

NOTES

Less Is More: Decluttering the State Action Doctrine

*Wickersham v. City of Columbia*¹

I. INTRODUCTION

Constitutional restrictions are not one-size-fits-all, restricting all conduct equally. Instead, the United States Constitution creates a schism between governmentally controlled domains and privately controlled sectors. The former are public actors, present throughout the vertical structure of government, and subject to Constitutional restrictions.² The latter are private actors, unburdened by Constitutional rules, with a degree of freedom and exclusionary power unavailable to governmental entities.³ But in this “golden age of privatization,” where private entities increasingly perform public duties with governmental backing, the dividing line between public and private actors is far from clear.⁴

The distinction between public and private actors, and the resulting effects on Constitutional claims, is commonly known as the “state action doctrine.”⁵ This doctrine is often seen as a threshold test, ensuring that a governmental wrongdoing is the basis for a Constitutional claim, even before the merits of a claim are considered.⁶ In use since 1875, the application of

1. 481 F.3d 591 (8th Cir. 2007), *cert. denied*, 128 S. Ct. 387 (2007).

2. Please note that the term “state action” implies governmental action at any level – federal, state, or municipal.

3. See John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C. L. REV. 569, 571 (2005).

4. *Id.* at 572 (quoting Paula A. Franzese, *Does it Take a Village? Privatization, Patterns of Restrictiveness and the Demise of the Community*, 47 VILL. L. REV. 553, 553 (2002)).

5. *Id.* at 575 (“[T]he state action doctrine holds that a claim based on the Constitution must be dismissed if the alleged injury is not the result of government wrongdoing.”). For example, shopping malls are privately owned and as such have the ability to restrict speech on their premises while public parks are state-controlled and therefore cannot arbitrarily restrict speech on its grounds. *See, e.g., Lloyd Corp. v. Tanner*, 407 U.S. 551, 559 (1972); *Pursley v. City of Fayetteville*, 820 F.2d 951 (8th Cir. 1987) (holding that an ordinance prohibiting picketing in front of a residence was an unconstitutional restriction of free speech since sidewalks are a public forum and the ordinance was not narrowly tailored as prescribed by the time, place, and manner doctrine).

6. *See infra* note 18 and accompanying text.

the state action doctrine has been inconsistent and choppy at best, with the Supreme Court handing down a variety of state action determinative “tests.”⁷ This situation has prompted commentators to call this doctrine, among other things, “dysfunctional”⁸ and “a conceptual disaster area,” with Justice Black referring to the United States Supreme Court’s jurisprudence on the issue as “a torchless search for a way out of a damp echoing cave.”⁹

The focus of this law summary is the tenuous distinction between state and private actors, examining both the various state action determinative tests proffered by the United States Supreme Court as well as the circuit courts’ application of these tests. Although the Supreme Court has dealt extensively with the issue of state action, and circuit courts have faithfully applied the highest court’s tests, problems remain. Many of the Supreme Court’s tests are very narrow, proffered in response to carefully defined factual situations. Therefore, whether explicitly in the opinion or a result of later interpretation, most of these tests can only be used in very particular instances. Thus, courts must not only pick the correct test from the multitude of options, but then must contort the narrow test to the facts of the given case.

As circuit courts continue to pick-and-choose which state action test to apply, a divergence of the circuits is imminent. This mayhem, however, is unnecessary, and the time has yet again arrived for the Supreme Court to grapple with the state action doctrine. The Supreme Court should clarify the scope and application of each “test,” tender a clear standard for determining state action, and remove the aura of mystery that surrounds the state action doctrine, particularly in the context of the recent Eighth Circuit decision, *Wickersham v. City of Columbia*.¹⁰

II. LEGAL BACKGROUND

A. Constitutional “State Action” Requirement

The main purpose of the “Constitution is to provide a framework for national republican self-governance.”¹¹ The Equal Protection Clause of the Fourteenth Amendment does not protect everyone equally – it only protects an individual against abridgement of his/her Constitutional rights at the hands of a state actor.¹² This requirement of state action, in effect, guarantees that

7. See *infra* Part II.C.

8. Kevin L. Cole, *Federal and State “State Action”: The Undercritical Embrace of a Hypercriticized Doctrine*, 24 GA. L. REV. 327, 343 (1990).

9. Charles L. Black, Jr., *Foreword: “State Action,” Equal Protection, and California’s Proposition 14*, 81 HARV. L. REV. 69, 95 (1967).

10. 481 F.3d 591 (2007), *cert. denied*, 128 S. Ct. 387 (2007).

11. Henry C. Strickland, *The State Action Doctrine and the Rehnquist Court*, 18 HASTINGS CONST. L.Q. 587, 591 (1991).

12. 16B AM. JUR. 2D *Constitutional Law* § 800 (1998). In free speech cases, for example, because the First Amendment only protects against free speech deprivation

individual freedoms are protected from federal law and federal judicial power.¹³ According to the United States Supreme Court, “[o]ne 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.”¹⁴ By focusing the judiciary’s attention on state action, this doctrine limits the courts’ power to regulate private interests and ensures that states and state actors respect individual liberties.¹⁵ Regardless of “[w]hether this is good or bad policy, it is a fundamental fact of our political order.”¹⁶

The determination of a party’s status as either private and, therefore, immune from constitutional claims, or public and subject to constitutional restrictions, is often viewed as a threshold question, preempting the court’s consideration of the merits of the case.¹⁷ While determining whether a wrongdoer is a governmental actor seems simple, actually distinguishing between public and private actors “has proven elusive in application.”¹⁸ Ultimately, a finding of state action directly affects the remedies available to the injured party.¹⁹

B. “Under the Color of State Law” in 42 U.S.C. section 1983

Title 42 U.S.C. section 1983 imposes liability on every person who, under the color of a statute, ordinance, or regulation, causes the deprivation of another’s federally protected right.²⁰ Intended as a damage remedy for those whose civil rights are violated, section 1983 applies only where deprivations occur under the color of state law.²¹ More specifically, for the statute to apply, a section 1983 defendant must act with the authority of the state,²² and a plaintiff must show that a state agent’s actions proximately caused the dam-

occurring at the hands of the state, plaintiffs who experience a loss at the hands of a private party are denied grounds for a constitutional claim. Only the Thirteenth Amendment’s prohibition on slavery directly restricts actions of private individuals. Strickland, *supra* note 9, at 591 n.13.

13. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

14. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991).

15. *Lugar*, 457 U.S. at 936-37. The purpose of the Constitution is, instead, to create a framework by which federal branches and state governments may regulate the daily activity of individuals. Strickland, *supra* note 9, at 591.

