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ABSTRACT:

The state action doctrine is notoriously confusing and contradictory. It is also a weak mechanism for enforcing the constitutional accountability of both State and private actors. Many solutions to the doctrine's varied issues have been posed, but as of yet its problems have not been resolved. In fact, they continue to worsen, as increasing privatization combines with the doctrine's restrictions to narrow constitutional liability to the point of potential nullity. This article examines the doctrine's failures through the specific lens of accountability, demonstrating through analysis of recent caselaw how the doctrine—along with creating confusion and countless circuit splits—allows innumerable constitutional violations to go unremedied, even where the State played a significant role in or had significant influence over the challenged action. It argues that the easiest and most effective solution to the doctrine's flaws lies within the heart of the doctrine itself, as defined by the Supreme Court: matching State responsibility with constitutional liability.

The conception of State responsibility as originally formulated by the Court does not necessitate as narrow a reading as it has thus far received, and a broader interpretation could allow the doctrine to fill in its current accountability gaps. To that end, this article proposes several modifications to the state action doctrine. These changes include interpreting the current state action tests used by courts as non-exclusive, removing the unwarranted requirement that the State be directly responsible for the specific action challenged, and adding factors into the analysis that capture a broader and more accurate vision of accountability.

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THE STATE OF THE STATE ACTION DOCTRINE: A SEARCH FOR ACCOUNTABILITY

I. INTRODUCTION

The notion that the state action doctrine needs fixing is not new. The doctrine—which mandates that constitutional liability only attaches to state actors, not private ones[1]—has engendered criticism ever since its inception, including that it is contradictory, unpredictable, and constitutes a highly imperfect mechanism for safeguarding fundamental constitutional values.[2] Despite all the negative attention, the doctrine today remains the mess it ever was. What adds new urgency, however, to this unfortunate state of events is the rise of privatization and outsourcing of formerly public services. This trend can be seen among a wide variety of entities that litigants frequently attempt to paint as state actors—including schools,[3] prisons,[4]

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[1] *See* United States v. Stanley, 109 U.S. 3, 11 (1883).

[2] *See, e.g.*, Martha Minow, *Alternatives to the State Action Doctrine in the Era of Privatization, Mandatory Arbitration, and the Internet: Directing Law to Serve Human Needs*, 52 HARV. C.R.-C.L. L. REV. 145 (2017); Emily Chiang, *No State Actor Left Behind: Rethinking Section 1983 Liability in the Context of Disciplinary Alternative Schools and Beyond*, 60 BUFF. L. REV. 615 (2012); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985); Laurence H. Tribe, *Refocusing the "State Action" Inquiry: Separating State Acts from State Actors, in Constitutional Choices* 246 (1985); Alan R. Madry, *Private Accountability and the Fourteenth Amendment; State Action, Federalism and Congress*, 59 MO. L. REV. 499 (1994); Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CALIF. L. REV. 569 (2001); Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169 (1995); Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967); *Developments in the Law: State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248 (2010); Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779, 789 (2004); Henry J. Friendly, *Public-Private Penumbra-Fourteen Years Later*, 130 U. PA. L. REV. 1289 (1982).

[3] *See* Florence Samson & Clive Belfield, *The Privatization of America's Schools, in* WHAT IS AUTHENTIC EDUCATIONAL REFORM? PUSHING AGAINST THE COMPASSIONATE CONSERVATIVE AGENDA 27–54 (Helen L. Johnson & Arthur Salz eds., 2008); Josh Cunningham, *A New Era of School Choice*, NAT'L CONF. STATE LEGISLATURES (Mar. 2017), https://www.ncsl.org/research/education/a-new-era-of-school-choice.aspx; Valerie Strauss, *There is a Movement to Privatize Public Education in America. Here's How Far It Has Gotten*, WASH. POST (June 23, 2018, 10:00 AM), https://www.washingtonpost.com/news/answer-

healthcare providers,[5] and suppliers of utilities and other essential services.[6] This tendency appears especially troubling when one acknowledges that privatization is particularly likely to occur to services provided to the less politically powerful.[7]

The state action doctrine does not foreclose the possibility of treating private actors as state ones when certain conditions are met—namely, when "the action of the [private entity] may be fairly treated as that of the State itself."[8] However, as will be readily apparent, it is all too easy for private entities wielding authority granted to them by the State, or whose actions would not be possible without State involvement, to slip through the cracks. Victims of alleged constitutional violations committed by, for example, foster parents granted dominion over their foster children by the State,[9] paramedics who assault prisoners whom they are called by the State to treat,[10] hospitals in the midst of involuntarily committing patients with State-granted

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sheet/wp/2018/06/23/there-is-a-movement-to-privatize-public-education-in-america-heres-how-far-it-is-has-gotten/.

[4] *See* Kara Gotsch & Vinay Basti, *Capitalizing on Mass Incarceration: U.S. Growth in Private Prisons*, SENTENCING PROJECT (Aug. 02, 2018), https://www.sentencingproject.org/publications/capitalizing-on-mass-incarceration-u-s-growth-in-private-prisons/; Patrice A. Fulcher, *Hustle and Flow: Prison Privatization Fueling the Prison Industrial Complex*, 51 WASHBURN L.J. 589, 589–92 (2012).

[5] *See* Chris Holden, *Privatization and Trade in Health Services: A Review of the Evidence*, 35 INT'L J. HEALTH SERV. 675, 675 (2005); Stefano Villa & Nancy Kane, *Assessing the Impact of Privatizing Public Hospitals in Three American States: Implications for Universal Health Coverage*, 16 VALUE IN HEALTH 24, 24 (2013); Mark Legnini et al., *Privatization of Public Hospitals*, ECON. & SOC. RSCH. INST. Jan. 1999, at 1.

[6] *See, e.g.*, Florencio Lopez-de-Silanes et al., *Privatization in the United States*, 28 RAND J. ECON, 447, 447 (1997); MARTHA MINOW, PARTNERS NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD (2002); Craig Anthony Arnold, *Water Privatization Trends in the United States: Human Rights, National Security, and Public Stewardship*, 33 WM. & MARY ENV'T L. & POL'Y REV. 785 (2009); Pamela Winston et al., *Privatization of Welfare Services: A Review of the Literature*, MATHEMATICA POL'Y RSCH., May 2002, at 7–8; Elisabeth R. Gerber et al., *Privatization: Issues in Local and State Service Provision*, CTR. FOR LOC., STATE & URB. POL'Y, UNIV. MICH., Feb. 2004, at 1.

[7] *See* Chiang, *supra* note 2, at 671.

[8] Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974) (citing Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176 (1972)).

[9] *See* Ismail v. Cty. of Orange, 693 F. App'x 507, 512 (9th Cir. 2017).

[10] *See, e.g.*, Watson v. Smith, No. 18-cv-142-FDW, 2019 U.S. Dist. LEXIS 56153, at *21 (W.D.N.C. Apr. 2, 2019).

power,[11] rehabilitation/transitional housing programs foisted upon individuals by the State,[12] testing companies whose services are mandated in order to receive State licenses,[13] and many others are not granted a constitutional remedy. Thus, a major criticism of the doctrine has been that it insufficiently promotes accountability, at the expense of individual rights and liberties[14]—a criticism that has only gained force as the delegatory arrangements which have so troubled the doctrine have become more and more popular.

This accountability issue exists upon two separate but interrelated axes: accountability of the State for its own actions—namely, its decisions to delegate certain services, or to encourage or compel the use of certain private actors—and accountability of all citizens, including private entities and corporations, for the upholding of fundamental constitutional values. Regarding the first axis, the state action doctrine as currently formulated allows the State in many instances to decide to delegate its responsibilities and/or services to private actors, or to enable or encourage the use of such actors, without attaching liability either to that decision or to the private entities, encouraging the avoidance of constitutional duties rather than their fulfilment. These private actors are not—excluding the limited ex-

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[11] *See, e.g.*, Julian v. Mission Cmty. Hosp., 218 Cal. Rptr. 3d 38, 70-75 (Ct. App. 2017); Bortolotti v. Gracepoint, No. 19-cv-1072-T-24, 2019 U.S. Dist. LEXIS 130080, at *10 (M.D. Fla. Aug. 5, 2019); Coppola v. Health All. Hosp. Broadway Campus, No. 17-CV-1032, 2019 U.S. Dist. LEXIS 8346, at *16–34 (N.D.N.Y. Jan. 17, 2019).

[12] *See, e.g.*, Smith v. Am. Behav. Health Sys., No. 16-cv-00380-MKD, 2018 U.S. Dist. LEXIS 146453, at *12–23 (E.D. Wash. Aug. 28, 2018).

[13] *See, e.g.*, Fox v. Int'l Conf. Funeral Serv. Examining Bds., 242 F. Supp. 3d 272, 282 (S.D.N.Y. 2017); Mattei v. Int'l Conf. Funeral Serv. Examining Bds., No. 1-15-CV-139, 2015 U.S. Dist. LEXIS 116009, at *3 (W.D. Tex. Sept. 1, 2015).

[14] *See, e.g.*, Minow, *supra* note 2, at 164–66; Chiang, *supra* note 2, at 667–69 ("The Constitution and the public are done a disservice if both government and private entities are able to avoid constitutional liabilities to which they would otherwise be subject."); Chemerinsky, *supra* note 2, at 539–40 ("[A]llowing the concept of state action to determine when rights are protected undermines liberty by allowing all private invasions of rights, even when the balance completely favors the victims."); Tribe, *supra* note 2, at 246 ("[W]here it is the State's persistent inaction in the face of patterns of deprivation for which state and society seem to many to bear collective responsibility, the premise that only identifiable state 'action' may be called to constitutional account is deeply troubling."); Madry, *supra* note 2, at 503 ("Among the forces that have shaped the present doctrine of private accountability, and motivated the scholarly debate, is the palpable need to protect the fundamental interests of people against invasion by powerful private initiatives.").

ceptions provided for under the state action doctrine—subject to the Constitution's demands, and thus can and do act contrary to constitutional values when not otherwise restrained (by, for example, state law). States can thus avoid constitutional liability for themselves via delegation, inaction, or funding private entities, rather than by actually keeping their practices in line with the Constitution's mandates. However, delegation of a duty or service, or lending support to a private actor that provides public services, does not inherently erase State responsibility. The State can and does choose which private entities it wants to delegate to or fund, and in what spheres it wants to delegate completely or allow for shared provision by State and private actors. There is therefore no obvious reason why the effects of those choices should be completely free of constitutional constraints or consequences for the State, or why people harmed by private actors deputized by the State should be deprived of a constitutional remedy, as is essentially the case under the current doctrine. Instead of encouraging States to follow the Constitution, or even to ensure that private delegees do so, the state action doctrine provides the opposite incentive: privatize away, in order to wash one's hands of responsibility and thus constitutional liability.

The other side of the accountability problem, which is bound up in the first, is that the current state action doctrine leaves gaping holes inside of which nobody at all is held accountable for violations of core constitutional values. In many instances where the doctrine prevents liability, neither the State nor the private entity involved are held liable for what would otherwise be, if directly performed by the State, violations of the Constitution.[15] Of course, state constitutions, state laws, common law, and the like may provide a remedy where a private actor violates constitutional norms—but they may not,[16] or they may provide remedies that are insufficient or more difficult to

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[15] *See* Chemerinsky, *supra* note 2, at 509 (collecting cases).

[16] *See id.* at 506, 509–10 (noting that "in situations when no statute prohibits discrimination, courts have used the state action doctrine to dismiss suits alleging private racial discrimination by employers, restaurants, cemeteries, and deliverers of services such as childcare. Similarly, in situations when there was no applicable statute, the courts have refused to review alleged sex discrimination by private employers and insurance companies, holding that there was no state action. Claims of discrimination on the basis of age, religion, and alienage likewise have been dismissed for want of state action. . . . In short, the courts have tolerated the violation of virtually every constitutional value, dismissing challenges to alleged infringements because of the absence of state action.").

obtain legally,[17] or that do not bear the strong symbolism of a finding of constitutional violation.[18] In such cases, violations of fundamental constitutional values are allowed to continue unchecked by anything other than the court of public opinion.

To some, this accountability problem is not a problem at all. It may be thought that private actors should be allowed to violate constitutional norms in ways in which the government should not—that is, in fact, the entire point behind the requirement of state action.[19] But in an age of increasing privatization and delegation, a strict, unbending belief that private actors should not be held to constitutional standards leaves vast amounts of services—many of which are arguably necessary to those wishing to live as fully-functioning members of society—vulnerable to discrimination and like evils. The accountability gaps' existence, and ever-growing nature, threaten to prove empty the Constitution's guarantees, allowing for violations of civil rights of a potentially alarming magnitude. The state action doctrine allows States to delegate, fund, and encourage, and escape constitutional liability, while simultaneously freeing the private actors in most cases from constitutional liability as well. Nobody, then, pays the bill for violations of fundamental constitutional norms—beyond their victims. Further, the violations are not meaningfully less harmful merely because they stem from private entities' actions rather than governmental ones. In reality, "private infringements of basic freedoms can be just as harmful as governmental infringements. Speech can be chilled and lost just as much through private sanctions as through public ones. Private discrimination causes and perpetuates social inequalities at least as pernicious as those caused by govern-

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[17] *See* Chiang, *supra* note 2, at 664.

[18] *Cf.* JOHN C. DOMINO, CIVIL RIGHTS & LIBERTIES: TOWARD THE 21ST CENTURY 4 (1994) ("At the core of the Supreme Court's authority and prestige is the principle of judicial review-the power to declare unconstitutional any state or federal law, judicial ruling, or executive action that is in conflict with the Constitution."); Christopher E. Smith, *Law and Symbolism*, 1997 DET. C.L. MICH. ST. U. L. REV. 935, 937–38 (1997) ("[The Constitution] is often 'analog[ized] . . . to a sacred text.").

[19] *See, e.g.*, Jackson v. Metro. Edison Co., 419 U.S. 345, 349 (1974) ("[T]his Court in the Civil Rights Cases . . . affirmed the essential dichotomy set forth in that Amendment between deprivation by the State . . . and private conduct."); Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n, 531 U.S. 288, 295 (2001) ("The judicial obligation is . . . to preserve an area of individual freedom by limiting the reach of federal law and avoid the imposition of responsibility on a State for conduct it could not control.") (internal quotation marks omitted).

ment action."[20] In addition, "the concentration of wealth and power in private hands, for example, in large corporations, makes the effect of private actions in certain cases virtually indistinguishable from the impact of governmental conduct."[21] And private entities, though subject in some sense to the power of public opinion through the demands of shareholders, are not subject to direct control by the public through democratic processes, meaning that there exists a less powerful practical check on private entities than on the State—calling for more legal accountability, not less.[22]

The state action doctrine appears to have evolved with accountability criticisms in mind, particularly surrounding accountability of the State.[23] State responsibility, in fact, forms the heart of the doctrine as applied to private actors. The Court has emphasized that,

> [t]he judicial obligation is not only to preserve an area of individual freedom by limiting the reach of federal law and avoid the imposition of responsibility on a State for conduct it could not control, . . . but also to assure that constitutional standards are invoked when it can be said that *the State is responsible* for the specific conduct of which the plaintiff complains.[24]

Thus, tracing State responsibility lies at the core of the state action inquiry. However, despite the courts' apparent awareness of the issue of accountability, and their explicit commitment to matching State re-

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[20] Chemerinsky, *supra* note 2, at 510.
[21] *Id. at* 510–11.
[22] *See id.*
[23] *Cf.* G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 HOUS. L. REV. 333, 336 (1997) ("The state action doctrine . . . contemplates a search for governmental responsibility.").
[24] *Brentwood*, 531 U.S. at 295 (internal citations omitted) (emphasis added); *see also* Burton v. Wilmington Parking Auth., 365 U.S. 715, 724–25 (1961) ("It is irony amounting to grave injustice that in one part of a single building, erected and maintained with public funds by an agency of the State to serve a public purpose, all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class citizen, offensive because of his race, without rights and unentitled to service, but at the same time fully enjoys equal access to nearby restaurants in wholly privately owned buildings."); West v. Atkins, 487 U.S. 42, 56 (1988) ("Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights.").

sponsibility with a finding of state action, the doctrine has not sufficiently evolved to meet and resolve accountability concerns—an issue that is becoming especially pressing in this new reality of privatization and delegation. Courts have intensely limited their conception of State responsibility to the detriment of overall accountability, generally refusing to look at practical effects and demanding a connection of the highest order between the State and the challenged action.[25] If the status quo remains unchanged, the number of constitutional violations unmatched by constitutional liability will only continue to grow.

This is not an unavoidable result of maintaining a state action requirement. The bones of the doctrine—the explicit commitment to ensuring that constitutional liability attaches where the State is responsible for the challenged action—provides a viable mechanism for preventing privatization from destroying accountability. Responsibility does not need to be as narrowly defined as courts have thus far interpreted it, and a broad conception can capture much of what now slips out of the doctrine's grasp. While many answers to the doctrine's problems have been proffered,[26] this paper does not attempt to analyze each of these options. Instead, mindful of both the power of—and thus the need for—a constitutional remedy, the potential inadequacy or unavailability of private law tools, and the reluctance of the Court to eliminate or radically change the doctrine, it focuses on ways in which the current doctrine could be reformed to promote accountability through a more robust conception of the doctrine's motivating principle: ensuring that the State cannot evade constitutional liability for the actions of private entities that "may be fairly treated as that of the State itself."[27] The Court has declared that the State cannot circumvent constitutional duties by delegating them to private actors,[28] and has centered the state action doctrine as applied to private actors around the ability to hold States responsible for the consequences of their actions.[29] This paper therefore presents a possible

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[25] *See infra* Parts II, III.

[26] *See, e.g.*, Chemerinsky, *supra* note 2, at 507; Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law*, 1 INT'L J. CONST. L. 79, 94 (2003).

[27] Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974).

[28] *See* West v. Atkins, 487 U.S. 42, 56 (1988) ("Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody.").

[29] *See, e.g.*, *Brentwood*, 531 U.S. at 295.

solution to the accountability problem that focuses on and responds to this concern, in order to increase accountability without fundamentally altering the nature of the doctrine.

Thus, Part II gives an account of the state action doctrine as it currently stands, illustrating its confused nature, its conflicting interpretation by lower courts, and its consequent propensity to create circuit splits, demonstrating the dire need for change. Part III closely examines certain problem areas that coincide with increased privatization, delegation, and State empowerment of private actors, in which a weakened conception of State responsibility has led to a failure of accountability. Part IV offers up ways in which the current doctrine could be reformed to prevent this failure, while still remaining within the spirit of the doctrine, as defined by the Court, of matching State responsibility with constitutional liability.

