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CONSTITUTIONAL LAW—STATE ACTION—*YEO v. TOWN OF LEXINGTON*: High School Student Editors as State Actors

> Even were we to adopt such [a flexible] approach . . . [to state action by keying it to the offensiveness of the constitutional complaint,] we would be inclined to group infringements of fundamental rights and racial discrimination together . . . just as they receive comparable scrutiny in equal protection cases.[1]

INTRODUCTION

The United States Constitution restricts only conduct by the state or federal government, not conduct by private individuals.[2] Constitutional guarantees, in other words, protect individuals only from "state action,"[3] not from private action. Thus, before a court

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1. Downs v. Sawtelle, 574 F.2d 1, 6 n.5 (1st Cir. 1978).

2. The Fourteenth Amendment of the United States Constitution reads in relevant part:

> *No State shall* make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State* deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1 (emphasis added). Since its enactment, the United States Supreme Court has interpreted this Amendment as outlining "the essential dichotomy set forth in that Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, 'however discriminatory or wrongful,' against which the Fourteenth Amendment offers no shield." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974) (citing Civil Rights Cases, 109 U.S. 3, 17 (1883)). In the *Civil Rights Cases*, the Supreme Court wrote the following:

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

Civil Rights Cases, 109 U.S. at 17. There are two exceptions to this rule about state action: the Thirteenth Amendment and certain privileges afforded United States citizens. For further discussion, see *infra* note 14.

3. It is probably clearer just to say "government action" since the requirement applies to federal, state, and local governments. However, to avoid confusion with the language of the cases, this Note will use the expression "state action" throughout.

> The phrase "state action" is a misnomer because the issue arises in an identical manner when the federal government or its agents are involved in a case. . . . [A]ll problems relating to the existence of government action–local, state, federal–which would subject an individual to constitutional restrictions come under the heading of "state action."

can determine whether a private citizen's constitutional right has been violated, it must first determine whether the state was responsible for the challenged action.

Typically, courts do not have trouble finding state action when the state or a particular state official causes the alleged constitutional violation. Finding state action is more difficult, however, when a private individual allegedly violates a constitutional right, and the aggrieved party attempts to characterize the wrongdoer as a state actor. If the aggrieved party can convince a court that the private wrongdoer's action may be fairly attributed to the state, then the court will find state action and analyze the merits of the constitutional challenge. But if no state action is found, the court will dismiss the constitutional challenge and never hear the merits of the case.

In *Yeo v. Town of Lexington*,[4] Douglas Yeo, a town resident, parent, and founder of Lexington Parents Information Network ("LEXNET"), submitted an advertisement to two Lexington High School ("LHS") publications, the LHS Yearbook, and the LHS *Musket*—a student newspaper.[5] Both publications refused to run his ad.[6] Yeo filed suit on the ground that this refusal violated his First Amendment right to free speech.[7] The United States Court of Appeals for the First Circuit held, however, that no First Amend-

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JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 12.1, at 470-71 (5th ed. 1995). Moreover, "the requirement may be satisfied by action of counties, municipalities, and other local government entities such as special districts. All such branches of local government are considered agencies of the State." Russell W. Galloway, *The Government-Action Requirement in American Constitutional Law*, 30 SANTA CLARA L. REV. 935, 935 n.6 (1990); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 18-1, at 1688 n.2 (2d ed. 1988) ("[T]he words 'state action' will denote action by *any* level of government, from local to national.").

4. 131 F.3d 241 (1st Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 2060 (1998).

5. The advertisement read as follows:

> We know you can do it!
> ABSTINENCE: The Healthy Choice
> Sponsored by: Lexington Parents Information Network (LEXNET)
> Post Office Box 513, Lexington Massachusetts 02173.

Id. at 244. See *infra* Part II.A for further discussion of the facts of *Yeo*.

6. *See Yeo*, 131 F.3d at 247.

7. *See id.* at 248. The First Amendment provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

Specifically, Yeo alleged a civil rights violation under 42 U.S.C. § 1983, which reads, in pertinent part:

> *Every person who*, *under color of* any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, *subjects*, or causes to be subjected, *any citizen* of the United States or other person within the jurisdiction thereof *to the deprivation of any rights*, privileges, or immuni-

ment violation occurred because the decision to reject the ad did not constitute state action.[8] The court found that high school student editors, acting independently, made the decision, and that the students' decision could not be fairly attributed to any school official.[9] As a result, the case was dismissed.[10]

This Note examines *Yeo* in an effort to determine whether, under the facts of *Yeo*, independent actions of public high school students may constitute state action. Part I provides an introduction to the state action doctrine, paying particular attention to its current formulations and its application to high school free speech cases. Part II presents the principal case of *Yeo v. Town of Lexington*. This Part presents the relevant facts of *Yeo*, and traces and explains the court's reasoning from the district court level to the en banc decision of the United States Court of Appeals for the First Circuit.

Part III critically evaluates the First Circuit's majority opinion in *Yeo*. First, this Part suggests that the First Circuit's majority opinion used a heightened standard for finding state action, a sequential approach,[11] instead of a more liberal standard, the totality approach,[12] because the court assumed that state action standards should vary with the offensiveness of the constitutional claim at

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> ties *secured by the Constitution* and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (Supp. II 1996) (emphasis added); *see also Yeo*, 131 F.3d at 248. As a general rule, the "under color [of law]" requirement of § 1983 is "treated as the same thing as the 'state action' required under the Fourteenth Amendment." United States v. Price, 383 U.S. 787, 794 n.7 (1966); *see also* Lugar v. Edmondson Oil Co., 457 U.S. 922, 935 n.18 (1982) (overturning an appellate court which treated the under color and state action analyses as separate, and finding "the under color-of-state-law requirement does not add anything not already included within the requirement of the Fourteenth Amendment"); Barrios-Velazquez v. Asociacion de Empleados, 84 F.3d 487, 490-91 (1st Cir. 1996) (treating the two analyses the same). The *Yeo* court followed this practice by treating the "under color of law" requirement of § 1983 as equivalent to the state action requirement. *See Yeo*, 131 F.3d at 248 n.3.

8. *See Yeo*, 131 F.3d at 255.

9. *See id.* at 253-55.

10. The First Circuit, sitting en banc, affirmed the decision of the United States District Court for the District of Massachusetts, *see Yeo v. Town of Lexington*, No. 94-10811-RGS, 1996 U.S. Dist. LEXIS 7310, at *15 (D. Mass. Apr. 22, 1996), and reversed its prior panel decision, which had found state action and a First Amendment violation. *See* Yeo v. Town of Lexington, No. 96-1623, 1997 WL 292173, at *2 (1st Cir. June 6, 1997), *rev'd en banc*, 131 F.3d 241 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 2060 (1998). As such, the en banc decision did not address the merits of the First Amendment issue, with the exception of Chief Judge Torruella's concurring opinion which asserted that no First Amendment violation had occurred. *See Yeo*, 131 F.3d at 255-56.

11. See *infra* Part I.A.3 for a discussion of the sequential approach.

12. See *infra* Part I.A.2 for a discussion of the totality approach.

stake. Second, this Part challenges the majority's use of this heightened standard by examining the court's assumption that courts should vary state action standards according to the offensiveness of the constitutional violation alleged. It argues that keying state action standards to particular constitutional rights is inappropriate because it undermines judicial accountability and fails to give equal consideration to all alleged fundamental rights violations. Third, this Part suggests that instead of varying state action standards with the type of constitutional right at stake, courts should use an "Equal Consideration Approach" for state action analysis, namely, they should apply the liberal state action standard to all alleged fundamental rights violations. Finally, this Part suggests that under the facts of *Yeo*, applying this liberal standard would support a finding of state action. As such, the Note concludes that state action should have been found in *Yeo*, and the case should have been decided on the merits.

I. Finding State Action

A. *The State Action Doctrine*

This section will introduce the United States Supreme Court's state action doctrine, its recent formulations, and its application to public high schools in particular.[13]

In almost all constitutional cases, the plaintiff must prove that a state actor, or someone whose action may be fairly attributed to the state, deprived him of a constitutional right.[14] The state action

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13. For a thorough discussion of the history of the state action doctrine, see G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility, Part I*, 34 Hous. L. Rev. 333 (1997), and G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility, Part II*, 34 Hous. L. Rev. 665 (1997). For more general discussions of the doctrine, see Barbara Rook Snyder, *Private Motivation, State Action and the Allocation of Responsibility for Fourteenth Amendment Violations*, 75 Cornell L. Rev. 1053, 1053 n.1 (1990) (providing a generous list of state action articles); Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 Mich. L. Rev. 302 (1995); Nowak & Rotunda, *supra* note 3, at § 12; 3 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure § 16 (2d ed. 1992); Tribe, *supra* note 3, at § 18; Galloway, *supra* note 3; Michael J. Phillips, *The Inevitable Incoherence of Modern State Action Doctrine*, 28 St. Louis U. L.J. 683 (1984); and Dilan A. Esper, Note, *Some Thoughts on the Puzzle of State Action*, 68 S. Cal. L. Rev. 663 (1995).

14. *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 156 (1978) ("[M]ost rights secured by the Constitution are protected only against infringement by governments."); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974) (stating that the Court has affirmed "the essential dichotomy set forth in [the Fourteenth] Amendment between

question requires little analysis when a state official engaged in the challenged conduct. Typically, when a state official caused the constitutional infringement, state action is presumed.[15]

Finding state action is more difficult where a private individual caused the alleged constitutional violation.[16] Recently, the United States Supreme Court stated that a court should make two inquiries in determining whether state action is present in such cases.[17] First, a court should ask "whether the claimed constitutional deprivation resulted from the exercise of some right or privilege having its source in state authority."[18] Under this inquiry, a court must determine whether the state provided the means, vis-a-vis a state created

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deprivation by the State, subject to scrutiny under its provisions, and private conduct, 'however discriminatory or wrongful,' against which the Fourteenth Amendment offers no shield"); Civil Rights Cases, 109 U.S. 3, 17 (1883) (striking down the Civil Rights Act of 1875 as unconstitutional since the Fourteenth Amendment, which Congress relied on to enforce the Act's prohibition against discrimination in public accommodations, only reaches state and not private action).

There are two exceptions to the state action requirement. The first involves the Thirteenth Amendment, which applies to both state and private action. A person claiming he has been subject to slavery or involuntary servitude need not prove state action. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 436 (1968) (finding discrimination by private real estate developer violated the 1866 Civil Rights Act because the drafters intended the Act to apply to both private and public discriminatory acts since that purpose is rationally related to eradicating slavery or its badges or incidents pursuant to the Thirteenth Amendment). The second exception involves certain privileges afforded to United States citizens, such as the use of the public roads for interstate travel. *See* United States v. Guest, 383 U.S. 745, 765 (1966) (upholding an application of the criminal conspiracy provision of the Civil Rights Act to private individuals who attempted to deprive black persons of the right to enjoy public facilities connected with interstate travel).

15. *See* 1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 2.04, at 62 (3d ed. 1991) ("The easy cases in which to find state action are those where a state employee acting on behalf of the state pursuant to state authority thereby brings about plaintiff's constitutional deprivation."). However, the presumption will not hold where the government official is not acting in his or her official capacity, or is performing an independent function that is in the context considered private. *See* Polk County v. Dodson, 454 U.S. 312, 324-25 (1981) (finding that a public defender was not a state actor when she was representing a criminal defendant, even though she was considered a state actor when performing other duties, such as when making hiring decisions).

16. *See* Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (finding no state action when nursing home administrators, using independent medical judgment, decided to discharge or transfer patients without adequate procedures, even though the nursing home received substantial federal funding and was extensively regulated); Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982) (finding no state action when a private school, acting independently, decided to discharge employees, even though the school received almost all of its funds from the state).

17. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 618-22 (1991).

18. *Id.* at 620; *accord* Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

right, privilege, or regulation, that caused the deprivation of a constitutional right.[19] Thus, someone must have used the state-created means to deprive someone of his or her constitutional rights.

Second, a court must also ask "whether the private party charged with the deprivation could be described in all fairness as a state actor."[20] In other words, a court must determine whether the private person who used the state-created means to deprive another of his constitutional right is, for all intents and purposes, a state actor; that is, whether a court ought to treat such private conduct *as if it were* state conduct.[21] To make that determination, the Supreme Court has outlined three factors: "[1] the extent to which the [private] actor relies on governmental assistance and benefits; [2] whether the actor is performing a traditional governmental function; and [3] whether the injury caused is aggravated in a unique way by the incidents of governmental authority."[22]

Courts have referred to the first and the third of these factors together as the "nexus" test,[23] and the second factor as the "public function" test.[24] The public function test is an independent test which analyzes whether the private action is of the kind tradition-

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19. For example, where a state statute provides a right to garnish, or to obtain a prejudgment attachment, it provides the means for which a private party may deprive another of his or her constitutional right of due process pursuant to the Fourteenth Amendment. *See Lugar*, 457 U.S. at 937.

20. *Edmonson*, 500 U.S. at 620; *accord Lugar*, 457 U.S. at 941-42.

21. *See* NAHMOD, *supra* note 15, § 2.04, at 62.

22. *Edmonson*, 500 U.S. at 621-22 (citations omitted).

23. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974).

24. *See* Terry v. Adams, 345 U.S. 461, 475 (1953); *see also* NOWAK & ROTUNDA, *supra* note 3, § 12.1, at 473; GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 890-91 (13th ed. 1997); Krotoszynski, *supra* note 13, at 314.

Besides the "public function" and the "nexus" tests, the Supreme Court has articulated other tests or factors. For example, the Court has formulated the "state compulsion" test, which analyzes whether a state law compelled a private person to violate another's constitutional right, and the "joint action" test, which analyzes whether a state official helped a private person violate another's constitutional right. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 152, 170 (1970) (finding state action when a restaurant used a state-enforced custom requiring racial segregation to deny service to a caucasian in the company of African Americans); *see also* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157 (1978) (finding no state action where private defendant engaged in true self-help when he sold a debtor's goods in his possession). For purposes of this Note, the state compulsion test and the joint action test are grouped with the nexus test, since they involve determining the number and quality of contacts between the private party and the state. *See Lugar*, 457 U.S. at 922, 939 (noting that "[w]hether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in such a situation need not be resolved here"). See *infra* Part I.A.1 for further discussion of the various tests or factors.

ally exclusively reserved for the state.[25] For example, in *Marsh v. Alabama*,[26] the Supreme Court held that the Town of Chickasaw, a suburb of Mobile, Alabama and privately owned by the Gulf Shipbuilding Corporation, which banned the distribution of religious literature, was a state actor because running a town is a power traditionally exclusively reserved to the state.[27]

If a private entity fails to satisfy the public function test, a court may still find state action if a sufficient nexus exists between the private actor and the state. The next section examines how a court may search for a nexus between private conduct and the state.[28]

1. The Nexus Test

The nexus test is a more difficult test to apply than the public function test. It requires a court to examine whether "private conduct abridging individual rights" has involved "to some significant extent the State in any of its manifestations."[29] In other words, a court must determine whether the state was somehow connected to,

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25. See *Evans v. Newton*, 382 U.S. 296, 299 (1966), where the Supreme Court found state action by private trustees of a park in light of the tradition of municipal control. The Court noted the following: "[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Id.*

26. 326 U.S. 501 (1946).

