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## Blackwater and Beyond: Can Potential Plaintiffs Sue Private Security Companies for Due Process Violations via Exceptions to the State Action Doctrine, Including Through Section 1983 Actions?

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# **BLACKWATER AND BEYOND: CAN POTENTIAL PLAINTIFFS SUE PRIVATE SECURITY COMPANIES FOR DUE PROCESS VIOLATIONS VIA EXCEPTIONS TO THE STATE ACTION DOCTRINE, INCLUDING THROUGH SECTION 1983 ACTIONS?**

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## I. INTRODUCTION

On March 30, 2004, insurgents attacked a United States military convoy in Fallujah, Iraq, killing four of its members.<sup>1</sup> The bodies were mutilated, burned, and hung from a bridge.<sup>2</sup> This incident quickly became infamous due to its shocking brutality.<sup>3</sup>

The Fallujah incident was also newsworthy for a second reason. Those killed in the attack were not members of the United States military, but rather employees of Blackwater Worldwide,<sup>4</sup> a private security company (PSC).<sup>5</sup> Blackwater was under contract with the U. S. government to provide extra security forces and to perform other duties typically performed by U.S. soldiers.<sup>6</sup> The Fallujah fallout was the first time many Americans became aware of the existence of such agreements, and for those who were aware of the existence of PSCs, the extent to which the government relies on them.

The existence and use of PSCs is controversial, and much academic discourse is available on the subject.<sup>7</sup> Much of this is centered on their use in Iraq and other military zones.<sup>8</sup> It is claimed that these entities are mercenaries who operate lawlessly and with no accountability.<sup>9</sup> The proposed solutions focus on international law, statutes aimed at military activities, and

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1. See, e.g., *U.S. Expects More Attacks in Iraq*, CNN.COM, May 6, 2004, <http://www.cnn.com/2004/WORLD/meast/03/31/iraq.main/> (last visited Apr. 4, 2009); see also *infra* Part II.C.2.

2. *U.S. Expects More Attacks in Iraq*, CNN.COM, May 6, 2004, <http://www.cnn.com/2004/world/meast/03/31/iraq.main/> (last visited Apr. 4, 2009)

3. See *id.*

4. This company was formerly known as “Blackwater USA”, and has recently again changed names, operating now as “Xe”.

5. See Jonathan Finer, Recent Development, *Holstering the Hired Guns: New Accountability Measures for Private Security Contractors*, 33 YALE J. INT’L L. 259, 259 (2008).

6. See *id.* at 260.

7. See *id.* at 259.

8. See *id.* at 259–60.

9. See *id.*

contract law.<sup>10</sup> The United States Constitution has been essentially ignored as an avenue of recourse.<sup>11</sup> This may be reasonable when discussing acts concerning the military or Iraqi citizens. However, PSCs can also affect U.S. citizens, who are entitled to the protections of the Constitution.

This article narrows this focus to the relationship between PSCs and American citizens. Specifically, this article raises the previously unanswered question of whether PSCs, when contracting with federal or state governments, are state actors. If they are determined to be state actors, then they would be liable for violations of the Constitution, especially the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments.<sup>12</sup> The practical application of this determination would be whether a U.S. citizen would have recourse if a PSC, acting under contract with a state or federal government, violated that citizen's federal constitutional rights.

This article argues that PSCs should be considered state actors when carrying out obligations under contract with a state or federal government. Thus, a citizen aggrieved by a PSC in this manner would have the same methods of recourse as he or she would if an actual government actor had caused the claimed injury, including a claim under 42 U.S.C. § 1983. However, this is not necessarily a green light to sue, as the aggrieved must also have a pleadable cause of action and the prospective defendant must be subject to suit.<sup>13</sup>

Part I describes the use of PSCs in the Hurricane Katrina aftermath. It then discusses the controversial events regarding PSCs in Iraq. Part II serves as a refresher on the state action doctrine, discusses its various exceptions, and analyzes the case law dealing with privately contracted security guards. Part III examines the law regarding section 1983 claims and analyzes the case law applying section 1983 to privately run prisons. Part IV offers the analysis of PSCs under the state action doctrine and argues that a PSC is a state actor when performing work under government contract if it violates the federal constitutional rights of a U.S. citizen. Part V provides a brief description on how suits might proceed—or not proceed—under 42 U.S.C. § 1983 after a violation has occurred.

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10. See *Finer*, *supra* note 5, at 260–63.

11. See *id.* at 261–65.

12. See, e.g., *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 929–30 (1982).

13. *Id.* at 930 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970)). See *infra* Part V for a discussion of how these requirements affect a suit against a state actor.

## II. THE USE OF PRIVATE SECURITY COMPANIES IN THE UNITED STATES

This part will focus on Blackwater's presence in New Orleans after Hurricane Katrina. While this article's thesis remains hypothetical at this point, the fact that PSCs have operated within the United States, makes this thesis more of a prediction of future events than pure conjecture. It will then describe Blackwater's controversial actions in Iraq to help advance the claim that these entities and their employees do participate in actions that would be, at best, questionable if subjected to federal constitutional scrutiny. Finally, it will summarize the current lawsuits pending against Blackwater to show the lack of remedies when a PSC acts abroad. This article attempts to provide a remedy for U.S. citizens when PSCs act domestically under either state or federal contract, as was the case with Blackwater in New Orleans.

### A. *The Rise of Private Security Companies*<sup>14</sup>

PSCs are nothing new, and the U.S. military has utilized private contractors since the American Revolution.<sup>15</sup> One author notes the use of privately contracted ships outnumbered the U.S. Navy in the War of 1812.<sup>16</sup> The use of PSCs exploded during Vietnam and has risen steadily ever since.<sup>17</sup> One explanation is that the demilitarization after the end of the Cold War helped increase the number of PSCs.<sup>18</sup> The current numbers are staggering. It is estimated that more than 30,000 employees of PSCs are currently in Iraq.<sup>19</sup>

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14. This section is intended to give a very brief description of how the use of PSCs came about. For a much more in-depth discussion and description of how these entities operate, see generally P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* (2003).

15. Michael J. Davidson, *Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield*, 29 PUB. CONT. L.J. 233, 234 (2000).

16. Finer, *supra* note 5, at 259.

17. *See id.* at 259–60; *See* Davidson, *supra* note 15, at 235.

18. E.L. Gaston, Note, *Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement*, 49 HARV. INT'L L.J. 221, 224 (2008).

19. JENNIFER K. ELSEA ET AL., *PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES* 3 (Cong. Research Serv., CRS Report for Congress Order Code RL32419, Aug. 25, 2008), available at <http://fas.org/sgp/crs/natsec/RL32419.pdf>.

## B. *Involvement in New Orleans After Hurricane Katrina*

While Blackwater is most infamously known for its actions in Iraq, it also contracts to perform operations within the United States.<sup>20</sup> Blackwater initially deployed approximately 150 personnel to help with security after Hurricane Katrina in September 2005.<sup>21</sup> This number would later swell by at least another hundred.<sup>22</sup> Blackwater issued a press release stating that it was donating aerial support and that airlift, security, humanitarian support, and logistics and transportation services would be available.<sup>23</sup> However, its presence also included ground personnel, which charged the government \$950 a day per employee.<sup>24</sup> It is claimed that Blackwater was paid a total of \$73 million in less than a year in New Orleans.<sup>25</sup>

However, at least for the purpose of this article, the financial aspects regarding PSCs are not as troubling as their actions. Blackwater employees were heavily armed with automatic weapons in New Orleans.<sup>26</sup> They patrolled the streets in khaki uniforms with an armband as their only identification as Blackwater employees.<sup>27</sup> They patrolled in SUVs or other vehicles, sometimes marked with the Blackwater logo, sometimes not.<sup>28</sup> They operated under contract with the Department of Homeland Security and at least some were deputized by the State of Louisiana.<sup>29</sup>

While there were no incidents in New Orleans that gained the press that the incidents in Iraq did, questionable conduct still went on, this time involving—assumedly—U.S. citizens.<sup>30</sup> Scahill reports of an interview with a PSC employee who was transporting wealthy business owners in New Orleans.<sup>31</sup>

20. See Griff Witte, *Private Security Contractors Head to Gulf*, WASH. POST, Sept. 8, 2005, at A14.

21. See *id.*

22. JEREMY SCAHILL, *BLACKWATER: THE RISE OF THE WORLD'S MOST POWERFUL MERCENARY ARMY* 325 (2007). "On September 18, Blackwater estimated that it had 250 troops deployed in the region; a number Mathews said would continue to grow." *Id.*

23. Press Release, Blackwater Tactical Weekly, Blackwater Joins Hurricane Katrina Relief Effort! (Sept. 5, 2005), available at <http://www.libertyparkusafd.org/lp/Hale/Special%20Reports%5CBlackwaterUSA%5CBlackwater%20Tactical%20Weekly.htm>.

24. See SCAHILL, *supra* note 22, at 326.

25. *Id.* at 327. So much for Blackwater's claims that "[w]e don't believe we will make a profit here" and "[i]f we break even on the security services, our company will have done a great job." *Id.* at 325.

26. *Id.* at 321–24. "[W]hat poured in fastest were guns. Lots of guns." *Id.* at 323.

27. See SCAHILL, *supra* note 22, at 321.

28. *Id.*

29. *Id.* at 324.

