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Commentary

*333 A CONCEPTUAL HISTORY OF THE STATE ACTION DOCTRINE: THE SEARCH FOR GOVERNMENTAL RESPONSIBILITY

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This Article is the first of a two part treatise containing an historical analysis of the state action doctrine. It has been adapted to the format of the Houston Law Review for publication purposes. The second half of this Article will appear in the Fall 1997 issue of the Houston Law Review.

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***334** "The vital requirement is State responsibility . . . ." [FN1]

I. Introduction

By its own terms, the United States Constitution applies almost exclusively to action engaged in by government [FN2] or to private action that can be fairly attributable to government. [FN3] Except ***335** in isolated instances, [FN4] the Constitution, unaided by legislation, has no application to private action that is not fairly attributable to government. [FN5] Thus, if Bob Wilson, a private individual, hits Mary Perez, a private individual, and seriously injures her, the Constitution, by its own terms, provides no relief for Mary; Bob has not invaded an individual right of Mary that is protected by the Constitution. [FN6] By way of contrast, if Max Martin, a county sheriff, takes Mary into custody and then brutalizes her, almost certainly Max, acting in his capacity as sheriff, has violated an individual right of Mary that is protected by the Constitution, specifically the right under the Fourteenth Amendment not to be subjected to punishment by a state official without due process of law. [FN7]

The private villain and bad sheriff hypotheticals exist at each end of the state action spectrum. [FN8] The bad sheriff hypothetical ***336** would be even easier to handle if a state statute authorized sheriffs to beat prisoners at will. [FN9] In the bad sheriff hypothetical, the case for some form of state responsibility is compelling; in the private villain hypothetical, the case for state responsibility in any form is virtually nonexistent. Between these two hypotheticals lie a myriad of fact situations in which the case for state responsibility in some form has greater or lesser appeal. In these in-between situations, the Court [FN10] has stated that "to fashion and apply a precise formula for recognition of state responsibility . . . is an 'impossible task' which '[t]his

Court has never attempted.' Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." [FN11]

The state action doctrine, then, contemplates a search for governmental responsibility, [FN12] a search that has already probed an almost infinite variety of fact situations. Stated conceptually, the doctrine asks: Under the Constitution, in what situations should government be held in some way responsible for harm inflicted by one person or entity (the wrongdoer) upon another person or entity (the victim)? [FN13] For purposes of this question, the terms "responsible" and "harm" should receive a broad construction. In terms of relief, governmental responsibility may take many forms. For example, government may be ordered to pay damages, [FN14] negatively enjoined from engaging in specified conduct, [FN15] or affirmatively enjoined to engage in specified conduct. [FN16] ***337** With respect to a private wrongdoer whose action may be fairly attributable to government, government may be required to disengage itself from, [FN17] or engage itself more closely with, [FN18] the wrongdoer in order to provide practical relief for the victim. There may even be instances when governmental responsibility flows from government's failure to act, situations in which the victim's harm is caused or aggravated by governmental inaction. [FN19]

In state action analysis, harm also presents itself in many forms: physical injury to person, [FN20] violation of property rights, [FN21] emotional pain and suffering, [FN22] denial of access to status, [FN23] economic loss, [FN24] and, in general, any legally cognizable ***338** harm which, if caused by governmental action or action fairly attributable to government, would constitute a deprivation of one or more rights protected by the Constitution. [FN25] Of course, the crucial question remains: When is government in some way responsible for the particular harm that has occurred? This is the state action question, and the efforts of the courts to answer that question reveal a fascinating conceptual history stretching from the Supreme Court's 1883 decision in the Civil Rights Cases [FN26] to present day decisions. [FN27] It is that conceptual history, in its multi-faceted manifestations, that this Article will describe and analyze in the Parts that follow.

Because the state action doctrine had its birth in the Civil Rights Cases, [FN28] this Article will first analyze that case in some detail. Historical starting points often contain the seeds of all that follows, and this is especially true with respect to the Civil Rights Cases and the state action doctrine. The facts of the case, and the majority [FN29] and dissenting [FN30] opinions of the Court, contain directly or indirectly all of the main conceptual questions later probed by the courts under the state action doctrine. [FN31] Accordingly, this Article will first identify those conceptual questions as they reveal themselves in the facts and opinions of the Civil Rights Cases.

***339** The Article will then trace the subsequent conceptual history of each of the state action questions revealed in the Civil Rights Cases. With one exception, each succeeding Part of the study will deal separately and respectively with each of those state action questions; one succeeding Part will cover two of the state action questions. [FN32] As to each state action question, the Article will proceed chronologically from the Civil Rights Cases to the present day. Thus, after the discussion of the Civil Rights Cases, each succeeding Part of the Article will constitute a "mini-history" of the particular state action question or questions that are the focus of that Part. For example, Justice Harlan's dissent in the Civil Rights Cases confronts expressly what is today known as the "public function" question under the state action doctrine: [FN33] What functions are so predominantly governmental in nature that their performance by a private person or entity may be fairly attributable to government? A succeeding Part of the Article will, therefore, describe the conceptual history of the public function question under the state action doctrine. [FN34]

After completing the mini-histories of the several state action questions, the Article will approach the state action doctrine from a totality perspective, describing conceptually where we are today and offering suggestions concerning the direction that the state action doctrine should take in the future. Why does the state action doctrine matter, and why does it merit the extensive attention it has received from courts and scholars? It matters because it is a core doctrine in our nation's constitutional framework. It is the tool with which the courts attempt to balance at least three competing

interests: (1) individual autonomy--the individual's interest in preserving broad areas of life in which he or she can develop and act without being subjected to the restraints placed by the Constitution on governmental action, [FN35] (2) federalism--the nation's interest in preserving the proper balance between state and national power, especially the power of states to determine, within generous limits, the extent to which regulatory power should be applied to private action, [FN36] and (3) constitutional rights--the interest in protecting constitutional ***340** rights against invasion by government or by action fairly attributable to government. [FN37] This balancing act requires what Professor Peter Shane describes felicitously as a comprehensive, "[r]esponsibility-based analysis of state action claims." [FN38] It is that type of fundamental analysis that this history of the state action doctrine is designed to advance.

II. The Civil Rights Cases and the Birth of the State Action Doctrine

A. A Historical Anomaly

It is a historical anomaly that the case giving rise to the birth of the state action doctrine [FN39] involved primarily the proper scope of congressional power under the Thirteenth and Fourteenth Amendments and only secondarily, or derivatively, the reach of the Constitution's self-executing force under those amendments. Section 1 of the Civil Rights Act of 1875 [FN40] prohibited discrimination on the basis of race, color, or previous condition of servitude in the "enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement." [FN41] Section 2 of the Act provided civil and criminal penalties for its violation. [FN42] In five separate proceedings, actions were initiated against persons and entities alleged to have violated section 1 of the 1875 Act. [FN43] In the United States Supreme Court, these five ***341** proceedings were combined under the heading "Civil Rights Cases." [FN44] As stressed by Justice Bradley at the outset of his majority opinion, "It is obvious that the primary and important question in all the cases is the constitutionality of the law: for if the law is unconstitutional none of the prosecutions can stand." [FN45]

It is hornbook law that Justice Bradley's opinion for the Court held sections 1 and 2 of the 1875 Act to be unconstitutional. [FN46] Justice Bradley focused his attention primarily on the power of Congress to enforce the Thirteenth and Fourteenth Amendments by "appropriate legislation." [FN47] With respect to the Thirteenth Amendment, Justice Bradley conceded that the enforcement power of Congress "may be primary and direct in its character" and that the amendment "clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." [FN48] Having made that concession, Justice Bradley defined "badges and incidents of slavery" quite narrowly, holding that "the act of a mere individual" in denying access to a place of public accommodation on the basis of race cannot be characterized as a badge or incident of slavery. [FN49] Such a characterization, he argued, "would be running the slavery argument into the ground." [FN50] Accordingly, Justice Bradley concluded that congressional enforcement power under the Thirteenth Amendment did not extend to the type of discriminatory action involved in the Civil Rights Cases. [FN51]

It is Justice Bradley's construction of congressional enforcement power under the Fourteenth Amendment that gave rise to the state action doctrine. Focusing on section 1 of the Fourteenth Amendment, Justice Bradley stated that this section, "after declaring who shall be citizens of the United States, and of the several States, is prohibitory in its character, and prohibitory upon the States." [FN52] He noted further: "It is State action of a particular character that is prohibited. Individual invasion of individual ***342** rights is not the subject-matter of the amendment." [FN53] Thus, Justice Bradley established the fundamental principle, unbroken to this day, that the prohibitory provisions of section 1 of the Fourteenth Amendment [FN54] apply only to offending state action and not to private action. [FN55] Phrased more technically, the self-executing force of those provisions reaches only governmental action and not private action.

Having established this state-action-only principle, Justice Bradley then considered the reach of congressional power in relation to section 1 of the Fourteenth Amendment. Conceding that section 5 of that amendment "invests Congress with power to enforce it

by appropriate legislation," [FN56] Justice Bradley continued:

> To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. [FN57]

Under this reasoning, congressional enforcement power in relation to section 1 of the Fourteenth Amendment may operate only against state action that itself violates the prohibitions of section 1 and not against "the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings." [FN58] Stated another way, in relation to section 1 of the Fourteenth Amendment, congressional enforcement power does not extend beyond the reach of the ***343** self-executing force of that section's prohibitory provisions. [FN59]

Turning, finally, to sections 1 and 2 of the Civil Rights Act of 1875, Justice Bradley concluded that those sections constituted an attempt by Congress to regulate private action directly without reference to offending state action. [FN60] As described by Justice Bradley, the 1875 Act

> makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the States. It is not predicated on any such view. It proceeds ex directo to declare that certain acts committed by individuals shall be deemed offences, and shall be prosecuted and punished by proceedings in the courts of the United States. [FN61]

Because, in his view, the 1875 Act was not tied to offending state action, Justice Bradley concluded that the Act exceeded the reach of congressional enforcement power under the Fourteenth Amendment. [FN62]

Thus, for Justice Bradley, the state action doctrine was a necessary predicate to his conclusion concerning the reach of congressional power under the Fourteenth Amendment. In holding that congressional power to enforce section 1 of the Fourteenth Amendment could not extend beyond that section's self-executing force, Justice Bradley had first to define what section 1 by itself prohibited. From this logical necessity emerged Justice Bradley's formulation of the state action doctrine: The prohibitory provisions of section 1 of the Fourteenth Amendment operate only against state action and not against private action. [FN63] This formulation is but a concrete application of the general state action principle set forth in this Article's introduction: With rare exceptions, the Constitution's self-executing force applies ***344** only to governmental action or to private action that may be fairly attributable to government. [FN64] Justice Bradley's formulation of the state action doctrine, therefore, set in motion an ongoing judicial search for governmental responsibility in all cases in which the controlling issue becomes whether government is in some way responsible for the particular harm that one person or entity has inflicted upon another person or entity. [FN65]

B. Six State Action Issues

As noted above, the facts and opinions of the Civil Rights Cases contain, directly or indirectly, the main conceptual issues of the state action doctrine. [FN66] At least six of these issues have received sufficient attention in subsequent court decisions to merit detailed analysis. Some of these issues are more clearly present in the Civil Rights Cases than others, but, with a bit of creative extrapolation, all six issues can be readily discerned. This subpart will describe briefly the six state action issues, the seeds of which are contained in the Civil Rights Cases. [FN67]

1. The Public Function Issue. [FN68] Government frequently delegates to private actors functions that government itself could perform, e.g., the operation of a political primary [FN69] or a company town, [FN70] the policing of a shopping plaza, [FN71] the provision of gas, electricity, or water to a community, [FN72] or the provision of education ***345** to children with special needs. [FN73] In such instances, the public function issue asks: How governmental in nature is the function that is delegated to the private actor? At some point along the similar-to-government continuum, the delegated function becomes so predominantly, even uniquely, governmental in nature that the private actor's action may be fairly attributable to government. [FN74] The private actor's actions in performing the function are then regarded as constituting state action, requiring government to do

one of two things: (1) withdraw the delegation, [FN75] or (2) compel the private actor to conform its actions to the requirements of the Constitution as they apply to governmental action. [FN76]

In his dissenting opinion in the Civil Rights Cases, Justice Harlan expressly recognized the public function issue. [FN77] Indeed, a public function analysis was one of three main arguments advanced by Justice Harlan to sustain the constitutionality of the Civil Rights Act of 1875: [FN78]

> In every material sense applicable to the practical enforcement of the Fourteenth Amendment, railroad corporations, keepers of inns, and managers of places of public amusement are agents or instrumentalities of the State, because they are charged with duties to the public, and are amenable, in respect of their duties and functions, to governmental regulation. [FN79]

***346** Accordingly, when such entities deny access on the basis of race, such a denial "is a denial by the State, within the meaning of the Fourteenth Amendment." [FN80] Here, the function of serving the general public in the areas of transportation, food and lodging, and amusement is characterized as a public function that is governmental in nature. When that function is delegated to private actors, such actors, to the extent of the delegation, become "agents or instrumentalities of the State." [FN81] When, therefore, the private actors perform the delegated function, they act as the state. [FN82] This reasoning by Justice Harlan constitutes an express application of public function analysis and gave rise to the use of this analysis, in a more constricted form, [FN83] in subsequent Court decisions. [FN84]

2. The State Nexus Issue. [FN85] In many instances, one or more links or contact points exist between government and the particular action of a private actor. [FN86] Such links may include government ***347** ownership of the property on which the action occurs (as lessor or otherwise), government funding, regulation, or licensing, mutual receipt of economic benefits between government and the private actor, government encouragement or approval, etc. [FN87] The state nexus issue asks: When do the contacts between government and the action of the private actor become so extensive that the action in question may be fairly attributable to government? [FN88] Generally speaking, more is better for those seeking to characterize the private action as state action. At some point along the nexus continuum, the action of government and the private actor become so intertwined that the courts will pin the state action label on the private actor's action. [FN89]

The state nexus issue is not as clearly expressed in the Civil Rights Cases as the public function issue, but it is there by ready implication. It emerges from Justice Harlan's discussion of the public function issue. [FN90] When Justice Harlan refers to the owners of places of public accommodation as "agents or instrumentalities of the State," [FN91] he is, at least arguably, stressing the links that exist between these owners and government. Somewhat paradoxically, this is made clearer in Justice Harlan's discussion of congressional power under the Thirteenth Amendment. [FN92] In discussing the position of innkeepers under the law, Justice Harlan noted that "[t]he law gives [innkeepers] special privileges[,] and ***348** [they are] charged with certain duties and responsibilities to the public." [FN93] Again, as to managers of places of public amusement, Justice Harlan stated that such places "are established and maintained under direct license of the law." [FN94] Here is an express reference to state licensing as a significant contact between government and the action of a private actor. [FN95] It is this attention to contact points between government and purported private action that adumbrates the use of state nexus analysis in subsequent Court decisions. [FN96]

3. The Beyond-State-Authority Issue. [FN97] In some instances, a governmental actor, acting in his or her official capacity, exceeds the authority conferred upon the actor by government. For example, in the "bad sheriff" hypothetical set forth in Part I of this Article, a sheriff, acting as sheriff, brutalizes a person in his custody. [FN98] The beyond-state-authority issue asks: To what extent does a state actor remain a state actor when his or her action exceeds the authority conferred upon that actor by government? When the state actor exceeds that authority, does his or her state action mantle disappear, or does the mantle remain as long as the state actor is at least projecting the aura of state authority? [FN99]

***349** Justice Bradley's majority opinion in the Civil Rights Cases [FN100] foreshadows

later court consideration of the beyond-state-authority issue. In discussing congressional power under the Thirteenth Amendment, Justice Bradley asks:

> Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the State, and presumably subject to redress by those laws until the contrary appears? [FN101]

While this language relates more appropriately to the state authorization and state inaction issues discussed later, [FN102] it does suggest this question: If, as argued by Justice Harlan's dissent, the owners of places of public accommodation are state actors, [FN103] and if state laws do, as presumed by Justice Bradley, prohibit such owners from denying access on the basis of race, [FN104] do the owners remain state actors when they act beyond the authority conferred upon them by the state? Under those suppositions, the authority conferred by the state upon the owners as state actors is to operate places of public accommodation in a racially nondiscriminatory manner. Their operation of such places in a racially discriminatory manner would thus exceed the authority granted to them by the state. In different factual contexts, it is this beyond-state-authority issue that later Court decisions confront. [FN105]

***350** 4. The Projection-of-State-Authority Issue. [FN106] In some instances, a private actor may choose to act as if he or she were a state actor in situations where the state has vested no authority of any kind in the private actor. In other words, the private actor, with no authority from the state, pretends to be a state actor--the private actor projects falsely an aura of state authority. For example, a private actor, flashing a police badge, may "arrest" someone and then beat that person while the victim is in the private actor's "custody." In these and similar situations, the projection-of-state-authority issue asks: If a private actor chooses to act as a state actor, to what extent may his or her action be attributed to the state? Will a person who chooses to live by a state action sword be compelled to die by that sword? [FN107]

Admittedly, the projection-of-state-authority issue does not appear as clearly in the Civil Rights Cases as do other state action issues. Hints of the projection issue, however, are contained in the opinions of both Justices Bradley and Harlan. In Justice Bradley's opinion, he refers to "the act of a mere individual" in denying access to a place of public accommodation on the basis of race. [FN108] In Justice Harlan's dissent, he refers to "any corporation or individual wielding power under State authority for the public benefit or the public convenience." [FN109] Let us assume with Justice Bradley that owners of places of public accommodation are not, by virtue of that status alone, state actors, but that state law presumably prohibits such owners from denying access on the basis of race. [FN110] If such owners then project falsely an aura of state authority, claiming the right as state actors under state authority to deny access on the basis of race, the projection-of-state-authority issue would then be present. In different factual contexts, later Court decisions confront the projection-of-state-authority issue suggested by the above extrapolation from the Civil Rights Cases. [FN111]

***351** 5. The State Authorization Issue. [FN112] State law may prohibit, permit, or compel a particular form of private action. Almost certainly, the great percentage of actions in which private actors engage are actions permitted by state law--state law, in statutory, administrative, or common-law forms, permits or authorizes the private action to occur. In this sense, state law may permit a private actor to walk on the beach, eat at a restaurant, or enter into a contract, etc. Or, more ominously, state law may permit owners of lots in a real property subdivision to enter into racially restrictive covenants concerning the sale of that property. [FN113] In all these instances, and in many others, the state authorization issue asks: What private action may government constitutionally permit to occur? Phrased differently, under the Constitution, to what extent may government permit one person or entity to harm another person or entity with legal impunity?

Thus phrased, the state authorization issue is in substance a merits question: What substantive limitations does the Constitution place on governmental authorization, i.e., on the power of government to permit private action to occur? It becomes a state action issue for study in this Article because of the difficulty that courts have experienced in recognizing it as a merits inquiry. [FN114] It is also an issue that Justice Bradley's opinion in the Civil Rights Cases clearly contemplates.

As previously noted, Justice Bradley assumed that "[i]nnkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them." [FN115] Justice Bradley then continued: "If the laws themselves make any unjust discrimination, amenable to the prohibitions of the Fourteenth Amendment, Congress has full power to afford a remedy under that amendment and in accordance with it." [FN116] What if Congress does not "afford a remedy" and the state's legal system permits innkeepers and public carriers to deny access on the basis of race? Does state permission constitute a denial of equal protection on the ***352** merits? Here is the state authorization issue in concrete form: Under the Constitution, may state law authorize or permit owners of places of public accommodation to deny access on the basis of race? [FN117] While Justice Bradley does not answer this specific question, his language leads ineluctably to a consideration of the broader state authorization issue in subsequent Court decisions. Indeed, of the six state action issues described in this subpart, the state authorization issue has created the greatest difficulty and confusion for both courts and scholars. [FN118] For that reason, it is probably the most conceptually intriguing of the six issues.

6. The State Inaction Issue. [FN119] Normally, government is not responsible constitutionally for harm inflicted by one private actor upon another private actor. [FN120] Assume, for example, that a ***353** parent brutally abuses his or her child. Assume, further, that state law clearly prohibits this act of brutality by making it a crime and by providing the child with avenues for obtaining civil relief and protection against the parent. At this point, the state has done nothing wrong in a constitutional sense. If, however, the state had ample foreknowledge of the child's danger and took no steps to avert that danger when such steps could have been easily taken, then the question of state inaction arises. [FN121] The state inaction issue asks: In what circumstances may state inaction be regarded as a form of state action that violates a prohibition of the Constitution? [FN122]

The state inaction issue assumes that the harm inflicted by the private wrongdoer upon the private victim does in fact violate the law of the jurisdiction in which the wrongful act occurs. The state inaction issue focuses, instead, on the question of the state's constitutional culpability for not taking affirmative action to prevent the harm. At some point along the state inaction continuum, the state's failure to act may be fairly described as a form of state action that itself constitutes a violation of the victim's constitutional rights. [FN123] In the Civil Rights Cases, language in Justice Bradley's opinion implicates the state inaction issue. Justice Bradley states that when owners of places of public accommodation deny access on the basis of race, they are "inflicting an ordinary civil injury, properly cognizable by the laws of the State, and presumably subject to redress by those laws until the ***354** contrary appears." [FN124] Assume that state laws do, as Justice Bradley presumes, prohibit owners of places of public accommodation from denying access on the basis of race. Assume, further, that state officials have ample knowledge that racial discrimination has occurred and is about to occur in a particular restaurant. Does the failure of state officials to take preventive action constitute a form of state action that itself violates the Constitution, assuming, of course, that the readily anticipated racial discrimination does in fact occur? In somewhat more unusual and severe factual contexts, the state inaction issue, as extrapolated from Justice Bradley's language, appears in subsequent Court decisions. [FN125]

C. An Overview of State Action: A Two Model Approach

There are many viable approaches to the state action question. The very size and complexity of the state action question invite different approaches. In a recent decision, Edmonson v. Leesville Concrete Co., [FN126] the Supreme Court framed its overview approach in these terms: "We ask[ ] first whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority; and second, whether the private party charged with the deprivation [can] be described in all fairness as a state actor." [FN127] Arguably, this approach does not greatly advance analysis because it simply restates the state action question in general terms. In addition, with respect to the Court's first question, it is hard to envision a right or privilege that, in a legal sense, does not have its source in state (governmental) authority. Without

that source, the right or privilege cannot legally exist.

Scholars, too, have attempted to fashion overview approaches to the state action question. Concerning the state nexus issue, for example, Professor Ronald J. Krotoszynski, after describing three ***355** contact tests, urges the courts to adopt a "meta-analysis" approach in which "a reviewing court [would] step back and consider whether the defendant satisfies a sufficient portion of each of the three [contact] tests to support a state action finding, even if no single test is satisfied completely." [FN128] As noted earlier, Professor Peter M. Shane has recently urged the adoption of a "[r]esponsibility-based analysis of state action" that would focus "on the entire array of responsibilities at stake in a disputed transaction." [FN129] Professor Shane argues that "a core aim of the state action doctrine is to maximize opportunities for each person, and for the community, to fulfill important responsibilities." [FN130] In truth, there is no talismanic solution to the state action question. As the Court acknowledged in Burton v. Wilmington Parking Authority, [FN131] "to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which '[t]his Court has never attempted."' [FN132]

Having listed six state action issues, all having their origins, more or less directly, in the Civil Rights Cases, I will now organize these issues into a two model overview approach to the state action question. For this purpose, the facts of the Supreme Court's 1978 decision in Flagg Bros., Inc. v. Brooks [FN133] are illustrative.

1. Flagg Brothers as a State Action Paradigm. [FN134] The facts of Flagg Brothers afford an excellent case study for discussion of the two state action models that this Article advances. In Flagg Brothers, the Court considered a New York statute that authorizes enforcement of a warehouseman's lien "'by public or private sale of the goods . . . [being stored] on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods."' [FN135] Thus, if a debtor fails to pay storage charges on goods stored with a warehouseman, the statute authorizes the warehouseman to make a private sale of the ***356** goods without state participation or supervision and provides no procedure by which the debtor may contest or block the sale. [FN136] The statute further provides that "'[a] purchaser in good faith of goods sold to enforce a warehouseman's lien takes the goods free of any rights of persons against whom the lien was valid, despite noncompliance by the warehouseman with the requirements of this section."' [FN137]

Acting under this statute, Flagg Brothers, Inc., a warehouseman, gave notice of pending sale to Shirley Brooks, a debtor who had stored her household goods with Flagg Brothers after being evicted from her apartment. [FN138] Flagg Brothers had failed in its earlier efforts to collect storage charges from Brooks. [FN139] In response to the notice of sale and "[a] series of subsequent letters from" Flagg Brothers, Brooks initiated a class action suit under 42 U.S.C. § 1983 in federal district court, "seeking damages, an injunction against the threatened sale of her belongings, and the declaration that such a sale pursuant to [the New York statute] would violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment." [FN140] Rejecting Brooks's class action complaint, the Court concluded that "the allegations of [Brooks's complaint] do not establish a violation of [Brooks's] Fourteenth Amendment rights by either petitioner Flagg Brothers or the State of New York. The District Court properly concluded that [Brooks's complaint] failed to state a claim for relief under 42 U.S.C. § 1983." [FN141] Later portions of this Article discuss the Flagg Brothers decision more fully. For a description of the two state action models, the above case summary is sufficient.

