COMMENT

IT'S TIME TO TRY SOMETHING NEW: WHY OLD PRECEDENT DOES NOT SUIT CHARTER SCHOOLS IN THE SEARCH FOR STATE ACTOR STATUS

INTRODUCTION

Today, education reform continues to be at the forefront of issues important to the American public. Although education reform has taken various forms over the years, one of the more noteworthy developments has been the creation of charter schools through state legislation.[1] Charter schools emerged in 1991 when Minnesota enacted the first charter school statute, and, since then, the charter school movement has taken off around the country.[2] Twenty years later, forty-two states and the District of Columbia have enacted charter school legislation.[3] Nationwide there are more than 4700 charter schools, with a total enrollment of over 1.4 million children.[4]

Recently, the federal government has jumped on the charter school movement bandwagon. The Obama Administration has demonstrated its support for charter schools by allocating competitive federal funds to states that have fostered charter school growth.[5] This federal support, combined with the movement's expansion over the past two decades, makes it likely that charter

1. Julie F. Mead, *Devilish Details: Exploring Features of Charter School Statutes That Blur the Public/Private Distinction*, 40 HARV. J. ON LEGIS. 349, 349 (2003).

2. *Id.* at 349–50. *See generally* MINN. STAT. ANN. § 124D.10 (West 2008).

3. *Charter School Law*, THE CENTER FOR EDUC. REFORM, http://edreform.com/issues/choice-charter-schools/laws-legislation (last visited Oct. 27, 2011).

4. *Multiple Choice: Charter School Performance in 16 States,* CENTER FOR RESEARCH ON EDUC. OUTCOMES AT STANFORD UNIV. 6 (June 2009), *http://credo.stanford.edu/reports/MULTIPLE_CHOICE_EXECUTIVE%20SUMMARY.pdf*.

5. *See* American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5, § 703, 123 Stat. 115,181–84 (2009); *see also* Race to the Top Fund, 74 Fed. Reg. 59,688 – 59,691 (Nov. 18, 2009) (implementing the educational reform goals of the ARRA, including funding to charter schools).

schools will continue to flourish across the country over the next twenty years.

But today, even after twenty years of expansion, the question of how to properly classify charter schools remains—are charter schools public or private schools? Although the answer to this question might seem to make little difference to the millions of students educated at charter schools, this classification becomes extremely important when it comes to the legal rights of these students and their teachers.[6] Specifically, a teacher or student seeking to enforce her constitutional rights against a charter school must allege that the charter school's actions can be "fairly attributable to the state."[7] Unfortunately, federal courts have yet to reach a consensus on whether charter schools are state actors or private entities.

This Comment will explore the Supreme Court's state action doctrine and how it has been applied to charter schools. Although courts may lean toward deeming charter schools as state actors, this holding has been called into question by a recent circuit court opinion.[8] This Comment discusses precedent relied on by some courts and analyzes whether courts should contemplate a different approach when considering state actor status.

Part I begins with the background and history of charter schools, discussing the charter-granting bodies, public funding, and governmental regulations of charter schools.[9] Part II focuses on the Supreme Court's state action doctrine, exploring the various tests the Supreme Court has employed in its state action jurisprudence.[10] Part III identifies ways the state action doctrine has been applied to educational institutions, in both the publicly funded private school and charter school contexts.[11] Finally, Part IV identifies why precedent cases in the publicly funded private school context are unpersuasive in the charter school context.[12] Part IV also suggests that a less obvious, but potentially more fitting, comparison for charter schools may be privately owned and operated prisons, and concludes that an application of the public function test leads to a finding of state action.[13]

6. *See infra* Part III.

7. Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982) (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)).

8. *See generally* Caviness v. Horizon Cmty. Learning Ctr., 590 F.3d 806 (9th Cir. 2010) (finding a former teacher's allegations insufficient to raise a reasonable inference that a charter school was a state actor).

9. *See* discussion *infra* Part I.

10. *See* discussion *infra* Part II.

11. *See* discussion *infra* Part III.

12. *See* discussion *infra* Part IV.A.

13. *See* discussion *infra* Part IV.B.

I. THE CLASSIFICATION OF CHARTER SCHOOLS

A charter school is by definition a statutorily created public school run by a private party.[14] Specifically, charter schools are publicly funded schools under the oversight of private management companies.[15] Traditionally, public schools have been defined as "school[s] established under state law, regulated by the local state authorities in the various political subdivisions, [and] funded and maintained by public taxation"; while private schools have been defined as "school[s] maintained by private individuals, religious organizations, or corporations."[16] Thus, charter schools contain elements of both public and private schools and may be classified as "quasi-public" or "hybrid public schools."[17]

The original idea behind the creation of charter schools was to reform traditional public schools by holding the individual schools responsible for educational achievement.[18] To reach this goal, charter schools must be exempt from many of the governmental and bureaucratic controls that plague traditional public schools.[19] Indeed, education reform would result from parents' ability to choose between schools and the resulting competition among schools.[20] This founding theory remains a major influence on the expanding charter school movement across the country.

The creation and requirements of charter schools vary by state. Although each state's legislation may differ in certain respects, there are a few characteristics that are present across state lines. Specifically, charter schools operate through contracts with authorizing bodies, receive public funding, and are subject to various education regulations.[21] Taken together, these characteristics blur the line between public and private education.

A. Charter-Granting Bodies

As is evident from their name, charter schools are typically created when a governing body grants a charter to an independent

14. LORI A. MULLHOLLAND & LOUANN A. BIERLEIN, UNDERSTANDING CHARTER SCHOOLS 7–8 (Phi Delta Kappa Educ. Found. ed., 1995).

15. *See generally* Stephen D. Sugarman & Emlei M. Kuboyama, *Approving Charter Schools: The Gatekeeper Function*, 53 ADMIN. L. REV. 869 (2001).

16. BLACK'S LAW DICTIONARY 1372 (8th ed. 2009).

17. Mead, *supra* note 1, at 352; *see also* THOMAS L. GOOD & JENNIFER S. BRADEN, THE GREAT SCHOOL DEBATE: CHOICE, VOUCHERS, AND CHARTERS 120 (2000); SANDRA VERGARI, THE CHARTER SCHOOL LANDSCAPE 2 (Sandra Vergari ed., 2002).

18. JOE NATHAN, CHARTER SCHOOLS: CREATING HOPE AND OPPORTUNITY FOR AMERICAN EDUCATION 1 (1996).

19. *Id.*

20. *Id.*

21. Sugarman & Kuboyama, *supra* note 15, at 917–24.

school operator.[22] Although state law determines which bodies are allowed to grant charters, generally public entities provide such authorization.[23]

The majority of states have permitted local school boards to grant charters.[24] The rationale is that local school boards have the administrative and educational expertise to best serve the community.[25] Additionally, various states have looked to existing and newly created agencies to sponsor charters, either exclusively or in conjunction with the local school boards.[26] Still, some states have chosen higher education institutions as the authorizing bodies for charter schools.[27] Here, the belief is that post-secondary institutions, especially those with education programs, have the required expertise to grant charters.[28]

Charters are granted for short periods of time, typically between three and five years.[29] Once granted, a charter functions as a contract that designates the obligations of the school and expectations of the authorizing body.[30] Thus, the charter may detail the particular mission of the school, the curriculum, and the factors determining whether a charter should be extended.[31]

22. James Forman, Jr., *Do Charter Schools Threaten Public Education? Emerging Evidence from Fifteen Years of a Quasi-Market for Schooling*, 2007 U. ILL. L. REV. 839, 843.

23. Sugarman & Kuboyama, *supra* note 15, at 880.

24. *Id.* For a more detailed description of chartering authority in the states, see Eileen M. O'Brien & Chuck Dervarics, *Charter Schools: Finding Out the Facts*, CENTER FOR PUB. EDUC. (Mar. 24, 2010), http://www.centerforpubliceducation.org/Main-Menu/Organizing-a-school/Charter-schools-Finding-out-the-facts-At-a-glance/Charter-schools-Finding-out-the-facts.html.