30. See *id.* at 327–28.

31. See *id.* at 328–29.

He claims that the “convoy came under fire,” and the employees “unleashed a barrage of bullets in the general direction of the alleged shooters.”<sup>32</sup> While this was likely self-defense, what is more troubling was the lack of investigation by either the Army or state troopers.<sup>33</sup> “[T]hey didn’t even care. They just left. . . . [W]e all coordinate with each other—one family.”<sup>34</sup> This suggests that PSCs were seen as equals of state and federal actors in their law enforcement status.<sup>35</sup>

Despite this, and the continued uproar over Blackwater’s presence in Iraq<sup>36</sup>, its presence in New Orleans after Hurricane Katrina has been essentially ignored.<sup>37</sup> However, as Hurricane Katrina was certainly financially successful for Blackwater, there is no reason to think that domestic activity will not continue in the future.<sup>38</sup> This presents troubling state action problems that are discussed *infra*.<sup>39</sup>

### C. *Private Security Companies in Iraq and Controversies*

This article is applicable to all PSCs, but Blackwater Worldwide will operate as the primary example, due to its infamy in the U.S. media and its involvement in New Orleans after Hurricane Katrina. The latter establishes the fact that state governments have used—and presumably will continue to use—PSCs.<sup>40</sup> It is apparent in the Hurricane Katrina aftermath that PSCs are not utilized solely by the U.S. military.<sup>41</sup> Likewise, one author notes that PSCs realize that there is potential in expanding operations within the United States: “The private security firm Blackwater is seeking to diversify its business by reaching out to U.S. state and local governments that may lack infrastructure or capacity to respond to natural disasters and terrorist attacks.”<sup>42</sup> This is important for this article, as it avoids the rather complex

32. SCAHILL, *supra* note 22, at 328–29.

33. *See id.*

34. *Id.*

35. *See id.*

36. In January, 2009, the U.S. State Department announced that Blackwater’s contract to operate in Iraq would not be renewed. It is unclear, however, when Blackwater will fully withdraw its employees. *See U.S. Will Not Renew Blackwater Contract in Iraq*, REUTERS.COM, Jan 30, 2009, <http://www.reuters.com/article/GCA-GCA-iraq/idUSTRE50T73520090131>.

37. *See id.* at 330.

38. *See* Brent D. Hessel, *United Nations Update*, 15 HUM. RTS. BRIEF 53, 54 (2007).

39. *See infra* Part V.

40. *See Hessel, supra* note 38, at 54.

41. *See id.*

42. *Id.* Hessel points out that Blackwater’s effectiveness was not questioned, but its cost was. *Id.*

issues of military immunity that would arise if Blackwater was solely contracted to provide soldiers on foreign soil as a military supplement.<sup>43</sup>

### 1. Controversial Incidents Involving Blackwater in Iraq

Blackwater's initial foray into Iraq was when it was awarded a no-bid \$27.7 million contract to provide security detail for L. Paul Bremer III, the Coalition Provisional Authority for the invasion.<sup>44</sup> Even after Bremer's departure, Blackwater stayed in Iraq on various security details.<sup>45</sup> In March 2007, *Time Magazine* reported that Blackwater had been paid \$320 million for its services in Iraq.<sup>46</sup> Among Blackwater's current responsibilities is providing security for the U.S. Embassy in Baghdad.<sup>47</sup>

Several controversial incidents have marked Blackwater's tenure in Iraq. The first was the killing of four Blackwater employees in an attack by Iraqi opposition forces on March 31, 2004.<sup>48</sup> Their bodies were burned and hung from a bridge overlooking the Euphrates River.<sup>49</sup> The images were broadcast on television.<sup>50</sup> This has been described as "a turning point in public opinion about the war."<sup>51</sup>

The Committee on Oversight and Reform (Committee) launched an investigation into the Fallujah incident as to whether Blackwater properly trained and supplied its employees.<sup>52</sup> The Committee concluded it had not.<sup>53</sup>

43. Although the Justice Department's recent indictment of five Blackwater employees on manslaughter charges for their involvement in the Nissor Square massacre suggests that this area of the law is in flux. Despite this "unprecedented use of the law", it is much too early in the proceedings to determine the likelihood of conviction. Ginger Thompson and James Risen, *Plea by Blackwater Guard Helps Indict Others*, NYTIMES.COM, Dec. 8, 2008, <http://www.nytimes.com/2008/12/09/washington/09blackwater.html?ref=us>

44. See SCAHILL, *supra* note 22, at 68–69. Scahill notes that the contract was awarded after the Secret Service had assessed the situation as too dangerous for its men. *Id.* at 69.

45. See *id.* at 164–65.

46. See Brian Bennett, *Victims of an Outsourced War*, TIME.COM, Mar. 15, 2007, <http://www.time.com/time/magazine/article/0,9171,1599682,00.html>.

47. *U.S. Embassy Resumes Use of Blackwater Security*, USATODAY.COM, Sept. 21, 2007, [http://www.usatoday.com/news/world/iraq/2007-09-21-iraq-blackwater\\_N.htm](http://www.usatoday.com/news/world/iraq/2007-09-21-iraq-blackwater_N.htm).

48. MAJORITY STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 110TH CONG., PRIVATE MILITARY CONTRACTORS IN IRAQ: AN EXAMINATION OF BLACKWATER'S ACTIONS IN FALLUJAH 4 (Comm. Print 2007), available at <http://oversight.house.gov/documents/20070927104643.pdf> [hereinafter PRIVATE MILITARY CONTRACTORS].

49. *Report: Blackwater 'Impeded' Probe into Contractors Deaths*, CNN.COM, Sept. 27, 2007, <http://www.cnn.com/2007/POLITICS/09/27/iraq.blackwater/index.html>.

50. PRIVATE MILITARY CONTRACTORS, *supra* note 48, at 4.

51. *Id.*

52. See *Id.* at 2.



Due to this finding, the Committee also concluded that “[t]hese actions raise serious questions about the consequences of engaging private, for-profit entities to engage in essentially military operations in a war zone.”<sup>54</sup> The Fallujah incident sparked questions about whether Blackwater is liable for injuries suffered by its own employees.<sup>55</sup>

A much more controversial incident led to questions about Blackwater’s liability to third parties harmed by its conduct.<sup>56</sup> On September 16, 2007, a group of Blackwater troops were involved in a gunfire attack on Iraqi citizens in Nisour Square in Baghdad, killing seventeen while wounding twenty-four others.<sup>57</sup> The fallout from this incident was fierce. The Iraqi government immediately revoked Blackwater’s license to operate in Iraq.<sup>58</sup> The State Department official in charge of PSCs in Iraq resigned.<sup>59</sup> Blackwater CEO Erik Prince took a trip to Capitol Hill to face a Congressional committee.<sup>60</sup> In addition, an American watchdog group filed a lawsuit on behalf of the Iraqi victims’ estates.<sup>61</sup> This incident has fueled the debate regarding Blackwater’s legality and accountability.<sup>62</sup>

## 2. Pending Lawsuits

Blackwater currently has two lawsuits pending, both resulting from incidents that occurred in Iraq.<sup>63</sup> The first was filed by the estates of the four

53. *Id.* at 17. Among Blackwater’s shortcomings were undertaking a mission before its contract began and one that it had been previously warned about as too dangerous, not providing properly armed vehicles and weapons, and sending out a team two members short. *Id.*

54. PRIVATE MILITARY CONTRACTORS, *supra* note 48, at 17.

55. See *infra* Part II.C.2 for a description of the lawsuit stemming from the Fallujah incident brought by the victims’ estates.

56. See Paul von Zielbauer & James Glanz, *Under Siege, Blackwater Takes on Air of Bunker*, NYTIMES.COM, Oct. 25, 2007, <http://www.nytimes.com/2007/10/25/world/middle-east/25blackwater.html?hp=&pagewanted=all>.

57. *Id.*

58. *Iraq Battle Was Self-Defense, Security Firm Says*, CNN.COM, Sept. 18, 2007, <http://www.cnn.com/2007/WORLD/meast/09/17/iraq.main/index.html> [hereinafter *Iraq Battle Was Self-Defense*].

59. Zielbauer & Glanz, *supra* note 56.

60. See John M. Broder, *Chief of Blackwater Defends His Employees*, N.Y. TIMES, Oct. 3, 2007, at A8.

61. See generally Plaintiffs’ First Amended Complaint, *Abtan v. Blackwater Worldwide*, No. 1:07-cv-01831 (D.D.C. Nov. 26, 2007); see *infra* Part II.C.2 for a discussion of this lawsuit.

62. See generally Plaintiffs’ First Amended Complaint, *supra* note 61.

63. See *Nordan v. Blackwater Sec. Consulting, L.L.C.*, 382 F. Supp. 2d 801, 803 (E.D. N.C. 2005); Plaintiffs’ First Amended Complaint, *supra* note 61, at 3.

Blackwater employees killed in the Fallujah attack in March 2004.<sup>64</sup> The lawsuit states claims for wrongful death and fraud.<sup>65</sup> It was originally filed in state court and later removed to federal court.<sup>66</sup> The federal district court remanded it to state court.<sup>67</sup> The Fourth Circuit Court of Appeals held the remand unreviewable and refused to issue a writ of mandamus.<sup>68</sup> The United States Supreme Court denied certiorari.<sup>69</sup>

The second lawsuit was filed by the Center for Constitutional Rights on behalf of victims of the September 2007 attack on Iraqi civilians.<sup>70</sup> The amended complaint claims, inter alia, violations of the Alien Tort Claims Act, wrongful death, and negligent hiring and supervision.<sup>71</sup> Blackwater is again in a jurisdictional battle, but this time over the proper federal forum.<sup>72</sup> Blackwater's motion to dismiss or transfer has yet to be ruled on.<sup>73</sup>

The existence of these lawsuits shows that Blackwater is certainly not immune to suit. However, they address statutory and common law violations. The remaining question is whether Blackwater is answerable for federal constitutional violations. This may seem conjectural at this point, but its actions in Louisiana certainly foreshadow such a situation, especially given its track record in Iraq. Thus, this article will analyze Blackwater—and any other PSC in a similar situation—under the traditional state action doctrine. It will argue that Blackwater is a state actor when it contracts with the federal or state governments and is therefore answerable for any federal constitutional violations that it may inflict on U.S. citizens.<sup>74</sup>

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64. *Nordan*, 382 F. Supp. 2d at 803.

