.} at 637. The court reviewed \textit{Rendell-Baker} and \textit{Blum} before reaching its conclusion. \textit{Id.} at 636.

\textsuperscript{130} \textit{Id.} at 637.

\textsuperscript{131} \textit{Id.} (indicating that the board members who were public officials offered services and assisted the agency and were not merely acting in an “honorary or figurehead capacity”).

\textsuperscript{132} \textit{Id.} at 638-39. The \textit{Gilmore} court recognized that not all of the actions of state actors are state actions. \textit{Id.}

\textsuperscript{133} \textit{Id.} at 637. See \textit{Lugar}, 457 U.S. at 937, for the appropriate analytical framework for assessing the relevance of involvement by public officials in nominally private activities.

\textsuperscript{134} 710 F.2d at 638.

\textsuperscript{135} \textit{Id.} at 638-39; \textit{see also} Krieger v. Bethesda-Chevy Chase Rescue Squad, 599 F. Supp. 770, 774 (D. Md. 1984) (noting that public official’s mere participation in private affairs does not make entity the state; rather, there must be nexus between capacity as official and challenged activity), \textit{aff’d}, 792 F.2d 139 (4th Cir. 1986).

\textsuperscript{136} This case may not be representative of the courts’ position on state action, but rather may indicate the direction in which the courts are moving. \textit{See} Thorn v. County of Monroe, 586 F. Supp. 1085, 1090-91 (M.D. Pa.) (holding no state action for private corporation operating nursing home that terminated nurses, despite facts that public officials were on nursing home board, state regulation existed, and county previously owned home), \textit{aff’d}, 745 F.2d 48 (3d Cir. 1984). \textit{But see} Milonas v. Williams, 691 F.2d 931, 940 (10th Cir. 1982) (finding state action
\end{quote}
Furthermore, the strict standards established by the holdings in *Graves* and *Gilmore* imply that it may be difficult to establish state action in a private prison context. This is probably a false implication, however, because a claim that is brought in a private prison context can be distinguished from both *Graves* and *Gilmore* in several ways. First, the funding and regulation in the private prison context will exceed the funding and regulation that were present in either *Graves* or *Gilmore*. The state or federal government will substantially, if not totally, fund a privately operated prison. The government will retain its responsibility for the treatment, physical environment, and duration of confinement of the inmates; therefore, the government will extensively regulate the private prison. Second, unlike the situations in *Graves* and *Gilmore*, the government will have policies governing various aspects of prison operations, conditions, and the treatment of inmates because it is the state that is ultimately obligated to protect these aspects of prison life. Third, also unlike the situations in *Graves* and *Gilmore*, the defendant entity will be a for-profit company, thus raising important questions of accountability. Fourth, the government will retain exclusive control over the placement of inmates in private prisons. These factors, taken together, indicate that *Graves* and *Gilmore* are not controlling. Even if they were, however, a private prison case will be strong enough to establish state action under a stricter test.

Therefore, under the traditional two-factor close nexus test, the private prison company will be a state actor and its operations will constitute state action. The two-factor test, however, probably will not be used frequently in the future. Additional factors will be required, such as the state's placement of prisoners at the prison and a significant state role in overseeing certain policies and management of the prison.

C. State Compulsion Test

In addition to using the public function and close nexus tests, many courts have recognized that state compulsion or significant encouragement is an important factor in the state action analysis.137 Few courts, however, have applied the state compulsion test as the sole de-

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137. The United States Supreme Court has articulated that "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." *Blum*, 457 U.S. at 1004; see also supra notes 23-25 & 34 and accompanying text.
In fact, the infrequency of the use of this analysis indicates that state compulsion is difficult to establish and that only in a rare case will this analysis alone support a finding of state action. 

*Adickes v. S.H. Kress & Co.* is one such case. In *Adickes*, a white woman brought a section 1983 claim against a private party for refusing to serve her in its lunchroom, allegedly because she was accompanied by blacks, and for conspiring with local police who arrested her for vagrancy on the private party’s premises after the incident. The United States Supreme Court determined that the fourteenth amendment, while clearly prohibiting the state from discriminating, did not prohibit a private party from discriminating on the basis of race unless that party acted “against a backdrop of state compulsion or involvement.” The Court believed, however, that the fourteenth amendment was offended if the state, by its law, compelled the private party to discriminate on the basis of race. The state action requirement was satisfied whether the state compelled a private party’s racially discriminatory act by statute or “by a custom having the force of law.” The Court concluded that state action was present because the police, as state officials, gave the discriminatory custom the force of law when they arrested the claimant. 