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

17. *Edmonson*, 500 U.S. at 619. Some authors, however, argue that the state action doctrine is more than a threshold question and serves a unique analytical function in Constitutional analysis. See Fee, *supra* note 3, at 573.

18. *Perkins v. Londonderry Basketball Club*, 196 F.3d 13, 18 (1st Cir. 1999).

19. Civil remedies arising out of a constitutional violation, however, arise under a separate cause of action.

20. 42 U.S.C. § 1983 (2000).

21. 14 C.J.S. *Civil Rights* § 30 (2007).

22. *Kia P. v. McIntyre*, 235 F.3d 749, 755 (2d Cir. 2000).

ages in question.²³ Acting with the “authority of [the] state” applies to both governmental entities and private parties acting in concert with state officers to deprive another of their constitutionally guaranteed liberty.²⁴

Coinciding with the section 1983 “color of state law” requirement is the Fourteenth Amendment’s “state action” requirement.²⁵ Remedies for violations of section 1983 and the Fourteenth Amendment differ, with the former providing civil relief and the latter providing equitable relief. With most parties instituting suits interested in both types of remedies, section 1983 issues are presented in many “state action” cases. According to the Supreme Court in *Lugar v. Edmondson Oil Co.*, the scope of section 1983 is slightly broader than the Fourteenth Amendment’s “state action” requirement.²⁶ For the most part, however, liability under section 1983’s “color of state law” requirement is equivalent to that of state action under the Fourteenth Amendment.²⁷

C. State Action Tests from the United States Supreme Court

State action generally arises out of a person’s acting on behalf of the government or performance of a duty that is traditionally carried out by the state.²⁸ The Supreme Court noted that the determination of whether conduct is private or amounts to “state action” is not an easy question²⁹ and there is no singular fact that is a “necessary condition . . . for finding state action.”³⁰ The important inquiry, therefore, is the interplay of the government and private actions in light of the particular facts of a case.³¹ As a result of this difficult

23. *Id.* at 761.

24. See 14 C.J.S. *Civil Rights* § 30 (2007). Action, in this context, denotes intense participation and compulsion of the challenged act: mere acquiescence on the part of the state to the action is insufficient. *Reinhart v. City of Brookings*, 84 F.3d 1071, 1073 (8th Cir. 1996).

25. See *Abbott v. Latshaw*, 164 F.3d 141, 145 (3d Cir. 1998).

26. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 n.18 (1982). The court further explained that plaintiffs must first show that they have been deprived of a right secured by the Constitution and secondly show that the defendant deprived them of this right “‘under the color of . . . statute.’” *Id.* at 930 (quoting *Flagg Bros. v. Brooks*, 436 U.S. 149, 155 (1978)).

27. *UAW, Local 5285 v. Gaston Festivals, Inc.*, 43 F.3d 902, 906 (4th Cir. 1995).

28. It is only when a private organization acts “with the authority of the government . . . [that the group is] subject to constitutional constraints.” *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991).

29. 16B AM. JUR. 2D *Constitutional Law* § 800 (1998) (citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); *Evans v. Newton*, 382 U.S. 296 (1966)).

30. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001).

31. See, e.g., *Gilmore v. City of Montgomery*, 417 U.S. 556, 573 (1974) (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961)). “[S]tate action may be found if, though only if, there is such a ‘close nexus between the State and the

balancing, the United States Supreme Court has created at least seven distinct tests to help lower courts deal with state action,³² despite the fact that the Supreme Court claims not to offer “tests” or even to categorize its state action decisions.³³

The first of these tests is the Public Function Test. This test requires that “the private entity exercise powers which are traditionally exclusively reserved to the state, such as holding elections or eminent domain.”³⁴ In order to find state power, the function served by the private group must be that which is *traditionally and exclusively* reserved to the state; the mere fact that the public is benefited by a private action is insufficient.³⁵ The Supreme Court has found “exclusive state power” to be a very narrow category. In fact, only the administration of elections,³⁶ operation of a company town,³⁷ eminent domain,³⁸ peremptory challenges in jury selection,³⁹ and, in very limited situations, the operation of a municipal park have qualified as such.⁴⁰ However, the courts must not take the “exclusive” power beyond the narrow context in which the rule was created.⁴¹

Second, the State Compulsion Test requires that a state exercise such coercive power that the “choice must in law be deemed to be that of the State.”⁴² This test is met when a state encourages or coerces a private party to engage in the challenged conduct.⁴³ Unlike the Public Function Test which is

challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’” *Brentwood Acad.*, 531 U.S. at 295 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

32. *Brentwood Acad.*, 531 U.S. at 296.

33. Benjamin Mintz, Note, *Analyzing the OPTN Under the State Action Doctrine – Can UNOS’s Organ Allocation Criteria Survive Strict Scrutiny?*, 28 COLUM. J.L. & SOC. PROBS. 339, 358 n.105 (1995).

34. *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992).

35. See, e.g., *S.F. Arts & Athletics v. U.S. Olympic Comm.*, 483 U.S. 522, 544 (1987) (citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982)); *Arlosoroff v. NCAA*, 746 F.2d 1019, 1021 (4th Cir. 1984).

36. *Nixon v. Condon*, 286 U.S. 73 (1932).

37. *Marsh v. Alabama*, 326 U.S. 501 (1946).

38. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974) (suggested in dicta).

39. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622 (1991).

40. *Evans v. Newton*, 382 U.S. 296 (1966).

41. See *UAW, Local 5285 v. Gaston Festivals, Inc.*, 43 F.3d 902, 908 (4th Cir. 1995) (noting that the application of the *Newton* municipal park test should be narrowly construed and that state action was found in *Newton* “because the city remained ‘entwined in the management or control of the park’”).

42. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 166 (1978); *Jackson*, 419 U.S. at 357; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1965)).

43. Paul C. McCaffrey, Note, *Playing Fair: Why the United States Anti-Doping Agency’s Performance-Enhanced Adjudications Should be Treated as State Action*, 22 WASH. U. J.L. & POL’Y 645, 664 (2006).

limited to a few specific situations, state compulsion is based on the degree of the state's influence over the private actor and, therefore, its potential application is much broader than the public function test. As Justice Souter noted in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, coercion and encouragement refer to the "kinds of facts that can justify characterizing an ostensibly private action as public instead."⁴⁴ Therefore, the major question that courts analyze under this test is whether or not the private entity had a choice to act or refrain from acting.⁴⁵

One of the most frequently used tests is the Nexus Test. Here, "the action of a private party constitutes state action when there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself."⁴⁶ Despite the inherently fact-bound nature of state action,⁴⁷ the Supreme Court stipulated that any one of the following factors, without more, are insufficient to find a close nexus: 1) state regulation, no matter its extent;⁴⁸ 2) public funding of a private group;⁴⁹ 3) private use of public property;⁵⁰ 4) minor presence of public officials on the board of a private entity;⁵¹ 5) the mere approval or acquiescence of the state in private activity;⁵² and 6) utilization of public services by private actors.⁵³ In combination, however, these factors may form a sufficient basis for a finding of state action.

