Florida State University Law Review

Volume 11 | Issue 4 Article 3

Fall 1984

The State Action Doctrine in State and Federal Courts

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COMMENTS

THE STATE ACTION DOCTRINE IN STATE AND FEDERAL COURTS

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The fourteenth amendment to the United States Constitution provides that no state shall deny equal protection or due process of law to any person.[1] This restriction has been declared by the United States Supreme Court to be applicable only to actions of the state.[2] Those states which have also granted these protections to their citizens through constitutional provision have construed such guarantees in the same light as their federal counterpart.[3] The result is that the fourteenth amendment and its state progeny may be used only when actions of the state cause the deprivation of the constitutional rights of equal protection and due process. Thus, a person who has been denied such constitutional rights through the wrongful conduct of a private individual cannot seek vindication through the use of the federal or state guarantees.[4]

An exception to this rule has been carved out by the United

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

2. The first Supreme Court case to make this distinction was the Civil Rights Cases, 109 U.S. 3 (1883) (discussed in detail *infra* at note 9 and accompanying text). The state action doctrine applies not only to the fourteenth amendment but also to other provisions of the Constitution. The *Civil Rights Cases* dealt only with the question of whether state action was required as a prerequisite for invoking the thirteenth and fourteenth amendments.

3. Some of the states' equal protection clauses are patterned after the federal clause. *See, e.g.*, CAL. CONST. art. I, § 7(a) ("A person may not be deprived of life, liberty or property without due process of law or denied equal protection of the laws."); HAWAII CONST. art. I, § 5 ("No person shall be deprived of life, liberty or property without due process of law, nor be denied equal protection of the law."). Others have utilized different language. *See, e.g.*, ALASKA CONST. art. I, § 1 ("that all persons are equal and entitled to equal right, opportunities and protections under the law"); ARK. CONST. art. II, § 3 ("The equality of all persons before the law is recognized, and shall ever remain inviolate.").

Only six states have determined that their equal protection clauses require state action. They are Connecticut, Florida, New York, Pennsylvania, Texas and Washington.

4. *See infra* notes 10 & 11 and accompanying text. This is not to say that there is no available remedy for an individual who has been denied equal protection by a private individual. Both state and federal statutes have been enacted that provide redress for private wrongs. *See, e.g.*, 42 U.S.C. §§ 1981, 1983, & 1985 (1982) (providing civil sanctions for deprivations of equal rights).

States Supreme Court so that under certain circumstances one may proceed against private individuals.[5] To determine whether private actions fall within the aforementioned exception to the fourteenth amendment, various tests have been established by the Court.[6] Because of the persuasive influence of the Supreme Court in this area, state courts have generally adopted these tests.[7] Unfortunately, the Supreme Court has been unclear as to what the requirements of these tests are, and as to what tests are to be used under what circumstances. Because of this lack of direction, the state courts have haphazardly engaged in the application of these theories, creating inconsistent decisions among states using the same test.[8] This comment will closely examine the development of these tests, determine where the confusion lies and suggest a superior method of analysis.

I. THE ORIGIN OF THE STATE ACTION DOCTRINE

Statutory construction of the limitations of the fourteenth amendment began with the *Civil Rights Cases* in 1883 when the Civil Rights Act of 1875, which prohibited racial discrimination in public accommodations, was declared void.[9] Nullification was

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5. One of the first cases to carve out an exception was Shelley v. Kraemer, 334 U.S. 1 (1948). In *Shelley*, black families who had purchased houses from whites brought an action under the fourteenth amendment when neighbors sought to enforce a racially restrictive covenant. Although the Court found that the "[a]mendment erects no shield against merely private conduct, however discriminatory or wrongful," it held that significant state involvement in the form of judicial enforcement of the discriminatory agreement amounted to state action. *Id.* at 13, 20. It has been suggested that it is easier to find state action within the conduct of an individual when the condoned action is racial discrimination. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 190-91 (1970). For example, the earlier line of state action cases involves racial discrimination and, in these cases, private discrimination was said to be state action. *See, e.g.*, Evans v. Newton, 382 U.S. 296 (1966); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Pennsylvania v. Board of Trusts, 353 U.S. 230 (1957); Terry v. Adams, 345 U.S. 461 (1953).

For discussion of this theory, see Robinson v. Price, 553 F.2d 918, 921 (5th Cir. 1977); Lockwood v. Killian, 375 A.2d 998, 1002 (Conn. 1977); Sharrock v. Dell Buick-Cadillac, Inc., 408 N.Y.S.2d 39, 51 (N.Y. 1978). This may explain why there has been a tightening of the state action doctrine. The recent enactment of anti-discrimination statutes lessened the need for the use of the fourteenth amendment and the Court did not wish to expand the doctrine for other types of deprivations. *See also* Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961); Comment, *State Action: A Pathology and a Proposed Cure*, 64 CALIF. L. REV. 146 (1976); Note, *State Action and the Burger Court*, 60 VA. L. REV. 840 (1974).

6. *See infra* notes 13-17 and accompanying text.

7. *See infra* note 55 and accompanying text.

8. *See infra* note 58.

9. 109 U.S. 3 (1883). The Civil Rights Act reads in pertinent part:

That all persons within the jurisdiction of the United States shall be entitled to

based on the determination that the fourteenth amendment imposed restrictions only against the states.[10] The Supreme Court held that

> [c]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual.[11]

This restriction was easy to apply when there was a clear indication that the state was involved. Thus, where the alleged deprivation occurred through the acts of a state agency or official, or involved a state law, regulation or rule, the state action requirement was met.[12] There arose other situations, however, in which it was more difficult to determine if the alleged wrongdoing occurred through state action. Thus, further development of the state action doctrine followed in the mid-1900's. During this period, the Court began to develop theories for determining when actions of a private actor could be proscribed under the fourteenth amendent.[13] Today, two tests have emerged.

The first, the "public function" test, involves the question of whether a private individual is performing a government function.[14] The "public function" test rests on the premise that, by del-

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> full and equal enjoyment of accommodations, advantages, facilities, and privileges of inns, public conveyances . . . theatres and other places of public amusement . . . and [these entitlements are] applicable alike to citizens of every race and color, regardless of any previous conditions of servitude.

Ch. 114, § 1, 18 Stat. 335 (1875).

10. *Civil Rights Cases*, 109 U.S. at 11-15.

11. *Id.* at 17.

12. *See, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Pennsylvania v. Board of Trusts, 353 U.S. 230 (1957).

13. *See, e.g.*, Evans v. Newton, 382 U.S. 296 (1966) (state action present when public officials are trustees of a discriminatory trust for a city park); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (lease to a private business converted private action into state action); Shelley v. Kraemer, 334 U.S. 1 (1948) (enforcement of discriminatory trust by judicial process is state action); Marsh v. Alabama, 326 U.S. 501 (1946) (company-owned town built and operated primarily to benefit the public subject to state regulation); Smith v. Allwright, 321 U.S. 649 (1944) (state delegation to a private organization of the power to regulate primary elections is delegation of a state function, transforming the private conduct into state action).

14. *See generally* Comment, *supra* note 5; Comment, *State Action: Judicial Perpetuation of the State/Private Distinction*, 2 OHIO N.U.L. REV. 722 (1975) [hereinafter *State Action: Judicial Perpetuation*]; Note, *supra* note 5.

egating an activity to an individual that has been "traditionally exclusively" performed by the government, a private person's actions performed under this authority become state action. Such functions include conducting primary elections, operating a company town and maintaining a city park.[15] Because this principle of law has been the subject of much academic commentary, it will not be discussed further in this comment.[16]

The second test, termed the "state involvement or encouragement" theory, is premised upon the idea that a private actor can become so involved with or encouraged by the state that his conduct is held to be state action.[17] Although this test has been the subject of some previous academic discussion,[18] there are still many confusing issues that have not been adequately developed. The development of these issues will be the subject of this comment.