65. *Id.*

66. *Id.*

67. *Id.* at 814.

68. *In re Blackwater Sec. Consulting, L.L.C.*, 460 F.3d 576, 595 (4th Cir. 2006).

69. *Blackwater Sec. Consulting, L.L.C. v. Nordan*, 549 U.S. 1260, 1260 (2007).

70. *See Plaintiffs' First Amended Complaint*, *supra* note 61, at 18.

71. *Id.* at 14–15, 17.

72. *See Defendants' Motion to Dismiss the Amended Complaint for Lack of Venue and to Dismiss Non-Legal Entities at 1*, *Abtan v. Blackwater Worldwide*, No. 1:07-cv-01831 (D.D.C. Jan. 22, 2008). The case is currently filed in the United States District Court for the District of Columbia. *Id.* Blackwater suggests the court should dismiss the entire suit for filing in an improper venue, or alternatively, transfer to the Eastern District of Virginia. *Id.*

73. *See Court Docket*, *Abtan v. Blackwater Worldwide*, No. 1:07-cv-01831 (D.D.C. Oct. 11, 2007).

74. This is not to insinuate that PSCs automatically will act in such a way. Therefore, this analysis does remain hypothetical to a certain extent. What is more certain is that governments will continue to utilize PSCs for certain matters and that it is possible that such a claim could arise in the near future. This is especially true if PSCs continue to act outside of military operations, such as Blackwater did during the Hurricane Katrina aftermath.

### III. THE DUE PROCESS CLAUSE AND STATE ACTION DOCTRINE

This part provides a description of the state action doctrine and its historical path. It then introduces the major strands of the doctrine and summarizes the seminal cases from which they sprang. It then focuses on two exceptions most pertinent to this article's discussion that PSCs will later be analyzed under:<sup>75</sup> The exclusive and traditional state function exception and the nexus exception. Finally, this part describes how courts have historically treated private security guards under the state action doctrine.

#### A. *The Origins of the State Action Doctrine*

The Fourteenth Amendment to the Constitution was passed in 1868.<sup>76</sup> Among other things, it promulgated that a state may not "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."<sup>77</sup> One of the first cases the Supreme Court applied this clause to was the *Civil Rights Cases*<sup>78</sup> in 1883.<sup>79</sup> In these consolidated cases, the underlying issue was whether a private entity could still enforce its racially discriminatory policies.<sup>80</sup> The Court held that the Amendment did not apply to private actors.<sup>81</sup> As opposed to this private discrimination, "[i]t is State action of a particular character

75. See *infra* Part III B.

76. *Lawrence v. Texas*, 539 U.S. 558, 596 (2003) (Scalia, J., dissenting).

77. U.S. CONST. amend. XIV, § 1.

78. 109 U.S. 3 (1883).

79. *Id.* at 9. The Amendment had come up before, but under different circumstances. *United States v. Cruikshank*, 92 U.S. 542, 554 (1876). In *Cruikshank*, the Court held that the Fourteenth Amendment did not incorporate the Bill of Rights and that the Bill of Rights was only applicable to the federal government. *Id.* at 551–52. This holding, of course, has been chipped away over the years through the doctrine of selective incorporation. See *Benton v. Maryland*, 395 U.S. 784 (1969) (incorporating the Fifth Amendment freedom from double jeopardy); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (incorporating the Sixth Amendment right to trial); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (incorporating the Sixth Amendment right to a speedy trial); *Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating the Fourth Amendment freedom from unlawful search and seizure); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (incorporating the First Amendment's provision preventing the establishment of a religion); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (incorporating the Eighth Amendment's ban against cruel and unusual punishment); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Near v. Minnesota*, 283 U.S. 697 (1931); *De Jonge v. Oregon*, 299 U.S. 353 (1937) (incorporating the freedoms of the First Amendment); *Gitlow v. New York*, 268 U.S. 652 (1925).

80. See *The Civil Rights Cases*, 109 U.S. at 9–11.

81. *Id.* at 11.

that is prohibited.”<sup>82</sup> The Court also clarified the power given to Congress in the final section of the Amendment.<sup>83</sup> Congress has only the power “[t]o adopt appropriate legislation for correcting the effects of such prohibited state laws and state acts.”<sup>84</sup> That is, Congress can invalidate state action that violates the Amendment, but it cannot invalidate similar private action.<sup>85</sup>

The debate soon centered on the definition of state action. Some state action is easily discernable, for example, an actual discriminatory state law<sup>86</sup> or action taken by a state employee.<sup>87</sup> A somewhat more difficult case is the doctrine’s application to government agencies. For example, in *Lebron v. National Railroad Passenger Corp.*,<sup>88</sup> the National Railroad Passenger Corporation—more popularly known as Amtrak—was held to be a government agent, thus subject to federal constitutional requirements.<sup>89</sup> The Court held that when “the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government.”<sup>90</sup> This has not been interpreted as an automatic finding that all government agencies are state actors; rather, it is a factual finding based on each specific agency’s makeup.<sup>91</sup> For example, the Ninth Circuit held the Federal Home Loan Mortgage Corporation—Freddie Mac—not to be a state actor for due process purposes.<sup>92</sup> This decision was based on

82. *Id.*

83. *Id.* The text of that section is: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV, § 5.

84. *The Civil Rights Cases*, 109 U.S. at 11.

85. *See id.* That is, it cannot invalidate discriminatory private action using the power granted to it by section five of the Fourteenth Amendment. *See id.* However, it can—and has—regulated discriminatory private action with other powers, notably its Commerce Clause power. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (affirming Congress’ power to regulate private hotel from discriminating against blacks under the Interstate Commerce Clause); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (affirming Congress’ power to regulate private restaurants under the Interstate Commerce Clause).

86. *See Palmer v. Thompson*, 403 U.S. 217, 220 (1971).

87. *See Hudson v. Palmer*, 468 U.S. 517, 533 (1984).

88. 513 U.S. 374 (1995).

89. *Id.* at 400. Amtrak was created under the Railroad Passenger Service Act of 1970. *Id.* at 383–84; *see also* 45 U.S.C. § 501 (2000), *repealed by* Act of July 5, 1994, Pub. L. No. 103–272, § 7(b), 108 Stat. 1379, 1386. *Lebron* dealt with a First Amendment issue regarding political advertising directed against the Coors family—of Coors Brewing fame. *Lebron*, 513 U.S. at 376–77.

90. *Id.* at 400.

91. *See, e.g., Am. Bankers Mortgage Corp. v. Fed. Home Loan Mortgage Corp.*, 75 F.3d 1401, 1409 (9th Cir. 1996).

92. *Id.*

the level of control the government had on the make-up of the board of directors, holding it was much less than in *Lebron*.<sup>93</sup>

However, there are exceptions to the state action doctrine in certain circumstances where the private entity's actions could legitimately be attributed to the state.<sup>94</sup> The literature on the subject varies. One academic counts six distinct categories in which state action could be found.<sup>95</sup> Another names two main categories, with the second consisting of three subcategories.<sup>96</sup> Regardless of the nomenclature of the various exceptions, the overarching idea is the same: Under certain circumstances, a private entity will be considered a state actor.

## B. *The State Action Doctrine as Applied to Private Entities*

The next section will focus on two commonly litigated exceptions that would most likely be discussed in a case involving a PSC: the exclusive and traditional public function exception and the nexus exception.

### 1. Traditional and Exclusive Governmental Functions

One area that will subject a private actor to the state action doctrine is when that actor is performing a traditional state function.<sup>97</sup> This exception has been narrowed to include only those functions which are "traditionally the exclusive prerogative of the State."<sup>98</sup> This exception has its beginning in the White Primary Cases, a collection of Supreme Court rulings dealing with

93. *Id.* at 1407–09. In an interesting dichotomy, while Freddie Mac is not a government actor for state action purposes, a federal district court has held that it is a government actor for immunity purposes. See *Paslowski v. Standard Mortgage Corp. of Ga.*, 129 F. Supp. 2d 793, 800–01 (W.D. Pa. 2000).

94. See generally G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 HOUS. L. REV. 333 (1997).

95. *Id.* at 344. Professor Buchanan claims the following six situations came about, albeit some of them indirectly, from the *Civil Rights Cases* decision: Public Function, State Nexus, Beyond-State-Authority, Projection-of-State-Authority, State Authorization, and State Inaction. *Id.* at 344–53.

96. See Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302 (1995). Professor Krotoszynski claims the two main categories are whether the actor is a state agency and whether the actor has sufficient contacts with the state. *Id.* at 306, 314. The "contacts" category is further broken down into: exclusive government functions, symbiotic relationships, and the nexus test. *Id.*

97. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974).