The fourth possible state action test, State Agency, occurs when a private entity is controlled by a state agency.⁵⁴ In these very limited cases, when a state agency acts in a discriminatory manner, the agency's actions are imputed directly to the state and give rise to "state action" sufficient to support a constitutional claim.⁵⁵ Much as public function is limited in application to

44. *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 303 (2001).

45. Eric Engle, *The Alien Tort Statute and the Torture Victims' Protection Act: Jurisdictional Foundations and Procedural Obstacles*, 14 WILLAMETTE J. INT'L L. & DISP. RESOL. 1, 23 (2006).

46. *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992).

47. See *supra* text accompanying note 29.

48. See, e.g., *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999).

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

50. See, e.g., *Blum v. Yaretsky*, 457 U.S. 991 (1982).

51. *Id.*

52. See, e.g., *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974).

53. See, e.g., *Am. Mfrs.*, 526 U.S. at 54 (noting that "'overt, significant assistance of state officials'" is required to make private actors' use of public services qualify as state action (quoting *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486 (1988))).

54. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (quoting *Pennsylvania v. Bd. of Dirs.*, 353 U.S. 230, 231 (1957) (per curiam)).

55. See *Pennsylvania v. Bd. of Dirs.*, 353 U.S. 230. Here, a school was established by a testamentary trust and its enrollment was limited to "poor white male orphans." *Id.* at 230-31. The city of Philadelphia served as the trusts' trustee and

the extent of the government's reach, so too is state agency limited to agencies created by the state.

The fifth state action test, the Entwinement Test, examines the relationship between the state and the private entity to determine if the government is entwined with the private group's management or control.⁵⁶ Examples of interrelationships examined under this test are: how many of a private group's members were also public officials, whether private employees were treated like state employees, and whether the duties performed by the public and private were interdependent of one another.⁵⁷

While closely related to the Nexus Test, the sixth state action test is the Symbiotic Relationship Test.⁵⁸ This test is more unstructured than the Nexus Test and simply requires a high level of mutual interdependence between the private group and the state in order for state action to be found.⁵⁹ Interdependence factors include "mutually conferred benefits, a close fiscal relationship, [and] a lessor/lessee relationship."⁶⁰ While not the most frequently used test by the court, the flexible nature of this test makes it an important element in the court's jurisprudence.

The last major test utilized by the Supreme Court is that of Joint Participation. Of the many tests offered, this test concentrates on the actual interaction between the state and the private party and not just the interrelatedness between the two.⁶¹ This test applies in situations where the state so closely encourages a party's activity that the private actor is said to be "cloaked with the authority of the state."⁶² This test focuses, therefore, on the activity undertaken by the parties and not merely their relationship with one another.

With this myriad of tests, overlapping yet distinct, the Supreme Court has left lower courts to determine each case based on the specific facts before the bench and also to choose between this wide variety of tests. Lower courts, therefore, find themselves in an unusual position where they are over-

state statute authorized the administration of the trust by the city. *Id.* at 231. Despite the fact that the school was private, the Court found state action since the state agency was a trustee. *Id.*

56. *Brentwood Acad.*, 531 U.S. at 296 (quoting *Evans v. Newton*, 382 U.S. 296, 299 (1966)).

57. *Id.* at 298-302.

58. The symbiotic relationship test is so closely related to the nexus test that the two are often applied interchangeably by the courts.

59. Gregory D. Malaska, *American Manufacturers Mutual Insurance Company v. Sullivan: "Meta-Analysis" as a Tool to Navigate through the Supreme Court's "State Action" Maze*, 17 J. CONTEMP. HEALTH L. & POL'Y 619, 651 (2001).

60. *Id.* (citations omitted). This test was last used in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), and has not been used since. *See, e.g., Rendell-Baker v. Kohn*, 457 U.S. 830, 843 (1982) (mutually conferred benefits); *Burton*, 365 U.S. at 726 (close fiscal relationship); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (lessor/lessee relationship).

61. Malaska, *supra* note 56, at 630.

62. *Id.*

run with guidance. Allowing lower courts to have so much discretion in determining which test to apply leaves substantial room for circuits to reach differing standards.

*D. Circuit Courts' Application of State Actor Determinative Tests*⁶³

Due to the preponderance of overlapping Supreme Court opinions on state action and the Supreme Court's hesitancy to clear the confusion, the majority of state action determinations occur at the appellate level. Appellate courts, therefore, are in the unfavorable position of applying one or more of the Supreme Court's state action decisions to the facts before the court. Often, because the existing tests are fairly narrow, appellate courts are forced to fuse multiple state action "tests" into a useful standard. As appellate courts create these hybrid tests in order to resolve cases, the state action doctrine is becoming even more obfuscated.

1. The Sixth Circuit

The Sixth Circuit addressed the issue of free speech and speech restrictions at the hands of a private group with state interaction in the case of *Lansing v. City of Memphis*.⁶⁴ Here, the plaintiff street preacher was barred from entering and preaching in a private group's festival located in a city park.⁶⁵ The private organization, Memphis in May, contended that it was not a state actor and therefore owed no First Amendment duties to the plaintiff.⁶⁶

Memphis in May was a not-for-profit corporation run by a volunteer board of directors with two of its nine committee members selected by city and county representatives.⁶⁷ Each year, the group leased a city park for their "Memphis in May" event, necessitating the closure of surrounding streets to automobile traffic.⁶⁸ In its lease with the city, Memphis in May agreed to "comply with the directives of the Memphis Police Department" in closing and keeping the surrounding streets free of traffic during the event.⁶⁹ Because the plaintiff Lansing preached at this event annually and met with resistance each year, Lansing initiated correspondence with city officials in the

63. The circuit decisions referenced in this section were chosen for their clarity in dealing with the state action question and the frequency with which they have been cited by subsequent state action cases.

64. 202 F.3d 821 (2000).

65. *Id.* at 824.

66. *Id.*

67. *Id.* at 825.