25. Sugarman & Kuboyama, *supra* note 15, at 880. In seven states the sole responsibility of sponsoring charters rests with the local school board. O'Brien & Dervarics, *supra* note 24, at tbl.1. These states include Illinois, Maryland, Oregon, Pennsylvania, Tennessee, Virginia, and Wyoming. *Id.*

26. Sugarman & Kuboyama, *supra* note 15, at 881. For example, in ten states the State Board of Education approves charters in conjunction with the local school board, while three states assign the entire responsibility to the State Board of Education. Moreover, the District of Columbia and Hawaii have created charter boards to make charter approval decisions. O'Brien & Dervarics, *supra* note 24, at tbl.1.

27. Sugarman & Kuboyama, *supra* note 15, at 880, 882. For example states including Michigan, Wisconsin, and New York have assigned authorizing authority to public universities or community colleges. *Id.* at 882.

28. *Id.*

29. O'Brien & Dervarics, *supra* note 24.

30. Julia L. Davis, *Contracts, Control and Charter Schools: The Success of Charter Schools Depends on Stronger Nonprofit Board Oversight to Preserve Independence and Prevent Domination by For-Profit Management Companies*, 2011 BYU EDUC. & L.J. 1, 6.

31. *Id.*

B. Funding

Charter schools can be characterized as "public schools of choice."[32] This is because the amount of public funding allocated to charter schools depends on the number of students that attend.[33] Thus, students do not pay tuition to attend a charter school, making charter schools an alternative to the local public schools. Indeed, charter schools that fail to attract enough students to cover their costs must close.[34]

Moreover, most state statutes explicitly prohibit charter schools from charging tuition.[35] The few states that do allow tuition to be charged do so only in the limited situations in which a traditional public school would also be permitted to charge tuition.[36] Federal law, under the No Child Left Behind legislation, explicitly defines a charter school as a school that "does not charge tuition."[37] To even qualify for grants or credits under the legislation, a charter school is prohibited from requiring students to pay tuition to attend.[38]

Recently, the federal government has shown its support for charter schools in the American Recovery and Reinvestment Act of 2009.[39] This legislation provided for 4.35 billion dollars in competitive grants to be allocated to state education agencies from the Department of Education's Race to the Top Fund.[40] Grants are awarded to states based on a scoring system which allocates points for a variety of educational reform goals. When applying for these grants, states that encourage charter school growth may receive up to forty points, out of a total of five hundred.[41]

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32. Robin J. Lake, *Can Charter Schools Become a Crossover Hit?*, *in* HOPES, FEARS, & REALITY: A BALANCED LOOK AT AMERICAN CHARTER SCHOOLS IN 2009 at vii, vii (Robin J. Lake ed., Univ. of Wash. Ctr. on Reinventing Pub. Educ. 5th ed. 2010), *available at* http://www.crpe.org/cs/crpe/download/csr_files/pub_ncsrp_hfr09_jan10.pdf.

33. *Id.*

34. *Id.*

35. Mead, *supra* note 1, at 367.

36. *Id.* For example, tuition may be charged where the student lives outside of the particular school district. *Id.*

37. *Id.* (quoting No Child Left Behind Act of 2001, 20 U.S.C. § 7221i(F) (2006)).

38. Mead, *supra* note 1, at 367. "The credit enhancement provision of the No Child Left Behind Act provides federal funds to be used as collateral to facilitate the ability of the ability of charter schools to borrow funds 'to address the cost of acquiring, constructing, and renovating facilities.'" *Id.* at 367 n.155 (quoting 20 U.S.C. § 7223 (2002)).

39. Pub. L. No. 111-5, 123 Stat. 115 (2009); O'Brien & Dervarics, *supra* note 24.

40. 74 Fed. Reg. 59,688 (Nov. 18, 2009); O'Brien & Dervarics, *supra* note 24.

41. O'Brien & Dervarics, *supra* note 24. Under the program the government will compare per-student funding at charter schools with traditional public schools and look for the existence of charter school legislation or the removal of caps preventing charter schools from entering the state. *Id.*

C. Regulation

The concept underlying charter schools is to free the operators from some of the bureaucratic regulations that constrain traditional public schools.[42] For example, charter schools are not subject to the same collective bargaining rights for teachers and thus have more control over employment decisions.[43] Charter schools are also in charge of their own budget, class size, school-day length, and academic calendar.[44] In exchange for such freedom, charter schools must meet the student achievement goals detailed in their charters.[45]

Still, charter schools are not free from all governmental regulation. Generally, state law requires charter schools to be operated by a nonprofit entity, although recently a few states have provided for legislation permitting for-profit operators.[46] Additionally, charter schools are typically prohibited from charging tuition or administering selective admission practices.[47] Charter schools are also subject to federal regulation. Under the No Child Left Behind legislation, charter schools must submit to a yearly progress review.[48] Moreover, charter schools that receive Title I funding must meet federal accountability guidelines.[49] Charter schools are further prohibited from discriminating on the basis of disability, race, color, gender, national origin, religion, or ancestry.[50]

II. GETTING INTO COURT: HOW PRIVATE LITIGANTS ENCOUNTER STATE ACTION ISSUES

A. Color of State Law

Private litigants may allege deprivations of their constitutionally protected rights under 42 U.S.C. § 1983.[51] In order for an individual to make a claim under Section 1983, she must

42. *See* O'Brien & Dervarics, *supra* note 24; *see also* Forman, *supra* note 22, at 843.

43. *See* O'Brien & Dervarics, *supra* note 24.

44. *Id.*

45. Forman, *supra* note 22, at 843.

46. *Id*. However, nothing usually prevents nonprofit operators from partnering with for-profit companies to manage the schools. *Id.; see also* Davis, *supra* note 30, at 8.

47. Sugarman & Kuboyama, *supra* note 15, at 873.

48. 20 U.S.C. § 7325 (2006); O'Brien & Dervarics, *supra* note 24.

49. *Id.*

50. *Id.*

51. 42 U.S.C. § 1983 (2006). The present day Section 1983 was originally enacted as Section 1 of the Civil Rights Act of 1871 for the purpose of enforcing the Fourteenth Amendment. Section 1983 provides a cause of action for an individual whose federally protected rights were violated by state or local officials. MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 1.03 (Aspen Publishers 2011).

allege she was deprived of a right secured to her by the Constitution and that such deprivation was committed under the color of state law.[52] According to the Supreme Court, "if a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, the conduct also constitutes action 'under color of state law' for Section 1983 purposes."[53] Thus, courts often skip any independent color of state law analysis and proceed directly to the question of state action.[54] Accordingly, understanding the state actor analysis is essential to the analysis of a Section 1983 claim.

B. State Action

The Supreme Court first developed the state action doctrine in 1883 while hearing *The Civil Rights Cases*.[55] In this set of five consolidated cases, the Supreme Court considered the constitutionality of the Civil Rights Act of 1875.[56] The Court ruled that the challenged provisions of the Civil Rights Act were unconstitutional and held that the Fourteenth Amendment applied only to state actors, not private parties.[57] Thus, when a party challenges the actions of another under the Fourteenth Amendment, a court must first determine whether the challenged actions constitute state action.[58]

After the initial development of the state action doctrine, it was the role of the courts to determine the line between purely private activity and state action.[59] Drawing this line has been one of the most "troublesome areas of civil rights litigation,"[60] and there is no "precise formula" that the Supreme Court will apply.[61] Therefore, each case's particular facts and circumstances must be evaluated.[62] Still, over the years, the Supreme Court has employed five various tests to help guide its analysis. The five tests include (1) the public function test; (2) the symbiotic relationship test; (3) the close nexus test; (4) the joint participation test; and (5) the pervasive

52. Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49–50 (1999).

53. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 296 n.2 (2001) (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 935 (1982)).

54. SCHWARTZ, *supra* note 51, § 5.10.

55. Jason Lance Wren, *Charter Schools: Public or Private? An Application of the Fourteenth Amendment's State Action Doctrine to These Innovative Schools*, 19 REV. LITIG. 135, 151 (2000) (citing The Civil Rights Cases, 109 U.S. 3 (1883)).

56. The Civil Rights Cases, 109 U.S. 3, 4 (1883).

57. *Id.* at 11.

58. *See id.* at 11–12.

59. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001).

60. SCHWARTZ, *supra* note 51, § 5.12 (quoting Int'l Soc'y for Krishna Consciousness, Inc. v. Air Canada, 727 F.2d 253, 255 (2d Cir. 1984)).

61. *Id.* (quoting Burton v. Wilmington Park Auth., 365 U.S. 715, 722 (1961)).

62. *Id.*

entwinement test.[63] Each of these tests will be discussed in turn below.

Before discussing the various tests employed by courts, it is important to note some principles that have emerged from the case law.[64] First, a private entity may be considered a state actor for some purposes but not for others.[65] As a result, courts consider whether the party's particular conduct qualifies as state action, not whether the particular party is itself a state actor.[66] Second, each court's holding must be considered in light of the judicial viewpoints employed during that particular era.[67] For example, the Warren Court was characterized by an expansive view of the federal government and state action, while the later Burger and Rehnquist Courts attempted to narrow the reach of federal power through the state action doctrine.[68] The current Court has continued to apply the state action doctrine in a restrictive and stringent manner.[69]

1. The Public Function Test

One test established by the Supreme Court is commonly referred to as the "public function test."[70] Under the public function test, state action is found where the state has delegated to the private sector functions that have historically and traditionally been governmental functions.[71] This test is founded on the theory that the government cannot avoid its constitutional obligations by delegating its functions to the private sector.[72] Rather, if the government is going to delegate particular functions, it must also delegate the accompanying constitutional obligations.[73]

The Supreme Court has since narrowed the public function test by adding the requirement that any delegated function must not only be historically and traditionally a function of the state, but must also be "the exclusive prerogative of the State."[74] Applying this requirement demonstrates that providing important functions or public services is alone insufficient to meet the public function

63. *Id.*
64. *Id.*
65. *Id.* (citing Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968)); *see also* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 171–72 (1972) (finding that a private club granted a liquor license by state liquor authority was not considered to be acting under state action).
66. SCHWARTZ, *supra* note 51, § 5.12.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* § 5.14.
71. *Id.* ("We have, of course, found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State.") (citing Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974)).
72. *Id.*
73. *Id.*
74. *Id.* (quoting *Jackson*, 419 U.S. at 352).

test.[75] Because few functions can meet the "exclusivity" requirement, the narrowed version of the public function test has proven extremely difficult to satisfy.[76]

2. The Symbiotic Relationship Test

In its 1961 decision, *Burton v. Wilmington Parking Authority*,[77] the Supreme Court established a test known as the "symbiotic relationship test."[78] Although the Court never coined the phrase "symbiotic relationship," it held that the state municipal parking garage had "so far insinuated itself into a position of interdependence" with a privately owned restaurant by leasing part of its lot to the restaurant.[79] Indeed, the Court reasoned that any alleged constitutional violations "[could not] be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment."[80] However, in the 1972 case, *Moose Lodge No. 107 v. Irvis*, the Supreme Court failed to find state action on the basis of a symbiotic relationship where a private party was issued a liquor license by the state.[81] Rather, the Court distinguished *Burton* stating, "[h]ere there is nothing approaching the symbiotic relationship between lessor and lessee that was present in *Burton*."[82]

Although the symbiotic relationship test has never been overruled, it has fallen out of favor with the Supreme Court over the

75. *Id; see, e.g.*, Blum v. Yaretsky, 457 U.S. 991, 1011 (1982) (holding that the provision of nursing home care did not meet the public function test); Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (holding that the education of maladjusted children did not meet the public function test); *Jackson*, 419 U.S. at 352–53 (holding that furnishing essential utility services did not meet the public function test).

76. SCHWARTZ, *supra* note 51, § 5.14; *see, e.g.*, Sybalski v. Indep. Grp. Home Living Program, Inc., 546 F.3d 255, 260 (2d Cir. 2008) (holding that the care of the mentally disabled was not an exclusive state function); Logiodice v. Trs. of Me. Cent. Inst., 296 F.3d 22, 26–27 (1st Cir. 2002) (holding that private schools did not provide an exclusive state function); United Auto Workers v. Gaston Festivals, Inc., 43 F.3d 902, 907–08 (4th Cir. 1995) (holding that arranging fairs and festivals was not an exclusive governmental function). *But see* Pollard v. Geo Grp., Inc., 607 F.3d 583, 592 (9th Cir. 2010) (holding that a private group that provides medical services for incarcerated individuals was a state actor because the incarceration of convicted individuals is an exclusive state function); Janusaitis v. Middlebury Volunteer Fire Dep't, 607 F.2d 17, 24-25 (2d Cir. 1979) (holding that volunteer fire department was a state actor because fire fighting in Connecticut was an exclusive governmental function).

77. 365 U.S. 715 (1961).

78. SCHWARTZ, *supra* note 51, § 5.13.

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

80. *Id.*

81. 407 U.S. 163, 177 (1972).

82. *Id.* at 175.

years.[83] For example, the Supreme Court's analysis in *Jackson v. Metropolitan Edison Co.*[84] demonstrates the narrow interpretation of the rule now employed by the Court.[85] The Court held that a utility company's termination of services did not amount to state action even though the utility was highly regulated, entitled to partial monopoly status, and provided an essential public service.[86] Subsequent lower courts have also adhered to the narrow interpretation of the symbiotic relationship test, rarely finding state action.[87] Accordingly, the symbiotic relationship test remains severely restricted and an unpersuasive tool for a litigant attempting to establish state action.

3. The Close Nexus Test

The "close nexus test" employed by the Supreme Court seeks to determine "whether there is a sufficiently *close nexus* between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[88] In defining the parameters of the test, the Court has established that "[m]ere approval of or acquiescence in the initiatives of a private party" is not sufficient to meet the close nexus test.[89] Furthermore, neither government licensing and regulation nor the provision of governmental benefits satisfy the close nexus test.[90]

The close nexus test is not easily satisfied.[91] Ultimately, the test is a fact-specific analysis under which a court will only find state action where the state has "ordered, coerced, or significantly encouraged the specific conduct under attack."[92]

4. The Joint Participation Test

The Supreme Court has found state action where private parties act jointly or in concert with state officials.[93] Thus, the

83. SCHWARTZ, *supra* note 51, § 5.13. For an explanation of the Supreme Court's analysis of the symbiotic relationship test in *Rendell-Baker*, see discussion *infra* Part III.A.1.

84. 419 U.S. 345 (1974).

85. SCHWARTZ, *supra* note 51, § 5.13.

86. *Jackson*, 419 U.S. at 358.

87. SCHWARTZ, *supra* note 51, § 5.13.

88. *Jackson*, 419 U.S. at 351 (emphasis added).

89. Blum v. Yaretsky, 457 U.S. 991, 1004–05 (1982).

90. *See* Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982); *Jackson*, 419 U.S. at 350.

91. SCHWARTZ, *supra* note 51, § 5.15.

92. *Id.* "[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum*, 457 U.S. at 1004.