98. *Id.* at 353.

the denial of black citizens' right to vote in state primary elections.<sup>99</sup> To synthesize, the Court held that although the Democratic Party of Texas, a private entity, was responsible for the questioned elections, the elections were ultimately regulated by state law.<sup>100</sup> Thus, the Democratic Party was answerable for its violations of the Fourteenth and Fifteenth Amendments when it excluded black citizens on the basis of race.<sup>101</sup> This was later extended to a private organization known as the Jaybird Democratic Association, which claimed it was a completely private and voluntary organization, not a state-regulated political party.<sup>102</sup> The Court so held that "[t]he Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county."<sup>103</sup>

The Court added another situation to the public function prong in *Marsh v. Alabama*.<sup>104</sup> In *Marsh*, the plaintiff was a Jehovah's Witness claiming a violation of her First Amendment freedoms of press and religion.<sup>105</sup> The defendant was a corporately owned town which claimed it had no federal constitutional liability.<sup>106</sup> The Court held the city liable, noting that "[o]wnership does not always mean absolute dominion."<sup>107</sup> It further reasoned that the city's actions, by opening up its property for public use and then regulating it, resulted in it being a traditional public function.<sup>108</sup>

The public function exception was further discussed in *Flagg Bros. v. Brooks*.<sup>109</sup> In *Flagg Bros.*, the Court held that a firm executing a lien sale pursuant to statute was not an exclusive traditional state function, although it is usually thought to be a sheriff's duty.<sup>110</sup> The Court noted that "[c]reditors and debtors have had available to them historically a far wider number of choices than has one who would be an elected public official, or a member of Jehovah's Witnesses who wished to distribute literature in Chickasaw, Ala.,

99. See *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

100. See *Smith*, 321 U.S. at 663–64; *Condon*, 286 U.S. at 89.

101. See *Smith*, 321 U.S. at 666; *Condon*, 286 U.S. at 89.

102. *Terry*, 345 U.S. at 462–63.

103. *Id.* at 469.

104. 326 U.S. 501, 506 (1946).

105. *Id.* at 504.

106. *Id.* at 502.

107. *Id.* at 506.

108. *Id.* The Court likened this to private companies that build and operate bridges, ferries, and roadways. *Marsh*, 326 U.S. at 506. "Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation." *Id.*

109. 436 U.S. 149 (1978).

110. *Id.* at 161–62.

at the time *Marsh* was decided.”<sup>111</sup> Due to the variety of options, creditors and debtors had to solve their dispute; the Court held that the lien sale was not a function exclusive to the state.<sup>112</sup> It also noted that there were several areas that would be better suited to the extension of the exception before creditor rights: “Among these are such functions as education, fire and police protection, and tax collection.”<sup>113</sup> The Court only mentioned these as possibilities and of course, declined to rule on any of them.<sup>114</sup>

## 2. Nexus/Entanglement

This section will attempt to synthesize the line of cases that address private action that is not a traditional government function, but yet involves such close activity with the state that the entity’s behavior can be attributed to the state. Nomenclature of this prong varies, with terms such as “joint activity,” “nexus,” “entanglement,” and “symbiotic relationship” being used in cases. However, the underlying premise is that the state and private actor have such a close relationship that the line between them becomes blurred.

### a. *Private Action That Is State Action*

In *Burton v. Wilmington Parking Authority*,<sup>115</sup> the Court held that the symbiotic relationship between a restaurant and a parking structure operated by the State was sufficiently close to require the restaurant to meet the mandates of the Fourteenth Amendment.<sup>116</sup> *Burton* involved a privately-owned restaurant that refused to serve the plaintiff, who was black.<sup>117</sup> The restaurant was located on the ground floor of a publicly owned parking lot, and it leased its business space from the operating state agency.<sup>118</sup> The State used the proceeds from the lease to help with the financing of and payment for the structure.<sup>119</sup> The lease provided that the State would include certain utilities and be responsible for most repairs.<sup>120</sup> In addition, the restaurant enjoyed a

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111. *Id.* at 162.

112. *Id.* at 163. “[E]ven if we were inclined to extend the sovereign-function doctrine outside of its present carefully confined bounds, the field of private commercial transactions would be a particularly inappropriate area into which to expand it.” *Id.*

113. *Flagg Bros.*, 436 U.S. at 163.

114. *Id.* at 163–64.

115. 365 U.S. 715 (1961).

116. *See id.* at 716, 726.

117. *Id.* at 716.

118. *Id.*

119. *See id.* at 719.

120. *See Burton*, 365 U.S. at 720.

public tax exemption for any improvements to the property that would be considered fixtures.<sup>121</sup> Signs hung from the structure stating its public nature and the state and national flags flew above it.<sup>122</sup>

The Court considered the fact that this set-up was mutually beneficial to both parties; the restaurant's patrons had a convenient place to park, and the State profited from their use of the structure.<sup>123</sup> The Court attempted to narrow its holding by recognizing that "a multitude of relationships might appear to some to fall within the Amendment's embrace" and by insisting that this is to be a factual inquiry.<sup>124</sup> In this case, the Court emphasized that the State went further than mere acquiescence to the discrimination; it instead "elected to place its power, property and prestige behind the admitted discrimination."<sup>125</sup> Based on the above factors, the Court found that by the mutual benefits conferred between the State and the restaurant, "[t]he State [had] so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity."<sup>126</sup>

In *Reitman v. Mulkey*,<sup>127</sup> the Court addressed an amendment to the California Constitution banning the State from regulating discrimination in property transactions except in those transactions where the State was the property owner.<sup>128</sup> Among its effects, the amendment nullified two state civil statutes penalizing discrimination in housing transactions.<sup>129</sup> California argued that it was simply taking a neutral position to private housing discrimination.<sup>130</sup> The Court disagreed, stating that the amendment "changed the situation from one in which discrimination was restricted 'to one wherein it is encouraged, within the meaning of the cited decisions.'"<sup>131</sup> Thus, the State was now "'at least a partner in the instant act of discrimination'"<sup>132</sup> The Court explained that by enacting the amendment, the State went beyond repeal of the civil provisions.<sup>133</sup> Instead of relying on mere "personal choice"

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121. *Id.* at 719.

122. *Id.* at 720.

123. *Id.* at 724.

124. *Id.* at 726.

125. *Burton*, 365 U.S. at 725. The Court also recognized the irony "that in one part of a single building, erected and maintained with public funds by an agency of the State to serve a public purpose, all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class citizen, offensive because of his race." *Id.* at 724.

126. *Id.* at 725.

127. 387 U.S. 369 (1967).

128. *See id.* at 370-71.

129. *See id.* at 372.

130. *See id.* at 376.

131. *Id.* at 375.

132. *Reitman*, 387 U.S. at 375.

133. *See id.* at 377.



to discriminate, one “could now invoke express constitutional authority” to do so.<sup>134</sup> This led the Court to conclude that the State had “significantly involved itself with invidious discriminations” and that this state action violated the Fourteenth Amendment.<sup>135</sup>

In *Brentwood Academy v. Tennessee Secondary School Athletic Ass’n*,<sup>136</sup> the Court held that a high school athletic association was a state actor when enforcing its rules against member schools.<sup>137</sup> Although the Association was comprised of both public and private high schools, the Court held that the “pervasive entwinement” between the Association and public high school officials required a finding of state action.<sup>138</sup> Examples of this entwinement included: the fact that each member-school was represented by a faculty or administration member acting within his or her scope of duty, that meetings were often held during school hours, and that the schools provided a small part of the Association’s funding.<sup>139</sup> There was a financial relationship between the public schools and the Association as well.<sup>140</sup> In exchange for the services the Association provided in scheduling and regulating athletic events within the state, it received dues from the member-schools and a portion of the sales generated by the events.<sup>141</sup> Not only were the public officials involved in the Association, they overwhelmingly performed “all but the purely ministerial acts by which the Association exists and functions in practical terms.”<sup>142</sup>

The Court referred to this presence of public school officials as “bottom up” entwinement.<sup>143</sup> It also found what it termed “top down” entwinement.<sup>144</sup> The Court noted that State Board of Education members were assigned to

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134. *Id.*

135. *Id.* at 376, 380–81.

136. 531 U.S. 288 (2001).

137. *See id.* at 290–91.

138. *Id.* at 291. The Court noted that 84% of the member-schools are public, and that the 16% which are private prevent “this entwinement of the Association and the public school system from being total and their identities totally indistinguishable.” *Id.* at 299–300. The dissent was unimpressed with “entwinement” as the basis of the majority’s holding. *Id.* at 305 (Thomas, J., dissenting) (“We have never found state action based upon mere ‘entwinement.’”).

139. *See Brentwood*, 531 U.S. at 299. “Although the findings and prior opinions in this case include no express conclusion of law that public school officials act within the scope of their duties when they represent their institutions, no other view would be rational . . .” *Id.*

140. *See id.*

141. *See id.*

142. *Id.* at 300.

143. *Brentwood*, 531 U.S. at 300.

144. *Id.*

serve on the board of control and legislative council.<sup>145</sup> It also considered the fact that the Association's ministerial employees were considered state employees for purposes of the state retirement system.<sup>146</sup> The Court found the sum result of these two forms of entwinement "unmistakable" and "overwhelming," and that the evidence presented required the Association to be considered a state actor.<sup>147</sup>

b. *Private Action That Is Not State Action*

The Court has drawn boundaries to ensure that a state and a private entity may interact without the private entity automatically becoming a state actor. In *Moose Lodge No. 107 v. Irvis*,<sup>148</sup> the Court held that a private social club did not become a state actor by virtue of its liquor license obtained from the state liquor board.<sup>149</sup> Likewise, the State was not liable for the club's racial discriminatory policies in so licensing them.<sup>150</sup> The Court held that this case presented "nothing approaching the symbiotic relationship between lessor and lessee that was present in *Burton*," noting that "while Eagle was a public restaurant in a public building, Moose Lodge is a private social club in a private building."<sup>151</sup> In analyzing the relationship between the licensing board and the club, the Court noted that the board "plays absolutely no part in establishing or enforcing the membership or guest policies of the club."<sup>152</sup> The board's regulatory scheme was to keep track of the number of licenses in a given jurisdiction and to regulate their use, and "cannot be said to in any way foster or encourage racial discrimination."<sup>153</sup> Thus, the State could not be held in joint activity with the private club and the club's discriminatory policies did not constitute state action.<sup>154</sup>

However, the Court did enjoin the enforcement of one provision of the board's regulations that required "[e]very club licensee shall adhere to all of the provisions of its Constitution and By-Laws."<sup>155</sup> It reasoned that this

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145. *Id.*

146. *Id.*

147. *Id.* at 302.

