

Michigan Law Review

Volume 94 | Issue 2

1995

Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations

Ronald J. Krotoszynski Jr.
Indiana University

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Constitutional Law Commons](#), [Jurisprudence Commons](#), [Rule of Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

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).

Available at: <https://repository.law.umich.edu/mlr/vol94/iss2/3>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

BACK TO THE BRIARPATCH: AN ARGUMENT IN FAVOR OF CONSTITUTIONAL META-ANALYSIS IN STATE ACTION DETERMINATIONS

*Ronald J. Krotoszynski, Jr.**

I was born and raised in the briar patch, Brer Fox!
Born and raised in the briar patch.¹

Brer Rabbit, after claiming repeatedly that he would prefer almost anything to being thrown into the briarpatch,² expressed glee once tossed there.³ In fact, Brer Rabbit wanted to be in the briarpatch because, like most rabbits, he could navigate the briarpatch with relative ease: the briarpatch was home.

Over the course of a century, the Supreme Court has developed a great degree of familiarity with the state action doctrine, a doctrinal briar patch. Like Brer Rabbit, the Court has disclaimed repeatedly any interest in being there.⁴ Writing for the Court only last term, Justice Scalia described the state action doctrine as "difficult terrain" and deftly avoided traversing it.⁵ Justice Scalia's acknowl-

* Assistant Professor of Law, Indiana University, Indianapolis. B.A. 1987, M.A. 1987, Emory; J.D. 1991, LL.M. 1991, Duke. — Ed. I am grateful for the invaluable advice and assistance provided by Professor William Van Alstyne. I would also like to acknowledge the contributions of S. Elizabeth Wilborn, Andrew M. Ray, Nancy M. Olson, Catherine S. Stempien, and Michael D. Granston, who were all instrumental in the development of this piece.

1. JULIUS LESTER, *THE TALES OF UNCLE REMUS, THE ADVENTURES OF BRER RABBIT* 16 (Dial Books 1987) (retelling JOEL C. HARRIS, *UNCLE REMUS* (1921)).

2. To be specific, he ostensibly would rather have been hanged, decapitated, or drowned than thrown into the briarpatch. JOEL CHANDLER HARRIS, *UNCLE REMUS* 18 (1921).

3. *Id.* at 19.

4. See, e.g., *Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 964 (1995); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632-33 (1991) (O'Connor, J., dissenting) (arguing that although the Court's state action cases have not been "a model of consistency," a "coherent principle has emerged," which should lead to predictable results); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972) (noting that the state action principle is "easily stated," but conceding that the proper analysis of state action questions is not always a simple task); see also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 n.51 (1982) (disposing of the state action analysis in a two-sentence footnote); cf. *Evans v. Newton*, 382 U.S. 296, 299 (1966) ("[G]eneralizations do not decide concrete cases."). In other cases, the Supreme Court has repeatedly invoked the talisman of state action and has conducted its state action analysis in a fashion suggesting that its state action tests generate relatively certain outcomes. See, e.g., *Rendell-Baker v. Kohn*, 457 U.S. 830, 837-38 (1982); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156-66 (1978).

5. *Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 964 (1995).

edgment that state action doctrine is difficult terrain is not surprising; unlike Brer Rabbit, the Court has demonstrated a seeming inability to maneuver in the underbrush once finding itself there.⁶ The state action doctrine, with its intricate mantras and talismanic phrases, has been and remains a dark thicket of constitutional law.

Since at least 1879, the Court has consistently held that the guarantees of both the Fourteenth Amendment and the Bill of Rights protect citizens only from acts committed by the government, and has required plaintiffs asserting claims under these provisions to establish the presence of "state action" before undertaking an analysis of the merits of a particular claim.⁷ These amendments "erect[] no shield against merely private conduct, however discriminatory or wrongful."⁸

The state action inquiry is not particularly difficult when an agency or officer of the government has allegedly violated the constitutional rights of an individual.⁹ The analytical exercise can become decidedly squirrely, however, when the actions of an ostensibly "private" entity violate constitutional norms, and the entity enjoys some kind of special relationship or connection to the federal or a state government.¹⁰

To be sure, the law generally — and constitutional law in particular — is often ambiguous, and judges are required to exercise discretion when deciding almost every matter that comes before them.¹¹ Thus, judges — like rabbits — should be reasonably comfortable in the briarpatch because their jobs routinely require them to be there. Nevertheless, the state action doctrine has proven especially difficult for the federal judiciary to administer.

In an attempt to bring order to the subject, the Supreme Court has developed three distinct tests for determining whether the rela-

6. See, e.g., *Evans v. Newton*, 382 U.S. 297, 299 (1966) ("What is 'private' action and what is 'state' action is not always easy to determine.").

7. See, e.g., *The Civil Rights Cases*, 109 U.S. 2, 11 (1883); *United States v. Harris*, 106 U.S. 629, 638-40 (1882); *Virginia v. Rives*, 100 U.S. 313, 318 (1879); see also *Public Utils. Commn. v. Pollack*, 343 U.S. 451, 461 (1952) (applying the state action requirement to federal constitutional claims).

8. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

9. See *Lebron*, 115 S. Ct. at 972-74. See generally *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) ("Our cases have . . . insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State.").

10. See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961). As Justice O'Connor has observed, the Court's cases "deciding when private action might be deemed that of the state have not been a model of consistency." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991) (O'Connor, J., dissenting).

11. See K.N. LLEWELLYN, *THE BRAMBLE BUSH* 134-35, 179-80, 187-92 (1960); WILLIAM VAN ALSTYNE, *INTERPRETATIONS OF THE FIRST AMENDMENT* 47-49 (1984).

tionship between a private entity and the government is sufficient to justify attributing the private entity's behavior to the state.¹² These tests have proven difficult to apply in practice and arguably have done little to improve either the quality or consistency of state action determinations. Largely because of the difficulties associated with applying the tests, a number of academics have seriously questioned their value as analytical tools.¹³

In this article, I argue that the existing tests for establishing the presence of state action are helpful in framing the state action question, but, as applied by the federal courts, they have all too often frustrated meaningful inquiry into the true relationship between ostensibly private actors and the federal or a state government. Wholesale abandonment of the tests, however, will not resolve this problem. Instead, courts conducting state action analyses must go beyond the mechanical application of the traditional tests to determine if, in the totality of the circumstances, a particular private entity is a state actor.¹⁴ Essentially, I advocate a constitutional "meta-analysis"¹⁵ that would improve the accuracy and fairness of state action determinations.

Part I presents an overview of contemporary state action doctrine, with particular attention to the Supreme Court's recent decision in *Lebron v. National Railroad Passenger Corporation*.¹⁶ Part II demonstrates the shortcomings — and absurdities — associated with the contemporary state action doctrine. In this Part, I argue that recent decisions of the lower federal courts reflect a failure in practice to honor the Supreme Court's admonition that its various

12. As will be explained more fully, *infra*, these tests are: (1) the "exclusive government function" test, see *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157-62 (1978); *Nixon v. Condon*, 286 U.S. 73, 88-89 (1932); (2) the "nexus" or "regulation" test, see *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); and (3) the "symbiotic relationship test," see *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

13. The state action doctrine has been described as "incoheren[t]," Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 505 (1985); a "doctrine that makes no sense," *id.* at 556; a "protean concept," Thomas P. Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1085 (1960); and a "conceptual disaster area," Charles L. Black, Jr., *The Supreme Court, 1966 Term — Foreword: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69, 95 (1967). On the other hand, the doctrine has also been described as "the most important problem in American law." See *id.* at 70.

14. See, e.g., *Hollenbaugh v. Carnegie Free Library*, 545 F.2d 382, 385 (3d Cir. 1976) (considering both an entity's public function as well as its relationship with the state in making a state action determination), *cert. denied*, 439 U.S. 1052 (1978).

15. "Meta-analysis" involves grouping data from separate scientific studies to reach the 95% confidence interval required to substantiate scientific claims. State action determinations could be improved by incorporating a roughly analogous technique. See *infra* section III.A.

16. 115 S. Ct. 961 (1995).

verbal formulations of state action are but "different ways of characterizing [a] necessarily fact-bound inquiry."¹⁷ Finally, Part III takes up the broader problem of cabining judicial discretion in the application of the state action doctrine. This Part presents an alternative approach to the contemporary state action analysis, an approach that is truer to the Supreme Court's repeated exhortation that "[o]nly by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be given its true significance."¹⁸

The federal courts' use of the various state action tests as formulaic shorthands that yield quick and easy answers represents an inappropriate application of the Supreme Court's state action precedents. Such jurisprudence has the unfortunate effect of insulating from constitutional scrutiny behavior fairly attributable to the state and is significantly underprotective of constitutional rights. The Court therefore should abandon sole reliance on these tests in favor of a more contextual approach. In short, the federal courts should return to the briarpatch, with the recognition that the state action doctrine, like Brer Rabbit, was "bred and born there."

I. A BRIEF HISTORICAL REVIEW OF THE STATE ACTION DOCTRINE

The Fourteenth Amendment provides that "[n]o State shall . . . 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."¹⁹ Since at least 1879, the Supreme Court has interpreted the "[n]o State shall" language of this clause to limit the application of the clause to acts "fairly attributable to the State."²⁰ Moreover, the Court has also applied the state action requirement to cases raising constitutional challenges to actions taken by the federal government.²¹ Thus, in any given case, a plaintiff claiming the violation of a constitutional right or liberty must first establish

17. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982).

18. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961); *see also* *Reitman v. Mulkey*, 387 U.S. 369, 378 (1967).

19. U.S. CONST. amend. XIV, § 1.

20. *See* *Lugar*, 457 U.S. at 937; *Ex parte Virginia*, 100 U.S. 339, 346-47 (1879); *see also* *The Civil Rights Cases*, 109 U.S. 3, 10-14 (1883) (reiterating state action requirement and citing *Ex parte Virginia* in support of the proposition).

21. *See* *Public Utils. Comm'n. v. Pollak*, 343 U.S. 451, 461 (1952); *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926); *see also* *Lebron v. National R.R. Passenger Corp.*, 12 F.3d 388, 390-91 (2d Cir. 1993), *rev'd*, 115 S. Ct. 961 (1995); *Franz v. United States*, 707 F.2d 582, 590-94 (D.C. Cir.), *modified on other grounds*, 712 F.2d 1428 (D.C. Cir. 1983).

that the alleged violation is somehow the handiwork of the government.

In approaching the question of governmental responsibility for a deprivation of constitutional rights, the Supreme Court has established a two-track analysis. First, a reviewing court must determine whether the defendant "is . . . [the] Government itself."²² If the defendant is not the government, then the Court must determine whether the actions of the nongovernmental entity can "be fairly attribut[ed] to the State"²³ through a kind of contacts analysis. The nature and scope of both inquiries are described below.

A. *Governmental Entities*

When the defendant in a civil suit is a government agency or officer, the state action inquiry is attenuated: government agencies and officials must observe the constitutional rights and prerogatives of the citizenry.²⁴ Until very recently, however, it was unclear whether a governmental entity could avoid its constitutional obligations simply by incorporating a "private" company to execute a public policy. Because a corporate entity is ostensibly private or at least can be legislatively declared so,²⁵ lower federal courts had indicated a willingness to excuse government-owned corporations from observing constitutional rights.²⁶

In *Lebron v. National Railroad Passenger Corporation*,²⁷ the Supreme Court rejected this reasoning. The Court held that before examining the relationship of the federal government to Amtrak —

22. *Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 964 (1995).

23. *Lugar*, 457 U.S. at 937.

24. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 390-97 (1971); cf. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177 (1972) (holding that a private entity was not bound by the Equal Protection Clause of the Fourteenth Amendment). See generally Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1208-12 (1992) (discussing the application of the Bill of Rights to the states and the antebellum state jurisprudence that required the state governments to honor certain "natural rights" of the citizenry, which included at least some of the rights set forth in the Federal Bill of Rights).

25. See *Lebron*, 115 S. Ct. at 971-72.

26. See, e.g., *Lebron v. National R.R. Passenger Corp.*, 12 F.3d 388, 390 (2d Cir. 1993) (accepting without question congressional characterization of Amtrak as a "private, for-profit corporation"), *rev'd*, 115 S. Ct. 961 (1995); *Morin v. Consolidated Rail Corp.*, 810 F.2d 720, 722-23 (7th Cir. 1987) (holding that Conrail is not a state actor because of its corporate nature); *Andersen v. National R.R. Passenger Corp.*, 754 F.2d 202, 204-05 (7th Cir. 1984) (holding that Amtrak is not a state actor because of its corporate form and congressional designation as a "private" entity); *Warren v. Government Natl. Mortgage Assn.*, 611 F.2d 1229, 1232-35 (8th Cir.) (holding that the GNMA is not a state actor), *cert. denied*, 449 U.S. 847 (1980); *Network Project v. Corporation for Pub. Broadcasting*, 4 Media L. Rep. (BNA) 2399, 2403-08 (D.D.C. 1979) (holding that the CPB is not a state actor).

27. 115 S. Ct. 961 (1995).

in other words, engaging in a contacts analysis — it was first necessary to determine whether Amtrak, as a government-created, controlled, and maintained corporation, constituted a component of the federal government.²⁸

Lebron involved a First Amendment challenge to Amtrak's decision to refuse to permit an advertisement parodying the Coors family's alleged support of right-wing political groups in Central America. Lebron, an artist, purchased the right to display a work of art depicting Nicaraguan villagers being menaced by a silver Coors beer-can missile.²⁹ After Amtrak's sales agent accepted Lebron's purchase of advertising space to display the picture in New York City's Penn Station, Amtrak exercised its contractual authority with the agent to refuse the advertisement.³⁰ Lebron then sued, claiming that Amtrak's refusal to display his work violated his First Amendment rights. Applying the three state action tests and relying on prior circuit precedents, the Second Circuit found that Amtrak could not violate Lebron's speech rights because it was not a state actor.³¹

On appeal from the Second Circuit, the Supreme Court recast the question presented for review. Rather than asking whether Amtrak, as a private entity, constituted a state actor, the majority instead inquired into whether Amtrak was really a "private" entity separate and distinct from the federal government.³² The Court "conclude[d] that [Amtrak] is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution."³³

Writing for an 8-1 majority, Justice Scalia went on to observe that "[i]t surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form."³⁴ Thus, if "the Govern-

28. 115 S. Ct. at 964.

29. 115 S. Ct. at 963-64.

30. 115 S. Ct. at 964.

31. *Lebron v. National R.R. Passenger Corp.*, 12 F.3d 388, 390-92 (2d Cir. 1993), *revd.*, 115 S. Ct. 961 (1995).

32. 115 S. Ct. at 962-68. The Second Circuit's opinion accepted without question the private character of Amtrak, based on Congress's statutory declaration that Amtrak is "not . . . an agency, instrumentality, authority, or entity, or establishment of the United States government." *Lebron*, 12 F.3d at 390; *see* 45 U.S.C. § 541 (1988). The Second Circuit did not consider whether Amtrak constituted a component of the federal government, focusing instead on whether Amtrak could be deemed a state actor because of its extensive connections to the federal government.

33. 115 S. Ct. at 972.

34. 115 S. Ct. at 973.

ment creates a corporation" in order to promote "governmental objectives" and retains effective control over the corporation, the corporation is a component of the government itself.³⁵

The *Lebron* decision effectively mandates a new first step in state action analysis. Rather than assuming the private character of an entity, plaintiffs would do well to first consider whether it is plausible to argue that the entity is in fact a component of the government.³⁶ Consistent with *Lebron*, governmental agencies cannot escape the mantle of sovereignty by drawing up articles of incorporation. Essentially, *Lebron* appears to reject the sovereign-commercial acts dichotomy that exists in international law.³⁷ The federal and state governments, unlike a foreign sovereign, cannot operate commercial enterprises in the same fashion as private citizens; neither the federal government nor a state government may act as a capitalist, free and clear of any constitutional constraints.³⁸

One could argue that *Lebron* stands only for the more limited proposition that a government-controlled corporation is a state actor if the government's involvement in the corporation relates to a public policy — in other words, that the government's participation in the enterprise is a kind of quasi-sovereign function. Consistent with this interpretation of *Lebron*, if the government's involvement with a corporation were merely accidental and did not reflect or serve an identifiable public policy objective, the corporation might not be a state actor.

