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Schwartz and Chemerinsky: Dialogue on State Action
DIALOGUE ON STATE ACTION

Martin A. Schwartz* and Erwin Chemerinsky**

JUDGE PRATT:

We are turning to the question of state action that is billed here as a dialogue between Professors Schwartz and Chemerinsky. We will continue with this. It does not prevent others from intruding, both of them are quite adept at answering questions from members of the panel, but I think we will have a rather free-flowing dialogue, trialogue, or whatever it gets to be.

PROF. CHEMERINSKY:

Thirty years ago, a young law professor Charles Black, wrote that the state action area is a conceptual disaster area.¹ Nothing has occurred in the last three decades to make that less so, Professor Schwartz decided we would start with twenty minutes of a quick overview of the law with regard to state action and use the rest of the time for dialogue with us and all the rest of the panel members.

For all purposes, under Section 1983, it is important to recognize that the test for whether or not there is action “under the color of

* Professor Martin A. Schwartz is highly accomplished in the field of § 1983 litigation and, among other things authored a leading treatise entitled *Section 1983 Litigation: Claims and Defenses* (3d ed. 1997), *Section 1983 Litigation: Federal Evidence* (3d ed. 1999) and with Judge George C. Pratt *Section 1983 Litigation: Jury Instructions* (1999). In addition, Professor Schwartz is the author of a bi-monthly column in the New York Law Journal, entitled “Public Interest Law.” Professor Schwartz has also been the co-chair of the Practicing Law Institute annual program on § 1983 litigation for over fifteen years, and is co-chair of its Supreme Court Review Program.

** Sydney M. Irmas Professor of Law and Political Science, University of Southern California Law School. This article is based on a transcript of remarks given at the Practicing Law Institute program on Section 1983 Civil Rights Litigation.

¹ Charles L. Black, Jr., *Foreword: “State Action,” Equal Protection, and California’s Proposition 13*, 81 Harv. L. Rev. 69, 95 (1967).

law,” is the same test for state action.² If you look at page 185 of the first volume of the book, there is an outline of cases I am going to discuss. The first two on the list are classic Supreme Court cases, *United States v. Price*,³ *Lugar v. Edmondson Oil*,⁴ both of which hold expressly that the test for “under color of state law” is the same used to determine whether or not there is state action.⁵ To speak generally, we might identify two situations where the state action issue could arise in 1983 litigation.

One deals with the government entity, the government officer performing on the job; the other involves the government officer being off of the job. With regard to the government officer being on the job, there is no problem with regard to state action in that instance. The holding of *Monroe v. Pape*⁶ states, even if the government official is violating the constitution or violating state or local law, there is still state action.⁷ The much harder question, of course, comes when the government official is off the job. When, in that situation, can it be said that the government officer is acting under color of state law? When, then, can it be said there is state action? Remarkably, there is silence from the Supreme Court on this issue. There are literally dozens, perhaps hundreds, of lower court cases dealing with this issue.⁸

The main generalization I would draw from these cases is that, if the off-duty official is invoking the authority of the government, then the court is likely to find state action,⁹ but if the off-duty official is truly acting as a private citizen, does not invoke the

² *United States v. Price*, 383 U.S. 787, 794 n.7 (1966) (noting that § 1983’s requirement of under color of law has consistently been treated as the same thing as the state action required under the Fourteenth Amendment); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982) (stating that the constitutional concept of state action satisfies the statutory requirement of action under color of state law).

³ 383 U.S. 787 (1966).

⁴ 457 U.S. 922 (1982).

⁵ *Price*, 383 U.S. at 794; *Lugar*, 457 U.S. at 928-929.

⁶ 365 U.S. 167 (1961).

⁷ *Monroe*, 365 U.S. at 240-241.

⁸ See e.g., *Wudtke v. Davel*, 128 F.3d 1057 (7th Cir. 1997); *Whitney v. New Mexico*, 113 F.3d 1170 (10th Cir. 1997); *Dang Vang v. Vang Xiong X. Twoed*, 944 F.2d 476 (9th Cir. 1991); *Bennett v. Pippin*, 74 F.3d 578 (5th Cir. 1996).

⁹ MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION, CLAIMS AND DEFENSES, vol. 1A, § 5.5 (3d ed. 1997).

authority of the government, then it is unlikely the court is going to find state action.¹⁰

Interestingly, in the last several years, many of these off-duty officer cases involved sexual harassment or sexual assault, and I have listed for you in the outline several of these cases from different circuits.¹¹ Let's talk about a few of them. *Wudtke v. Davel*¹² case involves a superintendent of a local school system, who, off the job, sexually assaulted one of the teachers and threatened her with revocation of her teaching credentials if she reported the incident.¹³ She brought a suit under section 1983.

The question presented is: Since the school official was off the job, is it under color of law? The Seventh Circuit held that he acted under color of law.¹⁴ The court emphasized that invoking his authority as superintendent of schools to revoke her credentials was sufficient for state action.¹⁵

The next case I listed is *Whitney v. New Mexico*¹⁶ from the Tenth Circuit. This case involves a person who is in charge of licensing day care centers.¹⁷ While off the job, he visits a person who wants a license. He sexually harasses the individual and a lawsuit is brought.¹⁸ His defense was he was not acting under color of law, he was acting off-duty in a private capacity.¹⁹ The Tenth Circuit held that he invoked the authority he had as a government official regarding the licensing, and that was sufficient for state action.²⁰

The last case I listed here is the most frequently cited sexual harassment off-duty officer case, the *Dang Vang v. Vang Xiong X.*

¹⁰ Schwartz, § 5.5 at 497.

¹¹ *Wudtke*, 128 F.3d 1057; *Whitney*, 113 F.3d 1170; *Dang Vang*, 944 F.2d 476.

¹² 128 F.3d 1057 (7th Cir. 1997).

¹³ *Wudtke*, 128 F.3d at 1059.

¹⁴ *Id.* at 1064.

¹⁵ *Id.*

¹⁶ 113 F.3d 1170 (10th Cir. 1997).

¹⁷ *Id.* at 1172.

¹⁸ *Id.*

¹⁹ *Id.* at 1174 (citing *West v. Atkins*, 487 U.S. 42, 49 (1988)). "It is firmly established that a defendant in a § 1983 suit acts under color of state law when he abuses the position given to him by the state." *Id.* The complaint alleged that Mr. Patrick harassed Ms. Whitney while he was deciding whether to grant Ms. Whitney a day care facility license. *Id.*

²⁰ *Whitney*, 113 F.3d at 1174-1175.

Towed case²¹ from the Ninth Circuit. This case concerns a social worker that was particularly involved in working with individuals from southeast Asia living in his community.²² He would frequently make arrangements to socially see women who he met on the job. However, he would then harass them.²³ A lawsuit was brought against him. The defense was he was acting completely off duty, so it was not under color of law.²⁴

The Ninth Circuit disagreed and emphasized the off-duty officer was invoking his government authority by scheduling the meetings with the individuals.²⁵ Also, these women believed, if they engaged in sexual relations with him, they would receive benefits from the government, and that, the court found, was sufficient for state action.²⁶

The other type of off-duty case is the police officer who is moonlighting, for example, as a security guard, and, again, there are dozens and dozens of cases²⁷ concerning the off-duty police officer who then engages in excessive force. The question in these cases is whether the off-duty police officer is acting under color of law.

In Professor Schwartz's treatise on Section 1983,²⁸ he does a superb job of synthesizing these cases, and, therefore, I actually quote the factors outlined in the book. These factors include: Does the local government have a policy that officers are always on duty?²⁹ If so, the courts are very likely to find that the off-duty officer is under color of law.³⁰ An extremely important

²¹ 944 F.2d 476 (9th Cir. 1991).

²² *Id.* at 478.

²³ *Id.*

²⁴ *Dang Vang*, 944 F.2d at 480.

²⁵ *Id.*

²⁶ *Id.* "An expert in Hmong anthropology testified at trial that after fleeing from Laos, Hmong refugees have been entirely reliant on government aid, and as a result, are in awe of government officials." *Id.*

²⁷ See, e.g., *Pitchell v. Callan*, 13 F.3d 545 (2d Cir. 1994); *Delcambre v. Delcambre*, 635 F.2d 407 (5th Cir. 1981); *Rogers v. Fuller*, 410 F. Supp. 187 (M.D.N.C. 1976).

²⁸ MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION, CLAIMS AND DEFENSES, vol. 1A (3d ed. 1997).

²⁹ SCHWARTZ, § 5.5 at 496.