148. 407 U.S. 163 (1972).

149. *See id.* at 177, 179.

150. *Id.* at 175–77.

151. *Id.* at 175 (emphasis added).

152. *Id.*

153. *Irvis*, 407 U.S. at 176–77.

154. *See id.* at 177.

155. *Id.*

would be state enforcement of the Lodge's discriminatory policy if it were to discipline the Lodge for violating its own policy of racial discrimination.<sup>156</sup>

These standards were again tested in *National Collegiate Athletic Ass'n (NCAA) v. Tarkanian*,<sup>157</sup> with the Court holding that the NCAA is not a state actor.<sup>158</sup> The University of Nevada, Las Vegas (UNLV), had disciplined its basketball coach Jerry Tarkanian after an investigation and recommendation by the NCAA.<sup>159</sup> Tarkanian filed suit against both UNLV and the NCAA alleging due process violations in his termination.<sup>160</sup>

The Court held that UNLV, as a public university, is clearly a state actor.<sup>161</sup> The remaining question was whether, through UNLV's compliance with NCAA rules and recommendations, the NCAA had transformed into a state actor as well.<sup>162</sup> The Court answered this in the negative.<sup>163</sup> The Court rejected the argument that the NCAA was involved in state action because UNLV adopted the NCAA's governing rules or because UNLV had a small level of involvement in drafting them.<sup>164</sup> It concluded that "the source of the legislation adopted by the NCAA is not Nevada but the collective membership, speaking through an organization that is independent of any particular State."<sup>165</sup> Lastly, the Court disagreed that UNLV had delegated its power to the NCAA, noting that the entities were really adversaries in this transaction.<sup>166</sup> The Court summed up the relationship by stating "[i]t would be more appropriate to conclude that UNLV has conducted its athletic program under color of the policies adopted by the NCAA, rather than that those policies were developed and enforced under color of Nevada law."<sup>167</sup>

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156. *See id.* at 178–79.

157. 488 U.S. 179 (1988).

158. *See id.* at 199.

159. *Id.* at 180–81. The Court described the NCAA's findings as "38 violations of NCAA rules by UNLV personnel, including 10 involving Tarkanian." *Id.* at 181. As for discipline by the NCAA, it had placed the program on probation for two years and threatened further sanctions if Tarkanian was not dismissed. *Id.*

160. *Tarkanian*, 488 U.S. at 181.

161. *Id.* at 192.

162. *Id.* at 193.

163. *Id.* at 195.

164. *See id.*

165. *Tarkanian*, 488 U.S. at 193. In a footnote, the Court suggested that it may have required a different analysis if the NCAA were made up of only schools within a single state. *Id.* at 193 n.13.

166. *Id.* at 196. The Court said that in disciplinary investigations, the NCAA is an adversary of the institution being investigated, as it is looking out for the interests of all the other member institutions. *Id.* It likened this to a state-paid public defender representing a client against the state. *Id.*

167. *Tarkanian*, 488 U.S. at 199.

### C. *Privately-Contracted Security Guards and the State Action Doctrine*

With this background, this section will show how private security guards have been treated under the exceptions to the state action doctrine. Whether a State's police power is an exclusive and traditional government function remains untested by the United States Supreme Court.<sup>168</sup> This section briefly describes the available case law on the subject. It focuses on the police power delegated to private security guards and the results courts have reached in such scenarios.

The Supreme Court's decision in *Griffin v. Maryland*<sup>169</sup> involved a claim that a private security guard enforced an amusement park's racially discriminatory policy.<sup>170</sup> However, this particular guard was a deputized sheriff by the state and wore a badge stating this.<sup>171</sup> He nonetheless remained under control of the park as to his duties.<sup>172</sup> The Court noted that the guard "purported to exercise the authority of a deputy sheriff."<sup>173</sup> Furthermore, the Court also noted that "[i]f an individual is possessed of state authority and purports to act under that authority, his action is state action."<sup>174</sup> Thus, the guard's actions constituted state action in violation of the Equal Protection Clause.<sup>175</sup>

While the Supreme Court has not revisited this particular issue, the *Griffin* holding and the *Flagg* dicta which specifically listed "police protection" as an example of a possible exclusive governmental function have provided guidance for lower courts deciding this issue.<sup>176</sup> The cases turn on the amount of authority delegated to the private security guards by the state.<sup>177</sup> The Seventh Circuit Court of Appeals perhaps described the necessary factors best in *Wade v. Byles*.<sup>178</sup> In *Wade*, a private security guard at a housing project was involved in an altercation that ended in the guard shooting the

168. See *Flagg Bros. v. Brooks*, 436 U.S. 149, 163–64 n.14 (1978).

169. 378 U.S. 130 (1964).

170. See *id.* at 131.

171. *Id.* at 132.

172. *Id.*

173. *Id.* at 135.

174. *Griffin*, 378 U.S. at 135.

175. See *id.* at 137.

176. *Flagg Bros. v. Brooks*, 436 U.S. 149, 163–64 (1978); see also *Griffin*, 378 U.S. at 137. The following cases are not intended to provide a complete overview of the case law by any means, but instead were selected as examples of how the lower courts have decided the issue. See, e.g., *Romanski v. Detroit Entm't, L.L.C.*, 428 F.3d 629 (6th Cir. 2005); *Payton v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 184 F.3d 623 (7th Cir. 1999); *Wade v. Byles*, 83 F.3d 902 (7th Cir. 1996).

177. *Romanski*, 428 F.3d at 640; *Payton*, 184 F.3d at 627; *Wade*, 83 F.3d at 905.

178. See 83 F.3d at 902, 905.

plaintiff.<sup>179</sup> The court stated that the powers granted to the defendant, including carrying a weapon, arresting trespassers until the police arrived, and shooting in self-defense, while perhaps traditionally reserved to the state, are not exclusively reserved to the state.<sup>180</sup> Based on this, the court held that the defendant “was not a state actor when he [fired the] shot.”<sup>181</sup>

Three years later, the Seventh Circuit confronted a factually different claim in *Payton v. Rush-Presbyterian-St. Luke’s Medical Center*,<sup>182</sup> and found the security guard to be a state actor.<sup>183</sup> In *Payton*, the security guard was stationed at a hospital, but he was also a “special police officer” under city ordinance.<sup>184</sup> As such, he was required to wear an issued badge and “conform to and be subject to all rules and regulations governing police officers of the city.”<sup>185</sup> The guard was granted broad authority by the ordinance: “[They] shall possess the powers of the regular police patrol at the places for which they are respectively appointed or in the line of duty for which they are engaged.”<sup>186</sup> The court held that this broad authority included functions traditionally and “exclusively reserved to the state.”<sup>187</sup> It found most distinctive the fact that the guards were not confined to a specific area nor were they limited in their arrest power as was the guard in *Wade*.<sup>188</sup> Finding “no legal difference exists between a privately employed special officer with full police powers and a regular Chicago police officer,” the court held that the guards were participating in state action.<sup>189</sup>

In *Romanski v. Detroit Entertainment, L.L.C.*,<sup>190</sup> the Sixth Circuit Court of Appeals held that private casino security guards were state actors, citing heavily to the Seventh Circuit’s decisions.<sup>191</sup> *Romanski* involved a casino patron detained by the casino’s security guards for several hours because she

179. *Id.* at 903. The defendant worked for a security company hired by the complex. *Id.* The company was also named as a defendant in this action. *Id.*

180. *Id.* at 906.

181. *Wade*, 83 F.3d at 907. “If Wade’s allegations are true, he may very well have a cognizable tort claim, but it is not one of constitutional dimension.” *Id.*

182. 184 F.3d 623 (7th Cir. 1999).

183. *Id.* at 630.

184. *Id.* at 624–25.

185. *Id.* at 625 (quoting CHI., ILL., CODE OF ORDINANCES § 4-340-100 (2008)).

186. *Id.* (quoting CHI., ILL., CODE OF ORDINANCES § 4-340-100 (2008)).

187. *Payton*, 184 F.3d at 630.

188. Compare *id.*, with *Wade v. Byles*, 83 F.3d 902, 906 (7th Cir. 1996). “[C]itizen’s arrests and the rights to carry handguns and use them in self-defense are available to individuals outside of the law enforcement community.” See *Payton*, 184 F.3d at 629 (citing *Wade*, 83 F.3d at 906).

189. *Id.* at 630.

190. 428 F.3d 629 (6th Cir. 2005).

191. *Id.* at 640.

took a token from an unoccupied slot machine.<sup>192</sup> As in *Payton*, a statute—this time a state statute, not a city ordinance—gave special police authority to the security guards.<sup>193</sup> This authority included “the authority to arrest a person without a warrant as set forth for public peace officers.”<sup>194</sup> However, the arrest must occur on casino property, thus, the Michigan statute seems narrower than the Chicago ordinance in *Payton*, which had no such limitation.<sup>195</sup> Nonetheless, the court held that “[w]here private security guards are endowed by law with plenary police powers such that they are *de facto* police officers, they may qualify as state actors under the public function test.”<sup>196</sup> Based on the statute and the arrest powers of the guards, the court concluded the police power the guards were given was the exclusive and traditional power of the state, and the guards were therefore state actors.<sup>197</sup>

#### IV. SECTION 1983 AND THE STATE ACTION DOCTRINE

While this article has thus far focused on the state action doctrine and its exceptions, this Part will discuss 42 U.S.C. § 1983. Section 1983 has proven an important tool for plaintiffs seeking remedies for federal constitutional violations and would likely be part of a claim against a PSC, as many of the state action cases discussed *supra* involved section 1983 claims.<sup>198</sup> This Part will examine the history of section 1983 and briefly describe its requirements and limits. It will also describe the availability of a *Bivens* action, a judicially created right that acts as the federal counterpart to a sec-

192. *Id.* at 632–33. It probably did not help the defendants’ case that the patron was a seventy-two year old woman and the token she took from the machine was worth five cents. *Id.* at 632.