II. THE DOCTRINE TODAY

As described, the state action doctrine has been roundly criticized as incoherent, unworkable, and insufficient to uphold our constitutional values. Yet, not much has been done to modify or clarify the doctrine; it continues to be an unpredictable jumble, as it has been for over a hundred years. This Part gives an account of the current state of the doctrine, closely examining cases from the past several years in order to demonstrate how a paucity of clear guidance from the Supreme Court has led to differing and often conflicting interpretations among the circuits. These variations occur across multiple planes, from the content of the tests derived from the Court's jurisprudence to the manner in which those tests are applied. Additionally, this Part highlights how an unnecessarily weak conception of State responsibility has shaped the development of the doctrine in such a way as to let accountability fall by the wayside. The resulting mess constitutes a powerful argument in favor of changing or at least clarifying the doctrine.

A. The Content of the Tests

Lower courts generally apply slight variations on three to four tests derived from the Supreme Court's relatively sparse state action jurisprudence (including precedent concerning direct application of

the Constitution and precedent concerning use of 42 U.S.C. § 1983 to hold actors liable for constitutional violations).[30] The Court did not itself label, explicitly endorse, or fully define these tests, though they have acknowledged their existence.[31] The Court has also maintained that the state action doctrine is not suited for, and cannot be boiled down to, an enumerated list of exclusive tests.[32] However, the use of the tests has become near-ubiquitous among the lower courts, without much attempt to step outside their boundaries. These tests include: the public function test, the State coercion/compulsion test, the joint action test, and the symbiotic relationship/nexus test. Courts have not been entirely consistent about how they define these tests, or even about the number of tests that exist.[33] Many courts state that there are only three tests—usually public function, coercion/compulsion, and symbiotic relationship/nexus, though the exact labels differ, with some combining joint action and nexus together. [34] Other courts recognize four tests—adding in joint action separately.[35]

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[30] The two inquiries are not exactly identical, but functionally courts' analyses of § 1983's "color of state law" requirement is extremely similar to their analyses of the state action requirement. *See* Julie K. Brown, *Less is More: Decluttering the State Action Doctrine*, 73 MO. L. REV. 561, 564 (2008) ("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. 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."). Thus, the inquiries will be treated as one for the purposes of this paper.

[31] *See, e.g.*, *Brentwood*, 531 U.S. at 294 ("The United States Court of Appeals for the Sixth Circuit . . . recognized that there is no single test to identify state actions and state actors but applied three criteria derived from [prior cases].").

[32] *See id.* at 294–95 (stating that "there is no single test to identify state actions and state actors" and that "[w]hat is fairly attributable [to the State] is a matter of normative judgment, and the criteria lack rigid simplicity").

[33] *See infra* Part III.

[34] *See, e.g.*, Fox v. Int'l Conf. Funeral Serv. Examining Bds., 242 F. Supp. 3d 272, 281 (S.D.N.Y. 2017) ("Although there is 'no single test to identify state actions and state actors,' . . . three main tests have emerged."); La. Div. Sons Confederate Veterans v. City of Natchitoches, 370 F. Supp. 3d 692, 702 (W.D. La. 2019) ("To determine whether otherwise private conduct is 'fairly attributable' to the [S]tate, and thus considered state action, the courts employ three tests.").

[35] *See, e.g.*, Belgau v. Inslee, 359 F. Supp. 3d 1000, 1013 (W.D. Wash. 2019) ("The Supreme Court has articulated four tests for determining whether a non-governmental person's actions amount to state action. . . ."); Davison v. Facebook, Inc., 370 F. Supp. 3d 621, 628 (E.D. Va. 2019) ("[T]he Fourth Circuit has recognized 'four exclusive circumstances under which a private party can be deemed to be a state actor.'").

i. Public Function

Private actors may be found to be state actors when they are performing a public function that "has been 'traditionally the *exclusive* prerogative of the State.'"[36] This test is on its face quite stringent, especially in cases where the function itself is relatively new, and thus no tradition of any kind exists in regard to its performance. The current test also represents a narrowing departure from the original public function test, which required only that a function be public in nature.[37] Courts have also explicitly stated that they are reluctant to broaden the category beyond that which has already been included, making it even more difficult to satisfy this already punishing test.[38]

The new narrowed version of the public function test, while seemingly clear and simple to explain, has been difficult to apply in practice. In some areas, the test provides clear foreclosure of a finding of state action on public function grounds: private schools,[39] attorneys,[40] social media websites,[41] and foster parents,[42] for example,

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[36] Rendell-Baker v. Kohn, 457 U.S. 830, 842 (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (1974)).

[37] *See* Barak-Erez, *supra* note 2, at 1176.

[38] *See* Amisi v. Melick, No. 15-4083, 2017 U.S. Dist. LEXIS 71456, at *12 (D.S.D. May 8, 2017) (noting that "[u]nder this 'public function' test, courts have been reluctant to expand the number activities that fall within the purview of § 1983," and collecting cases).

[39] *See, e.g.*, I.H. v. Oakland Sch. for the Arts, 234 F. Supp. 3d 987, 992 (N.D. Cal. 2017) ("It is also unlikely that plaintiff may argue that [defendant private school] is a state actor under the 'public function' test, as the Ninth Circuit has explained that the 'provision of educational services is not a function that is traditionally and exclusively the prerogative of the State.'"); Dawkins v. Biondi Educ. Ctr., 164 F. Supp. 3d 518, 529 (S.D.N.Y. 2016) ("[C]ourts have consistently held that 'education is not considered to be exclusively the prerogative of the State.'").

[40] *See* Surina v. South River Bd. of Educ., No. 17-2173(FLW), 2018 U.S. Dist. LEXIS 42346, at *9 (D.N.J. Mar. 15, 2018) ("[T]he Supreme Court has been clear that a lawyer representing a client is not, by virtue of being an officer of the court, a state actor under color of state law within the meaning of § 1983.'") (citing Polk Cty v. Dodson, 454 U.S. 312, 318–19 (1981)).

[41] *See, e.g.*, Fehrenbach v. Zeldin, No. 17-CV-5282, 2018 U.S. Dist. LEXIS 132992, at *8 (E.D.N.Y. Aug. 6, 2018) ("[T]he range of activities in which private actors have been held to be performing public functions is very limited. Indeed, courts in this District have determined that 'the Internet is, by no stretch of the imagination, a traditional and exclusive public function.'").

[42] *See, e.g.*, Ismail v. Cty. of Orange, 693 F. App'x 507, 512 (9th Cir. 2017); Leshko v. Servis, 423 F.3d 337, 341 (3d Cir. 2005); Rayburn *ex rel.* Rayburn v. Hogue, 241 F.3d 1341, 1348 (11th Cir. 2001); Milburn by Milburn v. Anne Arundel Cty.

have been overwhelmingly held to elude the public function test. In other areas, however, applying the test becomes more complicated. The provision of services to prisoners has produced a patchwork quilt, with certain services considered to constitute public functions, while others are thought to fall short.[43] The conduct of political parties has also produced mixed results, with actions like the conducting of elections constituting state action, while other actions, such as internal disciplinary measures, are considered completely private.[44] Post-conviction supervision additionally presents a complicated arena: for example, the monitoring of sex offenders,[45] but not the provision of transitional housing to parolees,[46] has been labeled state action under the public function test.

The public function test initially appeared to be a powerful tool to hold private actors (and the governments that enabled or delegated responsibilities to them) accountable to constitutional values and for their own actions. However, its extreme narrowing by the Court—along with the subsequent reluctance of lower courts to expand the doctrine any further—has stymied plaintiffs' attempts to use it as such. The test as it has been interpreted fails to fully serve either aspect of accountability and fails to fully capture the notion of State responsibility so fundamental to the doctrine. By limiting the test to only traditionally exclusive governmental prerogatives, the State is free to (and is, in fact, incentivized to) delegate as it wishes—or allow for private growth in any area it desires—outside of the test's narrow bounds, allowing it to act without constitutional consequence. And the private beneficiaries of the State's delegation or inaction are permitted to escape constitutional constraints as well. Thus, as it stands, the public function test is a weak mechanism for enforcing accountability.

Dep't Soc. Servs., 871 F.2d 474, 479 (4th Cir. 1989); Brown v. Hatch, 984 F. Supp. 2d 700, 708–09 (E.D. Mich. 2013) (collecting cases).

[43] *See infra* Section III.B.

[44] *See infra* Section III.E.

[45] *See* Jones v. Cty. of Suffolk, 164 F. Supp. 3d 388, 397 (E.D.N.Y. 2016) ("[T]he monitoring of registered sex offenders is an inherently public function.").

[46] *See* Janny v. Gamez, No. 16-cv-002840-SKC, 2018 U.S. Dist. LEXIS 222320, at *20 (D. Colo. Sept. 20, 2018) ("[T]he provision of transitional housing is not a function traditionally provided by the state.").

ii. State Coercion/Compulsion

The state coercion/compulsion test stems from the Court's reasoning in *Peterson v. City of Greenville*,[47] wherein the Court found state action where a private restaurant, following a city ordinance mandating race separation, refused service to African-American customers.[48] The Court stated that "[w]hen the State has commanded a particular result, it has saved to itself the power to determine that result and thereby 'to a significant extent' has 'become involved' in it, and, in fact, has removed that decision from the sphere of private choice."[49] The doctrine was later expounded upon by the Court in *Lombard v. Louisiana*[50] and *Blum v. Yaretsky*.[51] In essence, the coercion/compulsion test "considers whether the coercive influence or 'significant encouragement' of the State effectively converts a private action into a government action."[52]

This test, like the public function test, appears to allow for broad liability of private actors, but overall, it has not been interpreted to do so. Most courts require that the State in fact mandate, compel, or significantly coerce the actor to perform the specific action in question, with generalized allegations of control unconnected to the challenged act insufficient to incur state action.[53] The same is true of

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[47] 373 U.S. 244 (1963); *see also* Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 836 (9th Cir. 1999) ("The Court first applied the [compulsion] analysis in *Peterson v. City of Greenville*. . . .").

[48] *Peterson*, 373 U.S. at 247-48.

[49] *Id.* at 248.

[50] 373 U.S. 267, 269 (1963) (finding state action where plaintiffs were convicted of violating a Louisiana statute that criminalized declining to vacate a place of business after being ordered to do so).

[51] 457 U.S. 991, 991–93 (1982) (finding no state action where private nursing homes allegedly transferred/discharged Medicaid patients without providing notice/opportunity for hearing).

[52] Kirtley v. Rainey, 326 F.3d 1088, 1094 (9th Cir. 2003) (citing *Sutton*, 192 F.3d at 836-37).

[53] *See, e.g.*, Bellamy v. First Class Mgmt. LLC, No. 15-cv-431-FtM-29CM, 2017 U.S. Dist. LEXIS 122946, at *7 (M.D. Fla. Aug. 4, 2017) ("The compulsion theory applies when the [S]tate commands or compels a certain act."); Dawkins v. Biondi Educ. Ctr., 164 F. Supp. 3d 518, 526 (S.D.N.Y. 2016) ("[T]he state's regulation must actually 'evidence governmental coercion or encouragement' over the particular activity that allegedly caused the constitutional injury."); Johnson v. Fein, No. 18-CV-0096, 2019 U.S. Dist. LEXIS 50516, at *14 (N.D.N.Y. Mar. 25, 2019) ("[P]laintiff complains about the medical treatment that Dr. Fein provided to him at two medical appointments. Beyond plaintiff's conclusory assertion that he has sat-

grants of authority that are permissive in nature rather than mandatory: they cannot by themselves transform private action into state action.[54] State regulation of a private entity alone, even if extensive, is also generally not enough to satisfy the coercion/compulsion test.[55] Neither is State funding of the private entity, even if such funding makes up an overwhelming portion of the entity's operating budget.[56] Plaintiffs' attempts to make use of the test are frequently denied by courts, to the point where hardly any courts over the last few years found the test to have been satisfied in the cases before them.[57]

As with the public function test, the coercion/compulsion test, as interpreted, only narrowly conceives of State responsibility, and

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isfied the compulsion test because Dr. Fein was 'significant[ly] encouraged,' there is simply no evidence that the medical treatment rendered by Dr. Fein was anything other than the product of his personal medical judgment. . . .").

[54] *See, e.g.*, Bortolotti v. Gracepoint, No. 19-cv-1072-T-24, 2019 U.S. Dist. LEXIS 130080, at *10 (M.D. Fla. Aug. 5, 2019) ("[T]he Marchman Act does not require hospitals or physicians to pursue a specific course of action when they encounter a substance impaired patient. Rather, the Marchman Act sets forth guidelines and procedures under which a physician *may* initiate a patient's involuntary civil commitment. . . . The Marchman Act is, at its core, permissive—not mandatory. As such, it does not rise to the level of encouragement or coercion by the [S]tate in order to transform St. Joseph's conduct into state action."); Jackson v. Barden, No. 12 Civ. 1069, 2018 U.S. Dist. LEXIS 3861, at *39 (S.D.N.Y. Jan. 8, 2018) (finding the compulsion test unsatisfied because the statute in question "does not require a physician responding to an application thereunder to hospitalize the patient subject to the referral; rather, it provides that 'an examining physician . . . may receive and care for' such individual").

[55] *See* S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 544 (1987) ("Even extensive regulation by the government does not transform the actions of the regulated entity into those of the government." (citing Jackson v. Metro. Edison Co., 419 U.S. 345, 350 (1974))).

[56] *See* Holden v. E. Hampton Town, No. 15-CV-4478, 2017 U.S. Dist. LEXIS 53135, at *14 (E.D.N.Y. Mar. 31, 2017) ("[T]he Supreme Court 'has repeatedly held that a private entity's dependence on government funding does not make the organization a state actor.'" (quoting Archer v. Econ. Opportunity Comm'n Nassau Cnty., Inc., 30 F. Supp. 2d 600, 605 (E.D.N.Y. 1998))).

[57] *See, e.g.*, *Bellamy*, 2017 U.S. Dist. LEXIS 122946, at *7; *Dawkins*, 164 F. Supp. 3d at 526; *Johnson*, 2019 U.S. Dist. LEXIS 50516, at *14; *Bortolotti*, 2019 U.S. Dist. LEXIS 130080, at *10; *Jackson*, 2018 U.S. Dist. LEXIS 3861, at *39; Julian v. Mission Cmty. Hosp., 218 Cal. Rptr. 3d 38, 60 (Cal. Ct. App. 2017); Antwi v. HHS (Ctrs.) F.E.G.S., No. 13 Civ. 835, 2018 U.S. Dist. LEXIS 90903, at *8 (S.D.N.Y. May 18, 2018); D.W.M. v. St. Mary Sch., No. 18-cv-3099, 2019 U.S. Dist. LEXIS 145583, at *26–29 (E.D.N.Y. Aug. 27, 2019); La. Div. Sons of Confederate Veterans v. City of Natchitoches, 370 F. Supp. 3d 692, 702–04 (W.D. La. 2019).

thus has proved an imperfect tool to enforce accountability for either the State or private entities. As demonstrated by the across-the-board failure in recent years to satisfy it, the test is not easily accessible to plaintiffs. It provides an easy loophole for defendants: as long as the delegation or direction is phrased in terms that leave any sort of wiggle room for the private actor to act at least nominally independently, both the State and the private actors can avoid constitutional liability. And even if the State wields significant control over the private entity, as long as it can plausibly deny any direct responsibility for the challenged act, then a finding of State action can be avoided–even if the influence that the State wields (financial or otherwise) is so significant that one could reasonably infer that the private actor made its decisions with the State's wishes in mind, indicating State responsibility.

iii. Symbiotic Relationship/Nexus

The symbiotic relationship/nexus test (also occasionally called the "entwinement" test)[58] has apparently been derived from the Court's reasoning in *Brentwood Academy v. Tennessee Secondary School Athletic Association*.[59] There, the Court held that a nominally private organization for the regulation of sports amongst private and public schools was a state actor, as the Association's "private character . . . [was] overborne by the pervasive entwinement of public institutions and public officials in its composition and workings."[60] The gist of the nexus test is that state action can be found where "there is a such a 'close nexus between the State and the challenged action that the seemingly private behavior may be fairly treated as that of the State itself.'"[61] It is akin to the joint action test in that "both tests require that the [S]tate is 'so far insinuated into a position of interdependence with the [private party] that it was a joint participant in the enterprise.'"[62] As with the other tests, the nexus between the State and the private entity must be specifically connected to the action in

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[58] *See, e.g.*, Defibaugh v. Big Brothers/Big Sisters of Ne. Ohio Bd. of Trs., No, 17-CV-645, 2017 U.S. Dist. LEXIS 170728, at *8 (N.D. Ohio Oct. 16, 2017).
[59] 531 U.S. 288 (2001).
[60] *Id.* at 298.
[61] *Id.* at 295.
[62] *Julian*, 218 Cal. Rptr. 3d at 72 (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 357-58 (1974)).

question.[63] The nexus test is a more flexible and indefinitely defined test than the others, focusing above all on fairness—specifically, whether it would be fair to treat the private actor's actions as that of the State.[64] Such fairness can be found where an "arrangement between the [State and a private entity] allowed the [State], in effect, to shift one of its obligations to [the private entity];"[65] where the State and the private actor are "interdependent or affiliated"[66]; where the private entity is "dominated by and beholden to" the State;[67] and where the State "extensively participate[s] in running the [private entity] or in dictating its governance."[68] Neither funding nor extensive regulation alone are enough to satisfy the test.[69]

The nexus test, being so vague and undefined, has the potential to be read incredibly broadly and bring about increased liability for private actors, and thus increase accountability on all sides. However, as with all the other tests, it has not been so interpreted, with courts preferring an increasingly constricted inquiry and a nar-

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[63] *See, e.g.*, Holden v. E. Hampton Town, No. 15-CV-4478, 2017 U.S. Dist. LEXIS 53135, at *16 (E.D.N.Y. Mar. 31, 2017) ("The close nexus test is not determined by the general relationship between the parties, but rather whether there is a sufficiently 'close nexus between the State and the *challenged action*' such that the conduct 'may be fairly treated as that of the State itself.'") (quoting *Jackson*, 419 U.S. at 353); Smith v. Am. Behavioral Health Sys., No. 16-cv-00380-MKD, 2018 U.S. Dist. LEXIS 146453, at *18 (E.D. Wash. Aug. 28. 2018) ("[Plaintiff's] allegations do not give rise to an inference that 'such a close nexus' existed between the State and the *specific challenged conduct* in this case. . . .") (emphasis added).

[64] *See, e.g.*, *Brentwood*, 531 U.S. at 289, 295, 298 (noting that "[s]tate action may be found only if there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be *fairly* treated as that of the State itself,'" and that "[t]he nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim *unfairness* in applying constitutional standards to it") (emphasis added).

[65] Ackridge v. Aramark Corr. Food Servs., No. 16-CV-6301, 2018 U.S. Dist. LEXIS 54733, at *19 (S.D.N.Y. Mar. 30, 2018).

[66] Antwi v. HHS (Ctrs.) F.E.G.S., No. 13 Civ. 835, 2018 U.S. Dist. LEXIS 90903, at *8 (S.D.N.Y. May 18, 2018).

[67] Davis v. White, No. 17-cv-01533-LSC, 2018 U.S. Dist. LEXIS 161717, at *20 (N.D. Ala. Sept. 21, 2018).

