

5.1.A Express Causes of Action, Section 1983, Elements of the Claim

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The two principal statutes creating general causes of action for the enforcement of rights created by federal law are the Reconstruction Civil Rights Acts, particularly Section 1983, and the Administrative Procedure Act. Section 1983 authorizes a wide variety of suits against state and local governments and officials for deprivations of federal rights under color of state law, while other Reconstruction statutes authorize more limited claims against private parties who violate federal rights. The Administrative Procedure Act authorizes a narrower variety of suits against federal officials and agencies. Section 1983 litigation has vindicated constitutional and statutory rights in the context of health, welfare, education, housing, employment, and prison law in litigation against state, county, or municipal officials. The Administrative Procedure Act has vindicated similar rights by correcting federal agency action or by forcing specific federal agency action.

5.1.A. Section 1983

The Reconstruction Civil Rights Acts, enacted during the 1860s and 1870s, provide the right to bring an action in federal court for violations of federal civil rights by state or local officials, by private parties acting in concert with the state, or, in more limited situations, by private parties acting alone. The most important of these statutes is Section 1983. Section 1983 creates no substantive rights. Rather, it creates a vehicle for enforcing existing federal rights. The statute provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The elements of a Section 1983 case are “the deprivation of any rights, privileges, or immunities secured by the Constitution and laws” by a “person” acting “under color” of state law. The “laws” referred to include those statutes that confer individual rights on a class of persons that include the plaintiff. Because the purpose of Section 1983 is to vindicate federal rights, a plaintiff suing under the statute is in most circumstances not required to exhaust state procedures or remedies which would be otherwise required prior to filing suit.

A Section 1983 complaint filed in federal court must name a defendant who is not immune under the Eleventh Amendment and who is acting under color of state law, and must seek relief not barred by the Eleventh Amendment. If the plaintiff establishes a violation of a federal right, defendants may in certain circumstances avoid liability for damages by proving a qualified immunity.

5.1.A.1. Finding a Federal Right

By its terms, Section 1983 can be used to remedy the deprivation of “rights” granted to the plaintiff under the Constitution, federal statutes, and regulations implementing these statutes. Constitutional provisions that are enforceable by a private party under Section 1983 consist of those which create personal rights and either explicitly

apply to the states, or have been held to apply to the states by operation of the Fourteenth Amendment. In contrast to the relatively straightforward expression of individual “rights” protected by the Constitution, whether a statutorily created “right” exists has posed something of a challenge to plaintiffs.

Under the separation of powers doctrine, only the legislative branch has the power to create statutory causes of action. Hence, the ability of a private party to successfully sue to enforce a statute depends on whether Congress, in enacting the statute, has given the plaintiff a “private right of action.” As noted, these rights are sometimes expressly granted by statute. All other rights are “implied,” and a court’s task is to discern the intent of Congress. The two avenues for enforcing implied rights of action are either to sue directly under the statute or to litigate using the vehicle provided by [42 U.S.C. § 1983](#).

In *Cort v. Ash*, the Supreme Court enunciated a four-part test to determine whether Congress intended to imply a right to sue directly under a federal statute. In general, a plaintiff asserting the right is required to show that (1) membership in the class for whose benefit the statute was enacted, (2) evidence of Congress’ intent to confer a private remedy, (3) that a right to sue would be consistent with the statutory purpose, and (4) that the cause of action is not one traditionally relegated to the states to a degree that implying a right to sue would be inappropriate. In short, under this doctrine, the plaintiff must show that Congress intended to grant both a private right and a private remedy.

In the years following *Cort*, the judiciary became less willing to find rights of action implied directly under a statute, and plaintiffs began turning to Section 1983—the alternative path for enforcing rights created by federal statute. In *Maine v. Thiboutot*, decided five years after *Cort*, the Supreme Court held for the first time that Section 1983 could be used to remedy the deprivation of rights created by a federal statute. Seven years later, in *Wright v. Roanoke Redevelopment and Housing Authority*, it suggested that a regulation promulgated to interpret a federal statute could also be a “law” which could be enforced under Section 1983.

Section 1983 generally provides a remedy so long as a right is shown to exist. The Supreme Court stated: “Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by Section 1983.” However, not every federal law creates a “right” enforceable by a private plaintiff. As the Supreme Court became increasingly hostile to the use of Section 1983 to enforce federal statutes, it has continued to narrow its conception of the term. For this reason, one should understand the Court’s principal objections to the use of Section 1983 to enforce federal statutes.

The initial three-pronged test for finding a right enforceable under Section 1983 was set forth in *Wilder v. Virginia Hospital Association*. It asks whether (1) Congress intended the particular statutory provision to benefit the plaintiff, (2) the provision is so vague or amorphous as to make judicial enforcement difficult or impractical, and (3) the statute imposes a binding obligation on the government. After these inquiries, a fourth arises: (4) did Congress create a comprehensive mechanism for enforcing the statute which implies that it intended to deny a private right of action? Each of these prongs emerged from a series of Supreme Court decisions, with the first element undergoing something of a metamorphosis as it rose in importance in comparison to the other prongs of the test. Indeed, resolution of this first inquiry—the extent to which the plaintiff is “benefited” by the statute—will usually be the key to whether Section 1983 can be invoked to enforce a federal statute.