³⁰ *Id.* Professor Schwartz lists many United States Supreme Court and lower court cases where state action was found; see, e.g., *Griffin v. Maryland*, 378

consideration is whether the off-duty officer invokes the authority of the government?³¹ Does he or she identify himself or herself as a police officer?³² Does the person show a badge?³³ Does the person carry or use a service revolver?³⁴

All of which, once again, goes to what I see as the central inquiry: Is government authority being invoked? Does the person off duty try to make an arrest? This is the clearest obvious use of government authority.³⁵ Beyond this, the cases are really split³⁶ and it is a matter of trying to persuade the court that government authority is used enough so that you find it under color of law.

Those are the cases that involve government power, be it on-duty or off-duty.³⁷ The other set of state action cases, the ones that come to mind when we use the phrase "state action," involve private entities and private actors.³⁸ Here, the appropriate inquiry is when should they be regarded as state actors?

The most recent Supreme Court case was *American Manufacturers Mutual Insurance Company v. Sullivan*.³⁹ Before

U.S. 130 (1964) (holding that off-duty sheriff, who was also park employee, acted under color of law when he enforced the park's racial segregation policy); *Pickrel v. City of Springfield*, 45 F.3d 1115 (7th Cir. 1995) (holding that off-duty police officer also employed as a restaurant security guard acted under color of law when he became involved in an altercation with a restaurant patron); *Revene v. Charles County Comm'rs*, 882 F.2d 870 (4th Cir. 1989) (holding that officer acted under color of law when he shot a person to death even though the officer was not on-duty at the time, nor did he wear a uniform, and drove his own car at the time of the altercation).

³¹ SCHWARTZ, § 5.5 at 496.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* See, e.g., *Barna v. City of Perth Amboy*, 42 F.3d 809 (3d Cir. 1994) (holding that off-duty officers did not act under color of law when they became engaged in a personal altercation outside the jurisdiction); *Pitchell v. Callan*, 13 F.3d 545 (2d Cir. 1994) (holding that off-duty officer did not act under color of law when he became intoxicated and shot a guest in his home).

³⁷ *Wudtke*, 128 F.3d 1057; *Whitney*, 113 F.3d 1170; *Dang l'ang*, 944 F.2d 476.

³⁸ *American Manufacturers Mutual Insurance Co. v. Sullivan*, 119 S. Ct. 977 (1999); *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

³⁹ 119 S. Ct. 977 (1999).

we talk about the case, let me situate it in terms of the broader law of state action. The Supreme Court has said over the last half century there are two main exceptions to the state action doctrine; that is, two circumstances where private conduct will be found to be state action. One exception is called the “entanglement exception.”⁴⁰ The classic statement of the entanglement exception is that there is state action when the government affirmatively authorizes, encourages, or facilitates unconstitutional action.⁴¹ In this situation, either the private conduct is going to have to comply with the constitution or the government is going to have to stop what it is doing.⁴² The problem with the entanglement exception is that the cases do not neatly fit together. There are many inconsistencies in the decisions⁴³ that the Supreme Court has never resolved and to some extent, the inconsistencies are time based. For example, before the 1964 Civil Rights Act,⁴⁴ which says that private actors, hotels and restaurants and private employers cannot discriminate, the courts went out of their way to try to find that private discrimination was state action.⁴⁵

However, after the 1964 Civil Rights Act,⁴⁶ it became so much less important that private action be state action, because of the statutory protection. There is also a change based on the ideology of the Court. For example, the Warren Court⁴⁷ was far more willing and likely to find private action to be state action. The

⁴⁰ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, § 6.4.4.3 (1997).

⁴¹ *Shelley*, 334 U.S. at 14. The Court found that “the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court.” *Id.*

⁴² ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, § 6.4.4.3.

⁴³ Compare *Shelley*, 334 U.S. 1; *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Blum v. Yaretsky*, 457 U.S. 991 (1982).

⁴⁴ 42 U.S.C.A. § 2000a.

⁴⁵ *Shelley*, 334 U.S. 1; *Pennsylvania v. Board of Girard College*, 353 U.S. 230 (1957); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

⁴⁶ 42 U.S.C.A. § 2000a.

⁴⁷ From 1953 – 1969, the *Warren* Court was comprised of Chief Justice Earl Warren, and Justices Clark, Douglas, Fortas, Frankfurter, Goldberg, Harlan, Jackson, Marshall, Minton, Reed, Stewart, White and Whittaker.

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³¹ SCHWARTZ, § 5.5 at 496.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

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Burger and Rehnquist⁴⁸ Courts have been less likely to so find. Also, what makes the cases inconsistent is the underlying subject matter. If it is race discrimination, then the courts are much more willing to find the entanglement exception to apply;⁴⁹ if it is any other constitutional right, the courts are much less likely to find the state action doctrine to be met.⁵⁰ In fact, the Second Circuit in *Lebron v. Amtrack*,⁵¹ a case where the Supreme Court later granted review, said there is a distinction between race and non-race cases in the application of the purposely entanglement exception.

To quickly remind you and to set the stage for discussion of the race cases, *Shelley v. Kraemer*⁵² held that the courts cannot enforce racially restrictive covenants even though it is a private contract.⁵³ The Supreme Court said courts are a branch of the government. For the government, through its judiciary, to enforce a discriminatory contract is state action.⁵⁴ The case of *Burton v. Wilmington Parking Authority*⁵⁵ is a landmark state action case, but now the Supreme Court seems to either marginalize or overrule it in some recent decisions.⁵⁶ In the *Burton* case, the city of

⁴⁸ From 1986 – Present, the *Rehnquist* Court is comprised of Chief Justice William Rehnquist, and Justices Breyer, Ginsberg, Kennedy, O'Connor, Scalia, Stevens, Souter and Thomas.

⁴⁹ *Shelley*, 334 U.S. 1; *Burton*, 365 U.S. 715; *Norwood v. Harrison*, 413 U.S. 455 (1973); *Lugar*, 457 U.S. 922 (1982).

⁵⁰ *Rendell-Baker*, 457 U.S. 991; *Morse v. North Coast Opportunities*, 118 F.3d 1338 (9th Cir. 1997); *Blum*, 457 U.S. 991; *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179 (1988); *S.P. v. City of Takoma Park, Md.*, 134 F.3d 260 (4th Cir. 1998).

⁵¹ 513 U.S. 374 (1995).

⁵² 334 U.S. 1 (1948).

⁵³ *Shelley*, 334 U.S. at 20-21.

⁵⁴ *Id.* at 20.

⁵⁵ 365 U.S. 715 (1961).

⁵⁶ *American Manufacturers Mutual Insurance Company v. Sullivan*, 119 S. Ct. 977, 989 (1999) (noting that “later cases have refined the vague ‘joint participation test’ embodied in [*Burton*]”); *Blum v. Yaretsky*, 457 U.S. 991 (1982) (holding that “privately owned enterprises providing services that the State would not necessarily provide, even though they are extensively regulated, do not fall within the ambit of *Burton*”); *Jackson v. Metropolitan Edison*, 419 U.S. 345 (1974) (holding government regulation of a utility not state action); *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973) (holding that federal licensing of broadcast stations insufficient involvement by the government for state action); *Moose Lodge Number 107 v.*

Wilmington, Delaware ran a parking authority, and leased space to the Eagle Restaurant.⁵⁷ The Eagle Restaurant refused to serve African-American customers, arguing it was not a state actor.⁵⁸ The city, in defense, argued it was not requiring discrimination, it was just leasing the space.⁵⁹ The Supreme Court held that the leasing of government property to a private entity was sufficient for state action.⁶⁰ The Supreme Court noted that the government had the power as a term of the lease to prevent discrimination.⁶¹ The government cannot avoid its responsibility by abdication.⁶²

In the case of *Norwood v. Harrison*,⁶³ the third case listed, the State of Mississippi, subsequent to *Brown v. Board of Education*,⁶⁴ developed a program of giving free textbooks to all public and private schools in the state.⁶⁵ The Supreme Court found that there was sufficient government entanglement with the private school, which had a discrimination policy, because of its receipt of the free textbooks.⁶⁶

In contrast, there is another race case heard by the Supreme Court where no state action was found. This case is *Moose Lodge v. Iris*, which was decided by the Burger court.⁶⁷ It involved a private club, the Moose Lodge, that refused to admit or serve African-Americans, but possessed a state liquor license.⁶⁸ The argument was that the state grant of a liquor license is sufficient

Iris, 407 U.S. 163, 175 (1972) (holding a state grant of a liquor license to a private business insufficient action for the Constitution to apply).

⁵⁷ *Burton*, 365 U.S. at 716.

⁵⁸ *Id.*

⁵⁹ *Id.* at 717-718.

⁶⁰ *Id.* at 726.