II. THE STATE INVOLVEMENT OR ENCOURAGEMENT THEORY

State involvement or encouragement has been an issue in cases involving judicial enforcement of discriminatory conduct and the giving of public funds or aid to discriminatory institutions.[19] The main concern in these types of cases is whether the state involvement is so pervasive that it alone significantly facilitates or supports the wrongful conduct.[20] Conversely, there exists a line of cases concerned exclusively with the extent of connections between the state and the private person. Out of these cases have emerged a subcategory of state action theories—the symbiotic relationship test and the nexus test.[21] The Supreme Court has been hesitant to alleviate the dichotomy created by these two concepts and has hindered the lower courts in uniformly applying the tests. The result is that lower courts are unable to discern the requirements contained within each theory and are unsure when to utilize each

15. *See supra* note 13.

16. *See supra* note 14.

17. *See, e.g., State Action: Judicial Perpetuation, supra* note 14, at 723-24.

18. *Id.*

19. *See supra* note 11. *See also* Norwood v. Harrison, 413 U.S. 455 (1973) (state cannot lend textbooks to a private school that maintains racial segregation policies).

20. For instance in *Shelley*, the Court stated that "but for the active intervention of the state . . . petitioners would have been free to occupy the properties in question without restraint." *Shelley*, 334 U.S. at 19. In *Norwood*, the Court found that the state could "not grant the type of tangible financial aid here involved if that aid ha[d] a significant tendency to facilitate, reinforce, and support private discrimination." *Norwood*, 413 U.S. at 466.

21. *See generally* Comment, *supra* note 5.

test.[22] The following review of the Supreme Court cases creating these concepts should aid the reader in understanding the requirements envisioned by the Court.

A. *The* Burton *Symbiotic Relationship Test*

The symbiotic relationship test emerged in *Burton v. Wilmington Parking Authority*.[23] There, a coffee shop located within a state-owned parking building was leased to a private tenant for commercial use.[24] A black man, who claimed that the restaurant had refused to serve him solely because of his race, brought an action under the fourteenth amendment for declaratory and injunctive relief.[25] Refusing to fashion and apply a precise formula for determining whether state action was present, the Court declared that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[26] The Court then examined the relationship between the state and the private actor.

Finding that "[t]he State has so far insinuated itself into a position of interdependence . . . that it must be recognized as a joint participant" in the discrimination, the Supreme Court found state action present.[27] The basis for the "interdependence" between the state and the private entity found its root in the state lease to the private actor. The building was publicly owned and dedicated to "public use;" costs and maintenance of the premises were derived from public funds and customers parked in the parking building.[28]

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22. *See, e.g.*, Jeffries v. Georgia Residential Fin. Auth., 678 F.2d 919 (11th Cir. 1982) (states that the United States Supreme Court has not fashioned a precise formula); Foster v. Ripley, 645 F.2d 1142 (D.C. Cir. 1981) (claims that other circuits have determined which tests have continuing vitality); Braden v. University of Pittsburgh, 552 F.2d 948 (3d Cir. 1977) (strong disagreement between members of the court as to which test is the proper one to be applied); Schreiner v. McKenzie Tank Lines & Risk Management Services, Inc., 408 So. 2d 711 (Fla. 1st DCA 1982) (court recognizes fact that United States Supreme Court has been unclear as to the correct test to adopt), *aff'd*, 432 So. 2d 567 (Fla. 1983).

23. 365 U.S. 715 (1961).

24. *Id.* at 716.

25. *Id.*

26. *Id.* at 722. The reasoning for this statement is that assurance of the right to equal protection of the law was "reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace." *Id.* Given this statement, it is hard to understand how *Burton* later came to stand for a test that was well confined to its factual situation. If fashioning a precise formula was an "impossible task," then the Court apparently accomplished the impossible.

27. *Id.* at 725.

28. *Id.* at 723-24. *See also* Hammond v. University of Tampa, 344 F.2d 951 (5th Cir.

Taken together, these and other factors indicated that the "commercially leased areas . . . constituted a physically and financially integral and, indeed, indispensible part of the State's plan."[29] However, the Court did limit its decision to cases where a state leases public property in the manner and for the purpose shown to have been present in *Burton*.[30]

The *Burton* decision was later cited for the proposition that, under certain circumstances, a symbiotic relationship may exist between the state and a private party that will transform private conduct into state action.[31] Because the Court limited this case to a leasing situation, the symbiotic relationship test appeared well confined. However, in utilizing this test other courts painstakingly manipulated the holding of *Burton* so as to bring other factual situations within the boundaries delineated by the decision.[32] The need for a more encompassing test was obvious. This trend away from *Burton* began with *Moose Lodge No. 107 v. Irvis*.[33]

B. *The Nexus Theory*

Moose Lodge involved a claim of racial discrimination by a black man who, as the guest of a member, was refused service in a private club.[34] Because the state liquor board licensed the private

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1965) (establishment of university made possible by surplus city buildings turns action of university into state action); Wimbish v. Pinellas County, 342 F.2d 804 (5th Cir. 1965) (county lease of land for use as a golf course to private tenant who maintained racially discriminatory policies was state action); Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956) (lease of basement in county courthouse to tenant who practices racial discrimination in serving policies constitutes state action). *But see* Golden v. Biscayne Bay Yacht Club, 530 F.2d 16 (5th Cir. 1976) (discrimination by a private club holding a lease from the city not state action); Greco v. Orange Memorial Hosp. Corp., 513 F.2d 873 (5th Cir. 1975) (hospital leasing premises from the county for one dollar per year did not convert their actions into state action); Harvey & Corky Corp. v. County of Erie, 392 N.Y.S.2d 116 (N.Y. App. Div. 1977) (county who gave lessee exclusive right to sublease premises was insufficient, standing alone, to create state action).

29. *Burton*, 365 U.S. at 723-24. The Court listed a variety of mutual benefits that the state and coffee shop conferred upon one another. The restaurant derived benefits such as not having to pay higher rent due to a tax increase because the premises were held by a tax-exempt government agency. Similarly, the discrimination by the coffee shop benefitted the Parking Authority because the coffee shop ostensibly asserted that serving blacks would injure its business, thereby impairing its ability to pay rent.

30. *Id.* at 726. *See also*, Lewis, Burton v. Wilmington Parking Authority—*A Case Without Precedent*, 61 COLUM. L. REV. 1458 (1961).

31. This term was first used by the Court in Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175 (1972).

32. *See, e.g.*, Braden v. University of Pittsburgh, 552 F.2d 948 (3d Cir. 1977).

33. 407 U.S. 163 (1972).

34. *Id.* at 164-65.

club, the plaintiff claimed the refusal of service constituted state action for purposes of the federal equal protection clause.[35] To determine the merits of the claim, the Supreme Court examined the relationship between the state and the club. The Court found that there was nothing approaching the symbiotic relationship as found in *Burton* because the club owned its premises and was not open to the public.[36] Moreover, the state did not take part in establishing or enforcing the discriminatory practices. Detailed regulation did not foster or encourage the wrongful conduct.[37] Therefore, with the exception later stated, the Court found that the "regulatory scheme . . . [did] not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge to make the latter 'state action.' "[38] The exception noted was that a regulation promulgated by the liquor control board did require the club to comply with its constitution and bylaws. Because these documents were found to contain discriminatory requirements, the Court found the result would be to invoke state sanctions to enforce discrimination in violation of the fourteenth amendment.[39] Although it never explicitly stated that it was moving away from *Burton*'s symbiotic relationship test, the Supreme Court pursued a new line of inquiry in *Moose Lodge*. The beginning of a new test was soon recognized in

35. *Id.* at 165.