5.1.A.1.a. Did Congress intend the law to so directly benefit the plaintiff, such that those in his or her place are the “unmistakable focus” of the statute?

The seesaw battle between shifting Supreme Court majorities over what constitutes an enforceable right led to a greater focus on the relationship between the aim of the statute and its effect on the plaintiff. As formulated by *Wilder*, even if a statute imposes binding obligations on the state which are capable of judicial enforcement, Section 1983 cannot be invoked unless Congress intended the law to directly benefit the plaintiff. However, this only begins the inquiry. The plaintiff must also point to evidence that Congress intended that he or she—and not just the federal government—could sue to enforce the statute.

In years past, some courts understood the *Wilder* test to allow private enforcement when the plaintiff was generally a beneficiary of the statute sought to be enforced. This made Section 1983 a friendlier avenue for enforcing a federal right than the implied right of action doctrine announced in *Cort v. Ash*. The erosion of this interpretation was first suggested in *Blessing v. Freestone*. *Blessing* involved a mandate requiring states receiving federal child-welfare funds to “substantially comply” with federal requirements aimed at ensuring timely payment of child support. The Court held that the mandate was not “an individual entitlement to services, ... [but] simply a yardstick for the [federal government] to measure the systemwide performance of the State’s Title IV-D program.” Hence, parents who obviously benefited from the collection of child support were nevertheless unable to enforce the child support statute as a whole. This is because, the Court held, the syntax used by Congress in enacting certain state compliance and reporting provisions evidenced a focus on the government’s interest in recouping public assistance benefits, rather than ensuring a continued income stream to specific families.

Blessing placed a cloud over the first prong, raising the prospect of denying enforcement rights to some people who had, at first glance, “benefited” under the statute. Indeed, a non- Section 1983 case, *Alexander v. Sandoval*, presaged the Court’s subsequent decision in *Gonzaga University v. Doe* by placing great emphasis on the language used by Congress. “[S]tatutes that focus on the person regulated rather than the individuals protected create ‘no implication of an intention to confer rights on a particular class of persons.’” This view was imported into Section 1983 jurisprudence when elements of the implied right of action test were fused with *Wilder*’s “benefits the plaintiffs” test in *Gonzaga*.

In *Gonzaga*, the transformation of the “benefits” prong became manifest when the Court clarified that Section 1983 cannot be invoked simply because “the plaintiff falls within the general zone of interest that the statute is intended to protect.” Instead, the Court now requires a showing that “an unambiguously conferred right” exists that is “phrased in terms of the persons benefited.” “[I]t is rights, not the broader or vaguer ‘benefits’ or ‘interests,’ that may be enforced” under Section 1983. In *Gonzaga*, the Court considered whether the Family Educational Rights and Privacy Act conferred a right to sue on a student whose privacy had been violated by the unauthorized release of educational records. There, the Court dismissed statutory language that seemingly granted individual students protection from institutional invasions of privacy. It held instead that the statute was addressed more to the entity regulated than to the students benefited.

The Court cited several factors suggesting that the Family Educational Rights and Privacy Act did not confer an enforceable right upon students. First, the Court stated, “FERPA’s provisions speak only to the Secretary of Education, directing that ‘no funds shall be made available’ to any ‘educational agency or institution which has a prohibited ‘policy or practice’.” The Court approvingly quoted *Cannon v. University of Chicago*, a non-Section 1983 decision which applied the *Cort v. Ash* test to find a right of action implied under Title IX of the Civil Rights Act:

There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting [the statute] with an unmistakable focus on the benefited class, had written it simply as a ban on [certain] conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to ... institutions engaged in [prohibited] practices.

Second, because the statute barred the funding of institutions “which have a *policy or practice* of permitting the release of education records”, the Family Educational Rights and Privacy Act was said to “speak only in terms of institutional policy and practice, not individual instances of disclosure.” Citing *Blessing v. Freestone*, the Court found the Family Educational Rights and Privacy Act provisions to have an “‘aggregate’ focus ... not concerned with ‘whether the needs of any particular person have been satisfied,’ ... and ... cannot ‘give rise to individual rights.’” Conflating the previously separate inquiries under Section 1983 jurisprudence and the *Cort v. Ash* “implied rights” analysis, the Court concluded that “the initial inquiry [in a Section 1983 case] – determining whether a statute

confers any right at all – is no different from the initial inquiry in an implied right of action case, the express purpose of which is to determine whether or not a statute ‘confers rights on a particular class of persons.’”

An “unambiguously conferred right” that is “phrased in terms of the persons benefited” (rather than in terms of the person or agency regulated) is now a central factor determining a plaintiff’s ability to enforce a federal statute using Section 1983. Reviewing its past cases to illustrate the new standard, the *Gonzaga* Court noted that the rent ceiling provisions of the United States Housing Act of 1937 construed in *Wright*, as well as the reimbursement provisions of the Medicaid Act interpreted in *Wilder*, “explicitly conferred specific monetary entitlements upon the plaintiffs.” After *Gonzaga*, a plaintiff must now find a similar or analogous individual “entitlement” expressed in the language of a statute sought to be enforced through Section 1983. Therefore, the first question a prospective plaintiff must answer is whether he or she is the “unmistakable focus” of the statute in question.