⁶¹ *Id.* at 725. "[T]he Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation." *Id.*

⁶² *Id.* The Court noted that "no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be." *Id.*

⁶³ 413 U.S. 455 (1973).

⁶⁴ 347 U.S. 483 (1954).

⁶⁵ *Norwood*, 413 U.S. at 457.

⁶⁶ *Id.* at 469.

⁶⁷ 407 U.S. 163 (1972).

⁶⁸ *Id.* at 165-166.

government entanglement for there to be state action.⁶⁹ The Supreme Court, however, disagreed. The Court said that the grant of a liquor license was not sufficient entanglement for the Constitution to apply, thus the Moose Lodge was able to keep its liquor license and also continue its policy of discrimination.⁷⁰

Even after *Moose Lodge*, the Court is willing, in race cases, to use the entanglement exception. The next case, *Edmonson v. Leesville Concrete*,⁷¹ is a case with practical significance to you in many ways. In *Edmonson*, the Supreme Court held the use of peremptory challenges based on race, even in private civil litigation, violated equal protection.⁷² The Supreme Court noted that it is state law that authorizes peremptory challenges, and it is judges and government officials who administer peremptory challenges excusing jurors, and therefore, is another form of state action.⁷³ Previously, in *Batson v. Kentucky*, the Court held that the prosecutors cannot use a peremptory challenge based on race.⁷⁴

The next case is *Georgia v. McCollum*, where the Supreme Court held that if a criminal defendant uses peremptory challenges based on race, it violates equal protection.⁷⁵ Who is more the antithesis of the government than a criminal defendant? Yet, the Supreme Court reasoned that there is sufficient state action for peremptory challenges provided by state law and therefore, the constitution applies.⁷⁶

⁶⁹ *Id.* at 171.

⁷⁰ *Id.* at 616.

⁷¹ 500 U.S. 614 (1991).

⁷² *Id.* at 616.

⁷³ *Id.* at 624.

⁷⁴ 476 U.S. 79, 89 (1986).

⁷⁵ 505 U.S. 42, 48-55 (1992). The Court found that in order to determine whether the Constitution prohibits criminal defendants from exercising racially motivated peremptory challenges, certain questions must be addressed: "whether a criminal defendant's exercise of peremptory challenges in a racially discriminatory manner inflicts the harms addressed by *Batson* . . . whether the exercise of peremptory challenges by a criminal defendant constitutes state action . . . whether prosecutors have standing to raise this constitutional challenge. And . . . whether the constitutional rights of a criminal defendant nonetheless precludes the extension of our precedents . . ." *Id.* at 48.

⁷⁶ *Id.* at 52. (citing *Edmonson v. Leesville Concrete*, 500 U.S. 614, 624 (1991): "By enforcing a discriminatory peremptory challenge, the Court 'has... elected to place its power, property and prestige behind the [alleged] discrimination'").

However, if we look at the non-race cases, you find a different pattern. In the non-race cases, the Court is much less willing to find state action. The first case examined, *Lugar v. Edmonson Oil*, is one of the rare non-race cases where the entanglement exception is found to apply.⁷⁷ In this case, a creditor went to a judge to get an oral prejudgment attachment.⁷⁸ The Supreme Court held that since the law provides for prejudgment attachments and the judge issued the order, under *Shelley v. Kraemer*,⁷⁹ there is state action.⁸⁰

In addition, another case that is very important to this discussion is *Rendell-Baker v. Kohn*.⁸¹ This case raised the question of whether receipt of government funds is sufficient for state action.⁸² In this case there was a private school in Massachusetts that provided a special education curriculum and received almost 99 percent of its operating expenses from the state.⁸³ The teacher had criticized the administration and was subsequently fired.⁸⁴ The issue was whether the almost complete government subsidy was enough to constitute state action.⁸⁵ The Supreme Court held that contracting with the government, or receiving funds from the government, is not enough for state action.⁸⁶

In comparison, *Norwood v. Harrison* held that just receiving schoolbooks was enough.⁸⁷ In contrast, in *Rendell-Baker*, 99 percent funding was not enough for state action to be found.⁸⁸ What is the difference? Well, the Court does not say expressly. In *Norwood*, the Court saw the government as trying to encourage

⁷⁷ 457 U.S. 922 (1982).

⁷⁸ *Id.* at 925. See also Va. Code § 8.01-533 (1977).

⁷⁹ 334 U.S. 1 (1948).

⁸⁰ *Lugar*, 457 U.S. at 941. The Court has consistently held "that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a "state actor" for purposes of the Fourteenth Amendment. See, e.g., *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *United States v. Price*, 383 U.S. 787 (1966). *Id.*

⁸¹ 457 U.S. 830 (1982).

⁸² *Id.* at 838.

⁸³ *Id.* at 832.

⁸⁴ *Id.* at 834.

⁸⁵ *Id.* at 840.

⁸⁶ *Id.*

⁸⁷ 413 U.S. 455 (1973).

⁸⁸ *Rendell-Baker*, 457 U.S. at 840-843.

segregation by giving free textbooks.⁸⁹ In *Rendell-Baker v. Kohn*, it was not the government trying to encourage violation of First Amendment rights,⁹⁰ so it appears that the nature of government actions are crucial.⁹¹ A recent case, *Morse v. North Coast Opportunities*,⁹² applied the holding of the Court in *Rendell-Baker*.⁹³ The Court held that a private entity receiving Head Start funds is not sufficient for state action.⁹⁴

Similarly, in *Blum v. Yaretsky* the case involved the question of whether there was state action based on federal Medicaid and Medicare regulations that seemed to encourage the transfer of patients from specialized to general care for the sake of federal incentives.⁹⁵ The case specifically concerned the transfer of a patient solely because of federal incentives.⁹⁶ The Supreme Court held, since it is a private decision to transfer the patient from one place to another, there was no state action, even though the underlying reason for the transfer was to obtain government incentives.⁹⁷

⁸⁹ *Norwood*, 413 U.S. at 463.

⁹⁰ U.S. Const. amend. I. The First Amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or the press; or of the people peaceably to assemble, and to petition the government for a redress of grievances." *Id.*

⁹¹ *Rendell-Baker*, 457 U.S. at 841-842 (the decision to discharge was not compelled by state regulation, regulations that required committee approval on hiring personnel were deemed to be ultimately made by private management, and thus is not state action). *Id.*

⁹² 118 F.3d 1338 (9th Cir. 1997).

⁹³ 457 U.S. 830 (1982).

⁹⁴ *Morse*, 118 F.3d at 1342. The Court held "that the fact that a private school received almost all of its funds from the government did not transform its actions into governmental actions." *Id.*

⁹⁵ 457 U.S. 991, 993 (1982). Respondents were patients in a nursing home, whom were recipients of Medicaid assistance. They alleged that defendants had not provided adequate notice either of utilization review committee decisions, to ascertain whether the patient's continued stay in the facility is justified, or the right to an administrative hearing to challenge these decisions. *Id.* at 996.

⁹⁶ *Id.* at 1002.

⁹⁷ *Id.* at 1011. The Court reasoned that "privately owned enterprises providing services that the State would not necessarily provide, even though they are extensively regulated, do not fall within the ambit of *Burton*." *Id.*

Likewise, in *NCAA v. Tarkanian*, the Court found no state action.⁹⁸ Jerry Tarkanian was the basketball coach of the University of Nevada, Las Vegas. The National Collegiate Athletic Association ordered him suspended because of recruiting violations.⁹⁹ Tarkanian sued and claimed he should be afforded due process because he worked in a state university, and the NCAA is largely composed of state schools.¹⁰⁰ The Supreme Court ruled five to four that the NCAA is a private entity and therefore, does not have to comply with the Constitution.¹⁰¹

If one puts together all of these non-government, non-race cases, there is an overwhelming feeling there is an unwillingness to apply the entanglement exception outside of race cases.

There is a recent case, *S.P. v. Takoma Park*,¹⁰² which involved a private individual who filled out declarations and affidavits that led to the civil commitment of an individual.¹⁰³ The question was: Was this private action or state action? The court held that since it is a private individual who filled out the certification, it is therefore private, not state action.¹⁰⁴ Thus, the entanglement exception did not apply.¹⁰⁵

⁹⁸ 488 U.S. 179 (1988).

⁹⁹ *Id.* at 186.

¹⁰⁰ *Id.* at 187-188, 192-193. Tarkanian argued that the NCAA was a state actor and misused its power that it possessed through state law.

¹⁰¹ *Id.* at 193. If the NCAA was deemed to be a state actor, then the Fourteenth Amendment's Due Process Clause would apply. The Fourteenth Amendment provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law" *Id.*

¹⁰² 134 F.3d 260 (4th Cir. 1998).