68. *Id.* Memphis in May petitioned and received a Memphis City Council resolution to close streets surrounding the park. *Id.* Gate receipts from the fair were the major source of revenue for Memphis in May. *Id.* Only 2% of its total revenues came from the state. *Id.*

69. *Id.*

hopes of securing his right to speak at the event.⁷⁰ The city attorney responded, indicating that the city would protect Lansing's First Amendment rights as well as notifying Memphis in May that the city was willing to assist in determining permissible speech restrictions.⁷¹

The Sixth Circuit applied three tests to determine if Memphis in May qualified as a state actor: 1) the Public Function Test,⁷² 2) the State Compulsion Test,⁷³ and 3) the Symbiotic Relationship/Nexus Test.⁷⁴ Applying the Public Function Test, the court found while Memphis in May had more control over the streets than an ordinary citizen, the group remained subordinate to authority of the Memphis Police and Fire Departments for traffic control and opening and closing streets.⁷⁵ The Sixth Circuit held that because the city retained ultimate control over public areas at all times, despite Memphis in May's permission to use the streets for extra-ordinary purposes, Memphis in May's activity did not usurp powers traditionally retained by the state.⁷⁶

Under the State Compulsion Test, Memphis in May failed to qualify as a state actor because the connection between the group and the city's attorney was limited to one correspondence in which the city's attorney did not even assist the group but merely offered to assist the group in determining the "constitutional legal boundaries for protected speech."⁷⁷ Additionally, the plaintiff's interaction with the police was not directed by the group but was

70. *Id.* at 826.

71. *Id.* at 826-27. The letter sent by the Memphis city attorney to Lansing in response to his request for assurances that his right to free speech would be protected stated:

The City of Memphis agrees that Mr. Lansing has certain constitutional rights to engage in protected speech. It is our position to ensure that for the 1997 Memphis in May Festival that we provide information to the festival organizers as well as to the Memphis Police Department regarding any limitations that may be placed on those who wish to engage in protected speech.

Id. at 826. The city attorney's letter to Memphis in May stated:

The City Attorney's Office is willing to assist you and Memphis in May officials in determining what are constitutional legal boundaries for protected speech All things considered it is imperative that there is better coordination between Memphis in May officials and the City to ensure that protected constitutional rights are not abridged I would only ask that when negotiations are underway this year that you remember the balance between . . . competing interests when Memphis in May is drawing the borders for the festival activities. Those borders cannot infringe on protected constitutional rights.

Id. at 826-27 (alteration in original).

72. *See supra* text accompanying notes 32-39.

73. *See supra* text accompanying notes 40-43.

74. *See supra* text accompanying notes 44-51 and 56-57.

75. *Lansing*, 202 F.3d at 829.

76. *Id.*

77. *Id.*

instituted at the request of the plaintiff himself.⁷⁸ Lastly, the Nexus Test failed because there was not a clear nexus between Memphis in May and the city since the plaintiff failed to establish that more than one factor was present.⁷⁹

2. The Fourth Circuit

In a similar factual situation, the Fourth Circuit deviated from the Sixth Circuit's approach in *Lansing* and analyzed the state action issue as one based on the transfer of the state's "sovereign power" to a private entity.⁸⁰ In *United Auto Workers v. Gaston Festivals*, defendant Gaston Festivals organized and held an annual "civic pride" fair in downtown Gastonia, North Carolina.⁸¹ The fair, staffed by approximately 500 volunteers from the community, was held on both public and private land, requiring the event organizers to procure permits for the use of the public land. After obtaining these permits, the city provided police protection, traffic assistance, and sanitation services for the duration of the defendant's event.⁸² This case arose out of the defendant's denial of the UAW's application for a booth at the 1993 festival because the UAW failed to meet the festival's booth requirements.⁸³

The UAW argued that the operation of the municipal park for recreation is a state function and, as such, the Public Function Test should govern this case.⁸⁴ Because the Supreme Court has explicitly noted that the operation of a municipal park is an exclusive state power only in very rare circumstances, the Sixth Circuit disagreed with the UAW.⁸⁵ The Supreme Court's test applies only when a city plays an integral role in the operation of the event in a

78. *Id.*

79. *Id.* at 834; *see* text accompanying notes 44-51.

80. *UAW, Local 5285 v. Gaston Festivals, Inc.*, 43 F.3d 902 (4th Cir. 1995) (applying public function test).

81. *Id.* at 904.

82. *Id.* at 904-05.

83. *Id.* at 905. The booth approval policy stated:

[The fair] is neither politically, issue nor religiously oriented. 'Issue' is intended to mean a subject which is a topic of public debate or controversy, whether on a local, state or national level (e.g. abortion); and not a subject upon which there appears to be a general consensus of opinion (e.g. anti-litter campaign). The nature of the festival, i.e. a large crowd of people in a relatively small area for several hours, dictates that those 'issues' which are likely to foster confrontation or argument not be given a forum either pro or con in the setting. Therefore, booth space will not be granted to organizations falling in these realms.

Id.

84. *Id.* at 906.

85. *Id.* at 908. State action was found in *Evans* because the city remained "entwined in the management or control of the park." *Evans v. Newton*, 382 U.S. 296, 301 (1966).

city park. Thus, since the city had no role in the operation of the defendant's festival, the Sixth Circuit held the Public Function Test advocated by the UAW did not apply.⁸⁶ Because the city granted Gaston's permit and retained the power to revoke it, ultimate regulatory authority remained with the city.⁸⁷ Moreover, "[t]he state action doctrine has never been thought to extend to cases where the street, parks and public meeting places of a particular community are utilized for the exercise of first amendment rights."⁸⁸

The Fourth Circuit carefully noted in *Gaston* that a private organization has the power to decide admission criteria to its own event.⁸⁹ By holding a private event, having limited connections with the state, and not performing a traditional state function, Gaston retained the power to restrict speech at the event.⁹⁰

3. The First Circuit

In *Perkins v. Londonderry Basketball Club*, the First Circuit faced a young female athlete's claim of gender discrimination under 42 U.S.C. section 1983 against a basketball club.⁹¹ The Londonderry Basketball Club (LBC) was a volunteer-based, non-profit organization dedicated to organizing youth basketball tournaments in Londonderry. LBC was founded by Arthur Psaledas who, despite being the acting City of Londonderry's Recreation Director, created and ran LBC outside of his official capacities. Perkins was one of two girls selected to play on an otherwise all male team that attempted to play in a male division of an LBC-sanctioned basketball tournament.⁹² While her team was allowed to compete in LBC's tournament, Perkins was not allowed to play because of her gender.⁹³

The First Circuit applied a "trio of analytic avenues" to determine whether a private entity qualified as a state actor: 1) assumption of traditional public function when the challenged conduct occurred; 2) the existence of an elaborate financial or regulatory nexus between the groups; and 3) a symbiotic relationship between the private entity and the state.⁹⁴ As to the first element, the court emphasized the requirement that the function be one that is

86. *Gaston Festivals*, 43 F.3d at 908.

87. *Id.* at 910.

88. *Id.* (alteration in original) (quoting Nat'l Socialist White People's Party v. Ringers, 473 F.2d 1010, 1016 (4th Cir. 1973)).