Although this kind of government involvement with a corporation might be theoretically possible, most, if not all, existing

35. 115 S. Ct. at 974-75; see also *Chalfant v. Wilmington Inst.*, 574 F.2d 739 (3d Cir. 1978). In *Chalfant*, the Third Circuit held that the state cannot avoid its constitutional obligations by using an agent to execute its policies because a contrary rule would permit "any state [to] avoid the reach of the fourteenth amendment over any governmental function merely by turning over the administration of that function to [an agent]." 547 F.2d at 746.

36. For example, if the federal government opened a McDonald's restaurant across the street from the White House, perhaps in response to its current resident's passion for McFood, the McDonald's restaurant would be a state actor — notwithstanding the commercial nature of the enterprise — so long as the government retained control over the ownership and operation of the restaurant and opened the restaurant to promote a public policy objective.

37. See Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1602, 1605(a)(2). Under the FSIA, the "commercial activities" of foreign governments are not protected by the doctrine of sovereign immunity. In other words, a foreign government may be sued in the United States for the acts or omissions of a commercial enterprise under its direct control. Thus, the FSIA treats a corporation owned or controlled by a foreign sovereign as a private, rather than a public, entity. Cf. *Warren v. Government Natl. Mortgage Assn.*, 611 F.2d 1229, 1235 (8th Cir.) (Ross, J., concurring) (arguing that the GNMA, a wholly owned, government-controlled corporation, is not a state actor because it "functions only in a traditionally non-sovereign capacity"), cert. denied, 449 U.S. 847 (1980).

38. See *Lebron*, 115 S. Ct. at 972-75.

government-controlled corporations — entities like Amtrak, the Legal Services Corporation (LSC), and the Corporation for Public Broadcasting (CPB) — exist to effectuate clearly defined public policies and should therefore come within *Lebron*'s ambit. Moreover, a broad interpretation of *Lebron*'s scope is both theoretically and legally sound.

If the government can escape its constitutional obligations by resorting to the corporate form, constitutional guarantees are of little value indeed.³⁹ Make no mistake, the point is not a minor one. The violation of a particular substantive right by the government must be a matter of greater concern than violations of such rights by purely private entities.⁴⁰ Identifying government responsibility for violations of constitutional rights is essential to maintaining the rule of law under our Constitution.

Thus, the historic willingness of federal courts to acquiesce in the government's claim that corporations it controls are not state actors and therefore are free to disregard constitutional constraints is both disturbing and deeply counterintuitive.⁴¹ The government does not cease to be the government simply because it has assumed the form of a corporation, any more than a vampire ceases to be vampire because it has assumed the form of a bat.

A government employee's constitutional rights should therefore not be contingent on whether the employee works at the Depart-

39. See 115 S. Ct. at 973.

40. But see Chemerinsky, *supra* note 13, at 503-11, 536-42. Chemerinsky emphatically rejects this position, arguing that any violation of a right accorded constitutional protection should be actionable regardless of whether the state is in any way involved in the violation. *Id.* at 509-11, 524-27. Chemerinsky's position disregards the importance of the principle of limited government enshrined in our constitutional system, see *infra* note 109, and the special dangers associated with government-sponsored lawlessness. Like a large and dangerous river, once the government leaves its banks, it may well prove difficult, if not impossible, to restrain. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (providing a vivid example of the Court's inability or unwillingness to restrain governmental disregard of citizens' civil rights in a time of crisis); *Bailey v. Richardson*, 182 F.2d 46, 55-66 (D.C. Cir. 1950) (permitting the discharge of a government employee based on her lawful political affiliations and rejecting her claim to meaningful process prior to her discharge for disloyalty), *aff'd.* by an equally divided court, 341 U.S. 918 (1951). In consequence, particular vigilance is both appropriate and necessary regarding violations of fundamental rights that are attributable to the government. If a social consensus exists that a particular right should also be protected against private infringement, Congress and the state legislatures are free to create such protection through suitably drafted legislation.

41. Presumably, this jurisprudential trend will not survive the Supreme Court's decision in *Lebron*. This result, however, is not necessarily a certainty. See, e.g., *Alliance for Community Media v. FCC*, 56 F.3d 105, 118 n.10 (D.C. Cir.) (suggesting in dicta that government-controlled corporations — even post-*Lebron* — are not necessarily state actors), *petition for cert. filed*, 64 U.S.L.W. 3070 (U.S. July 21, 1995) (No. 95-124). Amazingly, Judge Randolph, writing for the en banc court, cited *Lebron* for the proposition that government-sponsored and controlled corporations are *not* state actors, demonstrating the adage that old habits are hard to break. 56 F.3d at 118 n.10.

ment of Housing and Urban Development or at a government-owned McDonald's restaurant. In both cases, the government is and should be subject to constitutional constraints. Cases that reach a contrary result, like the Second Circuit's decision in *Lebron*,⁴² reflect the courts' misguided attempt to permit the government to act as a market participant with the same freedom and subject to the same conditions that a privately owned and operated enterprise enjoys.⁴³

The argument, of course, is that if the government is to operate a railroad or an airline or a McDonald's restaurant effectively, in other words, at a profit, the government-sponsored enterprise cannot be constrained to observe the procedural due process rights and speech rights that apply to more traditional governmental entities.⁴⁴ Government-owned and operated enterprises, like Amtrak, can compete effectively with private sector competitors only if they are not burdened with the costs associated with observing these consti-

42. The Second Circuit held that Amtrak was not a state actor, in part, because of precedent finding that Conrail was not a state actor, but also because Amtrak did not satisfy completely any one of the three state action tests. *Lebron v. National R.R. Passenger Corp.*, 12 F.3d 388, 390-92 (2d Cir. 1993), *revd.*, 115 S. Ct. 961 (1995). *Lebron* was not, however, the only case to find that a government-created, owned, and controlled corporation did not constitute a state actor because of a statutory declaration that the corporation was private. See *Gerena v. Puerto Rico Legal Servs.*, 697 F.2d 447, 448-52 (1st Cir. 1983) (holding that PRLS is not a state actor); *Warren v. Government Natl. Mortgage Assn.*, 611 F.2d 1229, 1232-35 (8th Cir.) (holding that GNMA is not a state actor), *cert. denied*, 449 U.S. 847 (1980); *Liberty Mortgage Banking v. Federal Home Loan Mortgage Co.*, 822 F. Supp. 956, 958-60 (E.D.N.Y. 1993) (holding that FHLM is not a state actor); *Network Project v. Corporation for Pub. Broadcasting*, 4 Media L. Rep. (BNA) 2399, 2403-08 (D.D.C. 1979) (holding that the CPB and PBS are not state actors); see also *Jackson v. Culinary Sch. of Wash.*, 788 F. Supp. 1233, 1265 (D.D.C. 1992) (holding that the Student Loan Guaranty Association is not a governmental entity). Of course, the continuing validity of these cases is open to question in light of the Supreme Court's holding in *Lebron*. See *Lebron*, 115 S. Ct. at 968-69, 972-75. Because the facts in *Lebron* were quite strong — the federal government maintains both *de jure* and *de facto* control over the National Railroad Passenger Corporation — it is possible that the lower federal courts will find that government-sponsored corporations subject to less direct forms of government control are not components of the government itself and therefore are not state actors.

43. The Second Circuit's opinion in *Lebron* reflects a strong concern for allowing a government-owned and operated business to get on with the business of business. See *Lebron*, 12 F.3d at 390-92; see also Warren, 611 F.2d at 1232-35. Justice O'Connor's dissent in *Lebron* makes the point quite explicitly: "Because Amtrak's decision to reject Lebron's billboard proposal was a matter of private business judgment and not of Government coercion, I would affirm the judgment below." *Lebron*, 115 S. Ct. at 975 (O'Connor, J., dissenting).

44. For example, a worker at HUD generally enjoys the right to post-deprivation process following discharge. See *Perry v. Sindermann*, 408 U.S. 593 (1972). In a state that observes the employment-at-will doctrine, by contrast, a private employer is free to fire a worker for a good reason, a bad reason, or no reason at all. Consistent with *Lebron*, because the government cannot cease to be the government, it may not avail itself of the same freedom of conduct that private entities enjoy in their employment decisions. This will have the effect of increasing the operating costs of a government-owned and operated enterprise, causing a corresponding decline in its profits.

tutional rights. As a consequence, prior to *Lebron*, the lower federal courts often attempted to secure for such entities the same freedom of action enjoyed by their private-sector competitors.⁴⁵

The flaw in this reasoning is that the government cannot cease to be the government by virtue of incorporation.⁴⁶ If this means that government-owned and operated enterprises cannot compete effectively with their private sector counterparts, so be it; the government cannot waive the costs associated with observance of constitutional norms.⁴⁷ The alternative analysis permits the government to avoid its constitutional obligations through a procedural nicety.

Furthermore, from an economic perspective, the government can never truly act as a private entity. When the Congress or a state legislature decides to support a commercial endeavor, the business does not face the same opportunity costs or risk of failure that its private counterparts do. Federal Express, a private entity, is constrained in countless ways by market forces. For example, it cannot run deficits indefinitely; once its capital is exhausted, it will go bankrupt. Unlike Federal Express, the U.S. Postal Service, as a government-owned and operated enterprise,⁴⁸ has no real incentive to balance its books. The Postal Service does not face the specter of bankruptcy and dissolution, no matter how out of balance its expenditures and receipts.⁴⁹

Of course, when the government enters the market, it typically does so in order to achieve a particular public policy objective that might otherwise not be met by the private sector, precisely *because*

45. See *Lebron*, 12 F.3d at 390-92; *Rodriguez-Garcia v. Davila*, 904 F.2d 90, 93-99 (1st Cir. 1990); *Andrews v. Consolidated Rail Corp.*, 831 F.2d 678, 682-83 (7th Cir. 1987); *Myron v. Consolidated Rail Corp.*, 752 F.2d 50, 54-56 (2d Cir. 1985); *Anderson v. National R.R. Passenger Corp.*, 754 F.2d 202, 203-04 (7th Cir. 1984).

46. See *Lebron*, 115 S. Ct. at 972-75; see also *Arcoren v. Peters*, 829 F.2d 671, 680-81 (8th Cir. 1987) (Heaney, J., dissenting) (arguing that when the government functions as a private lender, it must "abide by the requirements of the Constitution").

47. But see *Warren*, 611 F.2d at 1232-35 (exempting GNMA from procedural due process requirements, notwithstanding its quasi-governmental status), *cert. denied*, 449 U.S. 847 (1980); *Newman v. Legal Servs. Corp.*, 628 F. Supp. 535, 541-42 (D.D.C. 1986) (exempting LSC from observing the First and Fifth Amendment rights of LSC employees); *Network Project v. Corporation for Pub. Broadcasting*, 4 Media L. Rep. (BNA) 2399, 2403-08 (D.D.C. 1979) (exempting the CPB and PBS from liability for alleged violations of the First and Fifth Amendments).

48. See 39 U.S.C. §§ 101, 201, 401 (1988).

49. See 39 U.S.C. §§ 2002-09 (1988) (conferring broad borrowing and spending authority on the U.S. Postal Service); see also U.S. CONST. art. I, § 8, cl. 7 ("Congress shall have Power . . . To establish Post Offices and post Roads."). See generally Carrie Stradley Lavargna, *Government-Sponsored Enterprises Are "Too Big to Fail": Balancing Public and Private Interests*, 44 HASTINGS L.J. 991 (1993); Don Phillips & John M. Goshko, *Amtrak Is Proving Too Thick-Skinned for Ax*, WASH. POST, Mar. 31, 1995, at A3.

a truly private enterprise cannot be operated on a for-profit basis or because a purely private for-profit entity might not operate in a fashion consistent with important governmental objectives. For example, operating a hospital in an isolated, sparsely populated rural county may not be cost-effective but is nevertheless quite necessary, at least from the point of view of the county's residents and their elected local officials.⁵⁰ Thus, there are usually sound reasons for the government's direct participation in the market.⁵¹

Far from undercutting the argument for treating government-created and controlled corporations as state actors, the public policy objectives underlying such activities support the argument. Government-sponsored corporations are simply a means of securing governmental objectives.

Government participation in the market, however, is not without costs to other market participants. When the government acts as a market participant, it shifts, at least in part, the cost of its inefficiencies onto other privately held competitors in the market.⁵²

50. Localities maintain or heavily subsidize hospitals and clinics in order to ensure that medical services are available within the community. See *Lubin v. Crittendon Hosp. Assn.*, 713 F.2d 414, 415-16 (8th Cir. 1983) (analyzing the constitutional status of a county-subsidized medical facility); *Eaton v. Board of Managers of James Walker Memorial Hosp.*, 261 F.2d 521, 522-24 (4th Cir. 1958) (describing a North Carolina law permitting local governments to build and operate medical facilities).

51. Amtrak provides yet another example. Congress established Amtrak to prevent "the threatened extinction of passenger trains in the United States." *Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 967 (1995); see also *Rail Passenger Service Act of 1970*, Pub. L. No. 91-518, § 101, 84 Stat. 1328 (explaining "that the public convenience and necessity require" the continuation of passenger rail service). In doing so, it deemed the survival of national passenger rail service a sufficiently compelling public policy objective to justify the creation and maintenance of a transportation service that the market could not or did not support. The New Panama Canal Company provides an additional example of the government underwriting an economically inefficient enterprise because of the importance of the enterprise to vital congressional policy objectives. See DAVID McCULLOUGH, *THE PATH BETWEEN THE SEAS: THE CREATION OF THE PANAMA CANAL 1870-1914*, at 329-41, 399-402 (1977); see also Act of June 28, 1902, 32 Stat. 481; GAO, *REFERENCE MANUAL OF GOVERNMENT CORPORATIONS*, S. DOC. NO. 86, 79th Cong., 1st Sess. 176-78 (1945).

52. The secondary home mortgage industry provides perhaps the best example of the government acting as a market-participant. See Charles L. Edson, *Public Assistance for Housing: Past, Present, and Future*, 3 PUB. L.F. 77 (1983); Peter E. Kaplan & Elizabeth B. Qutb, *The Regulatory Environment: An Overview*, in *THE HANDBOOK OF MORTGAGE BANKING: A GUIDE TO THE SECONDARY MORTGAGE MARKET* 183, 183 (James M. Kinney & Richard T. Garrigan eds., 1985). The Federal National Mortgage Association (Fannie Mae), 12 U.S.C. §§ 1716-23i (1994), the Federal Home Loan Mortgage Corporation (Freddie Mac), 12 U.S.C. §§ 1451-59 (1994), and the Government National Mortgage Association (Ginnie Mae), 12 U.S.C. §§ 1716-23i (1994), are the three principal entities created by the federal government to facilitate consumer access to capital for home loans. Ginnie Mae is government-owned and operated, Fannie Mae is owned by the government and private shareholders, and the nation's savings and loan associations own Freddie Mac. Alfred J. Puchala, Jr., *Securitizing Third World Debt*, 1989 COLUM. BUS. L. REV. 137, 140-41. Together, these three entities control approximately 10% of the secondary market in home mortgages. See Eric J. Murdock, Note, *The Due-On-Sale Controversy: Beneficial Effects of the Garn-St. Germain Depository Institution Act of 1982*, 1984 DUKE L.J. 121, 126. Given its

Government does not make business decisions for solely economic reasons but rather incorporates various political and social objectives into its operations.⁵³ Thus, if Amtrak is able to offer below-cost transit between Washington, D.C. and New York City, other companies offering fungible services will have to subsidize indirectly Amtrak's inefficiencies by lowering their fares to compete. Unlike Amtrak, however, private companies do not have the luxury of presenting Congress with a bill at the end of the fiscal year.⁵⁴

Government-controlled corporations also derive certain economic benefits from their association with the state.⁵⁵ The market places an economic premium on an association with the government. For example, securities offered by government-controlled corporations command a premium based on the market's assumption that the federal government would probably guarantee payment of these notes in the event that the government-controlled corporation defaults.⁵⁶ These benefits provide yet another justification for treating government-controlled corporations as state actors: significant benefits flow from their formal relationship with the government.