193. *See id.* at 633; *see also* MICH. COMP. LAWS § 338.1080 (2008).

194. *Romanski*, 428 F.3d at 633 (quoting MICH. COMP. LAWS § 338.1080).

195. *Compare* MICH. COMP. LAWS § 338.1080, *and Romanski*, 428 F.3d at 633, *with* CHI., ILL., CODE OF ORDINANCES § 4-340-100 (2008), *and Payton v. Rush-Presbyterian-St. Luke’s Med. Ctr.*, 184 F.3d 623, 628 (7th Cir. 1999). The ordinance in *Payton* allowed the guards “to ‘do special duty at any fixed place in the city, or at any place necessary for protection of persons, passengers and property.’” *Payton*, 184 F.3d at 628 (quoting CHI., ILL., CODE OF ORDINANCES § 4-340-030).

196. *Romanski*, 428 F.3d at 637 (citing *Payton*, 184 F.3d at 630; *Henderson v. Fisher*, 631 F.2d 1115, 1117–18 (3d Cir. 1980) (*per curiam*); *Rojas v. Alexander’s Dep’t Store, Inc.*, 654 F. Supp. 856, 857 (E.D.N.Y. 1986)).

197. *Id.* at 640 (citing and quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974)).

198. *See, e.g.*, *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 293 (2001); *NCAA v. Tarkanian*, 488 U.S. 179, 181–82 (1988); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 165 (1972).

tion 1983 action.<sup>199</sup> The relationship between the “state action” requirement of the Due Process Clause and the section 1983 requirement of “acting under color of state law” will then be discussed. Finally, this Part will analyze cases involving section 1983 claims against privately run prisons, which will serve as a basis for comparison to PSCs in Part V.

#### A. *A Brief Background of Section 1983 and Its Relationship to the State Action Doctrine*

Section 1983 of title 42 of the *United States Code* was originally passed as part of the Civil Rights Act of 1871 and later codified to its present state.<sup>200</sup> The statute states that:

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 immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .<sup>201</sup>

The statute’s main purpose is to provide redress for violations of the Fourteenth Amendment.<sup>202</sup> In order to plead a cognizable claim under § 1983, a plaintiff must show two elements: that he or she was deprived of a right guaranteed “by the ‘Constitution and laws,’” and that the defendant was acting “‘under color of law.’”<sup>203</sup> Among other relief, a successful § 1983 claim provides for reasonable attorney’s fees to the plaintiff.<sup>204</sup>

Section 1983 and the state action doctrine are related, but are doctrinally different when considering private parties.<sup>205</sup> In order to be liable under § 1983, a private party must be acting “under color of state law.”<sup>206</sup> To fall within the confines of the Fourteenth Amendment, a private party must meet

199. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 407–08 (1971) (Harlan, J., concurring).

200. See, e.g., *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).

201. 42 U.S.C. § 1983 (2000).

202. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 934 (1982) (quoting *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 545 (1972)).

203. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970).

204. 42 U.S.C. § 1988(b) (2006).

205. See *Lugar*, 457 U.S. at 928 n.8.

206. *Id.* at 935.

one of the exceptions to the state action doctrine.<sup>207</sup> In *Lugar v. Edmondson Oil Co.*,<sup>208</sup> the Court analyzed the relationship between the two standards.<sup>209</sup> The *Lugar* Court held that if state action was found to be present, then the “acting under color of state law” requirement of § 1983 would be satisfied as well.<sup>210</sup> It is important to note that the converse of this rule is not necessarily true; that is, not all valid § 1983 “acting under color of law” claims automatically equate state action for the purposes of the Fourteenth Amendment.<sup>211</sup>

One more facet of § 1983 must be mentioned. Section 1983 applies to those only under color of *state* law.<sup>212</sup> It is silent to federal actors.<sup>213</sup> In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,<sup>214</sup> the Court found an implied cause of action for damages for certain constitutional violations by federal actors.<sup>215</sup> While the initial *Bivens* decision was limited to a violation of the Fourth Amendment,<sup>216</sup> it has been extended to violations of the Fifth and Eighth Amendments.<sup>217</sup> However, the Court has stressed the extraordinariness of *Bivens* as a remedy, noting that the only circumstances in which it has been used are when individual actors violated one’s constitutional rights and there was no alternative remedy for the violation.<sup>218</sup> The

207. *See id.* at 926.

208. 457 U.S. 922 (1982).

209. *See id.*

210. *Lugar*, 457 U.S. at 942. “[P]etitioner was deprived of his property through state action; respondents were, therefore, acting under color of state law in participating in that deprivation.” *Id.* The Court also commented on the inequity that would result if “state action” was not held to equate to “color of law” for § 1983 purposes:

To read the “under color of any statute” language [sic] of the Act in such a way as to impose a limit on those Fourteenth Amendment violations that may be redressed by the § 1983 cause of action would be wholly inconsistent with the purpose of § 1 of the Civil Rights Act of 1871, 17 Stat. 13, from which § 1983 is derived.

*Id.* at 934.

211. *Id.* at 935 n.18; *see also* *Pino v. Higgs*, 75 F.3d 1461, 1464 (10th Cir. 1996); 15 AM. JUR. 2D CIVIL RIGHTS § 73 (2000 & Supp. 2008).

212. 42 U.S.C. § 1983 (2006) (emphasis added).

213. *See id.*

214. 403 U.S. 388 (1971).

215. *See id.* at 396–97.

216. *See id.* at 397.

217. *See, e.g.,* *Carlson v. Green*, 446 U.S. 14, 17–18 (1980) (finding a *Bivens* action for a violation by federal actors of the Cruel and Unusual Punishment Clause of the Eighth Amendment); *Davis v. Passman*, 442 U.S. 228, 229–30 (1979) (finding a *Bivens* action for a violation by federal actors of the Due Process Clause of the Fifth Amendment). *But see* *Bush v. Lucas*, 462 U.S. 367, 390 (1983) (declining to extend *Bivens* to a First Amendment violation).

218. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001).



two extensions mentioned above are the only two times the Court has found both factors met.<sup>219</sup>

## B. *Privately-Run Prisons and § 1983*

This section will analyze the treatment of privately-run prisons under § 1983. The phenomenon of privatizing state and federal prisons provides a workable analogy to that of privatizing the military in the form of PSCs.<sup>220</sup> In both cases, private actors are delegated a certain amount of authority to control others. One such private actor is Corrections Corporation of America (CCA).<sup>221</sup> CCA, now a publicly traded company, claims it is the nation's largest provider of jail, detention and corrections services to governmental agencies with 75,000 total inmates<sup>222</sup> in nineteen states and the District of Columbia.<sup>223</sup> It also contends that these figures make it the fourth largest correctional system in the United States, behind the federal prison system and those of two states.<sup>224</sup>

Privately-run prisons are not a new invention; rather, they have been in use since the nation's founding.<sup>225</sup> Both federal and state governments currently utilize these facilities.<sup>226</sup> However, private prisons under contract with the federal government have been treated slightly different than private prisons under contract with a state government for state action and § 1983 liability purposes.

219. *Id.* "In 30 years of *Bivens* jurisprudence we have extended its holding only twice . . . ." *Id.*

220. See Corrections Corporation of America, <http://www.correctionscorp.com/about> (last visited Apr. 4, 2009) [hereinafter CCA].

221. *Id.*

222. *Id.*

223. Corrections Corporation of America, CCA Facility Locations, <http://www.correctionscorp.com/facilities/> (last visited Apr. 4, 2009).

224. CCA, *supra* note 220.

225. Rachel Christine Bailie Antonuccio, Note, *Prisons for Profit: Do the Social and Political Problems Have a Legal Solution?*, 33 J. CORP. L. 577, 582–83 (2008).

226. *Id.* One author argues that while the use of private prisons by individual states has begun to decrease, the federal government's use of these entities has significantly increased over the past decade. Matthew T. Tikonoff, Note, *A Final Frontier in Prison Litigation: Does Bivens Extend to Employees of Private Prisons Who Violate the Constitution?*, 40 SUFFOLK U. L. REV. 981, 985–87 (2007). This is attributed to the crackdown on federal drug crimes as well as the increase in detainees after 9/11. *Id.* at 986–87.

## 1. Section 1983 Claims Against Private Prisons Housing State Prisoners

In *Richardson v. McKnight*,<sup>227</sup> the State of Tennessee had contracted with a private corporation to house inmates.<sup>228</sup> Two private guards claimed immunity from alleged § 1983 violations.<sup>229</sup> The Court held that qualified immunity did not extend to employees of private prisons.<sup>230</sup> It did not expressly rule on whether the guards' actions were considered those of a state actor, but ordered the lower court to decide this on standard state action precedent.<sup>231</sup> Justice Rehnquist's dicta in another case suggested that the claim would be valid: "[T]he private facility in question housed *state* prisoners—prisoners who already enjoy a right of action against private correctional providers under 42 U.S.C. § 1983."<sup>232</sup>

Several courts have agreed with Justice Rehnquist and have not only held that § 1983 is available, but also that privately-run prisons under state contract have satisfied the "under color of law" requirement.<sup>233</sup> In fact, the Sixth Circuit held this as early as 1991, well before the quoted dicta in *Correctional Services Corp. v. Malesko*<sup>234</sup> appeared.<sup>235</sup> In so holding, the court appeared to consider both the public function and the nexus exceptions to the state action doctrine.<sup>236</sup> The Fifth Circuit later agreed after *Richardson*: "[c]learly, confinement of wrongdoers—though sometimes delegated to pri-

227. 521 U.S. 399 (1997).