27. *See id.* at 508 (concluding that "the town of Chickasaw does not function differently from any other town"). *Marsh* applies when privately owned property is the functional equivalent to a municipality. *See* Galloway, *supra* note 3, at 943 n.28. Currently, the Court has recognized two other types of conduct as constituting a traditional public function: running elections for public office, *see* Smith v. Allwright, 321 U.S. 649, 663 (1944) (holding that a state party convention may not ban black persons from voting in primary elections); Terry v. Adams, 345 U.S. 461, 472 (1953) (finding that a Democratic party "club" was a state actor designed to evade constitutional prohibition against all-white primaries), and using peremptory challenges in selecting a jury, *see* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 627 (1991) (finding that a private litigant's race-based exercise of peremptory challenges was state action, since alleged deprivation implicated a traditional function of the government). *But see Jackson*, 419 U.S. at 352 (running a public power company was not a traditional public function exclusively reserved for the state); Hudgens v. NLRB, 424 U.S. 507, 520 (1976) (holding that operating privately-owned shopping centers does not constitute a "public function" under the state action doctrine). *See generally*, TRIBE, *supra* note 3, § 18-5; NOWAK & ROTUNDA, *supra* note 3, § 12.2.

28. For a thorough discussion of the public function test, see Esper, *supra* note 13, at 687-708. Since the state action analysis in *Yeo* does not involve a public function test, but the nexus test, *see infra* Part II, the following background material focuses on the nexus test only.

29. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961); *see also* Buchanan, *supra* note 13, at 422.

or had sufficient contacts with, the harm that the private actor caused the claimant. The Supreme Court has held that this analysis involves a fact bound inquiry and must be conducted on a case by case basis.[30] Nonetheless, the Court has used a variety of factors to determine whether a sufficient nexus exists between the private person's conduct and the state.[31]

a. Compelling, encouraging, and assisting

To determine whether a nexus exits between private and state action, the Court has analyzed whether the state has by law, by regulation, or by participation, compelled, encouraged, or assisted the challenged private activity.[32] For example, in *Shelly v. Kraemer*,[33] the Court found state action in a white private property owner's decision not to sell his land to an African-American purchaser because a court enforced a common law restrictive covenant on the land that forbade such sales.[34] The Court has also found state ac-

30. *See Burton*, 365 U.S. at 722 ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."); *see also* Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982) (acknowledging that no bright line rule exists to determine when there are sufficient connections between the state and a private actor to constitute state action).

31. *See generally* TRIBE, *supra* note 3, § 18-7; NOWAK & ROTUNDA, *supra* note 3, § 12.

32. *See, e.g.*, Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (noting that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State"); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164 (1978) (noting that "[o]ur cases state 'that a State is responsible for the . . . act of a private party when the State, by its law, has compelled the act'" (alteration in original)); *see also* Rendell-Baker v. Kohn, 457 U.S. 830, 839-43 (1982) (finding that no state action existed when a private, extensively regulated, and state funded school discharged employees because the state regulations in no way compelled or influenced the school's decision); Moose Lodge Number 107 v. Irvis, 407 U.S. 163, 177 (1972) (finding no state action with a private social club's racially restrictive policies because there was no government encouragement to have these policies).

33. 334 U.S. 1 (1948).

34. *See id.* at 19. In *Shelly*, the court action began when third parties interested in the transaction sued the owner to stop the sale. The Supreme Court held that such private discrimination was state action since it flowed from a judicial command to enforce racial discrimination, which would violate the Fourteenth Amendment. *See id.* This type of judicial encouragement of racial discrimination was also found to be state action when the Court struck down state imposed monetary damages against those who breached racially restrictive covenants because the penalty was the functional equivalent to encouragement. *See* Barrows v. Jackson, 346 U.S. 249, 250 (1953); *see also* Robinson v. Florida, 378 U.S. 153, 156-57 (1964) (holding that a private restaurant's racially restrictive practices constituted state action when those practices flowed from state regulation that required separate toilet facilities for blacks and whites).

However, those uses of a court which implicate state action should be distinguished

tion where a private creditor used a court to authorize, and a sheriff to assist, the seizing of a debtor's property.[35] Thus, the Court will find a sufficient nexus when the state compels, encourages, or assists private persons' activities.

b. Other contacts: regulating, benefitting, and subsidizing

The Court has also examined the number and quality of presumably "neutral" contacts between the private actor and the state for finding a sufficient nexus. These contacts include extensive licensing and regulation of a person's activities,[36] a mutual or symbiotic relationship between the state and the private person,[37] and extensive or direct state subsidies to the private person or entity.[38]

Although state regulation and licensing of a private activity

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from those which do not, such as using the courts to enforce trespass laws when a private landowner refuses to permit a member of a racial minority on his land. The trespass instances are presumably different because a court will not be involved in the private individual's decision. *See* NOWAK & ROTUNDA, *supra* note 3, § 12.1, at 487; *see also* TRIBE, *supra* note 3, § 18-6, at 1711 (discussing common law as a subject of state action theory). *But see* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 151-53 (1990) (arguing that the *Shelly* Court went beyond its role as adjudicator of private agreements in finding that a "decision of a state court under common law rules constitutes the action of the state").

35. *See Lugar*, 457 U.S. at 941-42 (finding state action when an oil company sued an alleged debtor and obtained a prejudgment writ of attachment of the debtor's property and then had the county sheriff execute the writ); *see also* Soldal v. Cook County, Ill., 506 U.S. 56, 72 (1992) (finding state action when the owner of a mobile home park enlisted the assistance of the county sheriff's office to remove a mobile home from the park by removing it from its foundation and towing it away). *But see Flagg Bros.*, 436 U.S. at 166 (finding no state action because the creditor engaged in true self-help when he sold a debtor's property, which was subject to a lien by the creditor).

36. *See Rendell-Baker*, 457 U.S. at 839-43 (examining whether a private school's extensive regulations transforms it into a state actor with respect to employee discharges); *Blum*, 457 U.S. at 1003-12 (examining whether state regulations and licensing of a private nursing home makes it a state actor when it discharged or transferred patients without adequate procedures); *Moose Lodge Number 107*, 407 U.S. at 175-79 (examining whether a private club's liquor license makes it a state actor with respect to the club's racial policies); CBS v. Democratic Nat'l Comm., 412 U.S. 94, 114-21 (1973) (examining whether federal regulations and licensing procedures played a role in encouraging a radio station's refusal to accept editorial advertising).

37. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 723-26 (1961) (finding state action when a private coffee shop would not serve an African-American since the shop leased its premises from a government-owned parking garage and each benefitted from the relationship, namely, the coffee shop received extra customers because the government employees used the garage, and the government received rental money from the shop). See *infra* notes 42-44 and accompanying text for further discussion of *Burton*.

38. *See* Gilmore v. City of Montgomery, Ala., 417 U.S. 556, 568-69 (1974) (holding that a city could not grant the exclusive use of public facilities to racially segregated groups because that constituted a subsidy to a racially discriminatory practice).

carry weight in the state action analysis, the weight is reduced when the effect of the regulation or license is neutral and does not somehow encourage the challenged activity.[39] In other words, regulation and licensing that does not, by itself, encourage or compel the challenged activity is insufficient to find state action.[40]

However, finding what the Court has termed a "symbiotic" or "mutual relationship" between the state and the private actor weighs more heavily in a state action analysis.[41] For example, in *Burton v. Wilmington Parking Authority*,[42] the Court held that a privately owned coffee shop, which leased its space from a government parking facility, was a state actor when it denied service to an African-American customer. The Court based its holding, in part, on the fact "that the peculiar relationship of the restaurant to the parking facility in which it is located confers on each an incidental variety of mutual benefits."[43] Importantly, the Court found state action even though the state did not directly aid or encourage the private actor.[44]

Another contributing factor in finding state action under the nexus test is the private party's use of direct or special state subsidies.[45] The subsidies, however, must be something more than generalized services or aid, such as fire and police protection or general tax exemptions.[46] But the amount of the subsidy is not disposi-

39. See *supra* note 36 for examples of cases where no state action was found involving neutral regulations.

40. *See Moose Lodge Number 107*, 407 U.S. at 163, 176-77, 179; *see also* NOWAK & ROTUNDA, *supra* note 3, § 12.4, at 495.

41. Justice Rehnquist first used the term "symbiotic relationship" in his opinion in *Moose Lodge Number 107 v. Irvis*, 407 U.S. 163, 175 (1972), to refer to what he thought was an important element in finding state action in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961).

42. 365 U.S. 715 (1961). See *infra* notes 56-60 and accompanying text for a more detailed discussion of *Burton*.

43. *Burton*, 365 U.S. at 724. The Court recognized that the restaurant benefitted from the convenience of the parking for its guests and the business from government workers. *See id.* Additionally, the government benefitted from the rental income, from its employees enjoying the convenience of a nearby restaurant, and from the increased demand for its parking facility. *See id.*

44. *See id.* at 725. In fact, the Court noted that it was the state's "inaction" that "has not only made itself a party to the refusal of service [to blacks], but has elected to place its power, property and prestige behind the admitted discrimination." *Id.*

45. *See* Gilmore v. City of Montgomery, Ala., 417 U.S. 556, 568-69 (1974). See *infra* notes 48-50 and accompanying text for a discussion of *Gilmore*.

46. *See* Norwood v. Harrison, 413 U.S. 455, 465 (1973) (noting that while a direct state subsidy of textbooks to private schools that discriminate on the basis of race constitutes state action, other assistance not readily available independently of the state,

tive.[47] The subsidies must be specialized and directed to a limited group. For example, in the case of *Gilmore v. City of Montgomery*,[48] the Supreme Court held that a city cannot give a racially segregated private school exclusive use of public facilities, since that action would be a direct subsidy of a discriminatory practice.[49] However, the Court ostensibly acknowledged that these private schools may use the facilities if other groups were also permitted to use the facilities.[50] Although the Court has not directly addressed whether receiving direct aid would, itself, turn private conduct into state action, the result in *Gilmore* suggests this possibility.[51] Nevertheless, the Court would probably not find state action where the aid was generalized and indirect.[52]

2. The Totality Approach

The Supreme Court has treated the relationship between nexus factors differently over the years.[53] For example, it has held that to find state action a court should consider the nexus factors in the aggregate.[54] As such, the Court has, in addressing state action, ana-

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such as electricity, water, and police and fire protection, would not constitute state action); *see also* NOWAK & ROTUNDA, *supra* note 3, § 12.4, at 502.

47. *See* Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982) (finding no state action even though in some years the state subsidized ninety-nine percent of a private school's tuition); Blum v. Yaretsky, 457 U.S. 991, 1011-12 (1982) (finding no state action even though a private nursing home received extensive government subsidies through the Medicare and Medicaid programs).

48. 417 U.S. 556 (1974).

49. *See id.* at 568-69. In *Gilmore*, the City of Montgomery, Alabama was permitting racially segregated schools and other segregated private groups and clubs exclusive use of city parks and recreational facilities in the context of a 1959 parks desegregation order. This policy created, "in effect, 'enclaves of segregation' and deprived petitioners of equal access to parks and recreational facilities." *Id.* at 566; *cf. Norwood*, 413 U.S. at 455 (striking down a program under which Mississippi loaned books to private schools which discriminated on the basis of race). According to the Court in *Norwood*, "the economic consequence is to give aid to the enterprise; if the school engages in discriminatory practices the State by tangible aid in the form of textbooks thereby gives support to such discrimination." *Id.* at 464-65.

50. *See Gilmore*, 417 U.S. at 570 & n.10 ("[W]e are unable to draw a conclusion as to whether the use of [public facilities] . . . by private school groups in common with others . . . involves government so directly in the actions of those users as to warrant court intervention on constitutional grounds.").

51. *Cf.* Fortin v. Darlington Little League, Inc., 514 F.2d 344, 347 (1st Cir. 1974) (finding state action in a sex discrimination case where a little league organization depended heavily upon city baseball diamonds). *See generally* NOWAK & ROTUNDA, *supra* note 3, § 12.4, at 502-03; Buchanan, *supra* note 13, at 401 n.444.

52. *See Norwood*, 413 U.S. at 465.

53. *See* Buchanan, *supra* note 13, at 390-410.

54. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 724 (1961). See *infra*

lyzed the combined effect of these factors. This so-called "totality approach" "seeks to determine how far the combined force of relevant contact factors has moved along the state nexus continuum."[55] To determine state action, in other words, the Court will consider the combined weight of all the nexus factors, when none alone is sufficient, and ask whether, in the aggregate, a sufficient nexus exists between the private actor and the state.

This totality approach was exemplified in the case of *Burton v. Wilmington Parking Authority*.[56] In *Burton*, the Eagle Coffee Shoppe, a privately owned restaurant, refused to serve a customer solely because he was African-American.[57] The coffee shop was located within an off-street automobile parking garage owned and operated by the Wilmington, Delaware Parking Authority ("Authority").[58] The owner of the coffee shop leased the space from the Authority.[59] In reversing the Delaware Supreme Court, which had found no state action by focusing only on one factor—the rental money the shop paid to the Authority—the United States Supreme Court found that the case turned on the consideration of a variety of factors.[60] Importantly, none of these "other factors" in isolation was sufficient to find state action. Instead, the Court considered their combined weight to find that the state "ha[d] elected to place its power, property and prestige behind the [challenged conduct]."[61]

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notes 56-60 and accompanying text for further explanation of the totality approach of *Burton*. *See also* Buchanan, *supra* note 13, at 396; Phillips, *supra* note 13, at 697.

55. Buchanan, *supra* note 13, at 397; *see also* Georgia v. McCollum, 505 U.S. 42, 50 (1992); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621 (1991); Evans v. Newton, 382 U.S. 296, 299 (1966).

56. 365 U.S. 715 (1961).

57. *See id.* at 716.

58. *See id.*

59. *See id.*

60. The Court stated that the Delaware Supreme Court's conclusion was incorrect "when evaluated in the context of other factors which must be acknowledged." *Id.* at 723. The other factors cited by the United States Supreme Court included: (1) the government owned the land and the building and leased it to the coffee shop; (2) the property leased to the shop and other lessees "[was] not surplus state property, but constituted a physically and financial integral and, indeed, indispensable part of the State's plan to operate its project as a self-sustaining unit[;]" (3) "the peculiar relationship of the restaurant to the parking facility in which it is located confers on each an incidental variety of mutual benefits;" and (4) the restaurant where the discrimination occurred is located in a government owned and operated building. *Id.* at 723-24.

61. *Id.* at 725. In Justice Clark's words:

> *Addition of* all these activities, obligations and responsibilities of the Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a

3. The Sequential Approach

After *Burton*, however, the Court slowly shifted to a "sequential approach" for its state action analysis.[62] With the sequential approach, the Court considered "each state nexus factor . . . in isolation and then discarded [it] completely if, by itself, it lack[ed] sufficient force to convert private action into state action."[63] This approach focuses only on those factors that alone would be sufficient to find state action, and it does not consider whether the factor might contribute in the aggregate to a finding of state action.[64]

> public parking service, indicates that degree of state participation and involvement [necessary to create state action].

Id. at 724 (emphasis added); *see also* Isaacs v. Board of Trustees of Temple Univ., 385 F. Supp. 473, 488 (E.D. Pa. 1974) (using *Burton*'s totality approach to find state action in a private university's employment termination decisions, which plaintiffs alleged violated their First Amendment rights); Phillips, *supra* note 13, at 697 (noting that *Burton*'s conclusions implied that the nexus factors "should be assessed in their *cumulative* impact, and not as discrete factors one or more of which must *itself* support a state action finding"); Buchanan, *supra* note 13, at 391.