Had the Supreme Court decided *Lebron* differently and held that Amtrak was not a state actor by virtue of Congress's designation of the company as nongovernmental or because of the nature of the activities, the government would have escaped its constitutional responsibilities, and private companies would have borne a

size and scope, the government's involvement in the mortgage industry has profound effects on private-sector enterprises competing in the market. See Lavargna, *supra* note 49, at 992-95. Significantly, prior to *Lebron*, lower federal courts had uniformly found that these entities were not state actors. See *Warren v. Government Natl. Mortgage Assn.*, 611 F.2d 1229, 1233-35 (8th Cir.), *cert. denied*, 449 U.S. 847 (1980); *Liberty Mortgage Banking v. Federal Home Loan Mortgage Co.*, 822 F. Supp. 956, 958-60 (E.D.N.Y. 1993).

53. Amtrak might elect to provide service to sparsely populated states because politicians from those states desire such service and possess sufficient political clout to ensure that Amtrak respects this preference. Service to such states could not be justified on an economic basis — it would drive up Amtrak's operating costs without providing an offsetting increase in Amtrak's operating revenues.

54. See, e.g., *How Much More Will Amtrak Shrink*, U.S. NEWS & WORLD REP., Jan. 2, 1995, at 12. Amtrak receives almost \$1 billion in federal subsidies and runs a \$200 million annual operating deficit. *Id.*; see also Phillips & Goshko, *supra* note 49.

55. See *Arcoren v. Peters*, 829 F.2d 671, 678, 680-81 (8th Cir. 1987) (Heaney, J., dissenting) (noting that government-controlled lenders enjoy advantages not shared by private lenders); see also *Petty v. Tennessee-Missouri Bridge Comm.*, 254 F.2d 857, 859-60 (8th Cir. 1958) (holding that a government-controlled corporation constituted a component of the state for purposes of applying principles of sovereign immunity).

56. See Ann Mariano, *VA Down Payment Plan Rallies Critics of the Budget*, WASH. POST, Feb. 3, 1990, at E1, E25. See generally Carole Gould, *The Top 10 Mutual Funds for Ginnie Maes*, N.Y. TIMES, Jan. 2, 1993, at 35.

nontrivial portion of the cost.⁵⁷ By requiring government-owned and operated corporations to observe constitutional rights and liberties, the Court has ensured that legislatures will not be able to avoid paying a greater share of the true cost of implementing their policy decisions.⁵⁸ Under *Lebron*, it will be difficult, if not impossible, for a government-owned and operated entity to compete at parity with private-sector enterprises offering fungible services. This result, in turn, will force legislators to consider more carefully the costs and benefits of underwriting a commercial enterprise.⁵⁹

In sum, the first-level inquiry in any state action case arising post-*Lebron* will be whether the defendant is the government itself. If the defendant is a governmental officer, agency, or instrumentality, the state action inquiry is at an end: state action is present.⁶⁰

B. *Contacts Analysis*

If the defendant is not an officer, agency, or instrumentality of the government but rather is a private individual or entity, the plaintiff must establish that the private individual's or entity's behavior should nevertheless be attributed to the state. Although the Supreme Court has established a number of different formulations of the state action inquiry at this level, three basic tests have emerged: (1) the exclusive government function test; (2) the symbiotic relationship test; and (3) the nexus test. Each of these tests requires a reviewing court to engage in a kind of contacts analysis in

57. In a wide variety of contexts, this is precisely what happened in cases before the lower federal courts involving government-created, owned, and controlled entities. See *Lebron v. National R.R. Passenger Corp.*, 12 F.3d 388, 390-92 (2d Cir. 1993), *rev'd*, 115 S. Ct. 961 (1995); *Warren v. Government Natl. Mortgage Assn.*, 611 F.2d 1229, 1232-35 (8th Cir.), *cert. denied*, 449 U.S. 847 (1980); *Network Project v. Corporation for Pub. Broadcasting*, 4 Media L. Rep. (BNA) 2399, 2403-08 (D.D.C. 1979).

58. Note also that such a rule will discourage private companies from associating themselves with government-sponsored enterprises or projects unless the government is prepared to shoulder the costs that the company will incur incident to its new "state actor" status.

59. Although private sector enterprises will still suffer from government-subsidized competition, the costs of complying with the due process and free speech guarantees of the Constitution will force governmental corporations to charge higher prices or to obtain larger governmental subsidies. Higher prices will lead consumers to favor fungible private-sector alternatives, and higher government subsidies will force legislators to think twice before establishing a government-sponsored enterprise. This is not to say that the government should *never* sponsor essentially commercial enterprises. Rather, the government should do so advisedly and only after assessing the full costs associated with a particular endeavor, including the externalities.

60. This leaves open the question of *how* one goes about deciding that a particular entity "is" the government itself. As will be discussed more fully, *infra*, the Supreme Court engaged in an open-ended analysis of Amtrak's "nature and history" in order to determine whether it constitutes a component of the federal government. *Lebron*, 115 S. Ct. at 967; see also *infra* notes 86-98 and accompanying text.

which the court examines both the nature of the defendant and the relationship between the defendant's behavior and the government.

1. *Challenges to an Existing Rule of Law*

At the outset, it is important to note that contacts analysis is necessary only if the validity of a state or federal law is not directly at issue; if a party to a suit is challenging the constitutionality of a state or federal law, state action is present, even if a private party, rather than the state, is attempting to enforce the particular law. Thus, in *New York Times v. Sullivan*,⁶¹ the Supreme Court found that the state action requirement was satisfied in a suit between two private parties:

Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.⁶²

The Supreme Court has repeatedly followed this holding in the thirty years since *New York Times* was decided.⁶³

Perhaps the best example of this approach is *Shelley v. Kraemer*,⁶⁴ the (in)famous pre-*New York Times* case in which the Supreme Court declared the judicial enforcement of racially restrictive covenants to be unlawful state action. In *Shelley*, the Supreme Court found that "the particular patterns of discrimination and the areas in which the restrictions are to operate, are determined, in the first instance, by the terms of agreements among private individuals."⁶⁵ The Court went on to explain, however, that

the action of state courts in enforcing a substantive common law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process.⁶⁶

61. 376 U.S. 254 (1964).

62. 376 U.S. at 265 (citation omitted).

63. See, e.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663, 668 (1991); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 n.51 (1982); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 90 n.1 (1980) (Marshall, J., concurring).

64. 334 U.S. 1 (1948).

65. 334 U.S. at 13.

66. 334 U.S. at 17.

The Court held that the enforcement of a state's common law rule constituted state action; the common law rule at issue was the law of property permitting landowners to establish restrictive covenants running with the land.⁶⁷ The Court found that the state's common laws in question facilitated and perhaps encouraged private discriminatory behavior and were therefore unconstitutional.⁶⁸ "[I]t would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment."⁶⁹

Shelley has proven controversial because it could be read to mean that any court involvement in an essentially private dispute satisfies the state action requirement.⁷⁰ Under this interpretation of *Shelley*, court involvement will transform private contract or property disputes into matters subject to the constitutional restrictions applicable to the government's behavior.⁷¹ *Shelley*, however, need not be construed so broadly. When one considers the fact that the common law of property generally disfavors the enforcement of restrictive covenants running with the land,⁷² the opinion is much eas-

67. 334 U.S. at 18.

68. 334 U.S. at 19-23.

69. 334 U.S. at 22.

70. Notwithstanding the academy's strong and consistent criticism of the case, *Shelley* has proven to be an enduring precedent. Indeed, the Supreme Court cited *Shelley* as good authority only four years ago in a major state action case involving the constitutional status of peremptory strikes in civil trials. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622 (1991).

71. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 27-29 (1959).

72. "Beginning with an early case, the English courts expressed a policy against the running at law of the burden of a covenant between owners in fee." 2 AMERICAN LAW OF PROPERTY § 9.14 (A.J. Casner ed., 1952). This reflects a social policy against restrictions encumbering the productive use of land. See RESTATEMENT (FIRST) OF PROPERTY, div. V, pt. III, intr. note, at 3156-60 (1944); see also *id.* § 537 cmt. a ("Unless a burden has some compensating advantage which prevents it from being on the whole a deterrent to land use and development, the running of the promise by which it was created is not permitted."); see also Louis Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 497 n.50 (1962) (describing how the common law did not favor "covenants restraining alienation indefinitely or for long periods" and suggesting that racially restrictive covenants fell within this prohibition). Thus, courts will refuse to enforce restrictive covenants that decrease the social utility of a parcel of land without conferring an offsetting benefit. See, e.g., *Price v. Anderson*, 56 A.2d 215, 219-21 (Pa. 1948) (refusing to enforce a restrictive covenant because such action would unduly impede development). In consequence, one can think of *Shelley* as a case in which the state courts were required to decide whether a racially restrictive covenant conferred more social benefit than cost on the use of property; here is where the Fourteenth Amendment enters the scene. Although racial integration of a neighborhood in 1948 might have caused property values to fall, avoiding a potential decrease in property values that would be directly attributable to racial prejudice is not the kind of social benefit that the state may secure through a discretionary application of its law of property. Consider and contrast the law of trespass, which enforces the property holder's right to deny access to real property generally and without regard to the social costs and benefits associated with such behavior.

ier to understand. Rather than finding state action because of a court's enforcement of a private contract, the state's policy of selectively enforcing restrictive covenants reflected a decision to facilitate some kinds of private behavior but not others.⁷³ If only a handful of restrictive covenants would be honored, it is odd indeed that the state would elect to make a racially restrictive covenant one of the chosen few.⁷⁴

In sum, a contacts analysis is necessary only if the underlying state or federal statutory or common law is not constitutionally infirm.⁷⁵

2. The Contacts Analysis Tests

The Supreme Court's contacts analysis state action tests are somewhat deceptive, insofar as their language holds out the promise of precise, predictable results. Indeed, the Supreme Court has sometimes acted as though the application of these tests were little

73. *Shelley* could also be characterized as a "nexus" case, insofar as it involves a challenge to private behavior taken at the behest of the state. See *infra* notes 93-98 and accompanying text.

74. See *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948). A hypothetical demonstrates the reasonableness of this approach. Under the common law, certain kinds of commercial enterprises had an obligation to provide services upon the tender of a tariffed fee. Thus, innkeepers and ferrymen were legally obliged to render service without regard to the identity of the person seeking the service, with certain narrow exceptions. See 3 WILLIAM BLACKSTONE, COMMENTARIES 166 (11th ed. 1791); see also *Bell v. Maryland*, 378 U.S. 226, 296-300 (1964) (Goldberg, J., concurring) (arguing that the common law rule protected citizens' access to public accommodation); *Uston v. Resorts Intl. Hotel, Inc.*, 445 A.2d 370, 373-75 (N.J. 1982) (holding the common law right to exclude, with respect to property owners who open their premises to the public, is limited by the common law right to reasonable access to public places). See generally 1873 Miss. Laws, ch. 63, § 1, at 67 (codifying the common law rule requiring common carriers and innkeepers to provide service to all comers). But see *Hall v. DeCuir*, 95 U.S. 485 (1877) (invalidating a Louisiana statute prohibiting common carriers from segregating on the basis of race on Commerce Clause grounds).

Suppose that the government permitted such enterprises to refuse service on the basis of race, gender, or sexual orientation but on *no other basis*? Although the government might claim that its law merely accommodates private decisionmaking, the state's decision to create a new exception from the general, common law rule to accommodate private acts of discrimination does not merely facilitate but encourages such behavior. See, e.g., *Peterson v. Greenville*, 373 U.S. 244, 246-48 (1962); *Alliance for Community Media v. FCC*, 10 F.3d 812, 818-22 (D.C. Cir. 1993), *rev'd in part*, 56 F.3d 105 (D.C. Cir.), *petition for cert. filed*, 64 U.S.L.W. 3070 (U.S. July 21, 1995) (No. 95-124). See generally *Henkin, supra* note 72, at 483 n.20 (suggesting that the state should be held responsible for acts of discrimination that occur when the state legalizes previously prohibited private discrimination).

75. Thus, a state statute that permitted garnishment of wages without process would be subject to challenge on due process grounds if invoked by a secured creditor, despite the fact that it is not a governmental entity. See, e.g., *Pacific Mut. Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (considering on the merits a due process challenge to the award of punitive damages in a civil case between two private parties). See generally *Wechsler, supra* note 71, at 27 (noting that statutory deprivations of constitutional rights constitute state action).

different from the application of the Pythagorean Theorem.⁷⁶ The lack of precision in the tests, coupled with the Court's treatment of the tests as sacred writ, have understandably exasperated some in the legal academy; as Professor Black has noted, "there were and are no clear and concrete tests of state action; the concept is notoriously, scandalously lacking in these; it is itself nothing but a catchphrase."⁷⁷ Although the Court's state action tests provide more guidance than a mere "catch-phrase," as will be demonstrated below, they are not the stuff of Euclidean geometry.

a. Exclusive State Function Test. If a particular task historically has been reserved *exclusively* to the state, a private party that executes the task on behalf of the state will be deemed a state actor. In *Flagg Brothers, Inc. v. Brooks*,⁷⁸ the Supreme Court noted in dicta that "there are a number of state and municipal functions . . . which have been administered with a greater degree of exclusivity by States and municipalities Among these are such functions as education, fire and police protection, and tax collection."⁷⁹

Subsequent Supreme Court decisions have demonstrated that then-Justice Rehnquist's dicta in *Flagg Brothers* was a bit overbroad; although education and fire protection are quintessential government functions, the provision of these services is apparently not sufficiently "exclusive" to the government to support a finding of state action when education or fire protection services are delegated to private entities.⁸⁰ "That a private entity performs a function which serves the public does not make its acts state action."⁸¹

Without a doubt, the exclusivity requirement severely inhibits the utility of the exclusive government function test. Beyond holding elections,⁸² empaneling juries,⁸³ and operating jails and pris-

76. See, e.g., *Rendell-Baker v. Kohn*, 457 U.S. 830, 839-45 (1982) (applying the three state action tests mechanically and with scant attention to nuance or detail). Alas, the reality has not lived up to the promise. As a practical matter, the state action tests have not made state action determinations any easier although they have permitted the lower federal courts to treat the state action inquiry as a simple one.

77. Black, *supra* note 13, at 88.

78. 436 U.S. 149 (1978).

79. 436 U.S. at 163.

80. See *Rendell-Baker*, 457 U.S. at 842-43 (finding no state action by a federally funded school); *Yeager v. City of McGregor*, 980 F.2d 337, 340-41 (5th Cir. 1993) (finding no state action by a nominally private local fire department).

81. *Rendell-Baker*, 457 U.S. at 842.