36. *Id.* at 175. More specifically, the Court pointed out that in *Burton* "the parking authority was enabled to carry out its primary public purpose of furnishing parking space by advantageously leasing portions of the building constructed." *Id.* Moose Lodge, on the other hand, was completely severed from any connection to state property. "[W]hile Eagle was a public restaurant in a public building, Moose Lodge is a private social club in a private building." *Id.* From this analysis, it is clear that the Court felt that *Burton* was still limited to its facts. However, the Court's statement that state regulation could not be said to have fostered the discrimination must be what has led others to suggest that if the regulation had had such an effect, then the requisite state action could have been found. Because this would not have fit into the lessor/lessee situation, it is understandable why the Supreme Court's treatment of these separate tests has confused lower courts. The suggestion has also been made that *Moose Lodge* is actually similar to *Burton* because the state profited from revenues of liquor sales. Comment, *supra* note 5, at 161.

37. *Moose Lodge*, 407 U.S. at 176-77. This view is probably the origin of the nexus test.

38. *Id.* at 177. State regulation of private enterprises has previously been the subject of state action analysis. In Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952), the Supreme Court found that permitting broadcasting on public transportation was not precluded by the Constitution. *Id.* at 454. In *Pollak*, a hearing had been held in which the challenged action had been reviewed and the PUC directly approved the practice. As later stated in Jackson v. Metropoliton Edison, 419 U.S. 345 (1974), "[a]pproval by a state utility commission . . . where the Commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice . . . into 'state action.' " *Id.* at 357.

39. *Moose Lodge*, 407 U.S. at 178-79. The effect of this finding by the Court should have placed *Moose Lodge* within the line of cases holding that state action results from judicial enforcement of discriminatory actions. *See supra* note 3.

which the crucial element was a finding that the state had "significantly involved itself" with the private party.[40] The question of exactly what the state had to involve itself with was expanded upon in *Jackson v. Metropolitan Edison.*[41]

In *Jackson,* a privately owned and operated utility company terminated the account of a customer because of delinquency in payments due for services. The customer brought an action for damages and injunctive relief under the Civil Rights Act and 42 U.S.C. § 1983, alleging that termination of her services constituted state action for purposes of the fourteenth amendment.[42] The Supreme Court scrutinized many aspects of the relationship between the utility company and the state to determine if state action was present. This was accomplished by inquiring "whether there [was] 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] Under this inquiry, the Court found that the requisite nexus was lacking.

First, the Court recognized that the company was subject to extensive regulation, but found that "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State."[44] Second, the Court rejected the argument that a monopoly, even if one had been granted, was determinative in finding state action because there was no nexus between the monopoly and the challenged action.[45] Third, because the utility company did not exercise a power "traditionally exclusively reserved to the State," the Court found no state action.[46] Fourth, although the regulated entity may request approval of a practice, the Court held that where the state had not placed its "weight on the side of the proposed practice by ordering it," the private conduct could not be attributed to the state.[47] Finally, the Court found that the *Burton*

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40. *See generally* Comment, *supra* note 5.

41. 419 U.S. 345 (1974).

42. *Id.* at 347-48. The fourteenth amendment violation was not claimed to be a denial of equal protection of the law but that due process had been denied. The customer claimed that "reasonably continuous electrical services" were an entitlement under state law and thus the termination was a deprivation without due process of law. *Id.* at 348 n.2.

43. *Id.* at 351. The case cited for this proposition was *Moose Lodge.* The nexus, then, that the Court was searching for in *Moose Lodge* was active state pursuit of the discriminatory policies.

44. *Id.* at 350.

45. *Id.* at 351-52.

46. *Id.* at 352.

47. *Id.* at 357. The provision that allowed the utility company to terminate services for nonpayment was filed in a general tariff with the Public Utility Commission. The provision

symbiotic relationship was not present.[48] All of these arguments "taken together" showed no more than that it was a heavily regulated company with at least a partial monopoly. Under the nexus theory, this was insufficient to connect the state to the private company's actions.[49]

After *Jackson,* a highly relevant question became when, if ever, would circumstances indicate that private conduct was proscribed under the fourteenth amendment. It was hard to understand how *Burton* could survive the *Jackson* test.[50] Did *Jackson* overrule *Burton* or did it merely create a second test? If the latter, was the second test separate and distinct or to be used in conjunction?[51] One of the major hindrances in utilizing the new nexus test was that it was almost as limiting as *Burton.* The Court now appeared to be searching for an action that the state had engaged in with the private actor instead of examining the conduct of the private actor. For instance, the Court in *Burton* recognized that passive activity, such as not discouraging discrimination, was sufficient encouragement to require a finding of state action. However, in *Jackson,* nothing less than actual state involvement in, or positive approval of, the violative conduct would establish the necessary nexus between the state and the private actor. A closer look at the language in *Jackson* indicates that the Court intended that the nexus must exist between the state and the challenged action. Thus, a multiplicity of connections between the state and the private person

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became effective if not disapproved 60 days after filing. It was not found by the Court that the utility company was required to file this provision nor that the PUC could even prohibit the practice. *Id.* at 355.

48. *Id.* at 357-58. The Court also recognized that the holding of *Burton* was limited to lessees holding public property.

49. *Id.* at 358. This last sentence may be the reason for the confusion surrounding the test. All of the arguments taken together were insufficient to connect the state with the utility's conduct for a finding of state action. This seems to suggest that the Court was looking to the totality of the circumstances in order to find the connection. However, the nexus test does not take into consideration the amount of connections involved. It takes only one connection, that of direct state involvement in the challenged activity, for a finding of state action.

50. In *Burton,* the only activity that the state engaged in which was held to encourage the discrimination was inaction. The test of *Jackson,* however, rejects the claim that passivity can ever be state involvement. The state, by approving the termination practice and by not directly disapproving it, was, in contrast to *Burton,* not encouraging the wrongful conduct.

51. Some courts have asserted that the tests are to be used in a consecutive order; the nexus test should be used only after application of the symbiotic test has not produced a state action finding. *See, e.g.,* Nguyen v. United States Catholic Conference, 548 F. Supp. 1333, 1341 n.22 (W.D. Pa. 1982) (citing Chalfant v. Wilmington Institute, 574 F.2d 739, 745-46 (3d Cir. 1978)).

does not satisfy the nexus test. Instead, there must exist some sort of involvement by the state in the wrongful conduct of the private party. *Moose Lodge* confirms this analysis because the close connections between the state and the private club were insufficient to implicate the state.

Since *Jackson* developed an analysis completely separate from *Burton*, did *Burton* retain any vitality? Because of recent Supreme Court pronouncements on this issue, discussed below, it appears that *Burton* is alive and well but that its use is limited to the exact factual situation for which the Court intended.[52] The interdependence that was found controlling in *Burton* was only present because of the lessor/lessee relationship.[53] The very nature of a lease establishes a relationship between parties that is absent when persons independently own property. In *Burton*, if the state had not been leasing premises to the coffee shop, the state would not have been relying upon the rent paid by its tenant. No agreements would have existed to maintain the property and the state could not legally oblige a neighbor to engage in the activities in question. The symbiotic relationship theory should be recognized and given its own position within the state action doctrines. However, the effectiveness of its use depends upon a court being confronted with a lessor/lessee relationship.

If *Burton* is limited to its facts and *Jackson* requires the state to participate in the wrongful conduct in order to find state action, then other courts faced with this issue should have little difficulty applying these theories. Unfortunately, this dichotomy, which may seem clear after a close analysis, has left the state and federal courts in confusion. Many of the federal courts have either expressly or impliedly admitted their confusion but were bound to try and follow the Supreme Court guidelines.[54] The state courts which were free to fashion their own tests, however, have followed the Supreme Court's state action analysis in *Burton* and *Jackson*.

An analysis of the decisions of the state courts reveals the confu-

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52. *See infra* notes 113-14 and accompanying text.