62. *See* Buchanan, *supra* note 13, at 401. According to Buchanan, the shift became "evident" with *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), which found no state action after analyzing, and dismissing as insufficient, each nexus factor one at a time, but not considering them all told. *See* Buchanan, *supra* note 13, at 401-02; *see also* Phillips, *supra* note 13, at 704, 716. For example, in his dissent in *Jackson*, Justice Douglas stated the following: "It is not enough to examine seriatim each of the factors upon which a claimant relies and to dismiss each individually as being insufficient to support a finding of state action. *It is the aggregate that is controlling*." *Jackson*, 419 U.S. at 362-63 (Douglas, J., dissenting) (emphasis added). Justice Marshall also commented about this retreat when he concluded that "[t]aking these factors together, I have no difficulty finding state action in this case." *Id.* at 366 (Marshall, J., dissenting).

The reason for the Supreme Court moving away from *Burton* is, in part, because it is distinguishable as a race discrimination case, where *Blum v. Yaretsky*, 457 U.S. 991 (1982), and *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), were procedural due process claims. *See* LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 251-52 (1985). See *infra* Part I.A.5 for further discussion of how the court may be varying its state action analysis according to the constitutional right at stake.

63. Buchanan, *supra* note 13, at 402.

64. The shift to the sequential approach went into full swing with *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982) (finding no state action when a private school discharged teachers even though the school received over ninety percent of its funding from the state), and *Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982) (finding no state action when a nursing home discharged or transferred patients even though the state funded and regulated it). Justices Brennan and Marshall joined in dissenting in these cases, objecting to the courts shift from *Burton*'s totality approach. *See Rendell-Baker*, 457 U.S. at 851-52 (Marshall, J., dissenting) ("Even though *there are myriad indicia* of state action in this case, the majority refuses to find that the school acted under color of state law when it discharged petitioners. The decision in this case marks *a return* to empty formalism in state action doctrine." (emphasis added)); *see also* Phillips, *supra* note 13, at 719 (noting that "[t]he *cumulative approach to indicia* of state action recommended by *Burton*, while not officially disavowed, has been tacitly replaced by a sequential treatment of such factors" (emphasis added)); Buchanan, *supra* note 13, at 404-06.

4. A Partial Return to the Totality Approach

Recently, the Supreme Court has partly revived the totality approach for its nexus analysis.[65] The Court has been willing to consider the combined weight of all the nexus factors, even if one alone is insufficient by itself to constitute state action.[66] For example, in *Edmonson v. Leesville Concrete Co.*,[67] a civil action where the plaintiff objected to the defendant's use of peremptory challenges, and *Georgia v. McCollum*,[68] a criminal action where the prosecution objected to the defendant's use of peremptory challenges, the Court found state action where the use of these peremptory challenges excluded jurors on the basis of their race. In *Edmonson*, the Court's state action analysis included, in part, a nexus test which described in detail the "overt, significant participation of . . . government [in] the *peremptory challenge system*."[69] It concluded that "a private party could not exercise its peremptory challenges absent the overt, significant assistance of the court."[70] Importantly, the Supreme Court cited *Burton* in stressing that the court "ha[d] not only made itself a party to the [racial act], but ha[d] elected to place its power, property and prestige behind the [alleged] discrimination."[71] In essence, then, the government was responsible for the

65. *See* Buchanan, *supra* note 13, at 420-23 (arguing that *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), *Georgia v. McCollum*, 505 U.S. 42 (1992), and *NCAA v. Tarkanian*, 488 U.S. 179 (1988), "display a returning willingness by the Court to consider the combined weight of all state contact"); *see also* Krotoszynski, *supra* note 13, at 304-05, 322-35 (arguing that recent decisions of lower federal courts were "fail[ing] . . . to honor the Supreme Court's admonition that its various verbal formulations of state action are but 'different ways of characterizing [a] necessarily fact-bound inquiry.'" (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982))).

66. *See Edmonson*, 500 U.S. at 622-25.

67. 500 U.S. 614 (1991).

68. 505 U.S. 42 (1992).

69. *Edmonson*, 500 U.S. at 622 (emphasis added).

70. *Id.* at 624.

71. *Id.* The Court also employed this analysis in *McCollum*. In *McCollum*, the Court noted that a white criminal defendant, who used peremptory challenges in a racially discriminatory way, "relie[d] on 'governmental assistance and benefits' that are equivalent to those found in the civil context in *Edmonson*. 'By enforcing discriminatory peremptory challenge, the Court "has . . . elected to place its power, property and prestige behind the [alleged] discrimination."'" *McCollum*, 505 U.S. at 52 (citing *Edmonson*, 500 U.S. at 624). For a critical comment on the Court's reasoning in *McCollum*, see Susan M. Sabers, *The Absence of State Action in* Georgia v. McCollum, 39 S.D. L. REV. 159 (1994). For a recent application of the totality approach in the Ninth Circuit, see *Grijalva v. Shalala*, 152 F.3d 1115, 1120 (9th Cir. 1998). In *Grijalva*, the court found state action when a health maintenance organization denied services to Medicare beneficiaries without adequate notice. *See id.* Importantly, the court used the totality approach in its application of the Supreme Court's nexus analysis. For example, after considering numerous nexus factors individually, the court held that "each of these

discriminatory act because it had created a framework within which a private person could discriminate.[72]

5. Variable State Action Approach

The Supreme Court has applied the totality approach, which is an easier state action standard to overcome than the sequential approach, primarily in race discrimination cases,[73] while it has applied the sequential approach primarily in due process cases.[74] As such, some commentators suggest that the Court is tacitly varying the state action standard according to the importance of the constitutional violation alleged.[75]

Even though the Supreme Court has not explicitly ruled on the relationship between state action analysis and the nature of the alleged constitutional violation,[76] numerous lower federal courts have

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[nexus] factors alone might not be sufficient to establish federal action. *Together* they show federal action." *Id.* (emphasis added); *see also* Catanzano v. Dowling, 60 F.3d 113, 117-20 (2d Cir. 1995) (applying similar analysis in Medicaid context); J.K. v. Dillenberg, 836 F. Supp. 694, 697-99 (D. Ariz. 1993) (applying similar analysis in Medicaid context).

72. *See Edmonson*, 500 U.S. at 624.

73. *See* Georgia v. McCollum, 505 U.S. 42 (1992); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991); Evans v. Newton, 382 U.S. 296 (1966); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). *But cf.* Moose Lodge Number 107 v. Irvis, 407 U.S. 163 (1972).

74. *See* Blum v. Yaretsky, 457 U.S. 991 (1982); Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

75. *See* Phillips, *supra* note 13, at 738 ("The Supreme Court may not have openly considered such matters, but there is reason to believe that the 'hierarchy of constitutional values' approach has influenced the Court's state action decisions."); *see also* TRIBE, *supra* note 13, § 18-3, at 1699 ("The state action requirement fixes a frame of reference. The substantive constitutional right at issue initially determines the parameters of this frame."); Nat Stern, *State Action, Establishment Clause, and Defamation: Blueprints for Civil Liberties in the Rehnquist Court*, 57 U. CIN. L. REV. 1175, 1216 (1989) ("It seems obvious that the Court tacitly engages in 'differential state action analysis,' under which the Court's willingness to find state action correlates to the importance that it attaches to the constitutional value at stake."); Morgan W. Tovey, *Dial-A-Porn and the First Amendment: The State Action Loophole*, 40 FED. COMM. L.J. 267, 285 (1988) ("[W]hether the Court finds state action often appears to be dependent upon the underlying constitutional right at stake.").

76. *See, e.g., Jackson*, 419 U.S. at 373-74 (Marshall, J., dissenting) (noting that "[t]he Court has not adopted the notion . . . that different standards should apply to state action analysis when different constitutional claims are presented"). The Supreme Court recently had the opportunity to address the variable approach to state action, but declined the offer. *See* Lebron v. National R.R. Passenger Corp., 513 U.S. 374, 408 (1995) (O'Connor, J., dissenting). In *Lebron*, the Court reversed the Second Circuit's holding that no state action existed when Amtrak refused an artist's advertisement because of its political content. *See id.* at 375. Importantly, the Second Circuit's refusal to find state action was based on a variable state action approach since it acknowledged that the outcome would have been different if the refusal had been based on race. *See*

applied varying standards of state action analysis depending on the type of constitutional right at stake.[77] Labeled "differential state action analysis,"[78] these courts have created a hierarchy of state action standards keyed to different substantive rights.[79] Generally, the courts have applied the liberal state action standards to race discrimination cases and the stricter standards to procedural due process cases, with gender discrimination and free speech falling somewhere in the middle.[80]

Some courts have suggested that the rationale for this approach is grounded in the roots of the state action doctrine itself.

Lebron v. National R.R. Passenger Corp., 12 F.3d 388, 392 (2d Cir. 1993), *rev'd*, 513 U.S. 374 (1995). The Supreme Court's reversal did not address this variable state action approach in its holding, but instead focused on whether Amtrak was a private or public entity. Finding Amtrak to be a governmental entity, the Court avoided the variable state action question. *See Lebron*, 513 U.S. at 408 (O'Connor, J., dissenting).

77. The most prominent of these lower federal courts is the Second Circuit, which has explicitly keyed its state action standard to the type of constitutional claim advanced. *See* Weise v. Syracuse Univ., 522 F.2d 397, 405-08 (2d Cir. 1975) (suggesting that state action would be found more readily in cases of racial and perhaps gender discrimination than in First Amendment cases); Coleman v. Wagner College, 429 F.2d 1120, 1127 (2d Cir. 1970) (Friendly, J., concurring) ("[R]acial discrimination is so peculiarly offensive and was so much the prime target of the Fourteenth Amendment that a lesser degree of involvement may constitute 'state action' with respect to it than would be required in other contexts . . . ."); *see also* Taylor v. Consolidated Edison, Co., 552 F.2d 39, 42-43 (2d Cir. 1977) (holding that a lesser amount of government involvement is needed to find state action in a racial discrimination case than in due process and First Amendment cases; a lesser amount of government involvement is needed in sexual discrimination cases as well). For an extensive list of cases in the Second Circuit, as well as other circuits, that discuss the relationship between the constitutional rights alleged and the state action requirement, see Jody Young Jakosa, *Parsing Public from Private: The Failure of Differential State Action Analysis*, 19 HARV. C.R.-C.L. L. REV. 193, 195 n.8 & n.10 (1984). In addition, see Martin B. Margulies, *1994: The First Amendment in the Second Circuit and District of Connecticut*, 14 QUINNIPIAC L. REV. 565, 567-69 (1994) (discussing, in part, the history of the Second Circuit's variable state action approach).

78. For purposes of this Note, "differential state action analysis" is referred to as "variable" state action analysis because the term more clearly expresses the idea that state action should vary with the constitutional right at stake.

79. *See* Jakosa, *supra* note 77, at 206.

80. *See* Jackson v. Statler Found., 496 F.2d 623, 629 (2d Cir. 1974) (recognizing "a less onerous [state action] test for cases involving racial discrimination, and a more rigorous standard for other claims"); Stearns v. Veterans of Foreign Wars, 394 F. Supp. 138, 144 n.7 (D.D.C. 1975) (holding that race discrimination state action precedents not applicable to gender discrimination), *aff'd*, 527 F.2d 1387 (D.C. Cir. 1976); *see also* Jakosa, *supra* note 77, at 199-202 (noting that most courts have been reluctant to resolve the issue of whether the liberal state action standard for race discrimination cases should also apply to gender discrimination cases, thus leaving gender cases somewhere in the middle); *id.* at 202 n.38 (citations therein). *But cf.* Grijalva v. Shalala, 152 F.3d 1115 (9th Cir. 1998) (applying the less onerous totality approach in the context of a due process violation).

The state action doctrine originated in the *Civil Rights Cases*,[81] when race discrimination was an invidious wrong that the reconstruction amendments, especially the Fourteenth Amendment, aimed to eradicate.[82] This level of concern over race discrimination is evidenced in the Supreme Court's use of strict scrutiny review when it analyzes the merits of race discrimination cases, while using intermediate review to evaluate cases of gender discrimination and only minimal scrutiny in cases involving nonfundamental rights.[83] Whatever the rationale, however, lower courts have suggested that less state involvement needs to be found with constitutional violations that courts take more seriously on the merits, hence creating a hierarchy of constitutional rights keyed to different standards of state action.

B. *State Action in the Public High School Context*

On several occasions the Supreme Court has been called upon to apply state action analysis in the context of public schools. In each of these cases, state action was presumed or conceded where students claimed that public school administrators violated their First Amendment rights, as these administrators were deemed state officials.[84] United States courts of appeals have also found state

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81. 109 U.S. 3 (1883).

82. *See* NAACP v. Thompson, 648 F. Supp. 195, 244 (D. Md. 1986) (noting that "the level of state action may be de minimis when racial discrimination is alleged because the hallmark of the Fourteenth Amendment has been to safeguard against discrimination based on race"); *see also* Scott v. Eversole Mortuary, 522 F.2d 1110, 1117 (9th Cir. 1975) (Ely, J., concurring and dissenting in part); Coleman v. Wagner College, 429 F.2d 1120, 1127 (2d Cir. 1970) (Friendly, J., concurring); Edwards v. Habib, 397 F.2d 687, 693 (D.C. Cir. 1968); New York City Jaycees, Inc. v. United States Jaycees, Inc., 377 F. Supp. 481, 488 (S.D.N.Y. 1974), *rev'd*, 512 F.2d 856 (2d Cir. 1975); Oller v. Bank of America, 342 F. Supp. 21, 23 (N.D. Cal. 1972); Bright v. Isenbarger, 314 F. Supp. 1382, 1392-93 (N.D. Ind. 1970); Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 82 (1967).

83. Under the strict scrutiny test, the alleged constitutional violation will be held invalid unless it is necessary to achieve a compelling state interest. *See* Palmore v. Sidoti, 466 U.S. 429, 432 (1984). Under the minimal scrutiny test, an alleged constitutional violation will be presumed valid if it bears a rational relationship to the end sought. *See* New York City Transit Auth. v. Beazer, 440 U.S. 568, 592-94 (1979). Under the intermediate scrutiny test, an alleged constitutional violation will be held invalid unless it bears a substantial relationship to an important government interest. *See* Craig v. Boren, 429 U.S. 190, 197-98 (1976).

84. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (presuming state action when students filed a First Amendment complaint against their high school principal's act of deleting student articles from the high school paper); Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986) (presuming state action when school officials disciplined a

action where public school officials acted together with, or encouraged, students to produce the challenged constitutional violation.[85]

However, courts have not yet addressed the state action issue in a scenario where public high school students, acting independently, allegedly infringe upon another's constitutional rights.[86] In such a case a court would apply the nexus test by analyzing the following questions. Had the school, by law, by regulation, or by participation, compelled, encouraged, or assisted the high school student newspaper editors' actions? Or, do the student editors' actions have sufficient contact with the school officials vis-a-vis school regulations, mutual benefits (a symbiotic relationship), or direct funding?[87] This novel scenario was presented, and these questions were raised, in the case of *Yeo v. Town of Lexington*.[88]

II. *Yeo v. Town of Lexington*

This section will discuss the case of *Yeo v. Town of Lexington* in detail. After presenting the facts of the case, it will discuss the opinion of the United States District Court for the District of Massachusetts. It will then discuss the state action arguments of the majority and dissenting opinions of the three judge panel of the United States Court of Appeals for the First Circuit. Finally, the section will discuss the majority and concurring opinions in the First

student for inappropriate language at a school assembly); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (presuming state action when striking down school officials' regulation against wearing anti-Vietnam arm bands); *see also* Vernonia Sch. Dist. v. Action, 515 U.S. 646 (1995) (presuming state action when student filed a Fourth Amendment claim against school district).

85. *See* Planned Parenthood v. Clark County Sch. Bd., 941 F.2d 817 (9th Cir. 1991) (finding state action when high school students' decision to reject ads from outside vendor was in compliance with school board policy); San Diego Comm. Against Registration and the Draft v. Governing Bd. of the Grossmont Union High Sch. Dist., 790 F.2d 1471 (9th Cir. 1986) (finding state action when high school students' decision to reject an ad from an outside political group was directed by the school board).