A state compulsion analysis may readily be applied in the private prison context as well. For example, if the private entity engages in conduct that may be challenged as cruel and unusual punishment as a result of the state setting unreasonably high standards to govern how the entity may treat prisoners, it may be argued that the state has significantly encouraged or compelled the activity. If the facts are suffi-

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138. *See* *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 171 (1970) (indicating that state action is present when state compels act); *see also supra* note 26 and accompanying text.


140. *Id.* at 146.

141. *Id.* at 169.

142. *Id.* at 171 (state may not discriminate on the basis of race “by direct action or through the medium of others who are under State compulsion to do so”) (quoting with emphasis Baldwin v. Morgan, 287 F.2d 750, 755-56 (5th Cir. 1961)).

143. *Id.*

144. *Id.* at 172. The Court hypothesized that it could be established that the police gave the discriminatory act the force of law because they made a false arrest of the claimant to harass her for attempting to eat with blacks or because they tolerated the threats of violence against those who violated the segregation custom. *Id.*

145. It is unlikely, of course, that the state’s standards would be impossible to meet. But they might be set at a higher level for private prisons than for public prisons to assure accountability and to hold private prison companies to their word that they can do a better job than the government can at managing prisons and jails.
ciently persuasive, this may be all that is necessary to establish state action.

Recent case law, however, indicates that state compulsion will be considered in conjunction with other factors. In *Lombard v. Eunice Kennedy Shriver Center*,148 for example, the federal district court discussed the state compulsion analysis but ultimately relied on the public function test. In this case, the plaintiff, an involuntary resident at a state mental institution, brought a section 1983 claim alleging that he had received inadequate medical care from a private organization that had contracted with the institution to provide medical services.147 In determining whether state action was present to support the claim, the court recognized that the state must compel the act and that "[a] private party’s action or decision must be required by a rule of decision imposed by the state before that action or decision will be deemed state action."148 Yet the court also noted that state compulsion would not be required for a finding of state action if the private party performed a traditional and exclusive public function.149 Here, the court considered it decisive that the state had an affirmative duty to provide adequate medical services for involuntarily committed residents of a state institution.150 Since the state delegated this duty, the private organization assumed a public function; thus the court found that its acts constituted

147. *Id.* at 678.
148. *Id.* at 679.
149. *Id.* at 680.
150. *Id.* “The critical factor in our decision is the duty of the state to provide adequate medical services to those whose personal freedom is restricted because they reside in state institutions.” *Id.* at 678. In a statement that virtually summarizes the experiences of the courts on the question of whether the acts of private entities performing functions that are delegated by the state constitute state action, the court added:

"[I]t would be empty formalism to treat the [private entity] as anything but the equivalent of a governmental agency for the purposes of 42 U.S.C. § 1983. Whether a physician is directly on the state payroll . . . or paid indirectly by contract, the dispositive issue concerns the trilateral relationship among the state, the private defendant, and the plaintiff. Because the state bore an affirmative obligation to provide adequate medical care to plaintiff, because the state delegated that function to the [private corporation], and because [that corporation] voluntarily assumed that obligation by contract, [the private entity] must be considered to have acted under color of law, and its acts and omissions must be considered actions of the state. For if [the private entity] were not held so responsible, the state could avoid its constitutional obligations simply by delegating governmental functions to private entities.

*Id.* at 680. *But see* West v. Atkins, 815 F.2d 993 (4th Cir.) (en banc), *cert. granted*, 108 S. Ct. 256 (1987), discussed *supra* at note 84.
state action.\textsuperscript{151}

\textit{Lombard} indicates that, in the state action determination, evidence of state compulsion carries equal, if not greater, weight than that which is accorded to the performance of a public function. Although state compulsion or encouragement may be difficult to prove if the state does not exercise it through a written law, the courts have left open the possibility that the coercion or encouragement of a decision may be exercised overtly or covertly. This analysis can have major importance in the privatization area, in which the state will likely retain a significant oversight function.