2. The Characterization Model: Is the Private Actor the State? [FN142] In the typical fact situation raising a state action issue, the challenger (the alleged victim) is adversely affected by the conduct of a "private" actor, an actor ostensibly acting in a private capacity. In this context, the focus is on the conduct of the private actor. Here, the conceptual question is whether the conduct of the private actor can be fairly regarded as the act of the state. In practical terms, the challenger is seeking to pin the state action label on the private actor's conduct. If the challenger ***357** is successful in this effort, the private actor's conduct is then treated as an act of the state and becomes subject to all the constitutional prohibitions that operate as a limitation on state power. [FN143]

In Flagg Brothers, for example, this characterization model would focus on the conduct

of the warehouseman, Flagg Brothers, Inc. The challenger-debtor, Shirley Brooks, would be attempting to show that the threatened sale of her stored goods by Flagg Brothers would entail conduct that constitutes state action. This is precisely the claim made by Brooks and rejected by the Court in Flagg Brothers. [FN144] Had Brooks prevailed on her claim that the conduct of Flagg Brothers in selling her stored goods should be treated as an act of the state, that conduct would have become subject to the full array of constitutional provisions applicable to state governmental action, particularly the Due Process Clause of the Fourteenth Amendment. [FN145]

Under the characterization model, two conceptual techniques have been employed to demonstrate that the private actor's conduct should be regarded as that of the state. While a more detailed explication of these techniques occurs later in this Article, a brief description of each is helpful now. [FN146] One technique employs a state nexus or state contact approach. [FN147] Under ***358** this technique, the challenger attempts to establish that multiple contacts exist between the state and the conduct of the private actor and that the number and pervasiveness of these contacts are at such a level that the private actor's conduct can fairly be called state action. [FN148] Through a process of state contact entanglement, the private actor's conduct loses its private identity and is characterized as state action.

At this point, it should be stressed that the previously described beyond-state-authority and projection-of-state authority issues [FN149] are in reality subissues or subsets of the state nexus technique. Both of these subissues are concerned with the question of contact, or lack thereof, between the state and the conduct of the alleged wrongdoer. For purposes of the characterization model, therefore, the state nexus technique embraces both the beyond-state-authority and projection-of-state authority issues.

Characterization of conduct as state action may also be sought under the public function technique. [FN150] Here, the challenger concentrates on the nature of the conduct in which the private actor is engaged rather than on contacts between that conduct and the state. The more the private actor's conduct is ***359** governmental in nature or function, the greater is the chance that, for constitutional purposes, such conduct will be regarded as action of the state. Although earlier Court decisions created expectations of a fairly generous application of the public function technique, [FN151] Court decisions in the 1970s and 1980s [FN152] confined the technique to a narrow category of cases: those cases involving the "exercise by a private entity of powers traditionally exclusively reserved to the State." [FN153] Thus restricted, the public function technique became a relatively impotent tool in the search for state action under the characterization model. As discussed later in greater detail, the public function technique has experienced a modest revival in Court decisions in the 1990s. [FN154]

3. The State Authorization Model: Does a State Act of Authorization Violate the Constitution? [FN155] As in the case of the characterization model, this second model applies typically to a fact situation in which the challenger is adversely affected by the state-authorized conduct of a private actor. Unlike the characterization model, however, the authorization model concentrates directly on the state act that has authorized the private actor's conduct and not on the question of whether the private actor's conduct constitutes state action. Here, the ***360** challenger is contending that the state act that has authorized the private actor's conduct is itself a violation of the Constitution, typically a denial of due process or equal protection under the Fourteenth Amendment or of due process under the Fifth Amendment. The challenger assumes that the private actor's conduct does not constitute state action. The challenger argues instead that the state has violated the Constitution by authorizing the private actor's conduct, by placing the private actor in a position where the actor may "gouge" the challenger with legal impunity.

Under the state authorization model, there is little question that the act on which the challenger is focusing is an act of the state. Typically, the challenged act would be a state statute [FN156] or a provision in a state constitution. [FN157] The statute or constitutional provision would be challenged as impermissibly authorizing the private conduct that has adversely affected the challenger. A claim based on this model, therefore, involves a claim on the merits--action clearly attributable to the state is alleged to violate the Constitution by authorizing a particular species of private conduct. Here,

there is no state action issue in the sense described in the characterization model. No attempt is made to pin the state action label on the private actor's conduct. Instead, the state authorization model proceeds directly to a review on the merits of an act that is clearly state action in the narrowest sense in which that term can be used. [FN158]

In a broader sense, this model does implicate state action concerns. The conduct directly affecting the challenger is the conduct of a private actor, not the conduct of a state actor. The state is being challenged because it has authorized the conduct of a private actor. As a part of its merits inquiry, the state authorization model thus requires a close examination of what the state ***361** has authorized. This examination, in turn, leads ineluctably to the use of techniques that parallel the state nexus and public function techniques employed under the characterization model. [FN159]

In relation to the facts of Flagg Brothers, the authorization model would operate as follows: The challenger, Brooks, would not attempt to show that the threatened sale of her stored goods by Flagg Brothers entails conduct that constitutes state action. Instead, Brooks would directly attack the New York statute authorizing the sale. She would contend that the statute, as applied to her, deprives her of due process of law in violation of the Fourteenth Amendment and that this deprivation of due process results from state action (the New York statute) that authorizes a private actor (Flagg Brothers) to divest her of title to her stored goods through the mechanism of a private sale that affords her no opportunity to contest the divestment on the merits. [FN160] For this claim to prevail, it is not necessary to demonstrate that Flagg Brothers is acting as the state. It is sufficient to show that, as applied to Brooks, the New York statute itself denies due process. [FN161]

In his opinion for the Court in Flagg Brothers, then Justice Rehnquist analyzed Brooks's claim exclusively in the context of the characterization model. His entire opinion is devoted solely ***362** to the question of whether the actions of Flagg Brothers were "properly attributable to the State of New York." [FN162] In pursuing this inquiry, Justice Rehnquist explored both the public function [FN163] and state nexus [FN164] strands of state action jurisprudence. Under each strand, he concluded that the conduct of Flagg Brothers in selling the stored goods of Brooks did not constitute conduct properly attributable to the State of New York. [FN165] Accordingly, he affirmed the district court's dismissal of Brooks's claim for failure "to state a claim for relief under 42 U.S.C. § 1983." [FN166]

Wholly absent from Justice Rehnquist's opinion in Flagg Brothers is any consideration of the state authorization model. Nowhere does Justice Rehnquist address the question whether New York, through its legislative enactment authorizing private sale by creditors in the position of Flagg Brothers, has denied due process of law to debtors in Brooks's position. [FN167] This neglect of the state authorization model effectively removed this model from serious Court consideration for more than a decade after the Court's decision in Flagg Brothers. As noted later, however, in some of the Court's more recent cases, [FN168] the state authorization model has returned, albeit in somewhat subdued form. [FN169] It ***363** is probably unwise, therefore, to read Flagg Brothers as immunizing state acts of authorization from review simply because the conduct authorized by the state cannot itself be regarded as state action under the characterization model.

4. Putting It All Together: The Six Issues and the Two Models Combined. The preceding subparts yield the following combination of the six state action issues and the two state action models: The characterization model contains the public function and state nexus issues. In addition to its general emphasis on the search for contacts between government and the private wrongdoer, the state nexus issue contains, as subissues, the beyond-state-authority and projection-of-state-authority issues. The state authorization model obviously and primarily contains the state authorization issue and, as a subissue, the state inaction issue. This organization of the two models and six issues appears in graphic form as follows:

The State Action Doctrine: The Search for Governmental Responsibility

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***364** III. The Public Function Issue

A. Historical Summary

As described earlier, when government delegates a function to a private actor, the public function issue asks: How governmental in nature is the function that is delegated to the private actor? The focus is on the nature or character of the function that the private actor is performing. As the delegated function becomes increasingly, even uniquely, governmental in nature, the case becomes ever stronger for attributing the private actor's action to government.

Historically, Justice Harlan's dissent in the Civil Rights Cases expressly advanced the public function issue. [FN170] Perhaps springing from that express recognition, the public function issue became a frequently utilized conceptual tool in the first seventy years of the twentieth century. In the White Primary Cases, [FN171] the "company town" case, [FN172] and in the first of the three "shopping center" cases, [FN173] the Supreme Court relied heavily on public function analysis in holding that the private action involved should be attributed to government. In the 1970s, public function analysis shriveled into relative impotence in the Court's decisions in Jackson v. Metropolitan Edison Co. [FN174] and Flagg Bros., Inc. v. Brooks. [FN175] This relative impotence continued through the 1980s, especially in the Court's decisions in Rendell-Baker v. Kohn [FN176] and Blum v. Yaretsky. [FN177] Finally, in some of the peremptory challenge cases of the 1990s, public function analysis appears to be making a partial comeback in a modest "one-of-several-factors" form. [FN178]

***365** B. The White Primary Cases

Not surprisingly, the first major use of public function analysis occurred in the White Primary Cases. Few functions are more closely associated with government than the political process by which we select our public officials. It is public officials that make, execute, interpret, and administer the laws that govern our daily lives. If the process by which we select these officials is not a public function for purposes of state action, then public function analysis has no meaning. This analytical reality combined with the historical reality that, in most Southern states, widespread racial discrimination in voting rights continued well into the 1960s, abating only with the passage of the Voting Rights Act of 1965. [FN179] It is that combination that produced the White Primary Cases, a series of cases in which the State of Texas, through increasingly convoluted devices, attempted to exclude blacks from participating in the primary election processes of the Texas Democratic Party.

In its first effort to exclude blacks from voting in these primaries, Texas proceeded bluntly and without disguise. A Texas statute, enacted in 1923, stated that "'in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas."' [FN180] For the Court in its 1927 decision in Nixon v. Herndon, [FN181] this was an easy case. State action was present in its rawest form, both in the passage of the exclusionary statute and in its enforcement by state officials. [FN182] Writing for the Court, Justice Holmes stated: "States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case." [FN183]

***366** Its direct approach thwarted, Texas shifted immediately to a more indirect approach. As described in the Court's 1932 decision in Nixon v. Condon, [FN184] "[p]romptly after the announcement" of the Court's decision in Herndon, Texas repealed the statute held unconstitutional in Herndon and enacted in its place a statute stating that "every political party in this State through its state Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party." [FN185] Accepting this statutory invitation, the State Executive Committee of the Democratic Party adopted a resolution providing "that all white democrats, . . . and none other,

[shall] be allowed to participate in the primary elections to be held July 28, 1928, and August 25, 1928." [FN186] Petitioner Nixon, a black, attempted to vote in the indicated primary elections and was excluded "on the ground that the petitioner was a Negro." [FN187]

Deciding the case on narrow grounds, the Condon Court, in an opinion by Justice Cardozo, stressed that the new Texas statute vested new power in the State Executive Committee of the Democratic Party, power that the Executive Committee would not otherwise have enjoyed under state law. [FN188] Noting that "[w]hatever inherent power a State political party has to determine the content of its membership resides in the State convention," [FN189] the Court concluded:

> The pith of the matter is simply this, that when those agencies [the State Executive Committees of the political parties] are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power. [FN190]

"With the problem thus laid bare," the Court held that the case was controlled by the Court's earlier decision in Herndon. [FN191] "Delegates of the State's power have discharged their official functions in such a way as to discriminate invidiously between white citizens and black." [FN192]

***367** Here is a classic example of public function analysis at work. The authority delegated by the state to the Executive Committee transformed the Committee, to that extent, into an "organ" of the State. In the Court's view, the authority delegated was uniquely governmental in nature. When exercising that authority, Committee members "are not acting in matters of merely private concern like the directors or agents of business corporations. They are acting in matters of high public interest, matters intimately connected with the capacity of government to execute its functions unbrokenly and smoothly." [FN193]

Pivoting evasively from its loss in Condon, Texas pursued its exclusionary goals by other means. Texas remitted all questions of political party membership to the parties themselves. Accordingly, on May 24, 1932, the state Democratic convention adopted a resolution providing that "all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the state shall be eligible to membership in the Democratic party and as such entitled to participate in its deliberations." [FN194] Petitioner Grovey, a black, was, because of his race, denied the right to receive an absentee ballot for purposes of voting in the Democratic primary election of July 1934. [FN195]

In the Supreme Court's 1935 decision in Grovey v. Townsend, [FN196] Texas scored a temporary victory. Distinguishing Condon, the Court in Grovey noted that here the action excluding blacks from the Democratic primary election was taken pursuant to a resolution adopted at the party's state convention. [FN197] Stressing the right of a political party "to define its membership," [FN198] the Court stated that "[w]e are not prepared to hold that in Texas the state convention of a party has become a mere instrumentality or agency for expressing the voice or will of the state." [FN199] With respect to participation in the party primary ***368** process, the Court in Grovey was not willing to extend public function analysis beyond the precise facts in Condon.

The state's victory in Grovey did not long endure. Nine years later, in 1944, confronting essentially the same facts as in Grovey, the Court in Smith v. Allwright [FN200] expressly overruled the Grovey decision. The Court relied heavily on its intervening decision in United States v. Classic, [FN201] in which the Court held that article I, section 2 of the United States Constitution authorizes Congress to regulate primary as well as general elections "where the primary is by law made an integral part of the election machinery." [FN202] Taking its cue from Classic, the Smith Court examined in detail the primary election process in Texas, emphasizing the extensive regulatory structure established by Texas law for conducting primary elections. [FN203] The Court concluded:

> [T]his statutory system for the selection of party nominees for inclusion on the general election ballot makes the party which is required to follow these legislative directions an agency of the State in so far as it determines the participants in a primary election. The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party. [FN204]

The Court noted further that, as a practical matter, Texas law limits the choice of the electorate in general elections to those candidates that are chosen in party primaries. [FN205] In that regulatory context, the Court held that the state "endorses, adopts and enforces the discrimination against Negroes, practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary. This is state action within the meaning of the Fifteenth Amendment." [FN206] In the context of Texas law, therefore, the Smith holding clearly applies the public function label to the action of the Texas Democratic Party in setting the qualifications for voting in the Democratic primary. [FN207]

***369** Texas was not through yet, at least not that part of Texas known as Fort Bend County. In 1889, white residents of Fort Bend County organized the Jaybird Association, a county wide political organization whose membership, throughout its history, was limited to whites. [FN208] Prior to each Democratic primary election, the Jaybird Association conducted its own primary election for county officials, an election from which blacks were excluded. [FN209] As explained by Justice Black in the Court's 1953 decision in Terry v. Adams, "While there is no legal compulsion on successful Jaybird candidates to enter Democratic primaries, they have nearly always done so and with few exceptions since 1889 have run and won without opposition in the Democratic primaries and the general elections that followed." [FN210] Qualified black voters in Fort Bend County challenged the constitutionality of the Jaybird scheme. [FN211]

In Terry, the Court held "that the combined Jaybird-Democratic-general election machinery has deprived these petitioners of their right to vote on account of their race and color." [FN212] In Justice Black's plurality opinion, he concluded that "[t]he Jaybird primary has become an integral part, indeed the only effective part, of the election process that determines who shall rule and govern in the county." [FN213] Here, Justice Black is using ***370** public function analysis to pin the state action label on the Jaybird election. The Jaybird election becomes state action because, in substance, the state has permitted "a duplication of its election processes" [FN214] by the Jaybird Association. [FN215]

With the exception of Grovey v. Townsend, [FN216] few would argue today that the Court did not reach the right decisions in the White Primary Cases. Those cases establish that any election process, in whatever form, that affects significantly--more than minimally--the political process by which public officials are ultimately selected will be characterized as state action. If state law permits any such election process to occur, the state will be regarded as having delegated a public function to those persons or entities conducting the election process, and that delegation, in turn, will transform the election process into state action. [FN217]

Before leaving the White Primary Cases, I add a personal note. I was born in Houston, Texas, in 1933 and, with minor exceptions, have been a Houston resident all my life. Two of the White Primary Cases, Grovey and Smith, involved the exclusion of black voters in Harris County, my home county, and one case, Terry, involved the exclusion of black voters in Fort Bend County, a county that borders Harris County. Moreover, these acts of exclusion in Harris and Fort Bend Counties all occurred in my lifetime, the Fort Bend Jaybird exclusions continuing into the 1950s. The White Primary Cases disclose a relentless and pervasive effort by the state of Texas, its officials, and the majority of its white citizens to deny black voters the right to vote because of their race. This tragic history bears importantly on the issue of racial reconciliation in America today and illustrates how deeply the evils of racism have poisoned the well of race relations in American society. [FN218] I take no comfort from this part of ***371** my state's history; I do take strong comfort from the substantial progress that has been made in protecting voting rights since the passage of the Voting Rights Act of 1965.

C. Of Company Towns and Shopping Centers

To what extent may a private business owner control the content of speech that occurs on the owner's business premises? In relation to private residences, the Court has given the homeowner virtually absolute control over the content of speech that is allowed to enter the residence. [FN219] The homeowner has in substance the power of a censor. [FN220] With respect to a business premises, the constitutional issues become more complex. For

example, what problems are created by the fact that the business premises of an owner may encompass an entire town or, less grandly, a large shopping center? Are such owners exercising a public function when they act to control the content of speech on their premises? If so, their acts in regulating speech content may then be characterized as state action.

In a time span that overlaps the White Primary Cases of the 1940s and 1950s, the Court began to apply public function analysis to the speech regulation activities of company towns and shopping centers. In four cases extending from 1946 to 1976, the Court, in relation to such activities, first expanded public function analysis [FN221] and then sharply contracted it, [FN222] proceeding conceptually in accordion-like fashion. The first of these cases is the ***372** well-known "company town" case, Marsh v. Alabama. [FN223]

At the time of the Marsh decision in 1946, the town of Chickasaw, Alabama, was owned by Gulf Shipbuilding Corporation, a private corporation. [FN224] Except for this feature of private ownership, the town had "all the characteristics of any other American town," replete with "residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated." [FN225] The Marsh Court noted further that a "deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman." [FN226]

Appellant Marsh, a Jehovah's Witness, attempted to distribute religious literature on the company owned sidewalk that ran alongside the business block of the company town. [FN227] She was warned that she could not do so without a permit from the company and was "told that no permit would be issued to her." [FN228] Claiming that the company rule could not be constitutionally applied to her, Marsh refused to leave and was arrested by the "deputy sheriff." [FN229] Marsh was charged with violating an Alabama statute that "makes it a crime to enter or remain on the premises of another after having been warned not to do so." [FN230]

The Marsh Court held that the Alabama trespass statute could not be constitutionally applied to Marsh. [FN231] The Court first stated that, under its prior decisions, a state municipality could not constitutionally have prevented Marsh from distributing religious literature under the facts of this case. [FN232] Accordingly, the Court had only to decide whether the private company town could be characterized as a state actor because it was discharging a public function. [FN233] As described by the Court:

> Our question then narrows down to this: Can those people who live in or come to Chickasaw be denied freedom of press and religion simply because a single company has legal title to all the town? For it is the State's contention ***373** that the mere fact that all the property interests in the town are held by a single company is enough to give that company power, enforceable by a state statute, to abridge these freedoms. [FN234]

The Court had little difficulty concluding that the company owning the town was discharging a public function and that the company should, therefore, be characterized as a state actor. [FN235] Noting that the operation of "privately held bridges, ferries, turnpikes and railroads" is "essentially a public function," [FN236] the Court concluded by analogy that "[w]hether a corporation or municipality owns or possesses the town[,] the public in either case has an identical interest in the functioning of the community in such manner that channels of communication remain free." [FN237] In short, the Court held that if Alabama delegates its policing function to a company town, the police action taken by the town is transformed into state action. [FN238]

Marsh was a relatively easy case for the Court. Twenty-two years later, in 1968, the Court was asked to extend the public function analysis of Marsh to shopping centers. [FN239] In Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, [FN240] the Court confronted "the question whether peaceful picketing of a business enterprise located within a shopping center can be enjoined on the ground that it constitutes an unconsented invasion of the property rights of the owners of the land on which the center is situated." [FN241] As described by the Court, Logan Valley Plaza, Inc. (Logan Valley) "own[ed] a large, newly developed shopping center complex, known as Logan Valley Mall, located near the City of Altoona, Pennsylvania." [FN242] Weis Markets, Inc. (Weis) was a business located in the mall. [FN243] Petitioners, ***374** "members of Amalgamated Food Employees Union, Local 590, began picketing Weis," the picketing occurring on the Logan

Valley Mall "almost entirely in the parcel pickup area and that portion of the parking lot immediately adjacent thereto." [FN244] The picketers were employees of competitors of Weis, and their picket signs stated "that the Weis market was nonunion and that its employees were not 'receiving union wages or other union benefits."' [FN245] The Logan Valley Court held that this picketing could not be constitutionally enjoined solely on the ground that the picketing occurred without the consent of the shopping center owner. [FN246]

In route to that holding, the Court canvassed in some detail the question whether the picketing could have been enjoined had it occurred on government property--in the public forum. [FN247] The Court concluded that, based on precedent:

> It is clear that if the shopping center premises were not privately owned but instead constituted the business area of a municipality, which they to a large extent resemble, petitioners could not be barred from exercising their First Amendment rights there on the sole ground that title to the property was in the municipality. [FN248]

As in Marsh, this required the Logan Valley Court to determine whether the shopping center's action in refusing to allow petitioners to continue their picketing could be characterized as state action. [FN249]

Stressing that "[t]he similarities between the business block in Marsh and the shopping center in the present case are striking," [FN250] the Court could

> see no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business district should be limited simply because the property surrounding the 'business district' is not under the same ownership. [FN251]

***375** This reasoning led the Court to conclude that

> the State may not delegate the power, through the use of its trespass laws, wholly to exclude [from the shopping center] those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put. [FN252]

Thus, the Logan Valley Court characterized the exclusionary action of the shopping center as state action, labeling the shopping center the "functional equivalent" of the business block in Marsh. [FN253]

Logan Valley represents, perhaps, the high water mark of public function analysis. [FN254] For First Amendment purposes at least, the Logan Valley Court held that a modern shopping center, in regulating speech activities on its premises, may be characterized as a state actor, and that this regulatory function, when delegated by the state to a shopping center, constitutes a public function. [FN255] The opinion left other important questions unanswered: May the shopping center be characterized as a state actor for purposes other than the First Amendment, e.g., in its hiring and customer-related decisions? Under what circumstances may the property interests of the shopping center owner outweigh even the First Amendment rights of persons seeking to exercise such rights on the shopping center premises? [FN256] These unanswered and difficult questions indicated that the Court might be readily induced to revisit the shopping center issue and that the high water mark of public function analysis might soon begin to ebb.

The ebbing was not long in coming. In 1972, the Court decided the case of Lloyd Corp. v. Tanner. [FN257] As described by the Court, "Lloyd Center embraces altogether about 50 acres, including some ***376** 20 acres of open and covered parking facilities." [FN258] Respondents "distributed within the Center handbill invitations to a meeting of the 'Resistance Community' to protest the draft and the Vietnam War." [FN259] After being warned by security guards that they would be arrested if they continued to distribute handbills within the Center, respondents left the Center to avoid arrest and thereafter sought "declaratory and injunctive relief" in the appropriate federal district court. [FN260] The Court held that Lloyd Corp., the owner of Lloyd Center, was not required to permit respondents to distribute antiwar handbills on the Center premises. [FN261]

In reaching its decision, the Court first noted that "[t]his case presents the question reserved by the Court in [Logan Valley], as to the right of a privately owned shopping

center to prohibit the distribution of handbills on its property when the handbilling is unrelated to the shopping center's operations." [FN262] The Court expressly rejected the argument "that all members of the public, whether invited as customers or not, have the same right of free speech [on the sidewalks, streets, and parking areas of a privately-owned shopping center] as they would have on the similar public facilities . . . of a city or town." [FN263] Stressing that "property [does not] lose its private character merely because the public is generally invited to use it for designated purposes," [FN264] the Court stated that it "has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only." [FN265] Here, it was "clear" to the Court that the "Fourteenth Amendment rights of private property owners" should prevail over the "First Amendment rights" of the antiwar handbillers. [FN266]

In substance, the Lloyd Corp. Court rejected the application of public function analysis to privately owned shopping centers. Throughout its opinion, the Court characterized the shopping ***377** center as a private actor, emphasizing that "the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property use nondiscriminatorily for private purposes only." [FN267] If the shopping center owner is labeled a state actor, the type of speech-content regulation engaged in by the owner in Lloyd Corp. would almost certainly be unconstitutional. [FN268] The force of this logic led irresistibly to the total demise of Logan Valley in the Court's 1976 decision in Hudgens v. NLRB. [FN269]

In Hudgens, a "group of labor union members . . . engaged in peaceful primary picketing within the confines of a privately owned shopping center" located in suburban Atlanta, Georgia. [FN270] This picketing was part of a general strike by the warehouse employees of Butler Shoe Co., one of whose nine retail stores was situated in the shopping center. [FN271] The picketing union members "were threatened by an agent of the [shopping center] owner with arrest for criminal trespass if they did not depart." [FN272] The Court considered the question whether this threat constituted a violation of the National Labor Relations Act (NLRA). [FN273] Ultimately, after disposing of Logan Valley arguments along the way, the Court remanded the case for consideration "under the statutory criteria of the National Labor Relations Act alone." [FN274]

Before reaching its determination that the Hudgens case should be resolved solely under the statutory criteria of the NLRA, the Court first demolished Logan Valley. [FN275] Regarding the ***378** public function issue, Justice Stewart's opinion for the Hudgens Court reasoned thusly:

> If a large self-contained shopping center is the functional equivalent of a municipality, as Logan Valley held, then the First and Fourteenth Amendments would not permit control of speech within such a center to depend upon [its] content. . . . It conversely follows, therefore, that if the respondents in the Lloyd case did not have a First Amendment right to enter that shopping center to distribute handbills concerning Vietnam, then the pickets in the present case did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike against the Butler Shoe Co. [FN276]

The Court concluded, "in short, that under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this." [FN277] To eliminate any remaining doubt regarding the status of Logan Valley, the Court stated that "we make clear now, if it was not clear before, that the rationale of Logan Valley did not survive the Court's decision in the Lloyd case." [FN278]

After Hudgens, therefore, it is clear that the Court will not characterize as a public function the speech regulation activities of shopping center owners. If relief for speakers is to come in this area, that relief will have to be sought under the state authorization model. There may well be, and probably ought to be, some constitutional limitation on the degree to which government may permit the owners of shopping centers to regulate speech activities on such centers with legal impunity. Phrasing the question in terms of state authorization does permit the flexible accommodation of conflicting constitutional rights advocated by Justice Powell in Lloyd. [FN279] With respect to shopping centers, the Court may have abandoned public function analysis precisely because it forced an "all or nothing" approach that precludes the balancing of competing constitutional interests that this area of the law almost certainly requires. [FN280]

