CHARTER SCHOOLS AS STATE ACTORS: ARE THEY TRULY PUBLIC SCHOOLS?

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ABSTRACT

The trend of establishing charter schools across the United States has been accomplished by authorization statutes labelling them as public schools. They are supported by public tax dollars but private entities are obtaining charters and in some cases hiring for-profit companies to operate the schools. Private boards of directors replace a locally elected school board to direct the operation of these schools. As teachers find traditional public schools closing and charter schools entering the market where closures have occurred they must choose between moving to a district still hiring fully certified teachers or entering employment with charter organizations. In making that change teachers must consider whether the terms of their employment have changed and understand the nature of their new relationship with school leadership.

As public employees, teachers were protected by constitutional provisions extending that protection to the states through the Fourteenth Amendment. That amendment is what incorporates much of the Bill of Rights and prohibits deprivation of those rights by state action. As charter schools become a larger employer of teachers the question arises whether these schools are also subject to those constitutional provisions in the same way a public school district is when employing teachers. The state action doctrine, developed in Fourteenth Amendment jurisprudence, controls whether those charter school employers must observe constitutional limitations or the employees have lost those protections by becoming charter employees. The question can only be answered by tracking the development and status of the state action doctrine through the decisions of the U.S. Supreme Court.

The state action doctrine has been famously labeled a "conceptual disaster area"[1] and has eluded consistent interpretation for more than a century. Because the law is often developed in a syllogistic pattern supported by building on previous holdings and remaining consistent in interpretation of fact situations most commentators have searched for some consistency in the holdings of the Court by connecting words that appear in multiple decisions. That method has failed to provide a truly consistent interpretation of state action and leads mostly to the "torchless search for a way out of a camp echoing cave"[2] as described by Professor Black sixty years ago. This study takes a different approach to the decisions to make sense of the changing interpretation of the doctrine through time.

Reading the cases with an eye to the members of the Court and the prevalent political issues of the day reveals first a steady expansion of the doctrine and then a contraction that follows the patterns of those political issues and pressures felt by the Court from time to time. This method uncovers an arc of decisions that follow that expansion and contraction through time and develop an understanding of how new cases might be decided. Because the Court has not dealt with this issue that projection will assist any litigants attempting to claim constitutional protection to shape their cases to provide the best chance of success.

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[1] CHARLES L. BLACK, JR., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARVARD LAW REVIEW 69, 95 (1967).

[2] *Id.*

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Chapter 1

The Issue of Charter Schools' Publicity

Introduction

Charter schools have become a substantial force in education in the United States in the twenty-first century. The first charter school law was enacted in Minnesota in 1991 and the first charters issued soon thereafter in 1992. Since then 42 states and the District of Columbia have enacted charter school laws with only Kentucky, Montana, Nebraska, North Dakota, South Dakota, Vermont, Washington and West Virginia without a public charter school law. According to the National Alliance for Public Charter Schools there were 1542 charter school operating in the 1999-2000 school year. By 2006-2007 that number had grown to 3999 and in 2014-2015 there were a reported 6630 charter schools operating.[3] Charter schools now constitute more than 6% of all public schools. By comparison during that same period private schools shrank in enrollment from 12% to 10% of all students while charters grew from .7% to 4.6%, more than accounting for the loss in private school enrollment.[4] There is little doubt that the charter school movement is growing in influence and is building a large following in states around the country.

When charters are discussed as a response to a perceived need to make radical change in schools one feature is prominent in the discussion. In the forty-three states

[3] National Alliance for Public Charter Schools, *Charter School Data Dashboard*, http://dashboard2.publiccharters.org/National/ (last visited, April 5, 2016).

[4] Institute of Education Sciences, National Center for Education Statistics, *The Condition of Education*, http://nces.ed.gov/programs/coe/indicator_cga.asp (May 2015).

with charter school statutes, all label them as "public schools" while exempting them from selected legal and structural obligations of traditional public schools. It is clear from the selected exemptions that advocates of charter schools have problematized teachers and specifically teacher unions. The National Alliance for Public Charter Schools, the largest association supporting charter schools, has created a Model Law for states to enact charter school legislation.[5] The Alliance grades states by their conformity to their model including the recommendation that states exempt charter schools from collective bargaining agreements in existence at least.[6] It also suggests exemption from all state laws and regulations except those that deal with health and safety, civil rights, student accountability, criminal background checks for employees, open meetings, freedom of information laws and accounting requirements. Teacher certification is suggested to merely meet the minimum requirements of the former No Child Left Behind law which allowed for alternative certification as a rather open option.[7] Each of those is open to state adoption and interpretation but the Alliance rankings of the states' laws indicate that most have adopted some limitation on collective bargaining for charters.[8]

[5] A New Model Law For Supporting The Growth of High-Quality Public Charter Schools (National Alliance for Public Charter Schools 2009).

[6] TODD ZIEBARTH, NATIONAL ALLIANCE FOR PUBLIC CHARTER SCHOOLS, MEASURING UP TO THE MODEL: A RANKING OF STATE CHARTER SCHOOL LAWS (2016).

[7] A New Model Law For Supporting The Growth of High-Quality Public Charter Schools, *supra* n.4 (2009).

[8] ZIEBARTH. 2016.

Although state charter laws vary across the states what remains constant is the enforceability of rights protected by the Constitution. Those rights, with one exception[9], are protected from infringement only by the state or federal government. Private individuals and corporations are not constrained by the Constitution from infringing on those rights unless they are specifically treated in a statutory scheme. Public employers are actors of the state and thus fall within the constraints prohibiting the infringement of rights of individuals set out in the Constitution. Despite the label of charter schools as public in the several statutory schemes there remains a question whether they are public for the purposes of the Constitution. This study will address that question.

Green and Mead[10] have reviewed the several state laws establishing charters quite exhaustively revealing some of the legal questions that vary in creation and operation of charters under similar but different state statutory schemes. All those schemes identify charters as "public schools" but statutory labels seldom carry the day when the exact legal nature of an institution is in question in the Court. Courts require reasoned analysis based upon precedent and foundational law to precisely define the status of institutions as public or private. Often the lines are not clearly drawn and require a close analysis of fact situations to unfold a complete picture of the status of a given new institution such as charter schools. Because charter schools are a significant departure from the traditional public school system that has existed in this country since at least the end of the nineteenth century their status is still at issue.

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[9] The Thirteenth Amendment abolishing slavery applies to individuals and states.

[10] PRESTON C. GREEN, III & JULIE F. MEAD, CHARTER SCHOOLS AND THE LAW: ESTABLISHING NEW RELATIONSHIPS (Christopher-Gordon 2004).

What will be referred to as traditional public schools in this study will be the public-school system that existed in the United States starting in the late nineteenth century until the arrival of the charter school movement. Public schools were a stable institution until policymakers and politicians began to depict them as failing beginning with the now well-known A Nation at Risk.[11] This narrative of failure led to a movement away from the stable format that existed from the post-Civil War era until the late twentieth century into what is a new format. The rhetoric surrounding these changes has been that these new formats are innovative and creative while remaining public schools has come under scrutiny[12] and raises serious questions about the substance of that rhetoric.

Statement of the issue

Teachers serve a central role in student learning and their status in charters will be largely defined by the determination of the Court whether they are public employees or private employees. Lesser rights could discourage qualified candidates from teaching in charter schools while lesser qualified teachers might find employment there after being limited from traditional public schools. One study reports that less qualified teachers are a greater percentage of the teaching workforce in non-white, low performing schools, particularly in urban areas.[13] More qualified teachers also tend to

[11] NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, UNITED STATES DEPARTMENT OF EDUCATION, A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983).

[12] See CHRIS LUBIENSKI, *Redefining "Public" Education: charter schools, common schools, and the rhetoric of reform*, 103 TEACHERS COLLEGE RECORD 634(2001).

[13] HAMILTON LANKFORD, et al., *Teacher Sorting and the Plight of Urban Schools*, 24 EDUCATIONAL EVALUATION AND POLICY ANALYSIS 37(2002).

quit or transfer out of poor urban schools leaving a less prepared teaching staff in those schools.[14] The requirement for teachers to be "highly qualified" as very loosely defined in the No Child Left Behind law that serves as the qualification floor for the model charter law has not been shown to be associated with larger student gains in learning.[15] Teacher quality is a significant factor for student achievement and first year teachers are generally significantly less effective than teachers with three or more years of experience.[16] Teacher turnover has significant and negative effect on student achievement particularly in schools with greater numbers of low-performing and Black students.[17] If charters fail to recruit and retain high quality teachers there will be a negative impact on student learning for their many students.

When serving in traditional public schools, teachers, like students, do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[18] Equal process and due process rights also fall within those not lost by teachers upon entering into employment as a public school employee. What is the effect if teachers in what is offered as a public school in the form of a charter school are no longer so protected? How will that impact the decision of individuals drawn to teach

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[14] *Id.* at 47.

[15] KRISTIE J. R. PHILLIPS, *What does "Highly Qualified" Mean for Student Achievement? Evaluating the Relationships Between Teacher Quality Indicators and At-Risk Students' Mathematics and Reading Achievement Gains in First Grade*, 110 THE ELEMENTARY SCHOOL JOURNAL 464(2010).

[16] STEVEN G. RIVKIN, et al., *Teachers, Shools, and Academic Achievement*, 73 ECONOMETRICA 417(2005).

[17] MATTHEW RONFELDT, et al., *How Teacher Turnover Harms Student Achievement*, 50 AMERICAN EDUCATIONAL RESEARCH JOURNAL 4(2012).

[18] Tinker v. Des Moines, 393 U.S. 503 (1969).

but concerned about the instability of an employment market without those protected rights? Those are questions we are not able to answer at this point but we can look ahead to see what path the Supreme Court is likely to follow in deciding the status of charter schools as either public or private institutions defining the protected rights of the teachers, if any.

Often, in arguing the strengths of charter schools the issue of tenure is raised as a part of teacher unionization. The fact is that teachers had tenure laws well before there were teacher unions. As early as 1909 teachers had tenure protection to avoid firings for specious reasons.[19] It is argued that somehow teachers are given such special treatment that their stability disrupts quality education in schools. However, teachers have been shown to be less stable in their employment that private workers despite tenure and due process protections. Because charter schools are often exempted from the restrictions of tenure laws or allowed to apply for exemption in seeking a charter[20] the sole remaining protection existing is the due process clause of the Fourteenth Amendment. If charter schools are found to be public employers that protection remains. If they are not, there is nothing to protect teachers from firings for any reason, including political or even personal reasons. The stability of employment for teachers in schools becomes very tenuous under such a scenario. There are no comparable data from the private sector, because the Bureau of Labor Statistics groups layoffs with firings. In 2012, companies with over a thousand employees, the closest private

[19] DANA GOLDSTEIN, THE TEACHER WARS: A HISTORY OF AMERICA'S MOST EMBATTLED PROFESSION (Anchor Books 2014).

[20] GREEN & MEAD, 92-94. 2004.

counterpart to large urban school systems, lost only about 2 percent of their workforce from firings, resignations, and layoffs combined while the data for teachers show approximately a 2% rate of dismissal for cause among both tenured and non-tenured teachers combined.[21] In short, teachers are more, not less, likely than many other workers to get fired. Without a requirement to show cause for dismissal there can be little doubt that the termination rate would grow higher.

Teacher stability is an important element of quality schools. Experienced teachers are shown to produce better results.[22] Teachers who are in their first few years of teaching are not as effective as they will become with experience.[23] Given the centrality of teacher quality to student learning it is essential to maintain a well-prepared and experienced teacher workforce to maintain high quality schools where student learning flourishes. That is not to say that teacher stability guarantees quality teaching but there is certainly evidence that high teacher turnover and low experience levels have produced poor results.[24]

All charter laws begin with the declaration that the charter schools they create are "public" schools. At least in part it is to assure the tax paying public that they are supporting a public institution. Attempts to provide tax money to private schools were

[21] DANA GOLDSTEIN, THE TEACHER WARS: A HISTORY OF AMERICA'S MOST EMBATTLED PROFESSION (Anchor Books 2015).

[22] RIVKIN, et al., ECONOMETRICA, (2005).

[23] JOHN P. PAPAY & MATTHEW A. KRAFT, *Productivity returns to experience in the teacher labor market: Methodological challenges and new evidence on long-term career improvement*, 130 JOURNAL OF PUBLIC ECONOMICS 105(2015).

[24] RONFELDT, et al., AMERICAN EDUCATIONAL RESEARCH JOURNAL, (2012).

either not politically successful or ran afoul of legal barriers to the use of public funds for private purposes but the statutory label of charters as public is not controlling legally for a determination of whether constitutional or even Civil Rights protections exist. Those protections exist only to limit action by actors on behalf of the public – commonly called state actors. Private action is not so limited. The significant question raised in this study is whether charter schools are public employers for the purposes of personnel actions. The Supreme Court has not ruled directly on the issue but the State Action Doctrine has been developed quite extensively and the patterns can provide indications of how the question will be answered.

In practice, the efficacy of charter schools remains a highly contested issue with wide variations in standards to measure that efficacy and the variance in student populations and communities. The questions about efficacy require an analysis of many different settings and communities and will require different answers to be complete. One feature of charter schools can be examined on a nation-wide basis. The nature of the publicness of charter schools is, in a central way, a matter of law and legal interpretation. The supreme law of the land for all states in found in the Constitution, the source of the basic rights enjoyed by all persons in the United States. Whether those rights are protected by the Constitution is dependent on whether the individual or institution infringing on them is a private or a state actor. That distinction applied to charter schools remains an open question but one that will define the nature of teachers' status as employees of those schools.

In the late nineteenth century, public schools developed into the means by which a wide group of citizens could find a pathway to employment opportunities outside of

the old traditional agrarian society. Industrial development and increasing technology called for better-trained workers who could read, communicate well, and understand the machinery and business aspects of a rising commercial economy. It was the public school that brought a community together through an elected group of local people forming and shaping policy for all local students to learn common curriculum, community values and an understanding of citizenship in the young democracy. Often, the schools were the identity of the community. Of course, we know that these schools were far from their ideal of inclusion of all students. That goal was not even approached until the mid-twentieth century and remains a challenge today. Private schools had long existed and remained to serve limited groups who could afford it or who had a religious connection to preserve but the distinction was clear: Public schools used common public tax funds and private schools used tuition or other private funding to operate.

The concept of public schools then was driven by a set of principles outlined masterfully by Goldin and Katz[25] and identified by them as "virtues" that developed as schooling emerged during the post-Civil War era as the country reunited and schools became a focus of towns and communities across the land. Those virtues were: public funding, public provision, separation of church and state, a decentralized system of independent districts, a forgiving open structure, and coeducational schools based on gender neutrality. The concept of what was a public school included all six of those principles and each was essential to the idea for various reasons.

[25] CLAUDIA GOLDIN & LAWRENCE F. KATZ, THE RACE BETWEEN EDUCATION AND TECHNOLOGY (Harvard University Press 2008).

The movement to change the institution of education began as a movement to expand public funding into schools not operated under public administration or elected school boards. It began with an attempt to use public funds to support private and even religious schools to help them meet specific needs required to continue to serve their students. That movement to sustain those schools soon created a narrative of a "market" economy within education.[26] That approach meant that schools should compete like businesses and the best would survive while the worst would fail. Using that philosophy, the concept of voucher funding was developed using public school funds and providing parents with a level of personal funding to carry to any school – public or private – to enroll their student in a school the parent thought best suited their needs. Legal challenges made those vouchers more problematic and in most settings they were not used widely and privileged those who already were using private schools for their children.

Charter schools alter the characteristics of public schools as identified by Goldin and Katz in several ways. They maintain public funding through shifting funds away from traditional public schools into charter schools but it is still public money. The question of whether it is publicly provided is debated but it is clear that private companies and organizations without elected boards or officials are operating schools – sometimes at a profit.[27] Church and state separation may or may not be maintained and

[26] JOHN E. CHUBB & TERRY M. MOE, POLITICS MARKETS AND AMERICA'S SCHOOLS (The Brookings Institute 1990).

[27] SARAH M. STITZLEIN, *For-Profit Charter Schools and Threats to the Publicness of Public Schools*, 44 PHILOSOPHICAL STUDIES IN EDUCATION 88(2013).

the question of whether it must be relies on the same constitutional principles that are the subject of this paper. Although some charter schools are locally owned and operated there are many companies who own several schools across the country and thus are not decentralized or locally controlled. The story of New Orleans schools following Katrina documents perhaps the most egregious example of this disruption of local voice in schools.[28] The forgiving open structure is also subject to some doubt and just how open charter schools are varies from place to place. Gender neutrality is most often intact but is not a given in charter schools.

Those virtues, as labelled by Goldin and Katz, relate to the student experience and local community control. What is omitted from the analysis is the teacher and the employment relationship to the school. In a traditional public school that relationship is well-defined and the requirements to qualify as a teacher are set to ensure that teachers who enter a classroom have received a base level of education in the art of teaching and in their subject matter. The various states have somewhat different laws controlling that relationship but central to all is the fact that the jobs are public employment – that is, the teachers are public employees. The significance of that fact is that teachers maintain a list of constitutional rights that no state or school district can violate. Private employers are not held to such a standard in dealing with their employees. If charter schools are not public employers there is a fundamental shift in the relationship leaving teachers without the rights they enjoy as public employees.

[28] KRISTEN L. BURAS, CHARTER SCHOOLS, RACE, AND URBAN SPACE: WHERE MARKET MEETS GRASSROOTS RESISTANCE (Routledge 2015).

The analysis in this study is appropriately labeled formalist because it examines the legal aspect of the nature of charter schools but that is not where the analysis ends. Formalism implies a study that ignores function – what is actually occurring in these spaces – and this study does not ignore that perspective on charter schools. The Court, looking at the state action doctrine, examines the relationship between the actors and the state through a lens of what occurred in the specific factual situation giving rise to a claim. The study is a detailed look at the peculiar facts of the dispute and that is truly a functionalist perspective on the charter school as a state or private actor. For that reason, this study straddles formalist and functionalist perspectives on the nature of charter schools.[29]

Another dichotomy in the policy discussions over charter schools is identified as an "instrumentalist" versus an "institutionalist" approach.[30] That analysis, however, is focused on a broader operational view of the purpose of schools as public education or public schools. The distinction between the two is centered on the concept on the one hand that public schools are operated, owned and governed by public bodies (institutionalist) while public education is a service that can be provided by private entities as well as public ones (instrumentalist). This study does not engage in that policy debate directly but seeks to identify one aspect of public control of schooling via legal status of those entities operating schools not in direct public control and

[29] For a greater discussion of the "formalist/functionalist" distinction see, GARY MIRON & CHRISTOPHER NELSON, WHAT'S PUBLIC ABOUT CHARTER SCHOOLS?: LESSONS LEARNED ABOUT CHOICE AND ACCOUNTABILITY 14-16 (Corwin Press 2002).

[30] CHRISTOPHER LUBIENSKI, *Instrumentalist Perspectives on the `Public' in Public Education: Incentives and Purposes*, 17 EDUCATIONAL POLICY 478(2003).

governance. The distinction between the institutionalist ideal of government owned and operated schools and the instrumentalist ideal that function, however limited in definition, prevails over form is, in part, driven by the rules under which each must operate. The rights and liberties protected by the Constitution certainly apply to public schools owned and operated by government entities. This study seeks to understand if those rights are protected for those employed by non-governmental entities that operate schools in the public name in the form of charters.

The rights enumerated in the Bill of Rights as included for the states in the Fourteenth Amendment include free speech, the right to due process before the taking of property, and equal protection of the laws. Simply the removal of due process from that equation means that teachers are all employees at will and can be fired without reason or cause. That places the corporate or private operators of a charter school in a position to absolutely control what happens in the classroom or who is teaching the students. A teacher's political record of voting in primaries of a certain party could be used as grounds for removal from the classroom. A lesson on evolution could also serve as a reason for termination. Without the controls of constitutional support for basic rights the basic relationship between teacher, school, and community is altered in serious ways.

The purpose of this study is to examine the decisions of the Supreme Court of the United States to determine whether charter schools are – for the purposes of constitutional rights – public schools. Although the statutes creating charter schools in the various states declare them to be public, the Supreme Court has never allowed a mere legislative label to control the nature of an institution. The Court has produced a

long line of cases discussing what factors must be considered to determine who or what organizations are subject to the limitations of the Constitution preventing infringement of those rights. By deciding who is subject to those limitations the court has decided who is a state actor and who is not. The State Action Doctrine will define whether charter school teachers are public employees or merely private employees lacking in constitutional protection. To understand the nature of charter schools' publicness then requires an understanding of state action analysis in the Supreme Court.

The development of the State Action Doctrine began with the early courts defining to whom the Constitution applied. The initial states were not interested in a strong central government and the Constitution was drafted to identify those specific areas of control by the central, or federal, authority and those that remained in the control of the states. Rather than create two lists of areas, the Constitution simply identified the limited areas in which federal control was supreme. Those included national defense, immigration, trade among and between the states and other powers necessary to maintain a single country from the many states.

The addition of the Bill of Rights to the Constitution introduced a series of statements of individual rights, some of which were deemed to be natural, or pre-existing rights while others were specifically directed at Congressional power by stating that "Congress shall make no law. . . ."[31] The Tenth Amendment provided the clear statement that those powers not set out in the Constitution as federal powers were

[31] U.S. CONST. amend. I.

specifically reserved for the states and the people.[32] Initial decisions of the Court deferred to the states and limited the application of the Bill of Rights solely to the federal government and its activities. States and individuals remained unfettered in their actions based on the assumption that the people were the state.

Later, following the Civil War, the question of how racial discrimination would be addressed arose leading to the first Civil Rights Act and the passage of the Fourteenth Amendment extending the protection of the Bill of Rights to the states. No longer could a state deny individuals rights guaranteed in the Constitution but individual behavior remained a matter unencumbered by the Constitutional mandates. Problems arose as state officials found ways to distance themselves from action by allowing others to carry out discrimination and violations of the rights guaranteed by the Constitution. The Court responded by exposing the arrangements and building the concept that state action could include the acts of private individuals and organizations when their acts were "fairly attributable to the state."[33]

Thus, State Action became more broadly defined to include a broader array of those barred from infringing on constitutional rights. It is this body of law that will determine whether charter schools are public or private as employers for the purposes of the Constitution. This study will examine that body of law for indications of how it will be decided when cases arrive before the Court as they surely will. The paper will

[32] U.S. CONST. amend. X.

[33] Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982).

conclude with some of the possible implications of the Court's decisions on this topic and what it might mean for education as a public institution.

There have been some studies of the question of charter schools and their standing as state actors. Most are in the form of comments or notes in law reviews and address specific cases without a broad overview.[34] Some have looked at the issue quite broadly and painted it all as a single issue concluding that charters are state actors[35] or are not state actors[36] without differentiation of the circumstances that exist between student rights and employee rights or any rights to be examined. One study has decided based on Circuit Court of Appeals decisions that charter school employees will not be constitutionally protected while students and parents will be.[37] One study looks at the issue on behalf of students of color and concludes that they are not protected by the Constitution in charter schools.[38] At least one study asks the question but offers no answers.[39] A few studies advocate for a change in the state action doctrine or argue that

[34] KEVIN S. HUFFMAN, *Note: Charter Schools, Equal Protection Litigation, and the New School Reform Movement*, 73 NEW YORK UNIVERSITY LAW REVIEW 1290(1998);BRADLEY T. FRENCH, *Charter Schools: Are For-Profit Companies Contracting for State Actor Status?*, 83 UNIVERSITY OF DETROIT MERCY LAW REVIEW 251(2006).

[35] HUFFMAN, NEW YORK UNIVERSITY LAW REVIEW, (1998);ROBERT J. MARTIN, *Charting the Court Challenges to Charter Schools*, 109 PENN ST. L. REV. 43(2004).

[36] FRENCH, UNIVERSITY OF DETROIT MERCY LAW REVIEW, (2006).

[37] MAREN HULDEN, *Charting a Course to State Action: Charter Schools and § 1983*, 111 COLUMBIA LAW REVIEW 1244(2011).

[38] PRESTON C. GREEN, III, et al., *Charter Schools, Students of Color and the State Action Doctrine: Are the Rights of Students of Color Sufficiently Protected?*, 18 WASHINGTON & LEE JOURNAL OF CIVIL RIGHTS AND SOCIAL JUSTICE 253(2012).

[39] KARLA A. TUREKIAN, *Traversing the Minefields of Education Reform: The Legality of Charter Schools*, 29 CONNECTICUT LAW REVIEW 1365(1997).

the state action doctrine fails to provide an appropriate rule regarding charter schools and others.[40] No thorough examination of the question of the state actor status of charter schools relating to teachers as employees was found. For that reason, this study is proposed to address the need to understand how teachers in charter schools are likely to be treated under the state action doctrine in the Supreme Court of the United States.

Research questions

The questions this study seeks to answer are:

Are charter schools state actors for Fourteenth Amendment purposes?

Are charter schools public employers as are traditional public schools?

Do teachers working for charter schools enjoy the same constitutional employment rights as public school teachers?

By examining the judicial decisions that have shaped the State Action Doctrine this study hopes to arrive at an expectation of how the Supreme Court will classify charter schools in their relationships to teachers and other employees.

Each of these questions requires as a starting point a thorough understanding of the history and development of the state action doctrine in the Supreme Court of the United States. Writers and even the Court itself have identified several tests. The Court has used terms similar in nature to describe the different analyses in different cases but

[40] CATHERINE LOTEMPIO, *It's Time To Try Something New: Why Old Precedent Does Not Suit Charter Schools in the Search for State Actor Status*, 47 WAKE FOREST LAW REVIEW 435(2012);BROOKES BROWN, *A Conceptual Disaster Zone Indeed: The Incoherence of the State and the Need for State Action Doctrine(s)*, 75 MARYLAND LAW REVIEW 328(2015);MARK TUSHNET, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 CHICAGO JOURNAL OF INTERNATIONAL LAW 435(2002).

the law is, by several writers' evaluation, a bit less than crystal clear in this area. One approach to this analysis is to extract the points of difference that are essential to understanding the Court's position and to categorize them in a way that is useful for the questions this study will address.

Once those categories are developed it will be necessary to examine the facts and circumstances surrounding each sort of analysis including the relationship of the private/public interests involved, the behavior involved, and the rights being transgressed. The Court has made a point of limiting certain holdings to very specific fact situations and to understand how a similar fact situation might be handled those details must be identified. I propose two different approaches to the development of the categories to attempt a sort of triangulation of the analyses to compare their results.

My hypothesis going into this study

My expectation in this study is that the Court's earlier decisions will likely lead to the determination that charter schools, as employers, will not be held to be public, or state actors. Of course, the Court is capable of shifts and changes in how it handles any fact situation by distinguishing it from earlier decisions and given the uncertain nature of the state action doctrine there is little way to predict with certainty the course the Court will take on this issue.

Delimitations of the study

It is not the purpose of this study to evaluate the performance or appropriateness of charter schools. Previous writers have provided policy

recommendations either praising or condemning charters.[41] Others have studied the results of charters for student achievement[42], community growth and recovery[43], and many other issues and perspectives surrounding their existence and operation. All of those questions are worthy of continuing study and discussion to inform policy moving forward. What has been less examined is what the precise legal nature of a charter school as a public institution is within the U.S. Constitution. It is limited to a single legal determination of the nature of the charter school as a state actor but that finding will be based on the actual operation and actions of the charter schools in question.

This study is also limited to questions of the relationship between charter schools and their teachers as employees. The law relating to student rights is also quite important and perhaps even more unsettled than that of teachers but it does involve another set of analyses not included in this study. The study is also limited to Supreme Court cases with exceptions for Circuit Court cases that have been decided after the last relevant Supreme Court case. Those Circuit Court cases are used only to see what the jurists on those panels expect the Supreme Court would do but they have no precedential value for any future Supreme Court case. They are included solely to see what others have written on the topic. The Supreme Court cases are the law and where there are gaps in that law, as there are in this study, those must be filled by the

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[41] CHUBB & MOE. 1990;MIRON & NELSON. 2002;DIANE RAVITCH, REIGN OF ERROR: THE HOAX OF THE PRIVATIZATION MOVEMENT AND THE DANGER TO AMERICA'S PUBLIC SCHOOLS (Vintage Books 2014);SARAH M. STITZLEIN, *For-Profit Charter Schools and Threats to the Publicness of Public Schools*, 44 PHILOSOPHICAL STUDIES IN EDUCATION 88(2013).