82. See *Terry v. Adams*, 345 U.S. 461, 468-70 (1953).

83. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620-23 (1991).

ons,⁸⁴ there are few, if any, government functions that are the "exclusive prerogative of the State."⁸⁵ In consequence, the exclusive state function test as currently interpreted by the Court is something of an empty set.

b. The Symbiotic Relationship Test. Although the continuing validity of this test is open to doubt,⁸⁶ as recently as the October, 1990 Term, the Supreme Court endorsed the symbiotic relationship test as a means of demonstrating the presence of state action.⁸⁷ "[I]n determining whether a particular action or course of conduct is governmental in character, it is relevant to examine . . . the extent to which the actor relies on governmental assistance and benefits"⁸⁸

*Burton v. Wilmington Parking Authority*⁸⁹ both defines and provides the best illustration of the symbiotic relationship test. In *Burton*, the government leased space to a diner in a government-owned and operated parking garage.⁹⁰ The diner refused to serve blacks. The Court held that the diner was a state actor because "[t]he State has so far insinuated itself into a position of interdependence with [the diner] that it must be recognized as a joint participant in the challenged activity."⁹¹ The symbiotic relationship test focuses on the interrelationship between a private individual or entity and the government, giving particular attention to any benefits the government receives from the arrangement.⁹²

84. See *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 703 (11th Cir. 1985). But see James Hirsch, *What's New in Private Prisons*, N.Y. TIMES, Apr. 26, 1987, § 3, at 17 (discussing the recent trend toward privatization of prisons).

85. *Jackson v. Consolidated Edison Co.*, 419 U.S. 345, 353 (1974); see also *Rendell-Baker*, 457 U.S. at 830; *Musso v. Suriano*, 586 F.2d 59, 62 (7th Cir. 1978). Presumably, neither a state nor the federal government could escape constitutional responsibility for the treatment of prisoners or mental patients by simply delegating responsibility for these affairs to a private company. See *West v. Atkins*, 487 U.S. 42, 53-58 (1988); *Rendell-Baker*, 457 U.S. at 842; see also Charles W. Thomas & Linda S. Calvert Hanson, *The Implications of 42 U.S.C. § 1983 for the Privatization of Prisons*, 16 FLA. ST. U. L. REV. 933, 941-46 (1989) (arguing that the delegation of core government functions does not immunize the state from liability based upon the delegatee's performance of the task).

86. See, e.g., *Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 979-80 (1995) (O'Connor, J., dissenting) (questioning the precedential value of *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961)).

87. See *Edmonson*, 500 U.S. at 621.

88. 500 U.S. at 621.

89. 365 U.S. 715 (1961).

90. See 365 U.S. at 716-17.

91. 365 U.S. at 725.

92. See 365 U.S. at 722-25; see also *Franz v. United States*, 707 F.2d 582, 590-94 (D.C. Cir.), modified on other grounds, 712 F.2d (D.C. Cir. 1983).

c. *The Nexus or Compulsion Test.* The Supreme Court has held that a private party is a state actor if the private party's actions are encouraged or substantially facilitated by the government.⁹³ When deciding whether the government is ultimately responsible for private discrimination, a court must "assess the potential impact of official action [to] determin[e] whether the State has significantly involved itself with invidious discriminations."⁹⁴ If a state policy "significantly encourage[s] and involve[s] the State in private discriminations," a private party's discriminatory behavior may be attributed to the State's policy, thereby subjecting the behavior to constitutional scrutiny.⁹⁵

Thus, if the state either requires or invites private parties to engage in behavior that the state could not itself undertake, the private party's actions may constitute state action.⁹⁶ The potential utility of this test is perhaps greatest in cases raising procedural due process claims.⁹⁷ This is so because a private employer has no obligation to provide such process,⁹⁸ and there is no underlying state law mandating or even encouraging specific procedural rights to

93. See *Reitman v. Mulkey*, 387 U.S. 369 (1967).

94. 387 U.S. at 380.

95. 387 U.S. at 381; see also *Alliance for Community Media v. FCC*, 10 F.3d 812, 818-21 (D.C. Cir. 1993), *rev'd in part*, 56 F.3d 105 (D.C. Cir.), *petition for cert. filed*, 64 U.S.L.W. 3070 (U.S. July 21, 1995) (No. 95-124); *Franz*, 707 F.2d at 592 n.38.

96. See *Reitman*, 387 U.S. at 380-81; see also *Alliance for Community Media*, 10 F.3d at 817-21 (finding state action where the government encouraged private actors to ban indecent material on public access television channels). In many cases, the nexus test may serve as little more than a complicated means of describing what is essentially a direct challenge to a state or federal statute; the private party's behavior has constitutional significance only by virtue of some positive law. It is this positive law and not the private party's behavior that justifies the application of constitutional norms. See, e.g., *Alliance for Community Media*, 10 F.3d at 817-21. *Alliance for Community Media* could arguably be characterized as a direct challenge to the validity of a federal statute that invites cable programmers to ban "indecent" programming. Indeed, Judge Wald conceded as much in her dissent from the en banc court's decision reversing certain aspects of the panel's opinion. See *Alliance for Community Media*, 56 F.3d at 130-34 (Wald, J., dissenting). Conceptually, this approach may make more sense than the alternative, which requires complicated mental gymnastics. In cases raising procedural due process claims, however, the government's ability to oversee or supervise a private entity's personnel or membership decisions could obligate the party to observe procedural due process by virtue of the government's oversight activities. See, e.g., *Coleman v. Wagner College*, 429 F.2d 1120, 1123-25 (2d Cir. 1970); *Isaacs v. Board of Trustees of Temple Univ.*, 385 F. Supp. 473, 487-90, 495 (E.D. Pa. 1974). In such cases, the nexus test functions independently because no state or federal law is at issue. The question is more basic: Is the private entity essentially functioning as an agent of the state, thereby executing a state program or policy?

97. See, e.g., *Coleman*, 429 F.2d at 1123-25.

98. Government employees generally enjoy a constitutionally protected interest in not being denied continued employment because of their exercise of constitutional rights. See *Perry v. Sindermann*, 408 U.S. 593 (1972); see also *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-40 (1985) (finding a state law property right in continued employment). But see *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 573-77 (1972) (holding that a professor appointed to a one-year term pursuant to a contract did not enjoy a legitimate

govern a private employer's particular employment practices. Accordingly, an employee working for a private employer may claim the benefit of pre-termination process as a matter of right *only* if the government can somehow be deemed responsible for the private employer's termination decision. The nexus test often provides the best means of establishing such responsibility.

C. *Putting It All Together*

The state action doctrine as currently constructed requires courts to engage in a three-step process. First, the court must determine whether the defendant is an agent of the government.⁹⁹ If not, the Court must then determine whether the claim effectively raises a challenge to a positive state or federal law.¹⁰⁰ Finally, if the case does not challenge the validity of a state or federal law but rather the enforcement of a private preference through an admittedly valid state or federal law, the court must engage in contacts analysis.¹⁰¹

II. THE LIMITATIONS OF THE STATE ACTION DOCTRINE

A great deal of scholarly energy has been devoted to pointing out the shortcomings of the state action doctrine,¹⁰² and it would be both impossible and unproductive to catalog all of these efforts. A

expectation of continued employment and therefore did not enjoy a protected property interest in his job).

99. See *supra* section I.A.; see also *Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 964 (1995).

100. See *supra* section I.B.1; see also *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964) (holding that a challenge to a jury verdict based on Alabama's common law of libel implicated a policy of the state, satisfying the state action requirement); William W. Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action*, 1965 DUKE L.J. 219, 229-30 (describing and criticizing the Court's brief, almost casual analysis in the *New York Times* case).

101. See *supra* section I.B.2. For example, if David Duke relies upon Georgia's common law of trespass to enforce his decision not to permit minorities to walk across his property, the underlying law — the common law of trespass — is undeniably constitutional. What is at issue is whether Mr. Duke could rely upon the local police to eject the trespassers and/or recover money damages from the minorities who trod upon his property without his consent, if the reason he wishes to exclude them from his property rests on racial prejudice. Cf. Wechsler, *supra* note 71, at 29-30 ("May not the state employ its law to vindicate the privacy of property against a trespasser, regardless of the grounds of his exclusion, or does it embrace the owner's reasons for excluding if it buttresses his power by the law?"). In such circumstances, Mr. Duke's preference must be attributable to the state for the minority defendants to raise the Equal Protection Clause as a defense in a criminal prosecution or a civil lawsuit.

102. See, e.g., 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) (collecting sources); see also Black, *supra* note 13, at 97-109; Chemerinsky, *supra* note 13, at 503-07; Van Alstyne, *supra* note 100, at 245-47; William W. Van Alstyne & Kenneth L. Karst, *State Action*, 14 STAN. L. REV. 3, 3-5, 57-58 (1961); Wechsler, *supra* note 71, at 29-34.

brief overview of the scholarship in this area, however, will illustrate the principal objections to the doctrine as it presently exists.

Legal scholarship about the state action doctrine has been a feast or famine affair. In the not-so-distant past, the state action problem was a prime focus of scholarly efforts as the legal academy tried to understand and make sense of the Supreme Court's analytical gyrations; there was a plethora of writings about state action in the 1960s. Scholarly interest in the topic has waned since then, however, not because the problem has gone away, but because many academics lost interest in trying to bring order to the morass of tests, holdings, and approaches that have emanated from the Supreme Court.¹⁰³

Oddly, however, contemporary scholarship about the state action doctrine has been as extreme as it is rare. Some of the most recent scholarly proposals either advocate abandoning the state action doctrine completely, in favor of some form of rights balancing¹⁰⁴ or suggest state action tests that would effectively transform almost all private behavior into state action.¹⁰⁵ On the other hand, the Supreme Court has not indicated any significant interest in substantially revising its state action jurisprudence. The virtuous mean between the two extremes¹⁰⁶ lies neither in abandoning the quest for consistent and intuitively rational state action determinations nor in slavishly hewing to the existing precedents without regard to the absurd results that flow from their formalistic application.¹⁰⁷

103. See Snyder, *supra* note 102, at 1053-57. Indeed, only a handful of articles about the state action doctrine have appeared in the 1990s. This may well reflect the creation of civil law analogs to the Equal Protection Clause, for example, Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-66 (codified as amended principally at 42 U.S.C. §§ 2000e to 2000e-17 (1994)); and the Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (1994)). Because most employees enjoy statutory protection from discrimination on the basis of race, sex, and religion, there is correspondingly less of a need to puzzle over whether a particular employer's actions reasonably could be attributed to the government.

104. See Chemerinsky, *supra* note 13, at 503-07, 524-27, 535-57. In fairness, over the course of the past thirty years, a number of commentators have advocated the abolition of the state action requirement. See, e.g., Robert J. Glennon, Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 226-27, 254-55, 259, 261.

105. See Snyder, *supra* note 102, at 1056-57, 1063-65, 1075-76, 1086; Jerre S. Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347, 367 (1963).

106. See THE NICOMACHEAN ETHICS OF ARISTOTLE, bk. II, ch. VI-10 (R.W. Browne trans., London, George Bell & Sons 1880) ("Virtue . . . is a mean state between two vices, one in excess, the other in defect; and it is so, moreover, because of the vices one division falls short of, and the other exceeds what is right, both in passions and actions, whilst virtue discovers the mean and chooses it.").

107. See, e.g., *Alliance for Community Media v. FCC*, 56 F.3d 105, 113 (D.C. Cir.) (holding that cable television companies are not state actors for purposes of applying the First Amendment even though statutorily authorized to restrict the content of programming), *peti-*

Scholarly criticism of the state action doctrine reflects a common belief, strongly held by some,¹⁰⁸ that the current state action doctrine unfairly insulates unlawful behavior from judicial review.¹⁰⁹ A second and perhaps equally compelling criticism is the

tion for cert. filed, 64 U.S.L.W. 3070 (U.S. July 21, 1995) (No. 95-124); *Lebron v. National R.R. Passenger Corp.*, 12 F.3d 388 (2d Cir. 1993) (holding that Amtrak is not a state actor for purposes of applying the First Amendment), *rev'd*, 115 S. Ct. 961 (1995); *Yeager v. City of McGregor*, 980 F.2d 337 (5th Cir. 1993) (holding that a state-supported volunteer fire company was not a state actor for purposes of applying the First Amendment).

108. See Chemerinsky, *supra* note 13, at 550-57.

109. Critics of the state action doctrine argue that it does not significantly protect individual autonomy values because the person discriminated against has an interest in the "constitutional value" of equal treatment. See Chemerinsky, *supra* note 13, at 509-11, 536-42; Kevin Cole, *Federal and State "State Action": The Undercritical Embrace of a Hypercriticized Doctrine*, 24 GA. L. REV. 327, 354-55 (1990). This argument largely ignores the fundamental nature of the relationship between the governed and the government. In the United States, government is the agent of the citizenry and not vice-versa. See, e.g., Amar, *supra* note 24, at 1205-12. To attribute private behavior to the government on a theory that the government failed to prohibit it puts the cart before the horse; in our private relations, we have a right to expect — if not demand — a sphere of autonomy. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (upholding the right of marital privacy); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (upholding the right to "direct the upbringing and education of [one's] children"); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (upholding the right to teach the German language). To say that a failure to regulate a particular area of private behavior is government action is to say that the government is the principal and the citizenry its agent. Cf. JOHN LOCKE, *Second Treatise, in TWO TREATISES OF GOVERNMENT*, ch. VII, §§ 87-89, at 366-69 (Peter Laslett ed., 1965) (explaining that individuals, existing prior to the state, come together to create a government that will exercise only those powers that the individuals cede to it; Locke places the individual prior to the state and plainly makes the state the agent of those who create it). Thus, government's failure to prohibit all forms of private discrimination and its willingness to create and enforce neutral laws protecting life, liberty, and property, such as the law of trespass, or its inability to adopt and enforce speech codes, see *American Booksellers' Assn. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986), does no violence to "constitutional values," although the private behavior at issue may well be unfair, unjust, or completely immoral. Only when the state encourages or endorses unconstitutional practices is a constitutional interest present because the individual is prior to the state.

Direct rights balancing, as Chemerinsky advocates, presupposes the primacy of the state over the individual. This is a proposition that I reject and a proposition that the Supreme Court has specifically declined to endorse. See, e.g., *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 194-97 (1989) (holding that the Due Process Clause "confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual"); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (invalidating on First and Fourteenth Amendment grounds the conviction of a Ku Klux Klan member for advocating violence as a means of effecting political change). Government may — and sometimes must — remain "neutral" in disputes over the fairness or justice of personal decisions. For example, a voter who refuses to support candidates for public office who are not members of his race is discriminating on the basis of race and could well be responsible for a minority candidate's defeat in an election for public office. Cf. Kenneth J. Cooper, *House Task Force Refuses to Dismiss Election Case*, WASH. POST, Mar. 24, 1995, at A1 (reporting on an election for a House seat decided by only twenty-one votes). The state provided the ballot and did not prohibit the voter from exercising his vote in a racially discriminatory fashion. I would argue that the minority candidate has not suffered a deprivation of a constitutional right that must be balanced against the voter's interest in exercising his ballot for such reasons as he deems fit and proper. This is so because voting is an area in which the state *must* remain neutral, enforcing the preferences of individual voters without regard to whether the state itself could hold those preferences. See Henkin, *supra* note 72, at 490-91 & n.39, 498 ("Since the state cannot prevent the discrimination, it is not responsible for it.").

apparent lack of consistency in the application of the doctrine.¹¹⁰

By examining the shortcomings of the state action doctrine through the prism of concrete cases, one can both better identify the particular shortcomings that have led so many to question the utility of the state action doctrine and propose a revised framework for making state action determinations that might overcome or lessen the effect of these shortcomings.

A. *Riding With the Lord: The Lebron Redux*

Imagine the consternation of many, if not most, of the passengers on an Amtrak metroliner train if the engineer, before pulling out of Union Station in Washington, D.C., announced over the intercom, "Let's all bow our heads before we begin our trip. . . . You should know that Jesus will be our co-pilot!" Such a blatantly sectarian message in the context of secular travel aboard a government-subsidized train would be jarring, to say the least. Yet, if Amtrak is not a state actor, it is free of the constraints of the First Amendment, including the Establishment Clause, and can take positions on matters of faith in its place of business, just like any cab driver or hamburger stand owner.¹¹¹

Under the Court's traditional contacts analysis tests, Amtrak probably would not qualify as a state actor.¹¹² A mechanical application of the exclusive government function, symbiotic relationship, and nexus tests leads, perhaps inexorably, to the conclusion that Amtrak is not a state actor. In *Lebron*, the Supreme Court deftly avoided the application of its contacts analysis state action tests simply by recasting the question presented for review. Had the Court applied these tests, however, the Second Circuit's decision would probably have been affirmed.¹¹³

Although there has been a long tradition of government support

110. See, e.g., Glennon & Nowak, *supra* note 104, at 221-22; VAN ALSTYNE, *supra* note 11, at 12-15. Compare *Janusaitis v. Middlebury Volunteer Fire Dept.*, 607 F.2d 17, 21-25 (2d Cir. 1979) with *Yeager*, 980 F.2d at 339-43.