93. SCHWARTZ, *supra* note 51, § 5.16; *see* Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970).

"joint participation test" is met when the parties conspire to violate the plaintiff's constitutional rights.[94] Furthermore, the test is also met where a private party cooperates with the state in a procedure that violates constitutional rights.[95] Cooperation implicating state action exists where the state creates procedures and a private party invokes the help of state officials to take advantage of those procedures.[96]

As previously noted, the modern Supreme Court has limited the state action doctrine by applying restrictive versions of the public function, symbiotic relationship, and close nexus tests.[97] Thus, litigants often rely on the joint participation doctrine when attempting to allege constitutional deprivations that constituted state action.[98] However, the joint participation requirement is not easily met because the lower courts require a plaintiff to plead more than a conclusory allegation of joint action.[99] Rather, "the pleadings must specifically present facts tending to show agreement and concerted action."[100]

5. Pervasive Entwinement Test

In the 2001 decision *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, the Supreme Court established yet another test for resolving the state action issue.[101] In *Brentwood Academy*, the Court held that a statewide interscholastic athletic association's enforcement of a regulatory prohibition constituted state action.[102] The Court found a "pervasive entwinement" between state officials and the association because almost all of Tennessee's public schools were members of the association, most of the association's members were public school officials, the majority of the association's funding came from the state, and the association governed intercollegiate athletics in lieu of the state's Board of Education.[103]

The pervasive entwinement test can be viewed as the Court's attempt to expand the state action doctrine outside the scope of the more restrictive state function, close nexus, and joint participation doctrines. In *Brentwood Academy*, the Court did not rely on coercive acts or joint action by the state, nor did the Court claim the

94. SCHWARTZ, *supra* note 51, § 5.16.
95. *Id.*
96. *Id.*; *see* Lugar v. Edmondson Oil Co., 457 U.S. 922, 942 (1982).
97. SCHWARTZ, *supra* note 51, § 5.16; *see* discussion *infra* Part III.B.1–3.
98. SCHWARTZ, *supra* note 51, § 5.16.
99. *Id.* (citing Fieger v. Cox, 524 F.3d 770, 776 (6th Cir. 2008)).
100. Sooner Prods. Co., v. McBride, 708 F.2d 510, 512 (10th Cir. 1983).
101. 531 U.S. 288, 291 (2001).
102. *Id.*
103. *Id.*

association was performing an exclusive state function.[104] Rather, the Court relied on the appearance of state action through the association's sufficient contacts with state officials, which the Court referred to as entwinement.[105] Compared to the other state action doctrines, the entwinement test examines the totality of the circumstances.[106]

III. STATE ACTION APPLIED TO EDUCATIONAL INSTITUTIONS

When courts have faced state actor issues in cases involving various types of educational institutions, they have attempted to apply the aforementioned state actor tests. However, courts' application of the tests in the education realm has been less than consistent. That is, courts employ various tests and approaches and have ultimately come to some incongruous conclusions. This Part discusses the details of various courts' application of the state action doctrine to private schools receiving public funding as well as charter schools.

A. State Action Applied to Private Schools Receiving Federal Funding

Before courts began addressing state action issues in cases involving charter schools, courts were faced with an analogous issue when constitutional violations were asserted against private education institutions receiving public funding. Not surprisingly, divergent court approaches have effectively created an inconsistent body of case law on the issue.

1. The Supreme Court: Rendell-Baker v. Kohn

In 1982, the Supreme Court granted certiorari in *Rendell-Baker v. Kohn*[107] to decide whether "a private school, whose income is derived primarily from public sources and which is regulated by public authorities, acted under color of state law when it discharged certain employees."[108] The underlying cases involved claims by employees of New Perspectives School against the director of the school, Kohn. The employees claimed Kohn wrongly discharged

104. Michael A. Culpepper, *A Matter of Normative Judgment:* Brentwood *and the Emergence of the "Pervasive Entwinement" Test*, 35 U. RICH. L. REV. 1163, 1184 (2002).

105. *Id.*

106. Logiodice v. Trs. of Me. Cent. Inst., 296 F.3d 22, 35 (1st Cir. 2002) (Lipez, J. dissenting); Megan M. Cooper, Case Note, *Dusting Off the Old Play Book: How the Supreme Court Disregarded the* Blum *Trilogy, Returned to Theories of the Past, and Found State Action Through Entwinement in* Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 35 CREIGHTON L. REV. 913, 985–86 (2002).

107. 457 U.S. 830 (1982).

108. *Id.* at 831.

them, in violation of their First and Fourteenth Amendment rights, for speaking out against school policy.[109]

New Perspectives School was a nonprofit private institution operated by a board of directors, none of whom were public officials.[110] The school specialized in educating maladjusted teenagers, with a majority of the students being referred to the school by city school committees or the Drug Rehabilitation Division of the Massachusetts Department of Mental Health.[111] During the years in question, the school's budget consisted of between ninety and ninety-nine percent public funds, and none of the school's students paid tuition.[112] Additionally, New Perspectives School's public funding was conditioned upon compliance with a variety of regulations.[113]

In 1980, the District Court for the District of Massachusetts granted summary judgment to the defendant in the lawsuit brought by plaintiff Rendell-Baker, holding that New Perspectives School was not a state actor.[114] However, nine days earlier a different judge in the District of Massachusetts reached the opposite conclusion in a lawsuit brought by five other teachers at New Perspectives School.[115] The Court of Appeals for the First Circuit consolidated the two actions and held that, although the school was regulated by the state, it was not dominated by the state and therefore its actions in dismissing the various plaintiffs did not constitute state action.[116]

In affirming the First Circuit's opinion, the Supreme Court addressed four factors the petitioners claimed required the Court to find that the school's decision to discharge them amounted to state action.[117] First, the Court reasoned that even though the state subsidized the students' tuition, "the school's receipt of public funds does not make the discharge decisions acts of the state."[118] Although the lower court found public funding to be a strong factor supporting a claim of state action, the Supreme Court relied on its holding in *Blum v. Yaretsky*,[119] where the Court held "that the similar dependence of nursing homes did not make the acts of the physicians and nursing home administrators acts of the

109. *Id.* at 833–35.
110. *Id.* at 832.
111. *Id.*
112. *Id.*
113. *Id.* at 833.
114. Rendell-Baker v. Kohn, 488 F. Supp. 764, 767 (D. Mass. 1980), *aff'd* 641 F.2d 14 (1st Cir. 1981), *aff'd* 457 U.S. 830 (1982).
115. Rendell-Baker v. Kohn, 457 U.S. 830, 836 (1982).
116. Rendell-Baker v. Kohn, 641 F.2d 14, 28 (1st Cir. 1981), *aff'd* 457 U.S. 830 (1982).
117. *Rendell-Baker*, 457 U.S. at 840–43.
118. *Id.* at 840.
119. 457 U.S. 991 (1982).

State . . . ."[120] Furthermore, the Court analogized to a public defender paid by the state whose "relationship with her client was 'identical to that existing between any other lawyer and client.'"[121] The Court stated that public funding of student tuition did not change the relationship between the school and its employees.[122]

Second, the Court reasoned that although the school was heavily regulated, "the decisions to discharge the petitioners were not compelled or even influenced by any state regulation."[123] Again, the Court based its holding on *Blum*, where even extensive regulation did not make a private party's actions state action.[124] Third, the Court reasoned that the fact that the school was providing an important state function was insufficient to find state action; rather, the issue was "whether the function performed has been 'traditionally the *exclusive* prerogative of the state.'"[125] While the education of "maladjusted high school students" was undoubtedly a public function, the legislative policy to provide for the education does not make it an exclusive state function.[126] Lastly, the Court reasoned that there was no "symbiotic relationship" between the school and the state.[127] Instead, "the school's fiscal relationship with the State [was] not different from that of many contractors performing services for the government."[128]

2. The Tenth Circuit: Milonas v. Williams

In a subsequent 1982 decision, *Milonas v. Williams*, the Tenth Circuit held that a private boys school's treatment of its students was sufficiently connected to the state to be characterized as state action.[129] The plaintiffs alleged that the Provo Canyon School had allowed their students to be subjected to "cruel and unusual punishment, antitherapeutic and inhumane treatment, and denial of due process of law."[130] The Provo Canyon School was a privately owned and operated school that specialized in educating teenage boys who required treatment in a restricted environment.[131] Many of the students at the school were placed there by the local school districts, with state and federal agencies funding their tuition.[132]

120. *Rendell-Baker*, 457 U.S. at 840.
121. *Id.* at 841 (quoting Polk Cnty. v. Dodson, 454 U.S. 312, 318 (1981)).
122. *Id.*
123. *Id.*
124. *Id.* (citing *Blum*, 457 U.S. at 1011).
125. *Id.* at 842 (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (1974)).
126. *Id.*
127. *Id.* (citing Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961)).
128. *Id.* at 843.
129. 691 F.2d 931, 939–40 (10th Cir. 1982).
130. *Id.* at 934.
131. *Id.* at 935.
132. *Id.* at 936.