[68] Janny v. Gamez, No. 16-cv-002840-SKC, 2018 U.S. Dist. LEXIS 222320, at *15 (D. Colo. Sept. 20, 2018).

[69] *See* Cranley v. Nat'l Life Ins. Co., 318 F.3d 105, 112 (2d Cir. 2003) (stating that "[a] finding of state action may not be premised solely on the private entity's creation, funding, licensing, or regulation by the government" and collecting Supreme Court cases).

row view of responsibility that leaves every case bound to its facts and essentially useless as precedent.[70] The Court's focus in the nexus test on "fairness" is certainly laudable, in the sense that fairness is an inherent good. But by doing so without maintaining a simultaneous focus on increasing accountability and promoting constitutional values, the Court has skewed the test away from fundamental questions of responsibility, skewing it heavily in favor of not finding state action despite the perverse incentives created by doing so. The nexus test therefore provides an opportunity to increase accountability, but also an opportunity to shy away from it—and courts have chosen the latter path.

iv. Joint Action

The joint action test—sometimes folded into the symbiotic relationship/nexus test,[71] and sometimes treated separately[72]—stems from the Court's decision in *Burton v. Wilmington Parking Authority*,[73] in which a restaurant located within a state-run parking garage, meant for public use (which the court considered an "essential government function"), was found to be a state actor.[74] The Court declared that:

> Addition of all these activities, obligations and responsibilities of the Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn.[75]

The test, similar in content to the nexus test, asks "whether 'the

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[70] *See infra* Part III.
[71] *See, e.g.*, Fox v. Int'l Conf. Funeral Serv. Examining Bds., 242 F. Supp. 3d 272, 281 (S.D.N.Y. 2017); La. Div. Sons of Confederate Veterans v. City of Natchitoches, 370 F. Supp. 3d 692, 702 (W.D. La. 2019).
[72] *See, e.g.*, Belgau v. Inslee, 359 F. Supp. 3d 1000, 1013 (W.D. Wash. 2019); Davison v. Facebook, Inc., 370 F. Supp. 3d 621, 628 (E.D. Va. 2019).
[73] 365 U.S. 715 (1961).
[74] *See id.* at 716, 723.
[75] *Id.* at 724.

[S]tate has so far insinuated itself into a position of interdependence with the private entity that it must be recognized as a joint participant in the challenged activity. This occurs when the [S]tate knowingly accepts the benefits derived from unconstitutional behavior.'"[76] Joint action may be proven by showing that a conspiracy between the private and State actors existed, or that the private and State actors willfully worked together in performing the challenged action.[77] Like with the coercion/compulsion test, if the ultimate decision that is being challenged was left to the private actor's discretion, any claim of joint action fails.[78] As with all of the described tests, funding alone is not enough to establish joint action.[79] And even if the State has demonstrably significant influence over a private actor, and can be shown to have worked in concert with that actor, plaintiffs must again show that the partnership directly affected the challenged action.[80]

The same issues that arise for the compulsion/coercion and symbiotic relationship/nexus tests in regard to accountability exist for the joint action test. As with the other tests, satisfying the joint action test is incredibly difficult for plaintiffs, with few succeeding in recent

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[76] Kirtley v. Rainey, 326 F.3d 1088, 1093 (9th Cir. 2003) (quoting Parks Sch. Bus., Inc. v. Symington, 51 F.3d 1480, 1486 (9th Cir. 1995); *see also* Quirarte v. United Domestic Workers AFSCME Loc. 3930, 438 F. Supp. 3d 1108, 1117 (S.D Cal. 2020) ("Joint action exists where the government affirms, authorizes, encourages, or facilitates unconstitutional conduct through its involvement with a private party, or otherwise has so far insinuated itself into a position of interdependence with the non-governmental party that it must be recognized as a joint participant in the challenged activity.") (internal quotation marks omitted).

[77] *See, e.g.*, Franklin v. Fox, 312 F.3d 423, 445 (9th Cir. 2002) ("A plaintiff may demonstrate joint action by proving the existence of a conspiracy or by showing that the private party was 'a willful participant in joint action with the State or its agents.'") (quoting Collins v. Womancare, 878 F.2d 1145, 1154 (9th Cir. 1989)).

[78] *See, e.g.*, Julian v. Mission Cmty. Hosp., 218 Cal. Rptr. 3d 38, 72 (Cal. Ct. App. 2017) ("Under the joint action test, courts examine whether state officials and private parties have acted in concert in effecting a *particular deprivation* of constitutional rights.") (internal quotation marks omitted); Sawyer v. Legacy Emanuel Hosp. & Health Ctr., No. 18-cv-02128-SB, 2019 U.S. Dist. LEXIS 75097, at *10 (D. Or. May 3, 2019); *Quirarte*, 438 F. Supp. 3d at 1117.

[79] *See* Dawkins v. Biondi Educ. Ctr., 164 F. Supp. 3d 518, 528 (S.D.N.Y. 2016) (noting that "the law is well-settled that the receipt of extensive governmental funding is insufficient to subject a private entity to liability under § 1983" and collecting cases).

[80] *See id.*

years.[81] Exceptions to this general rule appear to occur only where plaintiffs can demonstrate that the private actor relied upon the State actor such that the challenged action definitely could not or would not have happened without the State's direct involvement.[82] And once again, because the joint action must be directly related to the act in question, the State is allowed to act in concert with, and wield significant influence over, private entities generally—which ostensibly cannot help but affect the decisions made by the private actor, even if a direct link to a specific decision is difficult to prove—without either party incurring liability. Thus, while the joint action test is an obviously necessary component of any functional state action doctrine (otherwise the State could directly work together with private entities with impunity), it—along with the rest of the doctrine—does not do much to increase overall accountability, predominantly due, once again, to a limited view of State responsibility.

B. Application of the Tests

Beyond confusion about what exactly the content of the various tests is, and even how many tests there are and what they are called, lower courts consistently differ in their applications of the tests. This has occurred in two separate manners: first, courts have divided into those that apply the enumerated tests as exclusive methods by which to hold private actors accountable under the state action doctrine, and those that acknowledge and use the tests as guidelines, but state that the inquiry is a flexible one not delimited by only that reasoning which has previously been enunciated.[83] Second, the doc-

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[81] *See, e.g.*, *Julian*, 218 Cal. Rptr. 3d at 72; *Sawyer*, 2019 U.S. Dist. LEXIS 75097, at *10; *Quirarte*, 438 F. Supp. 3d at 1117; Silverman v. Ivers, No. 17-03700, 2019 U.S. Dist. LEXIS 192183, at *23–24 (N.D. Cal. Nov. 4, 2019); Pfister v. Madison Beach Hotel, LLC, No. 156055458S, 2017 Conn. Super. LEXIS 232, at *23–24 (Conn. Super. Ct. Feb. 3, 2017); Belgau v. Inslee, 359 F. Supp. 3d 1000, 1013–14 (W.D. Wash. 2019); Fed. Agency News LLC v. Facebook, Inc., 395 F. Supp. 3d 1295, 1313 (N.D. Cal. 2019).

[82] *See, e.g.*, Hernandez v. AFSCME Cal., 424 F. Supp. 3d 912, 922 (E.D. Cal. 2019) ("The deduction of [union] dues by the state is not merely an internal decision by the union. It involves significant state involvement and transforms the unions' conduct into state action. Accordingly, the court concludes that the state-actor prong is satisfied.").

[83] *Compare, e.g.*, Davison v. Facebook, Inc., 370 F. Supp. 3d 621, 628 (E.D. Va. 2019) ("[T]he Fourth Circuit has recognized 'four *exclusive* circumstances under which a private party can be deemed to be a state actor.'") (emphasis added) *with*

trine has produced numerous circuit splits wherein courts approach similar factual situations with widely varying results. These variations indicate at the very least that clearer guidance from the Supreme Court is needed, if not a complete overhaul of the doctrine.

i. Tests as Guidelines vs. Strict Enumerations

Use of the aforementioned tests for state action is present and significant across all the circuits, even if the content and labeling of those tests vary. However, not all of the circuits approach the tests in the same way, leading them to function as quite distinct mechanisms in different circuits. Some courts plainly state that, or act as if, the tests are only rough guidelines, meant to demonstrate where state action could be found but not to close off other avenues.[84] Other courts explicitly view the tests as exclusive, meaning that if the certain factual situation before the court does not match up with one of the enumerated tests, then no state action will be found.[85] Still other courts do not say in so many words that they view the tests as exclusive, and sometimes even say that they are not, but treat them as such by only examining whether the facts before them align with the tests, instead of looking more broadly at whether the actions in question are fairly attributable to the State.[86]

Garnier v. Poway Unified Sch. Dist., No. 17-cv-2215-W, 2019 U.S. Dist. LEXIS 167247, at *15 (S.D. Cal. Sept. 26, 2019) ("There is no single formula for determining state action.").

[84] *See, e.g.*, *Garnier*, 2019 U.S. Dist. LEXIS 167247, at *15; Beckman v. Chi. Bear Football Club, Inc., No. 17 C 4551, 2018 U.S. Dist. LEXIS 55140, at *21 (N.D. Ill. Mar. 30, 2018) ("Over time, Supreme Court and Seventh Circuit precedent have revealed that these cases do not so much enunciate a test or series of factors, but rather demonstrate examples of outcomes in a fact-based assessment. . . . In the end, the court makes a normative judgment under which [n]o one fact can function as a necessary condition [for state action] across the board and no set of circumstances [is] absolutely sufficient to establish state action.") (internal quotation marks omitted); Millspaugh v. Bulverde Spring Branch Emergency Servs., 559 S.W.3d 613, 617 (Tex. App. 2018).

[85] *See, e.g.*, *Davison*, 370 F. Supp. 3d at 628; Holden v. E. Hampton Town, No. 15-CV-4478, 2017 U.S. Dist. LEXIS 53135, at *14 (E.D.N.Y. Mar. 31, 2017) (noting that "the conduct of a private entity may be deemed to be state action only under certain circumstances" and listing three tests); Bellamy v. First Class Mgmt. LLC, No. 15-cv-431-FtM-29CM, 2017 U.S. Dist. LEXIS 122946, at *7 (M.D. Fla. Aug. 4, 2017) ("Private actors may become state actors only under three theories.").

[86] *See, e.g.*, Gekas v. HCA Health Servs. Tenn., Inc., No. 17-cv-00009, 2018 U.S. Dist. LEXIS 12298, at *11 (M.D. Tenn. Jan. 25, 2018) ("To determine whether ac-

Either of the last two approaches turns the tests into a weapon against any broad reading of state action—and any meaningful attempt at holding wrongdoers constitutionally accountable.[87] These approaches prevent the state action inquiry from evolving in the face of new relationship structures between the government and private entities. They confine each instance in which the Supreme Court has found state action strictly to their facts, setting an impossibly high bar for future findings of state action and ignoring the overall thrust behind each of those decisions. The Court's language in its state action cases indicates that these courts have the wrong approach: the Court has explicitly stated that determining state action is a "necessarily fact-bound inquiry,"[88] and that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance,"[89] which would seem to dictate that flexibility is favored over exclusive tests.[90]

Thus, the tests are not meant to be talismans of state action, but rather tools to examine whether the degree of state involvement is high enough to transform private activity into state activity. But courts frequently treat the tests as the be-all and end-all of state action, without looking deeper, unnecessarily limiting the inquiry. For example, in *Holden v. East Hampton Town*,[91] a district court operating under the assumption that there are only three exclusive tests for state action[92] held that Section 8 housing projects run by private enti-

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tions are 'fairly attributable to the state,' the Sixth Circuit has applied three tests. . . A plaintiff need only satisfy one of the tests to proceed with his claim."); Cahoo v. SAS Inst. Inc., 322 F. Supp. 3d 772, 792–93 (E.D. Mich. 2018).

[87] The latter approach—by acting under the guise of flexibility, but not following through on that promise—may, in fact, inflict this harm more powerfully, because it is ostensibly more difficult to challenge inflexibility disguised as flexibility.

[88] Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n., 531 U.S. 288, 298 (2001).

[89] Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

[90] However, the Court has also stated that "[w]hether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in such a situation need not be resolved here," Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982), indicating that the Court itself does not know quite what to make of these tests or how they should be deployed.

[91] No. 15-CV-4478, 2017 U.S. Dist. LEXIS 53135, at *16 (E.D.N.Y. Mar. 31, 2017).

[92] *See id.* at *14.

ties are not state actors.[93] By focusing only on whether the private entities had a symbiotic relationship with the State or acted jointly with local officials, and whether the provision of such housing constitutes a public function,[94] the court completely ignored the question of whether the specific realities of the housing projects' regulation and oversight by the State gave the State coercive power over them such that a finding of State responsibility—and thus state action—would be justified. The district court in *Doe v. Case Western Reserve University*[95] (and others in like cases[96]) focused so intensely on whether universities holding Title IX proceedings fit into the "three tests" used to determine state action—public function, compulsion, and nexus[97]—that it failed to thoroughly and independently analyze whether the pressure levied upon schools by the Department of Education to use particular procedures and make particular decisions caused the school to act as it did, potentially implicating State responsibility even if there was no direct interaction between the State and the school in that particular case. Strict use of the tests prevents courts from broadly viewing State responsibility, to the detriment of accountability.

If the state action doctrine is ever going to be transformed into a workable framework, the nature and function of the currently applied tests must be clarified. And if it is ever to be molded into a doctrine that properly ensures accountability and the upholding of our constitutional values, it cannot be confined solely to the currently enumerated tests.

ii. Circuit Splits

The number of circuit splits, both minor and major, that have been produced by the state action doctrine's application in lower courts is so great that listing them all out here is infeasible (and so great that the Supreme Court's ability to address and resolve each of the splits individually is doubtful). However, this paper compiles

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[93] *See id.* at *18.
[94] *See id.* at *14–18.
[95] No. 17 CV 414, 2017 U.S. Dist. LEXIS 142002 (N.D. Ohio Sept. 1, 2017).
[96] *See, e.g.*, *Doe v. Univ. of Denver*, No. 17-cv-01962-PAB-KMT, 2019 U.S. Dist. LEXIS 141523, at *6 (D. Colo. Aug. 20, 2019); *Heineke v. Santa Clara Univ.*, No. 17-CV-05285-LHK, 2018 U.S. Dist. LEXIS 114737, at *10–11 (N.D. Cal. July 10, 2018).
[97] *Case W. Rsrv. Univ.*, 2017 U.S. Dist. LEXIS 142002, at *22.

several salient examples in order to demonstrate the magnitude of the problem, and the frequency with which unclear guidance from the Supreme Court leads to a failure of accountability—once more counseling in favor of clarifying the state action doctrine or reworking it altogether, with accountability as an overarching guiding principle.

1. Migrant Camps

One important issue that has caused a sharp divide between the circuits is that of migrant farmworker camps located upon private property, and the First Amendment rights of the residents of those camps. Several courts have held that these residents are protected by the First Amendment from censorship by the property owner.[98] These courts have apparently based their decisions on the Supreme Court's reasoning *in Marsh v. Alabama*[99] (in which the Court held that a company town was a state actor subject to First Amendment restrictions)[100] and *Amalgamated Food Employees Union v. Logan Valley Plaza*[101] (in which the Court held "that a shopping center could not prohibit a union from picketing outside a non-unionized grocery store because a shopping center is 'the functional equivalent of the business district'"),[102] likening migrant farm camps to company towns and shopping centers.[103] Other courts, however, have refused to extend First Amendment protection to migrant farm camps for varying reasons.[104] For example, the Seventh Circuit held as such because in their view migrant farm camps are "not 'the functional equivalent' of a company town."[105] This reasoning was based on the Supreme Court's apparent about-face regarding private property owners and the First Amendment in *Lloyd Corp. v. Tanner*,[106] wherein the Court "held that a shopping mall could prohibit opponents of the Vietnam War from distributing handbills inside the mall, noting

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[98] *See* Rivero v. Montgomery Cnty., 259 F. Supp. 3d 334, 352 (D. Md. 2017); Petersen v. Talisman Sugar Corp., 478 F.2d 73, 82 (5th Cir. 1973).
[99] 326 U.S. 501 (1946).
[100] *Id.* at 504–05.
[101] 391 U.S. 308 (1968).
[102] *Rivero,* 259 F. Supp. at 352 (quoting *Amalgamated*, 391 U.S. at 318–20).
[103] *See id.*
[104] *See* Asociacion de Trabajadores Agricolas v. Green Giant Co., 518 F.2d 130 (3d Cir. 1975); Ill. Migrant Council v. Campbell Soup Co., 574 F.2d 374, 378 (7th Cir. 1978).
[105] *Rivero*, 259 F. Supp. 3d at 353 (citing *Ill. Migrant Council*, 574 F.2d at 376).
[106] 407 U.S. 551 (1972).

that shopping centers do not extend an 'open-ended invitation to the public to use the [facilities] for any and all purposes' but rather 'to do business with the [facility's] tenants.'"[107]

Thus, some circuits grant residents of migrant farm camps a constitutional remedy against invasions of their free speech rights, and some do not. Some migrant farmworkers, then, have a firm means of holding private parties accountable when they blatantly contradict the free speech values of the Constitution, and some have no (or lesser) means of enforcing those fundamental norms. The courts, in so diverging on such a vital issue, have all believed (or at least stated) that they are following Supreme Court precedent.

2. Private Physicians Working, But Not Under Contract, With State-Run Prisons

Another question that has troubled and divided lower courts is whether private physicians who do not have contracts with State-run jails or prisons, but who provide medical services to the inmates in one form or another, should be labeled state actors and be subject to constitutional claims. In *West v. Atkins*,[108] the Supreme Court held that "[a] physician who is *under contract* with the State to provide medical services to inmates at a state-prison hospital on a part-time basis acts 'under color of state law,' within the meaning of § 1983, when he treats an inmate."[109] In the wake of *West*, lower courts split in regard to doctors not under contract.[110] Some courts held that such doctors could still be considered state actors, finding, for example, that the State had "delegate[d] its constitutional duties to the professional judgment of others," and that "'the provision of medical services to prison inmates is traditionally the exclusive prerogative of the [S]tate.'"[111] Other courts held the opposite, finding that a "private physician treating an inmate at a private facility utilizing his independent medical judgment is not answerable to the [S]tate and does

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[107] *Rivero*, 259 F. Supp. 3d at 352 (quoting Lloyd Corp. v. Tanner, 407 U.S. 551, 564–65, 570 (1972)).
[108] 487 U.S. 42 (1988).
[109] *Id.* at 43, 57 (emphasis added).
[110] *See* Bevins v. Becker Cty., No. 16-4340, 2018 U.S. Dist. LEXIS 220614, at *30 (D. Minn. Oct. 30, 2018) (stating that "[a]fter *West*, courts have reached differing conclusions as to whether private physicians not under contract with the jail or prison facility can be considered state actors" and collecting cases).
[111] Anglin v. City of Aspen, 552 F. Supp. 2d 1229, 1244 (D. Colo. 2008).

not act under color of state law for purposes of § 1983."[112]

In essence, courts finding state action in these situations seem to rely on the public function test,[113] which does not apparently take into account permissiveness or direct state involvement in the challenged action, while courts that find no state action focus in on the ability of the private actor to make their own decision free from overbearing pressure of the State (something more akin to the nexus or joint action tests) while effectively ignoring the public function argument.[114] This line of cases demonstrates that even though the state action inquiry is meant to be fact-bound,[115] the doctrine is vague and permissive enough that even in near-identical factual situations, courts can reach different outcomes merely by relying on one test while ignoring the possible application of others. Firmer, clearer, and more explicit guiding principles and factors could help prevent these contradictory outcomes.