53. In *Burton*, the Court stated that "[i]t cannot be doubted that the peculiar relationship of the restaurant to the parking facility in which it is located confers on each an incidental variety of mutual benefits." *Burton*, 365 U.S. at 724. The only "peculiar" relationship the court can be referring to is that of lessor/lessee.

54. The numerosity of these decisions prevents listing them in entirety. Some of the cases with more involved discussions are: Foster v. Ripley, 645 F.2d 1142, 1146-47 (D.C. Cir. 1981); Braden v. University of Pittsburgh, 552 F.2d 948, 956-58 (3d Cir. 1977); Fulton v. Hecht, 545 F.2d 540, 541-43 (5th Cir. 1977); Robinson v. Price, 553 F.2d 918, 920-21 (5th Cir. 1977); Broderick v. Associated Hosp. Serv., 536 F.2d 1, 4-8 (3d Cir. 1976).

sion wrought by the Supreme Court's lack of clarity. Recognizing that discord exists in the federal system, this comment will demonstrate the corresponding chaos in the state systems. Following this overview, an attempt will be made to uncover the direction in which the United States Supreme Court is heading by examining several recent decisions. Although clarification of state action theories should have emerged through these latest decisions, this did not occur. Hence a superior method of analysis will be recommended which will clarify the process for determining the presence of state action. This new analysis should permit state and federal courts to uniformly apply the state action doctrine which, at least through the present time, has been an elusive task.

III. State Court Treatment of the State Action Issue

Interpretation of the different states' equal protection clauses has followed a course similar to the federal construction.[55] While the states have guaranteed equal protection in different forms,[56] each state that has been confronted with the issue of whether their constitution requires state action has found that it does.[57] As expected, however, the confusion of the federal decisions has carried over to the state decisions.[58]

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55. *See, e.g.*, State *ex rel.* Breese v. Smith, 501 P.2d 159 (Alaska 1972) (state court not obligated to interpret state constitution in the same manner as the federal constitution; broader safeguards are available under the state constitution); Sharrock v. Dell Buick-Cadillac, 408 N.Y.S.2d 39 (N.Y. App. Div. 1978) (state constitution can be given an independent construction and grant even more protection than its federal counterpart); Bulova Watch Co. v. Brand Distributors of Wilkesboro, Inc., 206 S.E.2d 141 (N.C. 1974) (United States Supreme Court's construction of federal constitution is highly persuasive but not binding upon construction of state constitution); *but see* Fox v. Michigan Employment Security Comm'n, 153 N.W.2d 644 (Mich. 1967) (state constitution secures same right of protection as federal equal protection clause); Garcia v. Albuquerque Public Schools Bd., 622 P.2d 699 (N.M. Ct. App. 1981) (standards for violation of the state and federal equal protection clauses are the same); Nyitray v. Industrial Comm'n, 443 N.E.2d 962 (Ohio 1983) (limitations placed upon governmental actions by equal protection clause of Ohio and federal constitutions are essentially the same); Darrin v. Gould, 540 P.2d 882 (Wash. 1975) (state version of equal protection clause construed in similar manner as equal protection clause of the fourteenth amendment).

56. *See supra* note 6.

57. *See supra* note 3.

58. Contradiction among state court decisions is prevalent. *See, e.g.*, Lincoln v. Mid-Cities Pee Wee Football Ass'n, 576 S.W.2d 922, 926 (Tex. Civ. App. 1979) (refusal by a private football association to allow a young female to participate in the sport is not "encouraged by, enabled by or closely interrelated in function with state action"); Junior Football Ass'n v. Gaudet, 546 S.W.2d 70 (Tex. Civ. App. 1976). *See also* Harvey & Corky Corp. v. County of Erie, 392 N.Y.S.2d 116 (N.Y. App. Div. 1977) (under a *Burton* analysis, a lease by a county to a private association, which in turn refused to sublet the premises, was not

One of the first state courts to find a state action requirement in its constitution was Connecticut. In *Lockwood v. Killian*,[59] the Connecticut Supreme Court was faced with a trust that was alleged to be discriminatory because it contained racial and religious restrictions.[60] The Connecticut Attorney General was a party to the action and the trial court enforced the religious trust. Because earlier Connecticut Supreme Court cases had established that the federal and state equal protection clauses had "the same meaning and imposed similiar constitutional limitations,"[61] the court concluded that private actions inhibiting individual rights were not violative of the state equal protection clause.[62]

The Connecticut court turned to the *Burton* and *Moose Lodge* cases as guidelines to determine whether the conduct was private or governmental. First, the court noted that the Supreme Court had never adopted a rigid formula but had relied upon a case-by-case approach.[63] Then the court, citing *Burton*, stated that the "court [was not] so significantly involved in the implementation of the religious restriction that it can be said that state action should be deemed responsible for what is essentially private discrimination. . . . The court merely applied neutral and nondiscriminatory principles."[64] The court then went on to quote language in *Moose Lodge*, which distinguished that case from *Burton*, stating that no symbiotic relationship was present.[65]

The misapplication of the Supreme Court tests is obvious in the Connecticut court's analysis. The court should have followed *Shelley v. Kraemer*,[66] a state action case which held that a discriminatory covenant could not be enforced through the judicial process. *Burton* does not apply to the *Lockwood* factual situation. There is

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state action). *But see* Murphy v. Harleysville Mut. Ins. Co., 422 A.2d 1097 (Pa. Sup. Ct.) (decision correctly utilized the United States Supreme Court doctrines), *cert. denied*, 454 U.S. 896 (1981); Jeffery v. Weintraub, 648 P.2d 914, 920 n.7 (Wash. Ct. App. 1982) (uncertain whether a lessor/lessee situation creates state action under present Washington law); MacLean v. First N.W. Indus. of Am., 600 P.2d 1027 (Wash. Ct. App. 1979), *rev'd*, 635 P.2d 683 (Wash. 1981).

59. 375 A.2d 998 (Conn. 1977).

60. *Id.* at 1000.

61. *Id.* at 1001.

62. CONN. CONST. art. 1, § 20 reads: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestory, national origin or sex."

63. *Lockwood*, 375 A.2d at 1002.

64. *Id.* at 1003.

65. *Id.* at 1004.

66. 334 U.S. 1 (1948). *See also supra* note 5.

no lease involved, nor are any of the qualitative connections between the state and the private actors seeking to enforce the trust present. Furthermore, if the court desired to center attention upon state participation in discriminatory conduct, *Jackson* could have been utilized.

Although Connecticut incorrectly used the state action tests, the same cannot be said of Florida, which not only recognized the confusion in state action theories but also correctly applied the tests. In *Schreiner v. McKenzie Tank Lines & Risk Management Services, Inc.*,[67] a handicapped individual brought an action against his employer and its insurer for deprivation of employment due to his infirmity.[68] Schreiner contended his dismissal was an unconstitutional deprivation under Florida's equal protection clause.[69] In reviewing this contention, the Florida First District Court of Appeal stated that the United States Supreme Court's finding of a state action requirement for the fourteenth amendment was not binding.[70] Regardless of this freedom from federal precedent, the court found that the state equal protection clause contained a state action requirement.

The next issue confronted by the court was whether Schreiner's private employer's and insurer's activities constituted state action so that Florida's equal protection clause would be applicable to their alleged discriminatory practices. The employer, a trucking company, and its insurer were both regulated by the state.[71] Based on this regulation it was contended that there was a sufficient relationship between the state and the employer so that the action of dismissal by the employer was converted into state action.[72] The court rejected this argument.

In declining to accept this position, the court noted that "[t]he federal judiciary has never clarified the extent to which either the

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67. 408 So. 2d 711 (Fla. 1st DCA 1982).

68. *Id.* at 713. The question of whether epilepsy was a physical handicap for purposes of the constitutional provision was assumed for this case only.

69. The Florida Constitution provides in part: "All natural persons are equal before the law. . . . No person shall be deprived of any right because of race, religion, or physical handicap." FLA. CONST. art. I, § 2.