***379** D. The Ultimate Contraction

As the Court in the 1970s was abandoning public function analysis in the shopping center cases, it contracted the public function concept even more severely in two other decisions also rendered in that decade: Jackson v. Metropolitan Edison Co., [FN281] a 1974 decision, and Flagg Bros., Inc. v. Brooks, [FN282] a 1978 decision. In Jackson, Metropolitan Edison Company terminated Catherine Jackson's electric service because of Jackson's nonpayment of her electricity bills. [FN283] Jackson claimed that this termination occurred without giving her adequate "notice, a hearing, and an opportunity to pay any amounts found due." [FN284] She claimed further that Edison's "termination of her service for alleged nonpayment, action allowed by a provision of its general tariff filed with the [Pennsylvania Utility] Commission, constituted 'state action' depriving her of property in violation of the Fourteenth Amendment's guarantee of due process of law." [FN285] In an opinion by then Justice Rehnquist, the Court rejected Jackson's claim, holding "that the State of Pennsylvania is not sufficiently connected with [[[Edison's] action in terminating [Jackson's] service so as to make [Edison's] conduct in so doing attributable to the State for purposes of the Fourteenth Amendment." [FN286]

At the outset of its analysis, the Jackson Court conceded that "[w] hile the principle that private action is immune from the restrictions of the Fourteenth Amendment is well established and easily stated, the question whether particular conduct is 'private,' on the one hand, or 'state action,' on the other, ***380** frequently admits of no easy answer." [FN287] Having stated this truism, the Court moved immediately to its state action analysis. With three swift blows, the Court rejected the argument that Edison should be characterized as a state actor under the characterization model. [FN288] Proceeding sequentially, the Court stated that none of the following three facts converted Edison's termination action into state action: (1) Pennsylvania's "extensive" regulation of Edison through the state's Public Utility Commission; [FN289] (2) "the monopoly status allegedly conferred upon [Edison] by the State of Pennsylvania"' [FN290] or (3) the fact that Edison "provides an essential public service required to be supplied on a reasonably continuous basis." [FN291] Finally, in a part of its opinion that will be discussed later in relation to the state authorization issue, the Court also "reject[ed] the notion that [Edison's] termination is state action because the State 'has specifically authorized and approved' the termination practice." [FN292]

It is in its discussion of the "essential public service" issue that the Jackson Court reduced the public function concept to relative impotence. The Court stated that "[w]e have, of course, found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State." [FN293] As examples of such "public functions," the Court cited the elections in the White Primary Cases, the company town in Marsh, and, interestingly, the municipal park in Evans. [FN294] The Court also described the exercise of the power of eminent domain as being "traditionally associated with sovereignty." [FN295] But, under its very tight public function test, the Court had little difficulty in concluding "that the supplying of utility service is not ***381** traditionally the exclusive prerogative of the State." [FN296]

In Flagg Bros., Inc. v. Brooks, [FN297] the Court reiterated its new public function test. As previously described, [FN298] Flagg Brothers involved a New York statute authorizing a "warehouseman's proposed sale of goods entrusted to him for storage." [FN299] An owner of stored goods argued that such a sale would constitute the exercise of a public function delegated to the warehouseman by the State of New York. [FN300] Rejecting this argument, the Court's opinion by then Justice Rehnquist held that the power of sale granted to the warehouseman was not a power "'traditionally exclusively reserved to the State."' [FN301] The Court again cited the White Primary and company town cases as examples of fact situations that met the Court's constricted public function test, [FN302] noting that these "two branches of public-function doctrine have in common the feature of exclusivity." [FN303] As explained by the Court,

> Although the elections held by the Democratic Party and its affiliates were the only meaningful elections in Texas, and the streets owned by the Gulf Shipbuilding Corp. were the only streets in Chickasaw, the proposed sale by Flagg Brothers under [the New York statute] is not the only means of resolving this purely private dispute. [FN304] ***382** If Logan Valley represents the high water mark for public function analysis, Jackson and Flagg Brothers clearly represent the low water mark. It would be difficult for many

"private" functions to meet the test of exclusivity advanced by Justice Rehnquist in Jackson and Flagg Brothers. [FN305] Under the Rehnquist test, the notion of public function almost disappears from the judicial scene as a meaningful analytical tool for finding state action. [FN306] It is no surprise, therefore, that public function arguments met with no success in the decade following the Flagg Brothers decision.

In two 1982 decisions, Rendell-Baker v. Kohn [FN307] and Blum v. Yaretsky, [FN308] the Court applied the exclusivity test with particular force. In Rendell-Baker, the Court considered "whether a private school, whose income is derived primarily from public sources and which is regulated by public authorities, acted under color of state law when it discharged certain employees." [FN309] The private school specialized in educating children with "special needs." [FN310] Conceding that the school was heavily regulated and funded by government, the Court, nevertheless, held that the school's action in discharging certain employees could not be fairly attributed to the state. [FN311] With respect to the public function argument advanced by the discharged employees, the Court reiterated the exclusivity test: "We have held that the question is whether the function performed has been 'traditionally the exclusive prerogative of the State."' [FN312] In a confusing choice of words, the Court conceded that "the education of maladjusted high school students ***383** is a public function," but concluded that the legislative choice to provide such services at public expense "in no way makes these services the exclusive province of the State." [FN313] The Court completed its public function analysis with this truism: "That a private entity performs a function which serves the public does not make its acts state action." [FN314]

A similar fate awaited the public function argument in Blum v. Yaretsky. [FN315] In Blum, respondents represented "a class of Medicaid patients challenging decisions by the nursing homes in which they reside to discharge or transfer patients without notice or an opportunity for a hearing." [FN316] As described by the Court, "The question is whether the State may be held responsible for those decisions so as to subject them to the strictures of the Fourteenth Amendment." [FN317] The Court concluded "that [the] respondents . . . failed to establish 'state action' in the nursing homes' decisions to discharge or transfer Medicaid patients to lower levels of care." [FN318]

As in Rendell-Baker, the Court in Blum conceded that the private actors in question, here the nursing homes, were heavily funded and regulated by the state. [FN319] Rejecting these contacts as insufficient to establish state action under a nexus analysis, the Court turned to the public function issue and once again reiterated the exclusivity test announced in Jackson and Flagg Brothers. [FN320] Conceding that the federal "Medicaid statute requires that the States provide funding for skilled nursing services as a condition to the receipt of federal moneys," the Court emphasized that the statute "does not require that the States provide the services themselves." [FN321] The Court, however, went still further, stating that even if the State were so obligated, "it would not follow that decisions made in the day-to-day administration of a nursing home are the kind of decisions traditionally and exclusively made by the sovereign for and on behalf of the public. Indeed, respondents make no such claim, nor could they." [FN322] The ***384** Blum and Rendell-Baker decisions indicate that it is nearly impossible for a challenger to meet the demanding requirements of the exclusivity test.

That reality was confirmed once again in the Court's 1987 decision in San Francisco Arts & Athletics, Inc. v. United States Olympic Committee. [FN323] A United States statute authorized "the United States Olympic Committee [the USOC] to prohibit certain commercial and promotional uses of the word 'Olympic."' [FN324] The petitioner, San Francisco Arts & Athletics, Inc. (SFAA), began to promote an athletic event to be entitled the "'Gay Olympic Games,' using those words on its letterheads and mailings and in local newspapers." [FN325] When SFAA refused to cease use of these words at the request of the USOC, the USOC, in the lower federal courts, sought and secured a permanent injunction against further use of the word "Olympic" by SFAA. [FN326] The Supreme Court granted certiorari and sustained the injunction. [FN327]

In sustaining the injunction, the Court first considered and rejected the arguments of SFAA that: (1) "Congress [did not] intend[ ] to provide the USOC with exclusive control of the use of the word 'Olympic' without regard to whether an unauthorized use of the word tends to cause confusion;" [FN328] (2) that "the First Amendment prohibits Congress from granting a trademark in the word 'Olympic"'; [FN329] and (3) that "the First Amendment

prohibits Congress from granting exclusive use of a word absent" a proof-of-confusion requirement. [FN330] Having resolved these three issues against SFAA, the Court moved to a consideration of SFAA's final argument: "[E]ven if the exclusive use granted by [Congress] does not violate the First Amendment, the USOC's enforcement of that right is discriminatory in violation of the First Amendment." [FN331] The Court stated that the "fundamental ***385** inquiry is whether the USOC is a governmental actor to whom the prohibitions of the Constitution apply." [FN332]

After rejecting several nexus arguments advanced by SFAA, [FN333] the Court, in relation to the public function issue, applied once again the now familiar exclusivity test, stating that "[t]his Court also has found action to be governmental action when the challenged entity performs functions that have been 'traditionally the exclusive prerogative' of . . . [g]overnment." [FN334] Conceding that "the activities performed by the USOC serve a national interest," the Court repeated its Rendell-Baker statement that performing a function that serves the public does not convert private action into state action. [FN335] Finally, the Court stressed that the congressional act "merely authorized the USOC to coordinate activities that always have been performed by private entities. Neither the conduct nor the coordination of amateur sports has been a traditional governmental function." [FN336] After rejecting all public function and nexus arguments advanced by SFAA, the Court concluded that "[b]ecause the USOC is not a governmental actor, the SFAA's claim that the USOC has enforced its rights in a discriminatory manner must fail." [FN337]

E. A Partial Comeback for Public Function Analysis?

After the Court's decisions in the 1970s and 1980s, it appeared that the public function concept had been milked of all practical potency. As a concept, it continued to exist theoretically but was of little practical value for litigants seeking to establish the existence of state action. From Jackson in 1974 to SFAA in 1987, the Court, in effect, confined the public function concept to the company town and White Primary Cases, cases of slight real-world importance to the conditions of American society in the 1990s.

It was somewhat unexpected, therefore, when the Court brought the public function concept partially back to life in two of the peremptory challenge cases of the early 1990s. In Edmonson v. Leesville Concrete Co., [FN338] a 1991 decision, the Court considered the ***386** question "whether a private litigant in a civil case may use peremptory challenges to exclude jurors on account of their race." [FN339] In an opinion by Justice Kennedy, the Court held that such "race-based exclusion violates the equal protection rights of the challenged jurors." [FN340] For the Edmonson Court, the controlling issue was, of course, the state action issue, the Court noting that "the legality of the exclusion at issue here turns on the extent to which a litigant in a civil case may be subject to the Constitution's restrictions." [FN341] Because the prohibitions of the Constitution, "[w]ith few exceptions . . . do not apply to the actions of private entities," [FN342] the Court proceeded to determine whether, in a civil proceeding, a private litigant's race-based exclusion of jurors constitutes state action.

In answering this question, the Court employed the two step test formulated in its 1982 decision in Lugar v. Edmondson Oil Co. [FN343] As described by the Edmonson Court, the Court asks "first whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority; and second, whether the private party charged with the deprivation could be described in all fairness as a state actor." [FN344] With respect to the first part of the Lugar test, the Court stated, "There can be no question that [this] part . . . is satisfied here"; The Court emphasized that "[b]y their very nature, peremptory challenges have no significance outside a court of law." [FN345]

The Edmonson Court then focused its main energy on the second part of the Lugar test: May the private party's action be fairly attributed to the state? It is here that the Court partially revived the public function concept. In conceptually important language, the Court stated:

> Our precedents establish that, in determining whether a particular action or course of conduct is governmental in character, it is relevant to examine the following: the extent to which the actor relies on governmental assistance and benefits, see Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988); ***387**Burton v.

Wilmington Parking Authority, 365 U.S. 715 (1961); whether the actor is performing a traditional governmental function, see Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946); cf. San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 544-545 (1987); and whether the injury caused is aggravated in a unique way by the incidents of governmental authority, see Shelley v. Kraemer, 334 U.S. 1 (1948). Based on our application of these three principles to the circumstances here, we hold that the exercise of peremptory challenges by the defendant in the District Court was pursuant to a course of state action. [FN346]

After completing its analysis of the "governmental assistance" question, [FN347] the Court turned to the public function question. Here, the Court stated that the controlling test is "whether the action in question involves the performance of a traditional function of the government." [FN348] For the Court, the answer was clear:

> A traditional function of government is evident here. The peremptory challenge is used in selecting an entity that is a quintessential governmental body, having no attributes of a private actor. The jury exercises the power of the court and of the government that confers the court's jurisdiction. [FN349]

The Court noted that "[t]hough the motive of a peremptory challenge may be to protect a private interest, the objective of jury selection proceedings is to determine representation on a governmental body." [FN350] The selection of jurors, therefore, "represents a unique governmental function," and when that function is delegated, at least in part, to private litigants by government, it is "attributable to government for purposes of ***388** invoking constitutional protections against discrimination by reason of race." [FN351]

The Edmonson Court's analysis of the public function issue is important for three related reasons: First, the Court veered away from the exclusivity test as advanced in Jackson and Flagg Brothers. The Court framed the public function issue in terms of "whether the actor is performing a traditional governmental function." [FN352] Absent here is any use of the word "exclusive." Second, the Court used the public function issue as one of three weight factors leading to the ultimate resolution of the generic state action issue. The Court did not consider each factor in an isolated, unconnected fashion; rather, it considered the ultimate state action question in the light of all three weight factors. This totality analysis approaches the meta-analysis advocated by Professor Krotoszynski under which "a reviewing court [would] step back and consider whether the [challenged action] satisfies a sufficient portion of each of the three tests to support a state action finding, even if no single test is satisfied completely." [FN353]

The third reason for the importance of the Edmonson Court's analysis is that, in its totality approach, the Court considered the three main branches of state action inquiry: the state nexus and public function branches of the characterization model and, more ambiguously, the state authorization inquiry under the state authorization model. Indeed, in its listing of three "relevant" state action factors, the Court's citation of cases matches respectively the three main branches of state action inquiry: Burton (state nexus), Terry and Marsh (public function), and Shelley (state authorization). [FN354] What this fusion of state action inquiries means is discussed more fully in the next Article in this series. Here, it is enough to stress that this fusion of factors has given at least some new life to the public function inquiry. The public function inquiry is no longer an impotent formality in which the Court inevitably finds that the private ***389** action in question lacks "the feature of exclusivity." [FN355]

The Edmonson Court's approach to the public function inquiry was duplicated almost identically in the Court's 1992 decision in Georgia v. McCollum. [FN356] In McCollum, the Court considered "whether the Constitution prohibits a criminal defendant from engaging in purposeful racial discrimination in the exercise of peremptory challenges." [FN357] In determining that such action by a criminal defendant constitutes state action, the McCollum Court pursued the same three question approach utilized in Edmonson [FN358] and analyzed the public function issue in Edmonson terms. [FN359] In addition, the Court rejected the defendant's contention "that the adversarial relationship between the defendant and the prosecution negates the governmental character of the peremptory challenge." [FN360] Citing Edmonson, the Court concluded that a motive "to protect a private interest," here an interest in acquittal, does not preclude a finding of state action. [FN361] The McCollum decision, therefore, further consolidates the current

Court's greater willingness to use public function analysis as an effective tool in the search for state action.

F. Concluding Observations

In Edmonson and McCollum, public function analysis more nearly assumes its proper role as a means for determining the existence of state action. The current Court was right to rescue the public function concept from the virtual oblivion of the exclusivity test applied by the Court in the 1970s and 1980s. Under the characterization model, the public function inquiry constitutes an important factor in determining when private action may be fairly attributed to the state. The inquiry should be one of degree, not an all or nothing question of governmental exclusivity. The more the challenged private action may be fairly characterized as governmental in nature, the stronger is the force of the public function argument. And, when the function performed by the private actor becomes predominantly, or even uniquely, governmental in nature, the force of the public function argument is very strong indeed. Hopefully, in relation to the public function concept, the Edmonson and McCollum decisions will promote the degree inquiry here advocated.

***390** In the public function area, however, another question remains unanswered: What is the proper relationship between the public function inquiry under the characterization model and the state authorization inquiry under the state authorization model? The courts have yet to work this out. When government delegates authority to a private actor to perform a particular function, government is permitting the actor to perform that function with legal impunity (assuming, always, that the private actor acts within the confines of the authority granted). Is public function analysis, then, but a part of the broader state authorization inquiry: Under the Constitution, to what extent may government authorize one private party to gouge another private party with legal impunity? Or, do certain grants of governmental authority, as in Terry, Marsh, and Edmonson, contain elements of governmental impact not present in a legal system's widespread grants of authority to the general public to engage in an equally widespread array of daily activities?

When government permits a private actor to play a significant role in determining the outcome of a process that is clearly governmental in nature, e.g., election of public officials, policing the streets of a community, selecting jurors, there is an element of governmental impact not present, for example, when government's legal system permits private persons to make contracts, choose dinner guests, or, more controversially, to choose restaurant customers. [FN362] It is that enhanced governmental impact that should attract the application of public function analysis under the characterization model. The presence of that enhanced impact indicates persuasively that a private actor is performing a public function and that such performance constitutes state action. In such cases, it makes policy sense to say that government is responsible for what the private actor does in performing the delegated function. When, however, a private party's action affects primarily the outcome of a process that is less clearly governmental in nature, as in the examples of making contracts and serving restaurant customers, the question of state action should, I believe, be handled generally under the state authorization model. [FN363]

***391** IV. The State Nexus Issue

A. Historical Summary

The state nexus issue asks: When do the contacts between government and the action of a private actor become so extensive that the action in question may be fairly attributed to government? [FN364] At some point along the nexus continuum, the action of government and the private actor become so intertwined that the courts will characterize the private actor's action as state action. Thus, the state nexus issue is quintessentially a question of degree, and, throughout its history, the courts have so approached it. As in the case of the public function issue, there have been variations in the liberality with which the courts have used state nexus analysis to pin the state action label on private action.

At the Supreme Court level, the state nexus issue was late out of the starting block. Not until the Court's 1952 decision in Public Utilities Commission v. Pollak [FN365] did

the state nexus issue surface discernibly, and then only in a fact situation in which the Court assumed the existence of state action for purposes of argument. [FN366] It took the Court's 1961 decision in Burton v. Wilmington Parking Authority [FN367] to bring the state nexus issue front and center in full-blown form. Reaffirmed in the Court's 1966 decision in Evans v. Newton, [FN368] state nexus analysis thereafter split in two directions. Beginning with the Court's 1969 decision in Sniadach v. Family Finance Corp., [FN369] the Court, in Sniadach and subsequent cases, reviewed various state statutes regulating the ***392** debtor-creditor relationship to determine if such statutes complied with due process requirements. With the notable exception of the Court's decision in Flagg Bros., Inc. v. Brooks, [FN370] these decisions used state nexus analysis in concluding that certain protective actions taken by private actors constituted state action. [FN371]

In parallel chronological fashion, the Court, in another series of cases, largely rejected state nexus arguments that attempted to attribute private action to the state. These cases ran from the Court's 1972 decision in Moose Lodge No. 107 v. Irvis [FN372] to its 1988 decision in NCAA v. Tarkanian. [FN373] While these cases encompassed a wide variety of fact situations, they were similar in their restricted application of state nexus analysis. Even in these cases, however, the Court did not totally suppress state nexus analysis and, in limited situations, did find certain contacts sufficient to establish state action. [FN374] Through the 1970s and 1980s, therefore, state nexus analysis retained some vitality, avoiding the virtual death sentence meted out to public function analysis under the prevailing exclusivity test. [FN375] Finally, in the 1990s, in the Court's decisions in Edmonson v. Leesville Concrete Co. [FN376] and Georgia v. McCollum, [FN377] state nexus analysis joined ***393** public function analysis as one of three "relevant" factors in determining the presence of state action. [FN378] Like public function analysis, state nexus analysis has made a partial comeback in these recent Court decisions.

B. A Late but Promising Beginning: From Pollak to Burton to Newton

Not until 1952 did the Court use state nexus analysis in a conceptually recognizable, if halting, manner. In Public Utilities Commission v. Pollak, [FN379] Capital Transit Company (Capital Transit), a privately owned corporation operating in the District of Columbia, "experimented with 'music as you ride' radio programs received and amplified through loudspeakers in a streetcar and in a bus." [FN380] The programs also included a small amount of news, weather reports, and commercial advertising. [FN381] The Public Utilities Commission of the District of Columbia (the Commission) conducted an investigation of this practice, permitting Pollak, a protesting passenger, to intervene in the investigation. [FN382] The Commission concluded that the Capital Transit radio programs were "not inconsistent with public convenience, comfort and safety" and permitted them to continue. [FN383] The Supreme Court sustained the constitutional validity of the combined action of Capital Transit in offering the radio programs and of the Commission in permitting them to continue. [FN384]

In reaching that conclusion, the Pollak Court had first to determine whether the action implementing the radio programs constituted governmental action. [FN385] In holding that it did, the Court expressly did "not rely on the mere fact that Capital Transit operates a public utility on the streets of the District of Columbia under authority of Congress," nor on "the fact that, by reason of such federal authorization, Capital Transit now enjoys a substantial monopoly of street railway and bus transportation ***394** in the District of Columbia." [FN386] Instead, the Court relied "particularly upon the fact that [the Commission], pursuant to protests against the radio program, ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed on the ground that the public safety, comfort and convenience were not impaired thereby." [FN387] The Court found in that fact "a sufficiently close relation between the Federal Government and the radio service to make it necessary . . . to consider [constitutional arguments under the First and Fifth] Amendments." [FN388]

In state nexus terms, the Court apparently held that the Commission's specifically targeted investigation and approval of the radio programs constituted a sufficient contact between government and the programs to justify a finding of state action in the continuation of the programs. The Court hedged, however, by saying that it was only "assuming [for purposes of going to the merits] that the action of Capital Transit in operating the radio service, together with the action of the Commission in permitting

such operation, amounts to sufficient Federal Government action to make the First and Fifth Amendments applicable thereto." [FN389] This is confusing language. In substance, the Court may be saying that Capital Transit and the Commission acted jointly in making it possible for the radio programs to continue. If that were true, later cases hold expressly that when a private actor and a state actor engage jointly in a course of conduct, the private actor may be characterized as a state actor for purposes of that joint action. [FN390] But is state authorization of private action enough by itself to make the state and private actors joint actors in relation to the action in question? Such a rule would convert all state-authorized private action into state action and almost certainly reaches too far. Clearly, the Pollak Court viewed the Commission's action as more than passive approval of the challenged action and as constituting, instead, an active encouragement of it. [FN391] Perhaps that factor of active encouragement is the key to the Court's state nexus analysis in Pollak. [FN392]

***395** If the Pollak Court's use of state nexus analysis was tentative and somewhat opaque, there was no hesitancy in the Court's vigorous and comprehensive use of state nexus analysis in its 1961 decision in Burton v. Wilmington Parking Authority. [FN393] Indeed, Burton may be fairly characterized as the quintessential example of state nexus analysis under the state characterization model. Burton establishes the conceptual framework for all subsequent state nexus decisions. Even when the Court later restricts state nexus analysis, it habitually cites Burton and attempts to distinguish Burton from the fact situation then before the Court. [FN394]

Burton involved an "action for declaratory and injunctive relief [[[against] Eagle Coffee Shoppe, Inc. [Eagle], a restaurant located within an off-street automobile parking building in Wilmington, Delaware." [FN395] The parking building was "owned and operated by the Wilmington Parking Authority [the Authority], an agency of the State of Delaware, and [Eagle was] the Authority's lessee." [FN396] Eagle refused to serve the appellant, Burton, "solely because he is a Negro." [FN397] The Burton Court held that Eagle's action of refusal constituted state action, and ***396** "the proscriptions of the Fourteenth Amendment must be complied with by [Eagle] as certainly as though they were binding covenants written into the [lease] agreement" between Eagle and the Authority. [FN398]

The Court began its state action analysis by conceding the impossibility of fashioning "a precise formula for recognition of state responsibility under the Equal Protection Clause." [FN399] The Court stated that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." [FN400] The Court then proceeded to sift facts and weigh circumstances under the state nexus strand of the characterization model.

Discounting the noncontact arguments of the Authority as "diminished" in their appeal by the weight of various contact factors, [FN401] the Court listed the relevant contact factors: (1) Government owned the land and building on which and in which Eagle was located as the government's lessee [FN402] (the government ownership and lessor factors); (2) the properties leased to Eagle and the other lessees "were not surplus state property, but constituted a physically and financially integral and, indeed, indispensable part of the State's plan to operate its project as a self-sustaining unit" [FN403] (the financial integration with government factor); (3) "the peculiar relationship of [Eagle] to the parking facility in which it is located confers on each an incidental variety of mutual benefits" [FN404] (the symbiotic relationship factor or, more colorfully, the "entrepreneurial symbiosis" factor); and (4) "[i]t is irony amounting to grave injustice" that Burton was "a second-class citizen" in a restaurant located in a governmentally owned and operated building [FN405] (the governmental encouragement or endorsement factor). For the Burton Court, the combined weight of these factors "indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn." [FN406]

***397** The Burton Court found none of its four listed factors to be conclusive when considered in isolation. Rather, it was the combined weight of the listed factors that led to the Court's ultimate state action holding. In its state nexus analysis, therefore, the Burton Court employed a totality approach, an approach that seeks to determine how far the combined force of relevant contact factors has moved along the state nexus continuum. The farther that movement, the more readily will the Court conclude that challenged private action may be fairly attributed to the state. [FN407] It would be left

to later cases to identify certain contact factors that, considered singly and without reference to other factors, have sufficient force to ring the state action bell. [FN408] It would also be left to later cases to deviate from the Burton Court's totality approach to an approach that considers each contact factor only in isolation, discarding a factor completely if, by itself, it lacks sufficient force to produce a finding of state action. [FN409]

In its 1966 decision in Evans v. Newton, [FN410] the Court reaffirmed the state nexus analysis employed in Burton. In the early twentieth century, Augustus Bacon, a United States Senator from Georgia, devised a tract of land to the city of Macon, Georgia, in trust, "to be used [[[by the city] as 'a park and pleasure ground' for white people only." [FN411] The city determined it could no longer operate the park as trustee on a racially segregated basis after the Brown v. Board of Education decision in 1954. [FN412] Accordingly, in a state court proceeding, the city resigned as trustee, and the state court, after accepting the city's resignation, "appointed three individuals as new trustees." [FN413] In Newton, the Supreme Court held that, under the particular facts of this case, ***398** continued operation of the park by the new "private" trustees constituted state action. [FN414]

In his opinion for the Court, Justice Douglas assumed that, during the period in which the park was managed directly by the city, the park was "swept, manicured, watered, patrolled, and maintained by the city as a public facility for whites only." [FN415] The Court continued:

> The momentum [the park] acquired as a public facility is certainly not dissipated ipso facto by the appointment of "private" trustees. So far as this record shows, there has been no change in municipal maintenance and concern over this facility. Whether these public characteristics will in time be dissipated is wholly conjectural. If the municipality remains entwined in the management or control of the park, it remains subject to the restraints of the Fourteenth Amendment . . . . [FN416]

Here is a clear application of state nexus analysis in which the Court focuses on the intertwining nature of the ongoing contacts between the city of Macon and the "management or control of the park" by the new trustees. [FN417] For the Court, those contacts, considered in totality, were sufficient in strength to justify a finding of state action in the continued operation of the park. [FN418]

The strength of state nexus analysis, as exemplified in Burton and Newton, and to a lesser degree in Pollak, would not continue in subsequent Supreme Court decisions. As indicated in the historical summary at the beginning of this subpart, [FN419] after Burton and Newton, the Court's state nexus analysis divided in two directions: In one set of cases, primarily but not exclusively those dealing with creditor-debtor relationships, the Court used a joint action contact analysis to attribute private action to the state. [FN420] In another set of cases, the Court retreated partially ***399** from the totality approach employed in Burton and began to view state contact factors in isolation, discarding a factor completely if, by itself, it lacked sufficient weight to justify a finding of state action. The next subpart deals first with the retreat-from-Burton set of cases.