D. \textit{Multi-Characterization Analysis}

The current state action analysis, which combines the several tests, has been most clearly articulated by the United States Court of Appeals for the Fifth Circuit in \textit{Frazier v. Board of Trustees}.\textsuperscript{153} No state action was found in this case, in which a discharged employee of a private corporation that provided respiratory therapy services for a county hospital brought a section 1983 claim against the hospital for violating her free speech, due process, and equal protection rights.\textsuperscript{154} Although the court described the state action question as a “paragon of unclarity,” a “protean concept,” and an “impossible task,”\textsuperscript{155} it believed that its path was “relatively well-marked” based on the instruction of \textit{Rendell-Baker} and \textit{Blum}.\textsuperscript{156} The court stated that the critical inquiry was whether “the alleged infringement of federal rights [was] fairly attributable to the state . . . .”\textsuperscript{157}

The court reviewed the case law and found several factors to be important to a state action analysis. It first recognized that the state’s financial involvement and regulation, although significant, were not enough to create a sufficiently close relationship between the hospital’s conduct and the state.\textsuperscript{158} The court also found that the performance of

\begin{footnotesize}
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\item[151.] 556 F. Supp. at 678, 680.
\item[152.] 765 F.2d 1278 (5th Cir. 1985), \textit{cert. denied}, 476 U.S. 1142 (1986).
\item[153.] \textit{Id.} at 1288.
\item[154.] \textit{Id.} at 1283 & n.8; \textit{see also supra} notes 11-12 and accompanying text.
\item[155.] 765 F.2d at 1283-84.
\item[156.] \textit{Id.} at 1283. This test originated in \textit{Lugar}, 457 U.S. at 937; \textit{see supra} notes 30-31 and accompanying text.
\item[157.] 765 F.2d at 1285. The Court examined \textit{Rendell-Baker} and \textit{Blum} for this result. It concluded that state funding did not make a private personnel decision state action and that general regulation was not enough—the regulation must control the challenged decision before state action can be found. \textit{Id}.
\end{enumerate}
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a traditional and exclusive state function and the joint participation or symbiosis between the state and the hospital were important, but dismissed both factors with respect to the facts of the case. According to the court, "only when the state has had some affirmative role, albeit one of encouragement short of compulsion, in the particular conduct underlying a claimant's civil rights grievance," will private conduct be fairly attributable to the state. The state in this case played no such role.

_Frazier_ indicates that the state's funding, regulation, delegation of a public function, and symbiosis will be factors that warrant consideration in the state action analysis, but that the crucial factor is whether the state was involved in, encouraged, or compelled the challenged conduct or decision. Under this analysis, the claim against a private prison will be supported by state action. To determine whether a nexus exists, a court should consider that the private prison would be substan-

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158. _Id._ at 1286-87. The court discussed the public function theory and inferred that the _Rendell-Baker_ Court required the delegation of a function before state action could be found. _Id._ at 1285. Applying the test to its own facts, the _Frazier_ court concluded that respiratory therapy was not "an activity that has traditionally been the exclusive prerogative of the state." _Id._ at 1286.

The court considered the joint participation/symbiosis theory the best argument for state action in this case. In light of _Rendell-Baker_ and _Blum_, however, the court did not feel that this theory, as developed in _Burton v. Wilmington Parking Auth._, 365 U.S. 715 (1961), had as much weight as it once had. In fact, it stated that "[t]he 'joint' of 1961 does not the 'symbiosis' of today make." 765 F.2d at 1287; _see also supra_ note 15 and _accompanying text_. Nevertheless, the court used the joint participation analysis and found that the private corporation was located on the hospital's premises, that the hospital paid for the utilities and supplied equipment, and that it profited from the services that the private corporation provided. 765 F.2d at 1287. The court concluded that the core of the relationship was missing—the state did not play "some meaningful role in the mechanism leading to the disputed act." _Id._ at 1288 (footnote omitted). Therefore, there was no symbiotic relationship. _Id._

159. 765 F.2d at 1286 (citing _Moose Lodge No. 107 v. Irvis_, 407 U.S. 163, 173, 176-77 (1972)).