3. Privately-Run Prisons

While the Supreme Court has squarely held that private physicians under contract with *State*-run prisons are state actors,[116] the circuits have split on whether employees of privately-run prisons are such. The majority view appears to be that such individuals are state actors.[117] The general reasoning of those courts is that "confinement of wrongdoers—though sometimes delegated to private entities—is a fundamentally governmental function," and thus privately-run prisons and their employees are subject to the same constitutional re-

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[112] Griffis v. Medford, No. 05-3040, 2007 U.S. Dist. LEXIS 99329, at *16 (W.D. Ark. Sept. 20, 2007).
[113] *See, e.g.*, *Anglin*, 552 F. Supp. 2d at 1244.
[114] *See Bevins*, 2018 U.S. Dist. LEXIS 220614, at *30–31(finding no state action and failing to address the possibility of a public function argument).
[115] *See, e.g.,* Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n, 531 U.S. 288, 298 (2001) (stating that state action is a "necessarily fact-bound inquiry").
[116] *See* West v. Atkins, 487 U.S. 42, 57 (1988).
[117] *See* Rosborough v. Mgmt. & Training Corp., 350 F.3d 459, 461 (5th Cir. 2003); Street v. Corr. Corp. of Am., 102 F.3d 810, 814 (6th Cir. 1996); Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 703 (11th Cir. 1985); Sarro v. Cornell Corr., Inc., 248 F. Supp. 2d 52, 60–62 (D.R.I. 2003); Palm v. Marr, 174 F. Supp. 2d 484, 487–88 (N.D. Tex. 2001*)*; Giron v. Corr. Corp. of Am., 14 F. Supp. 2d 1245, 1249 (D.N.M. 1998); Nelson v. Prison Health Servs., Inc., 991 F. Supp. 1452, 1463 (M.D. Fla. 1997).

straints as State-run prisons.[118]

The minority view holds that private entities in such situations are not state actors. The Fourth Circuit, in *Holly v. Scott*,[119] clearly laid out this perspective. The court found that a private entity under contract with a privately-run prison to provide medical care to inmates was not a state actor.[120] The court highlighted the lack of State involvement in any of the defendants' decisions,[121] and rejected the argument that the provision of medical services to inmates of a privately-run prison was a public function, declaring that the Supreme Court had clearly established that "the operation of prisons is not a 'public function.'"[122] The court rebuffed any comparison to *West*, distinguishing that case on the basis that it involved State-run, rather than privately-run, prisons.[123] Importantly, a concurring judge, dissenting from the majority's finding of no state action, pointed out that the case cited by the majority for this proposition—*Richardson v. McKnight*[124]—involved not a state action inquiry but an immunity inquiry, and noted that a more recent Supreme Court case, *Correctional Services Corp. v. Malesko*,[125] "expressly recognize[d]"—though did not actually hold—that "[private correctional providers] are government actors whose conduct is attributable to the government."[126]

The idea that the State can delegate out the duty of incarcerating individuals who have broken State laws—and whose lived experience during that incarceration is not conceivably meaningfully dif-

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[118] *Rosborough*, 350 F.3d at 461.
[119] 434 F.3d 287 (4th Cir. 2006).
[120] *Id.* at 294.
[121] *Id.* at 292–93 ("Defendants are not federal officials, federal employees, or even independent contractors in the service of the federal government. Instead, they are employed by GEO, a private corporation. There is no suggestion that the federal government has any stake, financial or otherwise, in GEO. . . . Nor is there any suggestion that federal policy played a part in defendants' alleged failure to provide adequate medical care, or that defendants colluded with federal officials in making the relevant decisions.").
[122] *Id.* at 293.
[123] *See id.* at 294 ("[T]his distinction between public and private correctional facilities is critical. The state's responsibilities are necessarily greater when it undertakes direct authority over prisoners' day-to-day care.").
[124] 521 U.S. 399 (1997).
[125] 534 U.S. 61 (2001).
[126] *Holly*, 434 F.3d at 299 (Motz, J., concurring) (citing Correctional Services Corp. v. Malesko, 534 U.S. 61, 72 n.5 (2001)).

ferent merely because their prison is run by a corporation rather than the State—without necessarily subjecting anybody to liability for constitutional violations suffered by those prisoners, does not pass the smell test. Such a result is an affront to the very idea of accountability. And yet, the vagueness and emptiness with which the Supreme Court has laid out the boundaries of the state action doctrine easily allows for a minority of courts to adopt this untenable outcome, by providing only illusory guidance entirely susceptible to subversion.

4. Actions Taken by a Union Pursuant to an Agency Shop Clause

Union agency shop agreements dictate[] that '"all the employees are represented by a union selected by the majority [of employees]' and that '[w]hile employees in the unit are not required to join the union, they must nevertheless pay the union an annual fee to cover the cost of union services related to collective bargaining.'"[127]

The circuits have divided over whether actions taken pursuant to these agreements constitute state action, and the Supreme Court "has specifically left unresolved [this] issue."[128] The Second,[129] Third,[130] and D.C.[131] Circuits have concluded that such actions, at least when performed by private-sector unions, do not constitute state action. The D.C. Circuit reasoned that:

> The NLRA does not mandate the existence or content of, for example, seniority clauses, work rules, staffing requirements, or union security provisions like agency shop clauses or mandatory payroll deductions for union dues. Even though federal law provides an encom-

[127] Misja v. Pa. State Educ. Ass'n, No. 15-cv-1199, 2016 U.S. Dist. LEXIS 186250, at *2 (M.D. Pa. Mar. 28, 2016).

[128] *Misja*, 2016 U.S. Dist. LEXIS 186250 at *14 (citing Commc'ns Workers of Am. v. Beck, 487 U.S. 735, 761 (1988) ("We need not decide whether the exercise of rights permitted, though not compelled, by § 8(a)(3) [of the National Labor Relations Act] involves state action.")).

[129] Price v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., 927 F.2d 88, 91 (2d Cir. 1986) ("a product of private negotiations and [is] not attributable to the government.").

[130] *See* White v. Commc'ns Workers of Am., 370 F.3d 346, 352 (3d Cir. 2004) ("CWA's statutorily enhanced bargaining power is insufficient to warrant a finding of state action.").

[131] Kolinske v. Lubbers, 712 F.2d 471, 478 (D.C. Cir. 1983) ("[A] state's mere authorization of private conduct does not justify a finding of state action.").

> passing umbrella of regulation, the parties, like any two parties to a private contract, were still free to adopt or reject an agency shop clause with or without government approval. Thus, the authorization for agency shop clauses provided by NLRA section 8(a)(3) does not transform agency shop clauses into a right or privilege created by the State or one for whom the State is responsible.[132]

The Third Circuit specifically noted that "[i]f the fact that the government enforces privately negotiated contracts rendered any act taken pursuant to a contract state action, the state action doctrine would have little meaning."[133]

Conversely, the First[134] and Fourth[135] Circuits have determined that state action is present in such situations. The reasoning for these decisions was simple and straightforward: as the Fourth Circuit stated, "since the statute clothes the union with the authority to exercise that power, the 'conduct [of the union] is otherwise chargeable to the State.'"[136] Interestingly, at least one district court in the Third Circuit, while maintaining that private-sector union actions taken pursuant to agency shop agreements do not constitute state action, has come to the opposite conclusion regarding public-sector unions, stating merely that "[t]hough we are tempted to extend the Third Circuit's rationale in *White* to a public-sector union as well, we find it imprudent to turn the tide against what is a clearly established pattern, if not precedent, in favor of hearing § 1983 claims against public-sector unions."[137]

Scholars have criticized the lack of clarity on this question from the Supreme Court for decades.[138] Whether or not individuals can hold unions accountable for violating their constitutional rights via agency shop clauses is a vital question, implicating not just the finances of individuals subject to the clauses, but "the ability of em-

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[132] *Id.*
[133] *White*, 370 F.3d at 351.
[134] *See* Linscott v. Millers Falls Co., 440 F.2d 14, 16 (1st Cir. 1971).
[135] *See* Beck v. Commc'ns Workers of Am., 776 F.2d 1187, 1209 (4th Cir. 1985).
[136] *Id.* at 1208.
[137] *Misja*, 2016 U.S. Dist. LEXIS 186250, at *18.
[138] *See, e.g.*, David H. Topol, *Union Shops, State Action, and the National Labor Relations Act*, 101 YALE L.J. 1135 (1992).

ployees to challenge collective bargaining agreements that have a discriminatory effect, a union's failure to pursue an employee's grievance for discriminatory reasons, and union rules that limit campaign contributions during union elections."[139] But, once more, the doctrine's vagueness allows for courts to reach completely different results on such an important issue.

Circuit splits are, of course, inevitable in any field of law, but the number of splits within the state action arena do give reason to pause. The described splits (and the many not detailed here), which are often explicitly based by the lower courts upon the same few Supreme Court cases that are available to them, cannot help but highlight the incoherence of the state action doctrine as it stands and the inability of either Supreme Court precedent itself or the tests that lower courts have derived from it to keep lower courts in check, or to foster a unified, predictable doctrine that suitably promotes accountability and constitutional values. The building blocks that the Court has provided for lower courts are not concrete or defined enough to produce a workable doctrine.

III. PROBLEM AREAS

In implementing the state action doctrine, courts are ostensibly supposed to ask whether the State is responsible for the challenged action—if it is, then constitutional liability attaches.[140] This framework constitutes a potentially vast mechanism for enforcing accountability for constitutional violations, and for preventing States from privatizing and delegating liability away. However, courts today have an increasingly narrow conception of State responsibility that undermines this mechanism. This section describes how lower courts have weakened and pulled away from the original concept of State responsibility, causing the framework to fail to live up to its true potential. It focuses specifically on areas in which the State continues to increasingly empower private actors, privatize previously public services, and delegate its responsibilities, demonstrating how the doctrine's current weak conception of State responsibility has hampered its ability to enforce constitutional values in these fields.

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[139] *Id.* at 1136.

[140] *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974).

A. Schools

Schools are a notoriously complicated area for the state action doctrine. Public schools are, of course, considered to be state actors, as they are direct agents of the State. The doctrine gets complex, however, when it comes to nominally private schools, including charter schools and those with some amount of State funding. Courts generally have stated that education is not a public function, and thus, private schools are not automatically state actors,[141] though schools run by private entities can be and are found to be state actors under particular circumstances.[142] However, the trend over the past couple of years appears to be an almost complete rejection of attempts to classify nominally private schools as state actors, despite sometimes heavy state involvement and regulation.[143]

For a characteristic example, in *Dawkins v. Biondi Education Center*,[144] the Southern District of New York acknowledged that the defendant institution, Biondi, a privately-run school that "provides educational services to students with special needs," was "'[f]or all

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[141] *See, e.g.*, Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982); Dawkins v. Biondi Educ. Ctr., 164 F. Supp. 3d 518, 529 (S.D.N.Y. 2016) ("[C]ourts have consistently held that 'education is not considered to be exclusively the prerogative of the State.'").

[142] *See, e.g.*, Peltier v. Charter Day Sch., Inc., 384 F. Supp. 3d 579, 592 (E.D.N.C. 2019) (finding a charter school run by a private corporation to be a state actor because "defendants are providing free, public education, and 'free, public education, whether provided by public or private actors, is an historical, exclusive, and traditional state function'"); K.H. v. Antioch Unified Sch. Dist., No. C 18-07716 WHA, 2019 U.S. Dist. LEXIS 109911, at *14 (N.D. Cal. July 1, 2019).

[143] *See, e.g.*, *Dawkins*, 164 F. Supp. 3d at 521, 529 (S.D.N.Y. 2016); D.W.M. v. St. Mary Sch., No. 18-cv-3099 (DRH)(GRB), 2019 U.S. Dist. LEXIS 145583, at *3, *26–29 (E.D.N.Y. Aug. 27, 2019); *See* I.H. v. Oakland Sch. for the Arts, 234 F. Supp. 3d 987 (N.D. Cal. 2017); Mason v. Intercoast Career Inst., No. 14-cv-00377-JAW, 2017 U.S. Dist. LEXIS 7305, at *1, *3 (D. Me. Jan. 19, 2017); Rafi v. Yale Univ. Sch. of Med., No. 14-CV-01582, 2017 U.S. Dist. LEXIS 117678, at *39 (D. Conn. Jul. 27, 2017); Raithatha v. Univ. of Pikeville, No. 16-CV-251-EBA, 2017 U.S. Dist. LEXIS 169366, at *24 (E.D. Ky. Oct. 13, 2017); Saud v. DePaul Univ., No. 19-cv-3945, 2019 U.S. Dist. LEXIS 187173, at *11 (N.D. Ill. Oct. 29, 2019); Urso v. Bradley Univ., No. 17-1482, 2018 U.S. Dist. LEXIS 53630, at *8–9 (C.D. Ill. Mar. 29, 2018); *but see* Peltier, 384 F. Supp. at 592 (finding a charter school run by a private corporation a state actor); K.H., 2019 U.S. Dist. LEXIS 109911, at *14 (denying a motion to dismiss for lack of state action).

[144] No. 13-CV-2366 (KMK), 2017 U.S. Dist. LEXIS 8878 (S.D.N.Y. Jan. 20, 2017).

practical purposes,' . . . 'a public high school with private status.'"[145] The court noted that it was "'heavily regulated' by New York State . . . and receives 'almost all of its funds from the State,'" and that "[t]o receive these funds, Biondi had to 'comply with a variety of regulations' promulgated by the NYS Department of Education."[146] Still, the court concluded that Biondi was not a state actor in allegedly firing an employee for his attempts to organize a union, as no evidence indicated that the State regulated Biondi regarding its employment decisions, and funding and regulation are insufficient unless the State actually threatens to remove funding in order to compel the firing.[147]

This result—and the many like it[148]—constitutes an untenable failure of accountability on the part of the state action doctrine, stemming from an unnecessarily narrow conception of State responsibility. While the State may not have directly run Biondi, it made its entire existence possible, shaped its actions through the regulations it forced it to accept with its funding, and lent it the imprimatur of the State by funding and heavily regulating it. The court itself acknowledged that Biondi acts and functions as a public school. Whether or not the State specifically flexed its muscles regarding this particular decision, the school knows it is subject to the State's demands. Its students and employees operate under essentially the same practical control by the State, as do those of public schools. State responsibility for the school's decisions is thus not absent. Why, then, neither Biondi nor the State that it depends on to survive can be held constitutionally accountable is difficult to justify, especially in light of the doctrine's focus on State responsibility. The court did not attempt to do so, beyond stating that Biondi does not meet the requisite tests.

Another aspect of the state action doctrine as applied to schools that has stirred up a good deal of litigation is whether schools are state actors when complying with the requirements of Title IX.[149] As of late—and perhaps due to the rise of the #MeToo movement,[150]

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[145] *Id.* at *2.
[146] *Id.* at *2–3.
[147] *Id.* at *12–19.
[148] *See* Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n, 531 U.S. 288 (2001).
[149] Title IX dictates that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under" federally funded education programs. 20 U.S.C. § 1681(a) (2018).
[150] *See, e.g.*, *#MeToo: A Timeline of Events*, CHI. TRIB. (Feb. 4, 2021, 1:52 PM), https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-

and the attendant attention it has drawn to the due process rights of those accused of sexual abuse,[151] as well as to the failure of Title IX procedures to adequately protect the interests of victims[152]—litigants have frequently attempted to hold private universities constitutionally liable for actions taken pursuant to Title IX and the Department of Education's interpretation of it.[153] Courts have rebuffed these at-

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htmlstory.html; Jessica Bennett, *The 'Click' Moment: How the Weinstein Scandal Unleashed a Tsunami*, N.Y. TIMES (Nov. 5, 2017), https://www.nytimes.com/2017/11/05/us/sexual-harrasment-weinstein-trump.html; Stephanie Zacharek et al., *The Silence Breakers*, TIME (2017), https://time.com/time-person-of-the-year-2017-silence-breakers/.

[151] *See, e.g.*, *The Erosion of Due Process for Public Figures in the #MeToo Era*, LEGAL INTELLIGENCER (Feb. 12, 2019, 2:10 PM), https://www.law.com/thelegalintelligencer/2019/02/13/the-erosion-of-due-process-for-public-figures-in-the-metoo-era/?slreturn=20210226160736; Shira A. Scheindlin & Joel Cohen, *After #MeToo, We Can't Ditch Due Process*, GUARDIAN (Jan. 8, 2018), https://www.theguardian.com/commentisfree/2018/jan/08/metoo-due-process-televictions; Dan Recht & Kelly Page, *The #MeToo Movement's Due-Process Problem*, DENVER POST (Mar. 9, 2018), https://www.denverpost.com/2018/03/09/the-metoo-movements-due-process-problem/.

[152] *See, e.g.*, Nell Gluckman et al., *Sexual Harassment and Assault in Higher Ed: What's Happened Since Weinstein*, CHRON. OF HIGHER EDUC. (Nov. 13, 2017), https://www.chronicle.com/article/sexual-harassment-and-assault-in-higher-ed-whats-happened-since-weinstein/; Lena Felton, *How Colleges Foretold the #Me-Too Movement*, ATLANTIC (Jan. 17, 2018), https://www.theatlantic.com/education/archive/2018/01/how-colleges-foretold-the-metoo-movement/550613/; Anna Fazackerley, *#Metoo on Campus: UK Universities Investigate Sexual Assaults Themselves*, GUARDIAN, (Jul. 31, 2018), https://www.theguardian.com/education/2018/jul/31/metoo-campus-universities-sexual-assaults-women; Collin Binkley, *#Metoo Inspires Wave of Old Misconduct Reports to Colleges*, PBS (Oct. 13, 2018), https://www.pbs.org/newshour/nation/metoo-inspires-wave-of-old-misconduct-reports-to-colleges; Nick Anderson, *Academia's #Metoo Moment: Women Accuse Professors of Sexual Misconduct*, WASH. POST (May 10, 2018), https://www.washingtonpost.com/local/education/academias-metoo-moment-women-accuse-professors-of-sexual-misconduct/2018/05/10/474102de-2631-11e8-874b-d517e912f125_story.html.