111. See, e.g., Dan McGraw, *The Christian Capitalists*, U.S. NEWS & WORLD REP., Mar. 13, 1995, at 53 (reporting on the growth of private businesses with religious agendas).

112. See *Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 979-81 (1995) (O'Connor, J., dissenting); *Lebron v. National R.R. Passenger Corp.*, 12 F.3d 388, 390-92 (2d Cir. 1993), *revd.*, 115 S. Ct. 961 (1995).

113. Justice O'Connor's dissent in *Lebron* demonstrates this point quite effectively. 115 S. Ct. at 979-81. Of course, the Supreme Court did find that Amtrak was a state actor, based on its conclusion that Amtrak is part of the federal government. 115 S. Ct. at 972-75. That the Court found it necessary to abandon its traditional state action tests in favor of a more intuitive taxonomy is quite telling.

of passenger and cargo rail service,¹¹⁴ passenger rail service in the United States cannot be fairly characterized as an "exclusive government function."¹¹⁵ Unlike police, fire, and sanitation services,¹¹⁶ the government has not historically shouldered primary responsibility for the provision of railroad transportation.

Turning to the nexus test, one finds that Amtrak receives federal funds and is subject to federal statutory and regulatory obligations. The level of funding and the degree of regulation, however, are probably not sufficient to satisfy *Jackson v. Metropolitan Edison*.¹¹⁷ The regulations are far from pervasive, and the federal government's funding constitutes but a portion of Amtrak's total receipts.¹¹⁸

The "symbiotic relationship" test supports the strongest argument one can make for treating Amtrak as a state actor under the Court's pre-*Lebron* state action jurisprudence.¹¹⁹ The federal government's relationship to Amtrak could be characterized as interdependent, with corporate officials regularly answering to federal officials, including the Congress, about their business decisions.¹²⁰ At least arguably, the federal government has "so far insinuated

114. The federal and state governments provided both direct and indirect subsidies to railroads to facilitate the building of a national rail system. See CARTER GOODRICH, GOVERNMENT PROMOTION OF AMERICAN CANALS AND RAILROADS 1800-1890 (1960); WALTER LIGHT, WORKING FOR THE RAILROAD 8-9 (1983); LLOYD J. MERCER, RAILROADS AND LAND GRANT POLICY: A STUDY IN GOVERNMENT INTERVENTION (1982); see also Paul Dempsey, *Rate Regulation and Antitrust Immunity in Transportation: The Genesis and Evolution of an Endangered Species*, 32 AM. U. L. REV. 335, 337 (1983) ("The growth, development, and expansion of the rail system into the midwest and western United States in the nineteenth century were for the most part attributable to governments and individual investors."); cf. JAMES D. COX ET AL., SECURITIES REGULATION 1333 n.1 (1991) ("[M]ost of the capital used to fund last century's railroad expansion in the United States came from bonds floated in Europe . . ."). Ownership and operation of the railroads, however, has almost always been vested in nongovernmental entities. The same tradition does not hold true in other parts of the world, including Western Europe and Asia. See Dempsey, *supra*, at 336.

115. Cf. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 161-63 (1978).

116. See 436 U.S. at 163.

117. 419 U.S. 345 (1974). In this case, the Supreme Court held that a privately owned and operated utility company was not a state actor despite its monopoly status and the heavy governmental regulation of most utility companies. 419 U.S. at 349-51.

118. See 49 C.F.R. §§ 700.1-701.8 (1994) (setting forth the Department of Transportation's regulations pertaining specifically to Amtrak, which comprises only 9 pages, most of which addresses how Amtrak must process FOIA requests); *Prepared Statement of Thomas Downs, Chairman and President of Amtrak, Before the House Committee on Transportation and Infrastructure, Subcommittee on Railroads*, Federal News Service, Feb. 7, 1995, available in LEXIS, Legis Library, CNGTST File; GAO, INTERCITY PASSENGER RAIL — FINANCIAL AND OPERATING CONDITIONS THREATEN AMTRAK'S LONG-TERM VIABILITY, Feb. 7, 1995, available in LEXIS, Legis Library, GAORPT File.

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

120. See, e.g., Don Phillips, *Hill Auditors Say Amtrak Needs Infusion of Capital*, WASH. POST, Feb. 8, 1995, at C1 (reporting on the congressional oversight of Amtrak's short- and long-term business plans).

itself into a position of interdependence with" Amtrak that it really is "a joint participant" in the business venture.¹²¹

Both Justice O'Connor — dissenting in *Lebron* — and the Second Circuit, however, found that Amtrak and the federal government were *not* in a symbiotic relationship.¹²² Justice O'Connor reasoned that because a member of Amtrak's management was directly responsible for the alleged deprivation of Lebron's First Amendment rights, the act could not be attributed to the government.¹²³ The Second Circuit, on the other hand, simply deferred to Congress's designation of Amtrak as a "nongovernmental" entity.¹²⁴ Regardless of the precise reasoning employed, under the Court's pre-*Lebron* state action jurisprudence, it is possible — and perhaps probable — for an entity such as Amtrak to escape responsibility for observing the constitutional rights of its employees and customers.

The point is not a minor one: the *Lebron* decision does not apply to cases in which the defendant is not arguably a component of the government itself. In cases involving more than nominally private defendants, lower federal courts must continue to apply the three traditional contacts analysis state action tests.

Nor was the Second Circuit's treatment and Justice O'Connor's proposed treatment of Amtrak anomalous. The Supreme Court's pre-*Lebron* state action jurisprudence, coupled with the lower federal courts' eagerness to permit the government to shed the mantle of sovereignty by legislative fiat, led to a raft of rather unconvincing opinions that rely entirely on formalistic analyses to avoid holding government-sponsored and controlled corporations accountable for observing constitutional norms. Indeed, the federal courts have demonstrated an amazing consistency in holding that government-controlled corporations are not state actors under the traditional state action tests. Time and again, federally chartered and controlled corporate entities have escaped constitutional liabilities on the theory that the sovereign is free to act as a private entity and need only declare an entity "nongovernmental" to achieve this objective, notwithstanding the fundamentally public character of the corporation's existence.

121. *Burton*, 365 U.S. at 725.

122. See *Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 979-80 (1995) (O'Connor, J., dissenting); *Lebron v. National R.R. Passenger Corp.*, 12 F.3d 388, 390-92 (2d Cir. 1993).

123. See *Lebron*, 115 S. Ct. at 980.

124. See *Lebron*, 12 F.3d at 390-91.

In addition to Amtrak, federal courts have found the Corporation for Public Broadcasting (CPB),¹²⁵ the Legal Services Corporation (LSC),¹²⁶ and the Government National Mortgage Corporation (GNMA)¹²⁷ to be "private" entities for purposes of imposing constitutional obligations. The CPB, however, to take one example, exists solely to administer federally funded grants to support educational television stations and programming, and is functionally little different from the National Endowment for the Arts or the National Endowment for the Humanities. To take a second example, one cannot seriously question the public character of the LSC.¹²⁸

Plainly, Amtrak, the CPB, the LSC, the GNMA, and similar entities represent constituent components of the federal government, notwithstanding Congress's declaration to the contrary. Indeed, *Lebron* casts serious doubt on the continuing validity of decisions that reach a contrary result. The majority's decision should effectively preclude governmental entities from shirking their constitutional duties by delegating the implementation of public functions to ostensibly "private" government-controlled entities.¹²⁹

As noted above, however, *Lebron* does not affect the ability of the government to implement policies through truly private entities. *Lebron*'s formal reach is limited to entities in which the government maintains both a substantial equity position and de jure control.¹³⁰ Accordingly, although *Lebron* represents a major shift in the Court's state action jurisprudence, the traditional state action tests remain valid and will continue to govern state action analyses in

125. See *Network Project v. Corporation for Pub. Broadcasting*, 4 Media L. Rep. (BNA) 2399, 2403-08 (D.D.C. 1979).

126. See *Newman v. Legal Servs. Corp.*, 628 F. Supp. 535, 541-42 (D.D.C. 1986). *Newman* has been effectively overruled. See *Texas Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 699 (D.C. Cir. 1991).

127. See *Warren v. Government Natl. Mortgage Assn.*, 611 F.2d 1229, 1232-35 (8th Cir.), cert. denied, 449 U.S. 847 (1980); see also *Jackson v. Culinary Sch. of Wash.*, 788 F. Supp. 1233, 1265 (D.D.C. 1992) (holding that the Federal Student Loan Guaranty Association — "Sallie Mae" — is "not a governmental entity" because Congress designated the corporation "private").

128. Of course, the act of representing a defendant in a criminal proceeding does not constitute state action. See *Polk County v. Dodson*, 454 U.S. 312, 317-19 (1981).

129. See *Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 972-75 (1995). But see *Alliance for Community Media v. FCC*, 56 F.3d 105, 118 n.10 (D.C. Cir.), petition for cert. filed, 64 U.S.L.W. 3070 (U.S. July 21, 1995) (No. 95-124).

130. See *Lebron*, 115 S. Ct. at 973-75. The *Lebron* majority did not specify the precise degree of control necessary for its holding to apply. Thus, it is not clear whether mere de facto control, as opposed to de jure control, would be sufficient to invoke successfully the *Lebron* rule.

cases in which the defendant is more than nominally private.¹³¹ Because the traditional state action tests, as applied, have failed to ferret out routinely and consistently actions "fairly attributable to the government," reform of the state action doctrine remains something of a work in progress.

B. *Catching Local Fire Companies in a Dysfunctional Net*

The current state action doctrine can be conceptualized as a fishing net with very wide holes, at least insofar as it applies to the behavior of more-than-nominally private entities.¹³² Although the tests are capable of catching the biggest fish, many small- and medium-sized fish routinely slip through unhindered. Given the government's relationship with Amtrak, it is difficult to fathom a better example of a "private" entity that should be deemed a state actor. Yet, for over two decades, every lower federal court to consider the question concluded that Amtrak was *not* a state actor.¹³³

Lebron now undermines the flawed reasoning that led courts to declare entities like Amtrak, the CPB, and the LSC to be free of constitutional obligations. Other similarly troubling results, however, are unaffected by the *Lebron* decision. The traditional state action tests — which the Supreme Court majority avoided applying in *Lebron* — are alive and well and, because they are often applied formalistically, will continue to work serious mischief.

Federal courts' treatment of the constitutional status of volunteer fire companies provides an excellent example of the shortcomings of the current state action doctrine because fire companies execute a quintessential "public" service that historically has not been an "exclusive" state function, they usually labor under state laws and some regulations, and they enjoy public financial support.

131. See, e.g., *Alliance for Community Media v. FCC*, 10 F.3d 812, 818-22 (D.C. Cir. 1993), *revd. in part*, 56 F.3d 105 (D.C. Cir.), *petition for cert. filed*, 64 U.S.L.W. 3070 (U.S. July 21, 1995) (No. 95-124); *Franz v. United States*, 707 F.2d 582, 590-94 (D.C. Cir.), *modified on other grounds*, 712 F.2d 1428 (D.C. Cir. 1983).

132. The Supreme Court's decision in *Lebron* does not alter the constitutional status of entities not subject to the control of the government through stock ownership or similar direct or indirect means, in other words, "private" entities. *Lebron* holds only that a government-chartered, owned, and controlled corporation executing a public policy is an instrumentality of the government. See *Lebron*, 115 S. Ct. at 972-75.

133. See *Lebron v. National R.R. Passenger Corp.*, 12 F.3d 388, 391-92 (2d Cir. 1993), *revd.*, 115 S. Ct. 961 (1995); *Andersen v. National R.R. Passenger Corp.*, 754 F.2d 202, 204-05 (7th Cir. 1984); *Wilson v. Amtrak Natl. R.R. Corp.*, 824 F. Supp. 55, 57-58 (D. Md. 1992); *Railway Labor Executives' Assn. v. National R.R. Passenger Corp.*, 691 F. Supp. 1516, 1524 n.11 (D.D.C. 1988); *Marcucci v. National R.R. Passenger Corp.*, 589 F. Supp. 725, 727-29 (N.D. Ill. 1984); *Kimbrough v. National R.R. Passenger Corp.*, 549 F. Supp. 169, 172-73 (M.D. Ala. 1982).

Similar entities include libraries, hospitals, and primary and secondary schools. The treatment of volunteer fire companies provides meaningful guidance about the state-actor status of nominally private entities providing these public services.

Leading the charge, the Fifth Circuit, applying the Supreme Court's traditional contacts-based state action tests, has held that a volunteer fire company is not a state actor. Most people — including the Chief Justice — view fire protection as an essential public service.¹³⁴ In order to satisfy the Supreme Court's state action requirement, however, fire protection must not be an "essential" public service but rather an "exclusive government function."¹³⁵ That is to say, the historical provision of a particular service by private parties will preclude a finding of state action under the exclusive government function test, even if government would have to provide the service in the absence of private companies.

In an opinion written by Judge Edith Jones, the Fifth Circuit held that the McGregor Volunteer Fire Department was not a state actor, and it therefore had no obligation to respect the First Amendment rights of its members.¹³⁶ Applying the three state action tests seriatim, the Court held that the fire company did not satisfy any one of the tests completely.¹³⁷

The court conceded that local governments often provide fire protection service but noted that, in some jurisdictions, private companies have assumed this duty.¹³⁸ Moreover, the existence of

134. See *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 163 (1978); see also *Meet the Press* (NBC television broadcast, Mar. 12, 1995) (Remarks of Senator Phil Gramm) ("If my house had caught on fire last night, I would have called the fire department . . . It's the government. . . . Government is an important part of our lives.").

135. See *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974).

136. See *Yeager v. City of McGregor*, 980 F.2d 337, 339-43 (5th Cir. 1993). Of course, Judge Jones has established a national reputation for her conservative jurisprudence. One cannot, however, simply dismiss the *Yeager* court's holding as an anomaly. See *Groman v. Township of Manalapan*, 47 F.3d 628, 641 (3d Cir. 1995) ("[W]e find the court's analysis in *Yeager* more persuasive than the court's [analysis] in *Janusaitis* and more consonant with controlling precedent, although we do not explicitly adopt the analysis in *Yeager*."); see also *Mark v. Borough of Hatboro*, 856 F. Supp. 966, 972-76 (E.D. Pa. 1994) (following, for the most part, the *Yeager* court's analysis and finding that a volunteer fire company was not a state actor), *affd. on other grounds*, 51 F.3d 1137 (3d Cir. 1995) (overruling the district court's holding that the fire company was not a state actor but affirming on other grounds). On the other hand, the contemporary state action doctrine does not compel the result in *Yeager*; it merely permits it. Thus, it is not surprising that a panel of the Third Circuit has held that firefighting was an "exclusive government function" under Pennsylvania state law. See *Mark*, 51 F.3d at 1144-48. Along the way, the court severely criticized the *Yeager* decision and the quality of Judge Jones's reasoning. See 51 F.3d at 1147 n.11.

137. *Yeager*, 980 F.2d at 339-43.

138. 980 F.2d at 341. But see *Chalfant v. Wilmington Inst.*, 574 F.2d 739, 746 (3d Cir. 1978) ("Nor can evasions of state governmental responsibilities be permitted to turn on the

state regulations and financial support, considered alone, was insufficient to establish a symbiotic relationship between the City of McGregor and the fire company.¹³⁹ Finally, there was no evidence that the City of McGregor or the State of Texas encouraged or facilitated the fire department's behavior.