[42] THE CHARTER SCHOOL EXPERIMENT: EXPECTATIONS, EVIDENCE, AND IMPLICATIONS (Christopher A. Lubienski & Peter C. Weitzel eds., Harvard Education Press 2010).

[43] BURAS. 2015.

reasoning and analysis of the Supreme Court. No state law is analyzed in this study as that would involve a substantial increase in the breadth of the study and an excellent study of the state laws of charter schools exists.[44]

As Justice Brennan noted, "Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government. It is therefore understandable that the constitutional prohibitions encounter their severest test when they are sought to be applied in the school classroom."[45] As will be seen throughout this study that test in state action and the Fourteenth Amendment has revealed just how difficult and knotty an area of the law can become even for the finest judicial minds in the country.

[44] GREEN & MEAD. 2004.

[45] School District of Abington Township v. Schempp, 374 U.S. 203 (1963).

Chapter 2

Review of the literature

The primary sources for this study are the text of the Fourteenth Amendment to the Constitution[46] and the opinions of the Supreme Court supplemented by the most recent Circuit Court of Appeals opinions that have shaped and established the state action doctrine applicable to that. The requirement for action "under color of state law" in the Civil Rights Act[47] run parallel and are essentially identical[48] so the cases discussing one are instructive for the other. It is those opinions that constitute the data for analysis to answer the questions this study posits. There are also secondary sources that can assist in the analysis of the opinions of the Court but they are assistive and not dispositive of the questions. Those will be discussed in a separate section of this chapter. For purposes of clarity the opinions of the Court will be addressed in chronological order for this review to better see the development over time of the doctrine.

The later analysis[49] will approach the question from two distinct perspectives. First, the traditional analysis of facts and details in the various categories of tests identified by the Court will be the traditional approach to state action case analysis. The second perspective will be driven by the theoretical base taken from Professor Black's

[46] U.S. CONST. amend. XIV § 1.

[47] 42 U.S.C. § 1983 (2016).

[48] United States v. Price, 383 U.S. 787 (1966).

[49] See chapter 4, *infra.*

work[50] and expanded upon by Peller and Tushnet[51] that develops the argument that the doctrine involves the balancing and distribution of certain individual rights rather than a factual, case-by-case analysis in the traditional analysis.

Primary sources

This study of the publicness of charter schools in the United States of America uses as its baseline means for analysis Supreme Court of the United States decisions that have shaped the state action doctrine as it applies to the Fourteenth Amendment of the U.S. Constitution.[52] That doctrine has grown from the post-Civil War era and continues to develop into the new era of privatization of traditionally governmental functions. Made necessary by the passage of the Fourteenth Amendment in 1868 applying Equal Protection and Due Process to the states, the State Action Doctrine began to expand the reach of the prohibition on infringing the constitutional rights of individuals beyond strictly governmental action to avoid results that allowed private individuals to take on governmental functions to circumvent the bar of governmental discrimination. The Supreme Court of the United States has a long history of defining state actors in many settings although it has not yet ruled in a true charter school case. The Fourteenth Amendment and those decisions are the basis for this section of the literature review.

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[50] CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED & UNNAMED (Yale University Press 1997).

[51] GARY PELLER & MARK TUSHNET, *State Action and a New Birth of Freedom*, 92 GEORGETOWN LAW JOURNAL 779(2004).

[52] *Id.*

The Fourteenth Amendment

To understand the State Action Doctrine one must first understand the Fourteenth Amendment and how it changed the legal landscape in the late nineteenth century. The Constitution was developed to unify the various states and to assign very specific and limited powers to the unified whole. To "establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty"[53] was not just a list of possibilities but was a limitation upon the central government as interpreted by the Supreme Court. Chief Justice Waite described it as a government of the people with greater power than that of the states but much more limited in scope.[54] It is the limitations that truly form the basis for the state action doctrine.

Because the Constitution lacked a statement of the basic rights to be expected in this new country the first ten amendments were adopted stating the now well-known rights of free speech, free assembly, freedom of religion and the principles of due process and equal protection, among others, in what has become known as the Bill of Rights.[55] As a limit on the power of the federal government, however, the Constitution prohibited that government from abridging those individual rights and left up to the States and the people whether to enforce and protect those rights on a state-by-state

[53] U.S. CONST. pmbl.

[54] United States v. Cruikshank, 92 U.S. 542 (1876).

[55] U.S. CONST. amend. I-X.

basis. Early cases refused to apply the obligation to protect those rights as a limit on the action of individuals or the states.[56]

The end of the Civil War saw the creation of much legislation designed to reform what was perceived as the errors of the Confederacy and to displace race as a means of discriminating against individuals. These acts were supported by the passage of the Fourteenth Amendment applying the Bill of Rights to the States. The text of the Fourteenth Amendment includes the following:

> 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.[57]

For the first time the states were included in the prohibition of abridgement of rights and the requirements of due process and equal protection of the laws. Two major areas of inquiry arose with that expansion of the reach of the Constitution beyond the federal government. The first, based upon the limitation of the States, is the question arose "Who is the state?" and what actors can be considered acting on behalf of the state. The second is the question of what rights are protected by the amendment. Three areas are listed – privileges and immunities, due process, an equal protection – yet there is no clarity what is included in those enumerated rights. These issues were left to the Court to develop a definition of state action when it deprives someone of the constitutional rights and just what rights are included. The cases that follow trace the development of those definitions to the present day chronologically within each category to

[56] United States v. Cruikshank, 92 U.S. 542 (1876).

[57] U.S. CONST. amend. XIV.

demonstrate the path the Court has taken to create the modern state action doctrine and what it preserves.

What rights are incorporated?

The cases involved in defining the rights protected by the Fourteenth Amendment are many of the same early cases that defined the state action issue. The issues of what was incorporated is one that is largely settled and developed much faster than the definition of a state actor but it is important to understand what rights are protected from state action to see the significance of this doctrine to the issue of whether charter schools are truly public – or in this analysis, state actors – and thus what rights charter schools are held or not held to protect. The language of the amendment is not entirely clear but the cases have since made this issue well defined.

Early in the history of the Fourteenth Amendment litigation of what rights are incorporated the Court made a rather sweeping decision in what is known as the Slaughter House Cases.[58] That decision virtually eliminated the use of the privileges and immunities clause to limit state action. The limited reach of the entire Fourteenth Amendment was a result of the Court's dictum that those amendments were only adopted to protect former slaves. Because the case before the Court did not relate to racial discrimination the amendment's protections were of no avail under the facts. That holding rendered the privileges or immunities clause useless for more than a century.

[58] Slaughter-House Cases, 83 U.S. 36 (1873).

The 1897 case of *Chicago, Burlington & Quincy Railroad v. Chicago*[59] saw the issue of taking of property without due process raised against a state actor by way of the Fourteenth Amendment. The Court did not hold the amendment to be inapplicable but went beyond that point to find that the taking was not without due process. For the Court to issue an opinion it first had to reach a jurisdictional finding and that jurisdiction could only be based upon a constitutional claim under the Fourteenth Amendment. Thus, by ruling in the case on the substantive issue the Court applied the due process taking clause to the state by virtue of the Fourteenth Amendment. The case of *Twining v. New Jersey*[60] supported the applicability of the due process clause in dictum acknowledging that the first eight amendments might apply to the states as a violation could deny them due process under the Fourteenth Amendment.[61]

Most of the decisions incorporating rights into the purview of the Fourteenth Amendment due process clause arose during the Warren Court. During that time, the Court incorporated into the due process provision of that amendment the Fourth Amendment exclusionary rule, excluding the use of evidence obtained illegally in a criminal prosecution,[62] the Fifth Amendment double jeopardy bar,[63] self-

[59] Chicago, Burlington and Quincy Railroad Co. v. Chicago, 166 U.S. 226 (1897).

[60] Twining v. New Jersey, 211 U.S. 78 (1908).

[61] *Id.* at 98-99.

[62] Mapp v. Ohio, 367 U.S. 643 (1961).

[63] Benton v. Maryland, 395 U.S. 784 (1969).

incrimination,[64] and the Sixth Amendment speedy trial requirement,[65] chance to confront witnesses,[66] and assistance of counsel[67] rights.

State Action Cases

The application of the Enforcement Act in a criminal indictment served as an early test of the new Amendment. State officials and individuals were indicted with a charge that they joined to deprive two African American gentlemen of rights "granted and secured"[68] by the Constitution or laws of the United States. The initial question before the court was whether the rights alleged to have been violated were so granted and secured by the Constitution. Relying on earlier decisions[69], the Court held that the rights to freely and peacefully assemble, bear arms, due process and equal protection were merely pre-existing rights stated in the Constitution without adding anything to those rights. Furthermore, the Court added that as to seeking redress from individuals, even the Fourteenth Amendment did not bar the violation of those rights as it was limited to prohibiting a state from infringing upon them. Thus began the delineation between who is and is not acting on behalf of a state.

That strict limitation was slightly expanded when the Court was presented with a claim involving the removal of a state court case to federal court claiming that the

[64] Malloy v. Hogan, 378 U.S. 1 (1964).

[65] Klopfer v. North Carolina, 386 U.S. 213 (1967).

[66] Pointer v. Texas, 380 U.S. 400 (1965).

[67] Gideon v. Wainwright, 372 U.S. 335 (1963).

[68] United States v. Cruikshank, 92 U.S. at 548.

[69] Twitchell v. Commonwealth, 74 U.S. 321 (1869);Gibbons v. Ogden, 22 U.S. 1 (1824).

African American defendant could not receive a fair trial in a state court with a jury of all white people[70]. The men in question had been indicted by a jury of all white men and the same profile described the venire for the petit jury. However, the statute providing for removal required that a pleading be filed asserting a certain denial of rights before trial commenced based on a state law or ruling violating the rights of the defendants. Had Virginia barred African Americans from jury panels by law such a pleading would have been possible but no such law was in existence. The Court held that it could not intervene in a situation of a lower court official engaging in discriminatory behaviors that could still, presumably, be rectified on appeal in the state courts at the end of the trial. The distinction was that the fact of an all-white jury was not evidence of a discriminatory law of the state and therefore failed to fall within the reach of the federal courts.

Racially mixed juries were the subject of two appeals on different questions. In one, the Court declared invalid a state statute restricting jury service to white persons as amounting to a denial of the equal protection of the laws to a non-white defendant.[71] In the same volume of the reports, the Court held that a similar discrimination imposed by the action of a state judge denied equal protection even though the language of the state statute relating to jury service contained no such restrictions.[72]

[70] Virginia v. Rives, 100 U.S. 313 (1880).

[71] Strauder v. West Virginia, 100 U.S. 303 (1880).

[72] Virginia v. Rives, 100 U.S. 313 (1880)

The next step in the development of the doctrine was a series of cases that recognized that the Fourteenth Amendment reached all state agencies but found nothing but individual action in the set of cases. In 1883, the Court struck down certain provisions of the Civil Rights Act of 1875 holding that it impermissibly addressed individual action and that was not authorized by the Constitution or any amendments[73]. The provisions set criminal penalties for any individual who violated certain rights of another. The Court reviewed the legislative history of the Fourteenth Amendment, the basis for the support for the statute. Finding the provision unconstitutional the Court held that the amendment plainly prohibits action by states and by state law but does not authorize Congress to act directly to control individual behavior.

An 1897 case pitted the Chicago, Burlington and Quincy Railroad against the City of Chicago in an eminent domain claim that the city obtained a jury verdict of $1 setting the value of the railroad's property at a street crossing.[74] The railroad claimed that was a taking without due process despite having participated at trial. The Supreme Court first made clear that anyone with a public position acts on behalf of the state. No limitation is placed on whether the actor is an employee of the State of Illinois or the City of Chicago. The Supreme Court made clear that a government actor at any level is "the state" in the meaning of the Fourteenth Amendment. The railroad lost the appeal based on a holding that the $1 compensation was appropriate under the circumstances.

[73] Civil Rights Cases, 109 U.S. 3 (1883).

[74] Chicago, Burlington and Quincy Railroad Co. v. Chicago, 166 U.S. 226 (1897).

The Court turned to the state court enforcement of the private agreements to find state action and noted the earlier cases that held that any manner of state involvement could be state action invoking the Fourteenth Amendment protections. Even a state's Supreme Court has been held to be subject to the limitations of the Amendment as state action. The Court went on to hold in these cases that judicial enforcement of a private agreement that violates constitutional rights protected by the Fourteenth Amendment is state action sufficient to overturn the state court action. Thus, the first test of state action beyond actual state laws and state agents is that judicial enforcement of a private action constitutes state action. As an absolute that principal will not hold for all factual situations.

A unique situation gave rise to a new category of state action in the case of *Marsh v. Alabama*[75] involving a town wholly owned by the Gulf Shipbuilding Corporation. The town appeared like any other town with streets, homes, stores, police services, and a Post Office all on a main highway and entirely open to the public. Stores contained a sign notifying visitors that they were on private property and that no soliciting was allowed. When a woman, after being denied a permit to do so, attempted to distribute religious literature in what seemed to be public areas she was told to leave the area and refused to do so. She was charged and convicted of refusing to leave private property after being warned to leave and asserted as a defense her First and Fourteenth Amendment rights. The state courts held that the public use of the property did not

[75] Marsh v. Alabama, 326 U.S. 501 (1946).

convert it to public property and found the statute criminalizing the woman's behavior valid and enforceable.

The Court began by making clear that had this been a municipal street in public ownership there could be no doubt that her defense would stand as an absolute defense. The sole question presented for review was whether private company ownership of the entire town was sufficient to allow that company the power to infringe the free speech rights of the woman arrested. Setting aside the issue of whether the streets had been dedicated to public use by the actions of the corporate owners the Court held that property held open to the public carried with it some of the responsibilities to protect the individual freedoms of those who use the premises. This "public function"[76] as described by the Court made applicable the constitutional guarantees of individual freedom by means of the Fourteenth Amendment. That label will become an argument to extend this holding further in later cases with mixed success. It is interesting to note that the term "state action" is not even used in the opinion of the Court despite the necessity of finding that the duties of the state applied to the corporate owners of the town.

The issue of restrictive covenants entered into by private landowners that limited the occupation of adjacent lands based on racial identity often leads to a state action decision. One was limited to Caucasians and the other excluded "people of the Negro or Mongolian Race."[77] The agreements were entirely private contracts until

[76] *Id.* at 507.

[77] Shelley v. Kraemer, 334 U.S. 1 (1948).

African American individuals purchased some of the property and occupied the premises. At that point, other landowners who were party to the covenant sought judicial enforcement of the covenant by injunction. The Court first made clear that had the state or city involved legislated the restrictions they would clearly be barred from doing so by the Fourteenth Amendment. Because these were the acts of private individuals they presented a new set of facts to the Court. The Court noted that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful."[78] The Shelley holding was reinforced in a later case in which an attempt was made by a neighbor to enforce a restrictive covenant by seeking damages for the breach of the covenant. The Court held that the judicial enforcement by awarding damages would be state action making the attempt to enforce the covenant unconstitutional.[79]

Public schools were the focus of a Fourteenth Amendment analysis in *Brown v. Board of Education*,[80] perhaps the most famous of school cases. The Court held in that case that the local school board of Topeka, Kansas could not operate schools separately for different races. Many issues were raised in that case and the meaning of equal protection under the Fourteenth Amendment had been clouded for over 60 years by a jurisprudence of "separate but equal" facilities typified by *Plessy v. Ferguson*.[81] In *Brown*, the Court made clear that the Fourteenth Amendment applied to public education and

[78] *Id.* at 13.

[79] Barrows v. Jackson, 346 U.S. 249 (1953).

[80] Brown v. Board of Education, 347 U.S. 483 (1954).

[81] Plessy v. Ferguson, 163 U.S. 537 (1896).

required actual equality rather than pro forma equality. Education was held to be "a right which must be made available to all on equal terms."[82] State action was involved in state sanctioned separation of children by race in local school districts and that separation was not beyond the reach of the Constitution.

The mid-twentieth century ushered in a new era of civil rights activism and litigation that began to develop a wider definition of state action. Previously the Court had focused on the involvement of state officials and meticulously avoided including the acts of others in the analysis. The cases from this period push that boundary into more complex interactions between private individuals and state officials. The several current categories of state action begin with these cases and their analysis forms the main argument for or against a finding of state action in the Court. What is clear from this line of cases is that there is no single test or circumstance by which a private entity or individual can be held to be a state actor.

A Delaware statute authorized the creation of a public authority by the City of Wilmington, Delaware that resulted in the construction of a public parking lot of the sort found in most urban settings.[83] As a source of revenue to pay for the structure in addition to parking fees a portion of the building was dedicated to retail businesses, including a coffee shop. The coffee shop was a part of the parking lot but was accessible by an entrance on the public sidewalk adjacent to the structure. The building was labeled as public by signs and flags but the retail operations were tenants and owned

[82] Brown v. Board of Education, 347 U.S. at 493.

[83] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

privately. The Authority had borne the costs of the initial construction of the coffee shop under its agreement with the tenant and the tenant finished with its own fixtures and front at its own cost, benefiting from the tax exemption of the Authority to the extent of its improvements. The Authority also paid for the heating of the shop and to provide regular maintenance to the structure. Other than a general requirement that the premises be used for serving food and drink and an agreement to follow all laws, there were no other restrictions on the use of the premises in the lease agreement, including no requirement that the tenant serve all members of the public.

In 1958, an African American gentleman parked in the structure, walked out to the sidewalk and entered the coffee shop. The owner refused him service based on his race so declaratory relief was sought in the state courts of Delaware. The trial court found the action in violation of the Fourteenth Amendment but the Delaware Supreme Court held that the shop owner was acting purely in his own private capacity and could not be held to the standard for state action. The Supreme Court accepted the case and reversed with a finding that the State had "so far insinuated itself into a position of interdependence with [the coffee shop] that it must be recognized as a joint participant in the challenged activity"[84] and thus applied the Fourteenth Amendment standard of equal protection. The public ownership of the building, the public nature of its purpose, and the fact that profits from the shop benefitted the public by supplementing the parking income all led to the conclusion that there was a sort of symbiotic relationship

[84] *Id.* at 724.

between the shop and the Authority. That entwinement led to the finding of state action by a purely private store owner.

The Court explicitly rejected any call to develop a "precise formula for recognition of state responsibility"[85] under the Fourteenth Amendment. A detailed analysis of the facts and circumstances is required to reveal "the nonobvious involvement of the State in private conduct"[86] to attribute that conduct to state action. It requires a detailed statement of the factual bases of each case to identify those factors that influenced the Court to find or deny state action. Unfortunately for later litigants the Court specified that the required state action could only be tied to this unique set of facts – language used later to limit its reach to those cases in which "the state leases public property in the manner and for the purpose shown"[87] in that case.

Taking another approach in a 1963 decision the Court was presented with a case of a sit-in demonstration at a lunch counter in Greenville, South Carolina.[88] Ten young African Americans entered a store and sat at the lunch counter reserved for whites only. The store manager closed the store and the participants in the sit-in were arrested for trespass and later found guilty of that charge. The store manager closed the counter and the store to avoid violating a Greenville ordinance prohibiting mixed race lunch counters and requiring racially segregated facilities in the form of tables, counters, dishes and preparation areas for food. The Court held that although the private act of

[85] *Id.* at 722.

[86] *Id.*

[87] Burton v. Wilmington Parking Authority, 365 U.S. at 726.

[88] Peterson v. City of Greenville, 373 U.S. 244 (1963).

closing the counter could not be reached by the Fourteenth Amendment, the involvement of the City of Greenville by making the serving of the young people a violation was sufficient to invoke state action and call for the reversal of the convictions.

Protestors outside of a privately-owned amusement park in Maryland objected to the park's policy of not allowing African Americans to enter or enjoy the rides in the park even though the rest of the public could enter and ride. A security guard, with the credentials as a deputy sheriff, asked the protestors to leave when they lined up to ride one of the rides after acquiring tickets for that ride. When the protestors did not leave, the deputy sheriff arrested them for trespass and the charges were brought to court. After the Maryland Court of Appeals refused to reverse the charges based on a finding that this was a purely private act on behalf of the private owners of the amusement park the case came before the Supreme Court. In a split decision, the Court held that the acts of a duly authorized deputy sheriff, even if enforcing a private policy, constituted state action and thus violated the Fourteenth Amendment equal protection mandate.[89]

Another case of entwinement involved the ownership of a park area that came under scrutiny.[90] In 1911 a decedent devised a tract of land to the City of Macon, Georgia, as a park for white people only. It was governed by a board of managers, all of whom were white. The City operated the park initially as a segregated one but eventually decided that it could not do so constitutionally and it integrated the park facility. The Board of Managers sought a court order to remove the City as trustee and

[89] Griffin v. Maryland, 378 U.S. 130 (1964).

[90] Evans v. Newton, 382 U.S. 296 (1966).

to name new trustees who would honor the wishes of the original testator that the park remain for white people only. African American citizens intervened claiming the segregation to be unconstitutional and the City resigned voluntarily as trustee. The heirs of the original testator intervened to have the trust revert to the estate if the original wishes of the testator to keep it segregated were not honored by the naming of new trustees to enforce that limitation. The state court named new trustees and the Georgia Supreme Court affirmed.

The Supreme Court noted the balance between private rights to associate with those of one's own choosing and the public requirement to provide public spaces for all equally. A private golf club could select freely its own members but a public golf facility is required by the Fourteenth Amendment to be open to all. Deciding what is public and what is private is "not always easy to determine."[91] The Court said that private conduct may become "so entwined"[92] with government as to become state action subject to Fourteenth Amendment equal protection requirements. "That is to say, when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations."[93]

The Court also distinguished cases involving golf clubs, supper clubs and other private associations saying that a public park is a service to a community like the police

[91] *Id.* at 299.

[92] *Id.*

[93] *Id.*

or fire departments. The City of Macon had provided all the operations for the park and it was public in all ways except the denial of use by non-whites. The Court held that the mere appointment of private trustees could not defeat the public nature of the park and that it must be operated subject to constitutional limitations.

In the era of the mid-twentieth century the question of who was a state actor was addressed in parallel with concept of acting "under color of state law" as was required by the 42 U.S.C. § 1983.[94] In a case that involved local law enforcement officers who released three African American prisoners only to catch up with them far from the prison joined by several civilians to murder them the Court found that the civilians were acting under color of state law. The joint action that necessarily involved the law enforcement officers created a connection between state officials and non-officials that made them all state actors.[95]

California tenants charged discrimination under a constitutional provision that protected a person's right to refuse sale or lease of property to anyone for any reason, including racially motivated reasons.[96] A statute barred discrimination in housing for racial reasons. The California Supreme Court struck down the constitutional provision declaring it in violation of the equal protection clause and the Court affirmed. The Court agreed with the California Supreme Court in its finding that the state was involved in a similar manner to the *Burton v. Wilmington Parking Authority*[97] case. Even though the

[94] 42 U.S.C. §1983 (2006).

[95] United States v. Price, 383 U.S. at 795.

[96] Reitman v. Mulkey, 387 U.S. 369 (1967).

[97] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

constitutional provision was neutral on its face it was operating to sustain discrimination in a way barred by the Fourteenth Amendment.[98]

Teacher rights in public schools were the focus of a case in which a teacher was fired after sending a letter to the local newspaper criticizing the district's handling of tax referenda.[99] The free speech claim was dismissed by trial and appellate courts in Illinois and certiorari was granted from the Illinois Supreme Court to the United States Supreme Court. The teacher presented a First Amendment defense claiming a right to publish his opinions about the district's handling of the referendum as a voting citizen. That claim could only stand based on the Fourteenth Amendment application of the First Amendment to the states. Most significant for the purposes of this study is the holding that the school board, as a public employer, may not compel a teacher to relinquish his First Amendment rights as a condition of employment.[100] That holding was supported by other previous cases to the same effect.[101] Constitutional rights extend to public school teachers through the Fourteenth Amendment in several aspects including due process[102], freedom of association[103], and free speech[104] rights.

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[98] U.S. CONST. amend. XIV.

[99] Pickering v. Board of Education, 391 U.S. 563 (1968).

[100] *Id.* at. 568.

[101] Wieman v. Updegraff, 344 U.S. 183 (1952);Shelton v. Tucker, 364 U.S. 479 (1960);Keyishian v. Board of Regents, 385 U.S. 589 (1967).

[102] Wieman, *supra.*

[103] Shelton, *supra* and Keyishian, *supra*.

[104] Pickering v. Board of Education, 391 U.S. 563 (1968).

As the Civil Rights movement continued into the mid-twentieth century demonstrations at lunch counters offered new perspectives on state action and how private acts could be folded into the acts of the state prohibited to be discriminatory by the Fourteenth Amendment. In one such case a so-called Freedom School in Hattiesburg, Mississippi, and its white teacher's actions with her African American students raised issues of state action.[105] Walking into the Public Library the students were refused the use of that facility. Following that refusal, the group went to the lunch counter at the Kress department store where the African American students were offered service but the white teacher was denied service since she was in their company – an act previously prohibited in Mississippi. The group left the store and the teacher was immediately arrested on a charge of vagrancy by a local policeman. The students were not arrested.

The case arrived at the Court on a Summary Judgment granted to the store ending the teacher's Fourteenth Amendment claim that her right to equal protection was violated by the custom and practice of discrimination and her allegation of a conspiracy between the store and the local police to deny her of her rights. The Court split on the first question of whether a custom and practice was involved but overwhelmingly found in favor of the teacher's claim that her allegations contained the facts of a conspiracy based on evidence that the policeman who arrested her immediately on her leaving the store had been inside the store while she was there and had in some way communicated with the counter waitress before making the arrest

[105] Adickes v. S.H.Kress & Co, 398 U.S. 144 (1970).

outside the store. The holding typified the Court's willingness to push the limits of state action in racially motivated discrimination to prevent circumvention of the constitutional guarantees by making actions informal or appear private to avoid that protection. Throughout the civil rights era, the Court has exhibited a greater willingness to extend the state action doctrine to find state action and protect individual rights violated in racially discriminatory ways.

Institutions and businesses became the subject of state action cases with the complaint of an African American guest in a Moose Lodge who was denied service.[106] The Lodge was a private club and as such was free to set membership requirements but as a guest he was only interested in joining his member friend for a meal. The Court considered the by-laws of the Moose Lodge and found that although membership was denied to African Americans, there was no such limitation on guests in the clubs. Because Moose was the holder of a publicly issued liquor license the guest argued that the denial to serve him was state action and sought the revocation of the license.

The Court denied the request to address the membership discrimination but did cite a requirement of the liquor law that the organization must conform to its own by-laws as a condition of the license. By requiring the Moose Lodge to comply with a discriminatory bylaw, the liquor commission converted the action of the private club into state action that was held in violation of the Fourteenth Amendment.

[106] Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

When a utility company with a government granted monopoly terminated service to a customer pursuant to its own policies, the Court found no state action.[107] The customer sued alleging a §1983 Civil Rights Act violation by the utility requiring her to prove the utility acted "under color of state law" held by the Court to be the same test as state action. The monopoly status of the utility and the high degree of regulation under which it operated was held not to convert its decision to terminate into an act under color of state law and the case dismissal was upheld by the Court. The Court also dismissed the public function argument presented by the petitioner saying that utilities were provided widely by private companies even though government regulated them quite extensively.

The use of public parks by private organizations with racially discriminatory admissions policies in Montgomery, Alabama, served to demonstrate just how detailed the fact situations are required to be to find state action. Although the Court had no problem holding that exclusive use of the parks by discriminatory groups could not be tolerated it required further findings of fact before ruling on all possible uses by those groups. The Court compared the facts to the Burton v. Wilmington Parking Authority case saying that the relationship between state and private groups becomes more involved than mere regulation. Interestingly the Court lists those activities that could be held traditionally exclusive realms of government as "electricity, water, and police and fire protection."[108]

[107] Jackson v. Metropolitan Edison, 419 U.S. 345 (1974).

[108] Gilmore v. City of Montgomery, 417 U.S. 556 (1974).

A statutory scheme for commercial transactions was challenged *Flagg Brothers v. Brooks*[109], a claim brought by two owners of property that was stored in a warehouse and which the warehouse owner threatened to sell for non-payment of fees. The claim, solely against the private warehouse owner, was that the statutory scheme delegated the governmental responsibility to resolve the dispute over fees through the seizure and sale of property to the warehouse and thus the actions were subject to the due process requirements of the Constitution. The Court disagreed with that position and drew a narrow line around the activities that could be said to be governmental in nature and a delegation of state power to a private party. Following a review of the election cases successfully prosecuted under this sovereign function theory the Court observed that many state functions have been more exclusive to the state than the issue presented of dispute resolution. "Among these are such functions as education, fire and police protection, and tax collection."[110] Later cases will not provide much support for the inclusion of education in that list.