¹⁰³ *Id.* at 264. Officer Rich responded with three other officers to the Peller home, where they found a distraught Ms. Peller, thereupon the Officers removed and transported her to Washington Adventist Hospital. Officer Brian Rich prepared a petition for an emergency psychiatric evaluation under Maryland law. After examination, doctors reported that she was in fact suffering from a mental disorder, which met the requirements for involuntary admission. *Id.*; see also MD. CODE ANN., Health-Gen. I. § 10-622(a) and 10-617 (1994).

¹⁰⁴ *Id.* at 268. The Court noted "that the statutory scheme . . . is more permissive than mandatory, and that it grants private physicians complete medical discretion in determining whether an individual should be involuntary committed. *Id.*

¹⁰⁵ *Id.* at 269.

I said there are two exceptions where private conduct constitutes state action. One is the entanglement exception, the other is the public functions exception. The classic statement of the public functions exception is, if a private entity performs a task that has been traditionally and exclusively done by the government, then the Constitution applies.¹⁰⁶ I have listed for you the classic Supreme Court cases: *Marsh v. Alabama*¹⁰⁷ and *Terry v. Adams*.¹⁰⁸ The *Marsh* case, more than a half century ago, involved a company town in Alabama, where the company literally owned all of the land and ran the town.¹⁰⁹ A group of Jehovah's Witnesses came to the town and wanted to distribute literature.¹¹⁰ The company claimed that since it was private property, the First Amendment did not apply and the group should leave.¹¹¹ The Supreme Court held that running a town is a task that has been traditionally done by the government.¹¹² If a private entity runs a town, it has to comply with the Constitution.¹¹³

We now look at *Terry v. Adams*,¹¹⁴ the so-called, "white primary case." After Texas was ordered to disenfranchise African-Americans, Texas decided to no longer hold political primary elections.¹¹⁵ It allowed the political parties, which were private entities, to run their own elections.¹¹⁶ The political parties decided they were not going to allow African-Americans to vote.¹¹⁷ The Supreme Court in *Terry* held that an election for government office, even a primary election, is a task that is traditionally done by the government, so the public function exception applies.¹¹⁸

¹⁰⁶ *Id.*

¹⁰⁷ 326 U.S. 501 (1946).

¹⁰⁸ 345 U.S. 461 (1953).

¹⁰⁹ *Marsh*, 326 U.S. at 502.

¹¹⁰ *Id.* at 503.

¹¹¹ *Marsh*, 326 U.S. at 504.

¹¹² *Id.* at 506.

¹¹³ *Id.* The Court noted that "[o]wnership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Id.*

¹¹⁴ 345 U.S. 461 (1953).

¹¹⁵ *Id.* at 470.

¹¹⁶ *Id.* at 471.

¹¹⁷ *Id.* at 470.

¹¹⁸ *Id.*

If you are dealing with a public function exception, the most important Supreme Court case for you to consider is *Jackson v. Metropolitan Edison*¹¹⁹ because it articulates the test the Supreme Court now uses. The *Jackson* case involved a customer of a private utility company who was having her service cut-off. It has been clearly established that if it is a government owned utility, it must provide due process before terminating service.¹²⁰ The issue here is: Does the private utility also have to provide due process? The customer argued that the private utility is performing a public function and, beyond that, the private utility has a state grant monopoly.¹²¹ The Supreme Court ruled, in an opinion written by Justice Rehnquist, that there is no state action.¹²²

The Supreme Court said that the public function exception applies only if the private entity is performing a task that has been traditionally exclusively done by the government.¹²³ The Supreme Court held that running a utility has not been traditionally just done by the government, and therefore, there is no state action.¹²⁴

The final case I have listed here, *Hudgens v. NLRB*,¹²⁵ involves whether or not there is a First Amendment¹²⁶ right to use privately-owned shopping centers for speech purposes. Earlier, the Supreme Court had suggested there was such a right, at least in some kinds

¹¹⁹ 419 U.S. 345 (1974) (holding that a private utility is not a state actor and need not provide due process before terminating service). *Id.*

¹²⁰ *Id.* at 358.

¹²¹ *Id.* at 351-52. The test must be whether 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. *See* MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION, CLAIMS AND DEFENSES, § 5.15 at 543. vol. 1A (3d ed. 1997).

¹²² *Jackson v. Metropolitan Edison*, 419 U.S. 345 (1974).

¹²³ *Id.* at 352.

¹²⁴ *Id.* at 353.

¹²⁵ 424 U.S. 507 (1967). The union along with the National Labor Relations Board filed an unfair labor practice charge against the owner of the North DeKalb Shopping Center, whose general manager threatened to arrest union employees for partaking in peaceful primary picketing of a store in the shopping center. *Id.*

¹²⁶ U.S. CONST. amend. I. The First Amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or the press, or the people peaceably to assemble, and to petition the government for a redress of grievances."

of speech cases.¹²⁷ The Supreme Court had indicated that private shopping centers perform a public function.¹²⁸ They are analogous to the twentieth century equivalent of the town square.

Yet, in *Hudgens v. NLRB*,¹²⁹ the Supreme Court says, under the United States Constitution, privately owned shopping centers are not state actors. The public function exception does not apply and therefore, the First Amendment does not apply.¹³⁰

The place where the public function exception is presently being litigated is in the area of private prisons.¹³¹ There is a trend in many parts of the country for the government to contract out the running of prisons and jails to private entities. The issue then arises, is the private prison to be regarded as a state actor? Are the acts of a private prison guard under color of law? In *Richardson v. McKnight*,¹³² the Supreme Court held that when private prison guards are sued, they are not entitled to qualified immunity.¹³³ There may be a good faith immunity,¹³⁴ a common law defense, but it is not the qualified immunity.¹³⁵ This was a five to four decision

¹²⁷ See *Marsh v. Alabama*, 326 U.S. 501 (1946) (stating that a company owned town is a state actor and must abide by the First Amendment).

¹²⁸ See *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968) (holding that a large privately owned shopping center could not enjoin peaceful union picketing on its property against a store located in the shopping center). *Id.*

¹²⁹ 424 U.S. 507 (1976).

¹³⁰ *Hudgens*, 424 U.S. at 519-21. See SCHWARTZ, § 5.13 at 533 (stating that Supreme Court decisions have recently narrowed the public function doctrine by insisting that the function be historically and traditionally governmental in nature, and the exclusive prerogative of the state).

¹³¹ See *Blumel v. Mylander*, 919 F. Supp. 423 (M.D. Fla.1996).

¹³² 117 S. Ct. 2100 (1997). A prisoner at Tennessee's South Central Correctional Center (SCCC) brought a § 1983 action against two prison guards, who were employees of a private, for-profit corporation which had a contract with the state to manage the correctional center. The inmate alleged that the guards used restraints on him, which caused injury and subjected him "to the deprivation of" a right secured by the United States Constitution. *Id.*

¹³³ See *Richardson v. McKnight*, 117 S. Ct. 2100 (1997).

¹³⁴ *Id.* at 2107-08. The affirmative defense is based on good faith and/or probable cause. *Id.*

¹³⁵ *Id.* at 2101. Mere performance of a governmental function does not support immunity for a private person, especially one who performs a job without government supervision or direction. *Id.*

written by Justice Breyer.¹³⁶ The Supreme Court expressly did not decide the question, though, of whether private prisons are state actors or private prison guards acted under color of law.¹³⁷ The Court assumed it without reaching the question.¹³⁸

Almost all of the lower courts so far have found that private prisons and private prison guards are state actors.¹³⁹ They use the public function exception. Running a prison or jail is a task that has traditionally been done exclusively by the government. I have listed three of the more prominent cases here, the *Street*¹⁴⁰ case, the *Blumel*¹⁴¹ case, and the *Lemoine*¹⁴² case all find there to be state action.

PROF. SCHWARTZ:

The most obvious case of state action is the public official who acts in accordance with state law.¹⁴³ That is not a problem. I think you could even put *Shelley v. Kraemer*¹⁴⁴ into that category, that is, the action of the state judge that constitutes state action, and if you look at it that way, *Shelley v. Kraemer* does not have to be a controversial state action case. However, I would also say that it probably is not all that important for Section 1983 litigation, because the judge is either going to be protected by immunity or abstention or some other non-merits doctrine. But how do you categorize *Shelley v. Kraemer*?¹⁴⁵ I do not know that it plays out in an important way.

PROF. CHEMERINSKY:

¹³⁶ *Id.* at 2102. (Breyer, J.).

¹³⁷ *Id.* at 2113.