Significantly, the *Yeager* court made no effort to consider the governmental nature of the fire protection services, the existence of state regulations, and the state subsidies in tandem. At no point did the court step back and examine the forest; instead, its analysis went from tree to tree.

This kind of constitutional myopia is not uncommon. In *Haavistola v. Community Fire Company*,¹⁴⁰ a case with substantially similar facts, a federal district judge reached the same result and used like reasoning. In that case, the court considered — and rejected — five separate theories of state action potentially applicable to the fire company.¹⁴¹ In consequence, the court held that the volunteer fire company was free to practice gender-based discrimination against female firefighters. Had the court considered the various connections between the state of Maryland and the fire company conjunctively, rather than singly and in insolation, the court could have reached a different conclusion.¹⁴²

The *Yeager* and *Haavistola* courts rigidly applied the particular formulations of state action handed down by the Supreme Court, but they failed to honor the Court's admonition that reviewing

fact that the instrumentality to whom the responsibility has been delegated once operated, in the dim and distant past, as a private institution.”).

139. *Yeager*, 980 F.2d at 342-43.

140. 812 F. Supp. 1379 (D. Md.), *revd.*, 6 F.3d 211 (4th Cir. 1993).

141. See 812 F. Supp. at 1392-99. In a bizarre opinion, the Fourth Circuit reversed the district court's entry of summary judgment. See *Haavistola v. Community Fire Co.*, 6 F.3d 211 (4th Cir. 1993). Noting that “[t]he district court's analysis is flawed in that it draws factual conclusions inappropriate on a motion for summary judgment,” the Fourth Circuit held that the legal status of the fire company was a factual question to be decided by a jury. 6 F.3d at 218-19. But see *Dobyns v. E-Systems, Inc.*, 667 F.2d 1219, 1221 (5th Cir. 1982) (rejecting the claim that summary judgment was premature “because the material facts were undisputed” and resolving the state action question as one of law). The absurdity of this position was later recognized by Judge J. Harvie Wilkinson, who correctly observed that under the court's holding, different juries could decide the state action question differently for the same entity. See *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, No. 93-1610, 1994 U.S. App. LEXIS 12492, at *6-*12 (Wilkinson, J., concurring) (4th Cir. May 31, 1994). The problem, of course, is that the Fourth Circuit goofed in *Haavistola*: although the subsidiary facts necessary to determine whether the Rising Sun fire company was a state actor were within the province of the jury, the legal significance of those facts was a question of law, appropriately reserved to the court. Because the parties in *Haavistola* did not dispute any of the subsidiary questions of fact, there was no role for the jury in determining whether the fire company was a state actor.

142. See, e.g., *Janusaitis v. Middlebury Volunteer Fire Dept.*, 607 F.2d 17, 21-25 (2d Cir. 1979).

courts must "sift[] facts and weigh[] circumstances"¹⁴³ in order to "determine whether the reach of the Fourteenth Amendment extends to a particular case."¹⁴⁴ This approach resulted in decisions that simply do not reflect a basic reality: citizens expect their government to protect them from the danger of fire.¹⁴⁵

Firefighters provide a service that is as closely and traditionally associated with state and local governments as the services provided by police officers, judges, tax collectors, and prison officials.¹⁴⁶ To be sure, firefighting once was an activity conducted by private organizations that were largely, if not completely, unregulated by state or local governments.¹⁴⁷ Firefighting, however, long ago evolved from a poorly organized, ad hoc affair of citizens with leather buckets into a government-sponsored, government-regulated service, with the states conferring plenary powers of entry and arrest on firefighters to ensure the safety of lives and property.¹⁴⁸

The importance of the legal status of a volunteer fire department cannot be underestimated. For example, a volunteer firefighter's ability to exercise her First Amendment rights could prove crucial to the safety and welfare of a community. If a company is not properly trained, is using outdated equipment, or lacks

143. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

144. *Evans v. Newton*, 382 U.S. 296, 299-300 (1966).

145. See, e.g., *Meet the Press*, *supra* note 134 (providing an example of support for this popular expectation from a most unlikely source: Senator Phil Gramm).

146. Some cities, however, choose to contract out the responsibility for providing fire protection. See MALCOLM GETZ, *THE ECONOMICS OF THE URBAN FIRE DEPARTMENT* 11 (1979). Even in those instances where a municipality elects to contract for fire protection services, however, it must retain substantial control over the contractor. *Id.* at 12. Furthermore, even if a city contracts out responsibility for firefighting to a private company, the character of the service would render the private company a state actor because it would be performing a state function. See Douglas W. Dunham, Note, *Inmates' Rights and Privatization of Prisons*, 86 COLUM. L. REV. 1475, 1501 (1986) ("Private entities entrusted to perform public functions are the 'functional equivalent' of state agencies."); see also *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 703 (11th Cir. 1985) ("Where a function which is traditionally the exclusive prerogative of the state . . . is performed by a private entity, state action is present.").

147. The first volunteer fire company in the United States was organized in 1736. See DEAN SMITH'S HISTORY OF FIREFIGHTING IN AMERICA: 300 YEARS OF COURAGE 12-13 (1978). Early volunteer fire companies existed primarily in urban centers. See *id.* at 12, 28-29. Members financed company operations through assessments on the members and fines for violations of company rules and provided their own personal equipment, including buckets, bags, and baskets. *Id.* at 12-13, 28-29. In 1853, Cincinnati established the first paid fire department in the United States. *Id.* at 57-59; see also HERBERT THEODORE JENNESS, *FROM BUCKET BRIGADE TO FLYING SQUADRON* 146 (1909) (noting the replacement of the volunteer fire companies in U.S. cities with municipal fire departments). These urban volunteer groups have long since been replaced by paid professional fire departments.

148. See SMITH, *supra* note 147, at 61.

adequate staffing, the community needs to know about it. In the context of public employment, the Supreme Court has recognized a free-speech easement in government workplaces to facilitate speech concerning matters of public concern.¹⁴⁹ Volunteer firefighters subject to summary discharge or other forms of punishment will think twice before speaking out about problems with the local fire company.

The logic of these arguments has not been entirely lost on the federal judiciary. The Second Circuit, applying the exclusive government function and symbiotic relationship tests in tandem, held in *Janusaitis v. Middlebury Volunteer Fire Department*¹⁵⁰ that volunteer fire companies in Connecticut were state actors for purposes of applying the First Amendment, explaining that "the function of fire protection is sufficiently 'associated with sovereignty' " to justify a finding of state action.¹⁵¹ The court observed that "[t]here are few governmental interests more compelling than that of protection from fire" and also noted that Connecticut law vested volunteer firefighters with "certain powers traditionally associated with sovereignty."¹⁵²

The Fifth Circuit disregarded *Janusaitis* in *Yeager*, deeming the decision "archai[c],"¹⁵³ whereas the district court in *Haavistola* distinguished the case on factual grounds.¹⁵⁴ Neither court recognized the real significance of *Janusaitis*, which was the Second Circuit's comprehensive approach to the state action question.¹⁵⁵ Instead of mechanically going through the motions of a state action analysis, the court in *Janusaitis* carefully weighed the facts in order to make an accurate state action determination.

149. See *Connick v. Myers*, 461 U.S. 138, 142 (1983) (seeking to strike "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968))).

150. 607 F.2d 17 (2d Cir. 1979).

151. 607 F.2d at 23-24 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974)).

152. 607 F.2d at 23-24.

153. *Yeager v. City of McGregor*, 980 F.2d 337, 341-42 (5th Cir. 1993).

154. See *Haavistola v. Community Fire Co.*, 812 F. Supp. 1379, 1398 & n.22 (D. Md.), *revd.*, 6 F.3d 211 (4th Cir. 1993).

155. Indeed, Judge Jones implied that the Second Circuit's reliance on multiple state action tests was evidence that the decision was not theoretically sound. *Yeager*, 980 F.2d at 341-42.

C. State Action Doctrine as a Playschool Cobbler's Bench

Almost every child is familiar with the "Cobbler's Bench," a shape-learning toy featuring a mallet, a small wooden "cobbler's bench," and brightly colored plastic shapes, including a circle, a square, and a triangle. The state action doctrine, as currently practiced, is something of a Cobbler's Bench: when presented with the need to make a state action determination, the federal courts compare the facts of a particular case, the shape, to each of the three state action tests, the holes. If the shape fits into one of the holes, the state action requirement is satisfied. If the shape does not fit exactly into one of the holes, however, courts too often conclude that state action is absent.

Courts do not know what to make of parabolas and trapezoids; in consequence, the federal courts disregard essential facts when applying a particular state action test, even though it may not be possible to make an accurate assessment of the entity's constitutional status without consideration of all potentially relevant factors conjunctively.¹⁵⁶ Judges, like frustrated young cobblers, need the flexibility to create openings that accommodate a variety of shapes.

Instead of using the Supreme Court's shorthands as analytical guideposts — which is all the various state action formulations are and all the Supreme Court has ever purported them to be — the lower federal courts have treated the state action tests as hard-and-fast limitations on the liability of ostensibly private entities for constitutional violations. If any one of the tests does not perfectly describe a particular person or entity, that person or entity is not a state actor, even if it has characteristics that meet some aspect of each of the tests.¹⁵⁷ In consequence, unconstitutional behavior that has its genesis with the government goes unremedied.

Ironically, the Supreme Court's attempt to provide the lower federal courts with guidance on making state action determinations — an inquiry that it has described as essentially "fact based" and requiring consideration of "nonobvious" factors — has devolved into a mechanical, formalistic application of the state action tests. The net effect of the Supreme Court's guidance has been to reduce

156. See, e.g., *Rendell-Baker v. Kohn*, 457 U.S. 830, 839-44 (1982); *Lebron v. National R.R. Passenger Corp.*, 12 F.3d 388, 390-91 (2d Cir. 1993), *rev'd.*, 115 S. Ct. 961 (1995); *Lubin v. Crittendon Hosp. Assn.*, 713 F.2d 414, 415-16 (8th Cir. 1983); *Warren v. Government Natl. Mortgage Assn.*, 611 F.2d 1229, 1233-35 (8th Cir.), *cert. denied*, 449 U.S. 847 (1980); *Northrip v. Federal Natl. Mortgage Assn.*, 527 F.2d 23, 30-31 (6th Cir. 1975); *Haavistola*, 812 F. Supp. at 1392-99. But see *Janusaitis v. Middlebury Volunteer Fire Dept.*, 607 F.2d 17 (2d Cir. 1979).

157. See, e.g., *Haavistola*, 812 F. Supp. at 1379.

the quality of the reasoning exhibited in the lower federal courts' state action determinations,¹⁵⁸ enabling the lower federal courts to avoid an approach that would require them to explore and explain the specific context in which claims of state action arise.

To be sure, there is an inherent tension between the creation and use of judicial shorthands in the quest for equal treatment and the need for judges to have the flexibility to exercise discretion to fit legal rules to the facts of particular cases.¹⁵⁹ Plainly, the state action doctrine reflects the assumption that reliance on structured rules will result in less arbitrary results than the alternative approach: directed, but largely unfettered, judicial discretion.

Constitutional law, however, is not Euclidean geometry: it is an exercise in persuasion, not mathematical proof.¹⁶⁰ As Professor Wechsler put it, "[t]he virtue or demerit of a judgment turns . . . entirely on the reasons that support it and their adequacy to maintain any choice of values it decrees" and on its ability "to maintain the rejection of a claim that any [other] given choice should be decreed."¹⁶¹

The contemporary state action doctrine too easily permits courts to avoid responsibility for making and explaining individualized state action determinations regarding the culpability of the government for constitutional wrongs committed by private entities. As such, it must either be abandoned or reformed. Because the proposals put forth for abandoning the doctrine would have significant, negative consequences on the freedom of private action,¹⁶²

158. See, e.g., *Lebron*, 12 F.3d at 390-93; *Yeager*, 980 F.2d at 340-42; *Wolotsky v. Huhn*, 960 F.2d 1331, 1334-37 (6th Cir. 1992); *Rodriguez-Garcia v. Davila*, 904 F.2d 90, 96-99 (1st Cir. 1990); *Adams v. Vandemark*, 855 F.2d 312, 314-17 (6th Cir. 1988).

159. This problem is something of a constant with any attempt systematically to treat like cases in like ways, such as the federal sentencing guidelines. See Charles T. Ogletree, Jr., *The Death of Discretion?: Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938 (1988) (defending generally the sentencing guidelines as facilitating process without conferring unlimited discretion on the courts); Jane Rutherford, *The Myth of Process*, 72 B.U. L. REV. 1, 97 (1992) (same); Frederick S. Levin, Note, *Pain and Suffering Guidelines: A Case For Damages Measurement "Anonmie,"* 22 U. MICH. J.L. REF. 303, 311-12 (1989) (same); cf. Albert W. Alschuler, *The Failure of the Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991) (criticizing arbitrary results generated under the sentencing guidelines); Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992) (same).

160. See Wechsler, *supra* note 71, at 10-20 (noting that the broad clauses of the Constitution preclude exactitude in their application and that the most one can expect of courts is "a principled decision").

161. *Id.* at 19-20.

162. See Chemerinsky, *supra* note 13, at 533-42; Snyder, *supra* note 102, at 1063-64, 1086-87. Both Chemerinsky's and Snyder's proposals would subject each and every citizen to the prospect of a lawsuit for inherently private behavior, behavior that itself is subject to a colorable claim of constitutional protection. For example, suppose I decide not to invite a neigh-

the state action doctrine must be reformed.

III. MAKING THE STATE ACTION DOCTRINE WORK

Notwithstanding the shortcomings associated with the state action doctrine as it presently exists, it should not be abandoned. The state action doctrine preserves a sphere of individual freedom of action, a freedom of action that would be reduced significantly were the Supreme Court to jettison the doctrine in favor of some sort of ad hoc rights balancing.¹⁶³ The state action doctrine also properly reflects and helps to preserve the theoretical priority of the individual over the state.¹⁶⁴ Because the individual citizen is prior to the state — that is to say, the state exercises authority derived from individual citizens and not vice versa — the state cannot legitimately be deemed responsible for a private citizen's each and every act.¹⁶⁵ At the same time, government can and should be held accountable for actions that it commands or encourages. The trick, of course, is striking the proper balance between the competing and conflicting goals of protecting individual liberty and requiring government fealty to constitutional commands.

Even if one embraces the state action doctrine as a necessary theoretical construct, one can still take the position that it could be significantly improved. The contemporary state action doctrine un-

bor's son to my daughter's birthday party because of his race and religious beliefs, and the neighbor, son in tow, arrives at my home to attend the party. If, in troglodyte fashion, I refuse to admit either the neighbor or his son and, moreover, have recourse to the local police to enforce my wish that they leave my property, can the neighbor sue me for a deprivation of his constitutional rights? Consistent with both Chemerinsky's and Snyder's theories of state action, I could be sued and made to answer for my refusal to include my neighbor's son in my daughter's birthday festivities. Chemerinsky would apparently permit the suit without regard to the involvement of the local police. See Chemerinsky, *supra* note 13, at 537-38. Snyder would first require the local police department's involvement. See Snyder, *supra* note 102, at 1094. In either case, my ability to select my social acquaintances would be severely circumscribed, even if I ultimately were to prevail in fending off my neighbor's suit. Under these theories, countless private social and religious organizations who rely upon the state to enforce their property rights would be subject to litigation that would have a chilling effect on the exercise of those rights.

163. See, e.g., Chemerinsky, *supra* note 13, at 533-42.

164. See *supra* note 109; see also *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991) ("One great object of the Constitution is to permit citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law."); *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988) (holding that the state action doctrine "preserves an area of individual freedom by limiting the reach of federal law" and avoids the imposition of responsibility on a State for conduct it could not [or did not] control" (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982))); *Norwood v. Harrison*, 413 U.S. 455, 469-70 (1973) (noting, in dicta, that the state may but need not remain neutral in the face of private behavior that it could not itself support or endorse).