In holding that the school's treatment of its students amounted to state action, the Tenth Circuit distinguished the case from the Supreme Court's holding in *Rendell-Baker*.[133] Although the Tenth Circuit found that the Provo Canyon School was quite similar to the defendant school in *Rendell-Baker*, the court noted that "[t]he plaintiffs in the present case [were] not employees, but students" and therefore *Rendell-Baker* was not controlling on the state action issue.[134] The court also emphasized that the Supreme Court's holding in *Rendell-Baker* was limited to a private school's action in discharging employees.[135] Furthermore, the court pointed out that the First Circuit's *Rendell-Baker* opinion stated that students in the school "would have a stronger argument than do plaintiffs that the school's action *toward them*" is state action.[136]

Additionally, the Tenth Circuit held that "the state ha[d] so insinuated itself in the Provo Canyon School as to be considered a joint participant in the offending actions."[137] The court's holding was supported by the fact that state agencies placed many of the students in the Provo Canyon School and that state officials were aware of, and even approved of, the school's practices.[138] The Court also found it relevant that there was significant state funding and regulation of the school.[139]

3. The Third Circuit: Robert S. v. Stetson School

In a 2001 decision, *Robert S. v. Stetson School, Inc.*, the Third Circuit held that a private school's treatment of its students was not state action.[140] The lawsuit involved a student's claim that Stetson School and its staff members violated his constitutional rights by subjecting him to "physical and psychological abuse."[141] Stetson School was a private residential school specializing in the education and treatment of sex offenders.[142] The school received funding from the state in the amount of $200 per day per student, and any costs not covered by tuition were paid by private grants or other charitable contributions.[143]

Mainly relying on the Supreme Court's holding in *Rendell-Baker*, the Third Circuit held that Stetson School's actions did not

133. *Id.* at 940.
134. *Id.*
135. *Id.*
136. *Id.* (emphasis added) (quoting Rendell-Baker v. Kohn, 641 F.2d 14, 26 (1st Cir. 1981) *aff'd* 457 U.S. 830 (1982)).
137. *Id.*
138. *Id.*
139. *Id.*
140. 256 F.3d 159, 169 (3d Cir. 2001).
141. *Id.* at 161.
142. *Id.* at 162.
143. *Id.* at 163.

amount to state action.[144] The court reasoned that Stetson School's receipt of federal funding did not make it a state actor.[145] The court also explained that Stetson School did not provide a function that was traditionally an exclusive province of the state because "the only schools that offered services similar to those provided by Stetson were private schools."[146]

4. The First Circuit: Logiodice v. Trustees of Maine Central Institute

In 2002, the First Circuit, in *Logiodice v. Trustees of Maine Central Institute*, held that a private school under contract with the local government to provide secondary education was not a state actor.[147] In *Logiodice*, the underlying dispute involved a student's allegations that the Maine Central Institute ("MCI") violated his due process rights by suspending him without a hearing.[148] MCI was a private high school that contracted with a local government agency to provide secondary education to students.[149] The local government did not operate a public high school in the area, but rather underwrote secondary education exclusively through its contract with MCI.[150] The contract required MCI to accept and educate all the students in the district, and, in exchange, the school district paid the students' tuition.[151]

In holding that MCI's decision to suspend the plaintiff without a hearing was not state action, the First Circuit rejected both the public function and entwinement tests as methods of finding state action.[152] First, the court reasoned that public education was not an exclusive province of the state because private schools receiving public funding were widespread even before municipalities developed their own public schools.[153] Second, the court reasoned that MCI was not entwined with the government because it was run by private trustees who had the sole right to enforce disciplinary rules.[154]

144. *Id.* at 164–69.
145. *Id.* at 165.
146. *Id.* at 166.
147. Logiodice v. Trs. of Me. Cent. Inst., 296 F.3d 22, 31 (1st Cir. 2002).
148. *Id.* at 25.
149. *Id.* at 24.
150. *Id.*
151. *Id.* at 24–25.
152. *Id.* at 26–28.
153. *Id.* at 27.
154. *Id.* at 28.

B. State Action and Charter Schools: The Circuit Split

1. The Federal Courts' Initial Lack of Analysis

When federal courts were first faced with alleged constitutional violations by charter schools, the courts failed to address the initial issue of whether charter schools are state actors for the purposes of Section 1983 claims.[155] Rather, the courts simply assumed that charter schools were state actors and moved on to the merits of the underlying cases.[156]

For example, in *Jones v. SABIS Educational Systems, Inc.*, the United States District Court for the District of Illinois assumed that the management company of a charter school was a state actor.[157] In *Jones*, the charter school's former principal alleged, among other things, that his discharge was in violation of his First Amendment rights.[158] The court never made a factual inquiry pertaining to the state actor issue, but rather assumed the charter school was a "public school," and therefore characterized it as a "governmental body."[159] The court dismissed the complaint on alternative grounds, holding that the plaintiff failed to allege his dismissal was motivated by the school's official custom or policy.[160]

Similarly, in *Daugherty v. Vanguard Charter School Academy*, the United States District Court for the Western District of Michigan also failed to undergo any state actor analysis.[161] *Daugherty* involved a charter school's alleged violation of the Establishment Clause.[162] As in *Jones*, the court referred to the charter school as a "public school" but made no factual determinations as to whether it was a state actor.[163] Instead, the court assumed the charter school's alleged actions constituted state action but nevertheless dismissed the complaint because the plaintiff failed to provide sufficient evidence of an official custom or policy.[164]

155. *See* Riester v. Riverside Cmty. Sch., 257 F. Supp. 2d 968 (S.D. Ohio 2002); Daugherty v. Vanguard Charter Sch. Acad., 116 F. Supp. 2d 897 (W.D. Mich. 2000); Jones v. SABIS Educ. Sys., Inc., 52 F. Supp. 2d 868 (N.D. Ill. 1999).

156. *See* cases cited *infra* notes 208, 217.

157. *Jones*, 52 F. Supp. 2d at 876–80.

158. *Id.* at 872.

159. *Id.* at 876.

160. *Id.* at 878–79. In *Monnell v. Department of Social Services*, 436 U.S. 658, 691 (1978), the Supreme Court held that a municipal entity is not held liable for constitutional violations of its employees simply on a theory of respondeat superior. Rather, a plaintiff must allege that unconstitutional acts were made under an official custom or policy. *Id.* at 694.

161. Daugherty v. Vanguard Charter Sch. Acad., 116 F. Supp. 2d 897 (W.D. Mich. 2000).

162. *Id.* at 903.

163. *Id.*

164. *Id.* at 917.

2. A Movement Toward a Traditional State Actor Analysis

Eventually, some federal courts began to recognize a need to address the state action issue when charter schools were sued for constitutional violations under Section 1983. Although courts have attempted to apply the various state action tests to resolve the issue, most courts have faced a muddled precedent of case law and have therefore failed to come to consistent resolutions.