Addressing a second position of the aggrieved parties in *Flagg Brothers* the Court rejected the claim that the warehouse owner had acted in a way compelled by the statute. The Court held that the statute established a means by which the state could remain uninvolved in such commercial transactions rather than require them all to enter a court of law to resolve differences. Acquiescence in a private action is not

[109] Flagg Brothers v. Brooks, 436 U.S. 149 (1978).

[110] *Id.* at 163.

equivalent to compelling an action or even encouragement of it such that the action is fairly attributable to the state under the Fourteenth Amendment.

An issue of private parties and judicial intervention served as the platform for a Texas case in which an injunction, allegedly issued as a result of an illegal conspiracy between a state judge and the private parties, barred the complainants from accessing the minerals on land to which they had mineral rights.[111] The injunction was dissolved after 29 months of litigation and a federal civil suit was filed claiming a conspiracy to wrongfully take property without due process naming the judge, parties who obtained the injunction, and others as co-conspirators. The lower courts held that the judge had judicial immunity and after dismissing him from the suit further found that there was no state action among the remaining alleged co-conspirators and dismissed the claims against them also.

The Court agreed that the judge had immunity from the suit but that immunity did not change the allegation of a conspiracy that lead to the wrongful issuance of an injunction. Private citizens, engaged with public officials, are state actors if they act in conspiracy with those public officials even if the officials have immunity from suit. The nature of the actions taken – the conspiracy with the judge to gain issuance of an illegal injunction – served as the guiding factor in the finding that the private individuals engaged in sufficient action under color of state law to be held liable for the deprivation of property rights of the injured party.

[111] Dennis v. Sparks, 449 U.S. 24 (1980).

In 1981, the Court considered a case in which a public defender, an attorney admittedly an employ of the county government, was sued by a client for malpractice in his representation pursuant to court appointment.[112] The Court went beyond the fact that the attorney was a public employee to examine the nature of the relationship between attorney and client. The Court cited *United States* v. *Classic*[113] to support the position "that a person acts under color of state law only when exercising power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'[114] Holding that the attorney's authority and obligations to her client were independent of the state and the employment relationship with the public defender's office, the Court rejected the claim that her acts as an attorney could constitute acts under color of state law. The key to the decision was that the Court looked not to the relationship but to the function involved. An attorney was noted to be an independent professional with duties only to her client and not to the public, her employer. The Court also excluded any thought that their decision was a blanket denial that public defenders were public employees noting that a public defender might have administrative duties, such as hiring employees for the office, that could be classified as acts under color of state law.[115] The study of the precise function involved is essential for an understanding of the requirements for state action.

[112] Polk County v. Dodson, 454 U.S. 312 (1981).

[113] United States v. Classic, 313 U.S. 299 (1941).

[114] Polk County v. Dodson, 454 U.S. at 317-318.

[115] *Id.* at 325.

Perhaps the case most cited as indicative of charter school predictions of state action is that of *Rendell-Baker v. Kohn*[116]. At issue in this case is a private school that contracted with public school districts for as much as 99 percent of its funding by providing students who had difficulty in traditional high schools with ways to complete their high school diploma. In fact, the diplomas they offered were issued by the local public school district. The school was subject to extensive regulation as a school and had to follow many of the same rules that public schools were subject to. The regulations required written employment policies and job descriptions but little else regarding personnel. The contract with the school district does state that employees of the school are not school district employees – separating them from any existing union contracts with district teachers. Rendell-Baker was a special sort of employee hired under a state grant and as such had to pass state approval of her qualifications before being hired.

The case arose when Rendell-Baker was fired without notice, a hearing, or stated cause for speaking up against certain actions of the director, Kohn. Following her dismissal five other teachers expressed their disagreement with the director's actions and informed her that they were forming a union at the school. They were fired the following day. The dismissed employees filed the action claiming a violation of their First Amendment rights of free speech under color of state law without due process. The lower court dismissed Rendell-Baker's claims holding that there was not the

[116] Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

requisite action under color of state law quoting *Jackson v. Metropolitan Edison*[117] in support of the ruling saying that the nexus was not close enough to hold the state responsible for the acts of the school. A separate District Court ruled in favor of the other five teachers citing *Burton v. Wilmington Parking Authority*[118] to find that the school served what was primarily a public function and was so entwined with the state regulations that its actions could fairly be attributed to the state.

The Court of Appeals dismissed both claims noting that the regulations imposed on the school by the state did not reach far into the employment relationship and that action was therefore not fairly attributable to the state. [Lugar language]. The Supreme Court consolidated the cases into one and began by establishing that the Fourteenth Amendment that served to protect the due process rights of individuals could only be applied to the state and not to private individuals. The Court compared the school to the nursing homes in *Blum v. Yaretsky*[119] because both received over 90% of their funding from public sources and both were highly regulated. Holding that both were more like private contractors who build roads or buildings for the public the Court dispensed the argument as inadequate. Neither funding nor regulation was enough to create the required nexus. The Court noted that the personnel actions were not required nor even regulated by the state, making the activity involved more important than the relationship.

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[117] Jackson v. Metropolitan Edison, 419 U.S. 345 (1974).

[118] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

[119] Blum v. Yaretsky, 457 U.S. 991 (1982).

The teachers raised the issue of the "public function" served by the school but the Court set that aside because schooling was not "traditionally the exclusive prerogative of the state"[120] that factor did not change the school into a state actor. Finally, the argument was presented that the school was in a "symbiotic relationship" with the state similar to that found in *Burton v. Wilmington Parking Authority*[121]. That decision contained language that limited it to the specific case of a lessor of public property and the Court applied that limitation to find that the school was not in such a relationship with the state. The claims were all dismissed and the school was not found to be a state actor.

Another category of case based on the involvement of the courts by a party to enforce a debt thus infringing on the debtor's right to due process is *Lugar v. Edmondson Oil Co., Inc.*[122] In that case the Court outlined the two-part test requiring first a determination that the State has created some right or privilege that has deprived a complainant of a constitutional right and then that the one who infringed on that right could fairly be said to be a state actor.[123] In this case the complaint was based on the acts of a creditor who obtained a writ of attachment in court to attach property of the debtor and the writ was executed by the County sheriff, effectively preventing the debtor from having access to his equipment used to operate his business. The debtor subsequently obtained a dismissal of the writ as not properly issued and then sued the

[120] Jackson v. Metropolitan Edison, 419 U.S. at 353;Blum v. Yaretsky, 457 U.S. at 1011.

[121] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

[122] Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982).

[123] Citing Flagg Brothers v. Brooks, 436 U.S. 149 (1978).

creditor for taking his property without due process, citing the involvement of the County sheriff in the process to claim that the creditor was a state actor working jointly with state actors making the creditor effectively an agent of the state.

The District Court and Court of Appeals cited *Flagg Brothers v. Brooks*[124] to deny adequate involvement in the deprivation by the state to convert the creditor's acts to state action for which he could be held responsible. The Court cited earlier cases of creditor action under a state statute for attachment or other pre-judgment remedies and noted that they had uniformly resulted in a finding that the creditor was liable as a state actor because it had used state statutes and state enforcement to deprive the debtor of due process rights. That the complainant's due process rights were violated was not questionable in this case. No hearing or opportunity to be heard took place and property was undoubtedly taken. The question moves to the second aspect of the inquiry to determine whether the behavior of the creditor could fairly be attributable to the state. The test for that is found in *Flagg Brothers* from pre-judgment interest cases and is called the "joint action test"[125].

The Court first distinguished the three counts of the complaint with the third being a complaint under state law and therefore pendant to the remaining two counts. The second count alleged abuse of the statutory procedures by the creditor and the Court held that the state could not be held responsible for wrongful use of its procedures. The first count set out a claim that the creditor had followed the state

[124] Flagg Brothers v. Brooks, 436 U.S. 149 (1978)

[125] Lugar v. Edmondson Oil Co., Inc., 457 U.S. at 928, n.6.

statute to attach the debtor's property and that by using the statutory scheme the debtor was deprived of that property without due process. That is, the Court looked to the constitutionality of the statutory scheme to determine if it violated due process requirements when used as designed. The Court cited the case of *United States v. Price*[126] to hold that the creditor had acted jointly with the state in seizing the debtor's property and therefore was subject to the requirements of due process. The misuse of the statute could not be so characterized but by following the statutory scheme the state was implicated in the process.

A nursing home decision to transfer Medicare patients to a lower level of care provided the background for a charge that the high level of regulation via Medicare made decisions of the nursing home those of the state in *Blum v. Yaretsky*[127]. The regulatory scheme required the nursing home operators to determine whether the patients were placed in the appropriate level of care, meaning that the services were necessary as provided. At the point that a decision to transfer patients to a lower level of care is made the operator was required to notify the state of the decision so the proper level of reimbursement could be provided through Medicare. The patients sued claiming a denial of Due Process because they had no notice or opportunity to be heard in the meeting of the committee that made the decision to reduce their level of care. The lower courts found that the patients were entitled to hearings and full due process

[126] United States v. Price, 383 U.S. 787 (1966).

[127] Blum v. Yaretsky, 457 U.S. 991(1982).

holding the transfers to be state action based on the state reduction in reimbursement under Medicaid in response to the decisions to transfer.

The Court observes that this case differs from other state action cases in that it is attempting to make state officials liable for the acts of private entities rather than trying to hold private entities liable as if they were state actors. The Second Circuit Court of Appeals had held that there was a close enough nexus between the private actors and the state that the state was liable for the transfers without due process. The Supreme Court disagreed holding that the conduct had not "received the imprimatur of the State so as to make it 'state' action for the purposes of the Fourteenth Amendment."[128] Despite strict regulation of the nursing homes by the state the Court failed to find the close relationship between the State and the particular acts complained of. The Court goes on to say that the state should not be held liable for private actions unless it "exercised coercive power or has provided such significant encouragement"[129] over the decision.

Some interaction with state officials was held to be necessary in a dispute that pitted non-union workers against union members who had assaulted them[130]. The non-union workers claimed a violation of their freedom of association and the lower courts held the conspiracy involving the unions had been for the purpose of denying the non-union workers of their right not to associate with a union and found a political and

[128] *Id.* at 1003.

[129] *Id.* at 1004.

[130] United Brotherhood v. Scott, 463 U.S. 825 (1983).

economic motivation for the conspiracy in the absence of the usual racial bias. The Court first reached the question of a requirement of state action to assert liability for a deprivation of rights under the First Amendment as extended through the Fourteenth Amendment. A long history of cases holding that the Fourteenth Amendment protects against state action served as the foundation for holding that this case required such a finding also. Without state involvement in any way the conspiracy could not sustain the action and the lower courts were reversed.

Charter organizations are the topic in a case pitting the San Francisco Gay Games against the United States Olympic Committee (USOC).[131] The USOC was granted a statutory charter by Congress and given exclusive use of the term "Olympic" and other words and phrases. When the San Francisco group tried to use the term as part of the title of their own games the USOC sought and obtained an injunction. Among other claims the groups alleged that the enforcement of the exclusive use of the word violated the Fifth Amendment and claimed that the USOC was a state actor subject to that Amendment. The Court held that the grant of a charter and exclusive use of certain words and phrases did not transform the private USOC into a public body. Even some federal funding did not create constitutional limitations on its actions. The public function argument was met with the reminder that such functions must have been the "*exclusive* prerogative"[132] of the government and the USOC did not perform such functions. Nor did the government coerce the USOC to enforce its exclusive use of the

[131] San Francisco Arts & Athletics v. United States Olympic Committee, 483 U.S. 522 (1987).

[132] *Id.* at 544., quoting Rendell-Baker v. Kohn, *supra* at 840.

word in question.[133] As a passive observer the government could not be held responsible for the acts of the USOC. A four-justice dissent argued that the majority erred in the finding that the USOC was not a state actor. The dissenters found the body to serve a public function and had a close enough nexus with the government to make it a state actor.

In what appears at first a twist of the decision in *Polk County v. Dodson*, [134] the Court held that a physician contracted by the state to treat prisoners is a state actor.[135] Distinguishing the adversarial relationship of the public defender to the state in *Polk* from the physician who acted in collaboration with the prison officials to meet their obligation to care for prisoners, the Court held that as a contractor of the state the physician's acts were the acts of the state. The attorney in *Polk* had as a primary responsibility the representation of the client against the state and therefore legal decisions could not be attributed to the state in the same way the doctor's decisions could.

Private insurers terminating medical payments under the Pennsylvania Worker's Compensation statute, a highly-regulated system, were not acting on behalf of the state when they terminated those payments without a hearing.[136] Decisions to

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[133] The Court, in a footnote, clarifies its position on the governmental function of presenting the face of the nation to the world as the USOC, in fact, does and is chartered to do but finds the lack of governmental control over the representation to eliminate the argument that it is a governmental function such as would make the USOC a state actor. *Id*. at 545 n.27.

[134] *Supra* at n.104.

[135] West v. Atkins, 487 U.S. 42 (1988).

[136] American Manufacturers v. Sullivan, 526 U.S. 40 (1999).

terminate benefits were in the discretion of the insurer and the creation of authority and a process to enact those decisions did not implicate the state in the action. Again, the Court looked at the specific behavior complained of rather than an overall scheme of regulation reiterating the holding in *Jackson v. Metropolitan Edison Co.*,[137] that a high level of regulation of private actors is not enough to create state action. Citing the earlier *Blum*[138] case the majority compared the decision to transfer patients to a lower tier of care to the reduction in disputed medical payments by the worker's compensation insurers. The effect of that holding is to require a careful examination into the specific behavior complained of and its nexus to the state.

In a case that moves closer to schools the Court faced a decision by a statewide high school athletic association to penalize a member school for alleged recruiting activities contrary to the association's bylaws.[139] In that case the Tennessee Secondary School Athletic Association (Association) membership included almost all the state's public high schools which made up 84% of the voting members. The major committees operating the Association were required to be school administrators and the public-school members attended to this business during school hours as a part of their jobs. The bylaws of the Association allowed for enforcement and penalties for non-compliance of its member schools. An express agreement existed between the state

[137] Jackson v. Metropolitan Edison, 419 U.S. at 345.

[138] Blum v. Yaretsky, 457 U.S. 991 (1982).

[139] Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288 (2001).

education agency and the Association acknowledging its supervision of athletics in the state's schools.

In a demonstration of the difficulty applying the tests previously applied by the Court the District Court found state action based on the close relationship between the Association and the schools. The Circuit Court of Appeals reversed and analyzed the three tests it found in Supreme Court decisions to hold that there was no state action involved. The Supreme Court reversed that decision in a 5-4 vote recognizing that defining what is "fairly attributable" to the state is not a matter of "rigid simplicity".[140] Although not explicitly stated the Court implied that once again this decision was limited to this particular fact situation showing such extreme involvement by school officials, admittedly state actors, in the decision making process of the Association creating the criterion of "pervasive entwinement to the point of largely overlapping identity"[141] for state action.

Circuit Court cases

Since the last Supreme Court cases decided on the state action doctrine the Circuit Courts of Appeals have applied the various tests in several cases to determine the presence or absence of state action. Although the cases are decided by learned judges they do differ in their application of the doctrine because of the lack of clear lines of distinction in the Supreme Court decisions. They do provide some insight into the

[140] *Id.* at 295.

[141] *Id.* at 303.

possible approaches relating to charter schools. This review will limit itself to those cases particularly well related to charter schools.

The First Circuit held that a "contract school" serving as the sole provider of high school services to public school students in Maine was not serving a public function.[142] In an unusual arrangement the local school district elected not to provide a high school but contracted with a private school to provide those services. A student who alleged that he was unfairly disciplined and not provided procedural due process because he was not provided an opportunity for a hearing before his suspension[143] sued both the private school and the public school district. The lower court granted summary judgement to both the private school and the public school district and the student appealed.

Confirming what has often been stated the court noted that the state action doctrine was "too generally phrased to be self-executing"[144] and lacked "neat consistency."[145] The argument presented by the student was that the private school was performing a public function. The court cited the *San Francisco Arts & Athletics*[146] case to hold that historically schools are not the exclusive function of government and thus, unless clearly a government entity must be held to be private actors. Another factor that seems influential in this holding is that the private school was governed entirely by

[142] Lee v. Katz, 276 F.3d 550 (9th Cir.);Logiodice v. Trustees, 296 F.3d 22 (1st Cir. 2002).

[143] See Goss v. Lopez, 419 U.S. 565 (1975).

[144] Logiodice v. Trustees, supra at fn 142.

[145] *Id.*

[146] San Francisco Arts & Athletics v. United States Olympic Committee, 483 U.S. 522 (1987).

private trustees and had only the contractual arrangement tying it to the public school district.

The court then engages in an interesting section of dictum speculating that there might be a balancing of rights approach that would induce a contrary finding. They note that if the student truly had no other options, the threat of suspension of education was widespread and without any means of redress there could be an argument for state action but deferred to the Supreme Court for the development of any such new tests and further found that the student did have redress beyond this constitutional challenge. The state's obligation to continue to provide schooling for this student did not end with the suspension so the state was not denying him an education.

In a final relevant analysis, the court ruled against the student in his claim against the public school officials for not including due process for suspensions in the contract with the private school. First acknowledging that the public school officials are state actors the court addresses the issue of state inaction as opposed to action. Could the school district officials be liable as state actors for not acting to include the provision? The court noted that in a due process claim inaction has never served as the basis for liability. Equal protection claims are handled differently, however.

In a factual setting that is somewhat parallel to the charter school situation the Secondary sources the Fifth Circuit considered a claim against a private contractor for prison services.[147] In a §1983 action an employee of the private contractor claimed that his termination violated his First and Fourteenth amendment rights, among other

[147] Cornish v. Correctional Services Corp., 402 F.3d 545 (5th Circuit 2005).

claims. The court acknowledged that the infringement of rights was properly set out in the complaint so that could not be argued on this Motion to Dismiss ruling. What did require examination was whether the private contractor for prison services was acting under color of state law – in other words, whether that contractor was a state actor.

Given the Supreme Court's reluctance to establish a broadly applicable test to define state actors the court starts with the process of "identifying the specific conduct of which the plaintiff complains."[148] In this case it is classified as an employment decision and the inquiry becomes whether that behavior is "fairly attributable to the State."[149] In an interesting approach to answering that question the court distinguishes the act of keeping prisoners from the act of terminating an employee saying the former would be state action while the latter is not. The court identifies the keeping of prisoners as a traditional public function while ruling that the termination of employees is not. That holding is certainly one that would impact teachers in charter schools.

Teachers sued their charter school employer in a §1983 action for violation of their First Amendment rights among other claims in a Tenth Circuit arising out of their dismissal resulting from their meeting off school grounds and after hours at various locations to discuss their concerns about the operation of the school.[150] The court ruled on a variety of claims for violation of freedom of speech, prior restraint of speech, freedom of association, due process, and pendant state claims. Despite the requirement

[148] American Manufacturers v. Sullivan, 526 U.S. 40 (1999).

[149] Cornish v. Correctional Services Corp., 402 F.3d. 545 (5th Cir. 2005).

[150] Brammer-Hoelter v. Twin Peaks Charter Academy, 492 F.3d 1192 (10th Cir. 2007).

under §1983 that the actions must be under color of state law there is no discussion of that requirement and the status of the teachers as government employees is taken as a given in the decision of the court.

Contrast that decision to a Ninth Circuit ruling in a case involving the termination of a teacher from an Arizona charter school.[151] The charter was run by a private, non-profit operator and that organization was the employer of the teacher. Arizona law provided that charter school teachers could participate in the state teacher retirement system and the state retirement laws provided that those benefits are available only to public employees, defining charter schools specifically as political subdivisions of the state.[152] The charter legislation required that personnel policies be filed with the chartering district and imposed several other regulations on charter schools. The Attorney General of Arizona had even ruled that charter schools were subject to the Open Meetings Act as public bodies.[153] Charters are exempted from teacher certification requirements and teacher tenure and dismissal procedures.

The teacher was dismissed after allegations by a student of some inappropriate contact but the evidence of that was presented to the governing board without any opportunity for the teacher or a representative of the teacher to participate. The teacher's demand for a hearing to clear his name was ignored by the charter school. The teacher filed suit claiming that the charter had deprived him of his liberty interest in

[151] Caviness v. Horizon Community Learning Center, 590 F.3d 806 (9th Cir. 2010).

[152] See Ariz. Rev. Stat. §§15-181 through 189.

[153] See Ariz. Op. Atty. Gen. No. I95-10, (1995).

preventing him from gaining other employment and his First Amendment right of free association by barring him from attending track meets in which his former students participated. As a §1983 action he also plead that the above was done by the charter school under color of state law. His case was dismissed by the District Court rejecting the claim that the charter was a state actor in its termination of his employment based solely on the argued grounds that the school was a public function. Because it was decided on a motion to dismiss there was no evidence taken or considered and there was nothing plead about any entwinement, encouragement, coercion or other state involvement in the termination.

The court began from the point that even though the state had defined the charter school as a public entity and treated it as such it must look at the operator as a private corporation and find state action as it would for any other private entity. There is no citation of authority for taking that stance offered by the court. Thus, the decision progresses through the standard state action analysis. That analysis begins by drawing parallels between the present case and an earlier case decided by the same court in which a contractor operating a correctional facility was found not to be a state actor in its role as an employer even though it might be for other actions.[154] That case acknowledged that even if the private prison operator were a state actor for operating a prison it was not a state actor as an employer. The court rejected the teacher's claim for having no allegation that the state participated directly in the personnel decisions and actions of the charter school operator. The Second Circuit followed a similar line of

[154] George v. Pacific-CSC Work Furlough, 91 F.3d 1227 (9th Cir. 1996).

reasoning in a claim against a private contractor for ambulance services to a municipality limiting the consideration of state action solely to the employment decision and not to any overall examination of the relationship.[155] The Third Circuit held that there was no state action in the removal of certain commercial literature from a toll road service plaza by the private contractor with the state to operate that plaza because the state did not participate in the removal or the day-to-day operations of the plaza.[156]

Secondary sources

There is a significant body of legal literature regarding the state action doctrine. A small portion of that literature also addresses some aspect of charter schools in light of that legal doctrine. This section of the literature review will look at the existing legal literature state action, including the manner in which it relates to charter schools, to highlight what has been done and what is left to analyze on the research questions posed in this study.

The literature addressing the state action doctrine generally is extensive and reflects the confusion over the various decisions of the Supreme Court on the issue of public versus private action. Chemerinsky divides state action decisions into two broad categories: public function and entanglement.[157] Nearly all writers agree on the public function category and find it very limited following the additional requirement that the

[155] Grogan v. Blooming Grove Volunteer Ambulance Corps, 768 F.3d 259 (2d Cir. 2014).

[156] P.R.B.A. Corp. v. HMS Host Toll Roads, 808 F.3d 221 (3d Cir. 2015).

[157] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (Aspen Publishers Third Edition ed 2006).

function be an exclusively governmental function.[158] Nowak and Rotunda[159] add another category involving government coercion or encouragement. One author has gone so far as to suggest that the entire concept needs to be scrapped in favor of a simpler analysis[160] as it relates to charter schools. Martin completed a lengthy study examining the challenges to the existence of charter schools in both federal and state courts but didn't address the status of charters in those courts beyond their right to exist.[161]

Isolation of a single case for analysis does not provide a broad understanding of the trends and tendencies of the Court over a long history of development of a particular legal doctrine. Also, looking at winners versus losers fails to draw nuance from decisions that have shaped a doctrine. Facts require a detailed analysis to draw from them underlying reasons for the Court to decide a case and limit it to those facts.

Other scholars have more directly addressed the state action question but not exhaustively. A study early in the charter school era briefly analyzed the state actor status of charter schools and the public function test but came to no conclusion about how that might result in a finding of state action in the charter school realm. No distinction is made in that article as to the possible difference between student rights

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[158] Jackson v. Metropolitan Edison, 419 U.S. at 544;Flagg Brothers v. Brooks, 436 U.S. 149 (1978);Rendell-Baker v. Kohn, 457 U.S. 830 (1982);Blum v. Yaretsky, 457 U.S. 991 (1982);San Francisco Arts & Athletics v. United States Olympic Committee, 483 U.S. 522 (1987).

[159] JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW (Thomson/West 8th ed 2010);JASON LANCE WREN, *Note: Charter Schools: Public or Private? An Application of the Fourteenth Amendment's State Action Doctrine to these Innovative Schools*, 19 REV. LITIG. 135(2000).

[160] LOTEMPIO, WAKE FOREST LAW REVIEW, (2012).

[161] MARTIN, PENN ST. L. REV., (2004).

and employee rights in the state action context.[162] Another early note focused on Fourteenth Amendment challenges to the existence of charter schools addressed a single case and came to no conclusion about the question of state action for charters.[163]

The first study directly addressing the issue of state action for charter schools is one that carefully examines the history of the doctrine and the characteristics of charter schools (with a focus on Texas school law) but fails to consider that there might be a difference in how student claims under the Fourteenth Amendment might differ from those of employees seeking to enforce rights. Central to this study is the premise that those two situations under the sort of analysis applied by the Supreme Court may very well move in different legal directions.[164]

There is a line of scholarship that emphasizes the limitations inherent to the constitutional structure of identifying rights that are declared to be in existence for all and barring the government from interfering with those rights. Bhagwat[165] argues that because the rights stated in the Bill of Rights are stated only to be free from governmental interference they are not actually individual rights assured by the Constitution. They are subject to being impaired or ignored by private action and thus are not accurately described as rights. Even the oft cited right of free speech is not protected against private invasion. A private employer may fire at will an employee

[162] TUREKIAN, CONNECTICUT LAW REVIEW, (1997).

[163] HUFFMAN, NEW YORK UNIVERSITY LAW REVIEW, (1998).

[164] WREN, REV. LITIG., (2000).

[165] ASHUTOSH BHAGWAT, THE MYTH OF RIGHTS: THE PURPOSES AND LIMITS OF CONSTITUTIONAL RIGHTS (Oxford University Press 2010).

based on disagreement with the words spoken by that employee. Government employees do not enjoy unfettered freedom of speech but there is some protection for certain types of speech not enjoyed by privately employed individuals.[166] The basic mistrust of government reflected in this approach to the Constitution is one part of the present day dismantling of public institutions, including schools, into private control. Along with that change, rights are left back to wither for lack of any basis for enforcement.

Perhaps the most quoted characterization of the state action doctrine in the literature is that of Professor Black saying that it "is a conceptual disaster area"[167] citing "its multiple vaguenesses and ambiguities"[168] and calling it "a map whose every country is marked *incognita*."[169] His analysis in 1967 even foreshadowed the retraction of the

[166] See Pickering v. Board of Education, 391 U.S.

[167] BLACK, HARVARD LAW REVIEW, 95(1967). For other appearances of this characterization see JESSE H. CHOPER, *Thoughts on state action: the "government function" and "power theory" approaches*, 1979 WASHINGTON UNIVERSITY LAW QUARTERLY 757(1979);HENRY J. FRIENDLY, *The Public-Private Penumbra – Fourteen Years Later*, 180 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1289(1982);MICHAEL J. PHILLIPS, *The Inevitable Incoherence of Modern State Action Doctrine*, 28 ST. LOUIS UNIVERSITY LAW JOURNAL 683(1984);RONNA GREFF SCHNEIDER, *State Action - Making Sense Out of Chaos - An Historical Approach*, 37 UNIVERSITY OF FLORIDA LAW REVIEW 737(1985);STEVEN R. RATNER, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 THE YALE LAW JOURNAL 443(2001);GILLIAN E. METZGER, *Privatization as Delegation*, 103 COLUMBIA LAW REVIEW 1367(2003);PELLER & TUSHNET, GEORGETOWN LAW JOURNAL, (2004);WILSON R. HUHN, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA LAW REVIEW 1379(2006);PAUL IMPERATORE, *When Cheerleading Becomes State Action*, 102 THE GEORGETOWN LAW JOURNAL ONLINE 7(2013);BROWN, MARYLAND LAW REVIEW, (2015);JAMES M. OLESKE, JR., *"State Inaction," Equal Protection, and Religious Resistance to LGBT Rights*, 87 COLORADO LAW REVIEW 1(2016).

[168] BLACK, HARVARD LAW REVIEW, 95(1967).

[169] *Id.*

doctrine he asserts was extended to address racial discrimination far more broadly than it could be sustained in other cases.