[153] *See, e.g.*, Doe v. Case W. Rsrv. Univ., No. 17 CV 414, 2017 U.S. Dist. LEXIS 142002, at *2–3 (N.D. Ohio Sept. 1, 2017); Doe v. Univ. of Denver, No. 17-cv-01962-PAB-KMT, 2019 U.S. Dist. LEXIS 141523, at *6 (D. Colo. Aug. 20, 2019); Heineke v. Santa Clara Univ., No. 17-CV-05285-LHK, 2018 U.S. Dist. LEXIS 114737, at *10–11 (N.D. Cal. July 10, 2018).

tempts en masse, for varying reasons.[154] One court rejected a plaintiff's attempt to classify the investigation of claims of sexual assault as a public function, noting that "[a] university's Title IX investigation into alleged sexual misconduct is separate and distinct from criminal adjudication of sexual misconduct, which is not supplanted by the university's investigation."[155] Other courts rejected the idea that by merely acting in compliance with the overall statutory scheme, private universities could be transformed into state actors.[156] There is much at stake here. Unless contractual obligations or state or federal laws by which to hold private universities accountable otherwise apply, the theory proffered uniformly by the lower courts in these cases allows such universities to violate vital constitutional norms, such as equal protection, in Title IX investigations and hearings. This is so even though such universities may be recipients of a good deal of State funding and regulation, making them beneficiaries of State support and authority as well as highly susceptible to State influence, thus placing the State in a position of responsibility for their actions. Title IX proceedings are significant for students on both sides, with more often than not far-reaching consequences for everyone involved.[157] A state action doctrine that so easily lets constitutional accountability slip through the cracks in such an important process, where the State is often highly involved, casts doubt upon

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[154] *See, e.g.*, *Case W. Rsrv. Univ.*, 2017 U.S. Dist. LEXIS 142002, at *21–26; *Univ. of Denver*, 2019 U.S. Dist. LEXIS 141523, at *30–36; *Heineke*, 2018 U.S. Dist. LEXIS 114737, at *55–62.

[155] *Univ. of Denver*, 2019 U.S. Dist. LEXIS 141523, at *34.

[156] *See, e.g.*, *Case W. Rsrv. Univ.*, 2017 U.S. Dist. LEXIS 142002, at *25–26; *Heineke*, 2018 U.S. Dist. LEXIS 114737, at *60–62.

[157] *See, e.g.*, Alexandra Brodsky, *A Rising Tide: Learning about Fair Disciplinary Process from Title IX*, 66 J. LEGAL EDUC. 822, 828–29 (2017) ("No one wins when processes are unfair."); Kathryn M. Reardon, *Acquaintance Rape at Private Colleges and Universities: Providing for Victims' Educational and Civil Rights*, 38 SUFFOLK U. L. REV. 395, 396 (2005) ("The widespread reluctance of academic institutions to deal with rape as a disciplinary and legal issue compounds the prevalence of sexual assault. The end result for victims is falling grades, prolonged school absence, and for many, eventual school drop out or failure."); Sarah Edwards, *The Case in Favor of OCR's Tougher Title IX Policies: Pushing Back against the Pushback*, 23 Duke J. GENDER L. & POL'Y 121, 133–34 (2015) ("Many things are at stake for the accused student, including his 'reputation, career goals, educational advancement, and relationships with faculty and peers.'"); Lavinia M. Weizel, *The Process That is Due: Preponderance of the Evidence as the Standard of Proof for Univ. Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1645–46, 1655 (2012).

the validity of the doctrine as a whole, and its stated commitment to tracing State responsibility.

The development of the state action doctrine in regard to schools is a story of increasingly limited constitutional liability for any nominally private educational institution. This is not baffling, nor surprising, but it is concerning if one prioritizes accountability both of government actors and of those in a comparable position to violate fundamental constitutional values. And it in many ways contradicts the notion of State responsibility at the heart of the doctrine.

This is especially concerning when one acknowledges the increasing privatization of education—from the rise of charter schools to the collective push for State-funded vouchers for private schools.[158] Children may be functionally required to attend private schools, whether because their designated public school is so ill-funded that there is no real choice to make,[159] or because the State has pushed greater and greater reliance on private schooling,[160] or because the State has involuntarily referred them to such schools.[161] And these schools do not remain free of State influence—far from it.[162] Unless one desires to leave large swathes of children, who may have little choice, with no constitutional remedy for blatant harms such as invidious discrimination, and simultaneously incentivize the State to perpetuate this trend, the state action doctrine must evolve to meet these changing circumstances.

B. Incarceration

Incarceration has also been a much-commented-upon[163]

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[158] *See supra* note 3.

[159] *See* Nicholas Masters, *Failing to Educate: How Flaws in the Modern Public School System Have Created a National Crisis and Could Invite Federal Intervention*, 10 WAKE FOREST J. L. & POL'Y 111, 113–14 (2019) (describing the "continuous and habitual underfunding of many public schools").

[160] *See supra* note 3.

[161] *See* Chiang, *supra* note 2, at 630, 651–60.

[162] Many receive significant if not total funding from the State, and/or are heavily regulated by the State. *See generally* Preston C. Green III et al., *The Legal Status of Charter Schools in State Statutory Law*, 10 U. MASS. L. REV. 240 (2015); Preston C. Green III et al., *Having it Both Ways: How Charter Schools Try to Obtain Funding of Public Schools and the Autonomy of Private Schools*, 63 EMORY L.J. 303 (2013).

[163] *See, e.g.*, Brian B. Evans, *Private Prisons*, 36 EMORY L.J. 253 (1987); Donna S. Spurlock, *Liability of State Officials and Prison Corporations for Excessive Use of*

quagmire through which courts have had difficulty wading. While State-run prisons are clearly state actors, and most (but not all) circuits have concluded that privately-run prisons are as well,[164] the doctrine surrounding private contractors who provide services to prisoners is complex and sometimes bewildering. The overall consensus appears to be that private contractors who provide "essential" services to prisoners—those that the State itself is mandated to provide—are bound by the Constitution, but those whose services are inessential are not.[165] This distinction is based on the notion that the State, in its role as jailor, is required by the Eighth Amendment to provide certain services to prisoners—"basic human needs"—and if it delegates those services, the delegees must also be bound by the Constitution.[166]

Courts have generally held that the provision of food services to prisoners is essential.[167] Sometimes the public function test is utilized, with one court holding that "[p]roviding food service . . . to . . . incarcerated people is one part of the government function of incarceration.'"[168] However, some courts have also found the nexus test satisfied, pointing to the contract between the food provider and the jail, and stating that the jail was "allowed . . . in effect, to shift one of its obligations to [the provider]," and thus "the nexus between the

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Force Against Inmates of Private Prisons, 40 VAND. L. REV. 983 (1987); Ira P. Robbins, *Privatization of Prisons: An Analysis of the State Action Requirement of the Fourteenth Amendment and 42 U.S.C. § 1983*, 20 CONN. L. REV. 835 (1988).

[164] *See, e.g.*, Sarro v. Cornell Corr., Inc., 248 F. Supp. 2d 52, 60–62 (D.R.I. 2003); Palm v. Marr, 174 F. Supp. 2d 484, 487–88 (N.D. Tex. 2001); Giron v. Corr. Corp. of Am., 14 F. Supp. 2d 1245, 1249–50 (D.N.M. 1998); Kesler v. King, 29 F. Supp. 2d 356, 370–71 (S.D. Tex. 1998); *but see* Holly v. Scott, 434 F.3d 287, 294 (4th Cir. 2006) (holding that incarceration is not "a traditionally exclusive state function").

[165] *See, e.g.*, Ackridge v. Aramark Corr. Food Servs., No. 16-CV-6301 (KMK), 2018 U.S. Dist. LEXIS 54733, at *19 (S.D.N.Y. Mar. 30, 2018); Buchanan v. Pfister, No. 17 CV 8075, 2018 U.S. Dist. LEXIS 169004, at *12 (N.D. Ill. Oct. 1, 2018); Perry v. JPAY, Inc., No. 16-cv-00362, 2018 U.S. Dist. LEXIS 40581, at *15 (W.D. Va. Mar. 13, 2018); Amig v. Cty. of Juniata, 432 F. Supp. 3d 481, 86–87 (M.D. Pa. 2020).

[166] *See, e.g., Ackridge*, 2018 U.S. Dist. LEXIS 54733, at *19; *Amig*, 432 F. Supp. 3d at 486-87.

[167] *See Ackridge*, 2018 U.S. Dist. LEXIS 54733, at *20; Torres v. Aramark Food & Commissary Servs., No. 14-CV-7498 (KMK), 2015 U.S. Dist. LEXIS 168188, at *4–6 (S.D.N.Y. Dec. 16, 2015); Best v. Aramark Corr. Servs., LLC, 2014 U.S. Dist. LEXIS 141588, at *3 (S.D. Ind. Oct. 6, 2014).

[168] *Ackridge*, 2018 U.S. Dist. LEXIS 54733, at *20.

two is sufficient to plausibly impute state action to [the provider]."[169] Private providers of drug-testing[170] and mental health care to inmates[171] have also been held to constitute state actors. In contrast, services such as the manufacture of toilets and sinks for prison use,[172] pest control on prison grounds,[173] the provision of telephone services[174] and music[175] to prisoners, and construction within a prison[176] have been held to be insufficient to transform private contractors into state actors.

While it is certainly a win on the accountability front that private contractors who provide "essential" services are considered state actors, the doctrine still presents potential problems. Deciding what is or is not "essential" seems to be a line-drawing exercise fraught with entirely subjective judgments on what inmates "deserve." Further, it seems likely that even contractors who have not provided "essential" services have the power to wield significant harms through constitutional violations directed at a captive population entirely at the mercy of the State, one that has no alternatives to the chosen contractors' services. For example, the provision of telephone services to inmates has been considered a non-essential service that does not render the provider a state actor,[177] but it is difficult to see why discrimination in the provision of television services, as opposed to discrimination in food provision, should incur no constitutional liability. The State is still responsible for the prisoners' use of the service. The constitutional violation is still blatant, and the prisoner is still forced

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[169] *Id.* at *19. This does not appear to be a common conclusion among courts dealing with private contractors for prisons, who mostly stick to the public function test. *See* McCullum v. City of Phila., No. 98-CV-5858, 1999 U.S. Dist. LEXIS 10423, at *3 (E.D. Pa. July 13, 1999); Sutton v. City of Phila., 21 F. Supp. 3d 474, 482 (E.D. Pa. 2014).

[170] *See Amig*, 432 F. Supp. 3d at 487.

[171] Finlinson v. Millard Cty., No. 16-cv-01009-TC, 2018 U.S. Dist. LEXIS 185262, at *88 (D. Utah Oct. 29, 2018).

[172] *See* Bell v. Metacraft, No. 18-cv-00991, 2018 U.S. Dist. LEXIS 192261, at *4 (M.D. Tenn. Nov. 9, 2018).

[173] *See Buchanan*, 2018 U.S. Dist. LEXIS 169004, at *12.

[174] *See* Lay v. G.T.L. Phone Corp., No. CIV 18-009-JHP-SPS, 2019 U.S. Dist. LEXIS 54125, at *6 (E.D. Okla. Mar. 29, 2019).

[175] Perry v. JPAY, Inc., No. 16-cv-00362, 2018 U.S. Dist. LEXIS 40581, at *15 (W.D. Va. Mar. 13, 2018).

[176] *See* Ledford v. Baenen, No. 16-CV-665-JPS, 2018 U.S. Dist. LEXIS 59765, at *3–4 (E.D. Wash. Apr. 9, 2018).

[177] *See Lay*, 2019 U.S. Dist. LEXIS 54125, at *6.

to use that telephone service (or be unable to use the telephone at all) due to the State's decision both to imprison that individual and to contract with that telephone service provider. Using the telephone may not be as basic a human need as food, but it is practically indispensable to participating in modern society, even when in prison.[178] Thus, while it is laudable that at least some contractors may be held liable for constitutional violations, the essential/non-essential distinction loses force when considering the reality of the lives of the imprisoned, and the dominating control that the State exerts over every aspect of their existence. And although it has been indicated by at least one court that a contract between a private entity and a prison could be enough to hold the contractor liable via the nexus test,[179] by and large that line of reasoning has not been utilized by other courts. This failure of accountability is particularly concerning regarding the carceral system, every part of which has become increasingly privatized[180] and thus increasingly impervious to constitutional claims.

The specific realm of healthcare provision to prisoners has produced an especially confusing array of holdings. The circuits have split over whether doctors who are not under contract with prisons, but who treat inmates, can be considered state actors. Some courts have held that a contract is needed in order to provide the requisite link for a finding of state action,[181] while others have held that a contract is not required and that physicians providing medical care to inmates are automatically state actors, as the State "delegated its constitutional duties [to provide medical treatment] to the professional judgment of others."[182] However, between these two stances are courts that have developed a complicated doctrine involving close analysis of the facts in order to tell whether the State actually exhibited authority over the particular medical decision being challenged; if it did, then the physician can be considered a state actor.[183] This

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[178] Prisoners may reasonably only be able to contact friends and family or their lawyer through the telephone, especially if they are illiterate.

[179] *See Ackridge*, 2018 U.S. Dist. LEXIS 54733, at *19.

[180] *See supra* note 4.

[181] *See* Griffis v. Medford, No. 05-3040, 2007 U.S. Dist. LEXIS 99329, at *6 (W.D. Ark. Sept. 20, 2007); Bevins v. Becker Cty., No. 16-4340, 2018 U.S. Dist. LEXIS 220614, at *31 (D. Minn. Oct. 30, 2018).

[182] Anglin v. City of Aspen, 552 F. Supp. 2d 1229, 1244 (D. Colo. 2008).

[183] *See, e.g.*, Johnson v. Fein, No. 18-CV-0096, 2019 U.S. Dist. LEXIS 50516, at *13–16 (N.D.N.Y. Mar. 25, 2019); Vaught v. Quality Corr. Care, LLC, No. 15-CV-346-TLS, 2018 U.S. Dist. LEXIS 16127, at *10–20 (N.D. Ind. Feb. 1, 2018);

standard appears difficult to meet, with few cases finding the requisite nexus.[184]

While the dependence of this doctrine on the nitty-gritty may be explained as an attempt to maintain some consistent, specific concept of State responsibility, perhaps in the process courts have lost sight of the forest for the trees. In examining every small detail to determine whether there is sufficient imprimatur of the State, courts lose the broader picture of State responsibility. The considerations that courts place so much importance upon—whether a patient was handcuffed, or whether the doctor took a trip to the prison site, or the like—do not really make a difference in terms of practical responsibility. The State is required to provide medical care for its prisoners, and it is not supposed to be able to delegate out that decision in order to avoid constitutional liability, as the Court has maintained.[185] But finding constitutional liability where there is a contract, but not where there is a contract-less but freely made choice to assume the State's duty, subverts that entire idea by providing the State an out whereby nobody is constitutionally liable for the State's medical decisions.

Gallegos v. Slidell Police Dep't, No. 07-6636, 2008 U.S. Dist. LEXIS 32029, at *3 (E.D. La. Apr. 18, 2008). Factors that play a role in this analysis are whether the inmate was treated at the prison, *see Johnson*, 2019 U.S. Dist. LEXIS 50516, at *13–16; *Vaught*, 2018 U.S. Dist. LEXIS 16127, at *10–12; *Gallegos*, 2008 U.S. Dist. LEXIS 32029, at *3; whether the challenged decisions were made out of pure medical judgment or were compelled by the State, *see, e.g.*, *Johnson*, 2019 U.S. Dist. LEXIS 50516, at *13–16; the degree to which the doctor's decision to treat the inmate was "voluntary," *see, e.g.*, *Vaught*, 2018 U.S. Dist. LEXIS 16127, at *14–16; whether the patient was handcuffed while being treated, *see, e.g.*, *id.* at *4; and whether the treatment was "emergency care" or a planned appointment, *see, e.g.*, Stratton v. Buck, 498 F. App'x 674, 676 (9th Cir. 2012).

[184] *See, e.g.*, *Vaught*, 2018 U.S. Dist. LEXIS 16127, at *10–20; *Gallegos*, 2008 U.S. Dist. LEXIS 32029, at *3; *but see* Martin v. Sec'y of Corr., No. 16-cv-2060, 2017 U.S. Dist. LEXIS 142831, at *5–9 (M.D. Pa. Sept. 5, 2017) (finding state action). One representative example is Johnson v. Fein, No. 18-CV-0096, 2019 U.S. Dist. LEXIS 50516 (N.D.N.Y. Mar. 25, 2019), in which an inmate was taken to an outside doctor for orthopedic care; the court held that the medical office was not a state actor, despite the fact that the doctor knew the plaintiff was an inmate and treated him multiple times, and that the office "provided 'regular' treatment to [the prison's] inmates." *Id.* at *18.

[185] *See* West v. Atkins, 487 U.S. 42, 56 (1988).

C. Healthcare

Plaintiffs have made many attempts recently to hold nominally private hospitals and healthcare providers accountable as state actors; these attempts are rarely successful, even if those hospitals receive public funding or act subject to statutory authorization.[186] One issue that has been presented with increasing frequency is that of involuntary hospitalizations/commitments. Courts have generally held that the mere involuntary hospitalization of an individual by a private hospital, pursuant to a grant of statutory authority to do so, does not constitute state action.[187] This conforms with the generally accepted principle that a grant of statutory authority does not turn private actors into state actors.[188] Courts have declined to find that involuntary commitment constitutes a public function, noting that "the detention,

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[186] *See, e.g.*, Julian v. Mission Cmty. Hosp., 218 Cal. Rptr. 3d 38, 47 (Cal. Ct. App. 2017); People v. Sykes, 96 N.E.3d 468, 471-72 (Ill. App. Ct. 2017); Antwi v. Health & Hum. Sys. F.E.G.S., No. 13 Civ. 835, 2018 U.S. Dist. LEXIS 90903, at *1–4 (S.D.N.Y. May 31, 2018); Bortolotti v. Gracepoint, No. 19-cv-1072-T-24 AAS, 2019 U.S. Dist. LEXIS 130080, at *10 (M.D. Fla. Aug. 5, 2019); Coppola v. Health Alliance Hosp. Broadway Campus No. 17-CV-1032, 2019 U.S. Dist. LEXIS 8346, at *1–14 (N.D.N.Y. Jan. 17, 2019); Davenport v. Pottstown Hosp., No. 17-1616, 2017 U.S. Dist. LEXIS 110861, at *1–9 (E.D. Pa. July, 18, 2017); Estate of Lovelett v. United States, No. C16-5922, 2018 U.S. Dist. LEXIS 97693, at *1-6 (W.D. Wash. June 11, 2018); Gekas v. HCA Health Servs. of Tenn., No. 17-cv-00009, 2018 U.S. Dist. LEXIS 12298, at *3–8 (M.D. Tenn. Jan. 25, 2018); Jackson v. Barden, No. 12 Civ. 1069, 2018 U.S. Dist. LEXIS 3861, at *39 (S.D.N.Y. Jan. 8, 2018); Martin v. Patel, No. 17-CV-916, 2018 U.S. Dist. LEXIS 95415, at *2–4 (S.D. Cal. June 6, 2018); Savage v. St. Peter's Hosp. Ctr. of Albany, No. 17-CV-1363, 2018 U.S. Dist. LEXIS 103593, at *1–8 (N.D.N.Y. June 21, 2018); Sawabini v. McGrath, No. 15-CV-692, 2017 U.S. Dist. LEXIS 137896, at *1–9 (N.D.N.Y Aug. 28, 2017); Smith v. Am. Behavioral Health Sys., No. 16-cv-00380-MKD, 2018 U.S. Dist. LEXIS 146453, at *1–3 (E.D. Wash. Aug. 28, 2018); Zhuang v. Benvie, No. 14-13076-IT, 2017 U.S. Dist. LEXIS 227160, at *1–5 (D. Mass. Nov. 3, 2017).