C. The Retreat from Burton: From Moose Lodge to Tarkanian

In 1968, in Powe v. Miles, [FN421] Judge Friendly wrote a prescient state action opinion for the Second Circuit Court of Appeals. In Powe, Alfred University, a private university situated in New York State, took disciplinary action against several student demonstrators from the University's Liberal Arts and Ceramics Colleges. [FN422] Justice Friendly's opinion held that this action did not constitute state action. [FN423] The court acknowledged that the Liberal Arts College received some funding from the state and that the state exercised some regulatory control over the educational standards of the college. [FN424] The students argued that these contacts were sufficient to convert the college's disciplinary action into state action. [FN425] Rejecting that argument, Judge Friendly stressed: "It overlooks the essential point--that the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury." [FN426] This emphasis on tying state contacts to the specific private action that is alleged to have caused the harm becomes a hallmark of later Supreme Court decisions in the 1970s and 1980s. In

these later Court decisions, the focus in Powe on state ties to specific private action bears fruit that Judge Friendly may not fully have intended. [FN427]

***400** In 1972, Moose Lodge No. 107 v. Irvis [FN428] began the Court's retreat from the Burton totality approach, a retreat made easier because the facts in Moose Lodge presented a persuasive case for not attributing private action to the state. In this case, Moose Lodge, "a local branch of the national fraternal organization located in Harrisburg, Pennsylvania," [FN429] refused service to appellee, Irvis, a black guest, because of his race. [FN430] Lodge rules restricted lodge membership to "white male Caucasians," and members were permitted to bring only Caucasian guests on the lodge premises. [FN431] Irvis argued that the discriminatory action of Moose Lodge in refusing to serve him as a guest constituted state action; he relied primarily on the fact that "the Pennsylvania liquor board had issued appellant Moose Lodge a private club license that authorized the sale of alcoholic beverages on its premises." [FN432] The Court held that "the operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge to make the latter 'state action' within the ambit of the Equal Protection Clause of the Fourteenth Amendment." [FN433]

In its application of state nexus analysis, the Moose Lodge Court carefully distinguished the facts before it from those in Burton. [FN434] The Court emphasized that "the Moose Lodge building is located on land owned by it, not by any public authority" and that, unlike Eagle in Burton, Moose Lodge was not "holding itself out as a place of public accommodation." [FN435] Instead, "Moose Lodge quite ostentatiously proclaims the fact that it is not open to the public at large." [FN436] In short, the Court concluded, "while Eagle was a public restaurant in a public building, Moose Lodge is a private social club in a private building." [FN437] Thus, the Court in Moose Lodge saw "nothing approaching the symbiotic relationship between lessor and lessee that was present in Burton.'' [FN438]

***401** Because of its strong "private entity" facts, Moose Lodge did not significantly damage the Burton totality approach to state nexus analysis. While Moose Lodge did receive a benefit from the state in the form of a liquor license, surely Justice Rehnquist is correct when he states that a private entity's receipt of a state benefit or service does not automatically convert that entity into a state actor. As noted by Justice Rehnquist, "Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private . . . [and] state conduct [as] set forth in The Civil Rights Cases . . . ." [FN439] On the state nexus continuum, therefore, the facts in Moose Lodge are much closer to the choice-of-dinner-guest hypothetical than to the public restaurant facts in Burton. Hence, the Moose Lodge holding placed minimal stress on the Burton Court's state nexus analysis. Greater stress would not be long in coming.

Before leaving Moose Lodge, it is important to note that the Court did hold that one state contact, by itself, establishes conclusively that private action should be attributed to the state. In granting a liquor license, the regulations of the Pennsylvania Liquor Control Board required that "[e]very club licensee shall adhere to all of the provisions of its Constitution and By-Laws." [FN440] As construed by the Court, this administrative regulation compelled Moose Lodge to adhere to its racially discriminatory membership and guest policies. [FN441] The Court held that this state compulsion denied equal protection and enjoined further enforcement of the Liquor Control Board's regulation "insofar as that regulation requires compliance by Moose Lodge with provisions of its constitution and by-laws containing racially discriminatory provisions." [FN442] In broader conceptual terms, the Court is saying that when government compels private action, that action may be attributed to government. Accordingly, under state nexus analysis, state compulsion becomes a conclusive factor that, by itself, converts private action into state action. Later cases reaffirm this narrow part of state nexus analysis. [FN443]

The retreat from the Burton totality approach to state nexus analysis became more evident in the Court's 1974 decision in ***402** Jackson v. Metropolitan Edison Co. [FN444] As noted previously, the Jackson Court rejected efforts to characterize Edison as a state actor through use of the state nexus analysis. [FN445] In so doing, the Court shifted from a totality approach to a sequential approach in which each state nexus factor is

considered in isolation and then discarded completely if, by itself, it lacks sufficient force to convert private action into state action. The Court first noted 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 . . . . Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so." [FN446] While conceding the existence of extensive governmental regulation, [FN447] the Court holds that regulation insufficient to convert Edison into a private actor. [FN448] The Court then discards the "extensive regulation" factor and does not thereafter take it into account as a part of the total state action picture. [FN449] The Court does not consider the extensive regulation factor in conjunction with other state action factors to determine whether the combined weight of all such factors is sufficient to justify a finding of state action. [FN450]

In a similar manner, the Jackson Court meted out the same sequential fate to three other state action factors: (1) the state's ***403** conferral of a virtual "monopoly status" on Edison in the community in which Edison operated [FN451] (a state nexus factor); (2) Edison's provision of "an essential public service required to be supplied on a reasonably continuous basis" [FN452] (a public function factor); and (3) the State's approval of the termination of Jackson's electric service [FN453] (in one sense, a state encouragement nexus factor and, in another sense, a state authorization factor properly considered under the state authorization model). As to each of these factors, the Court found the factor, taken by itself, insufficiently strong to convert private action into state action. In a passing bow to the Burton totality approach, the Court held that all of these factors, "taken together," were not enough "to connect the State of Pennsylvania with [Edison's termination] action so as to make [Edison's] conduct attributable to the State for purposes of the Fourteenth Amendment." [FN454] But, as stressed by Justice Douglas in dissent:

> Though the Court pays lip service to the need for assessing the totality of the State's involvement in this enterprise, . . . its underlying analysis is fundamentally sequential rather than cumulative. In that perspective, what the Court does today is to make a significant departure from our previous treatment of state action issues. [FN455]

In substance, therefore, if not in form, the Jackson Court retreated from a totality approach to state nexus analysis, adopting, instead, a sequential approach that considers each nexus factor in isolation without reference to the combined weight of all nexus factors. [FN456]

***404** In a related and important conceptual development, the Jackson Court stressed that in state action cases, "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." [FN457] Here, the Court is adopting the position advanced by Judge Friendly in Powe v. Miles: [FN458] "[T]he state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury." [FN459] This requirement that state contacts be tied specifically to the challenged private action becomes a staple of subsequent Court decisions concerning state action. [FN460]

The "specific tie" requirement is valid only if the totality approach is not discarded. In some instances, government's contacts with a private entity may be very pervasive, permeating nearly all of the entity's operations. In such cases, the combined force of the contact factors may be so strong that the state action taint colors all significant action taken by the entity. As expressed by Justice Marshall's dissent in Jackson: "[W]here the State has so thoroughly insinuated itself into the operations of the [private] enterprise, it should not be fatal if the State has not affirmatively sanctioned the particular practice in question." [FN461] Accordingly, the specific tie requirement should be used in careful combination with the totality approach, not as a device to blunt the effective operation of that approach.

Before leaving Jackson, it is well to recall a fundamental issue raised by Justice Marshall's dissent: Should "different standards . . . apply to state-action analysis when different constitutional claims are presented"? [FN462] If, for example, Edison refused to provide service to black customers, Justice Marshall "[could not] believe that this Court would hold that the State's involvement with the utility company was not sufficient to impose upon the company an obligation to meet the constitutional mandate of

nondiscrimination." [FN463] This perplexing question of "variable state action" suggests that Jackson-type cases may be handled more effectively under the state authorization model, or that under ***405** the characterization model, the combined weight of the same state nexus and public function factors creates a specific tie between government and one action by a private entity but not between government and another such action. If the Court continues to rely primarily on the characterization model in its state action analysis, some degree of variable state action may be a practical necessity. [FN464]

The Jackson Court's approach to state nexus analysis was duplicated in the Court's 1982 decisions in Rendell-Baker v. Kohn [FN465] and Blum v. Yaretsky. [FN466] In Rendell-Baker, the Court reviewed the action of a private school in discharging certain employees. [FN467] In relation to the discharge action, the Court, in seriatim fashion, held each of the following factors insufficient, by itself, to support a finding of state action: (1) government funding of at least ninety percent of the school's operating budget [FN468] (a state nexus factor); (2) extensive governmental regulation of the school [FN469] (a state nexus factor); (3) the school's performance of a "public function" in its education of "maladjusted" high school students [FN470] (a public function factor); and (4) the existence of a "symbiotic relationship" between the school and the State [FN471] (a State nexus factor). In its summation, the Rendell-Baker Court did not even make a pretense of applying the totality approach, holding simply "that petitioners have not stated a claim for relief under 42 U.S.C. § 1983." [FN472]

***406** A similar sequential fate awaited the state action factors advanced by the challengers in Blum v. Yaretsky. [FN473] Here, the challenged action involved decisions by a private nursing home to transfer or discharge Medicaid patients "without notice or an opportunity for a hearing." [FN474] The Blum Court considered factors similar to those discussed and found wanting in Rendell-Baker. [FN475] Again, as in Rendell-Baker, the Blum Court dismissed each factor as insufficient, by itself, to support a finding of state action, concluding in summary fashion "that respondents have failed to establish 'state action' in the nursing homes' decisions to discharge or transfer Medicaid patients to lower levels of care." [FN476]

In Blum, the Court reaffirmed the requirement that state contacts must be tied specifically to the "challenged [private] action." [FN477] Only then "can [it] be said that the State is responsible for the specific conduct of which the [challenger] complains." [FN478] The Blum Court, however, does not use the "specific tie" requirement in careful combination with the Burton totality approach. Instead, the Court uses the specific tie requirement first to isolate each factor it considers and then to discard that factor after the Court has held that it lacks sufficient force to support a finding of state action. After the twin decisions in Blum and Rendell-Baker, if the totality approach was not dead, it was at least gasping for breath. [FN479]

***407** In 1987, Justice Powell wrote the opinion for the Court in San Francisco Arts & Athletics v. United States Olympic Committee. [FN480] In this case, as noted previously, [FN481] the United States Olympic Committee (USOC) sought to enforce against San Francisco Arts & Athletics (SFAA) its congressionally granted right to prohibit unauthorized use of the word "Olympic." [FN482] SFAA sought to block that enforcement. [FN483] Crucial to SFAA's position was its contention that "the USOC is a governmental actor to whom the prohibitions of the Constitution apply." [FN484]

Justice Powell's opinion holding that the USOC is not a governmental actor reads like a textbook example of the sequential approach employed by the Court in Jackson, Rendell-Baker, and Blum. In a terse opinion, Justice Powell considered and briskly discarded a series of state action factors. [FN485] With almost machine gun efficiency, his opinion found each of these factors insufficient to support a finding of state action. [FN486] The opinion reveals little, if any, effort to consider the combined force of all relevant factors in relation to the state action issue. Instead, the Court merely concludes summarily that "[t]he USOC's choice of how to enforce its exclusive right to use the word 'Olympic' simply is not a governmental decision." [FN487]

***408** In 1988, the Supreme Court decided the intriguing case of NCAA v. Tarkanian. [FN488] As described by Justice Stevens in his opinion for the Court, "This case uniquely mirrors the traditional state-action case." [FN489] For that reason, the case is somewhat sui generis but does represent a partial return to the Burton totality approach. While the

Court held against the state action claim in a five to four decision, [FN490] both the majority and dissenting opinions do make an effort to consider the combined weight of all relevant state nexus factors.

Tarkanian involved these facts: Pursuant to its investigation of the basketball program at the University of Nevada Las Vegas (UNLV), the National Collegiate Athletic Association (NCAA) "placed the university's basketball team on probation for two years and ordered UNLV to show cause why the NCAA should not impose further penalties unless UNLV severed all ties during the probation between its intercollegiate athletic program and [its basketball coach, Jerry] Tarkanian." [FN491] To avoid the imposition of "further penalties" by the NCAA, UNLV informed Tarkanian that, during the two year probation period, he was to be "completely severed" from all ties to the University's intercollegiate athletic program. [FN492] In the course of complex state court litigation, Tarkanian claimed that both UNLV and the NCAA had deprived him of liberty and property without due process of law. [FN493] The Nevada State Supreme Court sustained those claims against the NCAA, [FN494] holding, among other things, that "the NCAA had engaged in state action." [FN495] The United States Supreme Court reversed, holding that the disciplinary action taken by the NCAA against UNLV did not constitute state action. [FN496]

In his opinion for the Court, Justice Stevens noted that in this case "the final act challenged by Tarkanian--his suspension--was committed by UNLV" and that UNLV was "without question . . . a state actor." [FN497] He also conceded that "[c]learly UNLV's conduct was influenced by the rules and recommendations of the NCAA, ***409** the private party." [FN498] But, Justice Stevens argued, "the source of the [rules] adopted by the NCAA is not Nevada but the collective membership [of the NCAA], speaking through an organization that is independent of any particular State." [FN499] Moreover, Justice Stevens stressed that,

> During the several years that the NCAA investigated the alleged violations [[[of UNLV], the NCAA and UNLV acted much more like adversaries than like partners engaged in a dispassionate search for the truth. The NCAA cannot be regarded as an agent of UNLV for purposes of that proceeding. It is more correctly characterized as an agent of its remaining members which, as competitors of UNLV, had an interest in the effective and evenhanded enforcement of NCAA's recruitment standards. [FN500]

In the "final analysis," therefore, Justice Stevens reasoned that "[i]t would be more appropriate to conclude that UNLV has conducted its athletic program under color of the policies adopted by the NCAA, rather than that those policies were developed and enforced under color of Nevada law." [FN501]

Justice White's dissent accepted Justice Stevens's invitation "to step through an analytical looking glass," [FN502] but, having made that step, the dissent concluded "that the NCAA acted jointly with UNLV and therefore is a state actor." [FN503] Describing in some detail the interlocking relationship between UNLV and the NCAA, [FN504] the dissent summarized its joint action analysis in these words:

> In short, it was the NCAA's findings that Tarkanian had violated NCAA rules, made at NCAA-conducted hearings, all of which were agreed to by UNLV in its membership agreement with the NCAA, that resulted in Tarkanian's suspension by UNLV. On these facts, the NCAA was "jointly engaged with [UNLV] officials in the challenged action," and therefore was a state actor. [FN505]

***410** That UNLV could have refused to comply with the NCAA sanctions was, under the dissent's analysis, irrelevant: "Here, UNLV did suspend Tarkanian, and it did so because it embraced the NCAA rules governing conduct of its athletic program." [FN506] Implicit in this statement is the dissent's awareness of the enormous compliance leverage that the NCAA can apply against erring members. Indeed, that reality undoubtedly undergirds the dissent's joint action analysis.

Tarkanian is a significant decision for two reasons: First, in the application of state nexus analysis, both the majority and dissenting opinions heralded a halt to the Court's retreat from the Burton totality approach. In a close case, both opinions examined, thoughtfully and comprehensively, the relevant state nexus factors and considered the combined force of those factors in reaching their ultimate conclusions. This development bears fruit in the Court's 1991 decision in Edmonson v. Leesville Concrete Co. [FN507] in which, as discussed later, [FN508] the Court restores state nexus analysis to a more

potent position.

The second significant aspect of Tarkanian relates to joint action analysis. In that context, Tarkanian serves as a bridge to the next subpart in which I discuss a series of Supreme Court decisions in which the joint action contact factor is the dispositive issue. With respect to joint action analysis, Tarkanian raises this intriguing question: If a private actor desires a state actor to engage in certain action, under what circumstances will the state actor's compliance with that desire convert the private actor into one who has acted jointly with the state? [FN509] Again, this is one of those difficult questions of degree and almost certainly relates, as urged in the Tarkanian dissent, to the degree of compliance leverage that the private actor enjoys over the state actor. It is to that and related joint action questions that the next subpart now turns.

D. The Joint Action Cases

On June 21, 1964, Cecil Ray Price, the Deputy Sheriff of Neshoba County, Mississippi, detained three civil rights workers, Michael Henry Schwerner, James Earl Chaney, and Andrew ***411** Goodman, in the Neshoba County jail. [FN510] That same night, Price released the prisoners, placed them in a car belonging to the sheriff's office, and drove them to a place on an unpaved road. [FN511] Shortly thereafter, the three civil rights workers were intercepted and murdered by eighteen persons, including three public officials, Deputy Sheriff Price, Sheriff Rainey, and Patrolman Willis of the Philadelphia, Mississippi, Police Department, and fifteen nonofficial persons. [FN512] All eighteen of the murderers were charged, among other things, with a violation of 18 U.S.C. § 242, now codified in Title 42, which makes it a federal crime for any person, while acting under color of law, to deprive any person of a right "secured or protected by the Constitution or laws of the United States." [FN513]

In United States v. Price, the Supreme Court sustained the above charge. [FN514] The Court first noted that, for purposes of statutory construction, the phrase "'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." [FN515] Clearly, the three public officials, Price, Rainey, and Willis, were state actors, [FN516] and the Court so held. [FN517] The Court then focused on the nonofficial defendants who participated in the murders. Here, the Court applied the joint action principle and held that the private defendants were also state actors:

> Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is ***412** enough that he is a willful participant in joint activity with the State or its agents. [FN518]

Noting that "the monstrous design described by the indictment" was "a joint activity from start to finish," the Court concluded that "[t]hose who took advantage of participation by state officers in accomplishment of the foul purpose alleged must suffer the consequences of that participation." [FN519] In effect, the private defendants "were participants in official lawlessness, acting in willful concert with state officers and hence under color of law." [FN520]

Price, then, confirms the proposition that a private actor who acts jointly with a state actor becomes a state actor to the extent of that joint action. To that extent, the joint action converts the private actor into a state actor. While clear, this proposition leaves unanswered an obvious question: Under what circumstances should we conclude that private and state actors are jointly engaged in a particular course of conduct? On this question, Price was an easy case. A more obvious, blatant, and brutal example of joint action would be hard to imagine. As indicated in the earlier discussion of Tarkanian, [FN521] other cases are not so easy. In a series of post-Price cases, the Court shed some, but not definitive, light on the question of when the related activities of a private and a state actor may be fairly characterized as joint action.

Beginning with the 1969 case of Sniadach v. Family Finance Corp. [FN522] and ending with the 1988 case of Tulsa Professional Collection Services, Inc. v. Pope, [FN523] the Court decided a number of cases dealing with the rights of creditors and debtors. The first two of these cases, Sniadach and Fuentes v. Shevin, [FN524] implicitly assumed the presence of joint action between a private creditor and a state official. Sniadach

involved a garnishment action against a debtor's wages, [FN525] and Fuentes involved a replevin action against a debtor's personal goods (a stove and a stereo). [FN526] In each case, applicable state law permitted the creditor to affect the property rights of the debtor before giving notice to the ***413** debtor and before giving the debtor an opportunity to be heard on the merits. [FN527] In both cases, the Court held that the challenged procedure deprived the debtor of property without due process of law. [FN528]

In both Sniadach and Fuentes, the Court explained that the creditor could not have taken the debtor's property without the assistance of a state actor. Under the Wisconsin procedure challenged in Sniadach, "the clerk of the court issues the [garnishment] summons at the request of the creditor's lawyer; and it is the latter who by serving the garnishee sets in motion the machinery whereby the [debtor's] wages are frozen." [FN529] Under the Florida procedure challenged in Fuentes, the creditor seeking repossession of Mrs. Fuentes' goods

> had only to fill in the blanks of the appropriate [replevin] documents and submit them to the clerk of the small-claims court. The clerk signed and stamped the documents and issued a writ of replevin. Later the same day, a local deputy sheriff and an agent of Firestone [the creditor] went to Mrs. Fuentes' home and seized the stove and stereo. [FN530]

Thus, in both Sniadach and Fuentes, the Court implicitly held that the creditor actions there challenged were converted into state action through the participation of state actors, i.e., that the creditor, a private actor, had acted jointly with a state actor (or actors) in the taking of the debtor's property. In this connection, it is significant to note that in Sniadach, the relief sought and obtained by the debtor ran against "Family Finance Corp. of Bay View et al." [FN531] and in Fuentes, against "Shevin, Attorney General of Florida, et al." [FN532] In each case, the relief granted operated pragmatically to prevent further action precisely by ***414** those private and state actors who, acting in concert, had a practical capacity to injure the property interests of the debtor. [FN533]

Sniadach and Fuentes began a trend in which the Court, in creditor-debtor cases, placed great emphasis on administrative participation by the state in the challenged action. That administrative participation, however automatic and ministerial, became the crucial element in the Court's search for joint action between private and state actors. In state nexus terms, administrative participation by state actors became a state contact sufficiently strong to invest the entirety of the challenged action with a state action character. [FN534] Having placed such emphasis on the administrative participation factor, the Court had next to confront a fact situation in which that factor was absent. That confrontation occurred in the Court's 1978 decision in Flagg Bros., Inc. v. Brooks. [FN535]

Flagg Brothers is a many-faceted case, raising a number of important state action issues that are discussed in various parts of this Article. Here, we focus on Flagg Brothers and the issue of joint action. As noted previously, Flagg Brothers involved a provision of the New York Uniform Commercial Code that permits a warehouseman to sell "goods entrusted to him for storage." [FN536] The warehouseman may make the sale without the aid or support of governmental officials and without resort to any administrative machinery of the state. [FN537] On the question of joint action, this absence of state administrative participation was decisive for the Court. In his majority opinion, then Justice Rehnquist stated:

> ***415** It must be noted that respondents [the challengers] have named no public officials as defendants in this action. The City Marshall, who supervised their evictions, was dismissed from the case by the consent of all the parties. This total absence of overt official involvement plainly distinguishes this case from earlier decisions imposing procedural restrictions on creditors' remedies such as [among other cases, Fuentes and Sniadach]. [FN538]

For Justice Rehnquist, then, the absence of administrative participation by the state precluded any joint action claim. The warehouseman was simply engaging in a self-help remedy authorized by state statute.