A serious consideration in the matter of the interpretation of Court decisions is found in the division of perspectives on the law between what Tushnet[170] calls progressive constitutionalism and what defaults to conservative constitutionalism. Often the divide is labeled in terms of Justices who are liberal versus those who are conservative. The current balance between the two on the Court has created much tension over certain major issues that will come before it and the questions surrounding charter schools are a part of that tension. The late Justice Scalia was the most eloquent, and probably the most vocal, advocate for the conservative perspective asserting that the Court should "ascertain an objective law"[171] without consideration of societal pressures. Those labeled as progressive constitutionalists or liberals[172] would interpret the Constitution as a developing document that reaches well beyond the direct language and is not subject to a single correct interpretation. Those divides play an important role in predicting how the Court may handle a set of facts before it.

Many scholars have attempted to define categories into which the state action decisions might fit. The Court itself has used several labels to match the arguments in any given case leading to a long list of terms describing the basis for a given decision. Those categories can serve to organize decisions but because the Court has limited the

[170] MARK TUSHNET, *Progressive Constitutionalism: What is "it"?*, 72 OHIO STATE LAW JOURNAL 1073(2011).

[171] Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[172] Both labels are highly contested and ill-defined generally.

effect of many decisions to the unique facts of that case and repeated that a close study of the facts is required in each case there are limits to the usefulness of categories. Still, there are some useful perspectives in what has been published.

Professor Black's report of the 1966 Supreme Court term identifies state action as "the single most important problem in American law"[173] and his famous "conceptual disaster area"[174] characterization so often quoted. He expresses his belief that the state action doctrine needs to be broadly interpreted because it is primarily a remedy to racial discrimination and disadvantage. He discusses the position that state inaction is often a source of damage to rights, specifically equal protection, and should be recognized as state action in violation of rights.

Long discussion of *Reitman v. Mulkey*[175] followed by a discussion of how uncertain the decisions leave the field. He argues that the uncertainty protects discriminators. He cites current scholarship on the doctrine to be summary in nature and non-controversial. He points out that a few writers are calling for eliminating the state action doctrine all together. State neutrality is impossible and whether by action or inaction of the state one race is discriminated against or disadvantaged there is a denial of equal protection and that should end the inquiry.

He really argues that the state action doctrine has been so narrowly interpreted as to vitiate the equal protection clause. He accepts that private decisions in private

[173] BLACK, HARVARD LAW REVIEW, *supra* n.1.

[174] *Id.* at 95.

[175] Reitman v. Mulkey, 387 U.S. 369 (1967).

places are not within the ambit of the fourteenth amendment but no analysis should be needed to determine some mystical amount of state involvement elsewhere. The Court has focused on the "significance" of the state involvement and that has led to the mess that the field is in.

Choper expressed his thoughts on the doctrine in mere observations after stating that he would not attempt any sort of comprehensive solution to the issue. The Civil Rights Acts of 1866 and 1964 largely addressed private racial discrimination issues and the latter removed them from most of the state action cases.

Glennon and Nowak[176] bemoan the deconstruction of the state action doctrine by the Court in 1975 cases that pushed most racial claims onto the Thirteenth Amendment that has no state action requirement. That left other claims to survive a state action analysis under the Fourteenth Amendment, a series of cases that has been already described as lacking a consistency. In fact, they claim that the Court had brought to an "end any possibility of a meaningful role for formal state action tests."[177] Undaunted, they proceed with an analysis of the cases first dividing them into cases of "official government action"[178] and those not involving such action. In the first instance, there is little to decide other than whether the official action is allowable. They argue that in the second instance there still remains only the single question of whether the action is proscribed by the Fourteenth Amendment. That is, the determination is not

[176] ROBERT J. GLENNON, JR. & JOHN E. NOWAK, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 THE SUPREME COURT REVIEW 221(1976).

[177] Id. at 224.

[178] Id. at 228.

"whether a state has 'acted,' but whether a state has 'deprived' someone of a guaranteed right."[179] A state that has deprived one of a right by inaction in the face of a private act is therefore as guilty of state action as a state that has legislated that deprivation. The determination boils down to a balancing of the interests of the private actor and the private person who has suffered the deprivation of a right by deciding whether the value of the right for which protection is sought exceeds the value of the complained of act or practice. If it does then the Fourteenth Amendment bars the complained of act or practice.

The balance test is evident in what are generally labelled as the public function cases. In those cases, the property rights of one individual are weighed against the First Amendment rights of another. Where the limitation of property rights is reasonably found to be a lesser evil than the limitation of First Amendment rights the latter prevailed. As in the shopping mall case decided in favor of the property rights the court balanced the ability of the individuals seeking to pass out pamphlets just outside the shopping mall on public streets and sidewalks to be an adequate protection of their First Amendment rights thus allowing the property rights to prevail.

Nowak and Rotunda[180] approach the factors used by the Court to find state action by first segregating out the public function analysis as *sui generis*. They cite the various instances of the use of that factor from the original white primary cases [Nixon v. Condon, Grovey, Smith v. Allwright and Terry v. Adams] to the company town and

[179] Id. at 229.

[180] NOWAK & ROTUNDA. 2010.

city parks of *Marsh* and *Evans*, to the more contemporary cases involving shopping centers and eventually public utilities and jury selection cases.

Direct state involvement in ordering or encouraging behaviors is the next factor examined by Nowak and Rotunda. This category appeared often in the Civil Rights era of the mid-twentieth century involving remaining laws or customs of segregation that influenced private parties to discriminate illegally against African-American individuals. It also encompasses enforcement of discriminatory contractual arrangements in state courts as in *Shelly v. Kraemer*.[181] Policemen who killed a prisoner while in custody were found to be state actors despite the illegality of their actions because they were given power as policemen by the state.[182] This factor also covers the creditor cases in which various collection efforts resulted in some legal enforcement of or enablement of a property right violation.[183]

The question of entanglement, entwinement and symbiotic relationships fall within another category according to Nowak and Rotunda. This category includes issues of government granted licenses and preferences, heavy involvement in the form of support, regulation, participation by government employees in an organization and even lack of government action when it is alleged the government should act. Benefits received by the private parties are examined as well as benefits to the public as connections sufficient to find state action. School desegregation cases fall within this

[181] Shelley v. Kraemer, 334 U.S.

[182] Screws v. United States, 325 U.S. 91 (1945).

[183] Flagg Brothers v. Brooks, 436 U.S;Lugar v. Edmondson Oil Co., Inc., 457 U.S.

category based on the Court's consistent reliance on *de jure* segregation and refusal to accept as state action *de facto* segregation. That line of cases culminated in the Kansas City, Missouri, decision refusing to allow a remedy that reached beyond the boundaries of the Kansas City school district because the outlying districts had no history of *de jure* segregation.[184]

Tribe[185] looks differently at the question of how the Court decides the cases and sees that the chaos that is the accumulation of holdings may define a negative order or what he calls an "'anti-doctrine'"[186] He suggests that a more rational approach to the analysis of state action decisions and the issues raised in them would be to start with the right being infringed. He argues that a well-defined concept of liberty that all citizens should be expected to enjoy would define the limits of governmental action whether affirmatively undertaken or accomplished through inaction in the face of private infringement. He analyzes the existing cases and for many, his approach seems to hold true despite not receiving the Court's recognition. He asserts that the confusion in the doctrine is that the Court has not consistently followed a particular analysis and moves from his liberty concept to analysis of identity of the actor as government or not and that leaves the field inconsistently decided.

Quite a different approach to the cases is developed by Choper[187] in his perspective of the doctrine as a distribution of power rather than a protector of liberty.

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[184] Missouri v. Jenkins, 515 U.S. 70 (1995).

[185] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (The Foundation Press 1978).

[186] *Id.* at 1149.

[187] CHOPER, WASHINGTON UNIVERSITY LAW QUARTERLY, (1979).

He suggests that the doctrine merely limits the power of the national government as against the states. The action of the alleged infringer of rights is not examined for a liberty or right to act in the fashion complained of but the question is the power of the national government to exert power over the state or the individual involved. Writing in the era after most of the racial discrimination cases had been resolved by statutory prohibition even in the states the question of state action no longer was entirely about resolving the lingering effects of slavery. He acknowledges the growing position that all action amounts to state action in situations where the state has power to act – whether it does or does not. That is, state courts or officials are generally able to limit acts of their citizens and their failure to limit one infringing another's rights amounts to state action subjecting the state to national authority.

What derives from that view of state action is a disconnect between the equal protection analysis and the other constitutional rights of free speech and religion, and procedural due process. Equal protection jurisprudence has developed a requirement that the actions infringing the rights must be committed with a discriminatory motive and if the state is to be involved, the state's action has to be so motivated. An independent judge, admittedly a state actor, by merely allowing an attorney in a case to strike jurors with a discriminatory impetus could not be found to violate equal protection. Thus, the inquiry needs to focus on the actual actor rather than the acquiescing state to find a need for a remedy even if there is no discriminatory motive on the part of the state. He supports the Glennon and Nowak position on this.

Many writers divide the development of the doctrine into eras of the Court. Just as Nowak and Rotunda drew the 1980s and 1990s as a line of demarcation in the

development of the doctrine, most writers have set apart the mid twentieth century as a time of expansion of the doctrine.[188] The expansion seemed to end with the cases dealing with shopping centers as the best illustration of the departure from freer findings of state action.[189]

Just as there are writers attempting to draw identifiable categories of tests for state action from the confusion of decisions of the Court, there are many who call for greater clarity from the Court. After listing the seven tests[190] appearing in the opinions of the Court one writer focuses on the confusion created for Circuit Courts to decide state action cases and calls for a clarifying decision from the Supreme Court to "declutter" the doctrine.[191] Another writer suggests that with increasing privatization a new approach is called for that looks at delegation of government power and adequacy of remedies for constitutional infringements.[192]

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[188] BLACK, HARVARD LAW REVIEW, (1967);SCHNEIDER, UNIVERSITY OF FLORIDA LAW REVIEW, (1985);NOWAK & ROTUNDA. 2010. PHILLIPS, ST. LOUIS UNIVERSITY LAW JOURNAL, (1984);MICHAEL KLARMAN, *An Interpretive History of Modern Equal Protection*, 90 MICHIGAN LAW REVIEW 213(1991).

[189] PHILLIPS, ST. LOUIS UNIVERSITY LAW JOURNAL, (1984).

[190] Public Function, State Compulsion, Nexus, State Agency, Entwinement, Symbiotic Relationship, and Joint Participation.

[191] JULIE K. BROWN, *Less Is More: Decluttering the State Action Doctrine*, 73 MISSOURI LAW REVIEW 561(2008).

[192] METZGER, COLUMBIA LAW REVIEW, (2003).

Chapter 3

Methodology

Traditional legal research is not classified as qualitative or quantitative but is an interpretive process that systematically investigates legal authorities and commentaries.[193] The process requires finding applicable law and commentary and making meaning from the combined material that informs the question. Lawyers research to understand the law while education researchers more often examine the wider consequences to influence policy and practice and raise issues that legal decisions may create for the future.[194] This study is a blend of the two as the questions serve to understand the law and also to inform policymakers and influencers by building understanding of the topic.

This study is based on a legal principle in constitutional law and is thus a study of the decisions of the Supreme Court of the United States that developed that principle. Some Circuit Courts of Appeals have also handed down opinions since the last Supreme Court case and those can be informative even if they are not precedential when the Court takes a case under consideration. Law review articles and hornbooks provide additional understanding and perspectives to gain a better understanding of the possible direction of the Court when this issue arrives before it. This study will also examine something of the larger political context surrounding the Court to understand how the law changes over time.

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[193] CHARLES RUSSO, *Legal Research: The "Traditional" Method, in* RESEARCH METHODS FOR STUDYING LEGAL ISSUES IN EDUCATION (Steve Permuth & Ralph D. Mawdsley eds., 2006).

[194] *Id.* at 6-7.

To study the law one must first understand how it is shaped and created in the legal system of the United States. The starting point of law in the United States is the Constitution – the foundational document upon which the nation was built. All other law and action must not violate the principles in the Constitution and no court or legislature can ignore its mandates. Likewise, the power of the federal government is limited to the powers and authority granted to it in the Constitution.[195] The Supreme Court is tasked with the responsibility to interpret the Constitution to determine if laws or behavior have fallen outside of its principles and in doing so its decisions essentially create of the body of constitutional law.

To conduct legal research is to find the sources of that law and the interpretation of those sources to see how those fit together to predict a result in future disputes. When researching questions of constitutional law such as the state action doctrine for this study it is best to start with the Constitution and then follow the development of the doctrine through time to the present. Because courts are bound by the principle of *stare decisis*[196] to make decisions based on prior decisions of the same court or higher courts there is a progression of decisions that shed light on an issue that has been litigated in several contexts under several different fact situations. The declared

[195] The Tenth Amendment states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." amend. X.

[196] The principle of *stare decisis* means that given the same fact situation the court is bound to make the same decision. Of course, seldom are two identical fact situations before the court separately so new fact situations may logically lead to a different result if warranted but the court must provide some rationale for the new direction.

principle of *stare decisis* does not mean that the Court always follows a syllogistic pathway to a decision. When the decisions of the Court are not clear with definitions and do not create concrete tests, there is room for interpretation in each new case. Because the state action doctrine has been built on terms that lack clear definition it is important to follow the path of decisions through time to understand its development.

Under the principle of *stare decisis* the same fact situation presented in a dispute should yield the same decision. If the Court finds a way to factually distinguish a new case it may elect to proceed in a new direction and nearly every case can be in some way distinguished from a previous one. The Court is free to create a well-defined test that applies broadly across all cases in some way similar but it is also free to make the holding dependent on the unique set of facts of a case before it limiting the precedential value of that holding. When tests are applied, but limited to a given fact situation it becomes more difficult to rely on that principle in future cases with even slightly different facts. As will be seen in this study the state action doctrine has generated several loosely defined tests with limited application and discerning a thread running through the cases is less than obvious. Professor Black opines that "the whole thing has the flavor of a torchless search for a way out of a damp echoing cave."[197]

Not all scholars or even Justices believe *stare decisis* is the primary force behind decisions made by the Court. The late Justice Scalia criticized the majority in his dissent in *Planned Parenthood v. Casey* saying, "The Court's reliance upon *stare decisis* can best

[197] BLACK, HARVARD LAW REVIEW, 95(1967).

be described as contrived."[198] He decried the Court's consideration of what he believed to be political pressure on the topic of abortion in that decision. The majority included in its opinion its belief that to reverse the longstanding decision in *Roe v. Wade*[199] would place the Court in a bad public light and serve to make it and illegitimate institution. Scalia retorts that both sides of the argument have been subjected to "political pressure"[200] on the topic of abortion. Without examining the surrounding pressures and positions one cannot expect *stare decisis* to carry the day in all cases.

By considering the various influences and perspectives over the course of time an arc of decisions can be drawn from what seem to be inconsistent decisions. No single case or decision or holding can be relied upon individually to predict the next steps the Court will take. The law is a whole and knit together sometimes precariously but always with ties that make it into a conjoined whole. It is prudent to explain here that there are times when precedent is abandoned and a totally new direction is taken by the Court. Such was the case when the holding of *Plessy v. Ferguson*[201] was abandoned and the *Brown v. Board of Education*[202] decision was reached just over 50 years ago. That is not subtly accomplished, however, and with a single exception[203] there is no direct refutation of previous law in the development of the state action doctrine.

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[198] Planned Parenthood v. Casey, 505 U.S. at 993.

[199] Roe v. Wade, 410 U.S. 113 (1973).

[200] Planned Parenthood v. Casey, 505 U.S. at 999.

[201] Plessy v. Ferguson, 163 U.S. at 537.

[202] Brown v. Board of Education, 347 U.S. 483.

[203] See, *infra*, the discussion of Hudgens v. National Labor Relations Board, 424 U.S. 507 (1976).

Sources of legal research are divided into primary sources, secondary sources, and publications that assist in locating those sources. Primary sources fall within a hierarchy that determines which law will control in certain circumstances. At the top of that hierarchy is the U.S. Constitution. It is the supreme law of the land for those matters covered by its terms. It is a self-limiting document that acknowledges that all matters not covered by it are left to the states or other bodies to establish the law. Beneath the Constitution there is legislation of all sorts, federal, state or local, that spells out issues of concern for those levels of government and creates the system of understandings for criminal behavior, commercial relationships, marital and family matters and property issues among many other topics. Those statutes are primary sources for the issues they cover but remain subject to the limits of the Constitution where it applies. Regulatory mandates are creatures of statutes and control how statutes are implemented in appropriate ways.

Running parallel to the statutory sources there are courts interpreting statutes and the Constitution serving as additional primary sources. When a case or controversy is put before the court a decision is made. That decision may be appealed to a higher court until it reaches the Supreme Court of the United States (in an appropriate case). Each court issues some sort of written decision and in the appellate courts those are accompanied by an opinion explaining the court's thinking in coming to that decision. Those opinions are also primary sources since they have the power of law and set how a statute or constitutional provision must be interpreted into the future unless overruled by a higher court or reversed by that same court.

Secondary sources include the many hornbooks, articles, notes and

commentaries on the law by scholars and other writers attempting to explain, influence, denounce, or advocate for a change in the law. Some secondary sources are directed to specific audiences to explain the law in an area of practice that concerns that audience. Others are part of the scholarly discussion of the law and how it can best be interpreted or decided. The range of topics is significant but only a small portion of the literature has the effect of changing how courts look at the law and decide cases. These sources are an excellent way to understand how other scholars and practitioners structure their analysis of what the courts have said in their opinions and thus can shed additional light on a given topic.

This study is mainly focused on the primary sources of the U.S. Constitution and the decisions of the Supreme Court of the United States because the requirement of state action is directly drawn from those two sources. No other court and certainly no legislative body can alter the course of the state action doctrine. Secondary sources specifically addressing the state action doctrine including how it relates to charter schools were also helpful in developing an understanding of the doctrine but the conclusions of this study must be drawn from those primary sources and must be apparent within them in order to be valid.

To locate opinions of the Court is accomplished in the age of computers and online decisions by searching a database of opinions using search terms and pursuing those cases that are most relevant. This study used the two widely accepted resources

of Lexis-Nexis Academic File[204] and HeinOnline[205] to conduct a search for terms like "charter school" and "state action" to identify cases that addressed the issues relevant to the questions. Once an initial group of cases is established legal research offers two other major avenues to find additional sources of investigation.

In each court opinion the Court cites other decisions it has made or those of other courts it finds instructive on a particular issue or that were cited in briefs or arguments of the parties. Those citations, found relevant by the Court, are the next line of inquiry to find additional decisions that will shed light on the issues. Another source of related cases is found by using the resource commonly referred to as Shepherd's that is a listing of all court opinions that cite a particular case and whether the court agreed with it, distinguished it, upheld it, reversed it or disagreed with it. That resource is found within the previously named electronic services. Those cases are consulted to find additional legal reasoning related to the initial search cases. Not all cases thus discovered are appropriate for use in the study so the next stage is to eliminate those only peripherally related or those with the searched terms but for one reason or another do not actually address those issues directly. Likewise, dissenting opinions or concurring opinions that lack a majority support on the Court cannot be considered precedential for later cases. The thoughts of a Justice in dissent may be considered to understand a point made by the majority and, on occasion, point the way for a later decision by the Court in a changing environment.

[204] http://www.LEXIS.com

[205] http://www.heinonline.org

In addition to cases the body of legal literature published by scholars providing their interpretation of specific areas of the law can also lead to additional sources. Some are books and others are legal journals and other scholarly publications. Both online sources also include those articles so the same search process yields literature in which scholars have analyzed the legal principles at issue. They are not binding on any court nor are they law but they can be instructive in interpreting the issues and providing additional perspectives on the Court's decision-making process on a given topic or case.

Gathering the cases and scholarly literature provides the data upon which an analysis will be made and that analysis is a specialized sort of interpretive exercise seeking to understand and perhaps predict the course of the legal principle in question. This study seeks to answer questions that are not yet answered directly by the Supreme Court and the existing case law does not always follow a set of persistent rules or tests that yield predictable results. A study of this sort requires the construction of meaning from the cases that help understand the direction the Court is taking and how it might decide future cases more nearly on point with the research questions. A study of the changing decisions on state action over time will serve as the method of answering the legal questions at issue in this study.

What is required to make meaning in such cases is to find the threads that run throughout a series of related cases and to locate the similarities as well as the disparities. Fact situations and circumstances that have yielded different results must be closely read to link them together into a whole to understand how the Court might proceed. It is important to factor into the analysis is the makeup of the Court at a given time. Different Justices approach the Constitution from different perspectives and as the

Court changes personnel those different perspectives move from a majority to a minority causing shifts in the general direction of the Court. By studying those shifts over time an arc of decisions can be detected that leads to a deeper understanding of the nature of the state action doctrine today.

Chapter 4

The Arc of State Action in the Supreme Court

Theoretical underpinning of this analysis

The traditional legal analysis for this study will be from the legal realist perspective. To define that requires a comparison to two other categories of analysis. The formalist viewpoint assumes that there is a "correct" decision that is made apparent by the review and understanding of existing case law. It begins with the expectation that a group of judges, looking at the same facts, will consult the same cases and eventually come to the same conclusion. Of course, were that truly the case there would be no split decisions on the Supreme Court so that perspective has been quite effectively criticized. The other end of the scale is the radical skeptical analysis and it begins from the position that there is support for any decision in any fact situation if one puts together the case argument that supports that position. The radical skeptical analysis assumes that judges decide the outcome they want and then construct the argument based on prior opinions to support their preferred decision. The legal realist perspective falls between those two polar opposites.[206]

Legal realism accepts the insertion of political positions by judges making decisions but assumes some constraint inherent in prior opinions. There is a narrower range of available outcomes because of the existing law that has created those limits. The realist will not simply choose a result but will look for support for the political

[206] For a comprehensive discussion of the classification of judicial approaches see, ROY L. BROOKS, STRUCTURES OF JUDICIAL DECISION MAKING FROM LEGAL FORMALISM TO CRITICAL THEORY (Carolina Academic Press 2nd. Ed. 2005).

result that best fits with the preferred result. Recent discussions of judicial decision-making have widely accepted that the judiciary are not able to eliminate their pre-existing political biases and will in some way include those in the selection of a result and a line of cases to support that result. For that reason, this analysis will follow that line of thinking to trace the state action doctrine to understand existing jurisprudence on the issue. In the next chapter that jurisprudence will be applied to the relationship of charter schools to teachers under the Fourteenth Amendment.

Because the Court changes over time the political and philosophical perspective of the Court changes leading to pathways for various areas of the law to wind and turn rather than follow a straight path as might be suggested by *stare decisis* or the formalist approach. Despite the argument by formalists that the law remains constant following a syllogistic path of interpretation it is the thesis of this study that the path changes with both political influence and personal preferences and philosophies of those who serve on the Court. That thesis is supported by distinguished jurists including Judge Richard Posner in his work explaining judicial decision-making.[207] The history of Court decisions in state action cases demonstrates quite a winding pathway and this study will follow that changing body of law to understand where it is likely to take charter schools in their relationship to teachers.

The hypothesis of this study is that the arc of decisions on state action by the Court leads to the conclusion that charter school personnel decisions where the charter school employer is not the state or school district will likely be held not to be state

[207] RICHARD A. POSNER, HOW JUDGES THINK (Harvard University Press 2008).

action and subject to constitutional scrutiny. As a cautionary addendum to that hypothesis it must be noted that at the time of the writing of this study the Court is incomplete with eight sitting Justices. Those on the Court are evenly divided from a philosophical and political perspective so the next appointee could shift the Court to a majority with a different perspective than it has demonstrated recently and that certainly could shift the way charter schools are viewed as state actors in their relationships with teachers and other employees but a major shift seems quite unlikely given the recent election results.

The analysis will trace the precedents through from the passage of the Fourteenth Amendment to the present day to examine how the Court has changed its analysis of the state action issue. Most previous studies have approached this analysis using the so-called categories for the presence of state action labeled by the Court in its decisions and seemingly exhaustively listed in more than one decision.[208] The difficulty with the category analysis is that those categories are inconsistent, at best, and in most cases after their initial application are distinguished to reach a decision that state action does not exist later cases.

The Arc of the State Action Doctrine

The arc of the decisions of the Supreme Court on state action issues follows a pattern established largely by the politically important issues of the day and the directions demanded by the dominant political powers. Although there is much written

[208] Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288 (2001);Rendell-Baker v. Kohn, 457 U.S. 830 (1982);Blum v. Yaretsky, 457 U.S. 991 (1982);American Manufacturers v. Sullivan, 526 U.S.40 (1999).

about the doctrine trying to develop a coherent line of decisions from the various labels and categories cited by the Court[209] there is much to support the position that the Court reacts to political context and political demands to maintain the legitimacy of the Court and reinforce the position of the President who has appointed the Justices. A majority of the Court at any given time serves upon nomination by a President no longer in office and for that reason the political leaning of the Court often lags behind the current leadership in the White House and on occasion that has moved a Justice well outside what was expected at the time of appointment. One need look no further than the appointment of Earl Warren to see a Justice who did not meet the expectations of President Eisenhower who appointed him.[210] It is certainly not a hard and fast rule that the Justices position themselves in accord with the President who appoints them but the exceptions to that are certainly in the minority.

No less an authority on judicial decision making than Judge Richard Posner has asserted that especially in constitutional cases the Supreme Court is a political court making decisions based on the political pressure of the day.[211] Although skilled at citing

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[209] DAPHNE BARAK-EREZ, *A State Action Doctrine for and Age of Privatization*, 45 SYRACUSE LAW REVIEW 1169(1994);BROWN, MARYLAND LAW REVIEW, (2015);BROWN, MISSOURI LAW REVIEW, (2008);WILLIAM M. BURKE & DAVID J. REBER, *State Action, Congressional Power and Creditor's Rights: An Essay on the Fourteenth Amendment*, 46 SOUTHERN CALIFORNIA LAW REVIEW 1003(1973);HULDEN, COLUMBIA LAW REVIEW, (2011);HENRY C. STRICKLAND, *The State Action Doctrine and the Rehnquist Court*, 18 HASTINGS CONSTITUTIONAL LAW QUARTERLY 587(1991);RORY B. WEINER, *Constitutional Law - State Action - Yeo v. Town of Lexington: High School Student Editors as State Actors*, 21 WESTERN NEW ENGLAND LAW REVIEW 183(1999);MICHAEL L. WELLS, *Identifying State Actors in Constitutional Litigation: Reviving the Role of Substantive Context*, 26 CARDOZO LAW REVIEW 99(2004);NOWAK & ROTUNDA. 2010.

[210] HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 200 (Rowman & Littlefield 5th ed 2008).

[211] POSNER. 2008.

various authorities in support of any given decision and distinguishing others, the Court has followed a path of political decisions that have shaped the law into the rather convoluted "disaster area"[212] famously described by Professor Black prior to the past 50 years of additional twists and turns to the jurisprudence around state action. Those years have not made the pathway any clearer but it has shed some light on the particular factors that seem to have driven the Court to hold for and against the litigants seeking to apply or deny the state action applicability in their own cases.

This analysis will begin with the period from the passage of the Amendment through the first 60 years of state action decisions. During this period, what seems apparently state action was tested and the Court dealt also with the balancing of rights of individuals vis-à-vis the state. The second period of analysis will consist of the next nearly 50 years in a period of racial tension and civil rights protests raising the political profile of those issues to the fore moving the Court to address those issue through expansion of the definition of state action doctrine. The following 30 years began a retraction of much of what the Court had accomplished previously based on the presidential campaign against "judicial activism" that rallied Richard Nixon into office changing the face of the Court and the path of its decisions to match that political position. The modern Court has not addressed the issue of state action directly and offers little insight to its inclination but based on the makeup of the Court it seems the trends developed earlier will continue. These periods will describe an arc of political decisions by the Court on state action that will send charter school teachers on the

[212] BLACK, HARVARD LAW REVIEW, 95(1967).

"torchless search for a way out of a damp echoing cave"[213] as Professor Black described it so many years earlier. In the final chapter I will look at how charters and their teachers may fare given the current path of state action and provide some avenues for argument that charter schools be found to be state actors.

Establishment of the state action requirement

The state action requirement arises from the language of the Fourteenth Amendment directly addressing what a state may not do and some very early cases deciding the constitutionality of an act of Congress under the Civil Rights Act of 1875[214] adopted by Congress after the passage of the Fourteenth Amendment. These cases attempted to define the new relationship between the federal government and the states following the Civil War. The passage of the Fourteenth and Fifteenth Amendments were a response to an intransigent South to establish the power of the federal government to protect the former slaves and provide some way to avoid both the fact and the appearance of a continuation of the institution of slavery.