86. College student-run newspapers are the closest analogue, and in these cases courts have been reluctant to find state action. *See, e.g.*, Leeds v. Meltz, 85 F.3d 51, 53-55 (2d Cir. 1996) (finding no state action where student editors of law school journal rejected ad); Sinn v. Daily Nebraskan, 829 F.2d 662, 665 (8th Cir. 1987) (finding no state action in refusal to print an ad where the student paper "maintains its editorial freedom from the state"); Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073, 1075 (5th Cir. 1976) (finding no state action when editors of college student newspaper refused to run ad); Avins v. Rutgers, 385 F.2d 151, 153-54 (3d Cir. 1967) (presuming no state action where state-supported law review rejected an article since editorial discretion is an essential element of publishing a journal).

87. See *supra* Part I.A for a discussion of the nexus test and its sub-factors.

88. 131 F.3d 241 (1st Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 2060 (1998).

Circuit's en banc decision, which reversed the three judge panel and affirmed the district court's decision that no state action existed.

A. *Case Facts*

In 1992, the Lexington School Committee decided "to distribute condoms and information regarding sexually transmitted diseases to students without parental consent."[89] Douglas Yeo, a town resident and parent, opposed the decision and formed a political action group that successfully placed the issue on the 1993 Town Ballot in the form of a town-wide referendum on the School Committee's condom policy.[90] The town sided with the School Committee; the voters approved the condom policy.[91] In response, Yeo helped establish the Lexington Parents Information Network ("LEXNET") "to educate parents on public school issues."[92] On behalf of LEXNET, Yeo submitted an advertisement promoting abstinence to the Lexington High School ("LHS") Yearbook.[93]

The LHS Yearbook was run by students. A staff of about sixty students made all editorial, business, and staffing decisions.[94] A LHS teacher advised the students, and the school paid her a stipend of less than $2,000 for that job.[95] This stipend and the use of LHS buildings and facilities were the only support the Yearbook received from the school.[96] Money from the sales of advertising and books entirely funded the Yearbook, allowing it to be financially independent from the school.[97]

The co-editors of the Yearbook rejected Yeo's ad and instructed their faculty advisor to call Yeo and offer him a chance to rewrite the ad "in a tone more appropriate to the mission of the Yearbook."[98] Yeo rejected the offer, and the faculty advisor subsequently sent Yeo a letter reaffirming the students' decision.[99] Yeo

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89. Yeo v. Town of Lexington, No. 94-10811-RGS, 1996 U.S. Dist. LEXIS 7310, at *7 (D. Mass. Apr. 22, 1996), *aff'd en banc*, 131 F.3d 241 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 2060 (1998).

90. *See id.*

91. *See id.*

92. *Id.* at *9.

93. *See id.* See *supra* note 5 for the text of the ad.

94. *See* Yeo v. Town of Lexington, 131 F.3d 241, 243 (1st Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 2060 (1998).

95. *See id.*

96. *See id.*

97. *See id.*

98. *Yeo*, 1996 U.S. Dist. LEXIS 7310, at *10.

99. *See id.* at *11. Karen Mechem, a LHS reading teacher and the Yearbook faculty advisor since 1980, stated that "because of the non-controversial nature of the

responded by demanding that the Yearbook reconsider its decision.[100] The Yearbook editors subsequently reaffirmed their decision to reject the ad, which the faculty advisor communicated to Yeo.[101]

Yeo also submitted a similar advertisement to the LHS newspaper, the *Musket*.[102] Like the Yearbook, the *Musket* was student-written and edited, with the students making all editorial, operational, and staffing decisions.[103] Its faculty advisor received $1,373 for that activity, and the School Committee provided funding of $4,500 per year.[104] The only LHS property that the *Musket* used was a mailbox; moreover, all the editorial layouts were done at the editors' homes.[105]

After receiving the advertisement request, the newspaper's business editor wrote to Yeo on behalf of the *Musket* informing him that the newspaper had rejected the ad.[106] Yeo protested to school officials, who advised the students that they should print the ad.[107] Nonetheless, the student editors reiterated their decision not to publish the ad.[108]

B. *The United States District Court for the District of Massachusetts*

Yeo filed a complaint in the United States District Court for

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advertising section of the yearbook, we have decided not to print [the] advertising you have submitted." *Id.* The panel decision had used Ms. Mechem's use of "we" as evidence of the school's involvement in the decision to reject the ad, but later the panel's author, Judge Stahl, was convinced that it did not implicate the school. *See Yeo*, 131 F.3d at 257 (Stahl, J., concurring).

100. *See Yeo*, 131 F.3d at 245.

101. *See id.*

102. *See id.* The advertisement sent to the newspaper had an additional line instructing students to contact LEXNET. *See id.*

103. *See id.* at 243-44.

104. *See id.*

105. *See id.* at 244.

106. *See* Yeo v. Town of Lexington, No. 94-10811-RGS, 1996 U.S. Dist. LEXIS 7310, at *11 (D. Mass. Apr. 22, 1996), *aff'd en banc*, 131 F.3d 241 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 2060 (1998).

107. *See id.* at *12-13. The superintendent, Jeffrey Young, wanted the ads printed "because the Town Counsel had determined that they should be published." *Id.* at *13. David Wilson, the school principal, even assured Yeo that the ads would be published and accepted from Yeo the uncashed $200 check for payment that the Yearbook had returned to him. *See id.*

108. *See id.* at *14. The students' decision occurred at a final meeting between the student editors of both the *Musket* and the Yearbook, the faculty advisors of each publication, the LHS Vice Principal (sitting in for the Principal), the Superintendent, and two members of the school board. *See id.*

the District of Massachusetts claiming that the Town of Lexington, among others,[109] violated his right to free speech guaranteed by the First and Fourteenth Amendments to the United States Constitution and by Article XVI of the Massachusetts Declaration of Rights.[110] The defendants moved for summary judgment on the grounds that "any alleged violation of [Yeo's] right to free speech cannot be ascribed to state action."[111] Both the Yearbook and the *Musket*, the defendants argued, were independently run student publications, and as such, their editors' acts were those of private individuals immune from constitutional challenge.[112]

Yeo argued that the publications' decisions were state actions,

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109. Among the other parties that Yeo named as defendants were David Wilson, the principal of the Lexington High School; Jeffrey Young, the superintendent of the Lexington Schools; Samuel Kafrissen, the teacher/advisor of the school newspaper, the *Musket*; Karen Mechem, the teacher/advisor of the LHS Yearbook; and the five members of the Lexington School Committee, John Oberteuffer, Lois Coit, Joseph Dini, Susan Elberger, and Barrie Peltz, who were individually named as defendants. *See id.* at *2, *3 n.1. No student editor, however, was named as a defendant.

110. *See id.* at *2-3.

111. *Id.* at *15.

112. *See id.* at *16. To bolster their case, the defendants argued that the publications operated independently of the school officials as required under Massachusetts law, which forbids school officials from abridging students' right to freedom of expression and as such releases school officials from any civil or criminal responsibility resulting from that speech. *See id.* at *16 n.13. The law mandates in relevant part:

> The right of students to freedom of expression in the public schools of the commonwealth shall not be abridged, provided that such right shall not cause any disruption or disorder within the school. Freedom of expression shall include without limitation, the rights and responsibilities of students, collectively and individually, (a) to express their views through speech and symbols, (b) to write, publish and disseminate their views, (c) to assemble peaceably on school property . . . .
>
> No expression made by students in the exercise of such rights shall be deemed to be an expression of school policy and no school officials shall be held responsible in any civil or criminal action for any expression made or published by the students.
>
> For the purposes of this section and sections eighty-three to eighty-five, inclusive, the word student shall mean any person attending a public secondary school in the commonwealth. The word school official shall mean any member or employee of the local school committee.

MASS. GEN. LAWS ch. 71, § 82 (1996). Originally the statute was elective, but on July 14, 1988, "in response to the [*Hazelwood*] decision, [which limited high school student free speech,] the Massachusetts legislature made the provision mandatory." J. Marc Abrams & Mark Goodman, *End of an Era? the Decline of Student Press Rights in the Wake of* Hazelwood School District v. Kuhlmeier, 1988 DUKE L.J. 706, 730 n.172; *see also*, Frank Phillips, *Legislative Committee Backs Bill to Bar Censoring of School Papers*, BOSTON GLOBE, Mar. 25, 1988, at B21. Four other states responded to *Hazelwood* with similar mandatory statutes. *See, e.g.*, ARK. STAT. ANN. §§ 6-18-1201 to -1204 (Mitchie 1995); COLO. REV. STAT. ANN. § 22-1-120 (West 1990); IOWA CODE ANN. § 280.22 (West 1989); KAN. STAT. ANN. §§ 72-1504 to -1506 (1992). California's student

and he advanced two theories to support his position.[113] First, Yeo argued that the court should find state action because of the close relationship between the LHS publications and the school authorities.[114] For example, he argued that both publications received financial support from the school, both were regulated curricular activities, and both enjoyed a symbiotic or mutually beneficial relationship with the school.[115] The court disagreed, finding that neither financial support nor regulated activity alone was sufficient for a finding of state action.[116] It stated that the proper test for finding state action is whether the state meaningfully participated in the challenged act.[117] The court added that meaningful participation requires a mutually beneficial relationship (or a symbiotic relationship), and that such a relationship did not exist in this case.[118]

Yeo argued, in the alternative, that there was state action because the school officials "'held themselves . . . out as [being] capable of resolving' the conflict" and thus the court should infer that the school officials were the real actors.[119] The court, however, noted that there was no evidence that anyone except the students actually made the decision to reject Yeo's ads.[120] At best, the court maintained, school officials might have approved or acquiesced in the decision, but that alone was insufficient to establish state action.[121] Thus, the United States District Court for the District of Massachusetts granted the defendants' motion for summary

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free speech statute, CALIF. EDUC. CODE § 48907 (West 1983), existed prior to the *Hazelwood* decision.

113. *See Yeo*, 1996 U.S. Dist. LEXIS 7310, at *17.

114. *See id.* at *18-23.

115. See *supra* Part I.A.1 for a discussion of these nexus factors for determining state action. Yeo's state action argument was based on the Eighth Circuit's decision in *Sinn v. Daily Nebraskan*, 829 F.2d 662, 665 (8th Cir. 1987) (upholding a student-run college newspaper's refusal to print an ad where the student paper "maintains its editorial freedom from the state"). The court in *Sinn* provided four factors for determining state action: "(1) extensive regulation, (2) receipt of public funds, (3) type of function involved [i.e., the public function test], and (4) presence of a symbiotic relationship." *Id.* at 665; *see also* Rendell-Baker v. Kohn, 457 U.S. 830, 840-42 (1982) (establishing the four factors for finding state action). Yeo argued that only the third factor did not exist. *See Yeo*, 1996 U.S. Dist. LEXIS 7310, at *18 n.16.

116. *See Yeo*, 1996 U.S. Dist. LEXIS 7310, at *19-21.

117. *See id.* at *23.

118. *See id.*

119. *Id.* (quoting Plaintiff's Memorandum in Opposition, at 31-32).

120. *See id.* at *24. The court noted that Yeo offered "nothing other than personal conjecture to dispute the student editors' sworn affidavits that they made the decision to reject Yeo's advertisement." *Id.*

121. *See id.* at *26 (citing Blum v. Yaretsky, 457 U.S. 991, 1004-05 (1982)).

judgment.[122]

C. *United States Court of Appeals for the First Circuit, Panel Decision*

Yeo appealed the district court's decision to the United States Court of Appeals for the First Circuit, and a panel of the First Circuit reversed the district court's ruling.[123] The First Circuit panel held that the defendant, Lexington High School, did engage in state action when it denied Douglas Yeo access to advertisement space in the *Musket* and the Yearbook.[124] This section will discuss the reasoning of the majority and dissent with respect to the state action issue.

1. The Majority Opinion

Under the facts of *Yeo*, the majority, in an opinion written by Judge Stahl, found the controlling framework for state action analysis established in the most recent Supreme Court case on public high school free speech, *Hazelwood School District v. Kuhlmeier*.[125] The majority interpreted *Hazelwood* as providing the test for finding state action in this context: state action exists if it is reasonable

122. *See id.* at *28.

123. *See* Yeo v. Town of Lexington, No. 96-1623, 1997 WL 292173, at *1 (1st Cir. June 6, 1997), *rev'd en banc*, 131 F.3d 241 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 2060 (1998).

124. *See id.* at *4. After finding state action, the court analyzed the merits of Yeo's First Amendment argument. The court held that the students' decision to reject Yeo's ads violated his First Amendment right to free speech. *See id.* at *8-18; *see also id.* at *29-35 (Lynch, J., dissenting). But since the panel's decision was vacated for lack of state action, and the en banc court did not reach the merits of the First Amendment issue, this Note focuses only on the state action question. For a critical discussion of the panel's First Amendment analysis, see John Matthew Berner, Casenote and Comment, *Abstinence, Advertisements, and the Abridgment of First Amendment Student Press Rights:* Yeo v. Town of Lexington, *No. 96-1623, 1997 WL 292173 (1st Cir. June 6, 1997)*, 21 HAMLINE L. REV. 181, 211-21 (1997).

125. *See Yeo*, 1997 WL 292173, at *5; *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (holding that a public high school principal did not violate high school students' First Amendment rights when he censored two articles from a high school newspaper).

The majority in *Yeo* began by attacking the district court's reliance on *Sinn v. Daily Nebraskan*, 829 F.2d 662, 665 (8th Cir. 1987), and *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-42 (1982), for its holding of no state action. The First Circuit panel found these cases distinguishable because the former involved a college newspaper at a state-supported university, and the latter involved teacher discharges from private, special-needs schools. The case at bar, however, involved publications at a public high school. *See Yeo*, 1997 WL 292173, at *5.

to perceive that the publications "bore the imprimatur[126] of the school."[127] Applying this "imprimatur test," the majority held that state action existed since there was a reasonable perception that the publications bore the imprimatur of the school—faculty members supervised both publications, and both were designed to educate and train student participants.[128] Moreover, the majority found that the student editors were not "wholly private actors" but were the representatives of public school publications, which bore the imprimatur of the school and which the school distributed to the public.[129] As such, the court held that the *Musket*'s and the Year-

126. An "imprimatur" is Latin for "let it be printed." It is a license or an allowance "giving permission to print or publish a book." BLACK'S LAW DICTIONARY 756 (6th ed. 1990).

127. *Yeo*, 1997 WL 292173, at *5. The majority opinion interpreted *Hazelwood* to mean that state action exists "where one confronts 'school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.'" *Id.* (quoting *Hazelwood*, 484 U.S. at 271).

In their brief for an en banc hearing, the defendants directly challenged the majority's interpretation of *Hazelwood* as containing an "imprimatur test." For example, the defendants argued that this state action test was not found in *Hazelwood*; in fact, the words "state action" do not appear in the opinion, and *Hazelwood* never even addressed the issue of state action. State action was presumed in *Hazelwood* because the students filed suit against the school principal. *See* En Banc Brief for Defendants-Appellees at 5, Yeo v. Town of Lexington, 131 F.3d 241 (1st Cir. 1997) (No. 96-1623). Additionally, neither the district court nor the plaintiff considered *Hazelwood* as a source for its state action analysis. *See* Yeo v. Town of Lexington, No. 94-10811-RGS, 1996 U.S. Dist. LEXIS 7310, at *18 (D. Mass. Apr. 22, 1996), *aff'd en banc* 131 F.3d 241 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 2060 (1998).