In dissent, Justice Stevens stressed that, on the joint action issue, Flagg Brothers was simply the ultimate extension of the Sniadach and Fuentes line of cases. Noting that abdication of "'effective state control over state power"' [FN539] was a major concern

expressed by the Court in Fuentes, Justice Stevens remonstrated:

> Yet the very defect that made the statutes defective in [Fuentes and similar cases]--lack of state control--is, under today's decision, the factor that precludes constitutional review of the state statute. The Due Process Clause cannot command such incongruous results. If it is unconstitutional for a State to allow a private party to exercise a traditional state power because the state supervision of that power is purely mechanical, the State surely cannot immunize its actions from constitutional scrutiny by removing even the mechanical supervision. [FN540]

On the joint action issue, both Justices Rehnquist and Stevens make valid points in Flagg Brothers. Justice Rehnquist is factually accurate when he notes the absence of state administrative participation in the warehouseman's sale of the debtor's goods. [FN541] Moreover, it would press the joint action concept to the breaking point to hold that joint action exists whenever a private party engages in an act authorized by the state. That, however, is not the substantive point that Stevens is making. While conceding that state administrative participation was absent in Flagg Brothers, Justice Stevens is arguing that this absence should not immunize the enabling New York statute from "constitutional scrutiny" [FN542] under other state action theories. For ***416** this purpose, Justice Stevens urges, both state authorization [FN543] and public function [FN544] analyses are available and, for him, were sufficient in their combined force to support a conclusion that prohibited state action had occurred. [FN545]

In its 1982 decision in Lugar v. Edmondson Oil Co., [FN546] the Court revisited issues decided in Sniadach and Fuentes. In Lugar, however, the Court expressly confronted the state action issue that Sniadach and Fuentes decided only implicitly. In Lugar, the petitioner, Lugar, was indebted to Edmondson Oil Co. (Edmondson). [FN547] Edmondson sued on the debt in Virginia state court. [FN548] Then, as described by the Court, in a proceeding ancillary to the debt action,

> Edmondson sought prejudgment attachment of certain of petitioner's property. . . . The prejudgment attachment procedure required only that Edmondson allege, in an ex parte petition, a belief that petitioner was disposing of or might dispose of his property in order to defeat his creditors. Acting upon that petition, a Clerk of the state court issued a writ of attachment, which was then executed by the County Sheriff. This effectively sequestered petitioner's property, although it was left in his possession. [FN549]

After a later hearing on the propriety of the attachment, a "state trial judge ordered the attached dismissed because Edmondson had failed to establish the statutory grounds for attachment alleged in the petition." [FN550] Thereafter, Lugar "brought this action under 42 U.S.C. § 1983 against Edmondson and its president." [FN551] The United States Supreme Court sustained Lugar's action. [FN552]

In reaching its conclusion, the Lugar Court first disposed of a recurring statutory construction issue: the meaning of "under ***417** color" of law as used in § 1983. [FN553] After a detailed discussion of this issue, the Court concluded that "[i]f the challenged conduct of . . . [Edmondson and its president] constitutes state action as delimited by our prior decisions, then that conduct was also action under color of state law and will support a suit under § 1983." [FN554] The Court then addressed the state action issue, announcing for the first time a "two-part approach" to the question of when conduct allegedly causing the deprivation of a federal right may be fairly attributable to the State:

> 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. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. [FN555]

This two part test remains the test employed by the current Court in state action cases. [FN556]

While conceding that some ambiguities existed in the three counts contained in Lugar's complaint, the Court read count one as attacking the constitutionality of the attachment process created by Virginia law. [FN557] This was sufficient to show that Lugar's deprivation was caused by Edmondson's exercise of a right created by the State, thereby satisfying the first prong of the Lugar test. [FN558] Tuning to the second prong of the Lugar test, the Court stated that "we have consistently held that a private party's joint

participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." [FN559]

The Court stated further that "[t]he Court of Appeals erred in holding that in this context 'joint participation' required ***418** something more than invoking the aid of state officials to take advantage of state-created attachment procedures." [FN560] Thus, the Lugar Court used the joint action concept to pin the state action label on Edmondson, and in the context of ex parte attachment of property, held that "invoking the aid of state officials" was a sufficient nexus to establish the requisite joint action between Edmondson and the state. As summarized by the Court, "petitioner was deprived of his property through state action; [Edmondson and its president] were, therefore, acting under color of state law in participating in that deprivation." [FN561]

In its 1988 decision in Tulsa Professional Collection Services v. Pope, [FN562] the Court confronted once again the state action issue in the context of creditor-debtor relationships. In Pope, however, it was the creditor who challenged the constitutionality of a state procedure invoked by the debtor. [FN563] After the death of Everett Pope, Jr., in Tulsa, Oklahoma, his wife, Jo "'Pope, was appointed Executor of his estate under Oklahoma law. [FN564] The decedent was indebted to a hospital at the time of his death, and Tulsa Professional Collection Services (TPCS) was the assignee of the hospital's claim against the estate. [FN565] Oklahoma probate law required TPCS to present its claim against the estate to the estate's executor "within two months of the publication of a notice advising creditors of the commencement of probate proceedings." [FN566] Instead of actual notice to TPCS, a notice to creditors was published by the executor in the Tulsa Daily Legal News, and TPCS failed to present its claim to the executor within two months after the date of that publication. [FN567] At all court levels, Oklahoma state courts held that this failure barred TPCS's claim against the estate. [FN568]

The Supreme Court reversed, holding that if the identity of TPCS "as a creditor was known or 'reasonably ascertainable', then the Due Process Clause requires that [TPCS] be given" actual notice of the place and time for filing claims against the estate. [FN569] After describing the claim of TPCS as a "property interest," the ***419** Court acknowledged that the "Fourteenth Amendment protects this interest . . . only from a deprivation by state action." [FN570] The Court conceded that "[p]rivate use of state-sanctioned private remedies or processes does not rise to the level of state action" [FN571] and that "the State's involvement in the mere running of a general statute of limitations [is] generally [not] sufficient to implicate due process." [FN572] When, however, "private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found." [FN573] After noting again the "self-executing feature" of a general statute of limitations, [FN574] the Court stressed that "[h]ere, in contrast, there is significant state action. The probate court is intimately involved throughout, and without that involvement the time bar is never activated." [FN575] The Court characterized this involvement as "so pervasive and substantial that it must be considered state action subject to the restrictions of the Fourteenth Amendment." [FN576]

In Pope, therefore, as in prior creditor-debtor cases, the Court placed great emphasis on the factor of state administrative participation in the challenged action. Once again, invoking the aid of state officials was held to constitute a sufficient basis for holding that a private party is acting jointly with the state. That joint action established, the party becomes a state actor to the extent of the private party's participation in the challenged action. In the creditor-debtor cases, the analytical pattern just described is firmly in place, and the Court is not likely to deviate from it in the foreseeable future.

That brings us back to Tarkanian, discussed in some detail in the preceding subpart. [FN577] On the joint action question, the Tarkanian majority stressed that, in substance, the private actor (the NCAA) and the state actor (UNLV) were seeking opposite ***420** goals. [FN578] Accordingly, the Court reasoned that it made little sense to characterize the NCAA and UNLV as joint actors. [FN579] In contrast, the dissent stressed the strong compliance pressure that the NCAA was able to exert against UNLV, thereby creating an intertwining relationship between the two entities that could fairly be characterized as joint action. [FN580] The fact that both the "opposite goals" and "compliance pressure" factors are relevant in determining the existence of joint action may help to explain

why Tarkanian was a five to four decision.

The cases from Price to Tarkanian establish clearly that when a private actor and a state actor engage jointly in a challenged action, the private actor becomes a state actor to the extent of the private actor's participation in that action. To that extent, joint action is a state contact that conclusively converts the private actor into a state actor. This rule makes persuasive policy sense. Indeed, it is hard to defend any other conceptual result. Private actors that truly engage in joint action with state actors should bear the constitutional responsibility that attends state action.

The real difficulty, of course, has been in determining the existence of joint action between private and state actors. Here, the Price to Tarkanian line of cases yields relevant factors. Among those factors are: (1) The "common goals" factor--Are the private and state actors seeking common or opposite goals? [FN581] (2) The "compliance pressure" factor--To what degree is the private actor able to exert pressure against the state actor? [FN582] (3) The "administrative participation" factor--Have government officials participated administratively in the challenged action? [FN583] (4) The "active participation" factor--How active and pervasive is the participation of government officials in the challenged action, i.e., to what extent have government officials actively fostered and encouraged the challenged action? [FN584] (5) The "no administrative ***421** participation" factor--Does the state's participation consist only of permitting the private actor to engage in the challenged action? [FN585] These factors, and perhaps others, considered in combination and weighed judiciously, should lead to an intelligent resolution of the joint action issue.

E. The Revitalization of State Nexus Analysis: Edmonson and McCollum

In a manner similar to public function analysis, Supreme Court decisions in the 1990s have, at least partially, revitalized state nexus analysis. As before described, Edmonson v. Leesville Concrete Co. [FN586] and Georgia v. McCollum [FN587] each involved the use of peremptory challenges to exclude jurors on the basis of their race: Edmonson in civil litigation between private litigants, [FN588] and McCollum in criminal litigation involving the use of peremptory challenges by the defendant. [FN589] In each case, the Court held that the racially discriminatory use of peremptory challenges constituted state action and, accordingly, a denial of equal protection on the merits. [FN590]

In Edmonson, the Court applied the two prong Lugar test for determining the existence of state action. [FN591] On the first prong, the Court held that the use of peremptory challenges clearly constituted "the exercise of a right or privilege having its source in state authority." [FN592] The Court then moved to the second prong of the Lugar test: "[W]hether a private litigant in all fairness must be deemed a government actor in the use of peremptory challenges." [FN593] Here, the Court stated that "it is relevant to examine the following: the extent to which the [private] actor relies on governmental assistance and benefits . . .; whether the actor is performing a traditional governmental function . . .; and whether the injury caused is aggravated in a unique way by the incidents of governmental authority . . . ." [FN594]

***422** State nexus analysis is subsumed under the first of the above "attribution" inquiries: "[T]he extent to which the [private] actor relies on governmental assistance and benefits." [FN595] It is under this inquiry that the Edmonson Court, in a manner similar to the Burton totality approach, examined the various contacts between the private litigant and the state in the use of peremptory challenges. Describing in some detail "the overt, significant participation of . . . government" in "the peremptory challenge system," [FN596] the Court concluded that "a private party could not exercise its peremptory challenges absent the overt, significant assistance of the court." [FN597] Citing Burton, the Court stressed that the court "has not only made itself a party to the [biased act], but has elected to place its power, property and prestige behind the [alleged] discrimination." [FN598] The Court repeated this state nexus analysis in almost identical form in McCollum. [FN599]

The careful use of state nexus analysis in Edmonson and McCollum, combined with the thoughtful majority and dissenting opinions in Tarkanian, does indicate that state nexus analysis is making at least a partial comeback. To some extent, the current Court has discarded the sequential analysis employed by the Court in Jackson, Rendell-Baker, and

Blum [FN600] and has returned to the totality approach employed in Burton. The Tarkanian, Edmonson, and McCollum opinions display a returning willingness by the Court to consider the combined weight of all state contact factors under state nexus analysis. Future cases ***423** will determine whether that trend continues.

F. Concluding Observations: The Impact of Lebron

In its 1995 decision in Lebron v. National R.R. Passenger Corp., [FN601] the Court considered "whether actions of the National Railroad Passenger Corporation, commonly known as Amtrak, are subject to the constraints of the Constitution." [FN602] In Lebron, petitioner Lebron challenged certain advertising policies of Amtrak as constituting a violation of Lebron's First Amendment rights. [FN603] Critical to Lebron's claim was the issue of whether Amtrak could be considered a governmental actor, thereby triggering the restraints placed by the First Amendment on governmental regulation of the content of speech. [FN604] In an opinion by Justice Scalia, the Lebron Court held that Amtrak was more than a private actor involved in some way with government; rather, the Court held that Amtrak was itself government. [FN605] The Court concluded that Amtrak "is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution." [FN606]

The Lebron Court reasoned that "Government-created and-controlled corporations are . . . part of the Government," stressing that "[i]t surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." [FN607] Reviewing the history and structure of Amtrak, the Court described Amtrak as "established and organized under federal law for the very purpose of pursuing federal governmental objectives, under the direction and control of federal governmental appointees." [FN608] This description led inexorably to the Court's holding that

> where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the ***424** corporation is part of the Government for purposes of the First Amendment. [FN609]

In substance, Lebron is a case about the "ultimate contact" between an actor and the state. That ultimate contact occurs when the actor in question is government itself, not merely a private actor who is to some extent entwined with the state. [FN610] When that actor assumes a nonhuman, corporate form, as in Lebron, it is simply not possible for the actor to act in a private capacity for state action purposes. [FN611] The actor's every action constitutes state action.

For purposes of state nexus analysis, Lebron is significant because it continues the trend established in Tarkanian, Edmonson, and McCollum: The Court's renewed willingness to examine comprehensively all relevant state nexus factors and to consider their combined force in resolving the ultimate state action issue. In Lebron, for example, the Court examined exhaustively "the nature and history of Amtrak and of Government-created corporations in general." [FN612] It is that attention to detail and to the practical meaning of state contact factors that signifies a present Court shift away from the Jackson sequential approach and toward the Burton totality approach. State nexus analysis deserves something more than the seriatim rejection of contact factors that, considered in isolation, fail to support a finding of state action. The Court's most recent state nexus decisions indicate a willingness to provide that something more and, with that something more, a better delineation of the scope of governmental responsibility.

[FNa]. Baker & Botts Professor of Law, University of Houston Law Center; A.B., Princeton University, 1956; J.D., University of Michigan, 1959.

[FN1]. Terry v. Adams, 345 U.S. 461, 473 (1953) (opinion of Frankfurter, J.).

[FN2]. See John E. Nowak & Ronald D. Rotunda, Constitutional Law § 12.1, at 470 (5th ed. 1995) (commenting that "[m]ost of the protections for individual rights and liberties...contained in the text of the Constitution specifically apply only to the activities of either the state or federal governments."). As used in this Article, "government" includes the United States and any level of state government, e.g., state, county, city, tax district, school district, etc. Correspondingly, "governmental action"

includes action by any such level of government.

[FN3]. See Shelley v. Kraemer, 334 U.S. 1, 13, 19 (1948) (holding that state court enforcement of private racially discriminatory restrictive covenants constitutes prohibited state action under the Fourteenth Amendment, but that voluntary adherence to such covenants by private parties constitutes only private action beyond the Amendment's self-executing reach). In Shelley, the Court stated:

> Since the decision of this Court in the Civil Rights Cases, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

Id. at 13 (citation omitted); see also Nowak & Rotunda, supra note 2, § 12.1, at 470 ("[W]henever a suit is brought against private individuals on the basis that they have taken actions which have violated the civil or political rights of another,....[t]here must be a determination of whether defendant's actions constitute governmental or 'state' action of a type regulated by the appropriate constitutional provision.").

[FN4]. See Nowak & Rotunda, supra note 2, § 12.1, at 470 (noting that the Thirteenth Amendment represents an exception to the government versus private action distinction in that "[o]nly the Thirteenth Amendment, which abolishes the institution of slavery, is also directed to controlling the actions of private individuals."). In the Civil Rights Cases, 109 U.S. 3 (1883), the Court concluded that the Thirteenth Amendment "[b]y its own unaided force and effect...abolished slavery, and established universal freedom." Id. at 20.

[FN5]. See The Civil Rights Cases, 109 U.S. at 11 (stating that "[i] ndividual invasion of individual rights is not the subject-matter" of the first section of the Fourteenth Amendment); see also Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991) ("With a few exceptions, such as the provisions of the Thirteenth Amendment, constitutional guarantees of individual liberty and equal protection do not apply to the actions of private entities.").

[FN6]. The hypothetical stated in the text assumes that Bob is acting alone out of spite and anger and that his brutal action is in no way connected to any governmental official or to any type of governmental encouragement, authorization, or support.

[FN7]. See Screws v. United States, 325 U.S. 91, 92-93 (1945) (involving essentially the same facts as the Max-Mary hypothetical). Screws contains a complex mixture of constitutional and statutory construction issues and will be discussed in greater detail in the second half, Part V, of this Article. It is cited here to show that, in the real world, "shocking and revolting episode[s] in law enforcement," similar to the Max-Mary hypothetical, do exist. See Screws, 325 U.S. at 92.

[FN8]. Unless the context clearly indicates otherwise, general references in this Article to "state action" and "state actor" mean "government action" and "government actor," respectively.

[FN9]. When a state statute authorizes a state actor to engage in particular conduct, state action is present in its strongest form. See Monell v. Department of Soc. Servs., 436 U.S. 658, 690-95 (1978).

[FN10]. Unless the context clearly indicates otherwise, all references in this Article to "Court" mean the United States Supreme Court.

[FN11]. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961) (citation omitted) (quoting Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 556 (1947)).

[FN12]. See Peter M. Shane, The Rust That Corrodes: State Action, Free Speech, and Responsibility, 52 La. L. Rev. 1585, 1592 (1992) ("[I]f a core aim of the state action doctrine is to maximize opportunities for each person, and for the community, to fulfill important responsibilities, then the courts' focus on the general theme of responsibility must look at interactions among the state and individual persons quite broadly.").

[FN13]. This Article assumes that the court deciding the state action question has personal jurisdiction over the person or entity causing the harm. This Article will not discuss the intriguing jurisdictional issues created by incidents of harm that transcend national boundaries.

[FN14]. See Monell, 436 U.S. at 662-63, 694 (holding that a municipality is not wholly immune from civil liability for constitutional violations under 42 U.S.C. § 1983).

[FN15]. See Burton, 365 U.S. at 716, 726 (finding that the State of Delaware, as lessor of public property, was sufficiently intertwined with its tenant, a restaurant that refused service based on race, to justify holding that the restaurant's denial of service to blacks constituted state action and violated the Equal Protection Clause).

[FN16]. See Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616, 631 (1991) (holding that race-based peremptory challenges violate the Constitution, and requiring a civil litigant to provide race-neutral explanations for peremptory challenges).

[FN17]. See, e.g., Marsh v. Alabama, 326 U.S. 501, 508-09 (1946) (prohibiting criminal punishment of a Jehovah's Witness for distributing religious literature in a "company town").

[FN18]. See, e.g., Burton, 365 U.S. at 726 (holding that when a state leases public property under the circumstances present in Burton, it must require its tenant to enforce the proscriptions of the Fourteenth Amendment as if they were binding covenants in the lease).

[FN19]. Compare DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 191 (1989) (holding that the Due Process Clause does not require states to protect individuals from private violence), with Ross v. United States, 910 F.2d 1422, 1430 (7th Cir. 1990) (holding that a county policy that prevented unauthorized civilians from saving a drowning child violated the child's Fourteenth Amendment right to life).

[FN20]. See, e.g., DeShaney, 489 U.S. at 193 (examining plaintiff's argument that Winnebago County social services employees "deprived [a 4-year-old child] of his liberty without due process of law...by failing to intervene to protect him against a risk of violence at his father's hands"); United States v. Price, 383 U.S. 787, 790 (1966) (discussing involvement of government officials in a conspiracy to shoot and kill three individuals).

[FN21]. See, e.g., Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 163 (1978) (holding that the sale of respondent's property by a creditor did not constitute state action even though a state statute authorized the sale in order to execute a warehouseman's lien); cf. Soldal v. Cook County, 506 U.S. 56, 72 (1992) (finding state action when the seizure of the alleged debtor's mobile home was supported by the actions of deputy sheriffs).

[FN22]. See, e.g., Harley v. Oliver, 539 F.2d 1143, 1145-46 (8th Cir. 1976) (denying recovery for emotional distress suffered by a mother when she temporarily lost custody of her minor child pursuant to a court order on the grounds that the father's actions in seeking the court order constituted "not a scintilla of state action").

[FN23]. See, e.g., Georgia v. McCollum, 505 U.S. 42, 54-55 (1992) (holding that the exclusion of individuals as jurors in a criminal trial on the basis of race violates the Equal Protection Clause); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991) (determining that civil litigants may not use peremptory challenges to exclude jurors on the basis of race).

[FN24]. See, e.g., Rendell-Baker v. Kohn, 457 U.S. 830, 834-35 (1982) (evaluating private school teachers' and counselor's claim that their discharge violated their constitutional rights); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 252 (1981) (examining an action against a city alleging that the cancellation of respondent's license to present and promote musical concerts constituted a violation of constitutional rights under color of state law).

[FN25]. See, e.g., Terry v. Adams, 345 U.S. 461, 470 (1953) (holding that the exclusion

of blacks from participation in state primary elections is a violation of the Fifteenth Amendment). A finding that a constitutional violation has occurred carries with it an implicit finding of state action because the duties created by the Constitution generally run only against government. See Nowak & Rotunda, supra note 2, § 12.1, at 470 (observing that, with the exception of the Thirteenth Amendment, the Constitution imposes duties solely upon governmental entities).

[FN26]. 109 U.S. 3 (1883).

[FN27]. See Lebron v. National R.R. Passenger Corp., 115 S. Ct. 961, 974- 75 (1995) (holding that, where "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directorsof that corporation, the corporation is part of the Government for purposes of the First Amendment").

[FN28]. See Nowak & Rotunda, supra note 2, § 12.1, at 475 (observing that the state action issue was not fully developed until the Civil Rights Cases).

[FN29]. The Civil Rights Cases, 109 U.S. at 8.

[FN30]. Id. at 26 (Harlan, J., dissenting).

[FN31]. Refer to Part II infra (discussing the conceptual questions created by the state action doctrine).

[FN32]. This Part, Part V, will appear in the second half of this Article.

[FN33]. See The Civil Rights Cases, 109 U.S. at 57-58 (Harlan, J., dissenting) (discussing the performance of a "public function" as a possible basis for finding the existence of state action).

[FN34]. Refer to subpart II(B)(1) infra. Each of the several state action questions will be similarly addressed.

[FN35]. See, e.g., The Civil Rights Cases, 109 U.S. at 24-25 (holding that hotel and restaurant owners are private persons and not state actors subject to the constraints of the Constitution).

[FN36]. See Shane, supra note 12, at 1587-88 (observing that the state action doctrine has emerged amidst a tension between national authority and local autonomy).

[FN37]. See, e.g., Burton v. Wilmington Parking Auth., 365 U.S. 715, 726 (1961) (finding a strong interest in preventing the denial of access to public buildings based on race, and therefore attributing discriminatory acts of a private lessee to a governmental lessor).

[FN38]. See Shane, supra note 12, at 1593. What I describe as the interest in protecting constitutional rights, Professor Shane describes as the interest in preserving "communal responsibility to the person." See id. at 1587. Both descriptions recognize that the courts have a responsibility to not permit government to associate itself with private wrongdoing in such a way as to undermine the constitutional values upon which the community depends for effective cooperative existence among its citizens.

[FN39]. See The Civil Rights Cases, 109 U.S. at 11 ("It is State action of a particular character that is prohibited [by the Fourteenth Amendment].").

[FN40]. 18 Stat. 335, ch. 114 (1875).

[FN41]. Id.

[FN42]. See id. § 2 (providing that violation of the Act constitutes a misdemeanor punishable by fine between $500 and $1000 and imprisonment between 30 days and one year).

[FN43]. See The Civil Rights Cases, 109 U.S. at 3-5. In the light of statements in Justice

Bradley's opinion for the Court, it is revealing to note the geographical diversity of the five proceedings. They were initiated in lower federal courts situated respectively in the states of Kansas, California, Missouri, New York, and Tennessee. See id. at 3.

[FN44]. See id. at 3.

[FN45]. Id. at 8-9.

[FN46]. See id. at 25 (holding that Congress did not have the authority under the Thirteenth or Fourteenth Amendments to pass the Civil Rights Act of 1875); Nowak & Rotunda, supra note 2, § 12.1, at 475.

[FN47]. See U.S. Const. amend. XIII, § 2; id. amend. XIV, § 5.

[FN48]. See The Civil Rights Cases, 109 U.S. at 20.

[FN49]. See id. at 24.

[FN50]. See id.

[FN51]. See id. at 24-25. For a detailed criticism of Justice Bradley's constricted definition of "badges and incidents of slavery," see G. Sidney Buchanan, The Quest for Freedom: A Legal History of the Thirteenth Amendment, Ch. III. Judicial Emasculation of the Thirteenth Amendment in the Post-Civil War Decades, 12 Hous. L. Rev. 357, 369-78 (1975).

[FN52]. The Civil Rights Cases, 109 U.S. at 10.

[FN53]. Id. at 11.

[FN54]. Section 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.

U.S. Const. amend. XIV, § 1.

[FN55]. See The Civil Rights Cases, 109 U.S. at 11. In his dissent, Justice Harlan stressed that not all of the provisions of section 1 of the Fourteenth Amendment are prohibitory in character. See id. at 46 (Harlan, J., dissenting) ("The assumption that this amendment consists wholly of prohibitions upon State laws and State proceedings in hostility to its provisions, is unauthorized by its language."). He argued that the clause of section 1 defining citizenship of the United States and of the several states "is of a distinctly affirmative character" and that "[t]he citizenship thus acquired...may be protected, not alone by the judicial branch of the government, but by congressional legislation of a primary direct character; this, because the power of Congress is not restricted to the enforcement of prohibitions upon State laws or State action." Id. Sadly, no subsequent Supreme Court decision has, to my knowledge, used the citizenship clause of section 1 as a basis for congressional enforcement power under the Fourteenth Amendment.

[FN56]. See id. at 11.

[FN57]. Id.

[FN58]. Id. at 17.

[FN59]. But see United States v. Guest, 383 U.S. 745, 762, 774, 782-83 (1966) (Clark, J., joined by Black & Fortas, JJ., concurring) (Brennan, J., joined by Warren, C.J., & Douglas, J., concurring) (opining that congressional power under section 5 of the Fourteenth Amendment extends beyond the self-executing force of section 1 of that amendment).

[FN60]. See The Civil Rights Cases, 109 U.S. at 14.

[FN61]. Id.

[FN62]. See id. at 19. In passing, Justice Bradley cursorily dismissed the Commerce Clause as a possible power base for the 1875 Act, "as the sections in question are not conceived in any such view." See id. This terse dismissal was rectified by the Supreme Court in its 1964 decisions in Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964), and Katzenbach v. McClung, 379 U.S. 294 (1964). In these two cases, the Court sustained the validity of those provisions of the 1964 Civil Rights Act that prohibited discrimination in places of public accommodation on the basis of race, religion, or national origin by holding that such provisions were a valid exercise of congressional power under the Commerce Clause. See Heart of Atlanta Motel, 379 U.S. at 261; Katzenbach, 379 U.S. at 303-05.

[FN63]. See The Civil Rights Cases, 109 U.S. at 11.

[FN64]. See Nowak & Rotunda, supra note 2, § 12.1, at 470.

[FN65]. Of course, once it is determined that government has acted in a particular way, it must then be determined whether that action in a substantive sense--on the merits--has violated a provision of the Constitution.

[FN66]. Refer to subpart II(A) supra (discussing Justice Bradley's exposition of the state action doctrine in the Civil Rights Cases).

[FN67]. In the summary description of the state action issues that follows, I cite only sparingly to the later Supreme Court decisions in which the respective issues are developed. Citation of such decisions will occur primarily in the detailed analysis of the issues that follows in the subsequent Parts of this Article. In this Part, the Article cites principally the part or parts of the Civil Rights Cases that gave rise to the issue in question.

[FN68]. Refer to Part III infra for a detailed discussion of this issue.

[FN69]. See Terry v. Adams, 345 U.S. 461, 468-70 (1953) (addressing the constitutionality of race-based exclusions from a political primary conducted by a private organization).

[FN70]. See Marsh v. Alabama, 326 U.S. 501, 508-10 (1946) (analyzing the constitutionality of certain practices of a privately owned company town).

[FN71]. See Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 315-19 (1968) (addressing the constitutionality of a privately owned shopping plaza's exclusion of picketers).

[FN72]. See, e.g., Jackson v. Metropolitan Edison Co., 419 U.S. 345, 346 (1974) (involving constitutional challenges leveled against a privately owned utility).

[FN73]. See, e.g., Rendell-Baker v. Kohn, 457 U.S. 830, 837-43 (1982) (analyzing the constitutionality of discharge decisions of a private school for students with special educational needs).