70. *Schreiner*, 408 So. 2d at 715. The court pointed to the differing treatment of this question by other state courts. Some states were found to construe their state constitutions within the limits and rights imposed by the federal constitution. Other states were said to follow only parallel provisions of the federal constitution while others felt their state constitution provided greater protection. *Id.* at 715 n.5. *See also supra* note 55.

71. *Schreiner*, 408 So. 2d at 717-18.

72. *Id.* The parties did not brief this point but the issues were raised by the court itself as possible state action sources.

symbiotic relationship or close nexus theories must be satisfied before state action can be found to exist."[73] The court also stated that it was unsure which theory must be used in assessing whether state action was present. Various federal circuits were found to have differed in their views as to the weight to be given the two theories.[74] After examining the general trend of the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit, the Florida court concluded that the favored approach was utilization of the close nexus theory.[75]

After recognizing the conflict among the various state and federal courts and finding the nexus test to be the one currently in vogue, the court concluded that, under either approach, neither a nexus nor a symbiotic relationship existed.[76] Because state regulation alone was the only relationship between the state and the private company, a symbiotic relationship was not present.[77] A nexus

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73. *Id.* at 717.

74. *Id.* The court recognized that the circuits have accepted the idea that *Jackson* did not overrule *Burton* and that there is a manner in which the two can be reconciled. The court then went on to subscribe to the theory that the *Burton* symbiotic relationship test still retained vitality after *Jackson*. *Id.* at 717 n.10.

75. *Id.* At the time of this case, the Eleventh Circuit had recently been established and the *Schreiner* court recognized that they would be bound by the Fifth Circuit until otherwise informed. Since then, the Eleventh Circuit has spoken with regard to the state action doctrine. *See* Daniels v. Twin Oaks Nursing Home, 692 F.2d 1321 (11th Cir. 1982); Jeffries v. Georgia Residential Fin. Auth., 678 F.2d 919 (11th Cir. 1982).

In *Jeffries*, the Eleventh Circuit stated that the relevant inquiry was whether a sufficiently close nexus existed. 678 F.2d at 923. The court was confronted with a state agency which participated in the termination and eviction process of tenants by their landlord. Recognizing that intimate government involvement by way of regulation or provision of benefits will not necessarily require a finding of state action, the court here found that there was other evidence which, when taken with the government involvement in regulation, was sufficient to sustain the lower court's finding of state action. The thought the court was attempting to articulate is that the single fact of a close degree of involvement between the state and the private actor may cause the actions of the individual to be transformed into state action even though the state is not involved in that particular challenged activity. The court found that the state agency "'has so far insinuated itself with the private owner in carrying out the [private] challenged eviction procedure' that the nexus between the state and the private action 'is both firm and close.'" *Id.* This analysis combines the *Burton* "interdependence" factor with the close nexus requirement of *Jackson*.

In *Daniels*, the Eleventh Circuit followed its earlier pronouncement in *Jeffries* of the state action doctrine with a confused statement. The court claimed that if the "complaining party can demonstrate that 'there is a sufficiently *close nexus* [or *symbiotic relationship*] between the State and the challenged action . . . [then] the action . . . may be fairly treated as that of the state itself." 692 F.2d at 1333 (citation omitted). This interpretation of the state action requirement succinctly demonstrates the utter confusion reigning in the circuit courts.

76. *Schreiner*, 408 So. 2d at 717.

77. *Id.* at 718. The use of the symbiotic relationship test should not have been made by

between the state and the allegedly discriminatory action (dismissal from employment) was also lacking because it was not shown that the state participated in the decision of dismissal.[78]

The Florida Supreme Court approved the decision of the District Court of Appeal.[79] Thus in Florida the theory to which courts would adhere is the nexus doctrine. The Florida court correctly applied the United States Supreme Court concept by analyzing the actions of the state in conjunction with the challenged activity instead of merely examining the existence of certain connections between the two.[80]

The states' treatment of the state action issue demonstrates that they have attempted to follow the requirements that the Supreme Court has found emanating from the fourteenth amendment. The application of these theories, however, has produced varying results. The blame for this situation can be placed upon the Supreme Court which, while attempting to be flexible in approaching the various factual circumstances presented in state action cases, has inadvertently done exactly what it said should not be done. In establishing the symbiotic relationship and close nexus tests, the Court has created rigid formulas that induce lower courts to search for similarities between their cases and those of the Supreme Court and has not invited analysis on a case-by-case basis.[81] The solution to this problem is for the Supreme Court to enunciate a theory unconfined to any limiting factual situation. The Court was faced with just such an opportunity in several recent cases.

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the court under the given factual circumstances. The court could have merely dismissed state action under this theory by finding no lessor/lessee relationship between the state and the regulated industries. There was no need to find that regulation does not create a symbiotic relationship because the threshold requirement of a lease was not met.

78. *Id.* The court also recognizes two other possible sources of state action. The revocation of the driver's license by the state could have been the source of a nexus but the court found that the connection between this act by the state and the challenged activity of the private actor (dismissal) was much too attenuated. Second, the use of the judiciary for resolving this conflict did not implicate the state in the actions of the private actor. *Id.*

79. Schreiner v. McKenzie Tank Lines & Risk Management Services, Inc., 432 So. 2d 567, 568 (Fla. 1983).

80. *Schreiner*, 408 So. 2d at 718.

81. This factor may explain why the Court has confused its followers with the *Burton* symbiotic relationship test. Realizing that the Supreme Court had taken the stance that no precise formula should be utilized, courts looking to *Burton* for guidance would have been skeptical of limiting its application to a lessor/lessee situation. Courts must have been convinced that *Burton* stood for more. It is easy to understand, therefore, how *Burton* came to stand for more than was ever intended.

IV. THE LATEST SUPREME COURT PRONOUNCEMENTS

The latest development of the state action doctrine resulted from three recent Supreme Court cases which, when read together, define the parameters within which the search for state action is to be conducted. The first case is *Lugar v. Edmondson Oil Co.*,[82] in which a private party sought prejudgment attachment of his debtor's property.[83] The writ of attachment was executed by a county sheriff.[84] The attachment was later ordered dismissed because Edmondson did not establish the grounds for attachment in the petition.[85]

An action under 42 U.S.C. § 1983 was brought against Edmondson on the grounds that the company had acted "under color of law" to deprive the debtor of his property without due process of law.[86] In reaching the decision that state action was present in this case, the Supreme Court stated that the requirement of state action for purposes of the fourteenth amendment and the "under color of law" language of 42 U.S.C. § 1983 is the same.[87] The inquiry used was a two-part approach in which a determination must be made as to whether the "deprivation of a federal right [is] fairly attributable to the State."[88] The two-part approach first requires that the deprivation "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, second, that the party responsible for the deprivation "be a person who may fairly be said to be a state actor."[89] The Court stated that without such a rule a party could be challenged for a constitutional deprivation if he merely relied on a state statute or regulation. Ad-

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82. 457 U.S. 922 (1982).

83. *Id.* at 924.

84. *Id.*

85. *Id.* at 925.

86. *Id.* 42 U.S.C. § 1983 (1982) provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, 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 in an action at law, suit in equity, or other proper proceeding for redress.

87. *Edmondson Oil*, 457 U.S. at 929. However, the Court stated that even though a finding of state action under the fourteenth amendment will satisfy the "under color of law" requirement of § 1983, the same could not be said about "under color of law" conduct satisfying the fourteenth amendment state action requirement. *Id.* at 935 n.18.

88. *Id.* at 937.