[187] *See, e.g.*, *Julian*, 218 Cal. Rptr. 3d at 71; *Bortolotti*, 2019 U.S. Dist. LEXIS 130080, at *10; *Coppola*, 2019 U.S. Dist. LEXIS 8346, at *25–34; *Jackson*, 2018 U.S. Dist. LEXIS 3861, at *39; *Sawabini*, 2017 U.S. Dist. LEXIS 137896, at *14–19; *Zhuang*, 2017 U.S. Dist. LEXIS 227160, at *6–9.

[188] *See, e.g.*, Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1925 (2019) ("[T]he City's designation is analogous to a government license, a government contract, or a government-granted monopoly, none of which converts a private entity into a state actor—unless the private entity is performing a traditional, exclusive public function."); *Julian*, 218 Cal. Rptr. 3d at 71 ("'[T]he fact that the government has granted a private entity certain powers and privileges under the law,' however, 'is insufficient to make the private entity's conduct state action.'").

assessment, and treatment of mentally disordered persons is not within the exclusive province or prerogative of the State,"[189] and that the mere fact that private entities share involuntary commitment power with the State does not transform it into a public function.[190] This conclusion has been questioned by courts within the circuits in which it governs,[191] but it remains the dominant approach—even in instances where the private hospital is the "only provider of inpatient psychiatric services in [the area]," raising an inference that the State has entirely "outsourced its commitment authority."[192] The compulsion/coercion test has also generally been found to be unsatisfied, at least in the average case where the commitment statute is phrased in "permissive" rather than mandatory terms.[193]

This area of case law is but one example of how the mandate that private entities cannot be transformed into state actors via grants of statutory authority leaves gaping holes in constitutional accountability, even where State responsibility is seemingly present. Involuntary commitment is a significant occurrence in one's life—perhaps even life-changing—and the potential for enormously harmful and consequential constitutional violations throughout the process is large.[194] From an accountability perspective, it is difficult to understand why those who suffer such violations at the hands of a State

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[189] *Julian*, 218 Cal. Rptr. 3d at 71; *see also Bortolotti*, 2019 U.S. Dist. LEXIS 130080, at *6–9.

[190] *See, e.g.*, *Julian*, 218 Cal. Rptr. 3d at 71; *Bortolotti*, 2019 U.S. Dist. LEXIS 130080, at *6–9.

[191] *Coppola*, 2019 U.S. Dist. LEXIS 8346, at *22 ("[T]here is reason to question *Rosenberg's* conclusion that the MHL merely codified a prerogative that private actors traditionally shared with the State under common law.").

[192] *Jackson*, 2018 U.S. Dist. LEXIS 3861, at *46–47.

[193] *See, e.g.*, *id.* at *35–49; *Julian*, 218 Cal. Rptr. 3d at *72–74; *Bortolotti*, 2019 U.S. Dist. LEXIS 130080, at *10; *Coppola*, 2019 U.S. Dist. LEXIS 8346, at *17–18, *27–28. Courts accept the possibility that state action may be found where the State is significantly involved in the process of the involuntary commitment, such as where the commitment must be or in fact was initiated by the State, *see, e.g.*, M.C. v. City of Westchester, No. 16-CV-3013, 2018 U.S. Dist. LEXIS 36557, at *30 (S.D.N.Y. Mar. 6, 2018), but this argument is rarely invoked successfully, *see, e.g.*, *Julian*, 218 Cal. Rptr. 3d at *70–75; *Bortolotti*, 2019 U.S. Dist. LEXIS 130080, at *6–13; *Coppola*, 2019 U.S. Dist. LEXIS 8346, at *16–34; *Jackson*, 2018 U.S. Dist. LEXIS 3861, at *35–49; *Sawabini*, 2017 U.S. Dist. LEXIS 137896, at *12–20; Zhuang v. Benvie, No. 14-13076-IT, 2017 U.S. Dist. LEXIS 227160, at *6-9 (D. Mass. Nov. 3, 2017).

[194] *See generally* Stephen J. Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, 70 CALIF. L. REV. 54 (1982).

hospital or State employee have a constitutional remedy available to them, but those who suffer them at the hands of a private entity with whom the State has placed the authority to involuntarily commit in the first place do not have access to such a remedy. In both situations, a direct, but-for cause of the commitment—and thus any attendant violations—is the State. The challenged commitments (or treatment during those commitments) would not be possible without the State's authorization, regardless of whether the power to commit has long been shared, and whether the hospital's final choice to commit was, in the end, optional. The State has *allowed* this power to be shared; the authority of the State created the authority of the private hospital to make its choice. That such authority can be delegated—in some cases entirely[195]—without subsequent delegation of constitutional liability defies logic and defies the State responsibility concept at the doctrine's core. Further, it damages both our ability to maintain constitutional values and the incentives of the State to ensure that such maintenance occurs.

D. Licensing/Testing

While licensing and testing companies have not been subject to as much recent state action litigation as the previous categories, the doctrine surrounding them leaves much to be desired. In general, courts have held that private entities that administer professional and occupational tests are not state actors, "even where the private entity creates and administers an examination that is required for state licensure."[196] Courts have stated that such companies fail the public

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[195] *See* Jackson v. Barden, No. 12 Civ. 1069, 2018 U.S. Dist. LEXIS 3861, at *46–48 (S.D.N.Y. Jan. 8, 2018).

[196] Fox v. Int'l Conf. of Funeral Serv. Examining Bds., 242 F. Supp. 3d 272, 282 (S.D.N.Y. 2017); *see also* Mattei v. Int'l Conf. of Funeral Serv. Examining Bds., No. 15-CV-139, 2015 U.S. Dist. LEXIS 116009, at *3 (W.D. Tex. Sept. 1, 2015) ("[f]ederal courts have consistently held that private entities administering examinations relied upon by the State do not qualify . . . as state actors for purposes of [§] 1983 claims."); Boggi v. Med. Review & Accrediting Council, 415 F. App'x 411, 414 (3d Cir. 2011); Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc., 40 F.3d 247, 250 (7th Cir. 1994); Langston v. ACT, 890 F.2d 380, 384–86 (11th Cir. 1989); Johnson v. Educ. Testing Serv., 754 F.2d 20, 23–25 (1st Cir. 1985); Jaramillo v. Prof'l Examination Serv., Inc., 515 F. Supp. 2d 292, 294–96 (D. Conn. 2007); Sims v. Hassenplug, No. 05-CV-155, 2006 U.S. Dist. LEXIS 50655, at *4–5 (M.D. Ga. July 25, 2006); Tolleson v. Educ. Testing Serv., 832 F. Supp. 158, 160–63 (D.S.C. 1992); Stewart v. Hannon, 469 F. Supp. 1142, 1147–48 (N.D. Ill. 1979).

function test, as "the formulation, grading, and reporting of standardized tests is not an exclusive public function."[197] Even where such organizations are entirely composed of State regulatory agencies, courts have been reluctant to find state action under the nexus or joint action tests.[198] However, where private entities "are directly involved in the licensing process, for example by having the power to revoke or issue licenses,"[199] courts have found state action, holding such activities to constitute public functions where mere administration of testing for those licenses is not.[200] The difference, the reasoning goes, is that

> it is not a traditional government function to make an assessment of an individual's qualifications for a professional license, for example by administering an exam and reporting the results. . . . But on the other hand, the issuance of a state license to practice a profession—that is, the act of granting or withholding the license—plainly is a traditional government function even if delegated to a private party.[201]

While this doctrine is not entirely unexpected, especially in light of courts' laser focus on traditional exclusivity, under a closer analysis (and with the overarching principles of responsibility and accountability in mind) the logic is suspect. If licensing itself is the prerogative of the State—and one it cannot delegate without attendant constitutional liability—then an activity that is a necessary, predicate to licensing—testing—would seem to be the State's prerogative as well. In other words, testing is an integral part of licensing (at least where the State has affirmatively mandated testing), and thus constitutional violations in the process of testing are not manifestly different in terms of State responsibility than violations in the process of licensing. Discrimination on the basis of gender in testing for a license begets the same result as discrimination on the basis of gender in doling out that license and constitutes the same fundamental constitutional violation. Through an accountability lens, the actions can-

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[197] *Fox*, 242 F. Supp. at 285.
[198] *See, e.g.*, *id.* at 287.
[199] Shume v. Pearson Educ. Inc., 306 F. Supp. 3d 117, 126 (D.D.C. 2018).
[200] *See id.*; Golden Rule Life Ins. Co. v. Mathias, 408 N.E.2d 310, 317 (Ill. App. Ct. 1980).
[201] *Shume*, 306 F. Supp. 3d at 126.

not be logically separated. That the State can delegate out the prerequisites for licensing without constitutional liability attaching to the recipient defeats the protections for the act of licensing itself and irrationally disclaims the State's responsibility for protecting its licensing process from constitutional violations.

E. Political Parties/Organizations

Despite several recent attempts by plaintiffs to categorize political parties and organizations as state actors, courts have been resistant toward labeling them as such.[202] The exception to this rule, as declared by the Supreme Court, is where the party or organization has been granted a special role by the State in elections:

> [W]hen a State prescribes an election process that gives a special role to political parties, it "endorses, adopts and enforces the discrimination" . . . that the parties . . . bring into the process-so that the parties' discriminatory action becomes state action.[203]

Systems in which "certain parties [have been given] the right to have their candidates appear with party endorsement on the general-election ballot,"[204] or systems "where committeemen perform public electoral functions (e.g., the nomination of candidates to fill vacancies or to run in special elections . . .)."[205] can constitute such a special role. Lower courts have overall refused to extend this line of reasoning beyond its narrow bounds, concluding that state action is not present if the challenged activity involves internal party actions, such as "disciplinary limitation on participation in its internal elections;"[206] "general measures to discipline [individuals] for their disloyalty to

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[202] *See, e.g.*, Marts v. Republican Party of Va., Inc., No. 17-cv-00022, 2018 U.S. Dist. LEXIS 55455, at *8–10 (W.D. Va. Mar. 31, 2018); Neuman v. Ocean Cnty. Democratic Cnty. Comm., No. 16-2701, 2017 U.S. Dist. LEXIS 12254, at *12–13, *15 (D.N.J. Jan. 30, 2017); Jacobson v. Kings County Democratic Cnty. Comm., No. 16-CV-04809, 2018 U.S. Dist. LEXIS 232688, at *7 (E.D.N.Y. Sept. 29, 2018); Owen-Williams v. Higgs, No. DKC 18-0439, 2019 U.S. Dist. LEXIS 18031, at *10–12 (D. Md. Feb. 5, 2019).

[203] Cal. Democratic Party v. Jones, 530 U.S. 567, 573 (2000) (citation omitted) (quoting Smith v. Allwright, 321 U.S. 649, 664 (1944)).

[204] N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 203 (2008).

[205] Seergy v. Kings Cty. Republican Cty. Comm., 459 F.2d 308, 314 (2d Cir. 1972).

[206] *Marts*, 2018 U.S. Dist. LEXIS 55455, at *16.

the party" that do not occur in "the course of operating a state-regulated primary or its equivalent;"[207] "the endorsement process by which a political party selects a candidate to represent its political platform;"[208] and "prevent[ing] [a member] from participating in the [party's] ongoing events and speaking at the Annual Public Leadership Vote . . . [or] remov[ing] him from the [party] altogether."[209]

What is troubling about this line of cases is, as with the testing and licensing cases, the lack of attention paid to practical effects. What courts insist they look at is the potential effect on "ballot access:" if the party's actions prevent or significantly impede the plaintiff from participating in the election at all, then it could be considered a state actor.[210] If the plaintiff's ability to actually get on the ballot is essentially unaffected, then no state action is found, even if the plaintiff was prevented from securing a nomination from the party in question.[211] As one court blatantly acknowledged,

> [a]ssuming that Defendants failed to adhere to their internal rules governing the candidate selection process, this failure, as Plaintiff concedes, did not implicate ballot access. Rather, Plaintiff's grievance is parallel to her not getting a 'fair shot' at being nominated. This is insufficient to deem Defendants' actions as state actions.[212]

However, these courts fail to acknowledge that in our essentially two-party system, a party endorsement is often a practical prerequisite to being elected; one might still technically be allowed to be on the ballot, but any meaningful opportunity to actually run for that particular office is extinguished without a nomination to a major party. Thus, racial discrimination in selecting a candidate to endorse can have the same effect as racial discrimination in selecting which candidates to allow to appear on the ballot. The distinction, then, between internal

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[207] *Id.*
[208] Neuman v. Ocean Cnty. Democratic Cnty. Comm., No.16-2701, 2017 U.S. Dist. LEXIS 12254, at *15 (D.N.J. Jan. 30, 2017).
[209] Owen-Williams v. Higgs, No. DKC 18-0439, 2019 U.S. Dist. LEXIS 18031, at *11 (D. Md. Feb. 5, 2019).
[210] *See, e.g.*, Jacobson v. Kings County Democratic Cnty. Comm., No. 16-CV-04809, 2018 U.S. Dist. LEXIS 232688, at *7–8 (E.D.N.Y. Sept. 29, 2018).
[211] *See id.* at *10.
[212] *Id.* at *12.

party processes and the actual running of an election falls apart. If the State is responsible for the one, it is in effect responsible for the other.

F. Modifying the Doctrine

As the previous sections demonstrate, the state action doctrine as applied to nominally private actors, despite its stated focus on State responsibility, has overwhelmingly failed to ensure accountability of either government actors or the private actors they aid, encourage, empower, and/or compel. The most comprehensive yet realistic way of approaching this failure of accountability is by clarify the state action doctrine and reforming (rather than eliminating) it to encompass a broader swath of acts that can reasonably be attributed to the State. This would consist of keeping the list of "tests" that are already considered when determining state action, elucidating the function of those tests, and adding onto them factors—designed with accountability in mind—that are but an extension of the Court's insistence that courts must "assure that constitutional standards are invoked when it can be said that the State is responsible for the specific conduct of which the plaintiff complains."[213]

There is no obvious or convincing reason why responsibility must be conceived as restrictively as it has been thus far. Responsibility in the state action context has not been clearly defined beyond its specific application in particular cases, and beyond the central—but vague—notion of fairness.[214] The Court's narrow application of responsibility in particular state action cases is largely unjustified and stands in contrast to the stated purpose behind holding private actors accountable as state ones. If the overarching goal is, as the Court maintains, to ensure that the State cannot nullify constitutional protections through delegation to and support of private actors, then this goal must be centrally considered in defining responsibility in the state action context.[215] It counsels for a more flexible conception of

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[213] Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n, 531 U.S. 288, 295 (2001) (internal citations omitted).

[214] *See, e.g.*, Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982) ("Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State.").

[215] *See* Richard W. Wright, *The Grounds and Extent of Legal Responsibility*, 40 SAN DIEGO L. REV. 1425, 1426 (2003) ("As has often been stated, the reasons for creating liability should also govern the extent of that liability.").

responsibility that is capable of taking into account the various ways in which the State may attempt to subvert constitutional liability, and the various arrangements the State may create in order to do so. Thus, responsibility in this context must, and can, encompass more than a direct involvement in the action causing harm, as it does in other areas of the law.

Elements of agency and tort law are particularly helpful. General agency law, as with the facet of the state action doctrine focused upon here, aims to "ensure that principals using agents do not thereby escape liability or other consequences of their choices."[216] Thus, in molding the appropriate conception of responsibility in the state action context, one may sensibly look to agency law's driving tenet that "the principal, who has chosen to conduct her business through an agent, must bear the foreseeable consequences created by that choice."[217] Tort law's more specific application of principal-agent theory in its respondeat superior doctrine provides fruitful ground to draw guiding principles, as, similar to the state action doctrine, its existence is at least in part motivated by the power employers have over their employees, and by a desire to hold employers liable due to the benefits they receive from their employees' actions.[218] While responsibility can never be fully defined, one can give the concept shape by drawing from the state action doctrine's driving principles and those of similarly-motivated doctrines.

Further, injecting more specificity into the state action analysis by enumerating additional factors to be considered would increase the predictability of the doctrine and make accountability failures more easily avoidable. While the Court has emphatically maintained that the question of state action is a fact-bound inquiry resistant to any strict formula or firm guidelines,[219] it is clear that more can be done to shape the doctrine to allow for greater accountability and a broader conception of State responsibility without necessarily setting

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[216] Paula J. Dalley, *A Theory of Agency Law*, 72 U. PITT. L. REV. 495, 495 (2011).
[217] *Id.* at 497.
[218] *See* RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006); Rhett B. Franklin, *Pouring New Wine into an Old Bottle: A Recommendation for Determining Liability of an Employer under Respondeat Superior*, 39 S.D. L. REV. 570, 572 (1994).
[219] *See, e.g.*, Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n, 531 U.S. 288, 289 (2001) (state action analysis is "necessarily fact-bound inquiry"); Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961) ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.").

hard lines. The problem with fact-driven approaches is that while they may provide flexibility, they are extremely vulnerable to manipulation—all a court must do is distinguish the facts even slightly—as well as simple misinterpretation (or equally plausible but differing interpretations), leading to a chaotic and incoherent doctrine. Thus, more guidance is needed in order to counteract these issues.

In the case of the state action doctrine, more factors are relevant to the notion of private accountability and State responsibility than the Court, and lower courts in its stead, have explicitly considered. Those factors could be added into the elastic, fact-driven approach. This would maintain the flexibility that the Court so desires, while providing more of a countervailing force against circuit splits and failures of accountability. Increasing the number of factors that are explicitly considered would also increase predictability, promoting the fairness that Court strives for while reducing constitutional violations by alerting private actors as to when they are required to stay within the bounds of the Constitution, and States as to when their delegations will not erase constitutional obligations.

This is not to say that accountability cannot be accomplished by other means. The problems engendered by the state action doctrine could ostensibly be fixed by the strengthening of state laws or by government oversight and/or the insertion of language into State contracts with private entities, or by the requirement's annihilation altogether.[220] However, while scholars have advocated otherwise, the Court has made it abundantly clear that the state action requirement is not going anywhere.[221] Thus, calls to get rid of it altogether—while possibly the best solution in terms of accountability—suffer from a lack of feasibility. Reformation is more plausible, especially that which is tied to the notion of State responsibility that the Court so prioritizes. The state action doctrine was created by the Court, and it is not set in stone; it can and should evolve along with the structure of our society. The suggestions made here do not constitute a radical departure from the original doctrine, but rather an extension of the Court's motivating reasoning to its logical conclusion.

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[220] *See, e.g.*, Chemerinsky, *supra* note 2, at 507 ("Protection of these values from private infringements need not necessarily be by constitutional review; protection can be provided by state statute, state common law, or federal statute."); Tushnet, *supra* note 26, at 94.