¹³⁸ *Id.*

¹³⁹ See *Citrano v. Allen Correctional Center*, 891 F. Supp. 312 (W.D. La. 1995); *Manis v. Corrections Corp. of America*, 859 F. Supp. 302 (M.D. Tenn. 1994); and *Plain v. Flicker*, 645 F. Supp. 898 (D.N.J. 1986).

¹⁴⁰ *Street v. Corrections Corp. of America*, 102 F.3d 810 (6th Cir. 1996).

¹⁴¹ *Blumel v. Mylander*, 919 F.Supp. 423 (M.D. Fla. 1996).

¹⁴² *Lemoine v. New Horizan Ranch and Center*, 990 F.Supp. 498 (N.D. Tex. 1998).

¹⁴³ See SCHWARTZ, § 5.5 at 490.

¹⁴⁴ 334 U.S.1 (1948) (holding that courts cannot enforce racially restrictive covenants). *Id.*

¹⁴⁵ *Id.*

If you take *Shelley v. Kraemer* to its logical conclusion, you can make all of the private conduct into state action, because any time a private person allegedly violates rights, someone can take the case to court. If the court dismisses the case, the judge's action is state action, and now the Constitution should apply.

The Supreme Court has recoiled from that and, therefore, you do not find *Shelley v. Kraemer* used much. The *Shelley* case is controversial, yet, it is not *New York Times v. Sullivan*¹⁴⁶ merely just *Shelley v. Kraemer* with another constitutional provision? The *New York Times v. Sullivan* case was a private defamation suit, a private individual against the New York Times, a private entity.¹⁴⁷ The question is: Is there state action? The Supreme Court held there was state action. It is a state's common law that is being applied.¹⁴⁸ It is the state judge applying it and, therefore, there is state action.

Yet, if you follow that argument, is it not state action when a judge dismisses a case against a private individual for lack of state action, thereby holding that the state's common law does not protect one's rights in that instance?

PROF. SCHWARTZ:

Absolutely. How could the judge's conduct be anything other than state action? It cannot possibly be private action. It is one of the great functions of government. I think the answer is that much of what a judge does in administering cases on a day-to-day basis is not unconstitutional state action, but I think it's clearly state action. I also think that you have to distinguish what the judge does from what the private litigant does.

The only exception I see in the principle that the public official who acts in accordance with state law is engaged in state action, is

¹⁴⁶ 376 U.S. 254 (1964).

¹⁴⁷ *New York Times v. Sullivan*, 376 U.S. 254 (1964).

¹⁴⁸ *Id.* at 265. "Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. . . . 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. *Id.*

the public defender case, *Polk County v. Dodson*.¹⁴⁹ In this case, the Supreme Court held that the public defender is not engaged in state action because although she is paid by the state, and employed by the state, she is an adversary of the state, and acts for the client, not under color of state law, but under the attorney/client relationship.¹⁵⁰ That is an exception, but an exception that has not been extended. For example, the doctor in a prison context, as in *West v. Atkins*,¹⁵¹ is held to be a state actor, even though the doctor has as much duty to the patient as lawyer has to the client.¹⁵² The doctor is not an adversary of the state. I think that is the main distinction.

I think that the case of the official who acts in violation of state law presents the more difficult problem. Professor Chemerinsky is absolutely right that the mere fact that the official acts in violation of state law does not mean there is no state action. However, the harder question is whether this individual, and, again, it could be whether the actor was on-duty or off-duty, was acting as an individual following personal pursuits, or whether the individual, although violating state law, was nevertheless exercising government authority. I think that framing the issue is not difficult, but I think the answer is certainly not always obvious when you look at the fact patterns of these cases. For example, in

¹⁴⁹ 454 U.S. 312 (1981). Respondent alleged that petitioner, who had been assigned to represent him in an appeal of a criminal conviction to the Iowa Supreme Court, failed to represent him adequately since she has moved for permission to withdraw as counsel on the ground that respondent's claims were legally frivolous. *Id.*

¹⁵⁰ See *Polk*, 454 U.S. 312. See also Schwartz, § 5.6 at 499-500. *Polk County* did not hold that a public defender never acts under color of state law, but only that he does not do so with respect to his representative function. *Id.*

¹⁵¹ 487 U.S. 42 (1988). Respondent, a private doctor under contract with the state of North Carolina to provide orthopedic services at a state-prison hospital on a part-time basis, treated petitioner for a leg injury sustained while petitioner was incarcerated in state prison. Petitioner was barred by state law from employing or electing to see a doctor of his own choosing. Petitioner alleged that he was given inadequate medical treatment, and sued respondent in Federal District Court under 42 U.S.C. § 1983 for violation of his Eight Amendment right to be free from cruel and unusual punishment. *Id.*

¹⁵² *Id.* at 49; see SCHWARTZ, § 5.6 at 503. *Polk County* was distinguished on the ground that the public defender was an adversary of the state. *Id.*

the sexual abuse and harassment cases,¹⁵³ a number of these cases concern police officers who are looking for sexual favors, and when you read fact patterns, I think it is far from obvious whether it is a personal pursuit taking place or use of government power.

Often it is a combination of both, a personal pursuit and use of government power. It is a use of government power to further a personal pursuit. Perhaps the best a trial judge can do with this issue is to give it to the jury, assuming that enough has been alleged in the complaint. This is what we do with many difficult questions. We tell the jury to decide whether the official was exercising government power or whether the official was acting as an individual. We are seeing more and more cases in which that is the holding of the court.

PROF. CHERMERINSKY:

That is a recent trend. Until very recently, I think the courts would have said the issue of whether someone is under color of law and the issue is the action is purely a legal question for the judge. It is interesting now to see it being given as a jury question.

The other point in response to what Professor Schwartz has mentioned is something I did not include in the outline, although it is in the later material. It is a Ninth Circuit case called *Van Ort v. Stanewich*.¹⁵⁴

There was a police officer in San Diego that had a very long disciplinary record.¹⁵⁵ Nevertheless, he stayed on the job and was promoted. The police officer received a tip that there was a grandmother living with a grandson who had a safe which contained a sizeable amount of money.¹⁵⁶ He went in with a warrant, did a search, found the safe, which did contain money and jewelry.¹⁵⁷

¹⁵³ See, e.g., *Dang Vang v. Vang Xiong X. Twoed*, 944 F.2d 476 (9th Cir. 1991).

¹⁵⁴ 92 F.3d 831 (9th Cir. 1997). Professor Chemerinsky represented the plaintiff on appeal.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 834.

The officer did not arrest anyone as there were no alleged crimes alleged committed.¹⁵⁸ He went back the next day when he was off duty, and the grandson answered the door and said, "Oh, Officer Stanewich, you're here again."¹⁵⁹ Stanewich then bolts the door, ties up the grandmother and her grandson, and literally tortures them to get them to tell him the combination of the safe.¹⁶⁰ He put lighter fluid in the grandson's eyes and threatened to set him on fire, and he inserted needles between the grandmother's fingers.¹⁶¹ At some point, the grandson's girlfriend managed to sneak out the back door and call the police.¹⁶² The police officer arrived and told Stanewich to stop what he was doing. Stanewich refused to comply, at which time the police officer then killed the off-duty police officer Stanewich.¹⁶³ Subsequently, the grandmother and grandson bring a lawsuit. Stanewich's estate had no assets, so they sued the county. The argument against the county is its policy of inadequate supervision and inadequate monitoring of discipline problems is what really caused the injuries.¹⁶⁴ The jury issued a special verdict that found that the officer was under color of law.¹⁶⁵

The Ninth Circuit reversed. The Ninth Circuit held that the officer was off duty.¹⁶⁶ The officer was, therefore, not acting under color of law.¹⁶⁷ As a result, it is not a question for the jury at all; it is a question of law for the judge and, as such, reversed the jury's finding.¹⁶⁸ The Supreme Court denied certiorari and refused to hear the case.¹⁶⁹

JUDGE PRATT:

¹⁵⁸ *Id.*

¹⁵⁹ *Van Ort*, 92 F.3d at 834.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 833.

¹⁶⁵ *Van Ort*, 92 F.3d at 835.

¹⁶⁶ *Id.* at 841.

¹⁶⁷ *Id.* at 838.

¹⁶⁸ *Id.* at 841.

¹⁶⁹ *Id.*

Professor Chemerinsky, that is typical of the Ninth Circuit. It is often wrong. I do not know how you can say that questions of whether a police officer is acting on his own or under color of state law, whether he was wearing his uniform, whether he was carrying his gun, what he said, how the activities arose, questions which are so fact intensive, could be anything other than jury questions. But I am a long way from having to make those decisions.

Judge Raggi, what is your reaction to that?