89. *Id.* at 910-11.

90. *Id.* In another case, citing *Gaston*, the Eighth Circuit also held that a private group's use of a City's public park where the private group created and enforced their own rules, with little other significant connection to the City, was still insufficient to find state action. *Reinhart v. City of Brookings*, 84 F.3d 1071 (8th Cir. 1996).

91. *Perkins v. Londonderry Basketball Club*, 196 F.3d 13 (1st Cir. 1999).

92. *Id.* at 16-17.

93. *Id.* at 17.

94. *Id.* at 18.

exclusively reserved to the state and, therefore, found that youth basketball is not a traditional state function.⁹⁵ Because the state merely allowed the LBC to use a public gymnasium for its tournament and because the state did not actively participate in the discrimination, there was no close nexus between the state and the discrimination.⁹⁶ To find a close nexus, “the focal point is the connection between the State and the challenged conduct, *not* the broader relationship between the State and the private entity.”⁹⁷ Lastly, the appellant contended that a symbiotic relationship existed between LBC and the city because the city received profits garnered from the challenged conduct (the same-sex tournament).⁹⁸ In rejecting this argument, the court noted that LBC’s small donation to the city over the years was insufficient to prove symbiotic relationship.⁹⁹

III. RECENT DEVELOPMENTS

Since *The Civil Rights Cases*, the judiciary has dealt with the state action doctrine and, despite the passage of 130 years, the inquiry into state action has not become easier.¹⁰⁰ Lower courts are currently struggling with the state action doctrine not because of lack of guidance from the United States Supreme Court, but because the lower courts are under the heavy burden of weighing such a fact-dependent matter against the host of state action tests handed down by the Supreme Court.

The United States Court of Appeals for the Eighth Circuit recently had the chance to rule on the state action doctrine in the case of *Wickersham v. City of Columbia*.¹⁰¹ Since state action is far from a new issue, the Eighth Circuit had previously dealt with this issue but *Wickersham* presented a unique and challenging set of facts. *Wickersham* gave the United States Supreme Court an opportunity to clarify the confusion surrounding the state action doctrine, an opportunity which the court failed to take.¹⁰²

In *Wickersham*, the defendant, Memorial Day Weekend Salute to Veterans Corporation (“Salute”), was a private not-for-profit corporation dedicated

95. *Id.* at 19; *see supra* text accompanying notes 32-396.

96. *Perkins*, 196 F.3d at 20.

97. *Id.* at 19-20 (emphasis added).

98. *Id.* at 22.

99. *Id.*

100. *See* *The Civil Rights Cases*, 109 U.S. 3, 17 (1883) (“[C]ivil rights, such as are guaranteed by the constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings.”).

101. 481 F.3d 591 (2007), *cert. denied*, 128 S. Ct. 387 (2007).

102. *Memorial Day Weekend Salute to Veterans Corp. v. Wickersham*, 128 S. Ct. 387 (2007).

to honoring veterans, most notably by holding a Memorial Day Air Show.¹⁰³ The Air Show was a two-day annual event, free and open to the public, held around Memorial Day at the Columbia, Missouri, Regional Airport.¹⁰⁴

Among the 2004 Air Show's attractions were booths, food, a solemn salute to veterans and, of course, airplanes.¹⁰⁵ Some of the aircraft were provided by the federal government while others were procured from private individuals, with fees differing depending on the source of the plane.¹⁰⁶ In order to obtain government owned planes, the City was required to fill out a "Ground Operations Plan" indicating that the Air Show was "officially supported by local government."¹⁰⁷ This plan was completed almost entirely by the airport's director, not Salute, and was signed by the city manager.¹⁰⁸

The City of Columbia leased the Columbia Regional Airport to Salute for the Memorial Day Air Show. However, in leasing the airport to Salute, Columbia's city counsel violated its own ordinance requiring the City to maintain total control of the airport at all times.¹⁰⁹ The lease stated that Salute had "exclusive control, subject to the rights of tenants and the provisions of [the agreement], to control activities taking place on the [tarmac] during the time period of the event."¹¹⁰ Normal airport traffic, however, did not cease during the Air Show.¹¹¹ In addition to approving Salute's plan for the

103. *Wickersham v. City of Columbia*, 371 F. Supp. 2d 1061, 1066 (W.D. Mo. 2005), *aff'd*, 481 F.3d 591 (8th Cir. 2007). Salute's mission statement is "To Honor and Remember those who served, those currently serving in our Armed Forces, Guard, Reserves, and our Allies." *Id.* The Air Show has been held annually since 1993 at the Columbia Regional Airport. *Wickersham*, 481 F.3d 591, 593 (8th Cir. 2007).

104. *Wickersham*, 481 F.3d at 593. The City of Columbia did not charge Salute for its use of the airport for its Memorial Day festivities. *Id.*

105. *Id.* Salute carefully controlled what groups were granted booth permits and the literature that was promulgated by those groups was also carefully limited so as to not infringe on Salute's ultimate purpose for the weekend. *Wickersham*, 371 F. Supp. 2d at 1071.

106. *Wickersham*, 371 F. Supp. 2d at 1067. The federal government, when providing planes and personnel for air shows, requires that the events be open to the public. *Id.* at 1066. Salute only has to pay for the travel expenses of government employees and not for the use or maintenance of the federally owned aircraft. *Id.* at 1067. Private aircraft owners, however, were paid an appearance fee and were reimbursed for their fuel, lodging, meals, transportation and other expenses. *Id.*

107. *Id.* at 1075.

108. *Id.* at 1073, 1075.

109. *Id.* at 1072.

110. *Id.* at 1072 (alterations in original). Columbia, Mo., Ordinance § 3-3, Ord. No. 10665 (1985) states: "The city shall, at all times, maintain full control of the airport. The city shall adopt no ordinance, resolution or motion and shall make no lease or contract with any person, including the United States Government, which will impair the City's control of such airport and its facilities." *Wickersham*, 371 F. Supp. 2d at 1072.

111. *Id.* at 1072.