89. *Id.*

ditionally, the Court noted that the two principles, while related, are not identical. If the case dealt with a party who has official character such that the weight of the state is behind his decisions, then the principles collapse into one another, but if the party is a private entity, then the principles diverge.[90]

Two illustrations of this two-part approach were provided by the Court. The first example presented was the *Moose Lodge* case, in which the Court claimed the focus was on whether the discrimination in question could be ascribed to any governmental decision. It was found that the regulatory scheme enforced by the Pennsylvania Liquor Control Board did not implicate the state in the wrongful conduct. Any government decision that did affect Moose Lodge was unconnected with the challenged activity.[91]

The second example discussed was the case of *Flagg Brothers v. Brooks*,[92] in which the use by a private party of a self-help provision of the state Uniform Commercial Code was challenged as state action. The Court in *Flagg* applied the two-prong inquiry and found the first test was met, but not the second. The state was responsible for the statute, but the action by the private party pursuant to the statute was not sufficient to justify characterizing that person as a state actor. Therefore, the Court found no state action present.[93]

In *Edmondson Oil,* the Court found that both prongs of the "fairly attributable" test were satisfied. The state, as in *Flagg,* was responsible for the "procedural scheme" of the statute.[94] Unlike *Flagg,* however, there was a state actor involved because the sheriff was a joint participant in exercising the writ. Therefore, the "under color of law" requirement of 42 U.S.C. § 1983 was satisfied.[95]

The next state action case decided that day was *Blum v. Yaret-*

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90. *Id.* This illustration is rather an awkward one because it initially appears that, for a private entity, the two prongs need to be independently analyzed. As later indicated, this is an incorrect construction. The divergence only requires that both facets fall within the state action doctrine and a different analysis for each prong is unnecessary. The distinction between the private and official character was merely to indicate that with the latter less needs to be shown.

91. *Id.* at 938.

92. 436 U.S. 149 (1978).

93. *Edmondson Oil,* 457 U.S. at 939.

94. *Id.* at 941. As the dissent points out, "[r]espondents did no more than invoke a presumptively valid state prejudgment attachment procedure available to all." *Id.* at 943.

95. The "joint participant" theory is derived from Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970), which held that joint participation by a private actor with a state official in discrimination was state action under § 1983. *Id.* at 152.

sky.[96] There a nursing home whose patients were Medicare recipients determined that some patients could be discharged or transferred to lower levels of care. In response to this transfer, the state reduced or terminated the patients' Medicare benefits. The patients, claiming their right to due process had been violated because they had not been afforded notice or a hearing, commenced suit against the state under the fourteenth amendment.[97]

The Court of Appeals for the Second Circuit found state action present.[98] Because the state "responded" to the transfer decisions by adjusting the Medicare benefits, the nexus requirement of *Jackson* was satisfied.[99] The Supreme Court reversed this decision and rejected the accompanying rationale. In so doing, the Court recognized the fact that this case was different from other state action cases in which a private actor is accused of state action. Here, the state allegedly denied fourteenth amendment rights through its responsibility for regulating the conduct of the nursing homes.[100] The other state action decisions, however, were found to provide guidance in the analysis needed to resolve the issues in this case.

The first principle announced was that the mere fact of state regulation does not convert private conduct into state action. A nexus must also be found between the state and the challenged action. Second, a state can be held liable for exercising coercive power or significantly encouraging, either overtly or covertly, a private party. Finally, the Court stated that the nexus may be present if the private entity has exercised a power "traditionally the exclusive prerogative of the State." Under these principles, state action was not found.[101]

The nexus was not satisfied because the response by the state was not the challenged activity; rather, it was the decision to discharge that was being challenged. State response through adjustment of payments was held not to render the state responsible for those actions.[102] Further, the decision to discharge was a medical

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96. 457 U.S. 991 (1982).

97. *Id.* at 995-96.

98. Yaretsky v. Blum, 629 F.2d 817 (2d Cir. 1980), *rev'd*, 457 U.S. 991 (1982).

99. *Id.* at 820.

100. *Blum*, 457 U.S. at 1002-03.

101. *Id.* at 1005.

102. *Id.* The argument was also rejected that the state "affirmatively commands" the discharge. There was no regulation by the state which ordered such conduct. The requirements of the pertinent regulation stated that transfers should be done according to need and the state provided the forms for the transfer.

judgment and thus could not be attributed to the state since it was made "in accordance with professional canons of ethics, rather than dictated by any rule of conduct imposed by the State."[103] The Court also rejected the argument that a relationship existed between the state and the hospital, created by regulation and subsidizations, so that the state was a joint participant in the decision.[104] Although an attempt was made to use *Burton*, the Court found that it did not encompass situations where private business was extensively regulated. Finally, the operation of a nursing home was found not to be a function "traditionally exclusively" the prerogative of the state.[105]

The last state action case to be determined by the Court that day was *Rendell-Baker v. Kohn*.[106] In *Rendell-Baker*, a non-profit private school that specialized in educating children with exceptional needs was claimed to have discharged its personnel in violation of the first, fifth and fourteenth amendments. Suit was filed under 42 U.S.C. § 1983.[107] Citing *Edmondson Oil*, the Court stated that a person is amenable to suit under 42 U.S.C. § 1983 if the "alleged infringement of federal rights [is] 'fairly attributable to the state.' "[108] The Court then turned to *Blum* to decide whether the action was attributable to the state.[109] Because dependency upon state funds and extensive state regulations were rejected as foundations for finding state action in *Blum*, they were also rejected in *Rendell-Baker*. More importantly, the decision to discharge the personnel in *Rendell-Baker* was not compelled or influenced by the state and the state "showed relatively little interest

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103. *Id.* at 1009. The Court found the case to be similar to Polk County v. Dodson, 452 U.S. 312 (1981). In *Polk*, a public defender who represented indigent defendents was found not to be acting under color of state law because his professional duties were dictated by his professional ethics, not by the state.

104. *Blum*, 457 U.S. at 1010-11. The Court side-stepped having to decide if these factors were sufficient to constitute a symbiotic relationship by resorting to *Jackson*'s nexus requirement. *But see* Rendell-Baker v. Kohn, 457 U.S. 830, 848 n.1 (1982) (Marshall, J., dissenting) (viewed separately, these are insufficient factors to establish state action; nevertheless, the "cumulative impact" would necessitate a state action finding).

105. *Blum*, 457 U.S. at 1011.

106. 457 U.S. 830 (1982).

107. *Id.* at 834-35.

108. *Id.* at 838. Yet, in *Blum*, the Court stated that fair attribution was to be the test when there is enforcement of state laws or regulations by state officials who were parties to the suit. Neither of these factors was present in *Rendell-Baker*.

109. Ironically, the Court in *Blum* did not state that the question was one of fair attribution. Yet, the Court in both *Rendell-Baker* and *Blum* conducted its analysis in terms of the then-existing state action doctrines.

in the school's personnel matters."[110]

As in *Blum,* the Court found that the case did not fall within the "public function" doctrine because a special school was not a function "traditionally the *exclusive* prerogative of the state."[111] Finally, the symbiotic relationship argument rejected in *Blum* was also rejected in *Rendell-Baker.* The Court stressed that in *Burton* the restaurant was leased from the state and the state profited from the discrimination by receiving rent. Here, the relationship between the state and the school was said to be more akin to a contractor who was employed by the government.[112]

A. The Current Status of the State Action Doctrines

It is difficult to assert, after the decisions rendered in these three cases, that the status of the state action doctrines is less ambiguous than before. One issue, however, has been determined. The vitality of *Burton* remains intact. A proposition stated earlier in this comment also remains unscathed. A symbiotic relationship can only be found when a state leases property to a private party. The reason behind this proposition is found in the language of *Rendell-Baker* where the Court emphasized the receipt of rent by the state from the coffee shop in *Burton.*[113] There appears to be a "sustenance" requirement in *Burton;* without the rent money, the state could not operate its parking premises and, without the rental premises from the state, the coffee shop might not be able to continue its operation. Thus, a symbiotic relationship should only be found when a lease exists.[114]

The most pertinent question to be raised after the recent state action trilogy is: To what status has the *Jackson* "nexus" test been relegated? If the "fairly attributable" test has been given the premier spot in state action doctrines, has the nexus theory become a

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110. *Id.* at 841. It appears by this statement that the state would have to directly order or participate in the decision to dismiss.