JUDGE RAGGI:

I do think a considerable number of the cases about law enforcement officers are going to come before juries. I think the other situation that the Professors discussed that what is more difficult to send to a jury is the question of the private actor. I think the reason the courts have always been very nervous about reaching too far to take private actors – and thereby, letting discrete cases decide whether they are or are not covered by state action – is that, on some basic level, we do want to encourage people to use courts and processes to resolve disputes rather than to duke it out in the street. Therefore, the notion that could automatically or somehow otherwise bring you into 1983 liability is that there is the line drawing problem. I think we have gleaned in that situation toward letting judges and courts draw the lines. However, I think whether on any given day an individual police officer or law enforcement officer is acting in a state action or private capacity is something the juries can decide.

JUDGE PRATT:

Judge Batts, where do you stand on this?

JUDGE BATTS:

The case that Professor Chemerinsky just described in California is troubling to me for a number of reasons. One of the points that I was curious about was whether there was any theory that, because the police officer obtained this information derivatively from his

official function or there was some direction that he would not have known that but for the fact he was a police officer, was that a factor that was considered?

PROF. CHEMERINSKY:

I argued that on appeal, but the court did not give it any weight. I argued he got the knowledge as a police officer, he went and did the search the day before as a police officer, and the reason that the grandson opened the door was that it was somebody who he recognized from the day before as being a police officer and let him in again.¹⁷⁰ None of those factors mattered to the Ninth Circuit. The Ninth Circuit said what was key was he was off duty and entirely on his own at the time and, therefore, was not under color of law.¹⁷¹

PROF. SCHWARTZ:

There was an issue in that case concerning the relationship between the no state action holding and municipal liability.¹⁷² The Ninth Circuit held that if the individual defendant is found not to engage in state action, the county is automatically off the hook.¹⁷³ That does not seem to be correct, because it would seem that even when state action is engaged in by a non-state actor, the county should be responsible for its own constitutional wrong?

I think that is an argument that you made.

PROF. CHEMERINSKY:

It definitely is. I would use this case as the occasion to distinguish the *Van Xiong* case I mentioned. *Van Xiong* was the main authority in the Ninth Circuit, but the Ninth Circuit distinguished *Van Xiong*, because the social worker expressly was using his governmental authority to set up meetings with the

¹⁷⁰ See *Van Ort v. Stanewich*, 92 F.3d 831, 834 (9th Cir 1996).

¹⁷¹ *Id.* at 836.

¹⁷² *Id.*

¹⁷³ *Id.*

women who he then sexually harassed.¹⁷⁴ Whereas, in *Stanewich*, the court said the officer may have gotten the knowledge from the government job, and maybe that is why the door was opened, but there was not an express indication of government authority.¹⁷⁵ Rather, in the cases that you litigate, should the extent to which the private officer is explicitly versus non-explicitly using government authority matter? I question it.

PROF. SCHWARTZ:

Let's get to the difficult problem. That is the discussion Judge Raggi raised about private entities and individuals and whether they are engaged in state action. The ultimate question is whether these organizations are engaged in state action. They are treated as questions of law, ultimately, the courts want to make that big determination, but there can be subsidiary factual issues. Therefore, in some cases it would have to be left to the jury to resolve what subsidiary factual issues in terms of the nature of the involvement of the government and private entity. Based upon those findings, the court can then make the state action rulings as a matter of law.

JUDGE RAGGI:

I am sure your jury instruction book that we are waiting for tells us we are not supposed to just ask juries whether they find liability or not, but rather ask them those factual questions, and then based on the answers you get, the court enters judgment.

JUDGE PRATT:

We push hard for special verdicts, although, whenever there is a case for special verdicts, I think it is still permissible to frame instructions that submit the entire issue to the jury to decide in effect as a general verdict.

PROF. SCHWARTZ:

¹⁷⁴ *Van Ort*, 92 F.3d at 839.

¹⁷⁵ *Id.*

One of the points Erwin made that I think has a practical litigation significance is that there really are two lines of state action decisions, the Warren court decisions and the post-Warren court decisions.¹⁷⁶ Even though none of the Warren court decisions actually have been overturned, maybe with the exception of *Burton*,¹⁷⁷ I don't think they represent, the current thinking of the United States Supreme Court. Most lower court judges probably understand that, so in terms of litigation, I think it gets more and more risky to rely upon those Warren court precedents.

When we look at the more recent precedents, some of things I will say may be a little different than the way Erwin described the entanglement test and public function test.¹⁷⁸ When I studied the area, I saw four possible tests. I saw a sufficiently close nexus test, which would ask whether the government has either coerced or significantly encouraged the private conduct.¹⁷⁹ Those words are important because it is not just authorization, that's clearly not enough under more recent Supreme Court decisions, its not enough for the government to just authorize, it must coerce or significantly encourage the private conduct. I think, when we look at *American Manufacturers* in a few moments in more detail, it's not even enough for the government to encourage the private conduct; the government must significantly encourage it. This, of course, is a question of degree. I do not really know how to draw that line.

Then, I think there is also a joint participation test which you describe as arcane.¹⁸⁰ The main issue I think is whether it is a joint action, a concerted action, or a conspiratorial action between the government and private sector.¹⁸¹ It's a little different type of inquiry. The public function test, definitely is a separate test,

¹⁷⁶ See generally Robert Jerome Glennon, *The Jurisdictional Legacy of the Civil Rights Movement*, 61 TENN. L. REV. 869 (1994) (examining the expansion of federal court review of state actions under the Warren court).

¹⁷⁷ See CHEMERINSKY, *supra* note 41, at § 6.4.4.3. "Burton never has been overruled. Yet, practically speaking, it may be a relic of the era, before the Civil Rights Act of 1964, when the Supreme Court tried to find ways to apply the Constitution to forbid private discrimination." *Id.*

¹⁷⁸ *Id.* at § 6.4.4.2.

¹⁷⁹ See *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 352 (1975).

¹⁸⁰ See generally CHEMERINSKY, *supra* note 41, at § 6.4.4.3.

¹⁸¹ *American Manufacturers*, 119 S. Ct. 984-85.

assuming it's a real test, which I'm not too sure about. We will come back to that also. Then, I would, at least, prior to *American Manufacturers*, have listed symbiotic relationship.¹⁸² I am treating *Burton v. Wilmington*¹⁸³ as a separate state action doctrine, I would have said before *American Manufacturers* that the Supreme Court had significantly narrowed this doctrine to cases in which it was shown that the government actually profited or gained in some way, from the constitutional wrongdoing,¹⁸⁴ which plaintiffs never seem to be able to show. But I am not sure that symbiotic relationship is much of a doctrine anymore after *American Manufacturers*. Therefore, I saw four potential doctrines, and I saw a couple of other cases, types of free-floaters that don't fit too well in any doctrine. *West v. Atkins*,¹⁸⁵ the prison physician case, I guess you would say is all over the place. It doesn't depend on any particular doctrine, although it's attempted to be explained in *American Manufacturers* as a public functions case.¹⁸⁶ I think the peremptory challenge decisions stand on their own, so I see the whole area slightly differently than you do.

PROF. CHEMERINSKY:

I do not think it matters much as to whether it is called two or four categories. I think Marty's categories of sufficient nexus and joint participation and symbiotic relationship are all ways of looking at the government's involvement in finding state action in private conduct. Sufficient nexus is really all about how closely tied is the government relationship. Joint participation is looking at what is the government's involvement with the private conduct.

¹⁸² See, e.g., *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

¹⁸³ *Id.*

¹⁸⁴ See *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (holding that a private school was not acting under color of state law when it fired its employees because its relationship with the state was the same as any other contractor); *Moose Lodge Number 107 v. Irvis*, 407 U.S. 163 (1972) (holding "there is nothing approaching the symbiotic relationship between lessor and lessee that was present in *Burton*"); *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973) (finding that federal licensing of broadcast stations is not sufficient government involvement for state action).

¹⁸⁵ 487 U.S. 42 (1988).

¹⁸⁶ *American Manufacturers*, 119 S. Ct. at 987-88.

Symbiotic relationship is to what extent the government is benefiting from and even involved with the private conduct. I think the peremptory challenge cases are about that.¹⁸⁷ I group them together under entanglement. The interesting thing is, in the most recent case we can look to, *American Manufacturers*, Justice Rehnquist seems to divide it into two areas. One-half of the opinion is dealing with the entanglement issue and the latter half of the opinion deals with public function. That is another reason there may be some conceptual reason to think in that way.