In *Reister v. Riverside Community School*, the United States District Court for the Southern District of Ohio finally addressed the state actor issue with regard to a charter school.[165] In *Reister*, a former teacher at a community school alleged that her discharge violated of her First Amendment rights.[166] Initially, the court determined that the community school was a state actor because community schools are public under the state legislation.[167] The court continued its analysis by addressing the issue under the public function test, holding that "free, public education, whether provided by public or private actors, is an historical, exclusive, and traditional state function."[168] The court also employed the entwinement test, holding that because the community school was "granted the authority to provide free public education to all students in a nondiscriminatory manner," it was "so entwined with governmental policies" that it must be considered a state actor.[169] Finally, the court distinguished the case from *Rendell-Baker* and *Logiodice* on the grounds that, as a charter school, the community school was created under state legislation unequivocally designating it as a public school.[170]

In *Scaggs v. New York State Department of Education*, the United States District Court for the Eastern District of New York faced the state action issue while addressing a constitutional violation alleged against a charter school.[171] In *Scaggs*, the underlying claim involved allegations against a charter school for failure to provide adequate education to disabled children in violation of the Equal Protection Clause.[172] The court differentiated the case before it from *Rendell-Baker* and held that "claims addressing the nature and quality of education received at charter schools may be properly brought against such schools and their

165. Reister v. Riverside Cmty. Sch., 257 F. Supp. 2d 968, 971–73 (S.D. Ohio 2002).
166. *Id.* at 969.
167. *Id.* at 972.
168. *Id.*
169. *Id.* at 973.
170. *Id.* at 972–73.
171. Scaggs v. N.Y. State Dep't of Educ., No. 06-CV-0799, 2007 WL 1456221, at *13 (E.D.N.Y. May 16, 2007).
172. *Id.* at *1–2.

management companies under Section 1983."[173] The court reasoned that the state is only minimally involved in claims concerning employment, like the claims underlying the *Rendell-Baker* case.[174] Rather, the court held that where "the claims relate to the alleged total inadequacy of a school to provide free public education to its students while receiving state funding, being bound to state educational standards and purporting to offer the same educational services and facilities as any other public school," the charter school must be considered a state actor.[175]

Most recently in *Caviness v. Horizon Community Learning Center, Inc.*, the Ninth Circuit held that a charter school was not a state actor.[176] The underlying claim in the case was brought by a former teacher at the Horizon charter school alleging violations of his due process right to obtain employment.[177] In holding that the charter school was not a state actor, the Ninth Circuit made the preliminary determination that "the relevant inquiry" was whether the charter school's role "as an employer was state action."[178] Furthermore, the court noted that "a private entity may be designated a state actor for some purposes but still function as a private actor in other respects."[179]

Moreover, the court in *Caviness* understood the holding in *Rendell-Baker* to mean that the Supreme Court foreclosed any argument that public education was a traditional and exclusive province of the state.[180] The court was not persuaded by the fact that the school in *Rendell-Baker* was private, while the charter school was designated as public.[181] Notably, the Ninth Circuit emphasized that the statutory designation of a charter school as public is not necessarily controlling.[182] The court stated that the plaintiff's characterization of the charter school as public "does not itself avail him in the employment context."[183]

173. *Id.* at *13.
174. *Id.*
175. *Id.*
176. Caviness v. Horizon Cmty. Learning Ctr., Inc., 590 F.3d 806, 818 (9th Cir. 2010).
177. *Id.* at 811.
178. *Id.* at 813.
179. *Id.* at 814.
180. *Id.* at 815.
181. *Id.*
182. *Id.* at 815–16.
183. *Id.* at 814.

IV. ANALYSIS

A. State Action as Applied to Charter Schools Lacks Comprehensive Precedent

Although most courts faced with a state actor issue in the charter school context have found charter schools to be state actors, courts have rarely employed a comprehensive analysis.[184] Rather, courts have tended to simply assume charter schools to be state actors.[185] Even the courts that have analyzed the issue have employed different approaches,[186] with the Ninth Circuit distinctly refusing to find state action.[187]

The result of these conflicting and often cursory analyses is a lack of persuasively reasoned precedent. This creates the unfortunate possibility that some courts may be tempted to start from the wrong end of the analysis—deciding the outcome before fully analyzing the issue. Practically, a court may thus pick and choose the arguments that will ultimately lead to desired outcomes. All too often, this may be a consequence of the muddled state actor doctrine and its inconsistent application to the education context, combined with the general inclination of courts to find that charter schools are in fact public schools.[188]

Courts are not wrong to be inclined to characterize charter schools as public schools. Charter schools were first envisioned as public schools, and are now created by state law and publicly funded.[189] Furthermore, the federal government has backed charter schools in efforts to reform state public education.[190] However, the

184. *See* discussion *supra* Part III.B.

185. *See* Daugherty v. Vanguard Charter Sch. Acad., 116 F. Supp. 2d 897, 903 (W.D. Mich. 2000); Jones v. SABIS Educ. Sys., Inc., 52 F. Supp. 2d 868, 871 (N.D. Ill. 1999).

186. *See* Scaggs v. N.Y. State Dep't of Educ., No. 06-CV-0799, 2007 WL 1456221, at *12–13 (E.D.N.Y. May 16, 2007) (using primarily the nexus test to determine that a charter school "engaged in state action, despite being a private corporation"); Riester v. Riverside Cmty. Sch., 257 F. Supp. 2d 968, 971–73 (S.D. Ohio 2002) (using "(1) the public function test, (2) the state compulsion test, (3) the symbiotic relationship/nexus test; and (4) the 'entwinement' test" to conclude that the charter school was a state actor).

187. Caviness, 590 F.3d at 818.

188. *See Daugherty*, 116 F. Supp. 2d at 903 (categorizing a charter school as "public" without engaging in a full state action analysis); *Jones*, 52 F. Supp. 2d at 871 n.2 (similarly defining a charter school as a "public, nonsectarian . . . school" without a full state action analysis). *Compare* Rendell-Baker v. Kohn, 457 U.S. 830, 831 (1982) (finding state action where a private school receiving public funding under regulation by state agencies fired its employees), *with* Milonas v. Williams, 691 F.2d 931, 940 (10th Cir. 1982) (distinguishing *Rendell-Baker* by differentiating between treatment of students and employees).

189. NATHAN, *supra* note 18, at 1; Mead, *supra* note 1, at 349.

190. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 182 (2009).

Supreme Court's recent attempts to limit the state actor doctrine have made it more difficult for courts to hold a charter school as a state actor without a more thorough analysis.[191]

1. Limitations on the Public Function Test

One reason courts addressing state action issues in the charter school context are faced with an uphill battle is the currently limited application of the public function test to educational institutions. Initially, the Supreme Court held in *Rendell-Baker* that the education of maladjusted students is not an "exclusive province of the State," thus preventing application of the public function test.[192] Later, circuit courts applied this same analysis to negate a public function argument. For example, the First Circuit broadened the premise and held that education generally, and specifically public education in Maine, was never a function "'exclusively' provided by government."[193]

The problem is that courts analyzing the state actor issue in the charter school context are faced with precedent holding that public education is not the "exclusive province of the State." [194] Thus, any public function argument may be null due to the exclusivity requirement. Indeed, the Ninth Circuit accepted this argument in *Caviness*.[195] The court reasoned that charter schools are similar to the school for maladjusted students in *Rendell-Baker*, and thus the Supreme Court had foreclosed any argument that charter schools provide an exclusive public function.[196]

However, this reasoning is ill conceived for two major reasons. First, courts, including the Ninth Circuit, have broadened the holding in *Rendell-Baker* further than the Supreme Court intended. The Supreme Court stated that the education of maladjusted students was not an "exclusive province of the State."[197] The Court focused on the education of maladjusted students in particular and did not seek to address a broader educational context. Although the school in *Rendell-Baker* was similar in some respects to a charter school, the Supreme Court has not explicitly spoken on whether charter schools provide an exclusive public function.[198]

Second, while the exclusivity requirement may be necessary to limit the far-reaching scope of the public function test, it is at odds with the doctrine itself when considering the characteristics of

191. *See* discussion *supra* Part II.B.
192. 457 U.S. 830, 842 (1982).
193. Logiodice v. Trs. of Me. Cent. Inst., 296 F.3d 22, 27 (1st Cir. 2002).
194. *Rendell-Baker*, 457 U.S. at 842.
195. 590 F.3d 806, 815 (9th Cir. 2010).
196. *Id.*
197. *Rendell-Baker*, 457 U.S. at 842.
198. *See* discussion *supra* Part IV.A.1.

charter schools.[199] The rationale of the public function test is to prohibit the government from delegating its functions to private actors and thus avoid constitutional obligations.[200] The exclusivity requirement seems to be an attempt to prevent a private actor performing a "traditionally" public function from being deemed a state actor where delegation has not truly come from the state. Rather, where the function is for the public but not exclusively provided for by the government, private actors are not necessarily acting as the state.