[FN74]. See, e.g., Marsh, 326 U.S. at 506-08 (concluding that the prohibitions of the First and Fourteenth Amendments applied to a company-owned town because of the town's similarity to traditional public towns).

[FN75]. Cf. Nowak & Rotunda, supra note 2, § 12.1, at 470 (observing that constitutional prohibitions generally apply only to actions of the government). By withdrawing the delegation of state authority, the state would remove the basis for finding state action, which is a prerequisite for finding a constitutional violation.

[FN76]. See, e.g., Marsh, 326 U.S. at 509 (concluding that the state could not allow a company town to restrict the distribution of religious literature, an action that the state could not constitutionally undertake itself).

[FN77]. See The Civil Rights Cases, 109 U.S. 3, 58-59 (1883) (Harlan, J., dissenting)

(observing that certain private entities may appropriately be considered agents of the state because of their duties to the public).

[FN78]. See id. Justice Harlan also argued that (1) denial of access to places of public accommodation on the basis of race constitutes a badge of slavery that Congress may prohibit under section 2 of the Thirteenth Amendment, see id. at 32-43, and (2) the first sentence of section 1 of the Fourteenth Amendment constitutes an affirmative grant of United States and state citizenship that Congress, under section 5 of that amendment, may protect against racial discrimination in places of public accommodation, see id. at 46-57.

[FN79]. Id. at 58-59.

[FN80]. See id. at 59.

[FN81]. See id. at 58.

[FN82]. See id. at 59 (concluding that the same standards of constitutional conduct applicable to the state are also applicable to "any corporation or individual wielding power under State authority for the public benefit or the public convenience").

[FN83]. In no subsequent Supreme Court decision has the Court been willing to apply the public function analysis as liberally as advocated by Justice Harlan in the Civil Rights Cases. See, e.g., Burton v. Wilmington Parking Auth., 365 U.S. 715, 724-26 (1961) (holding that an aggregate of activities on the part of the restaurant owner and the state, rather than the mere ownership of a public accommodation, indicated state participation in the discriminatory action). Indeed, under no state action theory of any kind has any such decision ever held that the owner of a place of public accommodation is, by reason of that status alone, a state actor. Cf. Heart of Atlanta Motel v. United States, 379 U.S. 241, 243 (1964) (holding that the discriminatory actions of a privately owned public accommodation constituted statutory, rather than constitutional, violations).

[FN84]. See, e.g., Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352- 53 (1974) (rejecting the argument that state action was present because a regulated utility company provided electric service to the public and hence performed a public function); Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 315-19 (1968) (finding that the owners of a shopping center in which the public had unrestricted access served a public function and the state could not allow the center owners to exclude individuals wishing to exercise their First Amendment rights); Terry v. Adams, 345 U.S. 461, 475-77 (1953) (holding that a private organization that held elections to select candidates to run for nominations in the official Democratic primaries for county offices violated the Fifteenth Amendment by excluding voters based on their race and color because the organization's primaries were tantamount to an election and thus served a public function); Marsh v. Alabama 326 U.S. 501, 509 (1946) (concluding that a company town served a public function and that its decisions were therefore subject to constitutional scrutiny under the First and Fourteenth Amendments).

[FN85]. Refer to Part IV infra for a detailed discussion of this issue.

[FN86]. See Burton, 365 U.S. at 724 (declaring that numerous activities, obligations, and responsibilities between the restaurant owner and the state provided a basis for finding state action).

[FN87]. See Jackson, 419 U.S. at 357 (discussing state regulation of a private utility provider); Burton, 365 U.S. at 723-24 (noting several links between the restaurant and the state, namely the lessor-lessee relationship, government funding to defray construction and maintenance costs of the building, government upkeep of the building, and the mutually beneficial relationship between the owner and the state).

[FN88]. Of course, as the Supreme Court's recent decision in Lebron v. National R.R. Passenger Corp., 115 S. Ct. 961 (1995) makes clear, the wrongdoer may in fact be government per se. See id. at 972-75 (holding that Amtrak is itself "an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution"). If the wrongdoer is itself government, this represents

the ultimate contact between government and the wrongdoer under state nexus analysis.

[FN89]. See, e.g., Marsh, 326 U.S. at 506 ("The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the...constitutional rights of those who use it."). As in the public function area, if the private actor's action is attributed to government under state nexus analysis, government must do one of two things: (1) eliminate or reduce its contacts with the action in question, or (2) compel the private actor to conform its actions to the requirements of the Constitution as they apply to governmental action.

[FN90]. See The Civil Rights Cases, 109 U.S. 3, 58-59 (1883) (Harlan, J., dissenting) (discussing the role that innkeepers and other public service businesses play as instrumentalities of the state).

[FN91]. Id. at 58.

[FN92]. See id. at 37-43 (discussing in detail racial discrimination by individuals engaging in public or quasi-public functions and how this discrimination is a badge of servitude).

[FN93]. See id. at 41.

[FN94]. See id.

[FN95]. No subsequent Supreme Court decision has held that the act of state licensing, by itself, converts the action of the licensee into governmental action.

[FN96]. See, e.g., Edmonson v. Leesville Concrete Co., 500 U.S. 614, 622 (1991) (concluding that a private litigant's use of peremptory challenges amounted to state action due to the necessity of governmental participation in the judicial system); Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (examining factors alleged to attribute state action to a private school and determining that a "'symbiotic relationship"' did not exist between the state and the private actor and, therefore, that state action did not exist); Moose Lodge No. 107 v. Irvins, 407 U.S. 163, 175 (1972) (declaring that the state and the private club that discriminated on the basis of race lacked the "symbiotic relationship" necessary to attribute the private actor's discriminatory behavior to the State); Burton v. Wilmington Parking Auth., 365 U.S. 715, 723-25 (1961) (concluding that numerous factors linked the state and a private restaurant located in a publicly-owned building, and the mutually-conferred benefits between the two indicated a high degree of state participation and involvement in discriminatory action which the Fourteenth Amendment was designed to condemn).

[FN97]. A detailed discussion of this issue will appear in Part V of the second half of this Article.

[FN98]. Refer to notes 6-9 supra and accompanying text (setting forth the bad sheriff hypothetical).

[FN99]. As elaborated upon in Part V, which will appear in the second half of this Article, the beyond-state-authority issue is in reality a subset of the state nexus issue: By acting beyond state authority, has the state actor lost his or her nexus with the state? Because of its own unique history, the beyond-state-authority issue is treated separately from the state nexus issue.

[FN100]. 109 U.S. 3, 8 (1883).

[FN101]. Id. at 24.

[FN102]. Refer to subparts II(B)(5), (6) infra (discussing the issues of state authorization and state inaction).

[FN103]. See The Civil Rights Cases, 109 U.S. at 58-59 (Harlan, J., dissenting) (declaring that "railroad corporations, keepers of inns, and managers of places of public amusement are agents or instrumentalities of the State, because they are charged with duties to

the public, and are amenable, in respect of their duties and functions, to governmental regulation").

[FN104]. See id. at 24 (stating that refusal of service by a place of public accommodation is "an ordinary civil injury").

[FN105]. See, e.g., Hafer v. Melo, 502 U.S. 21, 23 (1991) (holding that a state auditor general could be sued in her individual capacity under § 1983 for employment decisions); West v. Atkins, 487 U.S. 42, 48-57 (1988) (analyzing whether a physician's medical treatment of inmates in a state prison hospital can be attributed to the State and finding that the doctor did act "under color of state law" even when the physician misused his position); Screws v. United States, 325 U.S. 91, 107-08 (1945) (concluding that a sheriff, policeman, and special deputy "acted under 'color' of law" when they arrested and assaulted a citizen, even though their actions also violated state law); Barney v. City of New York, 193 U.S. 430, 441 (1904) (dismissing a Fourteenth Amendment claim on the basis of no state action where the Board of Rapid Transit Commissioners' deprivation of property was in violation of state authority and not merely in excess of state authority).

[FN106]. A detailed discussion of this issue will appear in Part V of the second half of this Article.

[FN107]. As is true of the beyond-state-authority issue, the projection-of-state-authority issue is in reality still another subset of the state nexus issue. Refer to subpart (II)(B)(2) supra (providing an overview of the state nexus issue). With this in mind, the relevant question becomes: If a private actor projects falsely an aura of state authority, has that person established such a "contact" with the state that his or her actions may be fairly attributed to the state?

[FN108]. See The Civil Rights Cases, 109 U.S. at 24.

[FN109]. See id. at 59 (Harlan, J., dissenting).

[FN110]. See id. at 24.

[FN111]. See, e.g., Williams v. United States, 341 U.S. 97, 98-99 (1951) (holding that a private detective, who used his special police officer badge to detain theft suspects and beat the suspects to obtain confessions, acted under color of law).

[FN112]. A detailed discussion of this issue will appear in Part VI of the second half of this Article.

[FN113]. See Shelley v. Kraemer, 334 U.S. 16 (1948) (addressing the constitutionality of state judicial enforcement of such restrictive covenants).

[FN114]. There is a type of state authorization that arguably falls within the confines of the state nexus issue: If government, expressly or impliedly, encourages a particular private action, does that encouragement create a governmental contact sufficient to justify attribution of the private action to government? Unless expressly stated otherwise, general references in this Article to the state authorization issue do not include this nexus type of state authorization.

[FN115]. The Civil Rights Cases, 109 U.S. at 25.

[FN116]. Id.

[FN117]. Interestingly enough, the Supreme Court has never directly answered this question. In Bell v. Maryland, 378 U.S. 226 (1964), the Court confronted this precise issue and divided indecisively by a vote of 3, 3, and 3. See id. at 241-42 (reversing criminal trespass convictions of blacks who were denied service at a restaurant on the basis of race, but resolving the case on state law grounds); id. at 227, 266 (Douglas, J., concurring) (concluding that states may not constitutionally authorize discrimination in privately-owned public accommodations); id. at 286 (Goldberg, J., concurring, joined by Warren, C.J., & Douglas, J.) (same); id. at 318 (Black, J., dissenting, joined by Harlan, J., & White, J.) (concluding that the Constitution does

not prohibit application of state criminal trespass laws in a manner that authorizes discrimination by private owners of public accommodations).

[FN118]. See Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620-28 (1991) (analyzing whether the exercise of peremptory challenges by a private litigant in a civil case constitutes state action); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 151-52 (1978) (posing the question whether a state's permitted sale of goods to satisfy a warehouseman's lien involves state action); Evans v. Abney, 396 U.S. 435, 443-45 (1970) (considering whether judicial construction of a will, which caused a segregated park to be closed rather than integrated, involved state action); Reitman v. Mulkey, 387 U.S. 369, 374-76, 381 (1967) (affirming the California Supreme Court's judgment that an amendment to the state's constitution authorized racial discrimination in the housing market and therefore involved impermissible state action); Shelley, 334 U.S. at 20 (determining that judicial enforcement of racially restrictive covenants constituted impermissible state action); Corrigan v. Buckley, 271 U.S. 323, 329-31 (1926) (declining to find state action when private individuals entered into a racially restrictive indenture). See generally G. Sidney Buchanan, State Authorization, Class Discrimination, and the Fourteenth Amendment, 21 Hous. L. Rev. 1 (1984) (grappling with the question of when state authorized "private conduct motivated by class prejudice" constitutes a violation of the Fourteenth Amendment's Equal Protection Clause); G. Sidney Buchanan, Challenging State Acts of Authorization Under the Fourteenth Amendment: Suggested Answers to an Uncertain Quest, 57 Wash. L. Rev. 245, 273-75 (1982) [hereinafter Buchanan, Challenging State Acts of Authorization] (positing that state acts of authorization should not be immunized from judicial review on the merits).

[FN119]. A detailed discussion of this issue will appear in Part VII of the second half of this Article.

[FN120]. Refer to note 5 supra and accompanying text (observing that such conduct is generally not attributable to the government). If government provides the victim with no reasonable avenue for redressing the harm, a state authorization issue, as discussed in the preceding subpart, would arise. In such a case, the government would be permitting one private actor to harm another private actor with legal impunity.

[FN121]. See, e.g., DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 194-97 (1989) (holding that the state's failure to protect a child from his father's abuse did not violate the child's constitutional rights because the state does not have an affirmative constitutional duty to protect its citizens).

[FN122]. Thus viewed, the state inaction issue is in substance a subset of the state authorization issue. By its failure to act, the state has permitted or authorized the offending action to occur. The merits inquiry then arises: Does that permission violate a prohibition of the Constitution?

[FN123]. Not surprisingly, such instances will generally involve situations in which the state's past action has enhanced the state's opportunity to prevent the harm from occurring or situations in which the state's past action precludes private action that might otherwise have blocked the harm. See DeShaney, 489 U.S. at 200 (observing that a state's failure to act to protect an individual rises to the level of a constitutional violation when the state has affirmatively acted to limit "the individual's freedom to act on his own behalf--through incarceration, institutionalization, or other similar restraint of personal liberty"). For a thoughtful and probing analysis of the state inaction issue in a factual context very similar to the "brutal parent" hypothetical at the beginning of this subpart, see Laura Oren, The State's Failure to Protect Children and Substantive Due Process: DeShaney in Context, 68 N.C. L. Rev. 659 (1990).

[FN124]. The Civil Rights Cases, 109 U.S. 3, 24 (1883).

[FN125]. See, e.g., DeShaney, 489 U.S. at 194-95 (concluding that the government's failure to protect a child from his father's violence was not a constitutionally cognizable claim because the Constitution does not require the states "to protect the life, liberty, and property of its citizens against invasion by private actors"); Ross v. United States, 910 F.2d 1422, 1431 (7th Cir. 1990) (finding that a county policy, which prevented unauthorized persons from attempting to rescue a 12 year old drowning victim and yet

offered no meaningful alternatives, violated the boy's constitutional right to life).

[FN126]. 500 U.S. 614 (1991). In Edmonson, the Court considered the question "whether a private litigant in a civil case may use peremptory challenges to exclude jurors on account of their race." Id. at 616. The Court held that such exclusion "violates the equal protection rights of the challenged jurors." Id.

[FN127]. Id. at 620 (citations omitted).

[FN128]. See Ronald J. Krotoszynski, Jr., Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations, 94 Mich. L. Rev. 302, 337 (1995).

[FN129]. See Shane, supra note 12, at 1593.

[FN130]. Id. at 1592.

[FN131]. 365 U.S. 715 (1961).

[FN132]. Id. at 722 (quoting Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 556 (1947)).

[FN133]. 436 U.S. 149 (1978).

[FN134]. This subpart is substantially reproduced from Buchanan, Challenging State Acts of Authorization, supra note 118, at 246-47.

[FN135]. Flagg Bros., 436 U.S. at 151 n.1 (quotation omitted).

[FN136]. See id.

[FN137]. Id. at 151-52 n.1 (quotation omitted).

[FN138]. See id. at 153.

[FN139]. See id.

[FN140]. Id.

[FN141]. Id. at 166.

[FN142]. This subpart is substantially reproduced from Buchanan, Challenging State Acts of Authorization, supra note 118, at 247-49.

[FN143]. Success in pinning the state action label on the private actor's conduct greatly increases the challenger's chances of ultimate success on the merits. This is because the Constitution's self-executing force has predominant application to governmental action and only limited application to private action. See United States v. Guest, 383 U.S. 745, 771-73 (1966) (Harlan, J., concurring in part and dissenting in part) (reviewing the motivations behind the formation of the Constitution and the limited situations where private individuals have rights under the Constitution against other private individuals).

[FN144]. See Flagg Bros., 436 U.S. at 156-57.

[FN145]. Had Brooks been able to establish that Flagg Brothers' conduct constituted state action, she could then have claimed that this threatened "state action" would deprive her of property without due process of law because the sale threatened by Flagg Brothers would deny her a fair hearing right to contest on the merits the divestment of title to her stored goods.

[FN146]. For a full description of the two techniques, see Gerald Gunther, Constitutional Law 890-91 (12th ed. 1991).

[FN147]. In Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), Justice Clark's opinion for the Court is a classic illustration of the state nexus or state contact approach under the characterization model. En route to its finding of state action on the facts before it, the Burton Court stated: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Id. at 722; see also Evans v. Newton, 382 U.S. 296, 299- 302 (1966) (utilizing the state nexus approach). In Newton, the Court held, regarding a park given to a city "for whites only," that the city's resignation as trustee of the park and the substitution of private trustees for the city did not remove the state action taint from the operation of the city park. See id. at 301. The Court stated: "So far as this record shows, there has been no change in municipal maintenance and concern over this facility" resulting from the city's resignation. See id.

[FN148]. If, as in Lebron v. National R.R. Passenger Corp., 115 S. Ct. 961 (1995), the Court holds that the wrongdoer is itself "an agency or instrumentality of [government]," see id. at 972, this represents the ultimate contact between government and the wrongdoer under the state nexus technique. Here, government and the wrongdoer merge into one.

[FN149]. For a summary description of these two issues, refer to subparts II(B)(3), (4) supra.

[FN150]. See the Court's discussion of the public function technique in Flagg Bros., 436 U.S. at 157-64 and Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352-54 (1974). In Flagg Brothers and Jackson, the Court held that the conduct challenged in those cases did not constitute a public function that transformed the conduct into state action. See Flagg Bros., 436 U.S. at 163; Jackson, 419 U.S. at 353. For cases in which the Court did find state action through application of the public function technique, see Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 316- 25 (1968) and Marsh v. Alabama, 326 U.S. 501, 506-13 (1946). On the state action issue, the Court's holding in Logan Valley was substantially eroded by its later decision in Lloyd Corp. v. Tanner, 407 U.S. 551, 561-67 (1972), and eventually overruled in Hudgens v. NLRB, 424 U.S. 507, 518 (1976). In another subject matter area, the Court's finding of state action in the White Primary Cases is in part explainable by a public function rationale. See Terry v. Adams, 345 U.S. 461, 469 (1953) (finding that the Jaybird Democratic Association was a state actor as its election primary was the only effective part of the process that determined who would be elected in a particular Texas county); Smith v. Allwright, 321 U.S. 649, 662-64 (1944) (concluding that the Democratic Party in Texas was a state actor whose actions were subject to the same standards applicable to a general election); Nixon v. Condon, 286 U.S. 73, 88-89 (1932) (holding that the statutory authorization of the exclusion of blacks from Democratic primaries violated the Fourteenth Amendment); Nixon v. Herndon, 273 U.S. 536, 540-41 (1927) (holding a Texas statute that excluded blacks from the Democratic primaries unconstitutional).

[FN151]. See, e.g., Logan Valley, 391 U.S. at 325 (finding that a private shopping center generally open to the public was a state actor); Marsh, 326 U.S. at 508-10 (holding that a company-owned town was a state actor). Note also the Court's expansive language in Evans v. Newton, 382 U.S. 296 (1966). In Newton, Justice Douglas's opinion for the Court stated that the finding of state action in that case "is buttressed by the nature of the service rendered the community by a park. The service rendered even by a private park of this character is municipal in nature." Id. at 301. In dissent, Justice Harlan speculated that Douglas's language could bring under the state action label "a host of other functions commonly regarded as nongovernmental though paralleling fields of governmental activity"--functions such as "privately owned orphanages, libraries, garbage collection companies, [and] detective agencies." Id. at 322 (Harlan, J., dissenting).

[FN152]. See, e.g., Flagg Bros., 436 U.S. at 149; Jackson, 419 U.S. at 345.

[FN153]. Jackson, 419 U.S. at 352. In Flagg Brothers, then Justice Rehnquist, writing for the majority, conceded that, even under his tightly confined definition of what constitutes a public function, the public function technique might still have some application among "such functions as education, fire and police protection, and tax collection. We express no view as to the extent, if any, to which a city or State might be free to delegate to private parties the performance of such functions and thereby avoid the strictures of the Fourteenth Amendment." Flagg Bros., 436 U.S. at 163-64 (footnote

omitted).

[FN154]. See, e.g., Georgia v. McCollum, 505 U.S. 42, 52-55 (1992) (finding that jury selection in a criminal case served a public function and thus constituted state action); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 624-28 (1991) (finding that jury selection in a civil case served a public function and thus constituted state action).

[FN155]. This subpart is substantially reproduced from Buchanan, Challenging State Acts of Authorization, supra note 118, at 249-52.

[FN156]. In Flagg Brothers, for example, an action under the state authorization model would attack the validity of the New York statute permitting a sale of goods to satisfy a warehouseman's lien. See Flagg Bros., 436 U.S. at 151 n.1.

[FN157]. See, e.g., Reitman v. Mulkey, 387 U.S. 369, 370-71 (1967). As discussed later in this Article, Reitman is a classic state authorization model case involving an attack against the validity of an amendment to the California Constitution. See id. Additionally, state acts of authorization may manifest themselves in the form of state administrative rulings, see Jackson, 419 U.S. at 347-48 (determining whether a heavily regulated, privately-owned electric company violated the Due Process Clause of the Fourteenth Amendment by denying a customer a hearing before terminating service), and through a state's common law, see Shelley v. Kraemer, 334 U.S. 1, 4 (1948) (holding unconstitutional state court enforcement of private racially restrictive covenants).

[FN158]. As noted previously, the state inaction issue may be viewed accurately as a part of the state authorization model. Refer to note 122 supra. The state's failure to prevent the offending act may, in certain limited instances, be viewed as an authorization of that act.

[FN159]. The public function technique bears especially close similarity to the state authorization model. Functionally, both probe the question of governmental delegation of authority. In the context of the characterization model, however, the public function technique focuses on the narrow question of whether ostensibly private conduct has been transformed into state action. In contrast, the state authorization model permits consideration of a broader question: What are the constitutional limits on a state's power to authorize private conduct? This broader question recognizes that even in circumstances where the private nature of the "gouging" conduct is clear, the state's delegation of authority to the private actor may, in some instances, exceed constitutional bounds. Hence, the public function technique as employed in the characterization model cannot serve as a substitute for the broader inquiry embodied in the state authorization model.

[FN160]. Such a claim arguably implicates both substantive and procedural due process concerns. Substantive due process is implicated in that the challenged New York statute defines certain conditions under which title to personal property may be transferred from one person to another through the mechanism of a private sale--the statute establishes a substantive rule concerning the transfer of title to personal property. Procedural due process is implicated in that the challenged statute permits this transfer of title to occur without giving the transferor (Brooks) an opportunity to contest the transfer on the merits--the statute arguably deprives Brooks of a fair hearing on an issue of vital import to her.

[FN161]. For purposes of this Article, it is not necessary to determine whether, under the state authorization model, Brooks's claim would be based predominantly on substantive or procedural due process. Both strands of due process are almost certainly present, and either strand, or both in combination, provides an ample basis for permitting a merits challenge to the New York statute under the state authorization model.

[FN162]. Flagg Bros., 436 U.S. at 156. Justice Rehnquist, in another part of his opinion, went on to state: "Thus, the only issue presented by this case is whether Flagg Brothers' action may fairly be attributed to the State of New York. We conclude that it may not." Id. at 157.

[FN163]. See id. at 157-64 (discussing prior cases that defined certain activities as exclusive public functions).

[FN164]. See id. at 164-66 (explaining that, while it has addressed the state nexus issue in the past, the Court has never held that state acquiescence converts private action into state action).

[FN165]. See id. at 157.

[FN166]. See id. at 166.

[FN167]. Justice Stevens, in dissent, was not so confident that the reach of Flagg Brothers is limited to the characterization model setting: "The Court today holds that our examination of state delegations of power should be limited to those rare instances where the State has ceded one of its 'exclusive' powers." Id. at 178 (Stevens, J., dissenting). Justice Stevens noted further: "Indeed, under the Court's analysis as I understand it, the state statute in this case would not be subject to due process scrutiny in a state court." Id. at 177 n.15. In short, Justice Stevens was expressing a fear that, sub silentio, the Court's opinion was eliminating the state authorization model from the state action landscape.

[FN168]. See Georgia v. McCollum, 505 U.S. 42, 53-55 (1992) (holding that a criminal defendant's purposeful discrimination on the ground of race in the exercise of peremptory challenges is unconstitutional); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621-28 (1991) (holding that a private litigant in a civil case may not constitutionally use peremptory challenges to exclude prospective jurors based on race).

[FN169]. In Edmonson, the Court expressly cited Shelley v. Kraemer, the classic state authorization case, in determining "whether the injury caused [by the private actor] is aggravated in a unique way by the incidents of governmental authority." See Edmonson, 500 U.S. at 622 (citing Shelley v. Kraemer, 334 U.S. 1 (1948)). What this citation means for revitalization of the state authorization model remains uncertain.

[FN170]. See The Civil Rights Cases, 109 U.S. 3, 57-59 (1883) (Harlan, J., dissenting).

[FN171]. See, e.g., Terry v. Adams, 345 U.S. 461, 469 (1953) (addressing whether racial exclusion of blacks in the "pre-primary" elections of a voluntary club of white Democrats was constitutional); Smith v. Allwright, 321 U.S. 649, 660 (1944) (finding that the white primary established by a Texas state convention violated the Fifteenth Amendment).

[FN172]. See Marsh v. Alabama, 326 U.S. 501, 502, 506-07 (1946) (holding that a state cannot "impose criminal punishment on a person who undertakes to distribute religious literature on the premises of a company-owned town contrary to the wishes of the town's management").

[FN173]. See Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 319-20 (1968) (considering whether a privately-owned shopping center is a state actor subject to the constraints of the First Amendment).

[FN174]. 419 U.S. 345, 352-53 (1974).

[FN175]. 436 U.S. 149, 157-64 (1978).

[FN176]. 457 U.S. 830, 842 (1982).

[FN177]. 457 U.S. 991, 1011-12 (1982).

[FN178]. See, e.g., Georgia v. McCollum, 505 U.S. 42, 51-52 (1992) (deciding whether race-based peremptory challenges of a criminal defendant constitute state action); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621, 624-28 (1991) (considering whether race-based peremptory challenges by private litigants in civil litigation constitute state action).

[FN179]. Pub. L. No. 89-110, 79 Stat. 445 (codified at 42 U.S.C. § § 1971, 1973 to 1973bb-1 (1994)). In South Carolina v. Katzenbach, 383 U.S. 301 (1966), the Court sustained the constitutional validity of the Act's most important provisions, stating that the Act was

"designed...to banish the blight of racial discrimination in voting." See id. at 308.