The earliest cases then dealt with the extent of power established in the new amendments and the early maneuvering for position on the issues was apparent when Congress passed statutes to enforce the newly declared power to enforce rights and quite soon they were challenged in court. An early case addressed the Enforcement

[213] *Id.* at 95.

[214] 18 Stat. 335 (1875).

Act[215] and made clear that the Fourteenth Amendment merely protected citizens from action by the states to infringe their rights as set out in the Constitution.

State action was held up as a limitation on the scope of the amendment allowing individuals to deny other's rights with impunity. In a series of cases known as the *Civil Rights Cases*[216] the Court further established the basic rule interpreting the Fourteenth Amendment holding that it could only apply to state action and not to individual actions. The case involved a federal statute prohibiting individual discrimination in various public settings and the Court struck down the laws in the absence of some state law or state action. Having created that basic limitation on the extent of the Fourteenth Amendment the Court created many extensions beyond that initial limitation resulting in the following categories allowing the amendment to reach beyond direct state action and state actors.

These questions of federalism would shape the initial state action doctrine and remain an influence long after the limitations placed on the federal government by the early decisions were rejected and new definitions and limitations developed. Before ratification of the Fourteenth Amendment the Court had made clear that the rights contained in the Constitution and its amendments applied only to restrain the federal government from violation of those rights. States were free to create rights or limitations on government powers as each saw fit without interference from the federal

[215] United States v. Cruikshank, 92 U.S. 546 (1876).

[216] Civil Rights Cases, 109 U.S. 3 (1883).

courts or Congress[217]. The passage of the Fourteenth Amendment asserted federal protection of certain of the rights contained in the Constitution as against the state authorities leading to the series of cases defining that relationship.

A sharply divided Court drew initial distinctions between United States citizenship and state citizenship and limited the federal reach of the Fourteenth Amendment to only those privileges and immunities directly related to the Constitution allowing the states to grant special privileges for a large area to a single corporation to control animal imports and slaughter for food[218]. That limitation on the privileges and immunities portion of the amendment remains largely intact to the present[219]. Cases since that early one have focused on the equal protection clause of the amendment.

The Court drew clear distinctions between acts of the state and acts of individuals holding that the federal courts could not enforce an act of Congress that barred interference by an individual with the rights of another individual. Purely individual acts were held not to be within the reach of Congress which could only act under the amendment to prevent states from violating certain rights[220]. In a pair of cases deciding whether an African American criminal defendant was entitled to a mixed race jury the Court applied a narrow reading of the federal removal statute holding that

[217] Twitchell v. Commonwealth, 74 U.S. 321 (1869).

[218] Slaughter-House Cases, 83 U.S. 36 (1873).

[219] Only a single case has relied upon the privileges and immunities clause in the amendment since the *Slaughter-House Cases*, id. In *Saenz v. Roe*, 526 U.S. 489 (1999), the Court held that durational residency requirements for inclusion in benefits programs violated the individual's right to travel freely among the states. That right to travel was specifically cited as protected by the Court in the *Slaughter-House Cases*.

[220] United States v. Cruikshank, 92 U.S. 542 (1876);United States v. Harris, 106 U.S. 629 (1883).

the cause for removal – the denial of rights of the defendant – must occur before trial in order to allow for removal. Thus, in one case the defendant was denied relief because the discrimination was based on the judge's acts during trial[221] while the other defendant making the same claim was entitled to relief because the law of West Virginia prohibited African Americans from serving on juries so that discrimination occurred before trial[222]. Both cases acknowledged that acts of the judiciary branch of state government did constitute state action.

Perhaps the most significant early decision of the Court under the Fourteenth Amendment is in a group of cases collectively decided as *The Civil Rights Cases*[223]. The five cases arose out of the Civil Rights Act of 1875[224] and arrived in different procedural fashion but all involved the denial of the use of public accommodations of one sort or another by companies or individuals operating those accommodations. At issue was the constitutionality of the act of Congress in regulating individual actions discriminating against individuals of a particular race. The statute declared the right of all persons to enjoy those accommodations without regard to race, color or previous condition of servitude and then made it a criminal act for any person to deny that right. The claim of right was based upon the Fourteenth Amendment and the Court held that unless the statute barred state discrimination through state laws it violated the constitutional limitation set out in the Fourteenth Amendment. Citing the Tenth Amendment, the

[221] Virginia v. Rives, 100 U.S. 313 (1880).

[222] Strauder v. West Virginia, 100 U.S. 303 (1880).

[223] Civil Rights Cases, 109 U.S. 3 (1883).

[224] 18 Stat. 335 (1875).

Court notes that there is no power granted in the Constitution to address private discrimination and thus that power is reserved to the states or to the people. Unless the "evil or wrong actually committed rests upon some State law or State authority for its excuse and perpetration"[225] Congress was without power to address the acts and the sole recourse would lie in state courts – an unfriendly venue for people of color. The decision in *The Civil Rights Cases* has never been overturned but an end run by application of the Fifteenth Amendment and a much broader interpretation of that amendment's enforcement power has allowed what the decision forbade.

The dissent by Justice Harlan in *The Civil Rights Cases* foreshadows the public function category of the state action doctrine. Arguing that the majority had ignored the intent of the Fourteenth Amendment to provide authority to the federal government to protect the rights of all persons he starts by calling for judicial restraint in overturning acts of the legislative branch. He then presents the case that railroads, inns, and public amusements bear a unique relationship with the public because their property is used for public purposes and thus, in his opinion, they are also burdened with certain public requirements including providing the service to all members of the public in the same manner. In an argument setting up the public function exception that would develop later he says that those properties used for public purposes "are charged with duties to the public, and are amenable, in respect of their duties and functions, to governmental regulation. …denial, by these instrumentalities of the State, … is a denial by the State,

[225] Civil Rights Cases, 109 U.S. at 18.

within the meaning of the Fourteenth Amendment."[226] He highlights the language of the amendment creating a national and state citizenship for all persons and based upon that national citizenship he argues that the rights granted to all national citizens are within the power of Congress to protect. Those rights did not arise from the states and thus only Congress can enforce them. Although his opinion was a dissent and thus not precedential it provided a map to later opinions.

The early years

The Court faced questions about the reach of the state action doctrine during this initial period and did begin to define how states might be limited under the new amendments. The Court following the Civil War was functioning in a time of great turmoil over the rights of the southern states as opposed to the federal government. Many decisions of this period failed to account for the surrounding racial struggle and took only a narrow dominant-centered view of the situation. That narrow focus without considering the context of the dispute limited the impact of the constitutional amendments. The results enabled those whose aim was to maintain power over the former slaves and allowed states to continue long-standing patterns of racial mistreatment under new laws and customs despite the intent of the amendments.

In the first case over the Fourteenth Amendment to reach the Court, five sitting justices were Lincoln nominees, three were Grant's choices and one remained from Buchanan's administration. They were loyal to Lincoln's vision of the union but were conscious of the precarious relationship between the states and the federal government

[226] *Id.* at 58-59.

in the Reconstruction era. Despite the history of the amendment as a means of addressing issues of former slaves, the first battle was without any racial element and served only to define states' rights in controlling what occurred in their own borders.

The *Slaughter House Cases*[227] raised all three of the new categories of rights to be applied to the states and the Court used it to build a dual citizenship argument holding that citizenship in the United States was separate from citizenship in any state. The rights the Court would protect had to emanate directly from the Constitution and all others were left to the states. The privileges and immunities of citizens were limited to those existing solely because the Constitution created them. Even previous rights generally held by free people were held not within its reach. The action complained of was a statutory enactment so there was no question that the state had acted. What was important was that the Court severely limited what was protected from state action rendering the amendment far less encompassing than it might seem upon initial reading.

The Court also read into the amendment a limitation that it was meant to deal with slavery. The absence of any issue of slavery directly caused the Court to dismiss arguments that the statute violated equal protection of the laws and to suggest that only Congress, under the enforcement clause of the amendment, could act to protect the former slaves under the equal protection clause. It was a clause empowering Congress to act but was not self-executing allowing the Court to take action. Great deference was shown to the states to handle the rights of their own citizens leaving the amendment

[227] Slaughter-House Cases, 83 U.S. 36 (1873).

with little effect.

Those holdings were reinforced when the Court later repeated the dual citizenship concept with approval and narrowly reading the rights protected by the amendment leaving the protection of citizens' rights up to the states holding, "The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the States, and it remains there."[228] Even the right of suffrage apparently granted in the Fifteenth Amendment was limited to a right not to be barred from voting on account of race only. With no Congressional action to enforce even that right the Court declared itself unable to do so.[229]

These decisions were made while southern states continued to enact laws limiting the rights of the new citizens based on their race and ignoring acts of individuals who prevented them from enjoying their new rights. This blind eye of the Court has been evident in many areas despite the clear evidence that the Court, at times, appears to respond to public and political pressure on issues of great national interest.[230] It is this blind eye that would allow the Fourteenth Amendment to be narrowed for the first several years of its existence.

All-white juries were found by the Court to violate equal protection when the discrimination was by statute barring non-whites from jury service[231] but if a jury panel

[228] United States v. Cruikshank, 92 U.S. at 542.

[229] United States v, Reese, 92 U.S. 214 (1876).

[230] For a discussion of this period and the political pressures on the Court see, ABRAHAM. (2008), chapter 7.

[231] Strauder v. West Virginia, 100 U.S. 303 (1880).

has no non-whites on it in de facto discrimination without a statutory basis the Court refused to address the issue as beyond its power.[232] Without the statute, the Court would not find state action and repeated its claim that the black defendant was on the same equal footing with his white counterparts in jury selection again turning a blind eye to the truth of the circumstances.

Congressional action under the new amendments came under scrutiny as Congress tried to expand the rights protected and the reach of the federal government. The states' rights oriented Court would strike the attempt to prohibit discrimination in public accommodations and transportation while allowing a prohibition barring states from preventing citizens from serving on juries based on race. In the former situation, the statute was addressed to the acts of individuals while in the latter the actions were those of state officials creating jury panels.[233] Justice Harlan dissented arguing that despite the fact that the transportation and accommodations were privately owned it was a governmental obligation to make and maintain that transportation such as rail and highway traffic ways. His foreshadowing of the public function argument would not reappear until much later and would not carry the day in the way he envisioned it.

Repeating the limitation of the Fourteenth Amendment to controlling state action alone the Court struck down a Congressional act making criminal the act of depriving another of constitutional rights claiming it exceeds federal authority by addressing

[232] Virginia v. Rives, 100 U.S. 313 (1880).

[233] Civil Rights Cases, 109 U.S. 3 (1883).

individual behavior.[234] Even when an individual in police custody is beaten to death the Court held the statute too broad and therefore unconstitutional claiming that it was not the role of the federal government to control criminal law in the states and that it was up to the state to prosecute a murder claim in the situation. The decision defines the low point in the reach of the amendment in Court holdings and the starting point for the arc of decisions on state action.

An outlier for the period came before the Court in the case of *Yick Wo v. Hopkins*[235] to examine a laundry regulatory law in San Francisco that was applied to bar Chinese laundries from operation while allowing white-owned laundries to operate in the same conditions. State action was found not in the actual language of the ordinance but in the enforcement of the ordinance by granting exceptions to all white-owned laundries and denying them to all but one Chinese-owned laundry. The Court found violation of equal protection in the enforcement of what might be a valid law extending the Fourteenth Amendment to non-citizens[236] based on the "all persons" introduction to equal protection. This unanimous decision offered the first look at equal protection as a broad protector of civil rights beyond voting and service on juries.

In what might appear to be a California rule the Court again rejected a city ordinance – this time in Los Angeles – that set telephone rates so low as to be

[234] United States v. Harris, 106 U.S. 629 (1883).

[235] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[236] Chinese people were not considered citizens at the time of this decision despite the 14th Amendment. They were subjects of the Emperor of China and remained such despite being present in the United States.

considered a taking of property without due process reinforcing the reach of state action to such ordinances and subjecting them to constitutional scrutiny.[237] The case involved no racial issues and stood essentially as a preservation of the commercial rights of the telephone company.

A decade after *Yick Wo* with only three of the same justices remaining decided the *Plessy v. Ferguson*[238] case recognizing whiteness to be property and declaring that it was powerless to put black citizens "on the same plane"[239] as white ones by eliminating enforced segregation. The blind eye ignored the obvious inequalities in accommodations that existed and declared them equal. Even the great dissenter, Justice Harlan, seemed resigned to the inability of the Court to change the dominant relationship of the white race over the black race but declared it the obligation of the law to eliminate that inequality and not to "tolerate classes among citizens."[240]

The state action doctrine became a firm wall of protection for racial discrimination when black workers were intimidated by white workers and prevented by threats of violence from working for an employer with whom they had a contract of employment.[241] The Court found no state action in that discrimination and even rejected the claim under the Thirteenth Amendment claiming it was not a continuing badge of slavery so the federal government had no power to address the behavior with

[237] Home Telephone and Telegraph v. Los Angeles, 227 U.S. 278 (1913).

[238] Plessy v. Ferguson, 163 U.S. 537 (1896).

[239] *Id.* at 552.

[240] *Id.* at 559.

[241] Hodges v. United States, 203 U.S. 1 (1906).

a charge of violation of constitutional rights. Individuals continued to be free to infringe the rights of others without consequence. Again, Justice Harlan dissents declaring that being physically restrained from working at an employer with whom one has a contract is as bad as slavery but he did not carry the day with that argument.

In a later decision the Court staunchly defended an employer's liberty right to hire only non-union workers and to rid itself of any who unionize even when the State of Kansas adopted a law protecting the rights of employees to join unions.[242] The Court generously allowed employees to join any union but did not see any coercion in the employer dictating the terms of employment to include resignation from a union and denied that insurance coverage offered by the union was any real pecuniary interest of the employee. The narrow view of the Court took only the viewpoint of the employer and simply explained away any interest the employee might have. A dissent noted that fourteen states and one territory had similar laws and found the declaration of them as contrary to the Constitution when several previous cases had held the liberty of contract subject to the public welfare rather than absolute. The majority had considered only the right of the employer and not that of the employee.

State police powers were held exempt from constitutional scrutiny when exercised to grant and take public right of ways for the safety of the public[243] But barring coal companies from mining under land to which they owned mineral rights was not a valid

[242] Coppage v. Kansas, 236 U.S. 1 (1915).

[243] Chicago, Burlington and Quincy Railroad Co. v. Chicago, 166 U.S. 226 (1897).

police power but an unconstitutional taking without compensation.[244] Negligent operation of a railroad even on a public right of way was held not to serve as state action.[245] The right to be free from self-incrimination was also held not to be included in rights protected by the Fourteenth Amendment after being held by the Court not to be one of the privileges and immunities of citizens and was also not a due process requirement despite referring to it as a right "universal in American law"[246] declaring that it had its origins in state law and thus was not protected by the Bill of Rights.

This early period of decisions under the Fourteenth Amendment avoided any attempt to stretch the doctrine beyond actual state or local officials and demonstrated a very cautious approach to finding constitutional violations even after finding state action. The exception being when the Court acted to protect the business interests as described above making it difficult to draw a conclusion that there was a consistent thread to support the finding or failing to find state action in these cases. The conservative reading of the reach of federal power and the concept of dual citizenship left the amendment without far-reaching effect and allowed states to continue to deny their own citizens many of what we now consider basic rights. That trend changed as the doctrine began to expand as racism became a more public issue and as the Court became far more willing to insert constitutional limits on marginally state actors.

Early expansion of the doctrine

[244] Pennsylvania Coal Company v. Mahon, 260 U.S. 393 (1922).

[245] Roman Catholic Church v. The Pennsylvania Railroad, 237 U.S. 575 (1915).

[246] Twining v. New Jersey, 211 U.S. at 91.

If the initial years of the Fourteenth Amendment drew a strict line around its reach and the power of the Court to extend constitutional protection the next era saw the wall created by state action extended somewhat to include action that could be interpreted as state action even though accomplished by private citizens. Race cases began to dominate the discussion and the call to eliminate racial discrimination was growing louder despite the best efforts of southern states to limit the rights of their African American citizens. Starting in the late 1920s and up to the Warren era the Court saw more plainly race based discrimination brought before it and developed new arguments to define state action to prevent it. No longer did most cases involve clear state action in the form of statutes or city ordinances although those continued. In this era, the Court was faced with individual actors with some ties to state action so the definition began to expand. Still, nine of the fourteen cases presented here involved racial issues as the country continues to address the divisions from the Civil War that were at the time of these cases more than six decades in the past.

The most significant issue facing the Court during the early part of this era was voting rights and the methods used to prevent black citizens from participating in the democratic exercise. For every decision finding a constitutional violation there was a shift in strategy to work around the ruling that required a broader definition of what constituted state action. Other issues did arise and in general the Court used the later part of the period to extend the reach of state action. Few decisions were unanimous as the difficult issue of federal intrusion into states' rights was still a tough issue to

balance. The multiplicity of opinions – dissenting and concurring – during this period[247] reveals how those issues pulled the Court in many directions. The hard work of reaching a majority also left many of the decisions weakened by limitations made necessary to constitute a majority of the Court.

Voting rights cases came to the Court first from Texas where a statute barred African American citizens from voting in the Democratic primary.[248] The statute was plainly state action and the violation of the Fourteenth Amendment apparent as demonstrated by a unanimous Court. Five years later, when the same African American voter was barred from the Democratic primary by a resolution of the Texas State Executive Committee of the Democratic Party the Court was faced with a voluntary association in the form of the party now asserting what the state could not.[249] What had changed since the previous decision was that the state had withdrawn its unconstitutional statute and replaced it with a directive that political parties in Texas were empowered to determine the qualification for membership in their own parties. Avoiding the larger question presented in arguments suggesting that political parties had become the agents of the state in primary elections the Court found a much narrower way to address the problem. The Court observed that the Democratic Party convention had not initiated that change but that it was assigned to the State Executive Committee by the legislature and thus it followed that it was state action. This case

[247] Between 1927 and 1953 the fourteen cases involving some state action issue included four unanimous rulings, five with one or more concurrence, and nine with one or more dissent.

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

[249] Nixon v. Condon, 286 U.S. 73 (1932).

drew only a 5-4 majority with a dissent arguing that the mere passage of the statute did not convert the party into an agent of the state. Sadly, the Court again laid out a pathway to allow discrimination to continue by declaring that the inherent power of the party resided not in the State Executive Committee but in the convention, opening the door for the next case in the sequence.

It took only three years for the Court to receive the next case that squarely presented what the Court had laid out in *Nixon v. Condon*[250] when the Texas Democratic Party convention itself set its membership requirements to include only white citizens and limit primary voting to its members.[251] The Court had held that it was an inherent power of the party to determine its own membership so it was a short step to declare this to be the act of a private, voluntary association without any connection to the state and therefore beyond the reach of the Fourteenth Amendment. The claim in the case was that the county clerk refused the plaintiff a ballot in the Democratic primary election based on the discriminatory membership requirements. Despite the enforcement of that private discriminatory decision by a state official the Court unanimously rejected it as an act of the State. The wall that protected discrimination through a finding of no state action was crossed and the primary cases seemed a dead end for the Fourteenth Amendment.

Primary voting returned to the Court in a 5-3 decision finally declaring voting in

[250] *Id.*

[251] Grovey v. Townsend, 295 U.S. 45 (1935).

those elections to be a right under Article I of the Constitution.[252] The state action requirement in the Louisiana case was easily met because the charge was against the Commissioners of Election who refused to count ballots and in some cases changed votes on primary ballots of primary voters. Race was not asserted as a factor in this denial of the right to vote. The state took an active role in administering the primary but it was acknowledged by the Court that nomination in the primary of the Democratic party in Louisiana was essentially a guarantee of election in the general election. The Court did not limit its holding to the participation of official state employees committing the violations. Instead, the Court turned to the constitutional provision that authorized states to set the time place and manner of holding elections for Congressional representatives but allowed Congress to alter those arrangements by law in all ways except the place of selection of Senators. In this primary for the House of Representative nominee the state paid for the primary and the general election ballot could contain no candidates except the primary winners. Thus, with the Democratic primary as the only route to the ballot, it amounted to election to the House for the winner. The Court held that the only real opportunity to cast a vote for a candidate for Congress existed in the primary, when it might matter. Side-stepping the Fourteenth and Fifteenth Amendments the Court held that Article I of the Constitution has no limitations on its application and applies to both individuals and states.

Nine years after erecting the wall of state action in primaries in *Grovey*[253] and

[252] United States v. Classic, 313 U.S. 299 (1941).

[253] Grovey v. Townsend, 295 U.S. 45 (1935).

after seven new justices were appointed to the Court by President Franklin Roosevelt a new opportunity to examine the Texas Democratic primary system came before the Court. A new Court with new political pressure to open the voting process resulted in overturning *Grovey* and re-asserting the principle of primary voting as a constitutional right.[254] Faced with the identical argument by the state that the political party was a voluntary and private organization, the Court pushed back the wall of state action to find a violation of the Fourteenth Amendment. In Texas, as in the earlier Louisiana case, the primary election selected the only candidate with a real chance to be elected in the general election so the nomination process was essentially the election process.

The principle of *stare decisis* required a detailed explanation of what had changed in the period between *Grovey* and *Smith*. Detailing the history of the Texas litigation over primary voting, the majority[255] identified the Louisiana case as a change in the law identifying the primary as an integral part of the election process. It opened the door for a finding that the delegation of the nomination process to the party constituted assignment of a state function to that private organization. Noting that the change from the *Nixon* cases to *Grovey* was "so slight a change in form" as to cause a new look at the "legal validity of the distinction"[256] between the holdings. After a review of the extensive statutory scheme controlling the nomination process and election of party officers holding that it made the party "an agency of the State in so far as it

[254] Smith v. Allwright, 321 U.S. 649 (1944).

[255] The sole dissenter was the author of *Grovey*, Justice Roberts, also one of only two justices remaining on the Court who participated in that decision.

[256] Smith v. Allwright, 321 U.S. at 661.

determines the participants in a primary election."[257] That statutory scheme imposed duties that the State could not delegate to a mere private party. This served to open the public function concept as a definition of state action – a concept that would expand and then substantially contract over time.

The next step in the public function definition of state action came in the company town in Alabama that was, in all aspects, a normal town but the property of the town was owned by a business corporation. The decision that the town was subject to the same constitutional limitations of a municipality was supported by many years of finding that toll bridges and roads and railroads were similar in their nature. Designed to serve the public interest and subject to extensive state regulation, those facilities were operated on behalf of the government and their acts were state acts. Justice Black, writing for the majority, declared that "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 statutory and constitutional rights of those who use it."[258] Justice Black, of course, was a fierce defender of the First Amendment and seldom found any limitation of speech to be justifiable. His decisions would play a significant role in the state action discussion over time extending into the Warren Court years.

Expansion beyond the right to vote stemmed from the same criminal statute making it a crime to violate constitutional rights of another when acting on behalf of the

[257] *Id.* at 663.

[258] Marsh v. Alabama, 326 U.S. at 506.

state. That statute was upheld in *United States v. Classic*[259] and was further tested in the case of a brutal beating to death of an African American man arrested by the police in Georgia.[260] The question of state action seems now to be clear but the argument was presented that the acts of a state officer outside of his state authority should be considered individual and escape the reach of the Fourteenth Amendment and the statutes enforcing it. The Court dealt with that argument by declaring that the authority that placed the policemen in charge of the deceased through arrest was what placed them in the position to take his life and therefore the power derived from the state and was state action. Arguments were also made that the federal-state balance of power would be altered by a federal enforcement of its criminal statute in a case of violation of a state statute – murder, in this case. The Court made the distinction between knowingly and intentionally denying the constitutional rights of another and violating a criminal state statute making it clear that the federal government charge was a separate matter from the state's obligation to enforce its criminal laws. The federal government could only enforce those rights reserved to it in the Constitution and its amendments.

The Fourteenth Amendment requirement of equal protection under the laws does have limitations and the Court has recognized situations in which a state has treated different citizens differently but was somehow justified in doing so. Not strictly a question of state action but a limitation on the reach of equal protection should state action be present, this could come into play in a case involving teachers and the

[259] United States v. Classic, 313 U.S. 299 (1941).

[260] Screws v. United States, 325 U.S. 91 (1945)

treatment of non-charter school public school teachers differently from charter school public teachers. In Louisiana in the early part of the twentieth century the profession of pilot for a river boat was largely a closed group filled by family members of previous pilots as it had been for many decades. Selected by the state to serve in that post, pilots were subject to a set of laws and prerequisites for their entry into service on the rivers. The position was an important one because only by the skill of the pilot could river boats safely navigate the waterways of Louisiana that carried a great deal of the goods of the Midwest in and out of the port of New Orleans. The system of appointment of new pilots required the recommendation of existing pilots who uniformly recommended their family members and those of other pilots currently in service.

In this system of obvious nepotism, a claim was filed charging that Louisiana in this manner was violating the rights of those not members of pilots' families to be equally considered for the post in violation of equal protection.[261] There is no doubt that the state acted with each appointment and there was no question that family members of current pilots were treated differently than others. The unequal treatment of applicants for the pilot profession was carried out by direct state action. Justice Black wrote for the Court holding that there is no requirement that a specific method of appointment be used for skilled positions and no requirement for a competitive method to be used. The Constitution simply would not reach into the method of selection of people to serve a highly-specialized position of service within the state.

The holding drew a sharp dissent from four justices asserting that had the

[261] Kotch v. Pilot Commissioners, 330 U.S. 552 (1947).

statute limited the position of pilot to the members of a single family it would not doubt violate the law of equal protection. By allowing the state to limit the selection of pilots to persons of several families the dissent argues there is no real distinction. Both sides of the issue cited the *Yick Wo*[262] case with the majority distinguishing it as based on racial discrimination and the dissent arguing that the case was precisely what *Yick Wo* had ruled unconstitutional: the discriminatory administration of a facially neutral law. The dissent argued that selection or treatment of professionals in different ways required something upon which to base a decision that justifies the differing treatment. The majority used a perceived higher level of skill in families of existing pilots as their justification.

As the Court began to reflect the policies of President Roosevelt the cases continued to expand the reach of the Constitution and move back the wall of state action. Justices appointed by Roosevelt were mostly supportive of his New Deal and therefore a stronger central government. With a few exceptions that meant that the expansion of what could be considered state action began to move apace. No single case opened more possibilities for expansion than a unanimous decision in two situations involving restrictive covenants on real estate.[263] Arising in two different states neither of which had any statute involved in the claims, the Court addressed private covenants that attached to land used as residential property.

[262] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[263] Shelley v. Kraemer, 334 U.S. 1 (1948).

In Missouri, the covenant was agreed to by thirty of thirty-nine owners of property along a street in St. Louis applying a fifty year restriction to occupancy of the properties only by members of the "Caucasian race."[264] to the exclusion of any other race. The neighborhood involved consisted of fifty-seven parcels of land, forty-seven of which were owned by the thirty signatories of the covenant. Five parcels were owned by African Americans at the time of the covenant and four were still owned by members of that race and had been for periods of twenty-three to sixty-three years. The case arose when an African-American buyer purchased a parcel and other land owners sued to prevent him from taking title and occupying the property. The state courts granted the relief enforcing the restrictive covenant. The other case involved a Detroit neighborhood with a restrictive covenant barring only occupancy of any of the properties by anyone not of the Caucasian race. When an African American family purchased one of the properties and occupied it the neighbors filed suit to remove them. The state court granted the relief enjoining the purchasers from occupying the premises. Both purchasers asserted that their Fourteenth Amendment right to equal protection had been violated by the court action in their respective states.

Two prior cases involving restrictive covenants were distinguished by the Court – the preferred method of upholding *stare decisis* without overruling a prior decision. One case involved property in the District of Columbia and it was thus found not to be the action of a state[265] eliminating the Fourteenth Amendment argument as the Court

[264] *Id.* at 4.

[265] Corrigan v. Buckley, 271 U.S. 323 (1926).

found the real issue to be the validity of a private agreement and not the action of any government. In the other case the Court remanded the case to the state court to allow the issues to be properly litigated there on the question of the validity of the agreement in property law terms rather than on any constitutional basis.[266] Having distinguished those two prior cases the Court was free to consider the issue whether judicial enforcement of a private agreement constituted state action invoking constitutional equal protection.