128. *See Yeo*, 1997 WL 292173, at *6. In articulating additional reasons to reinforce its conclusion that the publications bore the imprimatur of the school, the court stated the following:

> First, the high school's principal controlled the bank checking accounts of both publications. Moreover, the principal's affidavit indicates that he and other Lexington school officials retained authority and discretion over what the school publications would publish and that they were prepared to exercise such authority in cases involving a student desire to publish obscenity or other illegal material. In addition, the newspaper was largely funded with monies from the public fisc. Finally, both publications' faculty advisors received school salary supplements of several thousand dollars annually based on the additional responsibilities associated with their respective positions relative to the publications.

Id. (footnote omitted).

129. *Id.* at *7. The court noted that state action existed regardless of any factual dispute over whether the students made independent or private decisions:

> Our [state action] analysis would not change even if the town defendants convinced us that the student editors rejected the ads independently of Kafrissen, Mechem, Wilson, Young, and the other school officials with whom they were in close contact. . . . [The] Government cannot say that its behavior cannot be

book's refusal to publish Yeo's ads constituted state action.[130]

2. Dissenting Opinion

In dissent, Judge Lynch disagreed with the majority's state action analysis. She concluded that no state action existed because, in both publications, the students acted as independent editors, and their actions could not be fairly attributed to the school.[131]

Under the facts of *Yeo*,[132] the dissent noted that two approaches existed to finding state action.[133] The first approach required that the school administration's *decision not to interfere* constitute state action.[134] The second approach required that all the facts "taken together in context" sufficed to produce state action.[135] Yeo, the dissent concluded, failed on both accounts.[136]

In addressing the issue of whether the school officials' decision not to interfere should have constituted state action, the dissent noted that the leading Supreme Court decisions were "meaningfully different" and "thus provide[d] little guidance" for answering this question.[137] Specifically, the dissent noted that *Hazelwood*, which the majority used to frame its analysis, involved students' claims against public school administrators,[138] while the present case, by contrast, involved a non-student's claim against the inaction of

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> challenged because it was not acting independently, but rather was merely following "private" orders.

Id. at *7 n.8. (citations omitted).

130. *See id.* at *7. The court rejected the defendant's argument that Chapter 7, section 82(b) of the General Laws of Massachusetts precluded a finding of state action, since state action analysis preempted it, and since the Massachusetts Supreme Judicial Court has not addressed the issue of "the right of student-edited, school-sponsored publications to reject advertisements submitted to them." *Id.* at *7 & n.9.

131. *See id.* at *29 (Lynch, J., dissenting).

132. The dissent noted that Yeo did not sue the students, but rather the public school administrators, teachers, and members of the Lexington School Committee, who were presumably state officials. *See id.* at *26 (Lynch, J., dissenting).

133. *See id.* (Lynch, J., dissenting).

134. *See id.* (Lynch, J., dissenting). If the court believed that the school officials had affirmatively acted in the decision to reject Yeo's ad, then there would be little need for state action analysis because state action is presumed when a state official produces the challenged conduct. *See id.* (Lynch, J., dissenting). Because the government chose not to act in the present case, and the Constitution does not require or forbid them to act, the dissent noted that the "state action analysis is thus placed squarely in a very complex and changing area of the law." *Id.* (Lynch, J., dissenting). See *supra* Part I.A for further discussion of state action analysis.

135. *Yeo*, 1997 WL 292173, at * 26 (Lynch, J., dissenting).

136. *See id.* at *29 (Lynch, J., dissenting).

137. *Id.* at *26 (Lynch, J., dissenting).

138. *See id.* (Lynch, J., dissenting).

school officials.[139]

To answer this state action question, the dissent utilized two tests: the public function test and the nexus test.[140] First the dissent asked, did the state delegate a traditional public function to a private actor?[141] According to the dissent, running a school newspaper was neither a traditional government function, nor the exclusive prerogative of the state.[142] Thus, according to the dissent, Yeo could not establish state action using the public function test.

Next, the dissent applied the nexus test: was there a sufficient connection between state regulation, financial support, and the challenged conduct?[143] Judge Lynch noted that although each publication received some financial support, there was "very little interplay between the decision here and the state."[144] The dissent found that the financial relationship played no role in compelling, either covertly or overtly, the students' decision to reject the ads.[145]

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139. *See id.* (Lynch, J., dissenting). The dissent cited additional Supreme Court decisions regarding high schools and students that it also considered distinguishable. *See, e.g.*, Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986) (students challenged school officials' disciplinary actions); Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969) (student challenged school officials' censorship actions); *see also* Vernonia Sch. Dist. v. Action, 515 U.S. 646 (1995) (students challenged school district's mandatory drug testing).

The dissent further noted that "it is difficult to shoehorn the facts of this case into the fact patterns of the modern state action cases." *Yeo*, 1997 WL 292173, at *26 (Lynch, J., dissenting). On this point the dissent queried:

> Is this case like *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), where the actions of a private school, almost entirely funded by the state and closely regulated by public authorities, were found not to be state action? Arguably not, because this case involves a public school. Is it more like *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), where a private litigant's race-based exercise of peremptory challenges was found to be state action? Arguably not, because the alleged deprivation here does not implicate a traditional function of the government. Is it more like *NCAA v. Tarkanian*, 488 U.S. 179 (1988), where an unincorporated association of public and private colleges was found not to be a state actor even though the association's actions led a public college to take disciplinary action against a basketball coach? Arguably not, because in this case the state actors, the adults, have a supervisory relationship to the private group, the students, and are thus somewhat the inverse of the NCAA and the public college.

Yeo, 1997 WL 292173, at *26 (Lynch, J., dissenting) (parallel citations omitted).

140. *See Yeo*, 1997 WL 292173, at *26 (Lynch, J., dissenting). See *supra* Part I.A for further discussion of these tests.

141. *See Yeo*, 1997 WL 292173, at *27 (Lynch, J., dissenting).

142. *See id.* (Lynch, J., dissenting).

143. *See id.* (Lynch, J., dissenting).

144. *Id.* (Lynch, J., dissenting).

145. *See id.* (Lynch, J., dissenting). The dissent also noted that no symbiotic or mutually beneficial relationship existed between the publications and the school. *See*

The dissent next addressed whether the context in which the students caused the alleged constitutional violation would establish state action. Judge Lynch noted that although the students made their decision in a public setting—as public students at a public high school on public grounds—they had taken on private roles as student editors.[146] As such, their actions were similar to those of the public defender in the case of *Polk County v. Dodson* who had taken on a private function when she acted as counsel to her client.[147] In *Dodson*, the Court held that the public defender was not a state actor, even though she was considered a state actor when performing other duties, such as when making hiring decisions, since her duties to her client were akin to those of a private attorney.[148] Likewise, the dissent in *Yeo* noted that the students took on the duties of a private editor. For example, the students were independent of school officials, and at times maintained an adversarial relationship with them.[149] Accordingly, the dissent concluded that because the record established that the student editors made independent editorial judgments, no state action existed.[150]

D. *United States Court of Appeals for the First Circuit, En Banc*

The en banc court reversed the three judge panel and affirmed the district court's holding that no state action existed; as a result, the case was dismissed.[151] Judge Lynch, writing for a unanimous court, expanded the argument previously made in dissent. Although no judge filed a dissenting opinion,[152] Judge Stahl, who

id. (Lynch, J., dissenting). The dissent stated that "it is difficult . . . to discern what mutual benefits might arise from the students' decision not to run Yeo's ads." *Id.* (Lynch, J., dissenting).

146. *See id.* at *28 (Lynch, J., dissenting).

147. *See* Polk County v. Dodson, 454 U.S. 312, 324-25 (1981). In *Dodson*, an Iowa prisoner brought a pro se claim against, among others, an attorney in the Offender Advocate's Office claiming that his civil rights were violated when the public defender moved to withdraw as his counsel on the ground that his claims were legally frivolous. *See id.* at 314. The Supreme Court held, in relevant part, that the public defender "did not act under color of state law in exercising her independent professional judgment in a [state] criminal proceeding." *Id.* at 324.

148. *See Dodson*, 454 U.S. at 324-25.

149. *See Yeo*, 1997 WL 292173, at *29 (Lynch, J., dissenting). The dissent pointed out that, in fact, the school officials would have made a different decision. *See id.* (Lynch, J., dissenting).

150. *See id.* (Lynch, J., dissenting).

151. Yeo v. Town of Lexington, 131 F.3d 241, 243 (1st Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 2060 (1998).

152. Although no judge technically filed a dissenting opinion, Chief Judge Torruella's concurring opinion insisted that the en banc court mistakenly failed to address

had written the panel majority opinion, wrote a concurring opinion in which he concurred in the result, but continued to disagree with Judge Lynch's state action analysis. Thus, in addition to summarizing Judge Lynch's majority opinion, the following section will explain Judge Stahl's continuing disagreements with the majority view.

1. The Majority Opinion

Judge Lynch began her analysis by distinguishing the facts of *Yeo* as meaningfully different than the leading Supreme Court cases on high school student speech.[153] Moreover, she noted that other circuit courts which have addressed the closest analogues—independent college student editors—did not find state action.[154]

Thus, in framing the analysis for the novel set of facts in *Yeo*, Judge Lynch approached the state action inquiry by outlining three issues for analysis:[155] the first was whether the state, through the school officials, was affirmatively involved, either directly or covertly, in rejecting Yeo's ad;[156] the second was whether the school's failure to prevent the challenged conduct constituted state action;[157] and the third was whether the students' independent acts were fairly attributable to the school officials.[158]

Regarding the first inquiry, Judge Lynch noted that whether any direct state involvement existed was primarily a factual question, and the record did not support any direct state involvement.[159] She noted that there were indirect, more subtle ways that the school might have played a role in the decision-making process, either through a symbiotic relationship or by taking on a traditional public function.[160] However, evidence of a symbiotic relationship was in-

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the "important issue" of "the absence of a public forum" with respect to the students' publications. *Id.* (Torruella, J., concurring). Yet, for the court to have addressed that issue, it would have first had to find state action and thereafter address the merits of Douglas Yeo's First Amendment claim. Thus, it appears as if Judge Torruella is implicitly dissenting from the state action issue.

153. *See id.* at 250. See *supra* note 139 for an explanation of those cases.

154. *See Yeo*, 131 F.3d at 251. See *supra* note 86 for citations to these analogous cases.

155. *See Yeo*, 131 F.3d at 251.

156. *See id.*

157. *See id.*

158. *See id.*

159. *See id.* at 251-52.

160. *See id.* at 252. Judge Lynch also noted that the facts do not support the claim that the school was the "real actor" behind the scenes, nor that it was involved in some kind of "charade designed to evade constitutional prohibitions." *Id.*

sufficient for constituting state action since "there [was] no evidence the school officials tacitly endorsed or benefitted from the students' decisions."[161] Moreover, publishing a student newspaper and yearbook "is most emphatically not a traditional function nor an exclusive prerogative of the government in this country."[162] Thus, the state had neither a direct, nor a tacit affirmative involvement in the challenged activity.

Second, Judge Lynch considered whether the school's inaction constituted state action. For inaction to constitute state action, school officials must have an affirmative duty to prevent the challenged conduct.[163] While recognizing that state statutes are not determinative of the outcome of a federal constitutional question, Judge Lynch noted that the relevant Massachusetts statute, which prohibits school officials from censoring students, did not require the state to act affirmatively in instances such as the one in this case.[164] Thus, without an affirmative duty to act, the school's acquiescence did not constitute state action.[165]

Finally, Judge Lynch addressed what she termed the "key issue," namely, whether the students' independent conduct "may be fairly attributable to the state."[166] In making this determination, she applied the nexus test factors.[167] Judge Lynch first noted that the nexus between "state regulation and financial support of the publications and the challenged decisions militates against a state action finding."[168] Under the facts of *Yeo*, Judge Lynch found that although each publication received some financial support, there was "no interplay between the decision not to publish the advertise-

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161. *Id.*

162. *Id.*

163. *See id.*

164. *See id.* at 253.

165. Only rarely would the state have a duty to intervene to prevent a private actor from doing harm. For example, "state officials could not personally stand by and watch privately-contracted-for prison guards beat a prisoner to death, and then defend on the ground of no state action." *Id.* at 252 n.11; *see also* Ponce v. Basketball Fed'n of Puerto Rico, 760 F.2d 375, 378-80 (1st Cir. 1985) (holding that some occasions exist where "[t]he government should be responsible for failing to act where it should act," but in the case at bar no state action existed because the government had no affirmative duty to regulate amateur sports leagues); *cf.* DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189, 195 (1989) (finding that the Due Process Clause imposes no affirmative duty on the government to protect citizens from deprivation of life, liberty, or property by private actors).

166. *Yeo*, 131 F.3d at 253.

167. *See id.* See *supra* Part I.A.1 for a discussion of the nexus factors.

168. *Yeo*, 131 F.3d at 253.

ment and the state's provision of financial and faculty support."[169]

Moreover, reiterating an argument she made in her previous panel dissent, Judge Lynch added that the state action question "may shift depending on the context and the question asked."[170] Although the students made decisions in the context of a public school setting, in assuming their duties as editors, they had taken on a private role much like the public defender in *Polk County v. Dodson*[171] when she assumed the role of a private attorney in performing her duties as counsel for her client.[172] The students' role as independent editors, therefore, mitigated against finding state action.

Thus, because the record established that the student editors made independent editorial decisions, and that these decisions could not be fairly attributed to the school, the court held that no state action existed and dismissed Yeo's suit.[173]

2. Judge Stahl's Concurrence

Judge Stahl concurred with the majority's result, but for different reasons. Judge Stahl found the majority's state action ruling "to be wrong on the merits."[174] He asserted that the students were

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169. *Id.* at 254.

170. *Id.*

171. 454 U.S. 312 (1981).

172. *See Yeo*, 131 F.3d at 254. In *Dodson*, the public defender was not a state actor when she represented a criminal defendant since, in that context, her role (and relationship with the state) was the same as that of any private attorney's, even though she was considered a state actor when performing other duties, such as when making hiring decisions. *See Dodson*, 454 U.S. at 324-25. Judge Lynch noted the following:

> Even acknowledging that the public defender is a state employee, [*Dodson*] considered it important that, in the actual function of defending the client, the public defender's relationship to the state was necessarily independent, and even adversarial, and that the defender exercised independent judgment in the same manner as did attorneys in the private sector. So too here.

Yeo, 131 F.3d at 254 (footnote and citations omitted).

Likewise, Judge Lynch noted that the students in the case at bar were not state actors in their role as editors acting independently of the school, even though one could identify other contexts where they may be state actors. *See id.*

173. *See Yeo*, 131 F.3d at 255.