[FN180]. Nixon v. Herndon, 273 U.S. 536, 540 (1927).

[FN181]. 273 U.S. 536 (1927).

[FN182]. As described by the Court, "the Judges of Elections... refus[ed] to permit the plaintiff to vote at a primary election" because of his race. Id. at 539.

[FN183]. Id. at 541.

[FN184]. 286 U.S. 73 (1932).

[FN185]. Id. at 81-82.

[FN186]. Id. at 82.

[FN187]. See id.

[FN188]. See id. at 84-89.

[FN189]. Id. at 84.

[FN190]. Id. at 88.

[FN191]. See id. at 89.

[FN192]. Id. The Court expressly avoided the broader question: "Whether a political party in Texas has inherent power today without restraint by any law to determine its own membership." Id. at 83.

[FN193]. Id. at 88. The Court noted further:
> The test is not whether the members of the Executive Committee are the representatives of the State in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their action.

Id. at 89.

[FN194]. See Grovey v. Townsend, 295 U.S. 45, 47 (1935).

[FN195]. See id. at 46-47.

[FN196]. 295 U.S. 45 (1935).

[FN197]. See id. at 53.

[FN198]. See id.

[FN199]. Id. at 54. As a corollary proposition, the Court also held that action taken by Democratic party officials as managers of the party's primary election did not constitute state action; their action was taken simply "in obedience to the mandate of the state convention." See id. at 53.

[FN200]. 321 U.S. 649, 666 (1944).

[FN201]. See id. at 661-62 (citing United States v. Classic, 313 U.S. 299, 314 (1941)).

[FN202]. See Classic, 313 U.S. at 318.

[FN203]. See Smith v. Allwright, 321 U.S. 649, 661-64 (1944).

[FN204]. Id. at 663.

[FN205]. See id. at 663-64.

[FN206]. Id. at 664.

[FN207]. Going one step further than Texas, South Carolina attempted to evade the Smith holding by repealing all laws regulating state political parties. Without state interference, the political parties themselves adopted their own rules for conducting primary elections. Predictably, the state Democratic party excluded blacks from voting in primary elections. In Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947), the Fourth Circuit Court of Appeals held that Smith still applied: "Having undertaken to perform an important function relating to the exercise of sovereignty by the people, [the political parties] may not violate the fundamental principles laid down by the Constitution for its exercise." Id. at 391. The Rice court noted further that "the denial to the Negro of the right to participate in the primary denies him all effective voice in the government of his country." Id. at 392.

[FN208]. See Terry v. Adams, 345 U.S. 461, 463-65 (1952).

[FN209]. See id. at 463-64.

[FN210]. Id. at 463.

[FN211]. See id. at 461.

[FN212]. Id. at 470.

[FN213]. Id. at 469 (Black, J., joined by Douglas & Burton, JJ.). In a similar vein, Justice Clark stated:

> [W]hen a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play.

Id. at 484 (Clark, J., joined by Vinson, C.J., & Reed and Jackson, JJ., concurring). Viewing the case more as a nexus case, Justice Frankfurter stressed that "county election officials aid in this [Jaybird] subversion of the State's official scheme of which they are trustees, by helping as participants in the scheme." Id. at 476. It is in this same opinion that, in relation to the state action question in general, Justice Frankfurter states that "[t]he vital requirement is State responsibility--that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme by which colored citizens are denied voting rights merely because they are colored." Id. at 473.

[FN214]. Id. at 469.

[FN215]. The Supreme Court remanded the case to the district court "to consider and determine what provisions are essential to afford Negro citizens of Fort Bend County full protection from further discriminatory" action by the Jaybird Association. See id. at 470. This is an example of a situation in which government must act affirmatively to compel a private actor to either (1) cease its activities entirely, or (2) conform its conduct to the requirements of the Constitution. In this situation, disengagement by itself would almost certainly provide insufficient relief to black voters.

[FN216]. 295 U.S. 45 (1935). For a discussion of Grovey, refer to notes 196-99 supra and accompanying text.

[FN217]. As will be noted later, the same result could be achieved under the state authorization model: The state may not authorize, i.e., permit, the kind of election process described in the text to occur unless that process, were it clearly governmental in nature, conforms to the requirements of the Constitution.

[FN218]. It also reveals starkly the hypocrisy of those persons that advocated "law and order" while supporting the exclusion of black voters from the election process.

[FN219]. See, e.g., Rowan v. United States Post Office Dep't, 397 U.S. 728, 740 (1970)

(sustaining a congressional statute that, in substance, permits a homeowner to insulate his or her home from the further receipt of mail that the homeowner, for any reason, finds objectionable). As construed by the Rowan Court, "[T]he power of the householder under the statute is unlimited; he may prohibit the mailing of a dry goods catalog because he objects to the contents--or indeed the text of the language touting the merchandise." Id. at 737. The statute thus "permits a citizen to erect a wall...that no advertiser may penetrate without his acquiescence." Id. at 738. In sustaining the statute against free speech challenges, the Court concluded:

> That we are often "captives" outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere....The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain.

Id.

[FN220]. See id. at 738.

[FN221]. See Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308, 319, 325 (1968) (extending public function analysis to include speech-limiting activities by private shopping malls); Marsh v. Alabama, 326 U.S. 501, 505-07 (1946) (applying public function analysis to company towns).

[FN222]. See Hudgens v. NLRB, 424 U.S. 507, 520-21 (1976) (stating that public function analysis does not apply to shopping mall settings); Lloyd Corp. v. Tanner, 407 U.S. 551, 567-70 (1972) (stating that a shopping mall may restrict nonmall related speech on its premises without triggering public function analysis).

[FN223]. 326 U.S. 501 (1946).

[FN224]. See id. at 502.

[FN225]. Id. at 502. In summary, the Court stated that "the town and its shopping district are accessible to and freely used by the public in general [[[,]...there [being] nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation." Id. at 503.

[FN226]. Id. at 502.

[FN227]. See id.

[FN228]. See id. at 503.

[FN229]. See id. Presumably, the deputy sheriff was the town policeman referred to earlier in the Court's opinion, but the Court does not expressly say so.

[FN230]. See id. at 504.

[FN231]. See id. at 509-10.

[FN232]. See id. at 504-05.

[FN233]. See id.

[FN234]. Id. at 505.

[FN235]. See id. at 506.

[FN236]. See id.

[FN237]. Id. at 507.

[FN238]. See id. at 506-10. Again, under the state authorization model, it could be said that Alabama has authorized the company town to "gouge" Marsh with legal impunity. The proof of that authorization lies in the state's enforcement of its trespass statute against Marsh.

[FN239]. During this 22 year period, the Court decided Public Utilities Commission v. Pollak, 343 U.S. 451 (1952), in which the Court assumed for purposes of that case that a private transit company in the District of Columbia could be characterized as a state actor. See id. at 462-63. In Pollak, the Court relied more on a nexus approach rather than a public function approach, see id., and, on the merits, held that the transit company's "music as you ride" program did not violate the free speech rights of the company's riders, see id. at 463-66.

[FN240]. 391 U.S. 308 (1968).

[FN241]. Id. at 309.

[FN242]. Id. at 310.

[FN243]. See id.

[FN244]. See id. at 311.

[FN245]. See id. "The picketing was peaceful at all times and unaccompanied by either threats or violence." Id. at 312.

[FN246]. See id. at 324-25.

[FN247]. See id. at 313-15.

[FN248]. Id. at 315.

[FN249]. See id. at 316-19.

[FN250]. Id. at 317.

[FN251]. Id. at 319.

[FN252]. See id. at 319-20.

[FN253]. Id. at 325.

[FN254]. This high water mark was achieved over the strong protest of Justice Black, the author of the Marsh opinion. See Marsh v. Alabama, 326 U.S. 501 (1986). In his Logan Valley dissent, Justice Black stated: "The question is, Under what circumstances can private property be treated as though it were public? The answer that Marsh gives is when that property has taken on all the attributes of a town." Logan Valley, 391 U.S. at 332 (Black, J., dissenting). Justice Black's analysis would, of course, confine the Marsh holding to its precise facts. This is exactly what happened in the next two shopping center cases.

[FN255]. Refer to notes 192-203 supra and accompanying text.

[FN256]. This latter question is in reality not a state action question but rather a question regarding the substantive reach of constitutional prohibitions: Is that reach exactly the same as it would be if the shopping center property were owned by government?

[FN257]. 407 U.S. 551 (1972).

[FN258]. Id. at 553.

[FN259]. Id. at 556.

[FN260]. See id.

[FN261]. See id. at 570.

[FN262]. Id. at 552.

[FN263]. Id. at 569.

[FN264]. Id.

[FN265]. Id. at 568.

[FN266]. See id. at 570. Justice Marshall, the author of the Court's opinion in Logan Valley, dissented strongly: "It is plain...that Lloyd Center is the equivalent of a public 'business district' within the meaning of Marsh and Logan Valley." Id. at 576 (Marshall, J., joined by Douglas, Brennan, & Stewart, JJ., dissenting). Among other public function factors, Justice Marshall noted that "Lloyd's private police are given full police power by the city of Portland." See id. at 575.

[FN267]. See id. at 567. Does the Court's emphasis on nondiscriminatory use indicate that, under the state authorization model, the state could not permit the shopping center owner to exclude blacks from the shopping center premises? Would it be unconstitutional for the state to permit the private owner to thus gouge black citizens with legal impunity?

[FN268]. See, e.g., Boos v. Barry, 485 U.S. 312, 321-22 (1988); Perry Educational Ass'n v. Perry Local Educational Ass'n, 460 U.S. 37, 45 (1983); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972). In Boos, the Court stated:

> Our cases indicate that as a content-based restriction on political speech in a public forum, [the law before us] must be subjected to the most exacting scrutiny. Thus, we have required the State to show that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."

Boos, 485 U.S. at 321 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

[FN269]. 424 U.S. 507 (1976).

[FN270]. See id. at 508.

[FN271]. See id.

[FN272]. Id.

[FN273]. See id.

[FN274]. See id. at 523. The Court held "that the rights and liabilities of the parties in this case are dependent exclusively upon the National Labor Relations Act." Id. at 521.

[FN275]. See id. at 520-21.

[FN276]. Id.

[FN277]. Id. at 521.

[FN278]. Id. at 518.

[FN279]. See Lloyd Corp. v. Tanner, 407 U.S. 551, 569-70 (1972) (noting that the Fifth and Fourteenth Amendment rights of the private shopping center in question must be respected in considering whether the center was dedicated to public use so as to trigger public function analysis).

[FN280]. If this statement is correct, the Hudgens Court went too far in the opposite direction when it stated that "under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this." Hudgens, 424 U.S. at 521. The First Amendment should have some role to play in determining what speech activities government may permit shopping center owners to regulate. To date, in relation to shopping centers, the Court has not adopted the state authorization approach advocated in the text.

[FN281]. 419 U.S. 345 (1974).

[FN282]. 436 U.S. 149 (1978). The contraction wrought by Jackson and Flagg Brothers was foreshadowed by Justice Harlan's dissent in Evans v. Newton, 382 U.S. 296, 315 (1966) (Harlan, J., joined by Stewart, J., dissenting). Although Justice Douglas's opinion for the Court adopted primarily a nexus approach in finding that the operation of a park by "private" trustees should be characterized as state action, see id. at 301, Justice Douglas did state in dictum that "the predominant character and purpose of this park are municipal," see id. at 302 (citing Marsh and Terry). In his dissent, Justice Harlan objected to this public function by analogy approach under which the state action label might be placed on "privately owned orphanages, libraries, garbage collection companies, detective agencies, and a host of other functions commonly regarded as nongovernmental though paralleling fields of governmental activity." Id. at 322.

[FN283]. See Jackson, 419 U.S. at 347.

[FN284]. See id.

[FN285]. Id. at 348.

[FN286]. See id. at 358-59.

[FN287]. Id. at 349-50.

[FN288]. See id. at 350-54.

[FN289]. See id. at 350.

[FN290]. Id. at 351. The Jackson Court noted further that, in the case of Public Utilities Commission v. Pollak, 343 U.S. 451 (1952), the Pollak Court had "expressly disclaimed reliance on [a private transit company's] monopoly status" in assuming the existence of governmental action for purposes of that case. See Jackson, 345 U.S. at 352 (citing Pollak, 343 U.S. at 462).

[FN291]. See Jackson, 419 U.S. at 352. With respect to the Court's seriatim analysis, Justice Douglas, in dissent, complained that while "the Court pays lip service to the need for assessing the totality of the State's involvement in this enterprise,...its underlying analysis is fundamentally sequential rather than cumulative." See id. at 362-63 (Douglas, J., dissenting). In effect, Justice Douglas is advocating the "meta-analysis" approach to state action described by Professor Ronald Krotoszynski. See Krotoszynski, supra note 128, at 337.

[FN292]. Jackson, 419 U.S. at 354.

[FN293]. Id. at 352.

[FN294]. See id.

[FN295]. See id. at 353.

[FN296]. See id. In his Jackson dissent, Justice Marshall argued that the Court "reads the 'public function' argument too narrowly" and that, in his view, "utility service is traditionally identified with the State through universal public regulation or ownership to a degree sufficient to render it a 'public function."' Id. at 371 (Marshall, J., dissenting).

[FN297]. 436 U.S. 149 (1978).

[FN298]. Refer to subpart II(C)(1) supra.

[FN299]. Flagg Bros., 436 U.S. at 151-52.

[FN300]. See id.

[FN301]. See id. at 157 (quoting Jackson, 419 U.S. at 352).

[FN302]. See id. at 158-59.

[FN303]. Id. at 159. It is worth noting that Justice Rehnquist in Flagg Brothers dropped parks from his list of public function examples. See Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974) (citing Evans v. Newton, 382 U.S. 296 (1966) for the proposition that operation of a municipal park is a power "traditionally exclusively reserved to the state").

[FN304]. Flagg Bros., 436 U.S. at 159-60. Later in its opinion, the Court did acknowledge that:

> [W]e would be remiss if we did not note that there are a number of state and municipal functions not covered by our election cases or governed by the reasoning of Marsh which have been administered with a greater degree of exclusivity by States and municipalities than the function of so-called "dispute resolution." Among these are such functions as education, fire and police protection, and tax collection. We express no view as to the extent, if any, to which a city or State might be free to delegate to private parties the performance of such functions and thereby avoid the strictures of the Fourteenth Amendment.

Id. at 163-64.

[FN305]. For a list of functions that Justice Rehnquist stated might come closer to meeting the exclusivity test than the functions involved in Jackson and Flagg Brothers, refer to note 304 supra.

[FN306]. In his dissenting opinion in Flagg Brothers, Justice Stevens stated that the majority's emphasis on exclusivity "is not consistent with our prior decisions on state action." Flagg Bros., 436 U.S. at 172-73 (1978) (Stevens, J., joined by White & Marshall, JJ., dissenting). Instead, argued Justice Stevens, the public function issue should be "presented in terms of whether the State has delegated a function traditionally and historically associated with sovereignty." Id. at 171. Rejecting the argument that "the nonconsensual transfer of property rights is not a traditional function of the sovereign," Justice Stevens stated that the "overwhelming historical evidence is to the contrary." See id. at 171-72.

[FN307]. 457 U.S. 830 (1982).

[FN308]. 457 U.S. 991 (1982).

[FN309]. Rendell-Baker, 457 U.S. at 831. The Court equated "under color of state law" with "state action," stating that "'[i]n [statutory interpretation] cases under § 1983, "under color" of law has consistently been treated as the same thing as the "state action" required under the Fourteenth Amendment."' Id. at 838 (quoting United States v. Price, 383 U.S. 787, 794 n.7 (1966)).

[FN310]. See id. at 832.

[FN311]. See id. at 839-43.

[FN312]. Id. at 842 (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974)).

[FN313]. See id. The Court noted that "until recently the State had not undertaken to provide education for students who could not be served by traditional public schools." Id.

[FN314]. Id.

[FN315]. 457 U.S. 991 (1982).

[FN316]. Id. at 993.

[FN317]. Id.

[FN318]. Id. at 1012.

[FN319]. Id. at 1005-11; cf. Rendell-Baker, 457 U.S. at 840-41 (considering the nursing home's government funding).

[FN320]. See Blum, 457 U.S. at 1011.

[FN321]. See id.

[FN322]. Id. at 1012. In both Blum and Rendell-Baker, Justices Brennan and Marshall dissented. See id. at 1012 (Brennan, J., joined by Marshall, J., dissenting); Rendell-Baker, 457 U.S. at 844 (Marshall, J., joined by Brennan, J., dissenting). In his Blum dissent, Justice Brennan stated that "what is required is a realistic and delicate appraisal of the State's involvement in the total context of the action taken." Blum, 457 U.S. at 1013 (Brennan, J., dissenting).

[FN323]. 483 U.S. 522 (1987).

[FN324]. See id. at 524.

[FN325]. See id. at 525.

[FN326]. See id. at 527.

[FN327]. See id. at 528, 548.

[FN328]. See id. at 530.

[FN329]. Id. at 531-32.

[FN330]. See id. In passing, it should be noted that the last two issues could be analyzed under the state authorization model: Under the Constitution, to what extent may Congress permit the USOC to prohibit the use of the word "Olympic" by other entities?

[FN331]. Id. at 542.

[FN332]. Id. At this point in its opinion, the Court is clearly shifting to a consideration of the state action question under the characterization model. SFAA is trying to pin the state action label on the USOC.

[FN333]. See id. at 543-44.

[FN334]. Id. at 544 (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974)).

[FN335]. See id.

[FN336]. Id. at 544-45 (footnote omitted).

[FN337]. See id. at 547.

[FN338]. 500 U.S. 614 (1991).

[FN339]. See id. at 616.

[FN340]. Id.

[FN341]. See id. at 619.

[FN342]. Id.

[FN343]. 457 U.S. 922 (1982). For a detailed discussion of Lugar, refer to text accompanying notes 546-61 infra.

[FN344]. Edmonson, 500 U.S. at 620 (citation omitted).

[FN345]. Id. The Court noted further that "[p]eremptory challenges are permitted only when the government, by statute or decisional law, deems it appropriate to allow parties to exclude a given number of persons who otherwise would satisfy the requirements for service on the petit jury." Id.

[FN346]. Id. at 621-22. I have included the Edmonson Court's own case citations because I believe this will aid the reader in understanding the full import of what the Court is doing in its current approach to state action analysis.

[FN347]. On the question of governmental assistance, essentially a state nexus question, the Court stressed that "a private party could not exercise its peremptory challenges absent the overt, significant assistance of the court" and that "[b]y enforcing a discriminatory peremptory challenge, the court 'has not only made itself a party to the [biased act], but has elected to place its power, property and prestige behind the [alleged] discrimination'." See id. at 624 (alterations in original) (citing Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961)). This nexus argument will be discussed more fully in Part IV infra.

[FN348]. Edmonson, 500 U.S. at 624.

[FN349]. Id.

[FN350]. Id. at 626.

[FN351]. See id. at 627. The Edmonson Court drew support for its conclusion from the delegation-of-governmental-power analysis employed by Justice Clark in Terry v. Adams, 345 U.S. 461, 484 (1953) (considering the exclusion of minority voters from voting in a primary election run by an ostensibly independent non-governmental organization). See Edmonson, 500 U.S. at 625-26.

[FN352]. See Edmonson, 500 U.S. at 621.

[FN353]. See Krotoszynski, supra note 128, at 304 (arguing that "courts conducting state action analyses must go beyond the mechanical application of the traditional tests to determine if, in the totality of the circumstances, a particular private entity is a state actor"). The Court's approach in Edmonson falls somewhat short of pure meta-analysis in that, in the Court's opinion, all three factors that it examined pointed strongly toward a finding of state action, so that each single test examined by the Court was probably "satisfied completely." See Edmonson, 500 U.S. at 621.

[FN354]. See Edmonson, 500 U.S. at 621-22.

[FN355]. See Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 159 (1978).

[FN356]. 505 U.S. 42 (1992).

[FN357]. See id. at 44.

[FN358]. See id. at 45.

[FN359]. See id. at 45-46.

[FN360]. See id. at 54.

[FN361]. See id. at 54-55 (citing Edmonson, 500 U.S. at 626).

[FN362]. In Flagg Brothers, for example, the creditor's sale of the debtor's goods, without the debtor's consent, played a significant role in causing a "nonconsensual transfer of property rights," arguably a "traditional function of the sovereign." See Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 171-72 (1978) (Stevens, J., joined by White & Marshall, JJ., dissenting).

[FN363]. This question will be explored further in the second half of this Article, Parts VI & VIII. Under my analysis, there is obviously no bright line between those cases for

which public function analysis is more appropriate and those for which state authorization analysis is more appropriate. Indeed, some cases, as in Edmonson, yield appropriately to both types of analysis.

[FN364]. Refer to subpart II(B) supra.

[FN365]. 343 U.S. 451 (1952). State nexus analysis was shortly thereafter used by Justice Frankfurter in his concurring opinion in Terry v. Adams, 345 U.S. 461, 470 (1952) (Frankfurter, J., concurring). With respect to the Jaybird Association election system challenged in Terry, Justice Frankfurter stated that "here, the county election officials aid in this subversion of the State's official scheme of which they are trustees, by helping as participants in the scheme." Id. at 476. In Justice Frankfurter's view, this joint action provided the necessary state action contact between county officials and the Jaybird Association's "private" primary. See id. at 476-77.

[FN366]. See Pollak, 343 U.S. at 462-63 (considering whether the actions of a private transit company and the Public Utilities Commission in combination were sufficient to constitute state action). Refer to text accompanying notes 379-92 infra (discussing the Pollak case in greater detail).

[FN367]. 365 U.S. 715 (1961). The Burton Court held that, under the particular facts of that case, a coffee shop located in a building owned and operated by a state agency could not refuse to serve a patron solely on the basis of race because such exclusion would be discriminatory state action in violation of the Equal Protection Clause. See id. at 723-26.

[FN368]. 382 U.S. 296 (1966). The Evans Court concluded that a city's formal resignation as trustee of a public park did not remove the state action taint created by continued city maintenance of the park. See id. at 302.

[FN369]. 395 U.S. 337 (1969).

[FN370]. 436 U.S. 149 (1978). The Flagg Brothers Court held that a warehouseman's proposed sale of goods entrusted to him for storage, as permitted by state statute, was not state action. See id. at 164-66.

[FN371]. Chronologically, these cases ran from the 1969 Sniadach decision to the Court's 1988 decision in Tulsa Professional Collection Services v. Pope, 485 U.S. 478 (1988) (holding that Oklahoma's probate nonclaim statute is not a self-executing statute of limitations, that the statute operates in connection with the state's probate proceedings to adversely affect property interests, and that if the identity of a creditor is known or reasonably ascertainable, then the Due Process Clause requires notice to be given by mail or other means equally certain to provide actual notice).

[FN372]. 407 U.S. 163 (1972). In Moose Lodge, the Court held that a private club's discrimination did not violate the Fourteenth Amendment because the club's liquor license issued by the state did not transform the club's discriminatory conduct into state action. See id. at 178-79.

[FN373]. 488 U.S. 179 (1988). The Tarkanian Court determined that a public university's decision to suspend a coach under threat of further penalty by the National Collegiate Athletic Association did not transform the Association into a joint state actor with the university for purposes of the Fourteenth Amendment. See id. at 197-99.

[FN374]. See, e.g., Gilmore v. City of Montgomery, 417 U.S. 556, 569, 574 (1974) (sustaining a lower court's order enjoining the city from granting racially segregated groups exclusive access to its recreational facilities but overturning that part of the lower court's order that prohibited any nonexclusive use of public facilities by racially segregated groups). Refer to note 378 infra and accompanying text (discussing the alternative holdings of the Court).

[FN375]. Refer to subpart III(D) supra.

[FN376]. 500 U.S. 614 (1991). The Edmonson Court held that a private litigant in a civil

case may not use peremptory challenges to exclude jurors on account of race. See id. at 628-31.

[FN377]. 505 U.S. 42 (1992). The McCollum Court held that a criminal defendant's exercise of peremptory challenges was state action and that the Equal Protection Clause prohibited the defendant from engaging in purposeful discrimination on the basis of race. See id. at 59.

[FN378]. See Edmonson, 500 U.S. at 621 (summarizing the state nexus problem in terms of the extent to which the private actor "relies on governmental assistance and benefits").

[FN379]. 343 U.S. 451 (1952).

[FN380]. See id. at 454-55.

[FN381]. See id. at 461.

[FN382]. See id. at 456-57.

[FN383]. See id. at 457.

[FN384]. See id. at 463-66. On the merits, the Court rejected free speech and right of privacy arguments under the First and Fifth Amendments. See id.

[FN385]. See id. at 462.

[FN386]. Id.

[FN387]. Id.

[FN388]. Id.

[FN389]. Id. at 462-63.

[FN390]. See, e.g., United States v. Price, 383 U.S. 787, 794-95 (1966) (holding private persons to be state actors when they engaged jointly with state actors in murdering civil rights workers).

[FN391]. See Pollak, 343 U.S. at 459 (quoting the Commission's findings that the radio programs created better will among passengers and tended to improve riding conditions).

[FN392]. Refer to subparts IV(C), (D) infra for a discussion of the question when "active encouragement" by government may constitute a sufficiently strong contact to justify a finding of state action under the characterization model.

[FN393]. 365 U.S. 715 (1961). In a period roughly contemporaneous with the Supreme Court's decisions in Pollak and Burton, lower federal courts had already begun to employ state nexus analysis in a variety of fact situations. See, e.g., Hampton v. City of Jacksonville, 304 F.2d 320, 323 (5th Cir. 1962) (holding that a reverter clause in a city's sale of a golf course to private owners that restricted use of golf course to whites only was a sufficient contact to make operation of the course state action); Derrington v. Plummer, 240 F.2d 922, 925-26 (5th Cir. 1956) (holding that the racially discriminatory operation by a private lessee of a restaurant in the basement of a county courthouse constituted state action); Kerr v. Enoch Pratt Free Library, 149 F.2d 212, 216-19 (4th Cir. 1945) (holding that a private library's racially-based denial of a position in the library's training program constituted state action when the library was heavily funded and otherwise controlled by the city); cf. Tonkins v. City of Greensboro, 276 F.2d 890, 891-92 (4th Cir. 1960) (holding that the operation of a private swimming pool after a "no strings attached" sale by a city to a private corporation organized by members of the city's Parks and Recreation Commission does not constitute state action). Some of these cases, especially Kerr, also used public function analysis in finding the presence of state action. Derrington obviously foreshadows the Supreme Court's decision in Burton and, indeed, was cited by the Burton Court. See Burton, 365 U.S. at 723, 725 n.2. Sooner or later, state nexus analysis in the lower federal courts was destined to percolate upward

to the Supreme Court level.