The Court began its analysis by identifying the right to own and enjoy property as one of the rights the drafters of the Fourteenth Amendment sought to protect. Had a state passed a law prohibiting ownership of property by a particular race there would be no doubt that it would be stricken as contrary to that amendment. An earlier case had held that a city ordinance limiting certain blocks of property to whites and others to black persons was unconstitutional.[267] Other cases had further extended that ruling making it clear that a government could not discriminate in the manner demonstrated by the private agreements before the Court.[268] Returning to *The Civil Rights Cases* the Court reinforces that the Fourteenth Amendment is no bar to private discrimination but

[266] Hansberry v. Lee, 311 U.S. 32 (1940).

[267] Buchanan v. Warley, 245 U.S. 60 (1917).

[268] The Court cited several examples of state courts ruling on the issue in n.11 saying: "Courts of Georgia, Maryland, North Carolina, Oklahoma, Texas, and Virginia have also declared similar statutes invalid as being in contravention of the Fourteenth Amendment. Glover v. Atlanta, 148 Ga. 285, 96 S. E. 562 (1918); Jackson v. State, 132 Md. 311, 103 A. 910 (1918); Clinard v. Winston-Salem, 217 N. C. 119, 6 S. E. 2d 867 (1940); Allen v. Oklahoma City, 175 Okla. 421, 52 P. 2d 1054 (1936); Liberty Annex Corp. v. Dallas, 289 S. W. 1067 (Tex. Civ. App. 1927); Irvine v. Clifton Forge, 124 Va. 781, 97 S. E. 310 (1918)." Id. at 12.

can only apply to action that "may fairly be said to be that of the States."[269] If those covenants are complied with on a voluntary basis there could be no challenge based on the Fourteenth Amendment.

Acts of state courts had previously been held state action in the jury selection cases as well as in criminal case due process violations and the issue was well settled that state courts were subject to constitutional restraints as state actors. The unique question in this case was whether a court acting to enforce a purely private agreement could be held to be state action preventing it from enforcing a discriminatory agreement. The Court held the state court actions to be state action noting that there would be no other way for the covenants to operate but for the court providing the full power of the state to carry out the original agreements in denigration of the agreements of the current sellers and purchasers of the property. The argument was advanced by the plaintiffs that the state court was free to enforce covenants against white ownership and thus the races were treated equally by the court in its application of the law. Even the Court, famous for ignoring reality in such cases, could find no instance of such a holding and saw through the argument that the races were somehow equally treated by the state. In a final analysis, the Court explicitly balanced the individual civil rights of the purchasers of the property as a greater value than the rights of property owners to discriminate and held that enforcement of property rights must comply with Fourteenth Amendment limitations.

[269] Shelley v. Kraemer, 334 U.S. at 13.

State action was further extended in a case involving the radio service playing on the speakers in rail cars in Washington, D.C.[270] The rail company was a private corporation operating under a franchise granted by the federal government, also serving as the local government in the District of Columbia. The Public Utilities Commission, created by Congress, provided supervision of all public utilities including the rail car operation. When the radio broadcasts were installed on the rail cars there were customer complaints over the issue of being forced to listen to particular content as a violation of the First and the Fifth Amendments. The Commission found no violation and the passengers appealed to federal court. The rail company, the radio company and the Public Utilities Commission were all parties to the appeal to present their positions. Both the rail company and the radio company were private entities and the issue for the Court was to decide if the amendments to the Constitution even applied to their behavior.

The Court found a "sufficiently close relation"[271] to the government to apply constitutional limitations on the private rail operator with very specific reasoning for that finding. The Court refused to "rely on the mere fact"[272] that the company operated a public utility granted by Congressional authority or the "substantial monopoly"[273] for the transportation provider. What did make sufficient connection was the "regulatory

[270] Public Utilities Commission v. Pollak, 343 U.S. 451 (1952).

[271] *Id.* at 462.

[272] *Id.*

[273] *Id*.

supervision of the Public Utilities Commission … an agency authorized by Congress."[274] It was the action taken by the Commission to investigate the practice that seemed to be what shifted the Court's opinion to finding that special relationship that invoked constitutional limitations on the acts of the rail company. Interestingly, after finding that connection adequate, the Court failed to find any violation of either amendment in this situation.[275]

That case removed the connection to the state one more step by identifying governmental regulation and supervision as sufficient to convert a private company into a state actor. That concept failed to raise a dissent in this Court but it would come under attack as the arc of the decisions on state action starts to be rolled back in later years. It is particularly important to note that this claim was not based on racial discrimination but it did involve the highly protected rights of the First Amendment and Fifth Amendment liberties that, as in the *Marsh*[276] case caused the Court to reach further beyond direct action of the state to apply the protection of the Constitution under the Fourteenth Amendment.

The Court stepped further away from direct government action in the last of the primary voting cases from Texas raising an early test of whether inaction could

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[274] *Id.*

[275] In a prophetic dissent, Justice Douglas argued that the practice violated a right to be free from governmental intrusion and labeled it a right to privacy that would reappear in more famous cases later. Justice Frankfurter recused himself from the case describing himself as a "victim of the practice." *Id*. at 467.

[276] Marsh v. Alabama, 326 U.S. 501 (1946).

constitute action by the state.[277] The Jaybird Association was composed of all registered white voters and operated on a county level. It funded its own pre-primary election in which only members could vote and candidates interested in running for office would submit their names to the association for inclusion in those pre-primaries. Successful candidates in the pre-primaries nearly always submitted their names to the Democratic official primary and nearly always won both the primary and the general election without opposition. Every county-wide official was elected through this unofficial pre-primary system. The stated purpose of the association's actions was to exclude black citizens from having a meaningful vote. The Jaybird Association argued that as a private, voluntary organization it could conduct at its own expense and under its own rules any sort of activity to select candidates to endorse in the later official election process.

The case was presented under the Fifteenth Amendment right to vote which, like the Fourteenth, limited only state or national action. The Jaybird Association was not a state organization on its face and the state operated a separate primary system in which black citizens could vote under the earlier cases. The Court held that the vote taken by the Jaybirds rendered any other vote ineffective and meaningless thus depriving the black citizens a meaningful right to vote. It held that a state could not "permit such a duplication of its election processes"[278] in compliance with the Fifteenth Amendment. It was not active involvement by the state that crossed the constitutional limitation but the failure to act in the presence of a private system to deny a meaningful vote to black

[277] Terry v. Adams, 345 U.S. 461 (1953).

[278] *Id.* at 469.

citizens that was held to be state action. The argument over action and inaction continues and will appear again as the state action doctrine is further established by the Court. Only Justice Minton, in dissent, flagged the inaction aspect of the case as problematic for the future. It should also be noted that five justices in two concurrences declared that they would find state action in the presence of Jaybird Association members in public offices and in the leadership of the Democratic Party weakening the impact of the inaction finding by the lead opinion.

In the final decision of this era Justice Minton lead the Court in an 8-1 decision following up on the holding in the *Shelley v. Kramer*[279] case involving judicial enforcement of racial restrictive covenants on real estate. The Court faced a claim by one landowner against the seller of land in contravention of the restrictive covenant for damages to his property value resulting from the sale of land to a black family.[280] Even though the suit was brought by white property owners against a white seller the Court allowed the seller to assert the constitutional rights of the black citizens who would be impaired in their right to purchase property if sellers could be sued for damages by other owners. The Court held that judicial enforcement of the racially restrictive covenant was no less a violation of equal protection than the attempt in *Shelley* to vitiate the sale on the same grounds.

[279] Shelley v. Kraemer, 334 U.S. 1 (1948).

[280] Barrows v. Jackson, 346 U.S. 249 (1953).

The Warren Court

By 1953 the Court had extended the reach of the Constitution somewhat under the strength of the nine Roosevelt appointments who had supported his New Deal legislation and filled in by Truman appointees with similar tendencies. The majority most often sided with individual rights as against property rights or business. There were disagreements within over the power of the judiciary to overrule the legislature and those persisted but generally the Court took a more activist role than had previous Courts. The state action doctrine had begun to expand the reach of the Constitution but there was greater expansion to come under the leadership of Chief Justice Earl Warren. The splits in opinions largely arose from disagreements over whether legislative action should take precedence over the Court's policy positions but under Warren that moved dramatically to the position that the Court should intervene in any situation, with or without legislative action. With that approach, the state action doctrine underwent a broad extension of the definition of who might be a state actor but as seen in the opinions there was still great concern not to create a set definition that would apply broadly to a group of facts. State action may be the area of most caution for the activist Warren Court in that respect.

Warren himself was appointed by President Eisenhower apparently with the expectation that he would perform as a moderate Republican judge hard on crime but fair minded in civil rights. What he did was quite disparate from that expectation but he was but a single case of changing policy loyalties by Justices upon reaching the Court. Warren established his independence from Eisenhower in his first opinion for the Court

as he wrote the *Brown v. Board of Education*[281] decision for a unanimous Court. That unanimity represents what Warren meant to the Court more than any opinion he drafted in that he marshalled support for positions and built majorities for many decisions in which he was not the author.

It may well be that the Warren Court, in expanding the reach of the Court in several areas, set up the following eras to build political pressure to select more restrained justices to the Court. Although most of the major decisions of the Warren Court were centered around criminal procedure and the rights of the accused[282] it also established sweeping new law in the highly contested civil rights arena.[283] State action was a common issue in the discrimination cases and to reach the despised practices of racial prejudice the Court did expand the reach of the definition of who might be a state actor. Later, as shown in the following sections, many of those expansions were reined in by Court appointees specifically tasked with making the Court less activist according

[281] Brown v. Board of Education, 347 U.S. 483 (1954).

[282] See Mapp v. Ohio, 367 U.S. 643 (1961) extending the exclusionary rule to the states via the Fourteenth Amendment, Gideon v. Wainwright, 372 U.S. 335 (1963) extending the right to counsel to state court prosecutions and establishing it as a fundamental right, Malloy v. Hogan, 378 U.S. 1 (1964) extending the Fifth Amendment privilege against self-incrimination to states via the Fourteenth Amendment, Pointer v. Texas, 380 U.S. 400 (1965) applying the Sixth Amendment right to confront witnesses to the states via the Fourteenth Amendment, Klopfer v. North Carolina, 386 U.S. 213 (1967) applying the Sixth Amendment speedy trial requirement to the states via the Fourteenth Amendment, and Benton v. Maryland, 395 U.S. 784 (1969) applying the prohibition of double jeopardy to the states via the Fourteenth Amendment.

[283] It should also be noted that despite the original decision in the *Brown* case, Chief Justice Warren and a unanimous Court bowed to political pressure by lifting the pressure from school districts and allowing them to proceed with "all deliberate speed" (Brown v. Board of Education, 349 U.S. 294, 301 (1955)) thus leading to an extended period of delay in implementing the principles of the original decision in some cases for decades.

to the political claims of that period. That is why this period of the Court expresses the broadest version of state action used by the Court to date.

In a brief per curiam opinion the Court held that a municipal agency that acted as the trustee of a college established by a private citizen to support the education of poor white orphan boys could not enforce the requirement that applicants must be white to gain admittance.[284] The argument that the original grantor who established the trust established it solely for white students could not withstand the Fourteenth Amendment bar to the municipal trustee discriminating as a state actor. The mere fact of holding the position of trustee incorporated the state and its limitations.

It could be said that no decision more clouded the concept of state action than *Burton v. Wilmington Parking Authority*[285] although there are many cases with a valid claim on that label. Intermingling the issue of racial discrimination with a complex set of relationships between the state and the actual perpetrator of the discrimination served as the basis for the developing confusion over state action and its definition. Justice Harlan, in dissent, summed up the clarity of the decision nicely as "a process of first undiscriminatingly throwing together various factual bits and pieces and then undermining the resulting structure by an equally vague disclaimer … leave[s]

[284] Pennsylvania v. Board of Directors, 353 U.S. 230 (1957).

[285] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

completely at sea just what it is in this record that satisfies the requirement of 'state action.'"[286]

The facts that lead to such a conclusion are indeed difficult at best to construct into a definition. The clearest fact is that an African American gentleman was refused service at a coffee shop that was part of a parking garage built by the Wilmington Parking Authority, an agency of the State of Delaware, to provide parking for government agencies and also housed a few other shops along the sidewalk. The coffee shop was leased by the agency to the private owner whose action in denying service to the potential customer was a privately made decision. Equally clear is the principle established soon after ratification of the Fourteenth Amendment that it did not reach mere private action but served to limit only state action.[287] The layers build from that point on.

A Delaware statute provided that providers of refreshments were not required to serve anyone who "would be offensive to the major part of his customers, and would injure his business."[288] The statute was interposed as a defense to the rejected customer's Fourteenth Amendment equal protection claim. The Delaware Supreme Court held that the action of the shop owner was purely private and that under the statute he was not required to serve everyone who sought service in his shop. The majority dismissed the issue of the statute and took on the sole issue of whether the

[286] *Id.* at 728.

[287] Civil Rights Cases, 109 U.S. 3 (1883).

[288] As set out in n.1 of Burton v. Wilmington Parking Authority, 365 U.S. at 717.

discrimination was private or was state action. Justice Stewart, who concurred in the result, took the position that the Delaware Supreme Court had interpreted the statute to authorize discrimination on the basis of race contrary to the Fourteenth Amendment transferring the state action to the act of adopting the statute that supported the shop owner's act. Justices Harlan and Frankfurter, in dissent, argued that the only proper disposition of the case was to send it back to the Delaware Supreme Court to obtain a clear ruling on the nature of the Delaware statute and, if it returns a clear finding that the statute authorized racial discrimination, to hold the law unconstitutional without reaching a state action analysis of the act of the shop owner. That simpler approach to the case was not the path chosen by the majority.

After citing precedent for the state action requirement, the majority embarks on "sifting facts and weighing circumstances" to reveal "the nonobvious involvement of the State in private conduct"[289] to determine whether the state was adequately involved in it to invoke the Fourteenth Amendment. By declaring that state action is not subject to a precise definition[290] the majority obscured the doctrine for future cases and extended the assumption that each case must be *sui generis* making nothing clearly precedential. The Court pursued the sifting with a detailed discussion of the various links the state had to the shop owner in the case. Briefly, the shop was leased from the state and had been essentially built and maintained by the state. The parking facility in which the

[289] *Id.* at 722.

[290] Perhaps more accurately it could be said that no precise definition could muster a majority of the Court.

shop was located was financially not feasible without income from tenants like the coffee shop. The building was "dedicated to 'public uses'"[291] in the statute that created the Authority. The failure of the Authority to require non-discrimination of its tenant is noted by the Court and the failure to act, what would later become a significant issue in state action, was cited as making the state a participant in the discrimination. In sum, the Court holds that the state had "so far insinuated itself into a position of interdependence"[292] as to prevent the discrimination as being a private act beyond the scope of the Fourteenth Amendment.

Had the majority stopped at that point some certainty may have existed for the state action doctrine but again claiming that precision of definition was impossible the holding was limited to cases in which the state "leases public property in the manner and for the purpose shown to have been the case" in this dispute rendering it a marginally useful holding, at best, for future consideration. The language of interdependence and the application to leases leaves much room for interpretation and the Court has not failed to move in and out of that space freely since this decision. It falls within a general category of entwinement despite the use of the term "insinuation" but with the limitation to its facts it fails to provide much guidance for cases not identical in facts.

The biggest driving force behind expansion of the definition of state action arose out of the civil rights cases involving private action that was sometimes based on law

[291] Burton v. Wilmington Parking Authority, 365 U.S. at 723.

[292] *Id.* at 725.

and other times customs of the area. The sit-in demonstrations in the South set up a series of five cases taken together by the Court and for the 8-1 majority involved the same issue.[293] Writing for the Court in an unusually brief opinion Chief Justice Warren dispensed with all arguments except the Fourteenth Amendment state action claim as unnecessary. Citing a city ordinance that required segregated lunch counters the Court held that even if the owner of the counter refused to serve the African American students based on his own practice and custom and not to comply with the ordinance the city had "become involved"[294] in the relationship between owner and patron in such a way as to constitute state action. The State could not advance the argument that the store owner would have refused service even without the ordinance when it had co-opted that decision for itself. The mental state of the owner would not be given consideration.

In a dissent, Justice Harlan divided the cases and discussed each one separately urging the consideration of the motivation for the exclusion of the patrons and whether it was influenced by the ordinance. He found such evidence of influence by the ordinance or by the announcements of local law enforcement officials adequate in two of the cases. In one he found insufficient evidence of a violation to support a conviction and in the other two he suggested that the cases should be sent back to state court for further proceedings to decide various issues of state law. His careful analysis of the cases on their individual facts exposes the rather broad sweep of the majority in its

[293] Peterson v. City of Greenville, 373 U.S. 244 (1963).

[294] *Id.* at 248.

effort to eliminate racial discrimination without making a finer point. This approach of creating broad generalities in holdings was to mark many areas of criminal law and certain areas of constitutional law during the Warren Court years but failed to establish a clear rule for state action.

Expansion of the definition of state action continued with two cases decided the same day involving trespassing charges in racial discrimination cases.[295] In the *Griffin* case state action was found when a security guard working while not on duty as a sheriff's deputy arrested African Americans for remaining in an amusement park when told to leave because of their race. The Court reiterated the *Screws* holding that even if he would have acted the same way without official power or has no statutory authority to do what he did his action was state action because he was "possessed of state authority"[296] and by arresting the individuals he acted under that authority. The dissenters saw no difference between the guard making the arrest and simply removing the people from the premises for the police to make the arrest and thus found no state action.

The *Bell* case majority did not reach state action holding that a supervening statute forbidding discrimination in restaurants based on race in this restaurant sit-in case. Concurring writers made clear that a commercial business is not the same as a private home and it comes with less protection of the right to choose who enters and is served. Justice Goldberg suggested that Congress could adopt a statute forbidding such

[295] Griffin v. Maryland, 378 U.S. 130 (1964);Bell v. Maryland, 378 U.S. 226 (1964).

[296] Griffin v. Maryland, 378 U.S. at 135.

discrimination even by private commercial business owners under the Commerce Clause avoiding the state action limitation altogether. The dissent by Justice Black refused to find judicial enforcement of trespass to constitute state action and looked only to the original act of the private individual choosing who may and may not enter his commercial property.

The differentiation of a private home and a more public setting for privately owned property was the first explicitly identified public function case involving a municipal park bequeathed to the municipality in trust by a private individual for use by white people only.[297] The city had operated the park for some time in a segregated manner but eventually saw that was not within its power to maintain segregation and allowed all races to use the parks. The family of the original owner and residual beneficial owners of the trust property sought removal of the city as trustee and appointment of new private trustees to effectuate the discriminatory wishes of the grantor. The Court considered a wider context than merely examining the concept of the ability of a grantor of a trust to control the trust property. Had that been the scope of inquiry it would leave little doubt that it involved private action not subject to the Fourteenth Amendment.

Instead, the Court looked at the broader issue that took in the nature and history of use of the property as a public park operated by the municipality. Despite the attempt to appoint new trustees to remove the municipal trustees the Court considered

[297] Evans v. Newton, 382 U.S. 296 (1966).

that history to find that the park had become a public park not a private tract of property. The language of the Court develops the public function category clearly:

> The service rendered even by a private park of this character is municipal in nature. … A park … is more like a fire department or police department that traditionally serves the community. Mass recreation through the use of parks is plainly in the public domain, [citation omitted]; … the predominant character and purpose of this park are municipal.[298]

The political basis for the Court's decision is that it involved publicly displayed racial discrimination supported by an attempt to circumvent the Fourteenth Amendment by privatization of what had been a *de facto* public facility. By looking broadly at the history of the park and its operation the Court could justify its holding. The decision was written during a period of deep involvement of the Warren Court in policy during the height of the civil rights movement. Racial segregation was an evil being fought on several fronts and the Court pushed itself into the forefront of that issue in several decisions by extending what could be identified as state action. That push would falter after the racial discrimination cases subsided.

The broader context was also applied when civilians acted in concert with law enforcement officers to murder African American men who had been arrested and then let go in the country at night.[299] The law enforcement officers were clearly state actors

[298] *Id.* at 301.

[299] United States v. Price, 383 U.S. 787 (1966).

and found guilty of violating the civil rights of the decedents under the *Screws*[300] holding. The civilians who engaged in the ambush and murders were private citizens and could not be charged under the Civil Rights Act unless they were acting under color of state law. Had the Court kept its focus on their status as private citizens it might have deferred to the state to enforce its criminal statutes and declined to act under the Federal law. By opening the context to see that the civilians were working willfully in concert with state officials the Court could apply the Civil Rights Act to their activities as if they were state officers themselves. This holding maintained the *Screws* requirement that the action be a willful deprivation of rights and not a negligent one.

The Court continued to examine the wider context in *Reitman v. Mulkey*[301], a 5-4 decision that confounds the traditional methods of looking at state action categories as a logical whole. The case arose from two California cases in which race was used to deny a lease in one and to evict a tenant in another. In the refusal to rent case the trial court granted the landlord summary judgement based on Proposition 14, a constitutional amendment in California that prohibited the adoption of any law or action of the state or any level of government to abridge the right of an individual to sell or lease property to anyone he chose without limitation. The eviction case was presented to the trial court on the same basis but resulted in the opposite ruling by the court holding that it could not enforce a racially based eviction in compliance with the Fourteenth Amendment of the U.S. Constitution. The California Supreme Court reversed

[300] Screws v. United States, 325 U.S. 91 (1945).

[301] Reitman v. Mulkey, 387 U.S. 369 (1967).

the first and affirmed the second trial court based on the equal protection clause of the Fourteenth Amendment. The Supreme Court took the case on certiorari, the first indicator that it was seeking this opportunity to make a statement about the Fourteenth Amendment and it affirmed the California Supreme Court in both cases. Had it refused certiorari the result would not have been different except the Court would not have provided an opinion on the issues.

The cases offered a very narrow context as one possible basis for decision: the private landlord had decided not to lease property to another individual. State action came into the picture only with the move to the courts by the aggrieved tenants. Had the Court used the scope of the context that only included the private transaction there would be no state action. Even with the addition of the court enforcing the private action there could be a decision that such involvement does not make the original act state action and that all disputed interactions between individuals can be taken to a court for a decision making nearly all action state action.

Rather than follow the narrowest of paths to deciding the case the Court opened its inquiry to include the full text of Proposition 14 and how it might change the ability of local governments or the legislature to enact laws barring racial discrimination in housing. The Court reasoned that instead of merely repealing previous legislative action barring discrimination in housing the proposition also amended the California Constitution to bar any unit of government from adopting any such law. Doing so meant that to adopt anti-discrimination laws would first require constitutional amendment and putting discrimination on a protected footing as compared to any other legislation.

Taking that broader view of the action allowed the Court to consider the wider implications for the future of housing throughout the state of California rather than just the decision of the dispute at hand.

Justice Harlan wrote for the four-justice dissent and characterized the action as a simple repeal of the statute dismissing any impact the constitutional ban on anti-discrimination might have. By reducing the focus of the inquiry to just what has happened and not what the result of that would be on discrimination in housing Justice Harlan argued that the Fourteenth Amendment does not require anti-discrimination laws but only requires that the state not adopt discriminatory laws. Couching the issue in terms of action versus inaction allowed the dissenters to call for a reversal of the California Supreme Court's decision to strike Proposition 14 as contrary to the Fourteenth Amendment.

Traditional downtown shopping districts way to malls and shopping centers and as privately owned spaces that invited public use they created a new category of free speech cases for the Court to address. The new settings functioned much like the company-owned town of Chickasaw but lacked the presence of housing, separate post offices and other accoutrements of Chickasaw. These new institutions also appeared as the Court was undergoing some changes that began to favor private property rights over other rights. That shift has generally continued and will prove to be a major consideration when applying the state action doctrine to charter schools.

The first private shopping center case held true to the *Marsh* ruling. When union members wanted to peacefully picket a non-union business located in a shopping

center the Court had to balance the rights of the union members to assemble and freely express their views against the right of the landowner of the center to control the property and who enters upon it[302]. The target of the picketers was a store that had recently opened with all nonunion workers. The Amalgamated Food Employees Union sent picketers, none of whom were employees of the target store, to carry signs in the parking area outside the store to inform the public that the employees of the store "were not 'receiving union wages or other union benefits.'"[303] Justice Marshall, writing for the five justice majority that included Chief Justice Warren, extensively described the layout of the shopping center essentially highlighting that the nearest public way was not only quite busy but also quite a distance from the targeted employer's place of business. Further, he noted that there was minimal, if any, disruption in the operation of the store or the shopping center.

After noting that the general rule is that peaceful picketing in an area that is open to the public is protected under the First Amendment[304] and acknowledging that there are some restrictions placed on picketing to avoid undue hardship on the public or the property owner the Court found no such argument that this picketing was carried out in an improper manner. The sole issue was whether the picketing could be treated as a trespass on the private property of the shopping center that admittedly

[302] Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968).

[303] *Id.* at 311.

[304] Thornhill v. Alabama, 310 U.S. 88 (1940); AFL v. Swing, 312 U.S. 321 (1941); Bakery Drivers Local 802 v. Wohl, 315 U.S. 769 (1942); Teamsters Local 795 v. Newell, 356 U.S. 341 (1958).

invited the public to enter for shopping. The Court found the similarities to the *Marsh*[305] case "striking"[306] based on several factors including the general public invitation onto the premises for shopping. Despite the fact that the picketers could canvas the neighborhoods surrounding the shopping center the Court maintained the comparison to the company town and held that the state could not "delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises and in a manner and for a purpose generally consonant with the use to which the property is actually put."[307] It is important to note that this case and its successor cases address only the location of claimed free speech and neither the content nor the identity of the one exercising that right.

The *Amalgamated Food Employees Union* case was decided near the end of the Warren Court and before the next decision could reach the Court Chief Justice Warren had been replaced by the more minimalist government jurist in Chief Justice Burger and three additional Justices, Blackmun, Powell, and Rehnquist, joined the Court, all appointed by President Nixon and all sharing a similar minimalist government stance. The Warren Court extended constitutional rights in several categories, most notably in criminal law, but also took a broader view of state action cases than had been previously taken by the Court. In many ways, the concept of state action was most

[305] Marsh v. Alabama, 326 U.S. 501 (1946).

[306] Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. at 317.

[307] *Id.* at 319-320.

widely defined by the Warren Court and the period since has seen a contraction of how these cases are decided.

The Burger/Rehnquist Court

The era following the Warren Court begins with the election of President Nixon who ran, in part, on a platform opposing what he had labeled "judicial activism" of the Warren Court. This position led him to appoint justices he believed would do less to support individual rights and would avoid any extension of existing rights into new area. Within his first term Nixon appointed four Justices to the Supreme Court, changing the direction of the Court for many years. His appointments of Chief Justice Warren Burger and Associate Justices Blackmun, Powell, and Rehnquist shifted the Court away from its expansion of individual rights to a much narrower degree of judicial involvement and reading of the Constitution. As Chief Justice, Burger was an exceptional administrator but was unable to pull the Court fully from its more activist past under Warren. It was Justice Rehnquist, upon becoming Chief Justice, along with a few other changes that moved the Court to a more limited reading of the Constitution[308], who truly lead the Court on a full-scale retreat, even if not overruling, of the state action decisions of the previous Courts. Rehnquist served as an Associate Justice for 14 years during the Burger Court before becoming Chief Justice and thus was building his consensus long before taking the center position on the bench. He served 19 years as Chief Justice and upon his death the Court was very different from the Warren Court

[308] Justice Antonin Scalia was appointed as Rehnquist moved to the Chief Justice position substantially strengthening the "textualist" portion of the Court.

that preceded it. State action had been narrowed substantially and it appears likely that it will remain so for some time.

Although race continues to be a societal issue even today the pace of litigation around state action began to fall off during this period. Two cases early in the Burger Court pre-dated the arrival of William Rehnquist as a Justice and continued the previous Court's tendency to find state action in racial discrimination cases. *Adickes v. S.H. Kress & Co.*[309] was the last of the lunch counter demonstration cases and state action was found in the presence of a police officer and the custom of the area to prohibit the races eating at the same counter. *Griffin v. Breckenridge*[310] involved the federal statute referred to as the Ku Klux Klan Act[311] prohibiting conspiracies among private citizens to deny the rights of others. The statute was upheld based on a finding of a right of interstate travel combined with a holding that a conspiracy can be so widespread as to replace state power. Those combined with the assertion of the Thirteenth Amendment supporting Congressional power to enact legislation creating a private right of action for African Americans who had been denied basic rights of all free men. Those two cases marked the end of the arc of decisions rising and the peak of the extension of the state action beyond official state action.