160. _Id._ at 1288. The Supreme Court recently used a similar, albeit cursory, analysis in _San Francisco Arts & Athletics, Inc. v. United States Olympic Comm._, 107 S. Ct. 2971, 2984-87 (1987). The plaintiff argued, _inter alia_, that the Olympic Committee's enforcement of the use of the word "Olympic," under a charter granted to it by Congress, was discriminatory in violation of the fifth amendment. _Id._ at 2984. Rejecting this challenge, a majority of the Court (5-4 vote on this issue) utilized the close nexus test, the public function test, the state compulsion test, and the symbiosis test. _Id._ at 2984-87.

161. _See_ Comment, _supra_ note 7, at 479 ("All of these traditional factors converge on the common goal of discovering when private exercise of power presents the unique danger to individual liberty posed by the exercise of governmental power."); _see also_ _Watkins v. Reed_, 557 F. Supp. 278, 281 & n.9 (E.D. Ky. 1983) (suggesting the factors that _Blum_ and _Rendell-Baker_ deemed important included state regulation, state financial assistance, symbiotic relationship, performance of traditional and exclusive public function, and state coercion or encouragement), _aff'd_, 734 F.2d 17 (6th Cir. 1984).
tially, if not totally, state funded and state regulated. It should also analyze the state policies or regulations, if any, governing the challenged conduct. In addition, the operation of a prison is traditionally and exclusively a function of the state, and thus the state delegation of this task to a private entity would satisfy a public function analysis. Furthermore, in the event that the state furnishes the prison facilities for the private entity and retains ownership over the land and equipment, thereby remaining integrated with the prison, a court should find a symbiotic relationship. The establishment of any of these factors will be considered significant to the state action determination.

State action will not be found under a multi-characterization analysis unless the government specifically participated in the challenged conduct. Although direct participation may not be a frequent occurrence in the privatization context, this point will probably not be difficult to establish. The claims that inmates typically bring against the government involve infringement of rights that the government plays a major role in protecting; consequently, the government controls or at least participates in the challenged conduct. The conditions of the prison and the treatment of prisoners, for example, are obligations.

162. The court in Frazier noted that, if the state delegated its obligations in an attempt to avoid its constitutional responsibilities, such a "sham delegation of state tasks would clearly implicate both the state action and the under-color-of-law requirements of section 1983." 765 F.2d at 1287 n.20. Furthermore, "[i]f the state is allowed to delegate its responsibility, . . . those persons who exercise governmental power are shielded, at least partially, from political safeguards and political accountability." Comment, supra note 7, at 477 (footnote omitted). This point is particularly significant with respect to the development of private prisons, because one argument is that states can avoid liability by delegating their obligation to maintain and operate prisons. Privatization of Corrections: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 99th Cong., 1st & 2d Sess. 24 (1985 & 1986) (statement of the American Federation of State, County, and Municipal Employees).

163. This statement is too obvious to require extensive citation. See generally Robbins & Buser, Punitive Conditions of Prison Confinement: An Analysis of Pugh v. Locke and Federal Court Supervision of State Penal Administration Under the Eighth Amendment, 29 STAN. L. REV. 893 (1977).

164. See Medina v. O'Neill, 589 F. Supp. 1028, 1031 n.7 (S.D. Tex. 1984) (challenging confinement conditions where sixteen detainees had been confined in windowless cell designed to hold six), vacated in part & rev'd in part on other grounds, 838 F.2d 800 (5th Cir. 1988). In Medina, state action was established under a public function theory; a close nexus theory could have been used, however, because the government would have significant influence over the conditions of the facility even though a private entity operated it.

165. See Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 702 (11th Cir. 1985) (challenging improper medical diagnosis and treatment). The court in Ancata used a public function analysis to find state medical action and believed that the state's involvement in this area of prisoners' rights was well settled. Id. at 703. State action also could have been found under a close nexus test, because the treatment of inmates is the state's obligation and because the state has control over
that belong to the government, in spite of the delegation of operation to a private entity.\textsuperscript{166} State action will thus be found for conduct in these areas and others affecting the inmates under a multi-characterization analysis, even if it is the private party that engages in the conduct.\textsuperscript{167}

Unlike the claims of inmates, the claims of a private entity's employees against the government may not fit easily within a \textit{Frazier} analysis. Although the government may fund and regulate the private entity, it is not responsible for and does not control or influence decisions or conduct regarding the entity's employees to the same extent that it regulates and is responsible for the treatment of inmates and the conditions of their confinement.