Air Show, Columbia Regional Airport employees operated the airport and control tower for the Air Show, without payment from Salute.¹¹²

Additionally, Columbia's police captain created a unique security plan for the Air Show, and the Columbia Police Department executed this plan.¹¹³ Overall, the City of Columbia spent more than fifteen thousand dollars in overtime compensation for police officers at the Air Show, with more City money funneled towards airport employees, sanitation workers, and city-sponsored advertising for the Air Show, all without reimbursement from Salute.¹¹⁴

The Air Show's rules stipulated, in part, that no petitioning, soliciting, or political campaigning were allowed at the event.¹¹⁵ Specifically, the rules stated: "No protests are permitted inside the tarmac fence. No signing of petitions for any reason, and no passing of handbills for any reason is permitted inside the tarmac. Authorized programs, and authorized handout materials on the part of exhibitors is [sic] permitted."¹¹⁶ Inter-Salute memoranda noted that violators should first be asked to cease their behavior, then the Columbia Police should be notified of violators, and lastly "[a]ny person who persists in entering will be . . . arrest[ed]."¹¹⁷ The Columbia Police Department conceded that Salute's president, Mary Posner, was to be the ultimate arbiter of "permissible" speech.¹¹⁸

112. *Id.* at 1073. Not only did general airport personnel work at the event but four days of meetings were held between the air traffic controller, FAA representative, the City's fire chief, police Chief and the director of the airport. *Id.* Additionally, both the airport director and police officer were involved in year-round annual meetings with Salute. *Id.*

113. *Id.* at 1073-74.

114. *Id.* The City also provided free sanitation workers, recycling bins and free advertising for the Air Show. *Id.* at 1064, 1074. Police Captain Martin also planned and served as the primary contact for the Air Show's shuttle service. *Id.* at 1073. The city also planned for and provided for typical emergency services. *Id.* at 1074.

115. *Id.* at 1067.

116. *Id.*

117. *Id.*

[Protestors] are not allowed to enter onto the tarmac area and are restricted to protesting outside of the Columbia Bust Gate, noted as Gate # 1 Should protestors attempt to enter the premises, officers will immediately advise the Command Center and will stop their forward progress. . . . Any person who persists in entering will be given a trespass warning prior to arrest. Keep in mind that persons are not restricted from entering, only those who intend to conduct a protest once entry is made Once given a trespass warning, any person who attempts to enter onto the airport property is subject to arrest. The Tarmac Supervisor and Law Enforcement Security Commander should be notified.

Id. at 1067-68 (alterations in original).

118. *Id.* at 1068. Columbia Police Officer Martin testified that, "if [Posner] says that she does not want somebody on her property, regardless of what her reasoning is, I would ask that person to leave." *Id.* (alteration in original).

At the 2004 Air Show, plaintiff Bill Wickersham was arrested for attempting to gather signatures on a petition advocating renewable energy, and plaintiff Maureen Doyle was prevented from distributing antiwar flyers.¹¹⁹ Wickersham and Doyle subsequently brought a joint 42 U.S.C. section 1983 action in the United States District Court for the Western District of Missouri against the City of Columbia and Salute, seeking injunctive relief that would permit the plaintiffs to engage in expressive activities at future air shows.¹²⁰ The plaintiffs contended that given Salute's joint participation with the city in staging the Air Show and enforcing the speech restrictions, along with Salute's ultimate discretion to dictate arrests made at the Air Show, Salute qualified as a state actor for First Amendment purposes.¹²¹

The district court granted a temporary injunction allowing the plaintiffs to distribute leaflets at the 2005 Air Show but refusing to allow the plaintiffs to circulate petitions or other forms of solicitation.¹²² Ten months later, the same court issued a permanent injunction, noting that Salute was a state actor because of Salute's high level of entanglement with the city in planning the Air Show and monitoring expressive activities.¹²³ In its order, the district court noted that Salute's blanket prohibition against "adversarial messages" was not reasonable, and instead it allowed Salute to ban petitioning while allowing leafleting, sign carrying, and expressive clothing.¹²⁴

The Western District stated in its decision granting the injunction that because the Air Show required such conspicuous assistance from the city, without which the event could not occur, this situation was different from a city allowing a private group to merely use a public park.¹²⁵ Since the city allowed Salute's president to determine when speech violated Salute's standards, and because regulation of speech is typically an exclusive state function, the Western District found there to be a clear delegation of state powers to Salute.¹²⁶ Thus, while providing police protection for an event is typically insufficient to transform a private event into state action, transferring the

119. *Wickersham v. City of Columbia*, 481 F.3d 591, 595 (8th Cir. 2007), *cert. denied*, 128 S. Ct. 387 (2007). Wickersham refused to stop petitioning at which point he was issued a warning. The Columbia Police contacted Mary Posner, Salute's President, who directed that he be arrested for first degree trespassing, which he was. Wickersham was never prosecuted. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* (referring to *Wickersham*, 371 F. Supp. 2d 1061).

123. *Id.* at 596 (referring to *Wickersham v. City of Columbia*, No. 05-4061-CV-C-NKL, 2006 U.S. Dist. LEXIS 15438 (W.D. Mo. Mar. 31, 2006)).

124. *Wickersham*, 2006 U.S. Dist. LEXIS 15438, at *23-*29. A total ban of petitioning was allowed because it was uniformly enforced against all groups, regardless of their message. *Id.*

125. *Wickersham*, 371 F. Supp. 2d at 1064-65.

126. *Id.* at 1077. Typically, police exercise discretion in arresting people for trespass, however, here the police acted directly upon Posner's authority. *Id.*

state's right to restrict speech to a private entity is more egregious, necessitating the finding of state action.¹²⁷

A sufficient degree of entanglement was also found by the Western District because it appeared that Salute and the city were acting in concert. In *Reinhart v. City of Brookings*, the Eighth Circuit noted that some relevant considerations to finding entanglement were "(1) [i]nsurance coverage; (2) who provides planning, advertising, cleaning, managing and security; and (3) source of funds and benefits."¹²⁸ Because the Air Show could not occur without city employees running the airport, because the city filled out the forms required before the federal government provided airplanes for exhibition events, and because there was general confusion in the community regarding the sponsorship of the Air Show, Salute and the City of Columbia were sufficiently entangled as to justify a state action finding.

After a permanent injunction was entered, Salute appealed to the Eighth Circuit, arguing that it was not liable as a state actor and that the injunction violates Salute's own First Amendment rights.¹²⁹ In its decision, the Eighth Circuit looked to earlier cases that it and other circuit courts had ruled upon. However, because the United States Supreme Court had proffered a variety of methods for analyzing state action questions, each circuit had taken a unique approach to the issue, leaving the Eighth Circuit with much precedent but little guidance. Thus, the Eighth Circuit noted, "[o]ur ultimate conclusion must turn on the particular facts of the case, since 'only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.'"¹³⁰

The Eighth Circuit first looked to its most recent state action decision in *Reinhart v. City of Brookings*,¹³¹ as did the Western District. In *Reinhart*, the plaintiff claimed his First Amendment rights were violated by a private entity whose art fair was held at a public park.¹³² Unlike in *Reinhart*, however, where the city merely allowed the group to use the park, in *Wickersham*, the government provided "critical assistance" in planning and operating the event. Because the City of Columbia was involved to a much greater degree in the Salute's actions than the City of Brookings was involved in *Reinhart*, the Eighth Circuit held that *Reinhart* did not govern the instant case.¹³³

127. *Id.*

128. *Id.* at 1079 (citing *Reinhart v. City of Brookings*, 84 F.3d 1071, 1073 (8th Cir. 1996)).