With respect to a number of federal programs for low-income people, a strong argument can be made that Congress’ mandates are, in *Gonzaga*’s terms, “phrased in terms of the persons protected.” However, since many of these statutes were enacted under the Constitution’s Spending Clause, specific provisions of the statutes are written in a form which directs a federal agency to spend money so long as the state or other recipient complies with Congress’ rules (e.g., “the state’s plan shall provide ...”). Not surprisingly, government attorneys have argued with some success that such statutory provisions are “focus[ed] on the person regulated rather than the individuals protected” and hence, “create ‘no implication of an intention to confer rights on a particular class of persons.’” This sort of argument underscores the fact that advocates need to find language in the statutory provision sought to be enforced indicating that Congress “intended to confer individual rights upon a class of beneficiaries.” In addition, the advocate must research carefully how that provision has been interpreted both before and after *Gonzaga*. Given the Supreme Court’s tendency to restrict further the ability of private litigants to enforce federal laws, one should be very leery of the consequences of exploring new ground on this issue.

5.1.A.1.b. Is the alleged “right” so vague or amorphous as to make it unenforceable?

Assuming the statute unambiguously confers a right on plaintiffs, the second issue a prospective plaintiff must ask is whether the statute contains a standard by which to measure the state or local agency’s compliance with the law. In *Suter v. Artist M.*, the Court found that the plaintiff could not enforce the requirement, found in the Adoption Assistance and Child Welfare Act, that a state make “reasonable efforts” to avoid the removal of children from their parents’ homes. The Court held that the statute failed to set forth standards to judge the “reasonableness” of the state’s compliance with the law and was, therefore, too vague and amorphous to allow judicial enforcement.

By comparison, in *Wright v. Roanoke Redevelopment and Housing Authority*, plaintiffs prevailed in a Section 1983 claim that an inadequate public housing utility allowance violated rent ceilings imposed by the Brooke Amendment, even though the statute nowhere defined the components of “rent.” In response to arguments that the provision was vague and amorphous, the Court turned to United States Department of Housing and Urban Development (HUD) regulations to fill the gap, noting that the agency had defined “rent” to include a reasonable utility allowance. Similarly, in *Wilder*, plaintiffs overcame a “vague and amorphous” argument in their challenge to a state’s failure to provide “reasonable” Medicaid reimbursement rates to providers. The Court found that definitions found elsewhere in the statute provided a standard for judicial enforcement.

5.1.A.1.c. Does the statute create a binding obligation?

In *Pennhurst State School and Hospital v. Halderman*, the first decision to limit the use of Section 1983 to enforce a federal statute, the Supreme Court considered the ostensibly “rights producing” language found in the Developmentally Disabled Assistance and Bill of Rights Act. The Court ruled that congressional rhetoric about a disabled “bill of rights” found in the statute’s declaration of policy could not create enforceable rights since the law

did not tie a state's receipt of federal funding to the state's compliance with the purported bill of rights. The statutory language was held to be "hortatory" rather than mandatory. Therefore, the third question a prospective plaintiff must consider is whether the statute sought to be enforced actually requires the state or local agency to do something.

5.1.A.1.d. Does the statute contain a comprehensive enforcement mechanism?

If the statute at issue passes muster under the prongs above, Section 1983 is presumed to provide a remedy unless the defendant shows that the enactment contains a "comprehensive enforcement mechanism" whose breadth or scope suggests that Congress viewed that mechanism as the sole means for statutory enforcement. In *Middlesex County Sewerage Authority v. National Sea Clammers Association*, environmentalists sought to use Section 1983 to enforce both the Federal Water Pollution Control Act and the Marine Protection, Research and Sanctuaries Act, by enjoining the dumping of waste in the Atlantic Ocean. In addition to providing a limited right to sue to private parties, these statutes provided an elaborate alternative mechanism to address the pollution problem. The Supreme Court pointed to those measures as indicating Congress' intent to preclude enforcement of the legislation outside of the procedures set forth in these laws.

Following *National Sea Clammers*, the Court ruled that the existence of a comprehensive statutory remedy for aggrieved parties could also indicate Congress' intent to preclude any other private remedies, including the invocation of Section 1983, which were based on the same "common nucleus of operative facts" giving rise to the statutory violation. Thus, in *Smith v. Robinson*, a disabled child who had claimed that he was not receiving an appropriate free education in violation of the Education for All Handicapped Children Act, the Rehabilitation Act, and the Equal Protection Clause, won his Education for All Handicapped Children Act claim. He thereafter pointed to his alternative Section 1983 claim to seek attorneys fees under [42 U.S.C. § 1988](#). Holding that EAHCA's "comprehensive scheme" suggested Congress' intent that the Education for All Handicapped Children Act be the exclusive vehicle for addressing an equal protection constitutional violation which was "virtually identical" to the Education for All Handicapped Children Act claim, the Court reasoned that Sections 1983 and 1988 were statutory remedies that Congress could implicitly repeal or replace with an alternate remedy.