165. Put differently, the state's failure to prohibit a particular course of action by an individual citizen should not be deemed an endorsement of the particular behavior.

reasonably immunizes government-sponsored conduct from constitutional scrutiny because federal courts, including the Supreme Court, apply the state action tests both formalistically and in isolation.

Formalism, broadly defined, is the strict application of a rule.¹⁶⁶ While such application serves to ensure a high degree of predictability in results,¹⁶⁷ courts can enforce rule formality too strictly, even to the extreme of enforcing a rule when the reasons behind the rule are not present.¹⁶⁸ The federal courts' treatment of the exclusive government functions test provides a rich example of this problem.¹⁶⁹

The Supreme Court has also acquiesced in the lower courts' application of each state action test in isolation.¹⁷⁰ Thus, it is possible for an entity to enjoy some modicum of government control, regulation, funding, and so on and to perform a service associated with the government but not exclusively reserved to it and still not be a state actor.¹⁷¹ In many instances, if courts applied the tests in tandem, the state action requirement would be satisfied.¹⁷²

166. See P.S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* 28-31 (1987) (discussing formalistic reasoning).

167. *Id.* at 28-31, 88-93, 250-51.

168. *Id.* at 88-93, 108-09; cf. O.W. HOLMES, JR., *THE COMMON LAW* 1 (1881) ("The life of the law has not been logic: it has been experience."); LLEWELLYN, *supra* note 11, at 189 (A "rule follows where its reason leads; where the reason stops, there stops the rule.").

169. See, e.g., *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

170. See *Rendell-Baker*, 457 U.S. at 839-43; see also *Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 962, 972-75 (1995) (failing to criticize either the quality or depth of the Second Circuit's state action analysis). For examples of lower courts applying the state action tests in isolation, see *Lebron v. National R.R. Passenger Corp.*, 12 F.3d 388, 390-93 (2d Cir. 1993), *rev'd*, 115 S. Ct. 961 (1995); *Yeager v. City of McGregor*, 980 F.2d 337, 340-42 (5th Cir. 1993); *Wolotsky v. Huhn*, 960 F.2d 1331, 1334-37 (6th Cir. 1992); *Adams v. Vandemark*, 855 F.2d 312, 314-17 (6th Cir. 1988); *Anderson v. National R.R. Passenger Corp.*, 754 F.2d 202, 203-04 (7th Cir. 1984); *Crowder v. Conlan*, 740 F.2d 447, 450-52 (6th Cir. 1984); and *Jensen v. Farrell Lines, Inc.*, 625 F.2d 379, 384-87 (2d Cir. 1980).

171. See, e.g., *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1457 (10th Cir. 1995) (holding that the acts of private security personnel at a state-owned arena cannot be fairly attributed to the state under any of the state action tests); *Lubin v. Crittendon Hosp. Assn.*, 713 F.2d 414 (8th Cir. 1983) (holding that there was no nexus between the state's relationship to the operation of a private hospital that leased land and building from county and the disciplinary action taken by hospital against physician so as to justify attribution of the challenged action to the state); *Haavistola v. Volunteer Fire Co.*, 812 F. Supp. 1379 (D. Md.) (holding that local volunteer fire company, though regulated and funded by the state, was not state actor for purposes of § 1983 under any of the state action tests), *rev'd*, 6 F.3d 211 (4th Cir. 1993).

172. See, e.g., *Janusaitis v. Middlebury Volunteer Fire Dept.*, 607 F.2d 17, 22-25 (2d Cir. 1979) (applying both the "symbiotic relationship" and "public function" tests to find state action); *Chalfant v. Wilmington Inst.*, 574 F.2d 739, 743-45 (3d Cir. 1978) (applying both the "nexus" and "state involvement" tests to find state action).

A. *The Importance of a Substantive Approach to State Action Determinations: The Need for Meta-Analysis*

The state action doctrine would benefit from borrowing an analytical device developed by the scientific community: meta-analysis. In the sciences, a study must have a 95% confidence rate before it will be accepted as valid.¹⁷³ A study with a confidence rate less than 95% is not accorded dispositive weight.¹⁷⁴ In a rough sort of way, this corresponds to the requirement that a defendant satisfy a particular state action test completely before a court will find the presence of state action.

There is, however, an emerging trend within the scientific community toward the adoption of a new procedure called "meta-analysis."¹⁷⁵ Meta-analysis involves the grouping together of data from studies with confidence rates of less than 95% in order to create a single study with a confidence rate that equals or exceeds 95%.¹⁷⁶ Evidently, a growing number of scientists believe that the whole is greater than the sum of the parts. Thus, using meta-analysis, it is possible to reach the requisite 95% confidence level, even if none of the individual studies used in the meta-analysis meets the 95% threshold.¹⁷⁷

The state action doctrine would plainly benefit from the explicit use of meta-analysis. When a particular defendant does not satisfy any one of the three state action tests, a reviewing court should step back and consider whether the defendant satisfies a sufficient portion of each of the three tests to support a state action finding, even if no single test is satisfied completely.

In fact, a number of the circuit courts of appeals have taken this approach when deciding hard cases. In each instance, the use of a meta-analysis permitted the reviewing court to make a more refined state action determination.

In *Chalfant v. Wilmington Institute*,¹⁷⁸ the Third Circuit was

173. See *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941, 946-49 (3d Cir. 1990) (describing confidence requirements for scientific studies); see also KENNETH J. ROTHMAN, *MODERN EPIDEMIOLOGY* 115-124 (1986).

174. See *DeLuca*, 911 F.2d at 947; ROTHMAN, *supra* note 173, at 116-17.

175. See Michael D. Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of Agent Orange and Bendectin Litigation*, 86 NW. U. L. REV. 643, 683-85 & 685 n.184.

176. *Id.* at 685 n.184 ("Meta-analysis permits the results of several studies to be combined to determine an overall relative risk that reflects the best estimate from all of the data.").

177. *Id.*; see also *DeLuca*, 911 F.2d at 948 ("Different studies may each be rejected as insignificant, yet, when the studies are looked at collectively, a majority of the data may be moderately or strongly contradictory to the null hypothesis.").

178. 574 F.2d 739 (3d Cir. 1978).

presented with the question whether an ostensibly private library was a state actor. According to the plaintiff, the Wilmington Institute had discharged her on the basis of her gender and had also failed to provide her with adequate post-deprivation process.¹⁷⁹ The Institute responded by asserting that, as a private entity, it was not required to comply with the Due Process Clause of the Fourteenth Amendment.¹⁸⁰

Even though the Wilmington Institute did not fully satisfy any one of the Supreme Court's state action tests, the Third Circuit nevertheless found that the library was a state actor. The court appeared to rest its holding on a number of individually important, but not decisive, facts: (1) library services, although not an exclusive state function, were a traditional state function; (2) the library received significant public funding; and (3) the library's management structure was subject to state regulation.¹⁸¹ Essentially, the *Chalfant* court engaged in a meta-analysis: it took bits and pieces from each of the state action tests, applied them conjunctively, and found that in the "totality of the circumstances," the library was a state actor.¹⁸²

Significantly, it is doubtful that the Wilmington Institute satisfied any one of the Supreme Court's contemporary tests. Library services, although associated with the state, are not the "exclusive" province of the government.¹⁸³ Furthermore, the government did not control a majority of the library's governing board or determine library policies¹⁸⁴ nor was there any evidence to suggest that the government encouraged or coerced the Institute to discharge Chalfant.¹⁸⁵ Finally, the state did not derive any direct economic benefit from the library nor was the state immediately identifiable with the

179. See 574 F.2d at 740, 742.

180. 574 F.2d at 742.

181. 574 F.2d at 745-46.

182. 574 F.2d at 745-46. It is possible, of course, to go too far and to find state action in the absence of material evidence of a significant connection between the government and a private entity. See, e.g., *Jackson v. Statler Found.*, 496 F.2d 623, 629-34 (2d Cir. 1974) (suggesting that a private foundation might be a state actor based on its acceptance of a tax benefit and state regulations of charitable institutions).

183. See *Chalfant*, 574 F.2d at 754 & n.10 (Garth, J., dissenting); cf. *Terry v. Adams*, 345 U.S. 461, 468-70 (1961) (holding that certain activities, such as elections, are quintessentially the province of the state); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974) (citing *Terry* for the proposition that a private entity that performs certain "essential" government functions is a state actor).

184. *Chalfant*, 574 F.2d at 758-60 (Garth, J., dissenting).

185. 574 F.2d at 756-57 (Garth, J., dissenting); cf. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (holding that a state utility commission's mere approval of a utility's proposal does not convert the proposed practice into state action).

library.¹⁸⁶ Thus, while the Wilmington Institute did not satisfy completely any single state action test, significant evidence tending to establish state action under each of the tests existed and ultimately supported the Third Circuit's resolution of the case.

The Second Circuit's decision in *Janusaitis*¹⁸⁷ also reflects reliance on meta-analysis. The court explicitly relied on two state action tests to support its conclusion that a volunteer fire company was a state actor.¹⁸⁸ Once again, a blending of the state action tests permitted the court to conduct a more refined analysis.¹⁸⁹

Along the same lines, the D.C. Circuit engaged in an open-ended state action inquiry in *Franz v. United States*.¹⁹⁰ In *Franz*, a woman in the federal witness protection program had denied her ex-husband all visitation rights in violation of a state-court custody order.¹⁹¹ Pursuant to the program,¹⁹² the federal government had provided Catherine Franz with a new identity and refused to disclose her location or the location of the couple's children to William Franz, her estranged husband.¹⁹³ William Franz sued the U.S. government, arguing that it had violated his constitutional right of privacy and failed to provide him with due process before facilitating his former wife's decision to deny him all access to his children.¹⁹⁴

The threshold question for the court was whether Catherine Franz's decision to deny William Franz his visitation rights was attributable to the federal government. After conducting an open-ended inquiry, the court concluded that it was reasonable to hold

186. *Chalfant*, 574 F.2d at 756-57 (Garth, J., dissenting); cf. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (holding that the state's anticipated income from a lease contributed to a finding of state action by the lessee).

187. See *supra* notes 150-55 and accompanying text.

188. See *Janusaitis v. Middlebury Volunteer Fire Dept.*, 607 F.2d 17, 23-25 (2d Cir. 1979).

189. Ironically, one Third Circuit panel has criticized *Janusaitis* precisely because it expressly relied on two state action tests. See *Groman v. Township of Manalapan*, 47 F.3d 628, 640-41 (3d Cir. 1995) ("[*Janusaitis*'s] holding is ambiguously grounded in both the exclusive government function and the symbiotic relationship tests."). But see *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1155-58 (3d Cir. 1995) (Greenberg, J., concurring) (arguing that meta-analysis should be used in lieu of the three traditional state action tests).

190. 707 F.2d 582 (D.C. Cir.), modified on other grounds, 712 F.2d 1428 (D.C. Cir. 1983). Significantly, *Franz* is a post-*Blum-Rendell-Baker-Lugar* case. Thus, it is not subject to the criticism that it fails to reflect the current Supreme Court's state action jurisprudence. Cf. *Yeager v. City of McGregor*, 980 F.2d 337, 341-42 (5th Cir. 1993) (rejecting a 1979 decision of the Second Circuit as "archaic" because it predated the Supreme Court's 1982 trilogy of cases).

191. *Franz*, 707 F.2d at 585-86, 589-90.

192. See 18 U.S.C. §§ 3481-504 (1982) (amended in 1994).

193. *Franz*, 707 F.2d at 589-90. The Federal Marshals Service did forward William Franz's requests to exercise his visitation rights to Catherine Franz. 707 F.2d at 589-90.

194. 707 F.2d at 597-98, 607-08.

the federal government responsible for Catherine Franz's actions.¹⁹⁵

The court initially rested its holding on the nexus test, noting that "[t]he nexus is formed principally by the defendants' encouragement and support of Catherine's decision to hide the children from William."¹⁹⁶ The court further explained that "[t]he encouragement of Catherine's choice may well be the most important factor in this case."¹⁹⁷ It was not, however, the *only* factor to be considered.

"Expanding [its] field of vision somewhat," the court then "observe[d] that the defendant officials and [Charles] Allen [Catherine's mob-connected live-in boyfriend] and his household also are involved in a symbiotic relationship."¹⁹⁸ The court found that the government benefited from its relocation of Catherine and her children because the relocation facilitated testimony helpful in convicting Philadelphia mobsters.¹⁹⁹ The court concluded its state action analysis by observing that "many analytical roads lead to the same conclusion: the defendants are constitutionally accountable for the alleged injury to the plaintiffs."²⁰⁰

Like the *Chalfant* and *Janusaitis* courts, the *Franz* court did not mechanically apply the three traditional tests; instead, it carefully parsed the relationship of the government to the behavior of Catherine Franz and concluded that the government bore responsibility for that conduct. Had the court failed to "expand[] [its] field of vision somewhat,"²⁰¹ it almost certainly would have found that Catherine's behavior could not be attributed to the government.²⁰²

There was no plausible argument for the satisfaction of the exclusive state function test because child-rearing, the activity directly at issue in *Franz*, is quintessentially a private function.²⁰³ Moreover, the nexus test could not be met because the government did not encourage Catherine Franz to deny her husband his visitation

195. 707 F.2d at 590-94.

196. 707 F.2d at 592.

197. 707 F.2d at 592 n.38.

198. 707 F.2d at 593.

199. 707 F.2d at 593-94.

200. 707 F.2d at 594; see also *Buffalo v. Civiletti*, 702 F.2d 710, 716 (8th Cir. 1983) (finding that a parent's refusal to honor her ex-spouse's visitation rights constituted state action when the federal witness protection program facilitated this course of action).

201. *Franz*, 707 F.2d at 593.

202. See, e.g., *Yeager v. City of McGregor*, 980 F.2d 337, 340-43 (5th Cir. 1993); *Wolotsky v. Huhn*, 960 F.2d 1331, 1335-38 (6th Cir. 1992); *Adams v. Vandemark*, 855 F.2d 312, 314-17 (6th Cir. 1988); *Crowder v. Conlan*, 740 F.2d 447, 450-53 (6th Cir. 1984).

203. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

rights; it merely facilitated this behavior as an incident of enrolling her and her boyfriend in the federal witness protection program.²⁰⁴ Finally, the government was not in the same kind of symbiotic relationship at issue in *Burton*; it did not tacitly approve of Catherine Franz's conduct and, in fact, had attempted to assist William Franz in gaining access to his children, thereby directly distancing itself from Catherine Franz's conduct. Thus, none of the state action tests were fully satisfied.

Franz was properly decided, however, even though no one state action test was truly satisfied. First, there was something of a symbiotic relationship between the federal government and Catherine Franz; the government wanted her testimony and provided her with a new identity in exchange for her assistance. Her new identity, in turn, and the government's refusal to breach its promise of secrecy precluded William Franz from bringing an appropriate child custody action against his ex-wife. Moreover, the government *did* facilitate Catherine Franz's behavior by refusing to tell William Franz her whereabouts. Finally, the whole course of events took place in the overall context of the federal witness protection program, an exclusive government function. Thus, while no one state action test was completely satisfied, all three tests were satisfied to a substantial degree.

Franz, *Janusaitis*, and *Chalfant* demonstrate how a state action determination can turn on whether the reviewing court takes seriously the Supreme Court's admonition to "sift facts" and "weigh circumstances" in order to ferret out "nonobvious" state involvement in ostensibly private behavior.²⁰⁵ In these cases, the reviewing courts examined all aspects of the relationship between the government and an ostensibly private defendant and concluded that, in the totality of the circumstances, the defendant was a state actor.²⁰⁶

204. Cf. *Dial Info. Servs. Corp. v. Thornburgh*, 938 F.2d 1535 (2d Cir. 1991) (holding that government was not responsible for private behavior that it facilitated but did not encourage).