Justice William Rehnquist authored his first state action opinion in a case that marked a distinct change from earlier cases when he addressed how a Moose Lodge

[309] Adickes v. S.H.Kress & Co, 398 U.S. 144 (1970).

[310] Griffin v. Breckenridge, 403 U.S. 88 (1971).

[311] 42 U.S.C.S §1985(3).

treated an African American guest to the club.[312] The Moose Lodge was a part of a national social club that by its own constitution and bylaws allowed only white members and their guests to enter. The club owned its own building and received no tax dollars. It held a liquor license from the state of Pennsylvania where the liquor business is completely controlled by the state. A limit was set by statute on the total licenses available to a given municipality and that limit had long been reached so the only way to obtain a license was to purchase one from another holder of a license at monopoly prices. The Pennsylvania Liquor Control Board had extensive regulatory powers and a long list of physical requirements for licensees. Included in the Pennsylvania statute was a provision designed to prevent groups from fraudulently identifying themselves as private clubs that required the groups to comply with their own bylaws and constitution. In this case that meant that the statute required the Moose Lodge to prohibit its use by African Americans as members. There was no similar policy for guests until the case was decided at the lower court.

Newly seated Justice Rehnquist started by narrowing the scope of the context he would consider. Rather than consider all discriminatory practices and policies he limits the inquiry to only guest practices holding that the plaintiff had no standing to challenge membership practices since he had not been denied membership. Had the Moose Lodge not amended its bylaws during the litigation to include a limit on guests to

[312] Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

white people it is entirely possible that this case would have gone no further. He moves on to the state action question with an equally restrictive perspective.

In a laundry list of characteristics of a private club the decision recognizes each in the Moose Lodge and declares that the liquor license involvement of the state did not amount to state action making the discrimination illegal. Distinguishing the case from the restaurant in *Burton* he focusses on the fact that the property was not leased from the state. Ignoring the value as property that existed in the liquor license, a rare commodity, the Court simply aside the argument that the license scheme insinuated the state into the discriminatory scheme. Holding that "there is no suggestion in this record that the Pennsylvania statutes and regulations governing the sale of liquor are intended either overtly or covertly to encourage discrimination"[313] the Court recognized the "one exception"[314] to that finding in the existence of the state regulation that requires the private club to comply with its own constitution and bylaws, including racially discriminatory provisions. That was pushed aside for later handling so the Court could hold that there is no state action making the discrimination beyond the reach of the Fourteenth Amendment. It justifies ignoring that provision by declaring that the law does not, with the single exception, limit minority groups from applying for club licenses or being served in places of public accommodation.

The one exception referred to by the Court was handled by declaring that provision to be state action and contrary to the Fourteenth Amendment barring the

[313] *Id.* at 173.

[314] *Id.*

state from enforcing the provision designed to prevent groups from falsely claiming to be private when formed merely to maintain a discriminatory policy. Enjoining the state from enforcing the policy allowed the Moose Lodge to continue to operate as a racially discriminatory club holding one of the highly valued liquor licenses not available to other racial groups.

Justice Douglas and Justice Brennan, each joined by Justice Marshall, wrote in dissent but the three holdovers from the former Warren Court majority were unable to sway the new majority. Their position stressed the strict limitations on licenses in Pennsylvania and the monopoly granted by the Liquor Commission to the Moose Lodge based on those limitations. They also saw no reason to limit the holding to the guest policy when the state regulation required the club to enforce a discriminatory policy as to members and eventually guests. They cited Justice Harlan's eloquent dissent in the *Civil Rights Cases*[315] which argued that anyone "wielding power under State authority for the public benefit or the public convenience"[316] could not be allowed to discriminate against others based on race. Justice Brennan went further to argue that the deep involvement in regulating the operation of the liquor business at the Moose Lodge made the club a state actor. It is in this decision that the wall of protection around discrimination begins to rise after years of being torn down by the Warren Court.

A lengthy battle over use of public park facilities by private segregated schools and other groups served as the background for the next race discrimination case for the

[315] Civil Rights Cases, 109 U.S. at 26, *et. seq.*

[316] *Id.* at 59.

Court.[317] The City of Montgomery, Alabama, had an ordinance barring use of parks not designated for their race that was stricken more than 15 years before the present case. Following that ruling the city entered into an agreement with the YMCA to operate certain programs using public facilities where the practice of segregation was continued by the private YMCA organization. That was held to be state action in violation of the Fourteenth Amendment since the city had merely assigned its operation of the facilities to the YMCA to maintain segregated use. That litigation ended in an agreed order in which the city agreed to operate the facilities on an equal basis with a requirement that progress reports be provided to the court every six months. This case arises out of an exception to the first progress report claiming that the city was allowing segregated schools and other segregated groups to use the facilities. The District Court granted an injunction barring the city from allowing use of the parks and facilities to segregated schools and groups based on the requirements of the city to maintain a desegregated school system and by allowing the private schools to use the facilities without cost placed the city in a position of supporting segregated schools and groups.

The Court of Appeals upheld the part of the injunction that prohibited exclusive use of facilities by segregated private schools but held that non-exclusive use did not violate the Constitution or the previous desegregation orders. In ruling that private non-school groups could not be barred from use of the parks the Court of Appeals found no relationship to sustain state action (citing *Burton*) and that barring those groups from park use violated their right to freedom of association based on *Moose Lodge*. That

[317] Gilmore v. City of Montgomery, 417 U.S. 556 (1974).

holding places the right of private groups to discriminate beyond the reach of state action and court intervention. Based on that ruling the District Court amended its order to remove the provision prohibiting the City from allowing non-exclusive use of the parks by private schools or school affiliated groups.

Justice Blackmun wrote for the majority which consisted of the 5 most recently named members of the Court by Republican Presidents. He begins with the reminder that the *Civil Rights Cases* holding was that the Fourteenth Amendment did not reach individual action but reached any sort of state action, whether in law or in practice. The issues included whether the desegregation order had been violated and whether the city allowing segregated private schools and other private groups to use its facilities was state action in support of discrimination.

The Court had little difficulty holding that the grant of exclusive use of facilities by segregated groups created a "separate but equal" situation and also supported segregated schools in violation of the local school desegregation order. What was not so evident to the Court was that non-exclusive use, allowed by the Circuit Court's ruling, was a violation of equal protection. That decision was not possible with a record that failed to provide what sort of non-exclusive uses might be possible. The Court distinguished *Moose Lodge* because it was an action against the private group as opposed to the city. The key determination would be whether the city's actions allowing use by private groups by being involved in determining who uses what facilities and providing a scheme that puts the city in the position of making that decision rather than simply allowing all groups to use the facilities.

Important in the Court's discussion of the issue was the position that mere provision of generalized government services does not implicate the state in the discrimination of those to whom services are provided. Utilities and public safety were held in the same light as municipal recreational facilities that did not engage the state in discrimination in a way that meets the state action requirement. If the city uses its position to select groups and provide facilities to certain groups over other groups that might be adequate to involve the state in the discrimination of those private groups.

Again, the Court refused to adopt a clear definition and opts instead to hold that each case is different and requires a careful examination of its facts to determine if state action exists. Leaving that open to interpretation the Court remands the case to gather the evidence to support the perusal of facts that is required to find or rule out state action. The constant reference to the need to parse the facts in each case is a major factor in the difficulty making sense of the language of the decisions and creating categories that work well together. The inconsistency in language can only be overcome by looking at the surrounding political context and the scope of the inquiry by the Court.

Cases based on racial discrimination took a turn away from the Fourteenth Amendment during this era as statutes based on the Thirteenth Amendment which has no state action limitation were used to support claims. One interesting case when looking at charter schools involved private schools in Virginia that refused admission to

African American students.[318] Using Section 1981, a civil rights act from 1866 that bars discrimination in private contracts, the parents sued for admission for their children. The Court agreed for these non-sectarian private schools that they could not discriminate based on race. Strangely, the Court left open the question of whether a religious school could maintain racially discriminatory admission policies. In a footnote, the Court distinguished these private schools from private social clubs based on their advertisements for students quoting the Circuit Court to say the schools were "managed by private persons and not direct recipients of public funds" but "their actual and potential constituency, however, is more public than private."[319]

The other group of race based cases during this period was the peremptory challenge cases. Previously, the Court had rejected the chance to extend the reach of the Fourteenth Amendment into peremptory challenges[320] but in these additional cases racially discriminatory use of peremptory challenges was disallowed to private litigants in a civil case[321], racially discriminatory peremptory use by the defense counsel in a criminal case[322], and discriminatory peremptory challenges in a civil paternity suit striking all males from the panel.[323] The previous holding that required a showing of a

[318] Runyon v. McCrary, 427 U.S. 160 (1976).

[319] See n.10, 427 U.S. 160 at 173.

[320] Swain v. Alabama, 380 U.S. 202 (1965).

[321] Edmonson v. Leesville Concrete, 500 U.S. 614 (1991).

[322] Georgia v. McCollum, 505 U.S. 42 (1992).

[323] J.E.B. v. Alabama, 511 U.S. 127 (1994).

practice of excluding blacks by the prosecutor[324] was overruled in favor of a holding that merely excluding blacks from a particular jury solely based on race was not permissible.[325] Although the final example is not a racial discrimination case it establishes the significance of the administration of a trial and reinforces the principle that the judge is a state actor and in control of jury trial proceedings requiring them to be conducted in compliance with the Fourteenth Amendment. Each of those cases drew dissents claiming that the holding would mark the end of peremptory challenges in jury trials – an eventuality that has not come to pass.

Given the history of the ratification of the Fourteenth Amendment and the racial impetus for its inclusion in the Post-Civil War flurry of legislation to address the end of slavery and the uncertain status of the former slaves, the race cases have invoked more expansive Court action to find state action to alleviate outright and covert discrimination. It is in the cases with no racial issues involved where the state action doctrine and the reach of the Fourteenth Amendment face the most difficult issues. The series of cases extending beyond racial issues in this era has erected a significant wall in the form of state action to privilege those in superior positions of power over those not so privileged.

A clear retreat in state action by this Court is evidenced by holding that Viet Nam War protestors could be prevented from picketing in a privately owned but shopping

[324] Swain v. Alabama, 380 U.S. 202 (1965).

[325] Batson v. Kentucky, 476 U.S. 79 (1986).

center open to the public.[326] *Marsh* was rejected by the Court as "an economic anomaly of the past"[327] and in no way applicable to current economic reality isolating it as a singular case with little precedential value. The language in *Amalgamated Food* that referred to that shopping center as a business district and the equivalent of *Marsh* were dismissed as "unnecessary to the decision"[328] thus eliminating that holding as applicable to the present case. The Court then distinguished *Logan Valley*[329] by noting that the subject of the picketing in that case was directly related to the business and the war protestors were raising an issue not related to the businesses in the center the Court opened the door for consideration of the subject matter of speech in a First Amendment case. Although the Court did not expressly reverse *Logan Valley*, it eviscerated its holding with this first attempt to rely upon it.

Later, in *Hudgens v. NLRB*[330] the Court upheld a ban on union picketing on shopping center land declaring that labor law would take precedence over the First Amendment because the acts of the shopping center owner could not be fairly attributed to the state. Vigorous dissents were filed in both *Lloyd Corp.* and *Hudgens* and in the latter case the dissent argued that the distinguishing factor in *Lloyd Corp.* was not present in *Hudgens* and therefore the First Amendment should apply to be consistent

[326] Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551 (1972).

[327] *Id.* at 561.

[328] *Id.* at 562.

[329] Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968).

[330] Hudgens v. National Labor Relations Board, 424 U.S. 507 (1976).

with the *Logan Valley* holding. *Stare decisis* did not carry the day and the law remains that shopping centers are not state actors for purposes of the Fourteenth Amendment.

In what was a similar situation involving protestors in a shopping center the Court deferred to a more expansive California constitutional provision and rejected the arguments of the shopping center owners that to allow protestors on their private property infringed their property rights and their own free speech rights.[331] The Court held the property intrusion was minimal and the owners could post signs making clear that they did not agree with the positions of the protestors. The Court will uphold state laws and constitutional provisions that exceed the protections of the U.S. Constitution and will defer to a state court's interpretation of its own laws in such cases. Even when state provisions bar any action not required by Equal Protection in school busing the Court has deferred to the state finding no federal constitutional violation in that limitation.[332]

Cases involving utilities and their action in terminating service to customers began to create more of a wall against a state action finding in this era. The cases are based on claims of a loss of property without due process and two cases demonstrate the importance of a state action finding. The Associate Justice Rehnquist wrote for a divided Court in the first case involving a private utility that terminated service with no hearing, no notice, and no opportunity to pay following those safeguards.[333] The

[331] Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

[332] Crawford v. Board of Education of the City of Los Angeles, 458 U.S. 527 (1982).

[333] Jackson v. Metropolitan Edison, 419 U.S. 345 (1974).

customer alleged that the extensive regulation scheme and partial monopoly afforded the utility by the state implicated the state in the acts of the utility. The procedure used for termination was included in the utility's tariff filed with the state but the Court held the state had not mandated that procedure nor explicitly approved it. The benign neglect of the state in the situation was not adequate to attribute the procedure to the state and thus state action was not found to be present. Without such a finding, the Court did not need to reach the question of whether the right was a property interest subject to due process requirements.

In a later decision, a municipal utility faced the same claim under a statute which allowed termination for cause.[334] There the Court found a property right that required due process with the question of state action based on the municipal ownership of the utility. This difference highlights how the question of state action determines whether the Constitution applies and how the same activity operated by the public is required to provide due process while a private operator is not. Three Justices in dissent argued that the constitutional question should not arise and that the state law was sufficient to protect the rights of the customer. Rehnquist and Burger agreed with that viewpoint seeking to further limit the reach of the Constitution.

Creditor remedies raised issue of how much involvement is attributable to the state under commercial statutes including private remedies for creditors that would previously have been handled in the courts. Again, with Rehnquist writing for the

[334] Memphis Light, Gas & Water v. Craft, 436 U.S. 1 (1978).

majority, the Court took a very limited view of the reach of the state.[335] In the case a warehouseman sold property of a customer under provisions of the Uniform Commercial Code as adopted by the state. By the provisions of that code the warehouseman could sell property found within a storage space when payments were behind to apply to the amount owed. The Circuit Court of Appeals found that the state had delegated part of its power to allow the public sale without any resort to the courts and thus was implicated in the process. The Court disagreed and limited the public function argument to situations involving matters previously exclusively a state activity. Noting that there were other remedies for settling disputes the Court limited its inquiry into whether the state had been involved in this specific sale finding that it had not. Again, as a passive participant acquiescing in the sale the state could not be held responsible for it. The dissenters argued that the sale took place only because it was authorized by the state and thus implicated the state in the way the sale took place. The limitation of the Court in looking only to this sale and whether the state was involved in it points to the future of state action cases in this era.

When a creditor involved law enforcement to sequester the property of a debtor the Court did find state action with Justices Brennan and Blackmun switching sides with Justice White writing for the majority.[336] The original prejudgment attachment was dissolved after finding that it failed to meet statutory grounds for such a seizure and the debtor claimed a deprival of his property without due process by the creditor, a private

[335] Flagg Brothers v. Brooks, 436 U.S. 149 (1978).

[336] Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982).

party. Based on the involvement by the sheriff in the sequestering of the property the majority found that the state acted in concert with the creditor in depriving the debtor of property making the action of the creditor attributable to the state. Justice Rehnquist penned a dissent arguing that the state was not implicated when a private party invokes a valid legal process but failed to garner a majority for that view.

The same principle resulted when a landlord acted to remove a trailer from his trailer park before a hearing on the pending eviction case and without a court order.[337] The landlord asked the sheriff to be present when he forcibly removed the trailer and the sheriff complied with that request. Over the objections of the trailer owner and under the supervision of the sheriff the landlord unhooked utilities and anchors and pulled the trailer from the park, taking it to another property and damaging it in the process. Both the landlord and the sheriff were found by the Circuit Court of Appeals to be engaged in state action but held it was not a seizure under the Fourth Amendment. A unanimous Court found the involvement of the sheriff was not simply assisting in a legal procedure but made law enforcement a full participant in a process the sheriff knew to be occurring without a court order of eviction. Because the sheriff and landlord worked in concert both were found to be state actors and the seizure was found to be unreasonable under the Fourth Amendment made applicable by the Fourteenth Amendment to the state.

[337] Soldal v. Cook County, 506 U.S. 56 (1992).

The probate of an estate in Oklahoma gave rise to a similar claim that state involvement with a private individual could equate to state action on the part of the private individual.[338] Notice of the beginning of a claim period was simply published in a local newspaper as allowed by statute. Creditors whose actual address was known were not sent notice by mail or any other means individually. When creditors discovered that their claims were barred they sued claiming a taking of their property interest without due process. The central question for this study was whether the act of the estate following a state statutory procedure could be considered state action. Based on the probate court's intimate involvement in the administration of the estate, including the beginning of the claim period, the Court held that such substantial involvement must be considered state action. With that finding the statutory process was found lacking in due process for failing to provide adequate notice where possible. Only Chief Justice Rehnquist dissented claiming no distinction between an Indiana statute that allowed ownership of mineral rights to devolve to the surface owner if not active for 20 years and the 2 month claim period of the estate claim statute in a pending estate. He argued that there could be no state action based solely on the court's "perfunctory administrative involvement"[339] in the estate.

Judicial immunity enjoyed by a judge issuing a wrongful injunction does not shield the private parties that conspired with the judge to gain issuance of that writ even though his status as a state actor does extend to those private parties to make

[338] Tulsa Professional Collection v. Pope, 485 U.S. 478 (1988).

[339] *Id.* at 494.

them liable for constitutional deprivations.[340] The involvement of the judge did not work to extend the immunity enjoyed by the jurist to those private parties who worked with the judge to deprive the claimants of their property without due process.

A public defender representing a defendant in a criminal case is not a state actor because his duty is not to the state but to the defendant.[341] That rule is changed if the public defender is not merely providing representation to the defendant but is engaged in a conspiracy with prosecutors and judges to deprive a criminal defendant of his constitutional rights.[342] Like the judge working with private parties in the illegal injunction the difference in result for public defenders comes with the conspiracy with state actors in depriving someone of rights and not arising out of normal representation of a criminal defendant.

Not all professional relationships mirror the situation with a lawyer acting as a public defender while being paid by the state. A prison physician, an employee of the state, while acting as a professional in treating a prisoner remains a state actor because his duty aligns with that of the state.[343] He had the responsibility of a physician to heal his patient and the state was responsible for the safety and welfare of those in its custody while imprisoned. Because those duties aligned there was no reason to treat

[340] Dennis v. Sparks, 449 U.S. 24 (1980).

[341] Polk County v. Dodson, 454 U.S. 312 (1981).

[342] Tower v. Glover, 467 U.S. 914 (1984).

[343] West v. Atkins, 487 U.S. 42 (1988).

the physician as anything but a state actor liable under the Eighth Amendment for mistreating a prisoner in his capacity as the prison physician.

First Amendment rights have always enjoyed broad support in the Court and even the Justices less willing to extend individual rights are able to find state action to support a claim of violation of that right. Justice Scalia, who has been classified as a singular proponent of his own textualism,[344] found state action in what is commonly known as Amtrak, a private entity.[345] The issue before the Court was whether Amtrak was truly a private entity or a government one. Secondarily the issue was whether Amtrak was so related to the government as to be acting on behalf of the government thus making a private entity a state actor. Several features of the analysis are relevant to the possible status of charter schools.

Amtrak's charter expressly denied it status as a government agency but the Court looked beyond that label and held it to apply to issues like immunity or other matters within the control of Congress but not as to constitutional status. Following a long description of the history of the creation and operation of Amtrak the Court held it to be an agency of the United States Government constrained by the Constitution because it was "government-created and -controlled."[346] It was created "explicitly for the furtherance of federal governmental goals"[347] and was governed by a board largely

[344] BROOKS. 2005. See especially chapter two for Scalian textualism.

[345] Lebron v. National Railroad Passenger Corporation, 513 U.S. 374 (1995).

[346] *Id.* at 397.

[347] *Id.*

appointed by the government. Although dictum suggests that the corporation would also be considered acting as an agent of the government even if not a true government agency, the holding is limited to the finding that Amtrak was a government agency limited by the Constitution.

In dissent, Justice O'Connor suggested that the argument that Amtrak was a government agency was precluded by failure of the petition for certiorari to directly raise that question and she posits that the only issue before the Court was whether as a private entity Amtrak's actions could be attributed to the government. As to that issue she adopted a very narrow test finding that the government was not involved in the decision to limit the advertising appearing on Amtrak trains and thus the prohibition of the display was not subject to constitutional scrutiny.

The employees of two separate privately owned correctional facility operators were claimed to have deprived prisoners of their rights in cases that arrived at the Court on separate issues. The cases share significant parallels to charter school cases in that each involves the privatization of a governmental function that lacks exclusivity. The details of these decisions, both made by the Court in the later years of the Burger/Rehnquist Court, demonstrate the limitations that the path of decisions has put into place during the era.

In the first the employees sought qualified immunity, a privilege enjoyed by public employees working in publicly run prisons when charged with a §1983 claim for

deprivation of rights under color of state law.[348] The Court based its decision on a recently decided claim against private parties involved in a *Lugar*[349] attachment situation.[350] *Wyatt* detailed the basis for immunity for government officials and rejected its application to the private citizens in that case. What is unusual about the facts was raised in the dissent as "passing strange"[351] that a party can be held acting as a state actor under color of state law while denied the immunity of the public employee for the sole reason that they are not in fact public employees. The result of this reasoning is that the private person is held liable as a state actor without the immunity. Defenses remain viable but those require determinations of fact that may require trial while immunities serve to terminate litigation at the start.

The dissent argued that the immunity question should be consistent with the "under color of state law" determination. If the actor was acting with state authority then immunity should be granted in the same way as if the actor were a government employee.

The second case occurred in a privately operated halfway house where the inmate alleged that employees injured him negligently.[352] Asserting a claim based on a case that created a right to sue federal employees for damages while in prison

[348] Richardson v. McKnight, 521 U.S. 399 (1997).

[349] Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982).

[350] Wyatt v. Cole, 504 U.S. 158 (1992).

[351] *Id.* at 180.

[352] Correctional Services v. Malesko, 534 U.S. 61 (2001).

custody[353] the injured prisoner sought compensation from the corporate operator of the halfway house after the dismissal of the corporate employees on statute of limitations grounds. The majority framed the issue as one of extending the *Bivens* rule to allow prisoners in private prisons to sue corporate operators while those in government facilities would not be able to sue the agency and would be limited to the individual officers. The dissent written by Justice Stevens and joined by three Justices argues that preventing suit against the corporate operator made the rights of prisoners in the two types of facilities asymmetrical. They argued that allowing suit against the corporate operator but barring suit against the federal government would balance the rights since the corporate operator was the agent of the government like the prison officer in the government operated facility. In the discussions, there was no question about the acts of the operator being anything but state action since the entire case is built on the Fourth Amendment. That assumption of state action is tacit but present in the ruling.

One argument often made during this period is that the state is so deeply involved in regulating or directing a private enterprise as to become responsible for its decisions and actions. That argument was a part of what was involved in *Burton*[354] but that case was so limited to the specific facts of a private lessee of state property that is weak authority for much else. *Moose Lodge*[355] provided then Justice Rehnquist with his

[353] Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

[354] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

[355] Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

first opportunity to shape state action and that was followed by the two collection cases[356] in which Rehnquist continued to whittle away the state action expansion of earlier years. Three decisions issued the same day further shaped the concept of state regulatory involvement of private entities and how that might involve state action. Two of those cases found no state action and the majority spoke through the pen of Chief Justice Burger on one and Justice Rehnquist on the other. The third case, finding state action, drew a dissent from Chief Justice Burger and Justice Powell, joined by Justices Rehnquist and O'Connor. That dissent reveals as much about the issue as do the opinions in the other two cases.

The first of the cases considered here involved private school teachers who complained that their dismissal was a violation of their First Amendment speech rights.[357] Ordinarily there would be little question that a private school was not subject to constitutional limitations but this school presented a unique private school arrangement. What made it most private is that the school was operated by a private board of directors without any public officials as members and with no part of the selection being carried out by public officials. Looking only at that issue it is a simple case with no state action but the state is much more involved that such a cursory look reveals and that raises difficult questions of the publicity of the school.

By a contractual arrangement with a public school district, the students graduating from the school received diplomas from that district. A contract was also in

[356] Jackson v. Metropolitan Edison, 419 U.S. 345 (2974);Flagg Brothers v. Brooks, 436 U.S. 149 (1978).

[357] Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

place with a state mental health agency to provide services to students. Tuition from these arrangements amounted to more than 90% of the revenue for the school and virtually all students in attendance were able to attend because a public agency paid their tuition. The state law required schools receiving tuition payments to meet detailed and extensive regulations to which the school had to conform. Some of those regulations related to personnel standards and procedures and a requirement to maintain those on file along with job descriptions. The complainant was a counselor at the school hired under a federal grant distributed through a state agency. One condition of the grant was that the agency approve initial hiring decisions of those hired using grant funds to assure the agency that the person hired was qualified for the position. The trial court ruled that the school provided a public function and was therefore a state actor. The Court of Appeals reversed that finding and dismissed the claim holding that the state had not exercised any control over the school's personnel decisions.

The second case involved a nursing home facility that made decisions as to necessity of a level of care to satisfy Medicaid eligibility requirements.[358] The privately owned and operated nursing home was subject to extensive regulation including a requirement to review facility utilization by patients on a periodic basis to assess justification for the level of care provided by Medicaid funds. Upon determining that the patient needs a different level of care the facility notifies a state agency that then changes the level of funding for that patient to match the recommended level of care. The decision by the facility to lower the level of care was communicated to the state

[358] Blum v. Yaretsky, 457 U.S. 991 (1982).

agency and following administrative hearings the agency affirmed the action and notified the patients that their funding would be discontinued unless they moved to a lower level of care in accord with the facility's determination. The patients challenged the decision made without notice of a hearing and an opportunity to be heard on the issue in a claimed violation of due process under the Fourteenth Amendment. In order to sustain the claim, they needed to establish that the reduction of their benefit levels was the result of state action. The lower courts found state action based on *Jackson v. Metropolitan Edison Co.* and ordered a hearing be held for all such care decisions with participation by the patients.

The third case from the same day was the *Lugar*[359] decision in which the majority found that invoking that power of the sheriff to carry out what proved to be an erroneous attachment of property in a collection action was sufficient to create state action making the private party pursuing the collection liable for a due process violation. The dissent is the focus of this analysis as a companion to the other two cases and was based on a belief that the private citizen should not be held to a constitutional standard by merely seeking law enforcement to carry out an attachment. The collection cases will not follow the dissent and the dissenters will join in later decisions in such cases finding state action in the inclusion of law enforcement in pursuing collection cases.

[359] Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982).

The two cases finding state action present a similar issue of how much regulation is required to make a private institution into a state actor. Neither involved direct action by a state official but each presented a level of involvement in the larger process that could be taken to make the state a partner in the acts complained of. A wide scope of inquiry would look to the full situation to include consideration of reactive state action. A narrow scope of inquiry would end at the point of the single action that caused the alleged deprivation of rights. By limiting the scope the Court did much to eliminate the argument that the state extensively regulating the acts of a private party becomes a joint actor invoking the Constitution in those acts. What is inconsistent with that limitation is the commonly quoted language that a determination of state action

As noted above, the first case directly addressing this issue was *Moose Lodge*[360]and the newly appointed Justice Rehnquist deftly avoided the regulatory issue as a characteristic of state action while granting some small relief in that racially based case. State action was not the basis for the decision, however, and the relief granted rested on the direct regulatory language issued by the state rather than the behavior of the private club. More directly presenting the issue two years later was a claim that a private utility terminated service without adequate notice to the consumer.[361] That decision focused on the lack of involvement of the state directly in the termination of service despite the fact that the company was heavily regulated by the state, was at

[360] Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

[361] Jackson v. Metropolitan Edison, 419 U.S. 345 (1974).

least in a partial monopoly situation providing utility services, and required the state's approval of its general tariff although not specifically for its termination procedures. The narrowing of the scope of inquiry allowed the Court to look only to this termination and decide that the state did not participate directly in it to allow it to be implicated in the act.