[221] *See* Madry, *supra* note 2, at 502 ("The Court has repeatedly abjured [making every person a federal agent for every private initiative], however, in the name of maintaining the wall between public and private.").

Further, while state law and constitutions, along with contractual obligations, can certainly be powerful tools to protect the rights guarded by the Federal Constitution, it would seem preferable for values as fundamental as those enshrined in the Constitution to be insulated from the ephemeral nature of state politics, to be protected equally for all citizens, and to be afforded the powerful symbolism attendant to a grant of constitutional protection at the federal level. Finally, government oversight is likely to be overly complicated, expensive, and impractical, and neither the government nor private entities are strongly incentivized to insert protective language into their contracts.[222] Delegation may happen implicitly, without the possibility of a formal contract with which to bind the private entities. The need to strengthen plaintiffs' ability to hold private actors liable under the state action doctrine, then, seems quite important (if not necessary) to upholding constitutional values.

Last, subsidiary to the accountability problem is predictability—the notion that private actors should be provided with reasonable notice as to when they can be held liable under the Constitution. A major drive behind pushing for stronger accountability in the first place—its end goal—is prevention of constitutional violations. Ostensibly, when actors know or can easily predict that they will be held accountable for certain violations, they are less likely to commit them, leading to an overall net decrease in wrongs. The state action doctrine is currently extremely unpredictable, with cases seemingly confined strictly to their facts.[223] Thus, any solution to the current problems of the doctrine that aims to increase accountability—and consequently decrease constitutional violations overall—must also increase (or at least not substantially decrease) the predictability of the application of the newly-shaped doctrine. Clarifying the doctrine and adding more explicit factors into the analysis can aid in this goal.

What follows is a non-exhaustive list of ways in which the state action doctrine could be amended or appended in order to increase accountability, while still maintaining the requisite reasonable attribution to the State. First, the already enumerated tests should not—as some lower courts have been doing, either explicitly or implicitly[224]—be interpreted as exclusive, but rather non-exhaustive.

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[222] *See* Chiang, *supra* note 2, at 671.

[223] *See, e.g.*, Minow, *supra* note 2, at 149 ("The result is a set of decisions bound by their facts, not by their analyses.").

[224] *See supra* Section II.B.i.a.

Second, the convention that links between the State and private entities must point directly to the challenged action, and the related convention that discretion on the part of the private actor in the final decision eliminates the possibility of state action, should be abandoned, in favor of an approach that acknowledges the generalized influence a State may wield and the inevitability of discretion on the part of final decisionmakers. Finally, several new factors are presented as supplements to the current state action analysis. These factors are designed to help fill the gaps in accountability left open by the current doctrine. They are derived from a broader and more practical conception of State responsibility, which is, as described, meant to be the hallmark of state action, and take cues from agency law as well as the purposes behind the state action doctrine—including the refusal to allow States to subvert constitutional norms through delegation and privatization.

i. Interpret the Current Tests as Non-Exclusive

The Court has never said that the tests that have been derived from (and were not explicitly enumerated in) its decisions are the only mechanisms by which state action can be found. It has in fact indicated the opposite: in one recent case, the Court stated that

> [u]nder this Court's cases, a private entity can qualify as a state actor in a few limited circumstances—*including, for example*, (i) when the private entity performs a traditional, exclusive public function . . . (ii) when the government compels the private entity to take a particular action . . . or (iii) when the government acts jointly with the private entity.[225]

This statement indicates that the Court does not view the current state action tests as exhaustive. The Court has also repeatedly stressed that the state action inquiry is a fact-bound one not meant to be delimited by exclusive guidelines.[226] However, lower courts have not consistently followed this reasoning. Many courts outright declare that the only available state action tests are those that have al-

[225] Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019).
[226] *See, e.g.*, Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n, 531 U.S. 288, 289 (2001); Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

ready been laid out, and while not expressly stated, other courts act that way in practice, by either remaining silent as to what they are doing or claiming to do the opposite.[227]

The Supreme Court should explicitly clarify that the enumerated tests are not exclusive of other potential ones. First, the lack of consistency across the circuits on the exclusivity or non-exclusivity of the tests lead to inconsistencies in the circuits' application of the state action doctrine.[228] Entities that are identical in nature and function could be considered state actors in one location but not another. This is an issue because the Court may not have time to resolve every circuit split that arises from this fundamental, baseline difference in understanding of the doctrine. This inconsistency is inherently unfair to private entities who face different requirements than their peers based on the circuit in which the case is heard, and to plaintiffs who might have suffered grievous harms but do not have a remedy because they are heard in one circuit rather than another. This harms our ability to maintain essential constitutional values because private entities might flee to locations that use exclusive tests. Moreover, they are less likely to be found a state actor and thus less likely to be held liable for constitutional violations. In addition, the inconsistency decreases the predictability of the state action doctrine. This could only lead to economic inefficiency for businesses attempting to figure out if they qualify as state actors. This decrease in predictability is also likely to lead to a decrease in the maintenance of constitutional values, as private entities who know they will be considered state actors are ostensibly more likely to proactively follow the Constitution than those that believe they have some wiggle room.

Second, limiting the state action doctrine to the tests already enumerated would bring the doctrine to a screeching halt, because no new paths to state action for private actors could ever become available. This would be a net loss in accountability, as we would be able to hold fewer entities constitutionally liable for violations. Moreover, it would restrict the doctrine from fulfilling its mandate to connect State responsibility with constitutional liability. Academics already criticize the doctrine as confining precedential cases to their facts.[229]

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[227] See *supra* Section II.B.i.a.

[228] *See supra* Section III.B.ii.

[229] *See, e.g.*, Minow, *supra* note 2, at 149 ("The result is a set of decisions bound by their facts, not by their analyses."); Kevin Cole, *Federal and State "State Action": The Undercritical Embrace of a Hypercriticized Doctrine*, 24 GA. L. REV. 327, 353

Explicitly making that criticism a reality, as solidifying the tests as exclusive would do in effect, would cut off at the knees any future attempts to hold liable as state actors private entities that have not been the subject of a prior case. The world—along with the private entities and their relationship to the public and to the State—is consistently evolving, and manifestations of State responsibility along with it. The state action doctrine needs to keep up with these constant shifts, lest it become a hollow promise, an outdated tool that no longer functions as any kind of guarantee of accountability. This is especially so as the world increasingly becomes one of privatization and state delegation of responsibilities and duties, both assumed and required.[230] Explicitly confining the doctrine to existing precedent would likely further incentivize the State and private entities to create new arrangements that fail to fit into any of the preordained boxes for state action but that nevertheless work to damage the public's ability to ensure that constitutional values are upheld.

ii. Turn Away from the Focus on Control Over the Challenged Action and Whether the Final Decision Was Mandatory.

As described,[231] all of the tests used in the state action inquiry require that State involvement be directly linked to the challenged action.[232] For the public function test, the activity must be a part of that public function, and not extraneous.[233] For the coercion/compulsion test, the State must have actually coerced or compelled the private en-

(1990) ("Though Shelley and Sullivan might theoretically have broad impact, the Court's refusal to so read those cases may now be sufficiently clear that the cases can fairly be considered to be limited to their facts.").

[230] *See supra* Part I.

[231] *See supra* Section II.A.

[232] *See supra* Section II.A.

[233] *See, e.g.*, Sherlock v. Montefiore Med. Ctr., 84 F.3d 522, 527 (2d Cir. 1996) ("The fact that a municipality is responsible for providing medical attention to persons held in custody may make an independent contractor rendering such services a state actor . . . with respect to the services so provided . . . but that fact does not make the contractor a state actor with respect to its employment decisions."); George v. Pacific-CSC Work Furlough, 91 F.3d 1227, 1230 (9th Cir. 1996) ("[Plaintiff's] complaint bases its state action claim almost solely on the public function approach, asserting that [defendant] engages in a 'traditionally exclusive governmental function.' . . . [Defendant] concedes that incarceration is a traditionally exclusive state function. This assumption misses the point, however. The relevant inquiry is 'whether [defendant's] role as an employer was state action.'").

tity to take the action that the plaintiff claims violated the Constitution.[234] For the joint action test, the State must have worked with the private entity on the challenged action.[235] For the nexus test, the entwinement between the State and the private actor must be directly connected to the activity in question.[236] Similarly, a finding that the challenged action comes from the private actor's own discretionary judgment unrelated to State influence also defeats a claim of state action.[237]

This conceit unnecessarily limits courts' conception of State responsibility, to the detriment of predictability and accountability. This facet of the doctrine is a dangerous exercise in subjective line-drawing, wherein the level of responsibility the State is deemed to have for a specific action is left completely to the whim of the judiciary—and this is especially so where the precedential cases are confined more and more to their facts, leaving courts with little general guidance with which to work. This can only lead to more uncertainty within the doctrine, which can only lead to inefficiency, unfairness, and more constitutional violations. But greater than that, requiring responsibility for the particular challenged action ignores practical reality and needlessly narrows responsibility. A State that wields general coercive power over a private entity through extensive regulation, significant funding, participation of state actors within the private entity, acting as joint partners in an overall scheme or endeavor can easily be responsible for a particular decision even if it has made no specific moves to do so, and even if the private decisionmaker holds nominal discretion over the final action. For example, if the

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[234] *See supra* note 53 and accompanying text.

[235] *See supra* note 77 and accompanying text.

[236] *See supra* note 63 and accompanying text.

[237] *See, e.g.*, Griffis v. Medford, No. 05-3040, 2007 U.S. Dist. LEXIS 99329, at *16 (W.D. Ark. Aug. 31, 2007) ("[P]rivate physician treating an inmate at a private facility utilizing his independent medical judgment is not answerable to the State and does not act under color of state law for purposes of § 1983."); Woytowicz v. George Wash. Univ., 327 F. Supp. 3d 105, 118 (D.D.C. 2018) (finding no state action on the part of a University because "[a]lthough the government requires compliance with Title IX regulations as a precondition of receiving funding, the University and its employees exercised ample discretion in (1) establishing their own Title IX definitions and procedures, . . . and (2) implementing those policies during their investigation."); Julian v. Mission Cmty. Hosp., 218 Cal. Rptr. 3d 38, 73 (Cal. Ct. App. 2017) (finding no state action as the law in question "does not require or encourage 72-hour detentions and merely allows private parties to exercise their independent medical judgment regarding the need for treatment and evaluation").

State makes up ninety-five percent of a private organization's funding, then every decision that the organization makes will inevitably be influenced by the overwhelming control the State exercises over its budget. In this circumstance, even if the actor is technically acting at their own discretion, rather than at the state's behest, the threat of fund withdrawal will always loom overhead—even if not expressly stated. A principal does not lose responsibility for its agent's activity merely because the principal did not direct the agent to take that specific action, or because the agent had some level of discretion in choosing a path;[238] an employer is not free of respondeat superior liability merely because he did not command the particular employee action in question, or because the employee had discretion to take it.[239] It is the overall relationship between the two entities that leads to a finding of responsibility, not the principal's relationship to the specific action. If the state action doctrine is meant to ensure that someone is held constitutionally accountable when the State is responsible for a particular violation, then it must be implemented with an understanding of practical reality.

In addition, if the State has directed or coerced the private actor into performing the challenged action, concealing that activity in discovery or a courtroom is easier done than concealing a general coercive power. Thus, this aspect of the doctrine makes it exceedingly difficult for plaintiffs to prove state action where it would be considered to exist under current precedent, if all the facts were known. It provides a significant barrier towards recovery, damaging our ability to ensure that constitutional values are upheld and incentivizing the State to make any coercion or direction oblique, in order to prevent potential findings of state action. This is also true of the requirement that the actor cannot be exercising his own private discretion. Discre-

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[238] All that is required is that the agent "reasonably believes, based on a manifestation of the principal, that the principal wishes the agent so to act." RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt. b (2006). *See also* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. f(1) (2006) ("To the extent the parties have created a relationship of agency . . . the principal has a power of control even if the principal has previously agreed with the agent that the principal will not give interim instructions to the agent or will not otherwise interfere in the agent's exercise of discretion.).

[239] All that is required is that the employee act within the scope of his employment, *see* RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006), which in turn only requires the employee to be "performing work assigned by the employer or engaging in a course of conduct subject to the employer's control." RESTATEMENT (THIRD) OF AGENCY § 7.07(2) (2006).

tion always exists; there may be a range of options that the private actor knows are acceptable outcomes in the eyes of the State, and he may use his discretion in choosing between them, but that does not leave his actions untainted by influence of the State. The State may deliberately, as incentivized by this part of the doctrine, imbue statutes or agreements with a limited range of permissibility in order to subvert a finding of state action, while wielding significant influence such that there is no real choice to make.

Of course, some actions may be too attenuated to trigger State responsibility even if the State maintains coercive power over the private entity. For employers to be liable under respondeat superior, their employees must have acted "within the scope of their employment;"[240] for principals to be liable for their agents' actions, the agent must have acted within the scope of the authority granted to them by the principal.[241] This is because it is the relationship that is crucial to impose responsibility; the actions must be within the confines of that relationship in order to demand liability. Similarly, in order for the State's coercive power to elicit a finding of responsibility in any particular case, under this paper's theory the challenged action must fall within the scope of the State's influence. This is not a clear-cut concept, and is highly fact-dependent, similar to most of the state action doctrine. Agency and tort law can provide direction here by placing weight on whether or not the act in question benefitted the State (or would likely be thought to by the private entity), and relatedly whether the State would be thought to be invested in the outcome of the decision.[242] Another relevant factor in the context of State funding, encouragement, or grants of legal authority may be whether or not the challenged action falls within the scope of activities for which the State provides such support or authority (similar to the scope of employment/authority test from agency law). Finally, agency law's requirement for principal liability that the agent "reasonably believe[], based on a manifestation of the principal, that the principal wishes the

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[240] *See* RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006).

[241] *See* RESTATEMENT (THIRD) OF AGENCY § 7.03 (2006).

[242] This concept is similar to the idea in tort law that acting to benefit an employer/to serve the employer's purpose places an employee's actions within the scope of employment, thus triggering respondeat superior liability. *See* RESTATEMENT (THIRD) OF AGENCY § 7.07 (2006) (describing ways in which conduct potentially thought to be outside the scope of employment can be considered within it because, for example, the employee was "motivated to benefit employer" or "could have acted to benefit employer").

agent so to act"[243] is informative. If there is no reasonable basis to surmise that the State would have desired the challenged action, and the theory of state action is premised solely on general coercive control, then an inference of State responsibility is more difficult to make. While this limitation on State responsibility may be open-ended, it is not dissimilar to that within other legal doctrines, from which guidance can be taken.[244]

In sum, the state action doctrine should shift away from its current focus on direct responsibility for the challenged action and private discretion. Instead, it should look at the practical overall coercive power that the State wields over the private actor. This change would better capture State responsibility and better safeguard accountability.

G. Additional Factors

There are several factors drawn from the state action doctrine's purposes, as well as agency law that courts can look to in answering the state action question that more accurately captures the notion of State responsibility that at least nominally drives the doctrine. Consideration of these factors would transform the doctrine in-

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[243] RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt. b (2006).

[244] However, this limitation on State responsibility should not be taken to mean that entities performing a public function are inevitably not state actors when acting outside of that function. A private entity that performs a function delegated to it by the State often holds power and influence that it would not have without the State having so delegated, which could spill into other aspects of the private actor's operations. For example, in a recent case in the Fourth Circuit, *Watson v. Smith*, No. 18-cv-142, 2019 U.S. Dist. LEXIS 56153, at *6 (W.D.N.C. Apr. 2, 2019), the Western District of North Carolina held that private actors under contract to provide medical services to inmates of a State prison could not be considered state actors in reference to their challenged action: assaulting an inmate. *See id.* at *20–21. The court stated that "[w]hile the [private] Defendants were providing medical services to [the State] and Plaintiff, there is no suggestion in the record that they were charged with overseeing Plaintiff's security. Therefore, they were not acting under the color of state law when they allegedly assaulted him." *Id.* at *20. However, the entire reason that the medical providers had access to the prisoner—the reason why he was in their care—was that the State had delegated its duty of medical services to them, regardless of whether the State had chosen to specifically delegate its duty to protect the plaintiff from harm as well. The State used its authority to place the plaintiff in that situation, and the private actors took advantage of that authority. The private actor thus cannot reasonably say that their actions cannot be imputed to the State for responsibility purposes.

to a more powerful tool for enforcing accountability against States that privatize in order to avoid constitutional liability, and the private entities on the receiving end of such privatization.

i. Has the State Delegated a Service or Duty It Would Otherwise Reasonably Bear the Burden For?

As described, the current public function test leaves much to be desired. [245] The entire rationale behind the test is that the State must not be allowed to delegate out public duties and services without attendant constitutional liability and thereby strip constitutional guarantees of any real effect.[246] However, by requiring functions to be the traditionally exclusive prerogative of the State, the Court has sapped the public function test of its potential power to ensure such accountability and maintenance of constitutional values. This is especially so in an age of increasing delegation to private parties of governmental functions.[247] The state action doctrine needs to find a way to deal with this trend, without sacrificing accountability. Thus, the idea behind the public function test should be expanded upon to reach other delegated duties beyond that which it currently reaches—as was arguably its original nature.[248]

Of course, not all assumptions of public activity by a private actor can or should be covered by the state action doctrine. State delegation can happen in multiple ways: first, the State may explicitly delegate a function that it is required to perform. This is the form of delegation is generally covered by the state action doctrine.[249] If the State must provide a service, and if that service would be subject to constitutional limitations if directly provided by the State, then there is no logical reason not to extend those restrictions to private actors whom the State has chosen to perform the service in its stead. Second, the State may explicitly delegate by contracting with a private

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[245] *See supra* Section II.A.i.a.
[246] *See, e.g.*, West v. Atkins, 487 U.S. 42, 56 (1988) ("Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights.").
[247] *See supra* Introduction.
[248] *See* Barak-Erez, *supra* note 2, at 1176.
[249] *See, e.g.*, *West*, 487 U.S. at 55–56.

entity, even if it is a service that the State had previously performed itself. Of course, if this service was traditionally the exclusive prerogative of the State, then it already falls under the current limited public function test.[250] However, the test can and should be extended beyond traditional exclusivity. If the State has taken responsibility for a certain service such that it has created a market for it, and induced reliance upon its provision of that service, and then explicitly privatizes that service, it should not matter if the function is traditionally the sole domain of the State. The State is still responsible for the use of the private actor in this context, and State responsibility, as recognized by the Court, is essential. The State has in effect made the private entity its agent, acting in its stead, and thus, like principals in agency law it cannot remove responsibility for the consequences of that choice. This will reduce the incentive for private actors and the State to privatize current publicly-run services in order to lessen constitutionally liability, and will preserve accountability even where they choose to do so. While this could seem unfair to private actors, they have a choice as to whether they would like to contract with the State and accept the constitutional liability that comes with such a decision. While it might be said that discouraging or inhibiting privatization might lessen market innovation,[251] one would hope that such privatization will in many cases still be feasible even if the private actor must follow the Constitution—and if it is not, perhaps it is not desirable.