111. *Id.* at 842 (emphasis in original).

112. *Id.* at 843. After this decision was rendered, one court argued that this dicta reinstated the *Burton* symbiotic test. Adams v. Bain, 697 F.2d 1213, 1219 n.7 (4th Cir. 1982). *But see* Gerena v. Puerto Rico Legal Services, Inc., 697 F.2d 447, 451 (1st Cir. 1983) (court construed this same language in *Rendell-Baker* as stressing the importance of the lease and the payment of rent).

113. *Rendell-Baker,* 457 U.S. at 842. *See supra* note 31.

114. *See, e.g.,* Gerena v. Puerto Rico Legal Services, Inc., 697 F.2d 447, 451 (1st Cir. 1983) (in discussing the critical facts in *Burton,* the court stated that: "Most importantly, the profits the restaurant earned through discrimination were indispensible [sic] elements in the financial success of the government agency").

nullity? *Jackson* is referred to throughout the *Rendell-Baker, Blum* and *Edmondson Oil* decisions. Yet, if the Court is still using the test, why does it state at the beginning of *Rendell-Baker* that the question in determining if state action is present under the fourteenth amendment is whether the challenged conduct is fairly attributable to the state?[115] The explanation lies in the fact that the "fairly attributable" test will not always be used in a state action analysis. The basis for this statement is derived from *Blum*, where the Court states that there are two types of state action cases. The first situation involves a private party's conduct that has "sufficiently received the imprimatur of the State" so that the private action is converted into state action. The second group of cases involves a challenge to the enforcement of state laws or regulations by state officials who are themselves parties to the suit. In such cases, the question is whether the private motive that triggered the enforcement of those laws can fairly be attributed to the state.[116] For the former group of cases, the Court cites *Flagg, Jackson, Moose Lodge* and *Adickes v. S.H. Kress & Co.*[117] For the latter, the Court cites *Peterson v. City of Greenville*,[118] in which a city ordinance made it unlawful to seat whites and blacks together in a restaurant.

This analysis can be reconciled with the distinctions made in *Edmondson Oil*. The Court in *Edmondson Oil* stated that if a private entity is alleged to have engaged in wrongful conduct then the two prongs of the "fairly attributable" test diverge. The example given was *Moose Lodge*, which represents the beginning of the nexus test. This is comparable to the statement in *Blum* that in such types of cases an "imprimatur" must be found. These statements can be construed to mean that the Court requires an overall finding of state action which includes both state participation in the activity through laws, regulations or policies and state execution of the activity. *Moose Lodge* failed under this analysis because the discrimination did not emanate from the state laws or regulations.

The next statement by the Court in *Edmondson Oil* was that the tests "collapse" if the activity is carried out by a party with official character. This is equivalent to the *Blum* Court's statement that

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115. *Rendell-Baker*, 457 U.S. at 839-40.

116. *Blum*, 457 U.S. at 1003-04.

117. 398 U.S. 144 (1970).

118. 373 U.S. 244 (1963). The flaw in this assertion is that *Flagg* should have been cited for this proposal because it involves exactly this type of situation.

the second group of state action cases involves enforcement of state laws or regulations by a state official. This requirement means that the only factor for which state action must be shown is that the actor is a state actor. There is no need to show state action in the challenged activity because it came directly through the support of state laws or regulations. Thus, as exemplified in *Flagg Brothers* and *Edmondson Oil*, there was no need to determine if the deprivation was created through state action because it was derived from state law.

In sum, the "fairly attributable" test has not made a nullity of the nexus test. It only defines the point in time when the test comes into play. Therefore, the nexus test will be used at the same time as the other state action theories. This point in time occurs whenever it must be demonstrated that the challenged activity is a result of state decisions or, in other words, whenever it must be shown that an "imprimatur" exists.

Hence, the relevant inquiry is: What constitutes an "imprimatur?" Given the cases cited for this proposition and the fact that *Rendell-Baker* and *Blum* are still analyzed within the nexus/symbiotic relationship tests, "imprimatur" is just another way of stating that the court must be presented with state sanctioning of the challenged conduct. This would include demonstration of an "imprimatur" by establishing the existence of a public function, a nexus, or a symbiotic relationship. Furthermore, all but the nexus theory have remained untouched by the decisions. However, the seemingly well-defined concept of a nexus may have been given a broader scope after *Blum* because there may now be more circumstances to which it may be applied.

The Court in *Blum* stated that the nexus test is satisfied if the private entity has exercised powers that are "traditionally the exclusive prerogative of the state."[119] This presents a conflict among the state action theories. How is it possible that, on the one hand, the Court states that the nexus can only exist between the state and the challenged decision and that, on the other, the test can be satisfied by a private entity exercising a public function but with no specific approval of the challenged activity made by the state? If the nexus is satisfied by a private actor performing a public function, then the purpose of the nexus theory will be defeated. There will be no assurance that the state is responsible for the specific conduct which is challenged. Instead, by merely performing a

119. *Blum*, 457 U.S. at 1005.

public function, the nexus is automatically satisfied so that all activity engaged in by the private actor becomes state action.

Two explanations for this new language are possible. The use of the word "nexus" could be considered loose language, the connotation of which was not meant to denote the nexus test. Possibly, the intent was to state the availability of the public function doctrine, a separate branch of state action inquiry, but instead an unfortunate choice of words was made. Conversely, there may have been an intent to expand the nexus to a relationship between the state and private actor so that when an entity exercises a power "traditionally the exclusive prerogative of the state" it automatically will have engaged in state action. This construction may initially appear absurd but actually is very similiar to the effect that the *Burton* case created; it is very limiting. As of late, the Supreme Court has demonstrated little inclination towards characterizing any function as traditionally the exclusive prerogative of the state.[120] Thus, the Court may have no need to worry about a deluge of cases contending the presence of state action.

A summation of the propositions of the revised state action doctrine may be helpful in understanding where the Supreme Court now stands. Fourteenth amendment state action and 42 U.S.C. § 1983 "under color of law" state action use a similiar approach in determining if the prerequisites are met. The test used is whether the deprivation of the federal right is fairly attributable to the state, which is a two-part inquiry. Both parts are not always to be separately analyzed. If the challenge consists of enforcement by a state actor of a law or regulation then the two inquiries collapse. The inquiries diverge if a private entity is challenged under the "fairly attributable" theory. The tests to be used to show that fair attribution is present when a private party is involved are the state action doctrines that have evolved up until this period. The "fairly attributable" test does not supersede these concepts; it merely defines when they are to be used. Of these doctrines only one, the nexus test, may have been altered by the Supreme Court, although the change may have a minimal effect.

The attempted clarification by the Court of the state action doctrines has not been accomplished. Rather, a review of the few cases decided after *Blum, Rendell-Baker* and *Edmondson Oil* indicate

120. The special needs school in *Rendell-Baker*, the utility company in *Jackson* and the nursing home in *Blum* were all found not to be traditionally the exclusive prerogative of the state. The public function doctrine was mainly used for finding election primaries to be a public function. *See supra* note 13.

that courts are still as puzzled as before in deciding which is the correct state action theory to be applied under certain circumstances.

B. Application of Recent Supreme Court State Action Decisions

The latest Supreme Court cases have been discussed in federal decisions which have questioned whether private action falls within the prohibitions of the fourteenth amendment. A close look at these cases reveals that the lower courts are still unsure as to the requirements and differences between the nexus and symbiotic relationship test. For instance, in *Daniels v. Twin Oaks Nursing Home*,[121] a discussion by the concurring judge reveals that the dichotomy between the two tests is still misunderstood. In articulating the test to be used under 42 U.S.C. § 1983, the concurring judge correctly states that the deprivation of federal rights must be found to be fairly attributable to the state.[122] The facts of the case are not analyzed by collapsing the two tests together because the suit is against a private nursing home who was said to have been negligent in its care of a patient.[123] No state laws, regulations or state officials were involved. Therefore, the two prongs diverge and the "state must be shown to be sufficiently connected with the particular aspect of the defendant's conduct complained of" so as to find state action.[124] The tests for analysis are then presented, and it is here that the confusion is apparent.