The cases decided in the 1982 term then raised many of the same questions in a different circumstance. Rather than collection or a utility the private parties claimed to be state actors are a nursing home and a private school. In each case the Court found them to be free of the onus of constitutional limitation despite the extensive state involvement in their operations. Each claimant also argued that the respondent served a public function but the earlier imposed requirement that the function be exclusively the realm of government action had already made that argument unlikely to serve again as the basis for state action. For that reason, this analysis will not address that position in these cases.

One distinction of *Blum* is that the defendants in the case were the state employees who affirmed the decision of the nursing care facility to reduce the approved level of service. Thus, the claim was against state actors claiming that they were responsible for the acts of the private nursing care facility operator in reducing the approved level of care. Despite that distinction there is no difference in how the acts are analyzed by the Court. The Court draws an analogy between the decision of medical staff to enact a lower level of care based on regulatory language requiring them to place patients in an appropriate level of care and the decisions made they a public defender

representing a client in *Polk.*[362] Despite the absolute duty of a lawyer to act in the interest of the client the Court holds the decision by a nursing facility in pursuit of the regulatory requirement of the state to move patients to certain levels of care based on their condition to be essentially the same. It is enough for the Court that there are "professional standards not established by the State"[363] upon which the facilities may act.

Further distinguishing the decision to reduce the level of service from the decisions of a lawyer representing a client is the threat of state exclusion of participation in Medicaid patient care of any facility that over-serves Medicaid patients. The Court dismisses the threat of those penalties as any sort of coercive action by the state that might make it a partner in reducing levels of care for Medicaid patients. Even a regulatory requirement that the state officials review the assessments of recommended levels of care is held not to involve state involvement based on the lack of any requirement for the state to approve or disapprove those decisions as to specific patients.

A vigorous dissent by Justice Brennan accompanied by Justice Marshall argues that with increasing regulation by the government comes increasing scrutiny of the acts of those required to meet those regulations. Noting the reach of power by government inherent in a regulatory scheme as comprehensive as Medicaid the dissenters argue that it extends state action beyond the majority opinion's narrow scope of inquiry. It

[362] Polk County v. Dodson, 454 U.S. 312 (1981).

[363] Blum v. Yaretsky, 457 U.S. at 1008.

refers to the majority opinion as taking a "pigeonhole approach"[364] rather than a complete examination of the regulatory scheme and the power exercised by the government within the scheme to avoid a finding of state action. It is a criticism well taken and will apply to many of the state action decisions during this era of the Court.

The other state action case handed down the same day is facially more related to the question of charter schools because the actor in question is a private school. It lacks the charter arrangement but certainly maintains a strong contractual tie to the state in many ways. Chief Justice Burger wrote for the majority and again rejected the argument that the extensive regulatory involvement by the state in the operation of the school was inadequate to implicate the state in its personnel decision to terminate certain teachers. The Court narrowed its inquiry in this case to the decision to terminate a teacher ignoring the extensive regulatory and financial involvement of the state in the school's operation. Citing its decision of the same day in *Blum* the majority refuses to find state action based on the termination because the decision was that of a private entity, like the nursing facility in *Blum*. It also summarily rejects the argument that the extensive funding by the state was not a factor and compared it to the Medicaid funding received by the nursing care facility.

The draws an analogy to *Polk* once again by arguing that the public defender in that case was paid by the state just as the school relied on state funds to exist ignoring the special duty that served as the basis for *Polk*. A second analogy suggested by the

[364] *Id.* at 1014.

Court between the school relying on contractual payments from the state and companies that build roads, ships and other public structures for the government suggesting that their acts are not the acts of the government based on that revenue stream. Finally, the Court rejects a state action finding based on the fact that the government had nothing to do with the personnel decision and compares it to *Blum* in which the actions were at least related to a regulatory scheme of the government. As with many of these cases the public function argument was quickly dispatched claiming that even schools were not exclusively the province of the state. It also rejects the argument that the relationship of the school to the state was a "symbiotic"[365] one like that found in *Burton* saying repeating the comparison to any government contractor providing services to the state.

The dissent by Justice Marshall, joined by Justice Brennan, cites the statutory requirement of the state of Massachusetts to provide an education to the problem students served by the school in this case. It is suggested that placement of the students in the school and relying on its services to meet that statutory obligation made the school a proxy for the state and thus a state actor. It goes on to argue that it even meets the "symbiotic relationship" test of *Burton* based on heavy regulation of the school serving special needs students and the complete reliance on state funds for its existence. The dissenters also cite the vital role of public education and suggest that a private school used to provide that essential service brings it within the range of state actors for constitutional purposes. Finally, it distinguishes the role of contractors

[365] Rendell-Baker v. Kohn, 457 U.S. at 842.

building roads and equipment for the state by noting that this contractor is performing a statutory obligation of the state in providing educational services. The dissent characterizes the majority opinion as "empty formalism"[366] and suggests a "more sensitive and flexible interpretation"[367] of state action to fit the realities of the time.

The remaining state action cases of the era raised a variety of arguments for state action but little new law was developed. The United States Olympic Committee was held not to be a state actor based on its exclusive government charter[368] and an extensive workers' compensation regulatory scheme did not convert insurance carriers for that coverage into state actors making decisions about payment of medical bills.[369] Both of those cases drew dissents from the members of the Court who sought a broader interpretation of state action. In a unanimous decision union members who assaulted and drove away non-union workers were not state actors because the state was not a co-conspirator in that activity.[370] None of those cases extended the previous law of state action significantly.

Two cases presented related issues with the earlier case authored by Justice Stevens drawing a dissent by four Justices and the latter case by Justice Souter with a four Justice dissent including the Chief Justice. The first involved sanctions by the

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[366] *Id.* at 852.

[367] *Id.*

[368] San Francisco Arts & Athletics v. United States Olympic Committee, 483 U.S. 522 (1987).

[369] American Manufacturers v. Sullivan, 526 U.S. 40 (1999).

[370] United Brotherhood v. Scott, 463 U.S. 825 (1983).

National Collegiate Athletic Association (NCAA) imposed on the University of Nevada at Las Vegas (UNLV) for irregularities in the operation of its basketball program.[371] The sanctions required the school to sever its ties with the coach during a period of probation and the coach filed suit in Nevada state court seeking an injunction claiming a deprivation of property without due process. The school was a state institution and the NCAA was an association of colleges and universities both private and public. The NCAA was governed by the membership meeting in annual conventions and its Council and several committees. It maintained as a policy to prevent a blurring of the line between collegiate and professional athletics and pursuant to that duty it enacted various rules and enforced them against violation by the member institutions. It did not have the power to sanction individuals but did, as in this case, require an institution to sever ties with individuals found to have violated rules or suffer additional consequences as an institution. The Nevada state courts held that the NCAA was engaged in state action based on a delegated power from UNLV and ruled in favor of the coach on all counts.

On appeal the Court, Chief Justice Rehnquist writing for the majority, reversed the finding of state action by the NCAA. The majority observes that this is an unusual case because the state had not "provided a mantle of authority that enhanced the power of the harm-causing"[372] private entity. The actual act of damage was committed by UNLV, plainly a state actor subject to the Due Process Clause of the Fourteenth Amendment. The Court noted that most of the members of the NCAA are outside the

[371] National Collegiate Athletic Association v. Tarkanian, 488 U.S. 179 (1988).

[372] *Id.* at 192.

State of Nevada and independent of any state law, adding dictum to note that the result might be different if its activities and participants were all confined to a single state.[373] By merely accepting the NCAA's bylaws and standards UNLV had not become responsible for their content but could only withdraw or act to amend those bylaws in the NCAA process. The Court noted that UNLV, rather than assisting the NCAA in its investigation stood in opposition to it throughout the process and thus had not delegated its power to the NCAA. Acts of the NCAA were based on its policies and not the laws of the State of Nevada and thus it could not be held to be a state actor.

The dissent argued that a private party, invoking state action to carry out a decisive act could become a state actor citing *Adickes*[374] and *Dennis.*[375] What began as a decision of the NCAA was then enacted by the state university and that joint action was deemed by the dissent to be state action. Had UNLV refused to enact the recommendations of the NCAA it would have severed that connection and the NCAA could not be considered a state actor. Without the power of the state institution to remove the coach, the NCAA would have been powerless to do so. This line of argument is referred to in a footnote in the majority opinion where it is claimed that the state officials in the two cases were bad actors themselves contrasted with the asserted innocence of UNLV in accepting the discipline of the NCAA and terminating the coach. Once again, the scope of the inquiry was limited to the NCAA without truly examining

[373] *Id.* at 194, n.13.

[374] Adickes v. S.H.Kress & Co, 398 U.S. 144 (1970).

[375] Dennis v. Sparks, 449 U.S. 24 (1980).

the state university and its part in the action and an additional layer of wrongdoing was assigned to the two cases relied upon in the dissent.

Thirteen years after *Tarkanian* the Court took a case with several parallels to it but on the high school level. In *Brentwood Academy v. Tennessee Secondary School Athletic Association*[376] the Court was asked to review the imposition of sanctions on a high school claiming the Association was a state actor subject to constitutional restraints. The Association consisted of member schools, public and private, and was governed by boards and councils elected by members. It had a set of bylaws and regulations that set out various aspects of how high school athletics must be operated to comply with the association's standards and to maintain good standing in the association. 84 percent of the schools in the association were public high schools and the membership was confined to schools in Tennessee. The individuals who served on the various boards and councils governing the association were administrators from the schools who conducted the business of the association during school hours. Most of the financial support for the association came from public schools. Although the state had eliminated a requirement that the state board of education serve on the governing board of the association that practice continued and the employees of the association employees were eligible to participate in the state retirement system.

When a school sued the association for imposing sanctions claiming a deprivation of constitutional rights under the Fourteenth Amendment the issue of the

[376] Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288 (2001).

association's status as a state actor was the central issue in the case. The trial court ruled that it was a state actor and the Court of Appeals reversed that finding. The Supreme Court took the case on certiorari and in a 5-4 decision held that the TSSAA was a state actor. This time Justice Souter penned the majority opinion and Justice Thomas wrote for the dissent that included the Chief Justice. Three of the four dissenters had voted with the majority in *Tarkanian*[377] while only a single Justice from that decision joined the majority in *Brentwood Academy*.[378]

The extensive involvement of the state in the operation of the TSSAA served as too close a nexus to separate the state from the private association. The governance by public employees as a part of their jobs, the treatment of its employees as state employees and the observation that the association could not exist without the overwhelming participation of public schools all added to a clear relationship with the state. The fact that the association operated within a single state was also cited referring to the dictum in *Tarkanian*. By considering the entire relationship the Court could see a unity of interest and action that required the finding that the TSSAA was a state actor subject to constitutional limitation.

The dissent by Justice Thomas asserts that the majority extends state action beyond any previous decision and cites "common sense"[379] to say there could not be

[377] Justices Scalia and Kennedy joined the Chief Justice's dissent in *Tarkanian* and Justice Thomas was not yet on the Court.

[378] Justice Stevens, the author of the *Tarkanian* majority opinion also joined the majority here with Justices Souter, O'Connor and Ginsberg were not on the Court for the earlier decision.

[379] Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. at 306.

state action in this case and states the finding "encroaches upon the realm of individual freedom that the doctrine was meant to protect."[380] The limitation on the view taken by the dissent is that it looks only at the State as meaning the State of Tennessee without truly considering the public school officials that govern the association as state actors. It chastises the majority for not defining "entwinement"[381] despite the long history of the Court using terms not well defined to discuss state action. Finally, as a warning of what might happen as a result of the majority ruling the dissent suggests that the entwinement concept might extend to any group with public officials controlling it – a suggestion that it appears the majority would agree with. The dissent's concept that the association is a "private citizen"[382] seems to ignore the substantial state involvement to deny the relationship of the state to the association.

The result of the Burger/Rehnquist era is that much more limitation exists on state action than was previously developing. Despite Justice Thomas's warnings that the concept has become uncontrolled and ill-defined it has become far more confined and never was well defined. Again, it pays to consider the words of Professor Black when describing the state action concept at the beginning of this era as a quagmire and a dark cave because it was not well defined at that point. The era did little or nothing to add definition but did much to reverse the growth of the concept that occurred during the Warren Court.

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[380] *Id.* at 305.

[381] *Id.* at 312.

[382] *Id.* at 315.

The Roberts Court

The issue of state action has not appeared in the dozen years of the Roberts Court and that may signal how weakened the concept has become through previous decisions. It is also likely a result of litigants seeking other alternatives as causes of action such as reliance on state provisions to seek redress. The *Brentwood* case was revisited on the question of the First Amendment which the Court found was not violated by a rule prohibiting schools from recruiting student athletes but the state action finding was not changed.[383] Justice Thomas concurred but again argued that the original case should be reversed to find the Association was not a state actor. He was not joined in that opinion by any other Justice.[384]

Present status of the state action doctrine

The review of decisions and how they have changed through the years since the ratification of the Fourteenth Amendment reveals first that the Court has not constructed a clear definition of a state actor under that amendment. There is, however, a definite arc followed by the decisions that is not based on a syllogistic construction but shows an expression by the Court of the prevailing political climate that brought the Justices to serve on that body. When the different eras of the Court are examined they show definite changes in how the issue of state action has been used to allow or deny constitutional claims. The early years were cautious as would be expected for such a change in the federalist concept. The following years began to expand the concept as the

[383] Tennessee Secondary School Athletic Association v. Brentwood Academy, 551 U.S. 291 (2007).

[384] *Id.* at 306.

Court pushed somewhat beyond the initial caution. The Warren Court took the Constitution beyond any previous Court as it faced substantial issues of racial discrimination and extended individual rights in new ways. The backlash against the expansion of the Warren Court came in the form of the election of a president on a pledge to stop "judicial activism" and the appointment of two Chief Justices who reined in the state action doctrine almost to elimination. That withdrawal of the previous expansion has been followed by near silence in the Court on state action perhaps signaling that it lacks any application beyond direct state involvement in a denial of constitutional rights.

Chapter 5

Implications for Charter School Teachers

Charter schools have developed and proliferated in the United States following most of the development of the state action doctrine in the Supreme Court. In 2001 when the last substantive state action case was decided there were fewer than 2,000 charter schools. Today there are more than three times that many. Just how they should be treated on issues of constitutional law has yet to be decided definitively but those issues are of great significance to teachers who serve charter school students. Public employees do enjoy certain constitutional protections that are not afforded to employees of private institutions.

Teachers in charter schools have largely been excluded from state tenure laws but even without those laws there can be situations in which a *de facto* tenure is earned requiring some due process before termination of employment.[385] Free speech for public school teachers has been supported by several decisions of the Court with certain limitations as to subject matter.[386] Publicly employed teachers may not be required to submit an affidavit of the organizations to which they have belonged[387], sign

[385] Perry v. Sindermann, 408 U.S. 593 (1972).

[386] *See, e.g.*, Wieman v. Updegraff, 344 U.S. 183 (1952);Shelton v. Tucker, 364 U.S. 479 (1960);Keyishian v. Board of Regents, 385 U.S. 589 (1967);Tinker v. Des Moines, 393 U.S. 503 (1969);Pickering v. Board of Education, 391 U.S. 563 (1968).

[387] Shelton v. Tucker, 364 U.S. 479 (1960).

a loyalty oath[388], or certify that they are not members of the Communist Party[389] to gain or maintain employment. They may speak out on public issues as any citizen may when it is not specific to their job.[390] The Fourth Amendment protects them from searches that are not reasonable where they have some expectation of privacy even in their workplace.[391] If charter school teachers are held to be employed by private employers those constitutional provisions are inapplicable allowing the employer to ignore those protections. If charter schools are public, the teachers have rights like any other public school teacher. That is why it is essential to examine how charter schools might be categorized by the Court as state actors subject to constitutional limitations.

With the limitations placed on the application of the state action doctrine's inclusion of private citizens and entities in the recent past it cannot be said that charter schools are likely to be considered state actors in their relationship to their teachers. For reasons explained below it appears to be a very difficult argument to with state actor status for charter schools despite their identity as "public" schools. What is required is to explore what might be argued and how the cases might be framed to maximize the possibility that charter school teachers will be granted the same constitutional protections as their traditional public school counterparts.

[388] Wieman v. Updegraff, 344 U.S. 183 (1952).

[389] Keyishian v. Board of Regents, 385 U.S. 589 (1967).

[390] Pickering v. Board of Education, 391 U.S. 563 (1968);Garcetti v. Ceballos, 547 U.S. 410 (2006).

[391] O'Connor v. Ortega, 480 U.S. 709 (1987).

At the outset, it must be noted that charter schools are creations of state law and as such there are variations in how they are structured and administered. For purposes of this analysis no single state will be used but the characteristics of many charter arrangements will be used to analyze the arguments. For any given state, the situation might present a better or worse argument for any issue presented to the Court. This analysis will assume that private companies, administered wholly by private individuals may operate a charter and that in many cases a private company not the holder of the charter may administer a charter school and operate as the employer of the teachers in the school. It will also be assumed that the sole tie to either the local school board or the state education authority will be the charter for that school. It will also be assumed that the state has statutorily allowed charter schools to operate outside the existing tenure laws that are part of traditional public school teachers' contracts and that the only state directives imposed on the charter schools are those for health and safety of the students and little else. Because the Court has consistently recited that any state action case requires a careful examination of the unique facts and has refused to create any true rules for deciding the cases any fact situation can result in a singular decision.

How can charter schools be state actors?

The Court has discussed several factors in the long history of state action cases with little consistency. The factors have remained the same but how they apply to any given case has changed through the approximately 150 years since the ratification of the Fourteenth Amendment. Understanding the path of those changes in the application

of the factors serves as the basis for this analysis so this chapter will look at how those factors might be argued for charter schools and how the path of decisions points to a result of that argument.

Public Function

What seems most logical to argue to support a finding that a charter school is a state actor is that it is identified as a public school and therefore serves a public function. The cases from the middle portion of the twentieth century might have supported that argument and there is a remote possibility that the argument might be successful even now. More likely, however, is the assertion of the Court that the public function argument fails because school has not "traditionally the exclusive prerogative of the State."[392] Originally applied to a privately owned electrically utility the exclusivity requirement has been cited as support for the proposition that education is not such a prerogative.[393] That holding does not plainly preclude charter schools from being held to be a public function and leaves a small opening for argument.

Rendell-Baker involves a private school providing only services to "maladjusted high school students",[394] a service that the State of Massachusetts had not previously provided itself. Because there was not an issue of other students being educated that might serve as a small opening to argue that the education of most students in public

[392] Jackson v. Metropolitan Edison, 419 U.S. at 353.

[393] Rendell-Baker v. Kohn, 457 U.S. at 839.

[394] *Id.* at 842.

schools has been a public function for several decades. It cannot be argued to have been exclusive for the entire period of the existence of the United States because early education efforts were almost all privately run in some manner. Until the 1830's there were many suppliers of education and the concept of universal education was just becoming a reality. Following the Civil War there was a strong movement to indoctrinate the South with schools carrying the Northern message of abolition and stressing the values of the North. Increased industrialization and urbanization pushed public schools well into the majority during the 19th Century and since then the public common school has been a fixture in all states.[395]

The Court began its analysis of the state action issue in the case by comparing the private school to "not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government."[396] That analysis opens at least two possible avenues for argument that distinguishes the case and supports a different result. Simply the fact that the private corporations in the case exist for something other than public business and exist outside of the public realm creates a difference large enough for the Court to opt for a different result. Charter schools are created by the state and exist only because the state or an agency of the state gives it life through the charter. It is not one contract among many but the sole reason the charter school may operate. In addition, to lump

[395] For a full history of education in the United States through this era see, LAWRENCE A. CREMIN, AMERICAN EDUCATION: THE METROPOLITAN EXPERIENCE 1876-1980 (Harper & Row 1988);LAWRENCE A. CREMIN, AMERICAN EDUCATION: THE COLONIAL EXPERIENCE 1607-1783 (Harper & Row 1970).

[396] Rendell-Baker v. Kohn, 457 U.S. at 840-841.

the education of children in with ships, dams and bridges seems to be a stretch for a school created by the state to meet its obligation to educate young people. Although the current Court might reject those arguments they are worthy of presenting as a way to distinguish the case and allow for a holding that charter schools are state actors.

If the Court should decide to consider the full history of school in the United States that might be a factor but the more recent trend to limit the scope of the inquiry may work to keep the focus on the past century of public schools as a public function. Private schools are still a major factor but the state has provided its education through the traditional public school and having now adopted the public charter school that may be considered a part of that public function. Little of what is taking the political center stage today points to any expansion of the public function argument for charter schools. Based on the prevailing political winds the Court is unlikely to impose constitutional duties on the charter school movement based on this argument.

The symbiotic relationship

The *Burton*[397]decision created a unique avenue of argument that is built around the concept that the state benefits from its engagement with a private entity and when the private entity acts within that arrangement it implicates the state. Declared to be a unique fact situation, the holding in that case could support a finding that a charter school is involved in such a relationship with the local school district. The restaurant in *Burton* was placed in a public position by municipal action and that allowed it to

[397] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

publicly discriminate against a certain group of people unconstitutionally. One unique aspect of that case is that the restaurant was a lessor of public space where it operated. In some situations, charter schools are using buildings owned by a local school district in which a charter school is placed. Subject to charter requirements and local school board oversight of those requirements the charter is engaged to education some portion of the public district's students. The district benefits by having students educated and the charter benefits by having a location and students to operate a school. Based on that mutually beneficial arrangement it could be argued that a symbiotic relationship exists making the charter a public actor just as the restaurant was in *Burton.* Again, based on limitations in the holding to the specific facts that case is not strong support for any argument that is not squarely aligned with the facts upon which the decision relied.

Entwinement, insinuation and regulation

These three terms are combined for the purposes of this argument because there is little to distinguish their use by the Court. The argument is often made and seldom successful that the private party alleged to have violated the rights of a claimant was so heavily regulated that its acts were attributable to the state. It has been rejected by the Court in cases involving utilities[398], nursing homes[399], workers' compensation

[398] Jackson v. Metropolitan Edison, 419 U.S. 345 (1974).

[399] Blum v. Yaretsky, 457 U.S. 991 (1982).

insurers[400], liquor license holders[401], and a private school serving special needs students[402]. It is difficult to make an argument that schools, especially charter schools, are more regulated that those listed institutions. The Court has not since *Burton* looked at the totality of the circumstances to decide a state action case but addresses each separate category of argument as standing alone making a cumulative effect argument unsuccessful.

A single case of more recent date does support an argument that might prove successful in some settings. Amtrak was created by special charter by the federal government to support governmental objectives and when its practices came under scrutiny the Court did find it a state actor for First Amendment purposes.[403] Two factors were found to exist in that case and one of them is less likely to be the case in the charter school setting. The first factor was simply that Amtrak was created by a special charter and the second was that the government retained power to appoint six of nine members of the governing board of Amtrak directly and two more by virtue of remaining the holder of all of the preferred stock of the company. The remaining member is the president of the company. That level of control is not commonly found in charter schools and would seem to be key to the holding.

[400] American Manufacturers v. Sullivan, 526 U.S. 40 (1999).

[401] Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

[402] Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

[403] Lebron v. National Railroad Passenger Corporation, 513 U.S. 374 (1995).

Another aspect of *Lebron* is that the argument that the government was responsible for Amtrak's actions was changed to seek a finding that Amtrak was actually a government agency. Although that is also based on the two factors listed above there is an avenue to argue that a public charter school as identified in statute should, by its very nature, be considered an arm of the school district or the state depending on the chartering authority that grants it the right to receive public funds for educating students. This remains a weak position, however, unless some degree of control beyond the charter and some review of objectives in the charter exists.

The ill-defined nature of the words used to constitute this avenue of argument makes it very difficult to claim that the Court will decide in one way or another but given the whole arc of decisions and the severe limitations on the state action doctrine in the recent past there is little to suggest that any form of entwinement or insinuation will succeed short of the sort of control in *Lebron.*

Joint participation with state

The cases do support state action when the state is involved in the action that causes a constitutional violation. When law enforcement assists in an illegal seizure of property state action has been found to be present.[404] Where that involvement is more peripheral to the process the Court has rejected the notion that it is adequate to find state action.[405] The concept that the state must be directly involved in the act of

[404] Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982);Soldal v. Cook County, 506 U.S. 56 (1992).

[405] Flagg Brothers v. Brooks, 436 U.S. 149 (1978).

depriving one of constitutional rights is another difficult barrier to finding state action in charter school employment settings.[406] State inaction in the face of private action depriving another of constitutional rights is a logical argument where the state has set up a system to address the very wrong being committed but even when a minor child is being physically abused to the point of brain damage the Court would not find that child welfare authorities had a duty to act.[407] That seems to preclude any finding that the state would be responsible for failing to act even in the face of a wrongful termination of a charter school teacher. Short of a finding that a statute required a charter school to act in a manner that deprived a teacher of constitutional rights there is little suggestion in the cases that charter schools would be found to be state actors when taking personnel action.

Other options for charter school teachers

State constitutions and statutes are subject to state interpretation and in some cases provide greater levels of protection of individual rights that the U.S. Constitution. Many state constitutions contain due process and equal protection clauses and those are not all conditioned on state action to support a claim. A charter school teacher faced with a possible violation of rights should include any possible state claim to access relief. Those constitutional provisions are many and varied and beyond the scope of this

[406] See, Rendell-Baker v. Kohn, 457 U.S. at 841. Personnel decisions were not "compelled or even influenced by any state regulation." Blum v. Yaretsky, 457 U.S. at 1004. "Mere approval of or acquiescence in" "the specific conduct complained of" will not support state action finding. American Manufacturers v. Sullivan, 526 U.S. at 54. State inaction following permitted action is not adequate for state action finding.

[407] DeShaney v. Winnebago County, 489 U.S. 189 (1988).

study but may serve to sustain claims not supportable in federal courts. State statutory schemes are also quite varied and there may be relief found in those schemes also. They, too, are beyond the scope of this study but could serve to provide relief in some situations.

Finally, what has become a popular avenue of action for charter school teachers is the formation of unions. Although many states have barred access to state public employee unions for charter school teachers there is a federal scheme of labor law that has now on more than one occasion accepted charter school teachers as unions with private employers. The original case was that of *Chicago Mathematics & Science Academy*[408] which fought a lengthy battle first rejected by the state educational labor authority and then initially rejected as a private employer union by the National Labor Relations Board (NLRB) but the final holding was that the state did not create the not-for-profit entity that obtained a charter to operate a school so it was considered a private employer. That decision was heavily based on Illinois law and has been called into question based on the appointment of NLRB members as recess appointments. It should also be noted that the NLRB has a strong bias to finding that it has jurisdiction over unions not otherwise covered but unpublished decisions since that have relied upon the reasoning of *Chicago Mathematics*. Unions serve to negotiate in the employment contracts many of the rights that might otherwise be found in the

[408] Chicago Mathematics & Science Academy, 359 NLRB No. 41 (2012).

Constitution and by that avenue could protect teachers in charter schools despite their lack of standing as state actors for Fourteenth Amendment purposes.

Conclusion

The questions this study set out to answer bear repeating at this point. They are:

Are charter schools state actors for Fourteenth Amendment purposes?

Are charter schools public employers as are traditional public schools?

Do teachers working for charter schools enjoy the same constitutional employment rights as public school teachers?

Examining the arc of decisions of the Supreme Court since the ratification of the Fourteenth Amendment it seems that the questions may all be answered in the same way. The long history of decisions of the Supreme Court has expanded and then contracted the reach of the Fourteenth Amendment and there is no sign that a renewed expansion is on the horizon. Although charter schools differ in ways from state to state the charter system that has no public employee involved in operation of the schools and lead by a privately selected board of directors or trustees is not likely to be found to be acting as a state actor when employing and ending employment of teachers. Traditional public schools will continue to operate within the Constitution but public charter schools are likely to be held to a much lower standard of conduct as it relates to teachers.

State constitutions and state laws can be drafted to replace the rights taken from teachers but those are also subject to changes in the legislatures from time to time and

are not as durable as constitutional protection. To build in constitutional protection would require charter laws that include a public employee or elected official in the governance of the charter school or that include teacher rights drawn from the U.S. Constitution. Greater the involvement of public officials in the operation of charter schools raises the likelihood of a finding that they are state actors.

Without those protections in place, charter school teachers will continue to be in a precarious position of employment and will be subject to control by charter school operators that could limit their ability to teach their students to think critically, question the world around them and speak for issues that matter to them. It creates a corporate culture into what should be an open learning environment. Only by working to restore those rights to teachers can charter schools be considered truly public schools working in the best interests of students according to community standards set by democratic means.

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