129. *Wickersham v. City of Columbia*, 481 F.3d 591 (8th Cir. 2007), *cert. denied*, 128 S. Ct. 387 (2007).

130. *Id.* at 597 (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961)).

131. 84 F.3d 1071.

132. *Id.* at 1072.

133. *Wickersham*, 481 F.3d at 598 (citing *Reinhart*, 84 F.3d at 1072-73).

Asserted by Salute as controlling precedent, the Eighth Circuit noted that the Sixth Circuit's ruling in *Lansing v. City of Memphis*¹³⁴ did not apply to *Wickersham*.¹³⁵ In the instant case, Salute's president held absolute control over arrests made at the Air Show and Columbia policeman specifically followed her mandates.¹³⁶ In *Lansing*, however, the private organization did not attempt to instruct officers on how to deal with unwanted speech activities on festival grounds.¹³⁷ Since the City of Columbia unambiguously directed its police officers on how to deal with speech restrictions and because this was not analogous to the *Lansing* standard, *Wickersham* presented a unique factual situation where the city did not control the police's activity; therefore, the Eighth Circuit found that *Lansing* did not apply.¹³⁸

As the Fourth and First Circuits each found that private speech restrictions provided the requisite nexus between the challenged conduct and state involvement, the Eighth Circuit also found that there was a sufficient nexus that existed between Salute and the City.¹³⁹ Moreover, the Eighth Circuit paid particular attention to the issue of speech restriction control. At the event, Salute's president, Mary Posner, had unequivocal control of speech restrictions and Columbia police officers followed Posner's directions regarding speech violations instead of city ordinances.¹⁴⁰ Because the Columbia Police Department agreed to uphold Salute's laws rather than city ordinances, the police went beyond the kind of neutral assistance normally afforded to private citizens.¹⁴¹ In particular, the court noted that "The record supports the . . . findings . . . of a mutual understanding that city police would work to restrict speech activities at the air show according to Salute's wishes."¹⁴² Thus, when there is joint, intentional interaction between a private entity and police pursuant to a customary plan, it is proper to hold the private entity responsible as a state actor for the result it helped bring about.¹⁴³

State action is found when "the conduct at issue is 'fairly attributable' to the state."¹⁴⁴ Should the claimed loss result from the "'exercise of a right . . . having its source in state authority' and whether the party engaging in the deprivation" may fairly be labeled a state actor further guided the Eighth Cir-

134. 202 F.3d 821 (6th Cir. 2000); *see supra* text accompanying notes 60-75.

135. *Wickersham*, 481 F.3d at 598.

136. *Id.*

137. *Id.*

138. *Id.*; *see supra* text accompanying note 114.

139. *Wickersham*, 481 F.3d at 598. *See, e.g.*, *UAW, Local 5285 v. Gaston Festivals, Inc.*, 43 F.3d 902, 909 n.4 (4th Cir. 1995); *D'Amario v. Providence Civic Ctr. Auth.* 783 F.2d 1, 3 (1st Cir. 1986).

140. *Wickersham*, 481 F.3d at 598-99.

141. *Id.* at 598.

142. *Id.* at 599.

143. *Id.* (citing *Murray v. Wal-Mart, Inc.*, 874 F.2d 555, 558-59 (8th Cir. 1989)).

144. *Id.* at 597 (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)).

cuit's analysis.¹⁴⁵ The Eighth Circuit held, therefore, in light of the United States Supreme Court guidance and corresponding decisions from other circuits, "that Salute's curtailment of [plaintiff's] freedom of expression constituted state action and was actionable under section 1983."¹⁴⁶

IV. DISCUSSION

The requirement of state action is an essential prerequisite to most civil rights claims.¹⁴⁷ Despite this threshold position in American jurisprudence, state action law is a maze of dizzying options, countless factors, and no consistently applied test. The Eighth Circuit's undesirable position in *Wickersham* is one that circuit courts have been in and will continue to be in until the United States Supreme Court clarifies the state action doctrine.¹⁴⁸

Heavily fact dependent determinations, such as state action, provide forums for courts to stretch their analytical legs. Not constrained by tight-knit elemental analysis, fact-specific tests can provide for a true expansion of the judiciary's mental might.¹⁴⁹ The inconsistent results of fact-specific determinations, however, create a slippery slope for lower courts by creating confusing standards.¹⁵⁰ Not only are lower courts struggling to find state action, but they are hesitant to authoritatively find state action. In *Wickersham*, for example, the Eighth Circuit partook in a balancing act, weighing some of the United States Supreme Court state action "tests" with previous circuit court decisions applying those tests.¹⁵¹ After a thorough and lengthy analysis of the current law, the Eighth Circuit found that state action existed.¹⁵² Tempering its decision, however, the court restricted only Salute's ability to ban *all* sign

145. *Id.* (quoting *Lugar*, 457 U.S. at 939).

146. *Id.* at 599.

147. *See, e.g.*, Fee, *supra* note 3, at 571; The most notable exception being the 13th amendment's prohibition against slavery that applies to states and individuals alike. *Id.* at n.16.

148. *See* Louis Michael Seidman, *The State Action Paradox*, 10 CONST. COMMENT. 379, 391 (1993) ("No area of constitutional law is more confusing and contradictory than state action.").

149. To the contrary, however, state action doctrine is often seen as merely trying to fit a case into a pre-established rule. If a current case does not "fit" an earlier mold, no state action is found. *See* David E. Lust, *What to Do When Faced with a Novel State Action Question? Punt: The Eighth Circuit's Decision in Reinhart v. City of Brookings*, 42 S.D. L. REV. 508 (1997). On the other hand, however, commentators have noted that the state action doctrine gives courts an "out" when a finding on the merits of the case could potentially be destructive. *See* Dilan A. Esper, Note, *Some Thoughts on the Puzzle of State Action*, 68 S. CAL. L. REV. 663, 668 (1995).

150. *See, e.g.*, Kevin L. Cole, Federal and State "State Action": The Undercritical Embrace of a Hypercriticized Doctrine, 24 GA. L. REV. 327, 343 (1990).

151. *Wickersham*, 481 F.3d 591.

152. *Id.* at 601.

carrying, allowing Salute to restrict the time, place, and manner of protests.¹⁵³ Additionally, because lower courts are given discretion to pick from the variety of permissible tests, the potential for circuits to apply different “correct” tests is increasing, potentially resulting in an inconsistent federal standard.