\section*{Conclusion}

One argument in favor of prison privatization has been that it will eliminate, or at least reduce, government liability. This argument does not withstand examination. State action can be found in the private prison context under any of the various tests—public function, close nexus, state compulsion, and multi-characterization. Although the Supreme Court has increasingly restricted the application of the state action doctrine, with many lower federal courts following suit, the doctrine is certainly flexible enough to be used with vigor in the "right" case, such as one involving a private prison. Indeed, to lessen liability in the private prison context would be to curtail accountability. Common sense tells us that, if we delegate the incarceration function to private hands, we would want just the opposite to occur. As Justice Brennan has written in a different context,\textsuperscript{168} "[t]he Government is free . . . to 'privatize' some functions it would otherwise perform. But such priva-

\begin{thebibliography}{9}
\bibitem{166} See supra note 150 (recognizing that state cannot sidestep its constitutional obligations through delegation).
\bibitem{167} Under the eighth and fourteenth amendments to the United States Constitution, respectively, the states must protect against cruel and unusual punishment and must protect a prisoner's due process and equal protection rights. \textit{U.S. Const.} amends. VIII & XIV. In addition, the state controls parole decisions and sets standards for review. Conduct in these areas will be considered state action. \textit{See, e.g., Mayer, Legal Issues Surrounding Private Operation of Prisons, 22 CRIM. L. BULL. 309, 319-20 (1986) (suggesting that, to avoid potential legal consequences, state might retain control over prison disciplinary proceedings and decisions). See generally Note, Inmates' Rights and the Privatization of Prisons, 86 COLUM. L. REV. 1475, 1484-99 (1986).}
\bibitem{168} \textit{San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 107 S. Ct. 2971, 2984-87 (1987)} (holding that the fact that Congress granted a corporate charter to the United States Olympic Committee does not render that Committee a government actor to whom the fifth amendment applies).
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tization ought not automatically release those who perform government functions from constitutional obligations." If there is a benefit to be gained from prison privatization, therefore, it will have to come in some other form.

POSTSCRIPT

After this article went to press, the United States Supreme Court, on June 20, 1988, decided West v. Atkins. The Court addressed the question "whether a physician who is under contract with the State to provide medical services to inmates at a state-prison hospital on a part-time basis acts 'under color of state law,' within the meaning of 42 U.S.C. § 1983, when he treats an inmate." Presenting no major surprises for state-action jurisprudence, the Court answered the question in the affirmative, concluding that "respondent's delivery of medical treatment to West was state action fairly attributable to the State . . . ."

Justice Blackmun, writing for a unanimous Court on the state-action question, found "unpersuasive" the Fourth Circuit's reliance on Polk County v. Dodson, in which the Supreme Court held in

169. Id. at 2993 (Brennan, J., dissenting); see also REPORT OF THE PRESIDENT'S COMMISSION ON PRIVATIZATION, PRIVATIZATION: TOWARD MORE EFFECTIVE GOVERNMENT 149 (1988) ("Prisons remain subject to the supervision and regulation of the government—and, most important, subject to the rule of law—whether they are run by government employees or by a private agency.").
170. I do not intend to argue here the wisdom of prison privatization. Some of my views on that question have been addressed elsewhere. See, e.g., Robbins, Privatization of Corrections: Defining the Issues, 69 JUDICATURE 324 (1986).
171. 56 U.S.L.W. 4664 (U.S. June 20, 1988); see supra note 84 (discussing Fourth Circuit's en banc opinion in West).
172. 56 U.S.L.W. at 4665.
173. Id. at 4668.
174. Justice Scalia wrote a one-paragraph concurring opinion, noting that the lower courts had construed West's pro se allegation of inadequate medical attention as claiming an eighth amendment violation. Justice Scalia instead saw a due process claim:

I agree with the opinion of the Court that respondent acted under color of state law for purposes of § 1983. I do not believe that a doctor who lacks supervisory or other penological duties can inflict "punishment" within the meaning of that term in the Eighth Amendment. . . . I am also of the view, however, that a physician who acts on behalf of the State to provide needed medical attention to a person involuntarily in state custody (in prison or elsewhere) and prevented from otherwise obtaining it, and who causes physical harm to such a person by deliberate indifference, violates the Fourteenth Amendment's protection against the deprivation of liberty without due process.