[FN394]. See, e.g., Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 174-75 (1972). In describing Moose Lodge's operations, the Court stated: "Here there is nothing approaching the symbiotic relationship between lessor and lessee that was present in Burton.'' Id. at 175.

[FN395]. Burton, 365 U.S. at 716.

[FN396]. Id.

[FN397]. See id.

[FN398]. See id. at 726.

[FN399]. See id. at 722.

[FN400]. Id.

[FN401]. See id. at 722-24.

[FN402]. See id. at 723.

[FN403]. Id. at 723-24.

[FN404]. Id. at 724.

[FN405]. See id. As to this factor, the Court added: "Neither can it be ignored, especially in view of Eagle's affirmative allegation that for it to serve Negroes would injure its business, that profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a governmental agency." Id.

[FN406]. See id. In a series of concurring and dissenting opinions, Justices Stewart, Frankfurter, Harlan, and Whittaker debated whether the case should be remanded to the Delaware Supreme Court for clarification of that court's construction of a pertinent state statute or whether the state statute in question should be construed by the Supreme Court as unconstitutionally authorizing private restaurants to discriminate on the basis of race. See id. at 726-27 (Stewart, J., concurring); id. at 727-28 (Frankfurter, J., dissenting); id. at 729 (Harlan, J., joined by Whittaker, J., dissenting). The state authorization issue raised by these opinions will be discussed fully in Part VI.

[FN407]. Note again the Burton Court's stress on the "degree of state participation and involvement" in the challenged private action. See id. at 724 (emphasis added).

[FN408]. See, e.g., United States v. Price, 383 U.S. 787, 794-95 (1966) (discussing the joint action factor). Refer to subpart IV(D) infra.

[FN409]. See, e.g., Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351-52 (1974) (dismissing the argument that monopoly status conferred by a state constitutes state action).

[FN410]. 382 U.S. 296 (1966).

[FN411]. See id. at 297.

[FN412]. See id. at 298 (citing Brown v. Board of Educ., 347 U.S. 483 (1953)).

[FN413]. See id. at 298.

[FN414]. See id. at 302.

[FN415]. See id. at 301.

[FN416]. Id.

[FN417]. See id.

[FN418]. In substance, the Newton Court may be saying nothing more than that the city itself continued to operate the park even after the appointment of the new trustees. Under that view, the park never lost its governmental status. In dictum, the Newton Court also suggested that the operation of the park should be characterized as a public function because "the predominant character and purpose of this park are municipal." See id. at 302. In dissent, Justice Harlan objected to this "vague and amorphous" extension of public function analysis, insisting that such an extension might well encompass "a host of other functions commonly regarded as nongovernmental though paralleling fields of governmental activity." Id. at 322 (Harlan, J., joined by Stewart, J., dissenting).

[FN419]. Refer to subpart IV(A) supra.

[FN420]. The Court's decision in Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164-66 (1978) is the one exception.

[FN421]. 407 F.2d 73 (2d Cir. 1968).

[FN422]. See id. at 75, 79.

[FN423]. See id. at 79-82. In a separate part of his opinion, Judge Friendly held that similar disciplinary action taken against students of the New York State College of Ceramics, another college of Alfred University, did constitute state action. See id. at 82. As to the Ceramics College, the Court concluded that the character of the school's relationship with the state made the college a substantive part of the state's system of higher education. See id.

[FN424]. See id. at 81.

[FN425]. See id. at 80.

[FN426]. Id. at 81.

[FN427]. Judge Friendly's opinion in Powe was a thoughtful, degree-oriented opinion that used state nexus analysis to find state action in one set of facts regarding the ceramics college, see id. at 82-83, and no state action in another set of facts involving the liberal arts college, see id. at 79-82.

[FN428]. 407 U.S. 163 (1972).

[FN429]. Id. at 164-65.

[FN430]. See id.

[FN431]. See id. at 165-66.

[FN432]. See id. at 165. The Court held that Irvis had standing to challenge only the "guest service" policy of Moose Lodge and not its membership requirements. See id. at 166.

[FN433]. Id. at 177.

[FN434]. See id. at 175.

[FN435]. Id.

[FN436]. Id.

[FN437]. Id.

[FN438]. Id.

[FN439]. Id. at 173.

[FN440]. See id. at 177 (alteration in original).

[FN441]. See id. at 178-79.

[FN442]. See id. at 179. The Court's injunction is an example of a fact situation in which the state is required to disengage from specifically described private action, albeit in a very narrowly defined context.

[FN443]. See, e.g., Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974) (distinguishing approval from compulsion in dictum).

[FN444]. Refer to subpart III(D) supra for a description of the facts of this case. In the same year it decided Jackson, the Court decided Gilmore v. City of Montgomery, 417 U.S. 556 (1974). In Gilmore, the Supreme Court reviewed a lower federal court's order relating to the desegregation of public parks in Montgomery, Alabama. See id. at 558. The Court affirmed that part of the lower court's order that enjoined the city "from permitting exclusive access to public recreational facilities by segregated private schools and by groups affiliated with such schools." Id. at 569. The Court, however, held invalid that part of the lower court's order prohibiting "the mere use of [public recreational] facilities by any segregated 'private group, club or organization'... because [such order] was not predicated upon a proper finding of state action." Id. at 574. The Court noted that "[w]ithout a properly developed record, it is not clear that every nonexclusive use of city facilities by [racially segregated] school groups, unlike their exclusive use, would result in cognizable injury to these plaintiffs." Id. at 570-71 n.10. From these alternate holdings of the Gilmore Court, we can conclude that, in general, when government grants to racially segregated groups the exclusive use of public facilities, that action constitutes a sufficiently strong state contact to convert private action into state action. This general principle might fray at the edges if pressed to absurd extremes, e.g., use of a one-person public toilet facility by any member of a racially segregated group.

[FN445]. See Jackson, 419 U.S. at 350-52. Refer to subpart III(D) supra for a description of the facts and holding in the Jackson case.

[FN446]. Jackson, 419 U.S. at 350.

[FN447]. See id.

[FN448]. See id. at 358.

[FN449]. See id.

[FN450]. See id. at 360 (Douglas, J., dissenting) (contending that it is not enough to examine the many factors individually, and that the aggregate of the factors is controlling). Justice Douglas concluded that these factors "[i]n the aggregate...depict a monopolist providing essential public services as a licensee of the State and within a framework of extensive state supervision and control." Id. at 362.

[FN451]. See id. at 351-52. Even assuming that Edison enjoyed a monopoly status, the Court held that, for state action purposes, "there was insufficient relationship between [Edison's] challenged actions...and [its] monopoly status." Id. at 352.

[FN452]. Id. at 352. As discussed previously, the Court discarded this factor because the function performed by Edison was not a function "traditionally exclusively reserved to the State." See id.

[FN453]. See id. at 354. The Court held that state approval falling short of compulsion did not convert private action into state action. See id. at 357. In effect, this holding reaffirms the Moose Lodge holding that, under the state characterization model, state compulsion does convert private action into state action. The Court did not consider the state authorization issue: To what extent may the state authorize Edison to terminate Jackson's service with legal impunity?

[FN454]. Id. at 358.

[FN455]. Id. at 362-63 (Douglas, J., dissenting). As explained by Justice Douglas, "It is not enough to examine seriatim each of the factors upon which a claimant relies and to dismiss each individually as being insufficient to support a finding of state action. It is the aggregate that is controlling." Id. at 360.

[FN456]. Like Justice Douglas, Justice Marshall in dissent objected to the Court's retreat from the totality approach. See id. at 366 (Marshall, J., dissenting). Reviewing the various factors discussed by the majority opinion, Justice Marshall concluded that "[t]aking these factors together, I have no difficulty finding state action in this case." See id.

[FN457]. Id. at 351.

[FN458]. 407 F.2d 73 (2d Cir. 1968).

[FN459]. Id. at 81.

[FN460]. See, e.g., Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (citing Jackson, 419 U.S. at 351).

[FN461]. Jackson, 419 U.S. at 370 (Marshall, J., dissenting).

[FN462]. Id. at 373-74.

[FN463]. Id. at 374.

[FN464]. As discussed in the second half of this Article, the Court has never adequately confronted the conceptual problems created by the notion of "variable state action" and the relationship between that notion and the two state action models.

[FN465]. 457 U.S. 830 (1982). Refer to subpart III(D) for a description of the facts of this case.

[FN466]. 457 U.S. 991 (1982). Refer to subpart III(D) for a description of the facts of this case.

[FN467]. Rendell-Baker, 457 U.S. at 832, 834.

[FN468]. See id. at 840-41. The Court explained that:
> The school...is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts 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.

[FN469]. See id. at 841-42. The Court stated that "the decisions to discharge the petitioners were not compelled or even influenced by any state regulation." Id. at 841.

[FN470]. See id. at 842. As noted previously, the Court held that the education of special-needs children was not a function "'traditionally the exclusive prerogative of the State."' See id. (quoting Jackson, 419 U.S. at 353).

[FN471]. See id. In tersely dismissing this factor, the Court stated that "[h]ere the school's fiscal relationship with the State is not different from that of many contractors performing services for the government. No symbiotic relationship such as existed in Burton exists here." Id. at 843.

[FN472]. See id.

[FN473]. 457 U.S. 991 (1982).

[FN474]. See id. at 993.

[FN475]. See id. at 1004-12. The factors considered included: (1) extensive governmental regulation, see id. at 1004, 1007-10; (2) governmental approval, see id. at 1010; (3) substantial governmental funding, see id. at 10-11; and (4) performance of a public function, see id.

[FN476]. See id. at 1012.

[FN477]. See id. at 1004.

[FN478]. Id. Note the stress on governmental responsibility in the statement quoted.

[FN479]. In the course of its opinion, the Blum Court also reiterated the proposition that state approval falling short of compulsion does not convert private action into state action under the state characterization model. See id. at 1005-10. After rejecting the argument that the state commanded the challenged discharges, see id. at 1005, the Court held that the state's acquiescence in the discharges "is too slim a basis on which to predicate a finding of state action in the [discharge] decision itself," see id. at 1010. The Court reasoned that the discharge "decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State." Id. at 1008.

In both Blum and Rendell-Baker, Justices Brennan and Marshall joined in a dissenting opinion that objected strongly to the Court's evisceration of the Burton totality approach. See Blum, 457 U.S. at 1013 (Brennan, J., joined by Marshall, J., dissenting); Rendell-Baker, 457 U.S. at 844 (Marshall, J., joined by Brennan, J., dissenting). In Rendell-Baker, Justice Marshall concluded his dissent with these words: "Even though there are myriad indicia of state action in this case, the majority refuses to find that the school acted under color of state law when it discharged petitioners. The decision in this case marks a return to empty formalism in state action doctrine." Rendell-Baker, 457 U.S. at 851-52 (Marshall, J., dissenting).

[FN480]. 483 U.S. 522 (1987). Refer to subpart III(D) supra for a description of the facts in this case.

[FN481]. Refer to subpart III(D) supra.

[FN482]. See San Francisco Arts & Athletics, 483 U.S. at 527.

[FN483]. See id. at 528.

[FN484]. See id. at 542.

[FN485]. See id. at 543-47. The factors discarded included: (1) congressional grant of a corporate charter, see id. at 543-44; (2) extensive governmental regulation, see id. at 544; (3) congressional grant of exclusive use of the word "Olympic," see id.; (4) governmental funding, see id.; (5) performance of a function that serves the national interest, see id.; and (6) governmental acquiescence in the decisions of the USOC concerning use of the word "Olympic," see id. at 547.

[FN486]. See id. at 543-47.

[FN487]. Id. at 547. In a comprehensive dissent, Justice Brennan concluded that under both public function analysis, see id. at 549-56 (Brennan, J., dissenting), and state nexus analysis, see id. at 556-59, the USOC should be characterized as a state actor. Under public function analysis, Justice Brennan argued that "[t]he USOC performs a distinctive, traditional governmental function: it represents this Nation to the world community." Id. at 550. Under state nexus analysis, Justice Brennan argued that "[t]he USOC and the Federal Government exist in a symbiotic relationship sufficient to provide a nexus between the USOC's challenged action and the Government." Id. at 556-57. Brennan's dissent was joined by Justice Marshall, see id. at 548, and, in substance, by Justices O'Connor and Blackmun, see id. While I believe that the state action issue in SFAA is a close one, the Justice Brennan dissent is clearly truer to the Burton totality approach

than Powell's majority opinion. Justice Brennan's opinion does consider the combined weight of all relevant factors in resolving the state action issue. See id. at 559- 60.

[FN488]. 488 U.S. 179 (1988).

[FN489]. Id. at 192.

[FN490]. See id. at 199.

[FN491]. See id. at 181.

[FN492]. See id. at 187.

[FN493]. See id.

[FN494]. See id. at 189. The Nevada trial court had also sustained Tarkanian's claims against UNLV, enjoining UNLV from disciplining Tarkanian. See id. at 188. Content with this result, UNLV did not appeal the trial court's order, thereby leaving the NCAA as the sole appellant in the case. See id. at 189.

[FN495]. See id. at 190.

[FN496]. See id. at 199.

[FN497]. Id. at 192.

[FN498]. Id. at 193.

[FN499]. Id.

[FN500]. Id. at 196. Justice Stevens further analogized the NCAA to the state-compensated public defender in Polk County v. Dodson, 454 U.S. 312 (1981). In Dodson, the Court held that a public defender acts in a private capacity when he or she represents a private client in a conflict against the State. See id. at 319-28.

[FN501]. Tarkanian, 488 U.S. at 199.

[FN502]. Id. at 193.

[FN503]. Id. at 203 (White, J., joined by Brennan, Marshall, & O'Connor, JJ., dissenting).

[FN504]. See id. at 200-01.

[FN505]. Id. at 202 (alteration in original).

[FN506]. Id. at 203.

[FN507]. 500 U.S. 614 (1991).

[FN508]. A detailed discussion of the Court's consideration of state action in peremptory challenges will appear in Part V of the second half of this Article.

[FN509]. Obviously, the fact that the state actor acts in accord with the desires of a private party should not, by itself, convert the private actor into a state actor. Clearly, a stronger state contact is required.

[FN510]. See United States v. Price, 383 U.S. 787, 790-91 (1966).

[FN511]. See id.

[FN512]. See id.

[FN513]. See id. at 791 (citing 18 U.S.C. § 242). The indictment charged that all 18 defendants, "'acting under color of the laws of the State of Mississippi,'...'did

willfully assault, shoot, and kill"' the three victims "'for the purpose and with the intent"' of punishing the victims, thereby depriving them of life without due process of law. See id. at 793.

[FN514]. See id. at 807 (reversing the district court's dismissal).

[FN515]. See id. at 794 n.7.

[FN516]. As discussed in Part V of the second half of this Article, the three public officials did not cease to be state actors merely because they acted beyond the authority vested in them by the State of Mississippi. See Williams v. United States (Williams II), 341 U.S. 97, 101 (1951):

> [W]here police take matters in their own hands, seize victims, beat and pound them until they confess, there cannot be the slightest doubt that the police have deprived the victim of a right under the Constitution. It is the right of the accused to be tried by a legally constituted court, not by a kangaroo court.

Id.

[FN517]. See Price, 383 U.S. at 793.

[FN518]. Id. at 794.

[FN519]. Id. at 795.

[FN520]. Id.

[FN521]. Refer to subpart IV(D) supra (discussing NCAA v. Tarkanian, 488 U.S. 179 (1988)).

[FN522]. 395 U.S. 337 (1969).

[FN523]. 485 U.S. 478 (1988).

[FN524]. 407 U.S. 67 (1972).

[FN525]. See Sniadach, 395 U.S. at 337-39.

[FN526]. See Fuentes, 407 U.S. at 69-71.

[FN527]. In Sniadach, Wisconsin law permitted the creditor to "freeze" the debtor's wages simply by serving the debtor's employer as garnishee before giving notice to the debtor. See Sniadach, 395 U.S. at 338-39. The wages remained frozen until trial on the merits of the creditor's claim. See id. at 339. As described in Justice Harlan's concurring opinion, "[t]he 'property' of which [the debtor] has been deprived is the use of the garnished portion of her wages during the interim period between the garnishment and the culmination of the main suit." Id. at 342 (Harlan, J., concurring). In Fuentes, Florida and Pennsylvania law authorized "the summary seizure of goods or chattels in a person's possession under a writ of replevin." See Fuentes, 407 U.S. at 69. The laws of both states permitted this seizure "simply upon the ex parte application of any other person who claims a right" to the possessor's goods and provided the possessor with no prior notice or prior opportunity to be heard on the merits. See id. at 69-70.

[FN528]. Fuentes, 407 U.S. at 96-97; Sniadach, 395 U.S. at 341-42.

[FN529]. Sniadach, 395 U.S. at 338-39.

[FN530]. Fuentes, 407 U.S. at 71.

[FN531]. Sniadach, 395 U.S. at 337.

[FN532]. Fuentes, 407 U.S. at 67.

[FN533]. Once private action is converted into offending state action through the joint action concept, relief may operate against both private and state actors in whatever form is necessary to prevent further constitutional injury. In its later decision in Lugar

v. Edmondson Oil Co., 457 U.S. 922 (1982), the Court described the relief granted in Fuentes in these terms:

> Fuentes v. Shevin...was a § 1983 action brought against both a private creditor and the State Attorney General. The plaintiff sought declaratory and injunctive relief, on due process grounds, from continued enforcement of state statutes authorizing prejudgment replevin. The plaintiff prevailed; if the Court of Appeals were correct in this case [Lugar], there would have been no § 1983 cause of action against the private parties; yet they remained parties, and judgment ran against them in this Court.

Id. at 933.

[FN534]. As emphasized later in this subpart, the creditor-debtor cases may also be analyzed in state authorization terms: To what extent may the state authorize creditors to "gouge" debtors (or vice versa) with legal impunity through use of state administrative procedures? Refer to text accompanying notes 562-76 infra.

[FN535]. 436 U.S. 149 (1978). Refer to subpart II(C) supra for a detailed description of the facts of this case.

[FN536]. See Flagg Bros., 436 U.S. at 151.

[FN537]. See id. at 156-57.

[FN538]. Id. at 157

[FN539]. See id. at 174 (quoting Fuentes, 407 U.S. at 93).

[FN540]. Id. at 175 (Stevens, J., joined by White & Marshall, JJ., dissenting).

[FN541]. See id. at 157.

[FN542]. See id.

[FN543]. See id. at 170-71. The second half of this Article will contain a discussion of Justice Stevens's state authorization analysis.

[FN544]. See Flagg Bros., 436 U.S. at 171-76. Refer to subpart III(D) supra for a discussion of Justice Stevens's public function analysis.

[FN545]. For Justice Stevens, the prohibited state action was the New York statute itself; the statute, he argued, should be held unconstitutional because of what it authorizes a private actor to do. See id. at 178-79. As the whole tenor of this Article indicates, I strongly support the Justice Stevens position that the absence of joint action does not preclude the application of other state action theories, especially the application of state authorization analysis.

[FN546]. 457 U.S. 922 (1982).

[FN547]. See id. at 924.

[FN548]. See id.

[FN549]. Id. at 924-25.

[FN550]. Id. at 925.

[FN551]. Id.

[FN552]. See id. at 942.

[FN553]. See id. at 934-35.

[FN554]. Id. at 935.

[FN555]. Id. at 937.

[FN556]. See, e.g., Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991). As discussed in the second half of this Article, I question the utility of the first prong of the Lugar test.

[FN557]. See id. at 937.

[FN558]. See Lugar v. Edmondson Oil Co., 457 U.S. 922, 940 (1982). As described by the Court, Lugar was challenging "the state statute as procedurally defective under the Fourteenth Amendment." Id. at 941. The Court noted further that:
While private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action. This is subject to constitutional restraints and properly may be addressed in a § 1983 action, if the second element of the state-action requirement is met as well.
Id.

[FN559]. Id.

[FN560]. Id. at 942. The Court added: "Whatever may be true in other contexts, this [invoking the aid of state officials] is sufficient when the State has created a system whereby state officials will attach property on the ex parte application of one party to a private dispute." Id.

[FN561]. Id.

[FN562]. 485 U.S. 478 (1988).

[FN563]. See id. at 479-83.

[FN564]. See id. at 482.

[FN565]. See id.

[FN566]. See id. at 479.

[FN567]. See id. at 482-84.

[FN568]. See id.

[FN569]. See id. at 491.

[FN570]. Id. at 485.

[FN571]. Id. (citing Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978)).

[FN572]. Id. at 485-86 (citing Texaco, Inc. v. Short, 454 U.S. 516 (1982) and Flagg Bros., 436 U.S. at 166)).

[FN573]. Id. at 486 (citing Lugar v. Edmondson Oil Co., 457 U.S. 992 (1982) and Sniadach v. Family Finance Corp., 395 U.S. 337 (1969)).

[FN574]. Pope, 485 U.S. at 486.

[FN575]. Id. at 487. The Court described the role of the probate court as follows:
The nonclaim statute becomes operative only after probate proceedings have been commenced in state court. The court must appoint the executor...before notice, which triggers the time bar, can be given. Only after this court appointment is made does the statute provide for any notice; § 331 [state probate law] directs the executor...to publish notice "immediately" after appointment.
Id.

[FN576]. Id.

[FN577]. Refer to notes 488-510 supra and accompanying text (discussing NCAA v. Tarkanian,

488 U.S. 179 (1988)).

[FN578]. See Tarkanian, 488 U.S. at 196 (noting that "the NCAA and UNLV acted much more like adversaries than partners").

[FN579]. See id. at 196 n.16.

[FN580]. See id. at 200-03 (White, J., joined by Brennan, Marshall, & O'Connor, JJ., dissenting).

[FN581]. This factor was decisive for the majority in Tarkanian. See Tarkanian, 488 U.S. at 196.

[FN582]. This factor was decisive for the dissent in Tarkanian. See id. at 200-03 (White, J., dissenting).

[FN583]. This factor was decisive for the Court in finding state action in all of the creditor-debtor cases with the exception of Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978).

[FN584]. On this factor, compare the active and fostering role of the state action in United States v. Price, 383 U.S. 792, 795 (1966), with the more ministerial and passive role of state officials in some of the creditor-debtor cases.

[FN585]. This factor was decisive for the Court majority in Flagg Bros., 436 U.S. at 164-66. While this factor, if present, may conclusively negate the existence of joint action, its presence should not preclude a finding of state action under state authorization or public function analysis.

[FN586]. 500 U.S. 614 (1991).

[FN587]. 505 U.S. 42 (1992).

[FN588]. See Edmonson, 500 U.S. at 616.

[FN589]. McCollum, 505 U.S. at 44.

[FN590]. Id. at 50-57; Edmonson, 500 U.S. at 622, 628.

[FN591]. Edmonson, 500 U.S. at 620 (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)).

[FN592]. See id.

[FN593]. Id. at 621.

[FN594]. Id. at 621-22 (citations omitted).

[FN595]. Id. at 621.

[FN596]. Id. at 622. The description of government's involvement in the peremptory challenge process covered almost three pages of the Court's opinion. See id. at 622-24.

[FN597]. Id. at 624.

[FN598]. Id. (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) (alteration in original).

[FN599]. Georgia v. McCollum, 505 U.S. 42, 51 (1992). In dissent, Justice O'Connor decried "the remarkable conclusion that criminal defendants being prosecuted by the State act on behalf of their adversary when they exercise peremptory challenges during jury selection." Id. at 62 (O'Connor, J., dissenting). Here, Justice O'Connor is using an "opposite goals" argument, i.e., the state prosecutor and the defendant are seeking opposite goals in a criminal proceeding. While true, this argument ignores the fact that,

in the use of peremptory challenges, the defendant and the court are seeking the same goal: the valid exercise of the peremptory challenge by the defendant. Moreover, if either the prosecutor or the defendant exercises a peremptory challenge on the basis of race, the injury is the same: a juror is excluded on the basis of his or her race.

[FN600]. Significantly, Chief Justice Rehnquist, the main proponent of a sequential approach to state nexus analysis, dissented in Edmonson, 500 U.S. at 631 (O'Connor, J, joined by Rehnquist, C.J., & Scalia, J., dissenting), and concurred in McCollum only because of the precedential weight of Edmonson, which he still believed "to have been wrongly decided," see McCollum, 505 U.S. at 59-60 (Rehnquist, C.J., concurring).

[FN601]. 115 S. Ct. 961 (1995).

[FN602]. Id. at 963.

[FN603]. See id. at 964. Amtrak had refused to permit Lebron to display on an Amtrak controlled billboard an advertisement critical of the Coors family because of the family's alleged support of "right-wing causes." See id.

[FN604]. See id. at 967-75.

[FN605]. See id. at 974-75.

[FN606]. Id. at 972. Only Justice O'Connor dissented from the majority opinion. See id. at 975 (O'Connor, J., dissenting).

[FN607]. Id. at 973.

[FN608]. See id. at 974.

[FN609]. Id. at 974-75.

[FN610]. What Professor Ronald Krotoszynski describes as "a new first step in state action analysis," Krotoszynski, supra note 128, at 308, is thus a recognition that when the acting entity is in fact a part of government, the ultimate contact between that entity and government has been realized.

[FN611]. It is, of course, quite possible for public officials, i.e., human beings, to act in a private capacity. Even a "bad" sheriff can host a private dinner party at home without being characterized as a state actor in that capacity.

[FN612]. Lebron, 115 S. Ct. at 967. The Court's examination covered four pages in the Court's opinion. See id. at 967-71.

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