PROF. SCHWARTZ:

A couple of things about *American Manufacturers*. One thing to keep in mind is that the Third Circuit in this case had unanimously found state action.¹⁸⁸ I think the importance of this Supreme Court decision cannot be overlooked. You can ask the question, Why did the Supreme Court hear this case if for no other reason than to narrow the state action doctrine? One of the points that comes out of all of the post-Warren court state action decisions in my mind, and this is reinforced by *American Manufacturers*, is that the *quantity* of state involvement does not do it. The focus from the Supreme Court is much more on the particular type of state involvement. Is the state coercing? Is the state significantly encouraging? What type of function has been delegated? We have case after case in which the quantity of state involvement is great, but state action is not found.¹⁸⁹ Erwin mentioned *Rendell-Baker v. Kohn*.¹⁹⁰ That was a school for maladjusted children, not only

¹⁸⁷ See *Georgia v. McCollum*, 505 U.S. 42 (1992) (holding peremptory challenge must not be based on either the race of the juror or the racial stereotypes held by the party).

¹⁸⁸ See *Sullivan v. Barnett*, 139 F.3d 158 (3d Cir. 1998). The Third Circuit specifically held that "in creating and executing this system of entitlements, the Commonwealth has enacted a complex and interwoven regulatory web enlisting the Bureau, the employers, and the insurance companies . . . in effect, they become an arm of the State, fulfilling a uniquely governmental obligation under an entirely state-created, self-contained public benefit system." *Id.* at 168.

¹⁸⁹ See, e.g., *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Blum v. Yaretsky*, 457 U.S. 991 (1982) (involving government funding of medicaid where states funded over 90% of patient expenses).

¹⁹⁰ *Rendell-Baker*, 457 U.S. at 830.

licensed and extensively regulated by the state, but one year it got over 90 percent of its funds from the state. It was clearly carrying out a function, you may not call it a public function, but it was clearly carrying out a function of education for maladjusted children that the state would otherwise have to carry out.¹⁹¹ You put all of that together, and still, seven to two, no state action.¹⁹²

The same thing with utility companies. You mentioned the *Jackson* case.¹⁹³ You think about all the government involvement with utility companies; granting monopoly power, regulating, approving tariffs, important public service being carried out, and there is no state action. We do not know a government entity when we see one, meaning a utility company is as close to being a government entity without actually being a government entity. I think that is also true in *American Manufacturers*.

PROF. CHEMEKINSKY:

I very much agree with Marty in terms of significance of this case. Let me just give you a little factual background. It involves Pennsylvania's Workers' Compensation Law.¹⁹⁴ Pennsylvania amended the Workers' Compensation Law to say that the employer and its insurance company only had to pay medical bills that were reasonable and necessary, and it created a utilization review procedure.¹⁹⁵ When an insurance company felt that medical

¹⁹¹ *Id.* at 842.

¹⁹² *Id.* at 843.

¹⁹³ *Jackson v. Metropolitan Edison Company*, 419 U.S. 345 (1974) (finding no state action, the Court held that running a utility company is "not traditionally the exclusive prerogative of the state").

¹⁹⁴ *American Manufacturers*, 119 S. Ct. at 982.

¹⁹⁵ *Id.*; see also 77 PA. CONS. STAT. § 531(6) (West 1998). This section specifically provides:

(6) Except in those cases in which a workers' compensation judge asks for an opinion from peer review under section 420, disputes as to reasonableness or necessity of treatment by a health care provider shall be resolved in accordance with the following provisions:

(i) The reasonableness or necessity of all treatment provided by a health care provider under this act may be subject to prospective, concurrent or retrospective utilization review at the request of an employee, employer or insurer. The department shall authorize

bills weren't reasonable and necessary, they could forward them to the state-created utilization review board to hold a hearing to decide whether or not payment had to be given.¹⁹⁶ The case involves, several individuals who under Workers' Compensation Law had claims for medical expenses that insurance companies found were not reasonable and necessary and had forwarded to the utilization review procedure.¹⁹⁷ The question is: whether there is state action here?¹⁹⁸

All of this is created by state law, all of the procedures are specified by state law, and the utilization review procedure is entirely an entity of state law. For that reason, as Marty said, the Third Circuit found there to be state action.¹⁹⁹ The United States Supreme Court reversed unanimously.²⁰⁰ Justice Rehnquist wrote the opinion for the Court. The Court concluded that because it's a private employer, it is a private utilization review procedure, it's not state action.²⁰¹ The significance of the case in the long term is

utilization review organizations to perform utilization review under this act. Utilization review of all treatment rendered by a health care provider shall be performed by a provider licensed in the same profession and having the same or similar specialty as that of the provider of the treatment under review. Organizations not authorized by the department may not engage in such utilization review.

(ii) The utilization review organization shall issue a written report of its findings and conclusions within thirty (30) days of a request.

(iii) The employer or the insurer shall pay the cost of the utilization review.

(iv) If the provider, employer, employee or insurer disagrees with the finding of the utilization review organization, a petition for review by the department must be filed within thirty (30) days after receipt of the report. The department shall assign the petition to a workers' compensation judge for a hearing or for an informal conference under section 402.1. The utilization review report shall be part of the record before the workers' compensation judge. The workers' compensation judge shall consider the utilization review report as evidence but shall not be bound by the report.

Id.

¹⁹⁶ *Id.* at 983.

¹⁹⁷ *Id.* at 983-84.

¹⁹⁸ *Id.* at 984-85.

¹⁹⁹ *Sullivan*, 139 F.3d at 170.

²⁰⁰ *American Manufacturers*, 119 S. Ct. at 982.

²⁰¹ *Id.* at 989.

what the Supreme Court says about each of the exceptions to the state action doctrine identified.

As to the entanglement exception, the Supreme Court says the entanglement exception only applies if the government causes the private entity to violate the Constitution.²⁰² The government entity has to coerce it or cause the behavior to occur.²⁰³ The key obstacle to the Supreme Court's holding was *Burton v. Wilmington Parking Authority*.²⁰⁴ In *Burton*, the defense was that the city didn't coerce or cause the private restaurant to racially discriminate and the Supreme Court rejected that.²⁰⁵ The Supreme Court said the government had the power as a term of the lease to prevent discrimination and government can't avoid its responsibility by abdication.²⁰⁶ Rehnquist in *American Manufacturers* says *Burton* was an early state action case no longer to be followed.²⁰⁷ I do not think that's an express overruling of the holding of *Burton*. I think, if the facts of *Burton* happen again, the case would come out the same way, if nothing else under Title II Civil Rights Act. However, this does say that the symbiotic relationship analysis of *Burton* is no longer to be followed.

The second part of *American Manufacturers* involves the public functions exception.²⁰⁸ The argument here was that the utilization review procedure is really performing a public function, that the Constitution should be applied here.²⁰⁹ The Supreme Court rejects that argument as well. The Supreme Court says that, even though the government has created the mechanism, even though the government has mandated the procedures, that's not enough for state action.²¹⁰ Here is what I think is the practical significance for you: there is an important unresolved issue of whether state mandated dispute resolution constitutes state action and has to comply with the Constitution. I think most states have laws that

²⁰² *Id.* at 986.

²⁰³ *Id.*

²⁰⁴ 365 U.S. 715 (1961) (holding state action exists where government leases space to restaurant that racially discriminates).

²⁰⁵ *Id.* at 725.

²⁰⁶ *Id.*

²⁰⁷ *American Manufacturers*, 119 S. Ct. at 988-89.

²⁰⁸ *Id.* at 987.

²⁰⁹ *Id.* at 988.

²¹⁰ *Id.*

mandate arbitration for particular kinds of claims.²¹¹ Another issue is are the private arbiters and the private mediators to be regarded as state actors to comply with the Constitution? It's a huge issue, and it's really on the cutting edge. I think the language in *American Manufactures* suggests they are not state actors even though it's a state-mandated procedure and the state has dictated the procedure to be followed.

PROF. SCHWARTZ:

The one exception is this curious statement in the Court's opinion where the Chief Justice says that the utilization review committee itself, like that of any judicial official, may properly be considered state action.²¹² This is puzzling from a few different respects. From a fairly anti-state action court, why the gratuity? Secondly, what is the basis for concluding that the utilization review committee, as compared to the private insurance companies, was engaged in state action? I could only think that, when he says that the utilization review committee, like any judicial body, was engaged in state action that he must have been thinking public function doctrine.

PROF. CHEMERINSKY:

Because the case really is about the insurance company's choice not to pay the claims, I think they are saying, if it's a government entity itself, then its decisions are state action. The utilization review board itself is a government actor in what it does, but when it comes to what private actors do, I think, it would be private conduct and it wouldn't be state action, even though the operating procedure is state mandated procedures.

PROF. SCHWARTZ:

²¹¹ See, e.g., N.Y. GEN. BUS. LAW § 198 (a) (g) (McKinney 1998). New York consumers who invoke rights under automobile "lemon law" may be required to participate in mandatory arbitration.