In *City of Rancho Palos Verdes v. Abrams*, the Court found that, absent an explicit or implied indication that the statutory remedy was meant to complement other available remedies, the Telecommunications Act of 1996's provision of a limited private remedy implied that a Section 1983 action was precluded. In *Sea Clammers*, *Smith* and *Rancho Palos Verdes*, the statutes required the plaintiffs to exhaust administrative remedies or to comply with other procedures before bringing suit. As the Supreme Court subsequently explained in *Fitzgerald v. Barnstable School Committee*, to permit a plaintiff to bypass these procedures and to sue directly under § 1983 would have been incompatible with Congress' interest in creating these procedures. In contrast, Title IX, at issue in *Fitzgerald*, had no similar enforcement scheme and a private right of action directly under the statute has been implied. Thus, in the absence of exhaustion or alternative remedial measures, the Court held that concurrent Title IX and § 1983 claims was permissible.

The existence of developed enforcement mechanisms, moreover, is not enough to make them "comprehensive." Thus, in *Wright*, discussed earlier, the Court found that stringent federal oversight of public housing authorities, and the federal government's power to cut off funding to non-complying agencies, did not preclude a Section 1983 remedy. On the one hand, the Court noted that the "[statutory provision] and its legislative history [are] devoid of any express indication that exclusive enforcement authority was vested in HUD"; on the other, "both congressional and agency actions indicat[e] that enforcement authority is not centralized and that private actions were anticipated." Moreover, the Court observed, the statutory mandate that housing authorities provide a grievance procedure to tenants and the implementing regulation's provision that the existence of a grievance procedure would not preclude judicial review suggested Congress' intent to allow tenants to sue.

5.1.A.1.e. Does the enactment of a statute by Congress under its Spending Power undermine

the enforceability of the statute under Section 1983?

Defendants have argued that legislation enacted under Congress' spending power, Article I, Section 8 of the Constitution, generally creates only voluntary programs which the states are free to reject. Consequently, a state's decision to participate in such a program results only in contractual obligations that cannot rise to the level of being "the supreme law of the land." Although the issue has not come before the Supreme Court, two circuit courts of appeal have rejected this contention: *Antrican v. Odom* and *Westside Mothers v. Haveman*.

In *Westside Mothers v. Haveman*, the later of the two decisions, the Sixth Circuit ruled that the obligations of the state under the Medicaid Act were more than a mere contract. It quoted *Bennett v. Kentucky Department of Education*, which stated that, "[u]nlike normal contractual undertakings, federal grant programs originate in and remain governed by statutory provisions expressing desirable public policy." Applying the three-prong *Wilder/Blessing* test—before the *Gonzaga* decision—the appellate court found the Medicaid Act provision enforceable under Section 1983.

5.1.A.1.f. To what degree can a federal regulation create rights enforceable under Section 1983?

In *Wright*, the Supreme Court implied that a regulation implementing a rights-creating statute (defining "rent" as including a reasonable amount to cover housing authorities' tenants utility costs) was a "law" that could be enforced under Section 1983. Shortly thereafter, in *Wilder v. Virginia Hospital Association*, it relied on the definition of "reasonable" contained in Medicaid regulations, to flesh out the statutory requirement that the "reasonable cost" of services be paid to providers. This blunted the argument that the statute was too vague or ambiguous to be enforced. Drawing on these decisions and the somewhat analogous case of *Golden State Transit Corporation v. City of Los Angeles (Golden State II)*, it was generally believed that binding regulations could themselves create enforceable rights. Recent appellate court rulings, however, question this view, suggesting that the private enforceability of a particular regulation depends on (1) the extent to which the regulation directly implements congressional intent, and (2) whether Congress also intended the governing statute to create a "right" enforceable under Section 1983.

In *Chevron U.S.A. Incorporated v. Natural Resources Defense Council*, the Supreme Court ruled that "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to statute." Under this view, "a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise, ... but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable."

Nevertheless, Justice O'Connor posed the issue in her dissent in *Wright*: "it is necessary to ask whether administrative regulations alone could create such a right." Under the separation of powers doctrine, the creation of causes of action is within the purview of Congress, and the debate in the Supreme Court has involved the extent to which the enactment of Section 1983 evidenced the legislature's intent to generally make actionable any deprivation resulting from the violation of "the constitution and laws." The Supreme Court's recent decision concerning the Title VI "disparate impact" regulations strongly suggests that private enforceability of federal regulations is directly dependent on Congressional intent.

In *Alexander v. Sandoval*, the Court considered whether, outside of the Section 1983 context, "disparate impact" regulations issued by the federal government to enforce Title VI of the Civil Rights Act could create an implied right of action. The Court held that they could not, reasoning that: (1) one section of the statute had been interpreted as banning only intentional discrimination; (2) a second section of the statute—allowing HUD to issue regulations to

carry out the intent of Congress—went beyond the first section and banned “disparate impact” discrimination; hence (3) one could not infer an implied right of action to enforce the regulations, even though the court had earlier upheld the validity of the disparate impact regulations. The Court reasoned that “language in a regulation may invoke a[n implied] private right of action that Congress through statutory text created, but it may not create a right that Congress has not.”

Although *Sandoval* was an implied private right of action decision that essentially explored the contours of the first prong of the *Cort v. Ash* test, the Supreme Court’s decision in *Gonzaga* equated that prong with the first element of the *Wilder/Blessing* test for determining whether a statute creates rights enforceable under Section 1983: “[T]he initial inquiry [in a Section 1983 case] – determining whether a statute confers any right at all – is no different from the initial inquiry in an implied right of action case, the express purpose of which is to determine whether or not a statute ‘confers rights on a particular class of persons.’”