Most charter schools, however, are performing a state function through a contract with the public school system.[201] Charter schools are an attempt by the state to delegate its education function to a private party in order to realize the benefits of choice and competition, which are otherwise lacking in public education.[202] Although private parties run and manage charter schools, the government is still providing for the students' education through contracts and public funding. Thus, a charter school is performing a public function delegated by the state and should be considered a state actor, regardless of whether public education has been "exclusively" provided for by the government.

2. The Downplayed Role of Public Funding and Governmental Regulation

A second reason courts may struggle to find state action in the charter school context is that previous opinions have continually downplayed the role of public funding and governmental regulation in the state actor analysis such that any argument relying on such features are seemingly unpersuasive. Indeed, the various courts that have addressed state action in the charter school context have failed to effectively analyze the issues of public funding and governmental regulation as a result of the Supreme Court's decision in *Rendell-Baker* and its progeny.[203] In *Rendell-Baker*, the Supreme Court held that public funding was insufficient to find state action for a school's discharging decisions.[204] Furthermore, the Court held that state regulation of schools was not enough to constitute state action because the regulation did not compel or influence any such decisions.[205] Once again, subsequent federal courts have relied on *Rendell-Baker* to support the conclusion that public funding and state regulation are never sufficient to turn a private actor's

199. *See* discussion *supra* Part II.B.1.
200. *See* discussion *supra* Part II.B.1.
201. *See* O'Brien & Dervarics, *supra* note 24, at tbl.1.
202. *See* discussion *supra* Part I.
203. Rendell-Baker v. Kohn, 457 U.S. 830, 840–43 (1982); *see, e.g.*, Logiodice v. Trs. of Me. Cent. Inst., 296 F.3d 22, 26–28 (1st Cir. 2002).
204. *See Rendell-Baker*, 457 U.S. at 841.
205. *Id.* at 841.

decisions into state action. Specifically, the Third Circuit relied on *Rendell-Baker* to hold that state funding and regulation were insufficient to establish state action in *Robert S. v. Stetson School*.[206]

However, this same conclusory analysis is inapplicable in the charter school context—at least without further review. First, charter schools differ from the private schools at issue in *Rendell-Baker* and other publicly funded private schools.[207] In *Rendell-Baker*, only students who were referred to the school by the city or state did not pay tuition.[208] While ninety to ninety-nine percent of the school's budget was publicly funded during the few years leading up to the case and none of its students paid tuition, the school was not required to prohibit private funding.[209] Indeed, students were permitted to attend the school by choice and pay tuition.[210] On the other hand, tuition at charter schools is exclusively publicly funded.[211] Furthermore, compared with the school in *Rendell-Baker*, which contracted with the city school district to provide education on a student-by-student basis, charter schools are chartered to provide education to a community as a whole and are prohibited from using selective admissions practices.[212] Charter schools must also continuously meet the standards set in their charters and are subject to federal progress reviews.[213] Thus, although charter schools may seem similar to the school in *Rendell-Baker*, they have their own unique characteristics, which deserve a specified state actor analysis. Without further review, any conclusory holdings that public funding and state regulation are not sufficient to establish state action are inadequate.

Second, reliance on *Rendell-Baker* should not excessively broaden the proposition that state regulation and funding are insufficient to establish state action; any holdings which depend on this rationale outside the context of a plaintiff's wrongful discharge tend to go too far. According to the Supreme Court, state actor analyses should always begin by determining what action taken by the alleged state actor is in dispute.[214] It is a sound principle of constitutional law that a private party may be deemed a state actor in some contexts, but not others.[215]

206. 256 F.3d 159, 165–69 (3d Cir. 2001).

207. For a description of schools in cases following *Rendell-Baker*, see *supra* Part III.A.2–4.

208. *See Rendell-Baker*, 457 U.S. at 845–46 (Marshall, J., dissenting).

209. *Id.* at 832 (majority).

210. *Id.* at 845–46 (Marshall, J., dissenting).

211. Lake, *supra* note 32, at vii.

212. *Rendell-Baker*, 457 U.S. at 832–33; Sugarman & Kuboyama, *supra* note 15, at 873.

213. *See* discussion *supra* Part I.

214. SCHWARTZ, *supra* note 51, § 5.12 (citing Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 51 (1999)).

215. *See id.*

The Supreme Court in *Rendell-Baker* made clear that its analysis of state action is applicable only in relation to the school's discharge of the plaintiffs.[216] The Court reasoned that "the school's receipt of public funds [did] not make its *discharge* decisions acts of the state."[217] Furthermore, the Court stated that regulations did not compel or influence the school's *discharge* decisions, and thus, such decisions were not sufficient to find state action.[218] However, where a school is acting as an educator rather than an employer, a different analysis comes into play, and a court's reliance on *Rendell-Baker* may be misguided.

In sum, *Rendell-Baker* and subsequent circuit court decisions are ill-suited precedents for courts to rely on in the charter school context. Rather, courts should develop a new line of case law that fully analyzes the issue with regard to charter schools and their unique characteristics.

B. State Action & Private Prisons: A Useful Comparison for Charter Schools

In developing the state action doctrine in the charter school context, one useful area of jurisprudence may be state action as it has been applied to privately run prisons. Indeed, prisons may be more like schools than one might think, at least in understanding state action. Much like charter schools, prisons may be privately owned or run by private management companies.[219] Generally, where plaintiffs allege constitutional violations against private prisons or a private prison management company, the courts find state action.[220]

1. State Action in the Private Prison Context

In *West v. Atkins*, the Supreme Court addressed the issue of whether a physician under contract with the state to treat prisoners at a state-run prison hospital was a state actor.[221] The Court held that the physician was an employee of the state, and therefore a state actor.[222] Specifically, the Court reasoned that the physician was authorized and obligated to provide medical services to inmates,

216. *Rendell-Baker*, 457 U.S. at 841–42.
217. *Id.* at 840–41 (emphasis added).
218. *Id.* at 841–42.
219. *E.g.,* Richardson v. McKnight, 521 U.S. 399, 401 (1997); Rosborough v. Mgmt. & Training Corp., 350 F.3d 459, 459 (5th Cir. 2003).
220. *See Rosborough*, 350 F.3d at 461. *But see* Holly v. Scott, 434 F.3d 287, 294 (4th Cir. 2006) (holding that employees of a private corporation operating a prison are not federal actors for the purposes of a *Bivens* claim). Similar tests are employed in order to determine federal action under *Bivens* and state action sufficient for a Section 1983 claim. Morse v. N. Coast Opportunities, Inc., 118 F.3d 1338, 1343 (9th Cir. 1997).
221. West v. Atkins, 487 U.S. 42, 43 (1988).
222. *Id.* at 56–57.