A trickier question arises where the State merely allows such privatization to occur, rather than affirmatively creating it. This occurs when the State stops a particular service and allows private actors to fill the gap left behind. If the function is traditionally the exclusive domain of the State, then the public function test applies, and no problems occur. However, if the function is not traditionally the State's domain, the State may accomplish the subversion of the Constitution meant to be avoided by attaching state action to explicit contracts by stepping back and letting the free market fill its place. Thus, it seems manifest that in order to preserve the power of the overall rule and maintain a robust conception of State responsibility, state action must apply to actors who fill holes that the State has intentionally

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[250] *See supra* Section III.A.i.

[251] *See, e.g.*, Minow, *supra* note 2, at 158 ("Converting everything into the private sphere threatens personal freedoms to associate, to enjoy transparency, and to pursue innovations tested by economic and social marketplaces.").

created by stopping the provision of a service. This may be slightly unfair to private actors, as their awareness of the State's role is lessened without a contract. But ostensibly, those actors jump in to fill that gap because they are aware that the State has stepped back, so their liability does not attach without any warning or affirmative choice on their part. Further, it is not unfair to the State when the State has made a conscious choice towards privatization.

ii. Has the State Caused or Significantly Contributed to the Conditions Under Which Use of the Private Actor Is Necessary?

Currently, the state action doctrine's coercion and compulsion test ask whether or not the State coerced or compelled the private defendant into taking the challenged action.[252] If the State did so, then state action can be found because the activity in question can reasonably be traced to the State's own decisions.[253] While this factor is important and necessary in order to maintain accountability of the State for the consequences of its actions, it is an incomplete question. What should also be asked is whether or not the State has significantly contributed to the conditions under which use of the private actor is necessary. If the State has explicitly made use of a particular private actor necessary either formally or practically, or has done so implicitly, or has significantly contributed to that reality, then the State's accountability should not evaporate merely because it forced the plaintiff's hand instead of the defendants. The requisite State responsibility is still there. This is not a new concept: courts have already held that

> [S]tates have an affirmative duty of care to provide medical services to incarcerated prisoners because they have deprived them of the liberty to procure such services themselves, to protect prisoners from violence inflicted by other inmates, and to provide involuntarily committed mental patients with the services necessary to ensure their safety.[254]

However, this doctrine should extend beyond required duties to pris-

[252] *See supra* Section III.A.ii.
[253] *See id.*
[254] *See* Chiang, *supra* note 2, at 690.

oners, to reach all private entities that the State has allowed to access captive populations. Where the State forces citizens into making certain decisions, the requisite responsibility exists. This is simple, direct, but-for causation resulting from a State's intentional choice. For example, without the State imprisoning an individual who was later wronged by a prison contractor, and without the State deciding to contract with that entity, that individual would never have made use of the contractor and would never have been wronged by it. Again, the State has in effect made the private entity its agent because the State has, through its own actions, forced individuals to deal with the entity. Thus, the State is responsible for the harms worked upon those individuals by the entity that it has compelled them to use.

The most obvious example of this would be private contractors working with prisons. As described, the current doctrine amongst the lower courts mandates that only contractors providing "essential" services can be considered state actors; those providing discretionary services are not.[255] However, prison inmates are a captive audience—one kept in place by the State. The State has limited their options, making it such that they can only partake from the restricted number of contractors it selects. The regular market pressures that might keep a private company from blatantly violating the Constitution by discriminating on the basis of race, are non-existent, due to the State's actions. And even if the private entity is not under contract with the prison (say, an inmate is brought to a doctor without a prior contractual agreement), if the prisoner requires the service, and has no say as to who provides it to him, the State is still responsible for constitutional wrongs performed in that process. The prisoner did not choose to see that particular doctor; he was not given an array of options and allowed to weigh the pros and cons and investigate whether or not the actor had a history of, or a propensity towards, constitutional violations. The State has compelled him to see that particular doctor, even if it has not compelled the particular doctor to see him. If accountability within the state action doctrine is to be taken seriously and State responsibility fully conceptualized, then constitutional liability must be present when the State has taken away the victim's choice.

This line of reasoning can be extended beyond realms such as prisons where individuals are physically restricted by the State. State granted monopolies of necessary services present similar concerns.

[255] *See supra* note 165 and accompanying text.

Individuals desiring to live fulfilling lives as participating members of society have no real choice but to partake of these services. Because the State has taken away citizens' ability to choose, State responsibility exists, and constitutional liability must be imposed. Otherwise, the State could funnel practically necessary services into particular actors' hands free from constitutional liability, and individuals would have little choice but to accept that state of affairs. Involuntary referrals by the State of students to private disciplinary schools also fall into this category:

> Although *Rendell-Baker* and other cases make clear that education has never been exclusively a public function, involuntary referral of students coupled with compulsory education laws makes their education at these schools functionally an exclusive function, i.e., they have no choice but to attend. . . . In the alternative school context, the fact of involuntary referral to the schools in question, coupled with compulsory education, creates the equivalent of a nondelegable duty of care.[256]

Again, unfairness—the crux of the Supreme Court's worries in holding private actors accountable under the Constitution—is not a major issue here. Private actors and the State are ostensibly fully aware when they enter into contracts with each other for things such as prison services, or when they grant a (or act pursuant to a grant of a) monopoly, that use of the services in question is practically required.

H. Has the State Granted the Private Entity Authority It Would Not Otherwise Have?

A thorough conception of constitutional accountability would be a pipe dream if the State could grant a private entity the authority that was the but-for cause of the entity's ability to inflict the alleged constitutional violation, without any constitutional liability attaching. But that is the current composition of the state action doctrine; a grant of statutory authority, by itself, does not transform a private actor into

[256] *See id.* at 695.

a state actor.[257] This allows for results that appear manifestly unfair and counter to the core of both accountability and State responsibility, wherein a State could choose to give a private entity the legal authority to cause grievous harm without any actor being held constitutionally liable for the perpetuation of that harm. As Emily Chiang noted,

> Both state action and § 1983 doctrine are explicitly premised in recognition of the unique powers conveyed by state authority. . . . These doctrines recognize that once an individual has been vested with state authority, that authority carries 'a far greater capacity for harm than an individual trespasser exercising no authority other than his own.' Even misuse of that power is considered state action (or action taken under color of state law) because that power was possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law: '[P]ower, once granted, does not disappear like a magic gift when it is wrongfully used.'[258]

Where the State explicitly allows a private entity to act, it gives the entity an especially weighty and damaging power that it could not otherwise come by, and thus it can be fairly said that the State is responsible for the entity's actions in the course of wielding that power. By granting such power to the entity, the State has once more, in effect, made that entity its agent, exercising authority that otherwise would not belong to it but for the State's decision to bestow it. Therefore, where the State has given a private entity the ability to cause the harm in question, state action should be found.[259] This

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[257] *See, e.g.*, Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1925 (2019) ([T]he City's designation is analogous to a government license, a government contract, or a government-granted monopoly, none of which converts a private entity into a state actor—unless the private entity is performing a traditional, exclusive public function."); *Julian*, 218 Cal. Rptr. 3d at 71 ("'[T]he fact that the government has granted a private entity certain powers and privileges under the law,' however, 'is insufficient to make the private entity's conduct state action.'").

[258] Chiang, *supra* note 2, at 692.

[259] This is similar to a test proposed by Emily Chiang, in her article on the state action doctrine and disciplinary schools: "The first question to ask in the context of injuries committed by publicly-funded privately run school employees or officials, is whether those individuals were cloaked in the authority of the State when they

would apply to situations concerning involuntary commitment by private hospitals—the current doctrine surrounding which, as described,[260] leaves much to be desired regarding accountability. Where hospitals have the tremendous power to involuntarily commit people solely because the State has authorized them to do so, constitutional violations committed in the process of wielding such power would be addressed.

This would not unfairly surprise the State or private actors held liable under this factor, and it would increase predictability of the doctrine. Private entities and the State are aware when the entities act pursuant to a grant of legal authority by the State, States make a conscious choice to grant such authority and private actors make a conscious choice to act through it. Establishing this concept as an explicit factor in the state action test would let such entities know for certain that constitutional restrictions apply to their behavior, and it would let them choose in advance whether they want to act pursuant to such statutory grants and accept the attendant liability.

I. Has the State Significantly Encouraged the Public's Use of the Private Actor?

The functional responsibility of the State does not end where it has actually forced, either formally or practically, individuals to make use of a private entity. Responsibility can also be traced to the State where the State has significantly encouraged the public's use of a private actor. For example, if a State, instead of increasing or allotting funding for and effort into public schools, puts that time, energy, and money into promoting the use of private actors instead—through charter schools and school vouchers—then constitutional liability should attach where those schools violate the constitutional rights of their students, even if those students (or, more accurately, their parents) did have an at least nominal choice to attend those schools. As where the State grants power to an entity it would not otherwise have, if the State directs its citizens toward the use of a particular service by a particular provider, it has put the weight of its authority and in-

committed the injuries. In other words, were those individuals capable of inflicting the harms alleged solely by virtue of the power granted them by the State, or were the harms more akin to private harms, like common law tort injuries?" *Id.* at 691–92.

[260] *See supra* Section III.C.

fluence behind that provider, and it is responsible for the harms that come to those who make use of it. This is similar to one theory of respondeat superior, where an employer is liable for the actions of his employee because "the employer has selected and trusted the employee, and so should suffer for his carelessness rather than an innocent stranger who has had no opportunity to protect himself."[261] By encouraging the use of the private entity, the State has backed the entity with its power, creating a sense of safety in the minds of citizens in respect to use of the entity that would not otherwise exit. This is especially true where the State also heavily regulates and funds the entity, creating an even stronger appearance of trust. The State is responsible when the trust it has created leads to constitutional wrongs.

For example, in a recent Tenth Circuit case, *Janny v. Gamez*,[262] a district court dismissed a claim that a private shelter, at which a State officer directed him to stay as a condition of his parole—that allegedly "violated his Fourth Amendment right against false imprisonment, his Fourteenth Amendment right to equal protection, and his First Amendment religious rights"[263]—was a state actor. The court rejected the plaintiff's claims because the State "parole office utilizes the [private entity] to 'rehabilitate and house parolees.'"[264] The court also rejected that because "'[t]he Program offers free bed space and parole offers The Program free labor and referrals,'" the private actor could be considered a state actor, noting that "these allegations are insufficient to demonstrate a symbiotic relationship."[265] The new factor added here would conclude that such a "quid pro quo"[266] arrangement, if proven, is sufficient to find state action. Such a finding acknowledges that the State does not have

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[261] Franklin, *supra* note 218, at 574 n.28. While some have rejected this as a theory of tort liability because careful selection of employees does not exonerate the employer, *see id.*, this does not mean it is not a valid conception of responsibility, as opposed to liability. The question of whether an individual is liable for an act is not the same as that of whether he is responsible.

[262] No. 16-cv-002840, 2018 U.S. Dist. LEXIS 222320, at *21 (D. Colo. Sept. 20, 2018).

[263] *Id.* at *2.

[264] *Id.* at *14.

[265] *Id.* at 14. While the court's decision on state action was later overruled, due to specific collaboration between the entity and the involved State actors regarding the plaintiff specifically, the court did not base this decision off the general arrangement between the State and the entity. *See Janny v. Gamez*, No. 16-cv-02840-RM-SKC, 2019 U.S. Dist. LEXIS 34932, at *7–8 (D. Colo. Mar. 05, 2019).

[266] *Janny*, 2018 U.S. Dist. LEXIS 222320, at *15.

clean hands in such cases, even if specific collaboration regarding the individual's circumstances does not exist. The State, in pushing parolees towards a particular private entity, shares in the responsibility for constitutional violations worked by the private actor that harm those individuals. The private actor, conversely, accepts the benefits of the State's support. In such situations, if accountability and responsibility are viewed seriously and broadly, the State and the private actor must not both be able to shrug their shoulders and say that the Constitution does not apply. Additionally, it is fair to attach liability where the private actor has benefitted from the State's involvement, and where the State has benefitted from the private actor's involvement.[267]

J. Is the Function of the Private Actor a Formal or Practical Prerequisite to a Function That Is Either Traditionally Exclusively Public, Currently State-Run, or Mandated to be Provided by the State?

As detailed, the current state action doctrine acknowledges that services that the State is mandated to provide, or that are traditionally the exclusive prerogative of the State (i.e. a public function), cannot be delegated out to private actors without constitutional liability attaching to those actors' activities.[268] However, the current structure of the doctrine ignores the possibility that necessary prerequisites to these processes, either formal or practical, should be considered state action. This is a mistake, both in its logic and in regard to responsibility and accountability. If the State creates a license, and makes certain procedures integral parts of the path to receive that license, and allows private entities to oversee those procedures, then the procedures (and the actions of those private entities regarding them) are also its responsibility If the State cannot privatize public and/or required functions without transferring constitutional liability, then it should not be allowed to privatize—either affirmatively, or

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[267] This is, in fact, one of the main points of the nexus test. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 724 (1961) ("Addition of all these activities, obligations and responsibilities of the Authority, *the benefits mutually conferred*, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn.") (emphasis added).

[268] *See supra* Sections II.A.i.a, III.B.

through inaction that allows private actors to fill in the gaps left behind—necessary prerequisites to those functions, without constitutional liability also attaching. Otherwise, the entire point of connecting liability to actors who perform those public functions that have prerequisites would be defeated. If the goal is to stomp out constitutional violations in processes traditionally or actually run by the State, then that goal cannot be accomplished if violations are allowed to occur and infect such processes via their prerequisites. Thus, under this new rule, processes run by private actors, but that are functional or formal prerequisite to public functions under the current doctrine—such as internal political party primaries (practical prerequisite to general elections) or testing for professional or trade licenses (formal prerequisite to receive a license)—would be considered state action.

Once again, this factor provides a clear rule that would increase predictability and accountability while not being manifestly unfair to private actors. Whether or not one's service functions as a formal prerequisite to a public or required function is as obvious as whether or not one performs such a function, and thus the guidelines for the testing and licensing entities are clear. The idea of practical prerequisites may be a bit more subjective than whether one's service is a formal prerequisite, but past precedent that has determined what functions are considered public or required can serve as a guide to set the boundaries of the rule.

K. Are There No Other Legal Mechanisms by Which to Hold Any Actor Accountable for What Would Otherwise Be a Constitutional Violation?

While, in many cases, other forms of law will apply to a private actor's activity that a plaintiff seeks to classify as state action, this is not always the case.[269] If it is not, then the need for a finding of state action becomes greater. This factor is a dependent one that functions as additional support for finding state action in borderline cases. If accountability is to be prioritized, then the lack of other options through which those harmed by constitutional violations can hold the perpetrators liable is an important factor to consider when deciding upon state action. Thus, if the question of whether or not the entity can be considered a state actor is a close one, then the fact

[269] *See* Chemerinsky, *supra* note 2, at 509 (collecting cases).

that no state law, federal law, common law, state constitution, or other significant sanction applies to the private entity's actions should weigh in favor of finding state action. While this has thus far not been an explicit consideration by the courts, it is not an unprecedented mode of analysis. For example, courts consider in the process of asking whether a *Bivens* remedy should be granted whether or not the plaintiff has an alternative remedy available to them.[270] However, courts should be careful not to let the existence of other forms of liability for an actor work against a finding of state action where it otherwise would be found.[271] If the action can fairly be said to be that of the State, the existence of other remedies does not detract from that conclusion, and there is no evil in providing multiple paths to liability. This factor, too, causes no unfairness to the State—if the State would like to create a different remedy, it would be fully able to do so.

IV. CONCLUSION

Despite many years of pointed criticisms falling upon deaf ears, the state action doctrine is not without hope when it comes to its accountability problem. The Supreme Court provided the seeds for a robust conception of private accountability when it mandated that actions fairly attributable to the State trigger constitutionally liability,

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[270] *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1863 (2017) ("[W]hen alternative methods of relief are available, a Bivens remedy usually is not.").

[271] It is true that in *Bivens* cases, a finding that other remedies are available works against a claim for a new *Bivens* remedy.

> In 30 years of Bivens jurisprudence, the Court has extended its holding only twice, to provide an otherwise nonexistent cause of action against individual officers alleged to have acted unconstitutionally, . . . and to provide a cause of action for a plaintiff who *lacked any alternative remedy for harms* caused by an individual officer's unconstitutional conduct. . . . Where such circumstances are not present, the Court has consistently rejected invitations to extend Bivens.

See, e.g., Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 61 (2001) (emphasis added). However, that concern arises because *Bivens* is a judicially created remedy that the court is reluctant to extend. *Cf. id.* at 68 ("Although the plaintiff had no opportunity to fully remedy the constitutional violation, we held that administrative review mechanisms crafted by Congress provided meaningful redress and thereby foreclosed the need to fashion a new, *judicially crafted* cause of action.") (emphasis added). Neither the rights protected by the Constitution nor § 1983 are such remedies, and thus that concern does not exist.

even when nominally private entities perform them. This notion is far broader than the Court, and lower courts have thus far interpreted it to be. It provides a clear path towards closing the accountability gap with regard to increased privatization and delegation. State responsibility does not begin and end with the relatively few situations identified by the Court. It can stretch to encompass the varied conditions in which the State acts, or deliberately fails to act, in ways that empower or even encourage private entities to violate citizens' constitutional rights egregiously.

Such a solution is desperately needed. The doctrine as it stands provides too many escape routes—too many granular and unnecessary distinctions and justifications that allow private entities (and the governments that enable them) to shirk constitutional responsibility far too easily and too often. Labor unions may be banned from speaking to workers living in migrant camps;[272] companies administering tests necessary for professional licenses may discriminate based on disability;[273] doctors may be "deliberately indifferent to [the] serious medical needs" of State prisoners brought to their care;[274] educational institutions that are "[f]or all practical purposes . . . public high school[s] with private status" may fire employees for attempting to organize a union[275]—all without a constitutional remedy or any remedy at all. The current doctrine provides states with a compelling incentive to shift all possible responsibilities to private actors, rather than an overall reduction in constitutional violations. The state action doctrine's application to private actors is explicitly premised on avoiding this possibility; the doctrine can and should shift to do so. The evolution of modern society should not be allowed to make empty the promises of our Constitution.

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[272] *See* Asociacion de Trabajadores Agricolas de Puerto Rico v. Green Giant Co., 518 F.2d 130, 138–39 (3d Cir. 1975).
[273] *See* Boggi v. Med. Rev, & Accrediting Council, 415 F. App'x 411, 414 (3d Cir. 2011).
[274] Johnson v. Fein, No. 18-CV-0096, 2019 U.S. Dist. LEXIS 50516, at *1 (N.D.N.Y. Mar. 25, 2019).
[275] Dawkins v. Biondi Educ. Ctr., No. 13-CV-2366, 2017 U.S. Dist. LEXIS 8878, at *4 (S.D.N.Y. Jan. 20, 2017).