Id. at 4668-69 (Scalia, J., concurring in part and concurring in judgment).
175. Id. at 4667.
176. 454 U.S. 312 (1981); see supra note 67 (discussing Polk County).
1981 that a public defender's activities or functions did not constitute state action because public defenders were in an adversarial relationship with the state and because the state had not developed the professional standards that govern a lawyer's conduct. "In contrast to the public defender," Justice Blackmun wrote, "Doctor Atkins' professional and ethical obligation to make independent medical judgments, did not set him in conflict with the State and other prison authorities. Indeed, his relationship with other prison authorities was cooperative."\(^{177}\) Justice Blackmun stressed that the Fourth Circuit had "misread Polk County as establishing the general principle that professionals do not act under color of state law when they act in their professional capacities".\(^{178}\)

The [Fourth Circuit] considered a professional not to be subject to suit under § 1983 unless he was exercising "custodial or supervisory" authority. . . . To the extent this Court in Polk County relied on the fact that the public defender is a "professional" in concluding that he was not engaged in state action, the case turned on the particular professional obligation of the criminal defense attorney to be an adversary of the State, not on the independence and integrity generally applicable to professionals as a class.\(^{179}\)

This distinction leaves little, if any, room for applying Polk County's restrictive state-action holding to providers of other services. Concluding on this point, Justice Blackmun stated: "Defendants are not removed from the purview of § 1983 simply because they are professionals acting in accordance with professional discretion and judgment."\(^{180}\) Further, the Court attached no importance to the fact that Dr. Atkins was a contractor, rather than an employee of the state.

\(^{177}\) 56 U.S.L.W. at 4666-67.
\(^{178}\) Id. at 4667.
\(^{179}\) Id.
\(^{180}\) Id. The Court did suggest, however, that professional discretion and judgment were not "entirely irrelevant to the state-action inquiry. Where the issue is whether a private party is engaged in activity that constitutes state action, it may be relevant that the challenged activity turned on judgments controlled by professional standards, where those standards are not established by the State." Id. at 4667 n.10 (emphasis in original). Citing Blum v. Yaretsky, 457 U.S. 991 (1982), and Rendell-Baker v. Kohn, 457 U.S. 830 (1982), Justice Blackmun indicated that the requisite "nexus" with the state must be present for state action to exist. 56 U.S.L.W. at 4667 n.10; see supra notes 100-136 and accompanying text (discussing close-nexus test in private-person context); see also supra notes 137-151 and accompanying text (discussing state-compulsion test in private-prison context).
prison system:

It is the physician's function within the state system, not the precise terms of his employment, that determines whether his actions can be fairly attributable to the State. Whether a physician is on the state payroll or is paid by contract, the dispositive issue concerns the relationship among the State, the physician, and the prisoner.\(^{181}\)

Thus, if there was any ambiguity concerning the application of state-action doctrine to private prisons before West, the Supreme Court has eliminated it: State action will clearly exist in the prison-privatization context. Although West v. Atkins provides little insight into the precise test to be used in state-action analysis, the case is significant in the way in which it distinguishes and restricts Polk County v. Dodson. West is also significant because some of its language, albeit in the medical context, corresponds precisely to that used at the conclusion of this article.\(^{182}\)

Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights. The State bore an affirmative obligation to provide adequate medical care to West; the State delegated that function to respondent Atkins; and respondent voluntarily assumed that obligation by contract.\(^{183}\)

If state action is present when the state contracts out its obligation to perform one service, then state action is certainly present when the government contracts out the entire operation of a prison facility.

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\(^{181}\) 56 U.S.L.W. at 4668.

\(^{182}\) See supra note 169 and accompanying text.

\(^{183}\) 56 U.S.L.W. at 4668.