Not surprisingly, several appellate decisions have anticipated the evolution of the Supreme Court majority’s thinking on the enforceability of federal regulations, creating a split in circuits. On the one hand, the pre-*Sandoval/Gonzaga* decision in *Loschiavo v. City of Dearborn*, and the even earlier case of *Samuels v. District of Columbia*, interpreted Section 1983 in an expansive manner, holding that valid regulations were “laws” that could be enforced independent of whether the governing statute had actually addressed the subject of the regulation. Citing *Wright*, the court in *Loschiavo* reasoned that because “federal regulations have the force of law, they likewise may create enforceable rights” if the regulations otherwise pass muster under the three-prong *Wilder/Blessing* test.

On the other hand, every recent appellate decision to address the issue has embraced the *Sandoval* analysis, essentially holding that regulations cannot independently create rights, and are enforceable under Section 1983 only to the extent that the regulations merely “flesh out” a statutory provision which itself creates the right. Thus, in *Harris v. James*, the Eleventh Circuit found that Medicaid regulations could not create a right to non-emergency transportation absent an explicit provision in the governing statute. Similarly, in *South Camden Citizens v. New Jersey Department of Environmental Protection*, the Third Circuit relied on *Sandoval* to reject the private enforceability of Title VI disparate impact regulations under Section 1983. The First Circuit adopted this view in *Rolland v. Romney*, although went on to find that plaintiffs had an enforceable right to certain specialized services under the Medicaid Act. Most recently, the Ninth Circuit cited *Gonzaga* to buttress its holding in *Save Our Valley v. Sound Transit* that disparate impact regulations could not be enforced under Section 1983. The court found that the *Wilder/Blessing* test need not be invoked in the regulatory context until after the plaintiff had first established that the governing statute had created an enforceable right. Indeed, in *Caswell v. City of Detroit*, the 6th Circuit rejected its earlier ruling in *Loschiavo* to hold unenforceable HUD regulations interpreting statutory provisions unenforceable under the *Gonzaga* test.

In light of *Sandoval*, *Gonzaga*, and the recent trend of appellate court decisions, an advocate seeking to enforce a regulation should argue, when possible, that the governing statute, in *Gonzaga*’s terms, grants an “unambiguously conferred right,” which is “phrased in terms of the persons benefited,” and is merely “fleshed out” by the regulation.

In sum, after *Gonzaga*, a plaintiff seeking to enforce a federal statute using Section 1983 must be able to point to an “unambiguously conferred right” that is “phrased in terms of the persons benefited.” However, once this hurdle is overcome, Section 1983 is presumed to provide a remedy, absent a “comprehensive enforcement mechanism” or other evidence to suggest that Congress withdrew this avenue.

5.1.A.2. “Persons” Acting “Under Color of State Law” Under Section 1983

A Section 1983 action can be brought only against a person acting “under color of [state] law.” Liability lies against those “who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.” Although the term “person” was originally thought to refer only to human beings, the concept was broadened in *Monell v. New York City Department of Social Services* to include cities and local

governments whose custom, policy or practice caused the deprivation. In any event, when the defendant is a government employee doing his or her job and acting under apparent government authority, she or he is very likely a “state actor. When a private actor is involved, as is increasingly the case with the trend towards “privatization” of government services, the waters are somewhat murkier.

5.1.A.2.a. Under Color of State Law

State and local officials can interfere with federal rights in two distinct ways. By enforcing state laws or policies that conflict with federal law, state and local officials deprive their victims of federal rights. In such a case, the public officials obviously act under “color of state law.” State and local officials can also interfere with federally-protected rights by misusing power entrusted to them under state law. In such a case, the official acts under color of state law only at those times he or she is “clothed with the authority of state law.” Thus, a sheriff who assaulted his wife did not act under color of state law even though he was a public official; his status as a public official was not the source of his power to act. In a closer case, the Eleventh Circuit held that a city manager, who investigated a citizen by traveling to another state with a city police officer to ask questions of various people, did not act as a state actor because his conduct did not require state authority; a private citizen could have undertaken the same activity.

Although misuse of power cases occasionally present difficult questions, the vast majority involve defendants who were able to inflict injury only because they were clothed with state authority. In such cases, defendants act under color of state law and can be sued under Section 1983. Moreover, defendants who enforce invalid state laws and regulations always act under color of state law. Thus, the color of state law requirement ordinarily poses no problem in litigation against state and local officials, or against local governmental entities.

A more difficult question is presented when a private party is considered to be acting under color of state law so as to be suable under Section 1983. Although closely related to the Fourteenth Amendment’s state action requirement, Section 1983’s color of state law requirement is conceptually distinct. Conduct that is state action under the Fourteenth Amendment is always action under color of state law for purposes of Section 1983. However, conduct under color of state law may not constitute state action under the Fourteenth Amendment. Because Section 1983 claims against private actors ordinarily involve a claimed deprivation of a constitutional right flowing from the Fourteenth Amendment, it is almost always necessary to establish state action under the amendment to prevail under Section 1983. Therefore, the focus of this section will be Fourteenth Amendment state action cases.