228. *Id.* at 402.

229. *Id.* at 401–02; *see also* *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982) (holding that qualified immunity under § 1983 "is available only to [state] officials performing discretionary functions").

230. *Richardson*, 521 U.S. at 412. The dissent vigorously disagreed, noting:

Today's decision says that two sets of prison guards who are indistinguishable in the ultimate source of their authority over prisoners, indistinguishable in the powers that they possess over prisoners, and indistinguishable in the duties that they owe toward prisoners, are to be treated quite differently in the matter of their financial liability.

*Id.* at 422 (Scalia, J., dissenting).

231. *Id.* at 413–14.

232. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72 n.5 (2001). *But see* *Holly v. Scott*, 434 F.3d 287, 292 n.3 (4th Cir. 2006) ("It is an open question in this circuit whether § 1983 imposes liability upon employees of a private prison facility under contract with a state. We need not decide that issue here.").

233. *See, e.g., Skelton v. Pri-Cor, Inc.*, 963 F.2d 100, 102 (6th Cir. 1991) (per curiam).

234. 534 U.S. at 61.

235. *Skelton*, 963 F.2d at 102.

236. *See id.* "As a detention center, Pri-Cor is no doubt performing a public function traditionally reserved to the state." *Id.* "'There is a sufficiently close nexus between the State and the challenged action of [Pri-Cor] so that the action of the latter may be fairly treated as that of the State itself.'" *Id.* (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

vate entities—is a fundamentally governmental function.”<sup>237</sup> The Tenth Circuit has at least suggested the same in dicta.<sup>238</sup>

## 2. *Bivens* Claims Against Private Prisons Housing Federal Prisoners

The Court was more restrictive of a federal prisoner’s rights against a privately-run prison.<sup>239</sup> In *Malesko*, the Court held that *Bivens* actions were unavailable to a federal prisoner against a private corporation.<sup>240</sup> This was due, in part, to the fact that the prisoner would not have been able to file an action against anyone but the individual if it were a federally-run prison.<sup>241</sup> The Tenth Circuit held that *Malesko* barred a *Bivens* action against an employee as well as a privately-run prison itself.<sup>242</sup> In *Holly v. Scott*,<sup>243</sup> the Fourth Circuit agreed, noting that the plaintiff had other options under state law.<sup>244</sup> On the other hand, some federal district courts have read *Malesko* more broadly and allowed *Bivens* actions against the individual employees.<sup>245</sup> No circuit has joined this view to date.

## V. PRIVATE SECURITY COMPANIES AND THE STATE ACTION DOCTRINE

The state action doctrine has remained untested against PSCs under contract with the federal or state governments. In *Gantt v. Security, USA, Inc.*,<sup>246</sup> the plaintiff claimed that Security, USA, a PSC, violated her Fifth Amendment rights after informing the company of a protective order against her ex-boyfriend.<sup>247</sup> She claimed that she needed to remain indoors and se-

237. *Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 461 (5th Cir. 2003) (*per curiam*).

238. *See Peoples v. CCA Det. Ctrs.*, 422 F.3d 1090, 1111 (10th Cir. 2005) (Ebel, J., concurring in part, dissenting in part), *vacated en banc*, 449 F.3d 1097 (10th Cir. 2006). While this appears only in a concurrence in part, Judge Ebel was using this as an example of the asymmetry between § 1983 and *Bivens* in private prison settings. *See id.* He does not suggest that there is any question that the § 1983 claim is available. *See id.*

239. *See Malesko*, 534 U.S. at 71–72.

240. *Id.*

241. *Id.* at 72. “The prisoner may not bring a *Bivens* claim against the officer’s employer, the United States, or the BOP. With respect to the alleged constitutional deprivation, his only remedy lies against the individual . . .” *Id.*

242. *Peoples*, 422 F.3d at 1108.

243. 434 F.3d 287 (4th Cir. 2006).

244. *Id.* at 296–97.

245. *See Jama v. INS*, 343 F. Supp. 2d 338, 362–63 (D.N.J. 2004); *Purkey v. CCA Det. Ctr.*, 339 F. Supp. 2d 1145, 1149–51 (D. Kan. 2004); *Sarro v. Cornell Corr., Inc.*, 248 F. Supp. 2d 52, 63 (D.R.I. 2003).

246. 356 F.3d 547 (4th Cir. 2004).

247. *Id.* at 549.

cure, but the company forced her to work outdoors, where she was kidnapped at gunpoint and raped.<sup>248</sup> The court noted that there was no evidence to show that Security, USA was anything but a private company.<sup>249</sup>

Under this article's analysis, the PSCs will be operating under contract with either the federal or a state government; a factor not present in *Gantt*. While *Gantt* may stand for the principle that a PSC standing alone is not a state actor/PSCsr, when it operates under governmental contract for the purpose for governmental security or related objectives, the analysis changes dramatically.<sup>250</sup> This part will analyze whether a PSC meets one of the exceptions to the state action doctrine and is therefore liable for constitutional violations. It argues that a court could find that a PSC is a state actor under either the "public function" or the "symbiotic relationship" exception to the state action doctrine.

#### A. *PSCs Under the Public Function Test*

The first argument that a potential plaintiff could make is that providing security for United States citizens is an exclusive and traditional government function. If this is an exclusive and traditional government function, then the PSC would be liable as a state actor if it violates one's federal constitutional rights when contracting with a state or federal government to provide services.

The best way for a potential plaintiff to frame an argument is to compare PSCs, such as Blackwater, to private security guards that have been held as state actors. The plaintiff could also point to the dicta from *Flagg Bros.*, which specifically listed "police protection" as an example of a possible exclusive governmental function.<sup>251</sup> However, the *Flagg Bros.* Court specifically pointed out that it was not ruling on the matter, and it never had ruled on whether police protection was a traditional and exclusive governmental function.<sup>252</sup> Thus, the plaintiff would be left to distinguish PSCs based substantially on the case law from the lower courts.

In *Griffin*, the Supreme Court held that a deputized security guard, who used the appearance of police authority at a private amusement park, was a state actor.<sup>253</sup> *Wade* held that a private security guard, who only had the power to carry a gun and arrest trespassers until the police came inside the

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248. *Id.* at 550–51.

249. *Id.* at 552.

250. *See generally id.*

251. *Flagg Bros. v. Brooks*, 436 U.S. 149, 163 (1978).

252. *Id.* at 163–64 n.14.

253. *Griffin v. Maryland*, 378 U.S. 130, 135 (1964).

apartment complex, was not a state actor.<sup>254</sup> The courts in *Payton* and *Romanski* found state action by private security guards, but only in the presence of a broad statutory grant of authority.<sup>255</sup>

The Blackwater employees in New Orleans were deputized by the State of Louisiana, which carried with it the power to make arrests and use force.<sup>256</sup> They wore Louisiana law enforcement badges around their necks and were allowed to carry loaded weapons.<sup>257</sup> This deputization by the state governor would likely prove analogous to the delegation of police power by ordinance in *Payton* and by state statute in *Romanski*.<sup>258</sup> The authority goes beyond what was given to the guard in *Wade*.<sup>259</sup> There were no similar limitations on location or arrest power.<sup>260</sup> A court would most likely find that a PSC was a state actor in a Katrina-like scenario.

In addition, by a state or federal government contracting for a PSC's services, another element could be added to the analysis. This is the fact that the security company is directly contracted with the government, rather than working directly for another private actor.<sup>261</sup> A plaintiff might consider claiming that this in itself establishes state action and no exceptions are needed to prove that the PSC is a state actor.<sup>262</sup> However, this would be a difficult argument to make. In *Lebron*, the Court held that Amtrak, a government-sponsored corporation, was a state actor.<sup>263</sup> However, a key to that holding was that the government reserved the power to appoint members of the board of directors.<sup>264</sup> There is no evidence suggesting that any government has any amount of control over Blackwater's board of directors or over any other PSC.<sup>265</sup> Thus, this argument would be difficult for a plaintiff to make, and would most likely fail.

In sum, the factors discussed above would likely result in a finding of state action under the exclusive and traditional public function exception to

254. *Wade v. Byles*, 83 F.3d 902, 906 (7th Cir. 1996).

255. *See Payton v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 184 F.3d 623, 630 (7th Cir. 1999); *Romanski v. Detroit Entm't, L.L.C.*, 428 F.3d 629, 637 (6th Cir. 2005).

256. *See SCAHILL, supra* note 22, at 324. "'He was even deputized by the governor of the [S]tate of Louisiana. We can make arrests and use lethal force if we deem it necessary.' . . . Blackwater spokesperson Anne Duke also said the company had a letter from Louisiana officials authorizing its forces to carry loaded weapons." *Id.*

257. *Id.*

258. *See Payton*, 184 F.3d at 624–25; *Romanski*, 428 F.3d at 633.

259. *See Wade*, 83 F.3d at 906.

260. *Compare id.*, with *SCAHILL, supra* note 22, at 324.

261. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378–79 (1995).

262. *See id.* at 381.

263. *Id.* at 400.