174. *Id.* at 256 (Stahl, J., concurring). Judge Stahl asserted that the case should have been dismissed on statutory grounds because the defendants—Lexington High School officials—did not, pursuant to 42 U.S.C. § 1983, "ultimately cause the conduct of the non-party students," who rejected Yeo's ad. *Id.* (Stahl, J., concurring). See *supra* note 7 for the text of 42 U.S.C. § 1983. To prove this causal element of a § 1983 claim, the plaintiff Yeo would have had to show that either one individual defendant "actually colluded with the students" in their decision to reject the ad, or that the ad was rejected pursuant to the Town of Lexington's policy or custom. *Yeo*, 131 F.3d at 256 (Stahl, J., concurring). Insufficient evidence existed, noted Judge Stahl, to show either type of

public, not private, actors "insofar as they solicited and published advertisements from paying third partes."[175]

Although Judge Stahl abandoned his use of the *Hazelwood* "imprimatur test,"[176] he resurrected another position he had used in his previous majority panel opinion.[177] The student editors should be viewed as public actors, he asserted, "when they act as representatives of public school publications that bear the imprimatur of the school and are disseminated to the public as such."[178] More specifically, he noted that the students were public actors in their role as officials of the school newspaper in soliciting funds for it.[179]

Thus, according to Judge Stahl, the majority overlooked the preliminary question of whether the students were private or public actors.[180] He stated that the majority incorrectly relied on cases that "presume[d] that the actor [was] private."[181] These cases began the state action analysis by asking whether the private actor's action may be fairly attributable to the state instead of asking the antecedent question of whether the person or entity is a private or public actor.[182] As a preliminary matter, then, Judge Stahl asserted that the state action inquiry must begin with the question of "whether the conduct was . . . public or private."[183]

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causation. *See id.* (Stahl, J., concurring). As such, Stahl reasoned that the majority's state action ruling was a violation of judicial restraint because the court inappropriately reached a constitutional question of state action "'in advance of the necessity of deciding [it].'" *Id.* (Stahl, J., concurring) (quoting Three Affiliated Tribes v. World Eng'g, P.C., 467 U.S. 138, 157 (1984)). *But see id.* at 249 n.3 (noting that Judge Stahl's suggestion is an "unusual approach" since the Supreme Court has "consistently addressed the state action question before addressing questions of causation").

175. *Yeo*, 131 F.3d at 257 (Stahl, J., concurring).

176. See *supra* Part II.C.1 for an explanation of this argument.

177. *See* Yeo v. Town of Lexington, No. 96-1623, 1997 WL 292173, at *7 (1st Cir. June 6, 1997), *rev'd en banc*, 131 F.3d 241 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 2060 (1998).

178. *Id.*

179. *See id.*

180. *See Yeo*, 131 F.3d at 257 (Stahl, J., concurring) (noting that "[w]hether a person or entity is a private or a public actor obviously cannot be resolved through application of cases which presume that the actor is private").

181. *Id.* (Stahl, J., concurring).

182. *See id.* (Stahl, J., concurring).

183. *Id.* (Stahl, J., concurring). As an illustration, Judge Stahl noted that if an on-duty municipal police officer misuses his power to carry out a personal vendetta, the state action analysis would focus on whether his actions were solely private or were made possible by virtue of power of state law and because the officer "is clothed with the authority of state law." *Id.* at 258 (Stahl, J., concurring) (citing Martinez v. Colon, 54 F.3d 980, 986 (1st Cir. 1995) (finding no state action when on-duty police officer, assailant, at time and place in question, was engaged in clearly personal pursuit, and

The appropriate criteria for determining whether the students were public or private actors, Judge Stahl noted, may be found in *Polk County v. Dodson*.[184] In *Dodson*, the Court used two criteria to distinguish between the public defender's private and public roles.[185] First, because of a public defender's duty of loyalty to her client, she "is not amenable to administrative direction [from the state] in the same sense as other employees of the State."[186] Second, because state criminal defendants have a constitutional right to counsel, "it is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages."[187] Thus, a public defender's duty of loyalty and a defendant's right to counsel preclude the public defender from acting on behalf of the state, or in a public capacity in her role as the criminal defendant's counsel. In that role, therefore, she acted as a private actor.

Applying this analytic framework to the students' activities in working for the newspaper and yearbook, Judge Stahl concluded that the students performed a public function "insofar as they solicited and published [or declined to publish] advertisements from paying third parties."[188] He reasoned that the students' commercial function is a public role and not a private one because there is neither a duty of loyalty to a third party that would preclude supervisory direction, nor a constitutional obligation of the state to respect the students' commercial judgment.[189] Although the students as editors and publishers were performing private functions, Judge Stahl stated that "to the extent public school students solicit funds to support a public enterprise in their capacities as officials of that

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was not acting under color of state law, precluding a § 1983 substantive due process claim)). Likewise, Judge Stahl insisted that determining whether the students are public or private actors requires criteria other than those that determine whether the students' acts may be attributed to the Town. Criteria are needed to determine whether the students themselves are public or private actors. *See id.* (Stahl, J., concurring).

184. *See id.* (Stahl, J., concurring). In *Polk County v. Dodson*, 454 U.S. 312 (1981), the Supreme Court used a "functional test" when it held that a public defender does not act under color of law "when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." *Id.* at 325. The Court found that the public defender's function in this role was a private, not a public function, as opposed to when she was making hiring and firing decisions on behalf of the state. *See id.* See *supra* note 147 for the facts of *Dodson*.

185. *See Dodson*, 454 U.S. at 321-22.

186. *Id.* at 321.

187. *Id.* at 321-22.

188. *Yeo*, 131 F.3d at 257 (Stahl, J., concurring).

189. *See id.* at 258 (Stahl, J., concurring).

enterprise, they act under color of State law."[190] Thus, Judge Stahl utilized *Dodson*'s functional analysis against the reasoning of the majority by asserting that although the students did perform private functions, they performed a public one as well, and that should have been sufficient for finding state action.[191]

III. Equal Consideration for Fundamental Rights

In *Yeo v. Town of Lexington*, the United States Court of Appeals for the First Circuit, sitting en banc, held that the students' decision to reject the ad was not state action since there was an insufficient nexus between the school and the students' decision.[192] Yet, the court noted that under the same set of facts, state action would have been found if the students' decision had been to exclude someone from their editorial board on account of race.[193] The First Circuit would have ruled differently in a race discrimination case because in *Yeo* it endorsed the variable state action analysis,[194] applying a heightened state action standard to an alleged First Amendment violation and a more liberal standard to an alleged race discrimination violation.

This Part of the Note will critically analyze the court's use of this variable state action analysis in *Yeo v. Town of Lexington*. First, it will demonstrate how the majority applied the sequential approach's heightened standard in its state action analysis of the alleged First Amendment violation.[195] Second, this Part examines

190. *Id.* at 259 (Stahl, J., concurring). In fact, Judge Stahl stated that "the power of school officials to regulate the content of student publications and the acts of their student editors . . . is near its apex where the subject of the regulation involves the students' commercial interactions with third parties." *Id.* at 258 (Stahl, J., concurring) (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266-70 (1988)).

191. *See id.* (Stahl, J., concurring). The majority dismissed, out of hand, Judge Stahl's argument for distinguishing the students as acting privately in their role of reporting and publicly in their role of making advertisement decisions. *See id.* at 250 n.7.

192. *See id.* at 255.

193. *See id.* at 254 n.15. Judge Lynch wrote the following:

> [I]f this were a claim brought by a student who had been excluded from election to the editorial board [of the newspaper] on account of her race, and the school officials [had] declined to intervene, the analysis would focus on a *different decision* and *most likely would reach a different result.*

Id. (emphasis added).

194. As previously stated, variable state action analysis keys different state action standards to the type of constitutional right at stake, applying a heightened standard to First Amendment cases and a liberal standard to race discrimination cases. As a practical matter, then, courts will dismiss more alleged First Amendment violations by private persons. See *supra* Part I.A.5 for further discussion of variable state action analysis.

195. See *supra* Part I.A.3 for a discussion of the sequential approach.

the majority's use of this heightened state action standard by challenging its acceptance of the variable state action approach. This Part will suggest that the variable state action approach undermines judicial accountability and fails to give equal consideration to all alleged fundamental rights violations.[196] Third, this Part suggests that courts should use what will be termed an "Equal Consideration Approach" to state action analysis; they should apply the same state action standard—the more liberal totality approach—to all alleged fundamental rights violations. Finally, this Part will suggest that, under the facts of *Yeo*, applying the more liberal totality approach would support a finding of state action.[197] As such, the Note concludes, the First Circuit in *Yeo* should have decided Douglas Yeo's First Amendment complaint on the merits.

A. *The Majority's Use of the Sequential Approach*

With the sequential approach, a court finds state action by examining each nexus factor in isolation to determine if, by itself, it is sufficient to turn private conduct into state action.[198] Judge Lynch, in her majority opinion in *Yeo*, found no state action after she disposed of three theories for finding state action.[199] She first analyzed whether the school actually made or controlled the editorial decisions, and she found it did not control them since the record did not indicate otherwise.[200] Second, she dismissed the claim that the school's inaction constituted state action since the school had no affirmative duty to act.[201] Finally, Judge Lynch used the nexus analysis to determine whether the students' independent acts could be fairly attributed to the school.[202] It was pursuant to this third theory, the nexus analysis, that Judge Lynch used the sequential ap-

196. See *infra* Part III.B.1 for a discussion of these arguments.

197. See *supra* Part I.A.2 for a discussion of the totality approach.

198. Recall that nexus factors include: a state *compelling*, *encouraging*, or *assisting* the private person's challenged conduct; or, a private person's conduct having sufficient contacts with the state vis-a-vis *regulations*, *mutual benefits* (symbiotic relationship) or *direct or special funding*. See *supra* Part I.A.1 for further discussion of the nexus factors.

199. *See* Yeo v. Town of Lexington, 131 F.3d 241, 251 (1st Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 2060 (1998). For a further discussion of *Yeo*, see *supra* Part II.D.1.

200. *See Yeo*, 131 F.3d at 251-52.

201. *See id.* at 252-53. Judge Lynch also squashed the suggestion that an affirmative duty might derive from the existence of a "symbiotic relationship" between the publication and the school, or from a traditional government function of running a school. *See id.* at 253.

202. *See id.*

proach associated with variable state action analysis.[203]

In performing her nexus analysis, Judge Lynch analyzed nexus factors in isolation, dismissing each one when it alone was insufficient to implicate state action. For example, first she analyzed whether state regulation of the students' activities was sufficient to find state action.[204] Next she analyzed whether state subsidy of the students' publications rose to a sufficient level to find state action.[205] She concluded that each nexus factor, by itself, was insuffi-

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203. In fact, Judge Lynch prefaces her state action analysis by first defending the variable state action thesis. For example, she writes the following:

> The modern state action decisions of the Supreme Court do not rely on a single analytic model applied regardless of the fact patterns involved. . . . The analytic model used must *take account of the specific constitutional claim being asserted*, here, one under the First Amendment. *Cf.* Polk County v. Dodson, 454 U.S. 312, 324-25 (1981) (state action inquiry shifts depending on constitutional question asked). "Faithful adherence to the 'state action' requirement . . . requires careful attention to the gravamen of the plaintiff's complaint." Blum v. Yaretsky, 457 U.S. 991, 1003 (1982).

Yeo, 131 F.3d at 249 (emphasis added) (parallel citations omitted).

Judge Lynch's Supreme Court citations, however, do not support this approach. First, regarding *Polk County v. Dodson*, the state action question shifts, as Judge Lynch herself admitted, not based on the content of the complaint but based on the defendant's role in the context of the complaint. *See supra* notes 169-70 and accompanying text. Second, and more importantly, her quote from *Blum*, when placed in its context, does not mean, as Judge Lynch suggested, that a court must look to the plaintiff's complaint and identify the constitutional claim prior to its state action analysis. Instead, the Court in *Blum* looked to the plaintiff's complaint to determine if the challenged action attached to state regulations or procedures or whether it attached solely to a private person's decision. *See Blum*, 457 U.S. at 1003. This determination will change the focus of the state action analysis because state action is more easily identified in the former than in the latter case. Importantly, in *Blum*, the Court did not find that state action analysis begins by looking to the plaintiff's complaint to identify the constitutional claim at stake. As discussed *supra* note 76, the Supreme Court has not ruled on whether courts should key their state action analysis to the constitutional claim at stake. The following passage from *Blum* contains Lynch's quote and puts it in its proper context.

> Faithful adherence to the "state action" requirement of the Fourteenth Amendment requires careful attention to the *gravamen of the plaintiff's complaint*. *In this case*, respondents objected to the involuntary discharge or transfer of Medicaid patients by their nursing homes without certain procedural safeguards. . . . They have named as defendants state officials responsible for administering the Medicaid program in New York. These officials are also responsible for regulating nursing homes in the State, including those in which respondents were receiving care. *But respondents are not challenging particular state regulations or procedures*, and their arguments concede that the decision to discharge or transfer a patient originates not with state officials, but with nursing homes that are privately owned and operated. *Their lawsuit, therefore, seeks to hold state officials liable for the actions of private parties . . . .*

Blum, 457 U.S. at 1003. (emphasis added) (footnote omitted).

204. *See Yeo*, 131 F.3d at 254.

205. *See id.*

cient because the extent of each alone was de minimis.[206]

Importantly, however, Judge Lynch acknowledged that the above factors, *together with* numerous *other nexus* factors, "support[ed] Yeo's argument" for state action.[207] For example, she noted that the Yearbook centered on a public high school class, and the newspaper was named *Lexington High School Musket*.[208] She also noted that besides state subsidies supporting the publications, public school officials advised the students in producing these publications. Moreover, the "newspaper exist[ed] in the form it did because the school authorities and state law permit[ted] it to do so."[209] In addition, Judge Lynch noted that the publications provided "explicit educational value" and credentials for the students, achieved educational goals for the school, and that the students worked on these publications on school grounds and sometimes during school hours.[210]

But Judge Lynch dismissed these other nexus factors, which together appeared to support state action, as irrelevant given the context in which the students made their decision.[211] According to Judge Lynch, the "'nexus' argument turns on context," and the students had taken on private roles within the context of their public setting.[212] They did so, she noted, in the same way as a public defender does when she assumes her role as counsel to her client.[213] In such a case, the Supreme Court has held that the public defender's actions are no longer attributable to the state.[214]

We can distinguish, however, the case of a public defender assuming a private role in her duties as public counsel, and the logic behind it, from the situation presented in *Yeo*. The Supreme Court held that a public defender's decisions are not attributable to the state because "it is the constitutional obligation of the State to respect the professional independence of the public defenders whom

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206. *See id.* Here, Judge Lynch cites *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982), for the point that even extensive funding is insufficient by itself to find state action. *See Yeo*, 131 F.3d at 253.

207. *Yeo*, 131 F.3d at 254.

208. *See id.*

209. *Id.*

210. *Id.*

211. *See id.*

212. *Id.*

213. *See id.*

214. *See* Polk County v. Dodson, 454 U.S. 312, 324-25 (1981). See *supra* note 147 and accompanying text for further discussion of *Dodson*.

it engages."[215] However, the State has no constitutional obligation to respect the independence of student decisions regarding school publications.[216] Additionally, unlike a public defender, a student has no strict duty of loyalty to a third person such as a client.[217] As such, the analogy between the students' actions in *Yeo* and a public defender's is misplaced since the students' actions are neither constitutionally protected nor ethically required.[218] Judge Lynch, then, inappropriately relied on the public defender analogy to avoid numerous nexus indicia that together appeared to support state action.[219] Thus, to deny state action, Judge Lynch avoided using the more liberal state action standard associated with the totality approach and instead embraced a heightened state action standard associated with the sequential approach.[220]

B. *Problems with Using Variable State Action Analysis: Should Finding State Action Be More Difficult in First Amendment Cases than in Racial Discrimination Cases?*

The majority in *Yeo* used the sequential approach's heightened state action standard to conclude that no state action existed.[221] But it conceded that had the constitutional right at stake been one of racial discrimination, instead of the First Amendment, it would have likely found state action.[222] In racial discrimination cases, courts have primarily used the liberal state action standard associ-

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215. *Dodson*, 454 U.S. at 321-22.

216. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266-70 (1988) (holding that school officials may delete articles from student newspapers).

217. *See Dodson*, 454 U.S. at 321 (holding that, in part, a public defender's duty of loyalty to her client makes her actions not amenable to administrative direction from the state because that duty requires strict allegiance to her client).