5.1.A.2.b. Private Parties as State Actors

Since the early 1970s, the Supreme Court has substantially narrowed the range of private conduct that constitutes state action. In determining whether a private party has engaged in “state action,” a court must weigh “whether the claimed ... deprivation resulted from the exercise of a right or privilege having its source in state authority ” and “whether the private party charged with the deprivation could be described in all fairness as a state actor.” In doing so, a court looks at (1) the extent to which the actor relies on governmental assistance and benefits, (2) whether the actor is performing a traditional governmental function, and (3) whether the injury caused was aggravated in a unique way by the incidents of governmental authority. Because none of these factors is definitive, one can generalize that a deprivation of federal rights by a private party can constitute “state action” if the government has: (1) delegated its authority to the private actor, (2) participated in joint activity to a degree that the actions of one party can be attributed to the other, (3) created the legal framework necessary to carry out the private action, (4) compelled the private party to act in a certain way, (5) knowingly accepted the benefits of an unconstitutional practice, or (6) the private entity is carrying out a traditional “state function,” or (7) the government has created a “special relationship” with the plaintiff.

Delegation of a state responsibility to a private party can make the party a state actor, particularly if the function delegated is one traditionally performed by the state. This principle is illustrated by *West v. Atkins*, which rejected an agency's claim that no state action was involved when the negligence of a private doctor, under contract to provide care for inmates, injured the plaintiff in violation of the state prison's constitutional duty to avoid "deliberate indifference" to the medical needs of those in its custody.

5.1.A.2.b.ii. Joint Activity and "Pervasive Entwinement"

Joint activity by a private party and a government agent can also transform the private party into a state actor, where the purpose of the collusion is to violate the federal rights of the plaintiff. Similarly, in *Dennis v. Sparks*, the Court held that private parties who conspired with a judge to fix a case acted under color of law. A nominally private entity controlled by the state is also a state actor.

However, in the absence of a conspiracy or governmental control, the applicability of the joint activity test to find state action is problematic, as illustrated by *National Collegiate Athletic Association v. Tarkanian*. The case involved a private membership body of public and private colleges that regulated intercollegiate athletics. The National Collegiate Athletic Association (NCAA) determined that a member state university had violated NCAA rules and required that the school suspend coach Tarkanian. When the school complied, the coach sued under Section 1983, claiming that his firing violated due process. The Court held that the school, a state actor, and the NCAA, a private party, were not joint participants in the suspension of the coach. The Court reasoned that the school was free to cancel its agreement with the NCAA, the disciplinary function had not been delegated to the NCAA by the state, and the NCAA was actually acting on behalf of all other NCAA members against the efforts of the state to forestall the suspension of its most successful coach.

Nevertheless, in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, a case whose facts seem very much to parallel *Tarkanian*, the Court did find state action. In *Brentwood Academy*, a private association which regulated high school sports throughout the state was held to be a state actor because the overwhelming majority of its members were public schools, the association received some public funds from dues and game proceeds, its officers were drawn from public schools, association employees participated in the state retirement fund, and the association was seen to regulate sports activity instead of the state board of education. The Court stated that the "nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings."

5.1.A.2.b.iii. Governmental Creation of a Legal or Procedural Framework

A private party may be engaged in "state action" if the act which deprived federal rights could not have occurred but for the existence of a governmental framework requiring government approval or action. In *North Georgia Finishing, Incorporated v. Di-Chem, Incorporated* the Court found state action in a private party's invocation of a court-ordered attachment that failed to afford due process to the debtor. Similarly, in *Lugar v. Edmondson Oil Company*, the Court held that a creditor who invokes prejudgment attachment remedies requiring the participation of a court clerk and a sheriff, acts under color of state law. In contrast, in *Flagg Brothers v. Brooks*, involving a prejudgment attachment authorized by state law but not requiring the intervention of a court, no state action was found. Finally, in *Edmondson v. Leesville Concrete Company*, the Court found that a private attorney using peremptory challenges in a jury trial in a racially biased manner was a "state actor" because his act—use of peremptory challenges—could exist only in the judicial context and with the approval of a state judge. The rule of these cases is that a private party becomes a state actor if he or she uses a state procedure requiring some state intervention.

However, in *American Manufacturers Mutual Insurance Company v. Sullivan*, the Supreme Court found that a private workers' compensation insurer was not a state actor when it withheld payments without prior notice to a worker as part of a state "utilization review" of certain medical costs. The purpose of a utilization review is to assess the necessity for a particular procedure to determine whether the costs should be borne by the workers'

compensation carrier. In *Sullivan*, even if it could be assumed that the state, by providing a utilization review procedure, had “subtly encouraged” insurers to withhold payments pending the review, invocation of the procedure was not seen as required or coerced by the state.

Given the move towards privatization of formerly state programs, a close look at *Sullivan’s* analysis is warranted. The Court began by identifying the specific conduct complained of: the insurance company’s withholding of payments. It then analyzed the state’s role to determine whether “there is a sufficiently close nexus between the State and the challenged action ... so that the action of the [private party] may be fairly treated as that of the State itself.” Having understood that the state’s role was simply to accept the insurer’s request for a utilization review, checking the form for accuracy, and forwarding it to a private panel of health care providers for a decision, the Court found no state action. The Court described the “State’s decision to allow insurers to withhold payments” as “state inaction, or more accurately, a legislative decision not to intervene in a dispute between an insurer and an employee over whether a particular treatment is reasonable and necessary.”