205. See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

206. See *Franz v. United States*, 707 F.2d 582, 590-94 (D.C. Cir.), *modified on other grounds*, 712 F.2d 1428 (D.C. Cir. 1983); *Janusaitis v. Middlebury Volunteer Fire Dept.*, 607 F.2d 17, 22-25 (2d Cir. 1979); *Chalfant v. Wilmington Inst.*, 574 F.2d 739, 740-46 (3d Cir. 1978).

Judge Greenberg of the Third Circuit has argued that a totality of the circumstances approach that includes factors drawn from all three traditional state action tests should replace these tests. See *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1155-58 (Greenberg, J., concurring). I believe that Judge Greenberg's proposed approach is only partially correct. If any single state action test is completely satisfied, the reviewing court should not be required to belabor its state action analysis; his proposal, however, appears to require a totality of the circumstances approach in *all* cases. See 51 F.3d at 1156 ("[C]ourts should consider the principles furthered by the previous tests as part of a single balancing and weighing approach.").

Essentially, the *Franz*, *Janusaitis*, and *Chalfant* courts engaged in the legal equivalent of meta-analysis: they found that the whole created from the separate parts was greater than the sum of the parts. In so doing, they correctly identified the government's ultimate responsibility for ostensibly private conduct and thereby held the government constitutionally accountable for that conduct.

B. *Making Hard Cases Easier*

Only by expanding the state action inquiry — thereby requiring the lower federal courts to cast their analytical nets more broadly — can actions “fairly attributable to the State” be identified accurately. There is, of course, a place for shorthands, and if an entity fully satisfies the criteria set forth in a particular state action test, a reviewing court need not belabor its state action analysis. If an entity does not fully satisfy any one of the tests, however, reviewing courts have a professional²⁰⁷ — if not constitutional — obligation to consider the available evidence of state action in the totality of the circumstances and deduce on a case-by-case basis whether the particular activity complained of had its genesis with the state.

If such an approach were adopted,²⁰⁸ a number of cases would have been decided differently. The volunteer fire company cases provide an easy example. If a court examines the question broadly, the nature of the service and the existence of state funding and regulations will together compel a finding of state action in almost all instances.²⁰⁹

This would have the effect of significantly increasing the burden on federal judges charged with making state action determinations, without necessarily providing any significant offsetting improvement in the accuracy of such determinations.

207. See, e.g., CODE OF JUDICIAL CONDUCT EC 3(A) (1972); see also Roger J. Trayner, *Who Can Best Judge the Judges*, 53 VA. L. REV. 1266, 1280 (1967).

208. “Adopted” is perhaps inaccurate. As noted previously, the Supreme Court consistently has maintained that state action inquiries are fundamentally fact-based and must be made on an individual basis. At the same time, however, the Court has hewed narrowly to particular linguistic formulations of the state action inquiry. See *Blum v. Yaretsky*, 457 U.S. 991, 1003-12 (1982); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-42 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 839-44 (1982); cf. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619-21 (1991) (using an open-ended inquiry to determine whether the exercise of peremptory jury strikes by private litigants constituted state action); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725-26 (1961) (finding the presence of state action based on a fact-intensive inquiry into a “symbiotic” relationship between a private restaurant and the state). Thus, it might be more precise to say that the Supreme Court should simply enforce its own, often-repeated admonition that the various tests it has promulgated do not have a talismanic effect. Cf. *Rendell-Baker*, 457 U.S. at 847-52 (Marshall, J., dissenting) (criticizing the majority for failing to consider the evidence collectively).

209. See, e.g., *Janusaitis v. Middlebury Volunteer Fire Dept.*, 607 F.2d 17, 22-25 (2d Cir. 1979).

Although the Supreme Court's recasting of the question presented for review obviated the need for a contacts-analysis in *Lebron*,²¹⁰ the Second Circuit's initial treatment of the case would have been quite different had it "[e]xpand[ed] [its] field of vision"²¹¹ and considered Amtrak's function, funding, and governing structure conjunctively rather than in isolation.

Cases involving nominally "private" primary and secondary schools might also have been resolved differently if the reviewing courts had engaged in a more open-ended state action inquiry. *Rendell-Baker v. Kohn*,²¹² a case involving a private secondary school, is such a case.

In *Rendell-Baker*, the Supreme Court held that a privately owned and operated secondary school was not a state actor.²¹³ The plaintiff class included five teachers and one vocational counselor, all of whom worked at the New Perspectives School, a facility that educated students with alcohol, drug, or behavioral problems.²¹⁴ The vocational counselor, Rendell-Baker, had been hired through a federal grant to the school and was discharged over disagreements regarding the school's hiring policies.²¹⁵ The five other plaintiffs had written a letter critical of the school's administration to a local newspaper and had attempted to form a union.²¹⁶ All six sued the school, claiming that it had failed to provide them with due process and violated their First Amendment rights.²¹⁷

The New Perspectives School claimed that it was not a state actor and therefore did not — indeed could not — violate any of the plaintiffs' constitutional rights. The Supreme Court agreed and held that the school was not a state actor.²¹⁸ In so doing, the Court disregarded a number of facts that supported the plaintiffs' contention that the school should be deemed a state actor: (1) secondary education is a service generally associated with the government; (2) the state relied upon the school to meet the community's need to educate young citizens with drug, alcohol, or behavioral problems; (3) the state heavily regulated the school; and (4) 90-99% of the

210. See *Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 964-65 (1995).

211. *Franz v. United States*, 707 F.2d 582, 593 (D.C. Cir.), modified on other grounds, 712 F.2d 1428 (D.C. Cir. 1983).

212. 457 U.S. 830 (1982).

213. See 457 U.S. at 840-43.

214. See 457 U.S. at 833-35.

215. See 457 U.S. at 833-34.

216. See 457 U.S. at 835.

217. See 457 U.S. at 834-35.

218. See 457 U.S. at 837-43.

school's annual budget came from the state.²¹⁹

Mechanically proceeding through the state action tests, Chief Justice Burger failed to consider collectively the evidence supporting a state action finding. His majority opinion held that education, although associated with the government, is not an "exclusive" function of the government.²²⁰ It separately explained that neither significant public funding nor government regulations can establish state action.²²¹ Finally, the Court opined that although the school met a community need, it did not stand in a symbiotic relationship with the state because the state did not share in the profits generated by the school.²²²

In dissent, Justice Marshall conceded that education was not an exclusive state function and that funding and regulation by themselves do not transform an entity into a state actor.²²³ Notwithstanding these weaknesses, however, he observed that "the fact that a private entity is performing a vital public function, when coupled with other factors demonstrating a close connection with the State, may justify a finding of state action."²²⁴ Justice Marshall argued that a "more sensitive and flexible" interpretation of the state action requirement was needed to analyze properly the relationship of the state to the school.²²⁵ Essentially, Justice Marshall engaged in meta-analysis: he acknowledged that no single test had been satisfied but argued that if viewed collectively, the whole of the evidence exceeded the sum of the parts. Had the majority viewed the facts "in the totality of the circumstances," it would have found the school to be a state actor.²²⁶

219. See 457 U.S. at 837-43.

220. 457 U.S. at 842. But cf. Retha Hill, *New School Gives Troubled Youths a Chance*, WASH. POST, Mar. 22, 1995, at B1 (describing the opening and operation of a new Maryland "alternative school for adolescents who have had difficulty in traditional classroom settings"). The school is managed and operated by a private contractor, *id.* at B7, but performs an essential, if not exclusive, state function. The school's status as part of Maryland's overall educational system was reflected by the attendance of the Lieutenant Governor and State Superintendent of Education at the school's opening. *Id.* at B1. The school's status as a state actor is open to doubt, however, so long as *Rendell-Baker* remains good law.

221. See *Rendell-Baker*, 457 U.S. at 840-41.

222. See 457 U.S. at 843.

223. See 457 U.S. at 843, 847-49 (Marshall, J., dissenting).

224. 457 U.S. at 849 (Marshall, J., dissenting).

225. 457 U.S. at 851-52 (Marshall, J., dissenting).

226. See, e.g., *Chalfant v. Wilmington Inst.*, 574 F.2d 739, 743-45 (3d Cir. 1978) (viewing facts under the "totality of the circumstances"). The Court's treatment of *Rendell-Baker* was particularly egregious; her employment with the school was facilitated by a federal grant. See *Rendell-Baker*, 457 U.S. at 833. In addition, the decision to hire her was overseen by the State Committee on Criminal Justice, and the school's director informed the committee of his intention to discharge *Rendell-Baker* before ending her employment. 457 U.S. at 833-34.

In sum, the incorporation of meta-analysis in state action analysis would plainly provide more accurate state action determinations because courts would be put to the burden of explaining their state action determinations with particularity and care; the mere invocation of the watchwords or "catch-phrases"²²⁷ of the state action precedents would not satisfy a reviewing court's obligations.

Such an approach would also lead courts to reach intuitively correct state action determinations with greater frequency. The Second Circuit's holding in *Lebron* that Amtrak was not a state actor is unconvincing,²²⁸ just as the Fifth Circuit's decision in *Yeager* lacks persuasive force.²²⁹ The Supreme Court's reasoning in *Lebron* is compelling not only because it comports with one's general sense of Amtrak's proper legal status but also because the majority engaged in a broad factual inquiry regarding the fundamental nature of Amtrak and its relationship to the federal government.²³⁰ In approaching the question whether Amtrak was a component of the federal government, the Supreme Court considered Amtrak's history, its business practices, its financial structure, and its corporate control structure.²³¹ No one factor or set of factors was dispositive by itself. Rather, in the totality of the circumstances, a particular corporation constituted a component of the federal government. State action inquiries in cases involving truly private enti-

Thus, the state had directly passed on her qualifications to hold the position of vocational counselor and provided the funds to pay for her salary. The state's involvement in the hiring and retention of Rendell-Baker, coupled with the nature of the institution and the public need it met within the community, veritably compels a conclusion that, at least with respect to Rendell-Baker, the New Perspectives School was a state actor. Even if the five teachers employed by the school without direct state supervision could not establish state action, surely Rendell-Baker's situation was materially different; however, neither the majority nor the dissent made this distinction.

227. See Black, *supra* note 13, at 88.

228. See *Lebron v. National R.R. Passenger Corp.*, 12 F.3d 388, 390-92 (2d Cir. 1993), *rev'd*, 115 S. Ct. 961 (1995). The same can be said of many of the pre-*Lebron* cases involving government-controlled corporations. See, e.g., *Warren v. Government Natl. Mortgage Assn.*, 611 F.2d 1229, 1232-35 (8th Cir.), *cert. denied*, 449 U.S. 847 (1980); *Newman v. Legal Servs. Corp.*, 628 F. Supp. 535, 541-42 (D.D.C. 1986); *Network Project v. Corporation for Pub. Broadcasting*, 4 Media L. Rep. (BNA) 2399, 2403-08 (D.D.C. 1979).

229. See *Yeager v. City of McGregor*, 980 F.2d 337, 341-43 (5th Cir. 1993).

230. See *Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 967-69, 973-74 (1995).

231. See 115 S. Ct. at 967-74. The Court placed particular emphasis on the fact that six of Amtrak's nine directors were appointed by the President and Congress, and the remaining three were appointed by those six. See 115 S. Ct. at 967-68; see also 45 U.S.C. § 543 (1994). Significantly, the *Lebron* Court did not reach the question whether "control" for purposes of corporate law would be a sufficient condition for establishing that a particular corporation is a governmental entity. See 115 S. Ct. at 967-75. See generally 13 C.F.R. § 121.401 (1995) (defining "control" for purposes of affiliation determinations); 47 C.F.R. § 24.720 (1994) (same). Arguably, if the federal or a state government exercises de jure or de facto control over a corporate entity, the entity should be deemed an agency or instrumentality of the government. It is not yet clear, however, whether the *Lebron* holding prefigures such a rule.

ties²³² should be no less open-ended, probing, or careful.

In a variety of contexts, the Supreme Court has refused to accord dispositive weight to a single factor or criterion when applying a particular constitutional provision or rule.²³³ There is no reason to treat state action determinations any differently. The facts material to satisfying any given state action test should be collectively relevant, and the tests themselves should be applied conjunctively to ensure that the federal courts make accurate — and intuitively correct — state action determinations.

Of course, hard cases will remain. Although more probing factual analyses would yield better — in other words, more accurate — state action determinations, such an approach would not necessarily make deciding state action questions any simpler. On the contrary, the mandate of a more probing analysis would require a reviewing court to expend greater effort in many cases because it would have to puzzle through the intricacies of the relationship between private entities and the government, both singly and collectively.

Still, the game is worth the candle if one is committed to holding the government to its constitutional responsibilities. As Professor Henkin pointed out, “No algebraic formula nor any conjuring with the words of the Constitution can define with precision the limits of the state’s choices.”²³⁴ Analytical shortcuts in state action determinations might save time and effort, but these savings come at the price of government-sponsored lawlessness. Such a price is simply too high to pay.

IV. CONCLUSION

The state action doctrine is a necessary analytical construct; it permits courts to hold the government accountable and protects the freedom of individual citizens to make fundamental decisions about

232. By this, I mean corporate entities that are not controlled by the government.

233. See, e.g., *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2796-98 (1993) (holding that “many factors” bear upon the admissibility of expert testimony, with no single factor dispositive); *Oliver v. United States*, 466 U.S. 170, 177-78 (1984) (holding that “[n]o single factor determines” whether a Fourth Amendment privacy claim is legitimate; instead several factors “are equally relevant”); *Solem v. Helm*, 463 U.S. 277, 290-92 & 290 n.17 (1983) (holding that “no one factor will be dispositive” when determining whether a sentence violates the Eighth Amendment’s prohibition on cruel and unusual punishments); *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975) (holding that multiple factors are relevant when determining whether a violation of the Fifth Amendment right against self-incrimination has occurred).

234. Henkin, *supra* note 72, at 488.

their economic, social, religious, and personal relationships.²³⁵ For the construct to be useful, however, it must reliably provide accurate determinations about the public or private nature of individuals or entities in particular circumstances.²³⁶

Essentially, the state action doctrine is a device that permits the federal courts to balance the interests of private individuals and entities in being free from constitutional regulation against the public's countervailing interest in ensuring that the government and its agents do not disregard constitutional constraints. The current approach to state action analysis unduly favors the interests of private individuals and entities in being unregulated; moreover, it invites courts to require a very high burden of proof for establishing government responsibility for private conduct, while at the same time excusing them from making searching inquiries into the government's potential responsibility for the private conduct at issue. The state action doctrine can best serve its legitimate objectives if reviewing courts are required to engage in case-specific, factually intensive state action inquiries.

In sum, the state action doctrine is and, of necessity, must remain something of a legal briarpatch. Simplistic tests and other attempts to provide an artificial sense of order cannot tame the fundamental nature of the inquiry, which is wild, overgrown, and seemingly unmanageable. Like rabbits, judges should be comfortable maneuvering in the briarpatch; exercising discretion and making hard choices should come naturally to members of the judiciary. As Justice Scalia noted, the terrain of the state action doctrine is "difficult"²³⁷ to traverse, and so it must be if the federal courts are to make accurate state action determinations. It's time to go back to the briarpatch.

235. "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982); see also William P. Marshall, *Diluting Constitutional Rights: Rethinking "Rethinking State Action,"* 80 Nw. U. L. Rev. 558, 561-67 (1985).

236. As Justice Douglas explained, "generalizations do not decide concrete cases." *Evans v. Newton*, 382 U.S. 296, 299 (1966). The federal judiciary, however, all too often acts as though the state action glosses, which are but "generalizations," actually decide concrete cases. See generally LLEWELLYN, *supra* note 11, at 188-89 (arguing that judges must "come to recognize the steady and open checking of results against sense and decency as an off-courseness of our system of precedent when that system is working right").

237. See *supra* note 5 and accompanying text.