Failure to clarify the state action doctrine will not only confuse the courts, but will also confuse the general population. The Supreme Court must enunciate a clear state action standard in order to inform private parties of the actions sufficient to make them public actors. A lack of clear directive may result in private parties greatly restricting their public activities and interaction with government entities out of fear of unwittingly invoking the unpredictable state action doctrine. Or, on the other end of the spectrum, instead of limiting their actions, private parties may continue to hold public functions, but without the knowledge, support, or protection of municipal or state authorities.¹⁵⁴ Both of these options, however, have serious social ramifications.

Despite its historical hesitance to revamp the state action doctrine, the Supreme Court is quickly running out of time. Highlighted by *Wickersham*, not only are parties unable to determine what level of interaction with the state is permissible under the state action doctrine, but courts are unable to discern a clear test to determine if that interaction exists. One suggested method for reforming the state action doctrine calls for a workable test to be “cobbled” together from the existing methods.¹⁵⁵ This method allows for creative and flexible uses of existing state action doctrine by fitting different state action tests to the facts of a specific case.¹⁵⁶ Other remedies for the state action doctrine are the “differential state action” where the level of state action hinges on “the right or value at stake,”¹⁵⁷ and the abrogation of the state action doctrine entirely in favor of courts considering the merits of a given case.¹⁵⁸

Firmly rooted in the historical jurisprudence of the United States, the state action doctrine should not be easily discarded. While the state action

153. *Id.* The court further adopted the Western District’s holding that leafleting is allowed at the event while petitioning is impermissible. *Wickersham v. City of Columbia*, No. 05-4061-CV-C-NKL, 2006 U.S. Dist. LEXIS 15438, at *23 (W.D. Mo. Mar. 31, 2006)).

154. Such as a private entity transforming a typically open-to-the-public event to a strictly private event, precluding the issue of “free speech”. Conversely, should a private group wish to keep the event open to the public but still restrict the speech, the group would be placed in a difficult position of avoiding contact with the state, either by location of the event or involvement of local authorities, placing the safety of all parties at the event in jeopardy.

155. See Lust, *supra* note 144, at 522 (citation omitted).

156. *Id.*

157. *Id.* at 523 (citing Jody Young Jakosa, *Parsing Public from Private: The Failure of Differential State Action Analysis*, 19 HARV. C.R.-C.L. L. REV. 193 (1984)).

158. Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 506 (1985).

doctrine is flawed, its flaws are not fatal. In deciding how to apply the state action doctrine, lower courts do not need more discretion but instead need more guidance. Turning on the specific right or value in controversy, differential state action would necessitate a large amount of judicial discretion in each case and would merely add to the court's confusion. Cobbling together a workable state action doctrine is a viable option if the Supreme Court does away with redundant and overlapping standards. Perhaps the best hope for the state action doctrine, therefore, is not necessarily an overhaul, but more of a tweaking of existing doctrine into a concise, workable standard.

With judicial and social confusion progressively increasing, the time has come for the Supreme Court to hear a state action case and rule in a clear, authoritative, and concise manner. Noting that state action will never lend itself to a black-and-white analysis, the Supreme Court must lighten the lower courts' load in deciding state action cases. The lower courts would have an easier time if the Supreme Court cleared out the current complex analytical framework of state action by explicitly overruling inapplicable state action or by qualifying certain decisions as highly fact-dependent.

Just because state action is difficult to determine, however, does not mean that the concept should be done away with. Much like the public forum requirement of free speech cases, state action requirements serve valuable theoretical and practical threshold requirements in American law. Desiring a simplification of the state action doctrine for the benefit of both the courts and the public, the highly fact-dependent differential state action doctrine would not be the best course for the Supreme Court to pursue. Instead, the most practical use of the judiciary's time would be spent in re-contextualizing earlier decisions to ease the doctrine's applications to modern fact patterns.

Valuing the rich history of the state action doctrine, the Supreme Court must bundle the state action doctrine's legal significance with the modern need for a more stream-lined test.¹⁵⁹ Perhaps at the cost of verbal eloquence, the court should clearly outline the purpose of the state action doctrine and highlight the relationships between public and private entities that subject the latter to Constitutional restrictions. For the most part, this can be done by analyzing and expanding earlier doctrines to cover current state action issues.

With the Supreme Court finding distinctions among "entwinement," "symbiotic," and "nexus," it is no surprise that ordinary citizens are confused about state action. To clear up the uncertainty, the Supreme Court should clearly state the purpose of the state action doctrine before anything else. With such a rich state action history, the Supreme Court need not create an all new framework but should, instead, clarify the existing framework. While many of the tests overlap and terminology should be streamlined, the Su-

159. The Supreme Court offered a two-part theory behind state action: whether the claimed loss resulted from the "exercise of a right . . . having its source in state authority" and whether the party engaging in the deprivation may fairly be labeled a state actor. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982).

preme Court should first note that modern cases that may not fit squarely within one of the older tests may still give rise to state action, as was the case in *Wickersham*. More intensively, similar tests should be combined, like the Entwinement Test and Nexus Test, with the court eschewing historic language for ease of modern judicial application. Keeping in mind the purpose of enunciating a clearer standard for the public's understanding, the Court need not entirely overhaul the existing state action doctrine, but desperately needs to weed out underutilized and overly-confusing aspects.

In the hopes of clarifying the present situation, the United States Supreme Court must again address the issue of state action. By simply combining very similar tests under a common banner and thereby eliminating some of the bulk of the state action doctrine, the Supreme Court would be taking a substantial first step toward a precise state action standard. By clarifying, overruling, and noting narrowly-tailored decisions, the vast history of state action could be pared down into an applicable standard. Perhaps in time lower courts will have a clear understanding of the theory behind state action, along with streamlined "tests" for determining state action, so as to ease state action decisions and produce more uniform results. The hope is that, also, individual citizens will come to understand the concept of state action so as to choose whether to invoke state actor status instead of falling inadvertently into it.

V. CONCLUSION

Wickersham v. City of Columbia highlights the difficult analytical task facing courts in modern state action cases – balancing the United States Supreme Court's tests with individual circuits' applications of these tests, all while carefully excluding inapplicable precedent. Losing the court's favorability in recent decades, due in part to the judiciary's utter confusion with this area of the law, modern courts are hesitant to authoritatively find state action.¹⁶⁰ The state action doctrine is slowly descending into utter confusion, where private parties remain unaware of what conduct subjects them to Constitutional restrictions, and courts are unclear as to the appropriate state action standard. The time has come for the United States Supreme Court to declutter the state action doctrine by combining tests, shedding unnecessary terminology, demystifying the state action doctrine, and giving the lower courts a tangible standard with which to work.

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160. See *supra* note 154 and accompanying text.