²¹² *American Manufacturers*, 119 S. Ct. at 987.

The utilization review committee consisted of private health care providers, right? And to that extent, it is a group of private entities, the same way the NCAA is a private entity.

PROF. CHEMERINSKY:

I interpret the sentence differently. I think what the Supreme Court is saying there is the government board itself is a government entity, even though it's staffed by people who in the rest of their lives are private doctors. I served for two years as a volunteer, but I was elected by the voters on a city commission in Los Angeles.

Anything I did in my role of Commissioner was government action, though I was unpaid for it and I was a private law professor in the rest of my life. I think that utilization review board is a government body, so, its decisions are state action regardless of the individuals comprising the body at the time.

PROF. URBONYA:

Assuming the constitutionality of school vouchers, are there circumstances in which private schools would become state actors? I was listening to the Institute for Justice on the American Way and you can hardly tell which side is which side based on the title of these interest groups. The Institute for Justice said, and this is the side that is for vouchers, the last thing the private schools want are government regulations. They don't want to be subject to Title IX, they don't want the regulations, and the other side doesn't want vouchers. However, if we are going to have them, we want lots of regulations. What would it take to make a private school a state actor and have to comply with state action requirements?

PROF. CHEMERINSKY:

My answer would be that *Rendell-Baker v. Kohn* says even if the school gets 90 percent of its funds from the government, that's not enough for state action.²¹³ Therefore, even if the voucher was a

²¹³ *Rendell-Baker*, 457 U.S. at 830.

virtual total subsidy, that wouldn't be enough for state action. I have put aside the establishment question and I have put aside the ability of the government to put conditions on the vouchers, like, certain educational requirements, which they could do as part of the grant. I can say based on *Rendell-Baker v. Kohn* the voucher is not going to be enough for state action.

PROF. SCHWARTZ:

I want to come back to the public function doctrine. I have always been interested in this doctrine, and, Erwin, I can one-up you in terms of making bad law here because I lost *Flagg Brothers*.²¹⁴ The Court keeps talking about the function having to be an exclusive government function, and I keep thinking that is a test nobody can satisfy. If you apply it in a true fashion, even the private prison case, which presents a very compelling case to find state action based on the public function doctrine.²¹⁵ How can we say that a private prison is carrying out a function that is historically and exclusively a governmental function? Not only do we have a lot of private prisons now, but look at the qualified immunity question for private prison guards in *Richardson v. McKnight*.²¹⁶ The Supreme Court, in tracing the history said we have had a lot of private prisons in the past as well, So is public function a real test?²¹⁷ I have problems with this word "exclusive."

PROF. CHEMERINSKY:

²¹⁴ 435 U.S. 149 (1978).

²¹⁵ See *Richardson v. McKnight*, 521 U.S. 399 (1997); *Street v. Corrections Corporation of America*, 102 F.3d 810 (6th Cir. 1996) (holding actions of private prison guards are state action arising under color of state law); *Blumel v. Mylander*, 919 F. Supp. 423 (M.D. Fla. 1996) (finding a private company's operation of a jail constitutes state action under the public functions exception); *Lemoine v. New Horizons Ranch and Center*, 990 F. Supp. 498 (N.D. Tex 1998) (holding private juvenile residential treatment center is a state actor as to a juvenile who is involuntarily committed).

²¹⁶ *Id.*

²¹⁷ *Id.* at 404. See also *Wyatt v. Cole*, 504 U.S. 158 (1992); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981); *Owen v. City of Independence, Missouri*, 445 U.S. 622 (1980); *Imbler v. Pachtman*, 424 U.S. 409 (1976).

I think you make a terrific point because in none of these cases can it be said that the government has exclusively done it. There have long been company owned towns, so you can't say running a town is exclusively a government function.²¹⁸ You are right, as private prisons increase, if you go back to the early days of the country, governments entered contracts with private prisons and jails. Maybe the way of understanding all of this is, if the Supreme Court is doing an unstated balancing, what is really going on in the state action cases is a balancing of whether or not the Constitution needs to apply. We both agree the Court is much more willing to find state action in the race cases, because the Court says that we need to apply the Constitution, unstated balancing.²¹⁹ In other areas, the Court is less willing to find state action, balancing.

I think in *Jackson v. Metropolitan Edison*, the Court says a private utility is not a state actor and need not provide due process before terminating a service.²²⁰ I think, in the prison cases, the Court is saying it's so important to provide prisoners the protections of the Constitution, minimal as they may now be, and I don't think the Court is willing to say we are going to leave the prisoners without any protection against criminal and illegal punishment. That reflects the natural mechanical application of the words of the test.

PROF. SCHWARTZ:

The Supreme Court has never actually said that we use different state action principles in race cases as compared to non-race cases. I remember this came up at oral argument in the *Flagg Brothers* case when my adversary argued, this case does not involve anything like racial discrimination. Justice Marshall, if you remember his manner, responds to my adversary, no, it involves something important like procedural due process. To say, that there are these two lines of cases, one for race and one for non-race

²¹⁸ *But see* *Marsh v. Alabama*, 326 U.S. 501 (1946) (holding company-owned town is a state actor and must comply with the First Amendment).

²¹⁹ *See* *Shelly v. Kraemer*, 334 U.S. 1 (1948); *Norwood v. Harrison*, 413 U.S. 455 (1973).

²²⁰ *Jackson*, 419 U.S. at 352.

cases, it's an interesting observation, it might be accurate, but it's not supported by an explicit decision.

I still want to explore public function a little further, such as in the prison doctor case, *West v. Atkins*.²²¹ As I said before, if you read that decision, that's a unanimous holding that there is state action when the state hires the prison doctor to provide medical care for the inmates.²²² But the decision doesn't seem to be based upon any particular doctrine, it's based on a whole variety of factors that the Supreme Court has identified. Such as the prisoners have no choice when it comes to medical care, and the state is constitutionally obligated to provide medical care to prisoners.²²³ However, in *American Manufacturers*, Chief Justice Rehnquist attempts to explain *West v. Atkins* as a decision that in fact was based on the public function doctrine.²²⁴ That does not make any sense to me either because how can you say that the provision of medical care to inmates is an exclusive governmental function. That makes no sense at all. Certainly, the medical care is not provided only by doctors hired by the government but also by public officials. I am wondering whether what the Court maybe means is that it is an exclusive governmental obligation.

PROF. CHEMERINSKY:

I think conceptualizing this government obligation rather than government functions helps to explain the cases. Yet, I find, the *Polk County* case²²⁵ to be difficult to reconcile from that perspective because in *Gideon v. Wainwright* the government has the obligation to provide the legal services.²²⁶ This notion in that the public defender is adverse to the government, so that's not state action is expressly rejected in *Georgia v. McCollum*.²²⁷ Just as the criminal defense lawyer is supposed to do everything to serve the client, even though it may go against what the government wants, a

²²¹ 487 U.S. 42 (1988).

²²² *Id.* at 57.

²²³ *Id.*

²²⁴ *American Manufacturers*, 119 S. Ct. at 987-88.

²²⁵ *Polk County v. Dodson*, 454 U.S. 312 (1981).

²²⁶ 372 U.S. 335 (1963).

²²⁷ 500 U.S. 42 (1992).

doctor is supposed to do everything to serve the patient and the patient's needs even though it goes against what the government wants.

JUDGE PRATT:

How would it go against the government for the doctor to be serving the patient?

PROF. CHEMERINSKY:

The government says we don't want to spend money for the treatment.

JUDGE PRATT:

Just for the cost of the service?

PROF. CHEMERINSKY:

My guess is that happens a lot.

JUDGE PRATT:

That's not really a good analogy to the lawyer's position where his function is to fight the prosecutor.

PROF. CHEMERINSKY:

My question is: If what we are looking at is government duty, why is that a distinction that should matter? The government has the duty to provide legal services to those unable to afford it even more than the government has the duty to provide medical care to inmates. There is a duty under cases like *Estelle* that is clear.²²⁸

²²⁸ *Estelle v. Gamble* 429 U.S. 97 (1976). The Court held that while deliberate indifference to prisoner's serious illness or injury constitutes cruel and unusual punishment in violation of the Eighth Amendment, prisoner's pro se complaint failed to state a cause of action against physician both in his capacity as treating physician and as a medical director of the corrections department. *Id.* at 98.

I'm saying, from Marty's perspective, if you look just at government duty, *Polk County* seems wrong if the distinction is that the public defender is adverse to the government. *Georgia v. McCollum* says the public defender's excessive peremptory challenge is the state action even though the public defender is adverse to the government.²²⁹

²²⁹ *McCollum*, 500 U.S. at 52.