264. *See id.*

265. *See generally SCAHILL, supra* note 22.

the state action doctrine. While Blackwater, or any other PSC, would not likely be considered an actual part of a government by contracting with it, a plaintiff could prove that the authority delegated to PSCs was that of an exclusive and traditional state function.<sup>266</sup> With this finding, a PSC would be liable for federal constitutional violations when acting under such a grant of authority.<sup>267</sup>

### B. PSCs Under the Nexus Test

If the prior analysis is flawed, or simply unsuccessful in court, a plaintiff could also attempt to show that the nexus between the state and the PSC was so close that the private conduct rose to the level of state action.<sup>268</sup>

The best argument for a plaintiff would be that the government and the PSC enjoy a symbiotic relationship, as did the restaurant and the state in *Burton*.<sup>269</sup> She could claim that the PSC gets a lucrative contract. The state gets security detail without having to train, house, and supervise the private guards. The state also benefits from the hopeful decrease in crime and increase in public order by having the additional security.

However, to meet the *Burton* standard, a plaintiff would have to show a high level of interdependence.<sup>270</sup> To revisit an earlier quotation, “we all coordinate with each other—one family.”<sup>271</sup> To add to this, the descriptions of the dress and armor PSC employees possess do not seem to differentiate them from a state police force or militia.<sup>272</sup> To the uninformed, it would likely be difficult to tell whether an individual employee worked for a PSC or the state.<sup>273</sup> A court could consider this evidence of interdependence and that the state “elected to place its power, property and prestige behind the” PSC just as it would its own police force.<sup>274</sup>

A court could also consider the *Tarkanian* holding when making its decision. In *Tarkanian*, one problem the Court had was that no state controlled the NCAA.<sup>275</sup> Here, the PSC would have a contract with a specific governmental entity, whether an individual state or the federal government. This

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266. See *Lebron*, 513 U.S. at 394–95.

267. See *id.* at 400.

268. See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 716, 726 (1961).

269. See *id.* at 726.

270. See *id.* at 725.

271. SCAHILL, *supra* note 22, at 329.

272. See *id.* at 321–22.

273. See *id.*

274. See *Burton*, 365 U.S. at 725.

275. See *NCAA v. Tarkanian*, 488 U.S. 179, 193 (1988).

would show a higher level of control by the state than was present in *Tarkanian* as a PSC would have a specific authority to abide by.<sup>276</sup>

The plaintiff might try to invoke the *Brentwood* “entwinement” exception as well.<sup>277</sup> However, this would prove less successful. There does not appear to be the pervasive entwinement between the state and the PSC that was found in *Brentwood*.<sup>278</sup> In *Brentwood*, the Court found entwinement both “bottom up” and “top down.”<sup>279</sup> There is no evidence to suggest that Blackwater’s CEO serves on any governmental board due to the relationship. Likewise, there is no evidence that a governmental actor is involved in the business of the corporation. The necessary “overlapping identity” between the PSC and the government is not present.<sup>280</sup> Even though the *Brentwood* test is sometimes seen as less rigid, and more of a balancing test, than the other state action tests,<sup>281</sup> this scenario lacks the structural entwinement present in *Brentwood*.<sup>282</sup> Thus, *Brentwood*, standing alone, would more likely point to a holding that a PSC is not a state actor.

A PSC might point to *Moose Lodge* to try to differentiate its actions from the arguments made above. It could argue that the state is simply licensing and regulating its ability to provide security. It would analogize this to the situation in *Moose Lodge* where a private club was held not to be a state actor despite regulation from the state liquor board.<sup>283</sup> The PSC would attempt to distinguish the relationship with the state from *Burton* and show that it was more like the one found in *Moose Lodge*. However, the level of interdependence might be too much for the PSC to overcome. As previously discussed, the outward appearance of the PSC’s employees is nearly indistinguishable from other soldiers or state officers. The PSC would not remain a private entity on private property, as the *Moose Lodge* was,<sup>284</sup> it would be highly visible and possibly on public lands during its missions. The relation-

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276. See *id.*

277. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 297 (2001).

278. See *id.* at 302.

279. *Id.* at 300.

280. See, e.g., Megan M. Cooper, Case Note, *Dusting off the Old Play Book: How the Supreme Court Disregarded the Blum Trilogy, Returned to Theories of the Past, and Found State Action Through Entwinement in Brentwood Academy v. Tennessee Secondary School Athletic Ass’n*, 35 CREIGHTON L. REV. 913, 923 (2002). However, the author argues that the extension in *Brentwood* was unnecessary and state action could have been found through other exceptions. *Id.* at 990–91.

281. See James Potter, Comment, *The NCAA as State Actor: Tarkanian, Brentwood, and Due Process*, 155 U. PA L. REV. 1269, 1290–91 (2007).

282. See *id.*

283. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175–77 (1972).

284. See *id.* at 175.

ship between the government and the PSC would be much closer to that in *Burton* than in *Moose Lodge*.

For the reasons stated, a court should hold that a PSC, when providing security under contract with a state or federal government contract, is a state actor under the nexus exception. The strongest argument for this finding would be that they enjoy a symbiotic and interdependent relationship.

## VI. POSSIBLE CAUSES OF ACTION UNDER SECTION 1983

The previous part attempted to answer the question of whether a PSC would be considered a state actor when accused of a federal constitutional violation by a U.S. citizen. Now, consider a situation in which overzealous PSCs employees violate the federal constitutional rights of an individual. Perhaps the employees fire their weapons at an innocent person, as is currently alleged by Blackwater's actions in Iraq, and deprive that person of life without due process. A less violent example would be that the PSC decides to conduct its hiring decisions based on discrimination that would violate the Equal Protection Clause. In either scenario, a state actor would be liable for these federal constitutional violations. Relief would most likely be sought in the form of a section 1983 action against the actors.<sup>285</sup> This part recognizes this "real-world" solution and attempts to illustrate how a lawsuit might proceed under the precedent guiding section 1983 claims and *Bivens* actions as applied to private prisons.

### A. *Violation of Constitution by PSC with State Government Contract*

This part envisions a Katrina-like scenario. A PSC acts under state government authority to provide security and maintain order in an emergency situation.

The wronged individual might consider filing a section 1983 action against the individuals that searched him and against the PSC itself. As part of his or her claim, it would have to be alleged that the PSC, and its agents, were acting under color of state law during the illegal activity.<sup>286</sup> As discussed *supra*, the plaintiff should be successful in meeting this burden.<sup>287</sup> The requirements of a state actor would automatically result in a finding that the PSC or its agents were acting under color of law.<sup>288</sup> Furthermore, there

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285. See discussion *supra* Part III.

286. See *supra* Part IV.

287. See *id.* for the argument that a PSC is a state actor under these circumstances.

288. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 (1982); discussion *supra* Part III.A.



are situations where a finding of state action is not required for the actor to be “under-color-of-state-law.”<sup>289</sup>

Having decided that section 1983 can be used, it must be decided against whom. States are immune from suit.<sup>290</sup> Thus, the “stripping doctrine,” a judicially created legal fiction, is used to answer claims against a state.<sup>291</sup> So the plaintiff here must sue the director of the PSC in his personal capacity in order to recover damages.<sup>292</sup> The employee may also be sued under section 1983.<sup>293</sup> It could be argued that *Richardson* could be applied to this context as well. If it was, then the employees would not have the defense of qualified immunity available.

#### B. *Violation of Constitution by PSC with Federal Government Contract*

This section assumes a similar scenario as discussed above, but now the PSC’s contract is with the federal government. The difference from the above analysis will occur when deciding who can be liable to suit. The plaintiff would not have a statutory cause of action under section 1983 available against a federal actor, but instead, the implied *Bivens* action. The question would be who the plaintiff could file that suit against. If the prison analogy holds, the answer may very well be no one. Under *Malesko*, the PSC could not be sued, as the Court held that *Bivens* actions do not extend to private corporations.<sup>294</sup> Whether it could be extended to the individual employees of the PSC is an open question for now, but the majority opinion seems to suggest not.<sup>295</sup>

Thus, while a PSC may engage in the same conduct as a state actor while contracting with a state or the federal government, following the private prison analogy, the availability of suit may depend on the relationship.

289. See *Lugar*, 457 U.S. at 935 n.18.

290. See U.S. CONST. amend. XI.

291. See generally *Ex Parte Young*, 209 U.S. 123 (1908).

292. See *id.* at 159–60.

293. See 42 U.S.C. § 1983 (2006).

294. See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001).

295. See generally *id.* At least one author has recognized this limitation of *Malesko* and suggests that *Bivens* actions should be available to foreign citizens who have suffered at the hands of civilian contractors. See Scott J. Borrowman, Comment, *Sosa v. Alvarez-Machain and Abu Ghraib—Civil Remedies for Victims of Extraterritorial Torts by U.S. Military Personnel and Civilian Contractors*, 2005 B.Y.U. L. REV. 371, 416–17 (2005). The author suggests that the same action would give rise to a *Bivens* claim “if committed against a U.S. citizen.” *Id.* at 417. However, the case he cites involves a public prison, not a private one. See *id.* at 417–18. It has never been decided by the Court if *Bivens* extends to employees of private prisons.

While a PSC may engage in state action while under contract with the federal government, the plaintiff may be left with the same remedies as it would have been without a PSC held to be a state actor.

## VII. CONCLUSION

This article poses a hypothetical that may be tested in the near future. It offers a hypothetical violation of the federal Constitution by a PSC and then asks whether that entity could be held to be a state actor if it was operating under a government contract. This article argues that the answer to that question is relatively straightforward. A PSC would most likely be held to be a state actor in that situation. A court could use either the “exclusive and traditional public function” or the “nexus” exception to the state action test to so hold. However, a more difficult question is how a potential plaintiff would be able to seek redress upon this finding. Section 1983 may provide an avenue for relief for when a PSC is under contract with a state government. However, the issue is less clear when a PSC is under contract with the federal government. The Court has thus far refused to extend *Bivens* actions to private corporations. Thus, federal constitutional violations by a PSC under contract with the federal government may still not have a proper remedy, and PSCs may still be able to operate in a way inconsistent with what a federal agent would be allowed under the Constitution.