and thus did so "clothed with the authority of state law."[223] Additionally, in 2001, the Supreme Court in *Correctional Services Corp. v. Malesko* held that private prisons may be state actors.[224] The Court stated that "state prisoners . . . already enjoy a right of action against private correctional providers under 42 U.S.C. § 1983."[225]

Where plaintiffs allege violations of their constitutional rights against private prison management companies, courts have often cited *West* and held that actions by private prison management companies constitute state action.[226] For example, in *Skelton v. Pri-Cor, Inc.*, the Sixth Circuit held that a private corporation managing a prison was a state actor for Section 1983 purposes.[227] The court reasoned that a private corporation managing a prison was "performing a public function traditionally reserved to the state."[228] Furthermore, the court stated that "the power exercised by [the private prison] [was] 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'"[229] The Fifth Circuit adopted the Sixth Circuit's reasoning when it found state action by a private prison-management corporation in *Rosborough v. Management & Training Corp.*[230]

One potential obstacle present when trying to find state actor status for private prisons may arise because of the exclusivity requirement of the public function test.[231] Notably, in *Richardson v. McKnight*, the Supreme Court was presented with the question of whether a private prison's employees were entitled to qualified immunity.[232] Although it never directly addressed the issue, the Court necessarily assumed that private prisons were state actors.[233] However, in analyzing the immunity issue, the Court explored the history of prison operations in the United States and stated "correctional functions have never been exclusively public."[234]

Accordingly, if the exclusivity requirement was strictly applied in the case of private prisons, prisons would fall outside the realm of state action under a public function test.[235] Disturbingly, the

223. *Id.* at 55 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).
224. 534 U.S. 61, 72 n.5 (2001).
225. *Id.* (emphasis omitted).
226. *E.g.* Rosborough v. Mgmt. & Training Corp., 350 F.3d 459, 461 (5th Cir. 2003); Skelton v. Pri-Cor, Inc., 963 F.2d 100, 102 (6th Cir. 1991).
227. *Skelton*, 963 F.2d at 102.
228. *Id.*
229. *Id.* (quoting West v. Atkins, 487 U.S. 42, 49 (1988)).
230. 350 F.3d at 461.
231. SCHWARTZ, *supra* note 51, § 5.14; *see* discussion *supra* Part II.B.1.
232. Richardson v. McKnight, 521 U.S. 399, 401 (1997).
233. *Id.* at 403.
234. *Id.* at 405.
235. SCHWARTZ, *supra* note 51, § 5.14.

consequences of such a decision might prevent courts from using the Fourteenth Amendment to prohibit the brutal treatment of prisoners.[236] Although the Supreme Court has never directly resolved the issue of whether a privately run prison is a state actor, it is for this reason that lower courts have largely held that private prisons are state actors.[237] Otherwise, the policy behind the public function test, to prevent the delegation of governmental functions without the joint delegation of constitutional obligations, would be effectively lost.

2. Public Function Test Applied to Charter Schools

It is easy to see why private prison management companies that own and operate state prisons serve as guidance to courts analyzing the state action issue in the charter school context. The funding and management of charter schools tend to be very similar to that of private prisons. Much like private prison management companies that own and operate state prisons, charter school management corporations own and operate public schools.[238] Thus, a public function test similarly applied to charter schools should allow for a finding of state action.

State law provides the authority for the chartering of schools within the state. This authority allows school districts and other governmental bodies to contract with private management companies who own and operate a charter school to provide public education.[239] Thus, any wrongdoing alleged against a charter school in its provision of public education is only made possible "because the wrongdoer is clothed with the authority of state law."[240] Furthermore, by providing public education, charter schools are "performing a public function traditionally reserved to the state."[241]

Once again, it is important to note that the public function doctrine should not be limited by the exclusivity requirement in the charter school context.[242] As stated above, the Supreme Court has previously suggested that prison management functions have never

236. *Id.*

237. *Minneci,* 132 S. Ct. at 627 n.2. Accordingly, courts have held that providing medical services to incarcerated individuals constituted state action. *See, e.g.*, West v. Atkins, 487 U.S. 42, 54 (1988); Pollard v. Geo Grp., Inc., 607 F.3d 583, 588 (9th Cir. 2010), *rev'd on other grounds sub nom.* Minneci v. Pollard, 132 S. Ct. 617 (2012). In reversing *Pollard*, the Supreme Court did not address the issue of state actor status. *Id.* at 627 n.2 (Ginsburg, J., dissenting) ("The Ninth Circuit ruled that petitioners acted under color of federal law, and petitioners did not seek this Court's review of that determination.").

238. Forman, *supra* note 22, at 843.

239. *Id.*

240. United States v. Classic, 313 U.S. 299, 326 (1941).

241. Skelton v. Pri-Cor, Inc. 963 F.2d 100, 102 (6th Cir. 1991).

242. *See* discussion *supra* Part IV.A.1.

been reserved exclusively to the state.[243] Rather, private individuals have operated jails throughout this country's history.[244] However, like in the private prison context, a failure of the exclusivity requirement should not limit the application of the public function doctrine to charter schools.[245] Much like the right to operate private prisons, the ability to provide public education has been delegated by the state. Without a delegation from the state, public education would not be possible. Thus, the fact that private actors may have provided public education throughout history should not exempt publicly funded schools, like charter schools, from meeting the public function test to find state action.

The state actor analysis of privately owned prisons may also suggest that plaintiffs alleging wrongful termination against a charter school may not have a valid claim for state action compared to a plaintiff alleging wrongdoing by the charter school in its education function. In its 2005 opinion *Cornish v. Correctional Services Corporation*, the Fifth Circuit refused to deem a privately owned prison a state actor when a former employee alleged wrongful discharge.[246] Rather, the court held that although the private prison was performing a public function when it provided juvenile correctional services, the same prison was not a state actor when it acted in its role as an employer.[247] The Fifth Circuit's conclusion is also persuasive in the charter school context. Although a charter school may be performing a state function by providing public education, it is not performing a state function when it acts in its role as an employer.[248] Thus, it is important for each court addressing a state function issue to first determine what function the charter school was performing at the time of its alleged wrongdoing.

CONCLUSION

As discussed in this Comment, the Supreme Court's application of the state action doctrine is anything but consistent. This reality is apparent when federal courts have attempted to analyze the issue in the charter school context. As states across the country have facilitated the spread of charter schools, courts have begun to flirt

243. Richardson v. McKnight, 521 U.S. 399, 405 (1997).

244. *Id.*

245. Federal courts have found the actions of private prisons and their employees to constitute state action. *See* Rosborough v. Mgmt. & Training Corp., 350 F.3d 459, 461 (5th Cir. 2003); *Skelton*, 963 F.2d at 102; discussion *supra* Part IV.B.1.

246. Cornish v. Corr. Servs. Corp., 402 F.3d 545, 550 (5th Cir. 2005).

247. *Id.*

248. Although *Caviness* may have gotten this point right, its reliance on *Rendell-Baker* is inappropriate. The Supreme Court was reviewing state action in the context of the education of maladjusted teenagers, not charter schools. *See* discussion *supra* Part IV.A.

with a limited application of the state action doctrine to charter schools. This flirtation is a result of the Supreme Court's ruling in *Rendell-Baker* and subsequent federal cases holding that private schools receiving public funds are not state actors. However, reliance on this jurisprudence as precedent may be misguided; the unique characteristics of charter schools differentiate them from the private schools considered by the Supreme Court and its progeny.

Rather, *Rendell-Baker* and the subsequent federal cases holding private schools receiving public funds are not state actors should be limited to their specific facts rather than extended inappropriately to seemingly similar schools. Courts need to develop an analysis that is specific to charter schools, taking into account their unique attributes. Still, a better comparison may be with the public function doctrine applied to privately owned and managed prisons. In the end, a simple application of the public function test should allow a court to hold a charter school to be a state actor under the specific circumstances, keeping in mind the charter schools may be state actors in some contexts and not in others.

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