After stating that the public function test and the coercive power theory may be used, the concurring judge then claims that a party can demonstrate that "there is a sufficiently *close nexus* [*or symbiotic relationship*] between the state and the challenged action" of the private entity.[125] This is an erroneous statement. The two tests are separate and distinct. In the nexus test, no matter how strong the relationship is between the state and the private entity, only participation by the state in the challenged activity will result in a state action finding. On the contrary, it does not matter if the state is involved in the decision to engage in the wrongful conduct for a symbiotic relationship to be found. Instead,

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121. 692 F.2d 1321 (11th Cir. 1982).

122. *Id.* at 1333.

123. *Id.* at 1322.

124. *Id.* at 1333. It is not clear whether this analysis was accomplished in recognition of the distinction made in *Edmondson Oil* or if it was accidentally completed.

125. *Id.* (emphasis in original).

there must exist such an overwhelming amount of dependency between the two bodies that the actions of one become the actions of the other.

Another federal case to exemplify the existing confusion is *Adams v. Bain.*[126] In *Adams,* an employee of a volunteer fire department claimed he had been deprived of his employment without due process of law and brought an action under 42 U.S.C. § 1983.[127] Pertinent to the status of the state action theories is the discussion, in a footnote, of *Burton.* The court declared that *Burton* is not limited to its facts due to dicta in *Rendell-Baker.* The court then states that "[i]f there is such a symbiotic relationship in the present case, it would ordinarily follow that the volunteer fire department was exercising an 'exclusive public function.' "[128] This analysis is incorrect. The "interdependence" required in *Burton* does not emanate from a relationship between the state and the private party involving a private function. Instead, the interdependence is a result of a multiplicity of activities taken by each entity that are beneficial to one another. It does not follow that, by engaging in services of a public variety, a private actor benefits the state. As depicted by *Burton,* it was the commercial nature of the coffee shop which benefitted the state. Moreover, it was because the state was the lessor to the coffee shop that it benefitted from the activity. More than likely, the court retrieved this rationale from the aforementioned language in *Blum* which defined the nexus as being satisfied by the public function doctrine.

What these federal cases demonstrate is that after *Rendell-Baker, Blum* and *Edmondson Oil,* the Supreme Court has not come any closer to understanding the nexus/symbiotic relationship dichotomy. This can be attributed to one main factor, the inability of the Court to clearly articulate the state action doctrine. By this time, the reader should have an understanding of the difficulty the Court has encountered in developing a coherent doctrine. The multiplicity of circumstances presented by each case clearly eliminates the possibility for developing a precise formula. Yet, the approach the Court has taken is useless. It has created a variety of very narrow tests which, if a case does not fall within the finely delineated strictures of these theories, eliminate any possibility of a finding of state action. Of course, this may be the intent of the Court so as to

126. 697 F.2d 1213 (4th Cir. 1982).
127. *Id.* at 1215.
128. *Id.* at 1219 n.7.

limit the use of the fourteenth amendment. Even if this is the case, the Court should not have done so by creating an unuseable framework. Instead, the Court should establish a state action theory that is equally applicable to all circumstances. It does not necessarily follow that more cases will be found to have state action present. This development would merely allow clarity in the law. In order to create a new test, the Court must establish an underlying state action theory which is both flexible and understandable. The resulting test should be adaptable to a wide variety of situations, but should also possess clear enough guidelines to prevent confusion or manipulation.

V. SUGGESTIONS FOR REFORM

Creating a new state action test does not require much imagination because most of the answers can be derived from understanding the problems pervading state and federal court decisions. As far as possible a test should not be limited to any one factual situation. This cures the *Burton* problem which has perplexed potential users of the theory who have been unable to ignore the factual limitation placed upon the symbiotic relationship test. The first factor that should be present in the state/private actor relationship is a multiplicity of connections. This factor is an extension of the nexus test which does not consider multiple connections.[129] However, the Court should not only look to the quantity of connections but should also impose a quality requirement.[130] Inherent unfairness would occur if a multitude of minor connections could satisfy the first hurdle. Thus, in the first inquiry the factors of quantity and quality should be balanced. If a few connections between the state and a private actor involved a compelling argument for interdependence, then the quality requirement will have been satisfied. If there were a multiplicity of connections which were so minor as to be negligible, however, then the inquiry would end and no state action could be present. An example of the former is *Rendell-Baker*. In that case only two connections, funding and state regula-

129. Although the nexus test as enunciated by the *Jackson* court involves only the requirement of state involvement in the challenged activity, the minority in *Rendell-Baker* expresses its opinion that the nexus test involves more than mere state involvement. *Rendell-Baker*, 457 U.S. at 844.

130. This requirement was recognized in *Rendell-Baker* when the dissent stated that the majority was correct that, taken separately, regulation and funding were insufficient to find state action. The dissent then argued that the factors should not be viewed in isolation from one another but their cumulative impact should be considered. *Id.* at 848 n.1.

tion, would satisfy the test because of the strong qualitative factors. In the latter category, *Jackson* exemplifies a failure of the test because regulation along with other minor factors does not satisfy the test. It is true that this line of analysis encompasses more cases within the state action strictures as depicted by *Rendell-Baker*. Yet this approach allows the state action doctrine to function as more than just an "empty formalism."[131]

Assuming the first inquiry has been completed, a second factor should be considered. Actions of the state that are considered in any analysis should include passive as well as active state involvement. The essential ingredient in this respect is knowledge. If the state is cognizant of the challenged activity and chooses not to prevent it, then for all purposes encouragement of the activity is taking place.[132]

Support for this proposed state action test can be found among the dissenters in the major state action cases. For instance, in *Jackson*, the dissent stated that "*Burton* made clear [that] the dispositive question in any state action case is not whether any single fact or relationship presents a sufficient degree of state involvement, but rather whether the aggregate of all relevant factors compels a finding of state responsibility."[133] This stance is again taken in the minority opinion in *Rendell-Baker*, where it is stated that the majority was in error to analyze "the various indicia of state action separately, without considering their cumulative impact."[134] The essential feature that the dissent is emphasizing is an overall analysis of the facts which, in essence, is what a case-by-case approach is supposed to accomplish.

Because the dissenters have referred to searching for a "cumulative impact," the name for this new theory is conveniently available. Moreover, no radical departure from previous decisions needs to be made. Only flexibility is being added—the product of this clarification is to provide workable, clear guidelines to the state and federal courts.

It should now be obvious that there does exist an analytical

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131. *Id.* at 852.

132. *But see* Murphy v. Harleysville Mut. Ins. Co., 422 A.2d 1097 (Pa. Sup. Ct.) (although the regulation required filing of proposed rates, the regulation did not require that the insurance commissioner review each filing), *cert. denied*, 454 U.S. 896 (1981). In such a situation, knowledge could only be attributed to the state if it had actually reviewed or been informed of the rates.

133. *Jackson*, 419 U.S. at 360 (citations omitted).

134. *Rendell-Baker*, 457 U.S. at 848 n.1.

framework in which all factual circumstances can be viewed while simultaneously maintaining uniformity. The new theory is well suited to this area of law because of the unlimited factual circumstances that can be encompassed within its boundaries. State and federal courts would no longer have to resort to weakly searching for similarities between a confusing host of prior decisions and the case before them. Instead, the courts will now be able to do what the United States Supreme Court had intended—they will be able to employ the test on a flexible case-by-case basis.