The Court, nevertheless, recognized that the utilization review panel’s subsequent *affirmative decision* to uphold or reverse the insurance company *would be* state action because the panel possessed authority delegated to it by state statute: “While the decision of a [Utilization Review Organization], like any judicial official, may properly be considered state action, a private party’s mere use of the State’s dispute resolution machinery, without the ‘overt, significant assistance of state officials,’ ... cannot.”

In the context of state-mandated procedures or programs carried out by private parties, the distinction between state and private actions depends on (1) whether the state plays an active role in furthering the act which allegedly caused the deprivation of federal rights, and (2) the degree to which the procedure invoked is a core governmental function or institution. In short, the inquiry turns on whether the state affirmatively furthers the action or merely authorizes it, and, if the latter, how important the procedure is to the functioning of the state.

5.1.A.2.b.iv. Governmental Compulsion or Significant Encouragement to Act in a Particular Way

One of the most important Section 1983 issues for legal aid advocates is the degree to which one can imply “state action” from the fact that the defendant has received government funding or is extensively regulated by the state. Generally, government funding or regulation does not make a state actor of the recipient or the regulated party unless one can show such a close connection between the government and the act complained of that the action taken “may be fairly treated as that of the State itself.” A private landlord participating in the Section 8 program is a “state actor” while taking actions required by federal regulations, but is only a private actor if she unilaterally locks out her tenant in violation of those regulations. The act of forcible eviction is analytically an expression of her private will and not compelled by government fiat.

Several Supreme Court decisions have accordingly confirmed that, absent delegation, joint activity, or a state created framework, state action is rarely found absent compulsion or significant encouragement from the government to the private entity to act in a particular way. For instance, in *Jackson v. Metropolitan Edison Company*, a highly regulated utility was not a state actor when, without prior notice to its customer, it terminated her power for nonpayment of a utility bill. The Court saw no “nexus” between government regulation and the company’s action that would be sufficient to implicate due process. The decision to cut off power was prompted by economic concerns and was made by the company with little relation to the fact that its business was highly regulated.

A similar conclusion was reached in *Blum v. Yaretsky*, where a nursing home receiving Medicaid funding decided to discharge particular patients without giving them a hearing. Given that Medicaid regulations did not specifically require any particular level of care, the nursing home’s decision could not be imputed to the state. Indirect government involvement resulting from the regulatory requirement that the state be notified of any change did not alter this conclusion. The Court wrote: “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.”

Similarly, in *San Francisco Arts and Athletics, Incorporated v. United States Olympic Committee*, the Court held that the United States Olympic Committee's refusal to license the use of the word "Olympic" was not state action even though Congress granted it the exclusive right to license the use of the word. Once again, the Court distinguished authorization from compulsion, finding the former insufficient to establish state action.

Most recently, as discussed above, the Court held in *American Manufacturers Mutual Insurance Company v. Sullivan*, that a private workers' compensation insurer who used a state "utilization review" of certain medical costs resulting in the withholding of payments without prior notice to the worker, did not thereby become a state actor. The Court concluded that because its actions were not imposed or sanctioned by the state, it could not be a state actor.

Nor does governmental funding give rise to "state action" absent state coercion or significant encouragement of the act causing the deprivation. Thus, in *Blum v. Yaretsky*, the Court rejected the contention that extensive public funding converted the nursing home's decision to lower the level of care into state action in violation of the Medicaid Act. In essence, there was no cause and effect relationship between the fact of public funding and the nursing home's allegedly unlawful act.

Finally, the Court addressed this issue in *Rendell-Baker v. Kohn*. This case involved the termination of teachers and counselors critical of management by a private school that was primarily dependent on federal funding for the education of "troubled" children. In order to ensure that school staff met certain minimum requirements, state regulations required the government to be notified whenever the school hired or dismissed its counseling staff. Nevertheless, the Court found no state action. The Court reasoned, first, that "the decisions to discharge the petitioners were not compelled or even influenced by any state regulation." Second, the Court held that "[a]cts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts."

5.1.A.2.b.v. The "Symbiotic Relationship" Test

The Supreme Court has applied several other tests to find state action, although their application now appears limited to the facts presented in the original cases. The first of these is the "symbiotic relationship" test first broached in *Burton v. Wilmington Parking Authority*. In *Burton*, a city agency leased facilities to a restaurant that engaged in racial discrimination. Because the city gained parking revenue from the restaurant's operation, and the restaurant gained a good location and tax benefits from the city, the Court held that the restaurant acted under color of state law, and, therefore, violated the Fourteenth Amendment when it refused to serve black patrons.

The Supreme Court began narrowing *Burton* in *Moose Lodge No. 107 v. Irvis*, holding that the grant of a state liquor license did not convert the discriminatory conduct of the licensee into state action. The Court specifically rejected the plaintiff's claim of a *Burton* symbiotic relationship, even though the license was of great value to the licensee and generated revenue for the state. According to the Court, the benefit to the state of liquor license revenues was only remotely attributable, if at all, to the private party's discriminatory conduct.

The Court further constricted *Burton* in *Rendell-Baker v. Kohn*. *Rendell-Baker*, as noted above, held that a private school that depended almost exclusively on government funding, was extensively regulated, and contracted with governmental agencies to provide educational services, did not act under color of state law when it fired an employee. The Court rejected the claim of a symbiotic relationship between the state and the school on the grounds that the state neither owned the school property nor benefited from the firing.