218. *Cf.* West v. Atkins, 487 U.S. 42, 51 (1988) (finding state action where a private doctor contracted with the state to provide medical care in a prison because, unlike a public defender, a doctor's "professional and ethical obligation to make independent medical judgments [do] not set him in conflict with the State and other prison authorities").

219. Judge Lynch noted that given these factors "[i]t is a close question whether the injury caused here is aggravated in a unique way by the incidents of government authority." Yeo v. Town of Lexington, 131 F.3d 241, 254 (1st Cir. 1997) (en banc) (citing Edmonson v. Leesville Concrete Co., 500 U.S. 614, 622 (1991)), *cert. denied*, 118 S. Ct. 2060 (1998).

220. See *supra* Part I.A.5 and citations therein for a discussion of varying state action standards and their associated constitutional claims.

221. See *supra* Part III.A for further explanation.

222. See *supra* note 193 for Judge Lynch's statement that supports this claim.

ated with the totality approach.[223] In *Yeo*, the First Circuit chose to use a heightened state action standard to address Yeo's First Amendment claim because it embraced a variable state action approach, keying state action standards to the offensiveness of the alleged constitutional violation.[224]

Should courts vary the state action analysis based on the constitutional violation alleged? To defend this practice would require courts to rank fundamental constitutional rights in a hierarchy of importance for purposes of reaching the merits.[225] Under this approach, courts would decide that someone who has been racially discriminated against ought to have a better chance of having his or her day in court than someone whose speech has been suppressed. The alternative would be for courts to apply the same state action standard to all fundamental constitutional rights.[226]

1. Problems with the Variable State Action Approach

Some courts have found that ranking fundamental constitutional rights is inappropriate for state action analysis.[227] These

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223. See *supra* Part I.A.5 for a discussion of the use of a liberal state action standard for race discrimination cases.

224. *See Yeo*, 131 F.3d. at 249 & n.6.

225. Recall that the issue here is whether one can overcome the threshold test of state action to prevent the court from dismissing the case before it reaches the constitutional merits. Thus, even though the courts treat First Amendment rights and rights against racial discrimination as fundamental, by making it easier to dismiss free speech rights courts implicitly rank them lower, and find them to be less protected, than rights against race discrimination. This difference in ranking is not self-evident. In fact, the reverse may be true since protecting free speech provides the very groundwork for a society of laws within which people can argue for and defend racial equality.

226. A right is fundamental when it is "so rooted in the traditions and conscience of our people" that fair and enlightened system of justice would not be possible without it. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); *accord* Washington v. Glucksburg, 521 U.S. 702, 721 (1997) (determining a fundamental right by looking at whether the right is "deeply rooted in this Nation's history and tradition").

227. *See* Isaacs v. Board of Trustees of Temple Univ., 385 F. Supp. 473, 485 (E.D. Pa. 1974). Judge Higginbotham wrote the following:

> Often, it would seem, courts have been influenced in their determinations of the preliminary, jurisdictional question—whether "state action" exists—by the particular invidiousness of the constitutional violation alleged. When viewed in this context, defendants[ ] . . . implicitly suggest[ ] that courts generally, and this Court in particular, should be more reluctant to find "state action" in cases which do not involve racial discrimination. I decline to accept that suggestion. It is difficult, and perhaps impossible, to arrange federal constitutional rights in an ascending hierarchy of value. What is clear is that any deprivation of such a right, whether to the equal protection of the laws as guaranteed by the Fourteenth Amendment or *to the freedoms of speech and association as guaranteed by the First Amendment*, is a matter of extreme im-

courts have asserted that because the Supreme Court has deemed a right fundamental, courts should treat any alleged violation of that right with an equal level of state action inquiry.[228] In other words, whether one asserts a right against discrimination or a right to free speech, the courts have recognized that in either case the assertion is extremely important to the person suffering the deprivation, and courts should be equally sensitive to such deprivations.[229]

Courts have also asserted that variable analysis allows judges to rank fundamental constitutional values without adequate justification.[230] That is, a court will assign a particular state action stan-

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> portance to the person who suffers the deprivation. It is equally clear that the courts should be especially sensitive to any such deprivation, whether it involves a black man who is refused service in a segregated restaurant, . . . or two faculty members who were fired for speaking their minds about a university's publication policies, as is purportedly the case here. *The freedoms of speech and association have been held so fundamental to the concept of ordered liberty that they have been incorporated* into the Due Process clause of the Fourteenth Amendment. Edwards v. South Carolina, 372 U.S. 229 (1963). Clearly, then, the courts should be alert to their infringement "under color of" state law, and quick to vindicate them if they have in fact been curtailed.

Id. at 485 n.11 (emphasis added); *see also* Parks v. "Mr. Ford," 556 F.2d 132, 154 (3d Cir. 1977) (Gibbons, J., concurring); Cohen v. Illinois Inst. of Tech., 524 F.2d 818, 823 n.7 (7th Cir. 1975); Stern v. Massachusetts Indem. & Life Ins. Co., 365 F. Supp. 433, 439 (E.D. Pa. 1973); Keller v. Kate Maremount Found., 365 F. Supp. 798, 801 (N.D. Cal. 1972), *aff'd sub nom.* Geneva Towers Tenants Org. v. Federated Mortgage Investors, 504 F.2d 483 (9th Cir. 1974); Seidenberg v. McSorleys' Old Ale House, Inc., 317 F. Supp. 593, 598 n.7 (S.D.N.Y. 1970). Recently, the United States Court of Appeals for the Second Circuit questioned the continued validity of its variable analysis approach. *See* Albert v. Carovano, 851 F.2d 561, 570-74 (2d Cir. 1988) (en banc); *see also* Tavoloni v. Mount Sinai Med. Ctr., 984 F. Supp. 196, 204 (S.D.N.Y. 1997).

228. *See* Downs v. Sawtelle, 574 F.2d 1, 6 n.5 (1st Cir. 1978); *Isaacs*, 385 F. Supp. at 485 n.11; *see also* Jakosa, *supra* note 77, at 194 (criticizing the variable state action approach as "artificial and unjust").

In fact, the First Circuit itself has rejected this variable state action approach when applied to fundamental rights. *See Downs*, 574 F.2d at 7 n.5 (noting that even if the court were to adopt the Second Circuit's "flexible approach to state action analysis" it would "be inclined to group infringements of fundamental rights and racial discrimination together"); *see also* Lamb v Rantoul, 561 F.2d 409, 411 (1st Cir. 1977) (expressing reservations over using the variable state action approach); *cf.* Fletcher v. Rhode Island Hosp. Trust Nat'l Bank, 496 F.2d 927, 931 (1st Cir. 1974) (applying a heightened state action standard in an economic due process case where a depositor claimed that a bank violated her due process rights when it used without notice the plaintiff's checking account deposits to setoff her bank credit card debt). See *infra* Part III.C for further discussion of the First Circuit's approach.

229. *See Isaacs*, 385 F. Supp. at 485 n.11.

230. *See Parks*, 556 F.2d at 154. Writing in concurrence, Judge Gibbons criticized this masking of judicial reasoning:

> The result of [the] adoption [of variable state action analysis] would be to hinge the availability of the national law applicable to the states by virtue of the fourteenth amendment not on the relationship between the actor and the

dard based on the constitutional violation alleged and then apply that standard without ever having to articulate why it assigned more or less importance to the constitutional value at issue.[231]

If a court is to treat free speech with less importance than racial equality, the court ought to "articulate [its] reasons for tilting the scale one way or the other."[232] In failing to provide such reasons, courts silently rule on the relative value of fundamental rights, which undermines judicial accountability.[233]

2. A Balancing Approach to State Action Analysis?

To overcome the lack of judicial accountability associated with the variable state action doctrine, some authorities argue for jettisoning the state action requirement and instead balancing the substantive interests of the parties up front.[234] Under this approach, a

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> state but on a prejudgment by the judge, state or federal, of the importance of the rights being claimed on his subjective scale of constitutional values. It is true, of course, that in discussing the merits of claims for constitutional protection we make evaluations of the relative worth of competing claims of the opposing party and of society. *But when we do so on the merits we are forced to articulate our reasons for tilting the scale one way or the other.* By the device of a "non-decision," turning the result on the absence of state action in a particular context, a judge makes subjective social policy decisions without exposing those reasons.

Id. (Gibbons, J., concurring) (emphasis added).

231. The problem of not providing judicial reasons for assigning lesser importance to First Amendment rights is especially troubling in the case of *Yeo*. Yeo's First Amendment complaint rested on the argument that the high school newspaper and yearbook were limited public forums, which would trigger the court's use of strict scrutiny analysis to Yeo's claim because the advertising ban was based on the content of his ad. *See* Yeo v. Town of Lexington, No. 96-1623, 1997 WL 292173, at *16 (1st Cir. June 6, 1997), *rev'd en banc*, 131 F.3d 241 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 2060 (1998). By dismissing the case, the court never analyzed the important and difficult First Amendment question of whether the high school publications were public or non-public forums. In fact, the panel decision is proof that this question is not so easily resolved. *See id.* at *9, *29; *see also Yeo*, 131 F.3d at 255 (Torruella, J., concurring) (emphasizing the importance of discussing the public forum issue).

232. *Parks*, 556 F.2d at 154.

233. The value of judicial accountability derives from the value that our legal system places on deliberating (reasoning) about legal rights. This value of deliberation is respected only if courts leave a record of their reasons, which other courts can decide either to follow, because they agree with the reasoning, or to overrule, because they find the reasoning mistaken. A lack of judicial accountability, then, undermines the importance of deliberation to the legal system.

234. *See* Erwin Chemerinsky, *Rethinking State Action*, 80 Nw. U. L. Rev. 503, 540 (1985) (arguing that balancing substantive interests "would force the courts clearly to identify and define the conflicting liberties, enhancing understanding of each of the rights at stake"); *see also* Robert J. Glennon, Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 Sup. Ct. Rev. 221, 231; Nowak & Rotunda, *supra* note 3, § 12.5, at 507-09. The Supreme Court has

court would resolve the state action question as follows. First, it would identify the constitutionally protected interests of the victim. Second, it would identify the constitutionally protected interests of the actor. Third, the court would balance those interests.[235] The court's ability to strike this balance rather than find significant state involvement would determine the outcome of the state action decision.[236]

Under the balancing approach, in other words, the state always acts, since it chooses to make a change or tolerate the status quo. The so-called "state action requirement" is "merely a tool for separating out those nongovernmental activities whose existence so impairs certain fundamental values that they are proscribed by the Constitution."[237] The Constitution, therefore, "does not require the judiciary to determine whether a state has 'acted,' but whether a

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never adopted this approach, but some authorities suggest that the Court engages in it covertly under the state action rubric. *See* Esper, *supra* note 13, at 678; *see also* Chemerinsky, *supra*, at 540.

235. *See* Esper, *supra* note 13, at 677-78. An alternative formulation would be the following: "If the importance of the [complainant's] right is not clearly greater than that of the challenged practice, the effect of the practice on the right does not violate the [Constitution]." Glennon & Nowak, *supra* note 234, at 231; *cf.* Kenneth L. Karst & Harold W. Horowitz, Reitman v. Mulkey*: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 75 (defending a more complex balancing approach, which takes into account "the value of the objective of the challenged conduct (state or private), the seriousness of the impact of that conduct on the constitutionally protected interest in equality, and, where pertinent, the availability of alternative means for achieving the same objective with a lesser invasion of the interest in equality").

236. In fact, although the court in *Yeo* did not use the balancing approach per se, there is evidence that it was balancing First Amendment interests as a prerequisite to its state action determination, and that this balancing influenced that determination. For example, the court wrote the following:

> There are expressive interests involved on both sides of this case. Yeo's are obvious. Those on the other side are perhaps less obvious. *The identification of these interests puts the state action question in context.*
>
> If the actions by the students are themselves state action or may be attributed to the school officials and provide the basis for state action, the inevitable legal consequence will be some level of judicial scrutiny of the students' editorial judgments. The inevitable practical consequence will be greater official control of the students' editorial judgments. Both consequences implicate the students' First Amendment interests, which are far from negligible. . . . In addition, the defendant school officials themselves have an interest in their autonomy to make educational decisions. The officials have determined that the best way to teach journalism skills is to respect in the students' editorial judgments a degree of autonomy similar to that exercised by professional journalists. That choice by the officials parallels the allocation of responsibility for editorial judgments made by the First Amendment itself.

Yeo, 131 F.3d at 249-50 (emphasis added) (citations and footnote omitted).

237. Glennon & Nowak, *supra* note 234, at 259.

state has 'deprived' someone of a guaranteed right."[238]

One advantage of this approach is that it requires judicial accountability by forcing the court to justify how it has balanced important constitutional values. Instead of masking the reasoning for denying state action behind a prearranged hierarchy of rights, a court is forced to defend the relative weight it is assigning to a particular constitutional right as it would if it were analyzing a constitutional claim on its merits.[239]

The balancing approach is problematic, however, because it essentially eliminates the state action requirement.[240] The approach is premised on the idea that all action is state action—either action that changes behavior or inaction that tolerates the status quo. Such a premise diverges too far from the history and practice of the state action doctrine. The traditional state action doctrine assumes that a distinction between state and private action is not so blurred as to be invisible. Thus, a major flaw in the balancing approach is that it goes too far by eliminating a distinction accepted since the *Civil Rights Cases*.[241]

C. *An Equal Consideration Approach to State Action Analysis*

A better approach to state action analysis would incorporate the balancing approach's virtue of requiring judicial accountability, while at the same time preserving the state action doctrine. An approach that would achieve both goals would give equal consideration to all alleged fundamental rights violations by using the more liberal totality approach for finding state action. Using this "Equal Consideration Approach," courts would preserve the distinction between state and private action, thereby upholding the state action doctrine itself. More importantly, they would preserve the integrity of fundamental constitutional rights by facilitating judicial accountability for their value and rank.

Under an "Equal Consideration Approach," courts would apply the same state action standard to all alleged fundamental consti-

238. *Id.* at 229.

239. See Karst & Horowitz, *supra* note 235, at 75 for a complex balancing approach that resembles a court's analysis of a constitutional claim on its merits.

240. *Cf.* Esper, *supra* note 13, at 680-82 (noting other difficulties with the balancing approach).

241. 109 U.S. 3, 17 (1883) (affirming the essential dichotomy between state and private conduct). Moreover, eliminating the state action requirement is also contrary to explicit constitutional text. *See* U.S. CONST. amend. XIV § 1 ("No *State* shall . . . nor shall any *State* . . ." (emphasis added)); U.S. CONST. amend. I ("*Congress* shall make no law . . ." (emphasis added)).

tutional rights violations.[242] Accordingly, each claimant's alleged constitutional deprivation would receive equal judicial treatment.

Giving each fundamental constitutional right equal consideration does not mean that each claimant's constitutional interest receives the same value and rank. When analyzing rights on the merits, a court will rule that some interests are more important than others; it will balance competing interests as it must in all constitutional decisions on the merits. Receiving equal consideration simply means that each alleged constitutional rights violation confronts the same hurdle before reaching the merits. This approach provides for equal consideration (a similar state action hurdle) because the claimant must overcome the state action hurdle to avoid a dismissal. To raise the bar only on some fundamental constitutional rights would not sufficiently respect those other constitutional claimants and the deprivations they allege.[243]

Thus, if the same state action standard should apply to all fundamental rights, then finding state action in First Amendment cases should not be harder than finding it in racial discrimination cases. Moreover, if the totality approach's liberal state action standard would have supported a finding of state action in *Yeo*,[244] then the First Circuit should have applied that standard and not dismissed the case.

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242. In fact, the First Circuit has supported this approach. *See* Downs v. Sawtelle, 574 F.2d 1 (1st Cir. 1978). After noting his reservations about the Second Circuit's use of the variable state action approach, Chief Judge Coffin wrote: "Even were we to adopt such an approach, however, *we would be inclined to group infringements of fundamental rights and racial discrimination together* for the purpose of state action analysis just as they receive comparable scrutiny in equal protection cases." *Id.* at 6 n.5. (emphasis added); *see also* Lavoie v. Bigwood, 457 F.2d 7, 13-15 (1st Cir. 1972) (finding that an ejectment action instituted to violate tenant's First Amendment rights by mobile home park owner whose monopoly had been created by zoning was an application of New Hampshire landlord and tenant statute and amounted to state action even though the statute was neutral on its face); *cf.* Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073, 1084 (5th Cir. 1976) (Goldberg, J., dissenting). Writing in dissent, Judge Goldberg argued that the two issues (race discrimination and free speech) should, in some instance, be treated the same. He writes that a court would no doubt review "a decision by the students [of a college run paper] to exclude blacks from participation in the newspaper staff as a decision imbued with state action. To my mind the pure 'state action' question should be the same in the first amendment context." *Mississippi Gay Alliance*, 536 F.2d at 1085 (Goldberg, J., dissenting).

243. This claim assumes that receiving sufficient respect requires having an equitable opportunity to have one's constitutional rights addressed on the merits.

244. See *infra* Part III.D for an application of the totality standard to the facts of *Yeo*.

D. *Applying the Equal Consideration Approach to the Facts of* Yeo

The Equal Consideration Approach recommends that courts apply the same state action standard to all fundamental constitutional rights. That standard, this Note assumes, could be the more liberal standard associated with the totality approach, which courts apply in race discrimination cases. This final section will apply that standard to the facts of *Yeo* and suggest that the First Circuit could have found state action under the totality approach.

Unlike the sequential approach, the totality approach does not look at each nexus factor in isolation and then dismiss completely its possible contribution to the aggregate. Instead, under the totality approach, courts consider each nexus factor together with the others and analyze whether, in the aggregate, they constitute state action.[245] Given the number of nexus indicia present in the context of the students' editorial decision, this section will apply the totality approach to the facts of *Yeo* and argue that under such an analysis state action existed.

The relevant factors in *Yeo*, which analyzed in the aggregate would support a finding of state action, are the following: (1) the *Musket* and the Yearbook were official public high school publications used to represent the school;[246] (2) public high school students produced the publications; (3) the public perceived that the publications bore the imprimatur of the public school;[247] (4) a state law provided students with decisional authority;[248] (5) state officials supervised the students and received extra compensation for those responsibilities;[249] (6) the high school principal controlled the bank

245. See *supra* Part I.A.2 for further discussion of the totality approach.

246. *See* Fortin v. Darlington Little League, Inc., 514 F.2d 344, 347 (1st Cir. 1975) (finding state action, where a private baseball little league denied a ten year-old girl the right to play based on her gender, because, in part, the little league's use of the city-kept baseball diamonds "undoubtedly took on in the public consciousness a semi-official character, little different from recreational programs under direct City sponsorship").

247. *See* Yeo v. Town of Lexington, No. 96-1623, 1997 WL 292173, at *6 (1st Cir. June 6, 1997), *rev'd en banc*, 131 F.3d 241 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 2060 (1998); *see also* Falzarazo v. United States, 607 F.2d 506, 511 (1st Cir. 1979) (finding no state action, where tenants of a federally subsidized housing project sued their landlords, because "[t]he badge of 'public entity' cannot be fairly attached to [the housing projects]").

248. *See* MASS. GEN. LAWS ch. 71, § 82 (1996). See *supra* note 112 for the text of the statute. Originally the statute was elective, but on July 14, 1988, "in response to the [*Hazelwood*] decision, the Massachusetts legislature made the provision mandatory." Abrams & Goodman, *supra* note 112, at 730 n.172; *see also*, Phillips, *supra* note 112.

249. The advisors to the Yearbook and the *Musket*, both Lexington High School

checking accounts of both publications;[250] (7) the school officials retained final authority over the publications and were prepared to use it in cases where students wanted to publish obscene material;[251] (8) both publications received state financial assistance;[252] (9) a mutually beneficial relationship existed between the students and the high school;[253] (10) the students used state facilities;[254] and (11) the students represented the school in commercial transactions with third parties.[255]

In the aggregate, these factors should support a finding of state action under the liberal standard of the totality approach. Under this approach, recall, no direct or overt government participation is required. Instead, to borrow language from *Burton v. Wilmington Parking Authority*,[256] "[o]nly by sifting facts and weighing circumstances can the *nonobvious involvement* of the State in private conduct be attributed its true significance."[257] Echoing this language, the First Circuit itself has held that "[t]he essence of *Burton* . . . is that the relationship between the state and the private [party] may be so intertwined that the state will be held responsible for conduct

teachers, received about $2,000 and $1,373, respectively. *See* Yeo v. Town of Lexington, 131 F.3d 241, 243-44 (1st Cir. 1997) (en banc), *cert denied*, 118 S. Ct. 2060 (1998).

250. *See Yeo*, 1997 WL 292173, at *6.

251. *See id.*

252. *See Yeo*, 131 F.3d at 243-44.

253. This relationship existed in two ways. First, the school fulfilled its educational objectives, and the students received skills and credentials. Second, the students funded their publications from money received from the commercial transactions with third parties in the town, and the town had the prospect of monetary benefit. *See id.* at 258 (Stahl, J., concurring).

254. The Yearbook used the LHS buildings and facilities; the *Musket* had a mailbox at the school. *See id.*; *see also* Rendell-Baker v. Kohn, 641 F.2d 14, 23 (1st Cir. 1981) (noting that the strongest state action factor in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), was the use of public property), *aff'd*, 457 U.S. 830 (1982); Fortin v. Darlington Little League, Inc., 514 F.2d 344 (1st Cir. 1975) (relying heavily on the use of public property as a factor for finding state action in a sex discrimination case).

255. *See Yeo*, 131 F.3d at 259 (Stahl, J., dissenting).

256. 365 U.S. 715 (1960).

257. *Id.* at 722 (emphasis added). A number of courts have used *Burton*'s totality approach to analyze alleged First Amendment violations. *See* Carlin Communications, Inc. v. Mountain States Tel. and Tel. Co., 827 F.2d 1291, 1298 (9th Cir. 1987); International Soc. for Krishna Consciousness, Inc. v. Air Canada, 727 F.2d 253, 254 (2d Cir. 1984); Foster v. Ripley, 645 F.2d 1142, 1154 (D.C. Cir. 1981); Jensen v. Farrell Lines, Inc., 625 F.2d 379, 382 (2d Cir. 1980); Reitz v. Persing, 831 F. Supp. 410, 416 (M.D. Pa. 1993); Pleasant v. Lovell, No. 83-F-2251, 1990 WL 393737, at *7 (D. Colo. Sept. 28, 1990); Henry v. First Nat'l Bank of Clarksdale, 424 F. Supp. 633, 639 (N.D. Miss. 1976); Curtis v. Rosso & Mastracco, Inc., 413 F. Supp. 804, 806 (E.D. Va. 1976); Isaacs v. Board of Trustees of Temple Univ., 385 F. Supp. 473, 487-88 (E.D. Pa. 1974); Keller v. Kate Maremount Found., 365 F. Supp. 798, 800 (N.D. Cal. 1972).

with which it had no direct connection."[258]

In a variety of earlier decisions, the First Circuit's state action analysis was consistent with this conclusion. For example, in *Fortin v. Darlington Little League, Inc.*,[259] the First Circuit found state action in a sex discrimination case by analyzing an expanded set of state action indicia. There, a ten-year-old girl was denied a right to play little league baseball because of her gender. In finding state action, the court went beyond the factors of regulation and financial assistance and focused on the private little league's relationship with the city. The little league not only used and depended on the city-provided baseball diamonds, but the city accommodated the league's practice and playing schedule to the virtual exclusion of other members of the community.[260] As such, the court pointed out that this gave the league a "semi-official character" in the public consciousness.[261]

The First Circuit's analysis of nexus indicia in *Lamb v. Rantoul*[262] also supports interpreting the factors in *Yeo* as sufficient for state action under the totality approach. In *Lamb*, a female school teacher at a private postgraduate school—the Rhode Island School of Design—alleged sex discrimination when the school denied her tenure. In its denial of state action, the First Circuit identified a variety of nexus indicia, which it held to be insufficient. The indica included the following: (1) the city conveyed a building to the school (and the school gave the city an easement in other property for historical purposes); (2) the state required five of the forty-three school directors to be city officials; (3) the school received some government subsidies; (4) the state required the school to submit annual reports; and (5) the school was required to allow the state to conduct inspections.[263] Importantly, the difference between *Lamb* and *Fortin* turns on, in part, the use of state facilities and land, and the appearance that the entity is official in the public's eye. Moreover, and even more importantly, *Lamb* declined to apply the more liberal totality approach in a sex discrimination case,[264] and instead relied for its state action analysis on *Jackson v. Metropolitan Edison*

258. *Rendell-Baker*, 641 F.2d at 22 (citing Downs v. Sawtelle, 574 F.2d 1, 8-9 (1st Cir. 1978)) (emphasis added).

259. 514 F.2d 344 (1st Cir. 1975).

260. *See id.* at 347.

261. *See id.*

262. 561 F.2d 409 (1st Cir. 1977).

263. *See id.* at 410.

264. *See id.* at 411.

Co.,[265] which used a heightened state action standard associated with the sequential approach. Whether the court should have applied the totality approach to a sex discrimination case is beyond the scope of this Note. However, given that the First Circuit later endorsed applying the totality approach to all fundamental rights,[266] *Lamb* suggests, anyway, that the number and variety of nexus indicia in that case may have been sufficient had it applied the liberal approach. That is especially relevant given that in *Yeo* the state action nexus indicia included, among others, the use of public land and facilities, and the appearance in the public's eye that the publications were official.[267]

Nevertheless, the number and quality of nexus indicia in *Yeo* implicate all told a sufficient contact with the state to satisfy the liberal state action standard defended in this Note. This conclusion is not only consistent with prior First Circuit state action analysis, but with Judge Lynch's own assessment of the facts.[268] Their cumulative impact provides a sufficient nexus between the students' decisions and the school to create state action. The public high school students in *Yeo* depended on the school for the existence of the yearbook and the newspaper, and the school itself provided editorial opportunities only to its students. The school needs students to generate a yearbook and a newspaper—each playing an important

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265. 419 U.S. 345, 358-59 (1974) (finding no state action when a private utility company did not provide due process when it terminated a customer's service).

266. *See* Downs v. Sawtelle, 574 F.2d 1, 7 n.5 (1st Cir. 1978) (finding state action where a private community hospital allegedly conspired to sterilize the plaintiff, a deaf mute, against her will).

267. Interestingly, these two factors, use of public property and official appearance, were significant in *Fortin*, which was also a sex discrimination case. This suggests that these factors may be enough even under a stricter state action standard. *Cf.* Rendell-Baker v. Kohn, 641 F.2d 14, 23 (1st Cir. 1981) (involving the dismissal of a teacher at a private high school, where the absence of these two factors played a role in the First Circuit denying state action), *aff'd*, 457 U.S. 830 (1982). In *Falzarano v. United States*, 607 F.2d 506 (1st Cir. 1979), the court denied state action when tenants alleged procedural due process violations against landlords of a federally subsidized housing project. The only nexus indicia included zoning regulations, and reduced utility rates and taxes. These factors, the court held, did not come up to *Fortin* because the housing projects were privately owned and "the badge of 'public entity' cannot fairly be attached to them." *Id.* at 511; *see also* Ponce v. Basketball Federation of Puerto Rico, 760 F.2d 375, 382 n.5 (1st Cir. 1985) (denying state action where a private sporting organization revoked a player's right to play because of his national origin, and distinguishing itself from *Fortin* by noting that the sporting organization did not take on a semi-official character in the public's eye because the government's accommodations were far less significant than they were in *Fortin*).

268. *See* Yeo v. Town of Lexington, 131 F.3d 241, 254 & n.15 (1st Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 2060 (1998).

role in the high school's identity—and the students need the public high school for these opportunities. That is, the public high school provides the framework within which students make editorial and advertising decisions.[269] The public high school, in other words, "has elected to place its power, property and prestige behind the [challenged conduct]."[270] In doing so, the students' editorial decisions were sufficiently intertwined with the state.

Judge Lynch, in her majority opinion, therefore, should have considered the combined weight of these factors and more carefully analyzed whether, taken together, they would suggest the students' decisions were fairly attributable to the state. Such an analysis should have occurred as it would have had the case involved race discrimination.[271] Under the "Equal Consideration Approach," therefore, the court might have found state action.[272]

CONCLUSION

The First Circuit en banc decision in *Yeo* has too narrowly in-

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269. *Cf.* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 622 (1991) (finding state action when a plaintiff in a civil case used a peremptory challenge to exclude a juror on the basis of his race, and noting in its analysis that the government had "created the legal framework governing the [challenged] conduct" (citation omitted)).

270. Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961).

271. *See Yeo*, 131 F.3d at 254 n.15.

272. The court in *Yeo* worried that finding state action would effectively "spell the end" to public school publications, since students could not report or editorialize without running afoul of the First Amendment's mandate of viewpoint neutrality. *See id.* at 258. (Stahl, J., concurring). But this worry is misplaced. The court could have avoided this consequence if it had ruled on the merits by analyzing the weight and scope of the student editors' First Amendment rights as editors, and balancing them against Douglas Yeo's claim to access to the publications. For example, in his concurring opinion, Chief Judge Torruella appeared to have wanted to find state action and discuss the merits because he decided to write separately "to highlight an important issue that the majority fails to address–the absence of a public forum." *Id.* at 255 (Torruella, J., concurring). He argued that the students were not intending "to open a forum for all public discourse" and as such they were "permitted to filter out pure political speech." *Id.*; *cf.* Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633, 1644 (1998) (holding that a broadcaster's decision to exclude a political candidate from a state-owned public television broadcast's political debate "was a reasonable, viewpoint-neutral exercise of *journalistic discretion* consistent with the First Amendment" (emphasis added)). Such an analysis would have been more beneficial than the court's variable state action analysis which treated First Amendment rights as less important than rights of racial equality. In fact, the contrary may be true: First Amendment rights may be more important since they constitute the groundwork for a democracy itself within which the value of racial equality is defended by public arguments of law, politics and morality. *See, e.g.*, Schneider v. New Jersey, 308 U.S. 147, 161 (1939) (noting that the First Amendment "lies at the foundation of free government by free men").

terpreted the state action inquiry. In focusing on each nexus factor in isolation, the court, in essence, overlooked the forest while going tree to tree. The majority applied a narrow state action analysis under the assumption that state action analysis should vary with the type of constitutional violation alleged. As such, the majority applied a higher state action standard to Yeo's First Amendment complaint than it would have if his complaint had been one of racial discrimination.

Keying state action standards to the type of constitutional violations alleged, as the court did in *Yeo*, is problematic since this approach fails to impose judicial accountability to explain why some constitutional rights are ranked higher than others, and because it fails to sufficiently respect each constitutional claimant's fundamental right violation. This Note suggests that courts should apply the same state action standard to all fundamental rights, namely, by using the liberal totality approach currently employed by courts in racial discrimination cases. This approach promotes both a sufficient level of judicial accountability and equal respect for fundamental constitutional rights. As applied to *Yeo*, this Note concludes that state action should have been found since the majority would have reached a finding of state action had it used the totality approach. Yeo, therefore, should have had his day in court.

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