A plaintiff claiming state action on the basis of a "symbiotic relationship" between a private party and state or local government must show that the government derives a financial benefit that can be specifically attributed to the challenged conduct. In *Burton*, the benefit to the government was the additional revenue resulting from the increased patronage given to a whites-only restaurant. In contrast, the government received no specific benefit from the club's discriminatory conduct in *Moose Lodge* or the school's decision to fire a schoolteacher in *Rendell-Baker*. Only the combination of a symbiotic relationship and a specific financial benefit to the government from the conduct

at issue will create state action out of private conduct. For these reasons, *Burton* is rarely applicable.

5.1.A.2.b.vi. The “Public Function” Test

The public function doctrine is another moribund test for state action, originating with *Marsh v. Alabama* and the *White Primary Cases*. Read broadly, they suggested that certain responsibilities are so quintessentially governmental that private parties who perform them necessarily act under color of state law. Thus, the private landowner who established the company town in *Marsh* performed many of the public functions traditionally associated with local government; like a local government, it could not bar handbilling on its streets. In the *White Primary Cases*, private organizations that barred black voters from participating in primary elections performed a traditionally public function in holding an election, thereby acting under color of law.

It is doubtful that the public function doctrine survives in the broad form suggested forty years ago. In *Hudgens v. NLRB*, the Court held that a shopping center was not a first amendment forum, reasoning that it was not the functional equivalent of a company town. In so ruling, the Court may have confined *Marsh* to its facts; the only contemporary analogue to a company town may be a migrant labor camp. Similarly, the *White Primary Cases* rationale probably retains force only because it involved the constitutionally protected right to vote and the guarantee of a “republican form of government.”

Jackson v. Metropolitan Edison Company provided the doctrinal foundation for further narrowing the public function doctrine. Rejecting the claim that the provision of electricity was a public function, the Court held that a public function must be one that traditionally was “the exclusive prerogative of the state.” Thus, the Court has since found that the following are not public functions: enforcement of a warehouseman’s lien, education of children with special needs, the operation of a nursing home, control of the word “Olympic,” and establishment of disciplinary standards for intercollegiate athletics. The atrophied “public function” doctrine now can probably be collapsed within the “delegation of traditional state function” test discussed above.

5.1.A.2.b.vii. The “Special Relationship” Test

Unlike the above tests, which seek to use Section 1983 to sue *private parties* as state actors, the special relationship test seeks to hold the *government* liable for the acts of a private party. Section 1983 can be used to sue a government agency for injuries caused by a non-governmental third-party *if*, as the result of the government’s “special relationship” with the victim, the latter has been put in a position that severely hampers his or her ability to protect themselves. Such a relationship most clearly exists when the victim has been incarcerated in jail or prison or committed in a state institution. However, it has on occasion also been found where government action has placed the plaintiff in such obviously dangerous circumstances as to make the government responsible for plaintiff’s well-being.

A non-custodial “special relationship” is found only in rare circumstances. Thus, in the case creating this standard, *DeShaney v. Winnebago County Department of Social Services*, the victim was a child who had been reported to the county as having been repeatedly abused by his father, the custodial parent. Despite these reports and a subsequent investigation, the county did not remove the child from his home. After a severe beating that left the child permanently injured, the county was sued by the non-custodial parent, who contended that the failure to take action deprived the child of substantive due process rights. The Court found that even though the county knew of the potential harm to the victim and continued to monitor his situation, this did not create a “special relationship” with the county sufficient to make the government liable:

[W]hen the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – e.g., food, clothing, shelter, medical care, and reasonable safety – it transgresses the

substantive limits on state action set by the Eighth Amendment and the Due Process Clause. [Citations omitted.] The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.

An arrest, incarceration, involuntary commitment, or a foster care placement resulting from a dependency proceeding would create a “special relationship” necessary to establish liability.

5.1.A.2.c. When Government Can Be a “Person” if the Deprivation of Federal Rights Stems from a Government “Policy”

Legal aid advocates regularly face the problem of individually vindictive or incompetent government workers whose actions deprive clients of the level of public assistance or other benefit to which they are entitled. These actions are often taken by agency employees in violation of that agency's own stated policies. In such cases, as more fully discussed in [Chapter 8](#) of this MANUAL, only the employee is liable in a Section 1983 claim. Even if the employee's acts result in a violation of federal constitutional, statutory, or regulatory rights, they cannot give rise to agency liability under Section 1983. Agency liability must be founded on a deprivation caused by the institution's “custom, policy or practice,” and not as the result of aberrant behavior by a rogue employee.

This rule was established by *Monell v. New York City Department of Social Services*, which held that a municipality could be a “person” for purposes of Section 1983, but limited the scope of the agency's liability to only those instances where the deprivation resulted from that agency's custom, policy or practice. *Monell* establishes the principle that the government should be liable only for actions for which it is directly responsible. This holding gives a plaintiff several options. She can sue the defendant employee in her personal or official capacity, or both. Assuming the defendant is not a State and immune under the Eleventh Amendment from suit in federal court, the plaintiff can name as an additional defendant – or even the sole defendant – either the agency itself, or its titular head, who is sued in his or her official capacity. Naming the entity or its head is particularly important when injunctive relief binding the entire agency is sought. An order entered against the agency head in her or his official capacity will bind any successor officer.

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