PRIVATE IN FORM, PUBLIC IN FUNCTION: WHY THE U.S. SUPREME COURT SHOULD ADOPT THE NEXUS EXCEPTION TO THE STATE ACTION DOCTRINE

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INTRODUCTION

In a world of increasing privatization, the means for state actors to breach the rights of citizens grows ever more diverse.[1] The exponential increase in privatization blurs the boundary between state and private actors, making it increasingly difficult to apply the decades-old tests to differentiate between them.[2] Fortunately, several circuit courts of appeal have derived a test, the Nexus Exception, to address the blurred lines.[3] The Nexus Exception determines whether a private actor is structurally a state actor for constitutional protection.[4]

When a state deprives citizens of their constitutionally protected rights, citizens assert those rights through 42 U.S.C. § 1983.[5] Section 1983 creates a private cause of action against state actors, a constitutional tort, whereby the justice system can make deprived citizens whole.[6] Courts have recognized that litigants generally have viable constitutional claims only against state actors, a principle known as the State Action Requirement.[7] This is because constitutional rights typically protect individuals from the government.[8]

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[1] Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369 (2003).

[2] *Id.* at 1369, 1456.

[3] *See infra* Parts III.C and III.D.

[4] *See infra* Parts III and IV.

[5] *See infra* Part I.

[6] *See infra* Part I.

[7] *See infra* Part II.

[8] *See infra* Parts II and IV.

However, private actors can deprive citizens of their constitutionally protected rights.[9] Section 1983 does not directly address private actors.[10]

To close this gap, the U.S. Supreme Court developed two major categories of exceptions to the State Action Requirement: (1) the Public Function Exception and (2) the Entanglement Exceptions.[11] Each provides a path to permit plaintiffs to raise § 1983 claims against private actors.[12] The Entanglement Exception category itself contains three distinct exceptions: (1) the Joint Action Exception; (2) the Symbiosis Exception; and (3) the Nexus Exception.[13] The Supreme Court has expressly affirmed the first two, but the Nexus Exception results from inconsistent circuit interpretations of an already ambiguous Supreme Court decision.[14]

Where the First Circuit has enunciated a clear, workable Nexus Exception for determining state actors, the Fifth Circuit's version of the test places an onerous burden on plaintiffs.[15] The burden is so high that it is, to borrow a phrase from another area of constitutional law, "fatal in fact" to plaintiffs' assertions of the Nexus Exception.[16] In the interest of government accountability to the people, this comment argues that when a case reaches the Court presenting this issue, the Court should adopt the First Circuit's approach to the Nexus Exception to ensure state actors cannot violate constitutional protections and then hide behind private actors who do not fit within the parameters of the traditional state actor tests.

Part I briefly outlines 42 U.S.C. § 1983 as a claim, its essential elements, and its intended purpose. Part II addresses the commonly understood and accepted exceptions to the State Action Requirement. Part III addresses the development and current understanding of the Nexus Exception in the First and Fifth Circuits. Finally, Part IV argues that the Supreme Court should adopt the First Circuit's approach to the Nexus Exception for doctrinal and normative reasons when a case presents this issue to the Court.

[9] *See infra* Part II.

[10] *See infra* Part I.

[11] *See infra* Part II.

[12] *See infra* Part II.

[13] *See infra* Part II.B.

[14] *See infra* Parts II and III.A.

[15] *See infra* Parts III.C and III.D.

[16] *See* Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

I. 42 U.S.C. § 1983: THE CITIZEN'S PRIVATE CAUSE OF ACTION

Before examining the Nexus Exception, it is helpful to understand § 1983 as a cause of action, the State Action Requirement, and the three Supreme Court-recognized exceptions to the State Action Requirement. 42 U.S.C. § 1983 is the mechanism by which any person within the jurisdiction of the United States may file a civil cause of action for violations of constitutionally protected rights against state actors.[17] To make a claim under § 1983, the plaintiff must plead (1) a state actor (2) deprived a person of a constitutionally protected right, privilege, or immunity (3) under color of law.[18] The first element is the subject of this comment.[19]

Of equal importance to the elements of a § 1983 claim is the context in which 42 U.S.C. § 1983 claims reside. Congress passed § 1983 as Section 1 of the Civil Rights Act of 1871.[20] Significantly, Congress passed this Act to enforce the newly ratified Thirteenth, Fourteenth, and Fifteenth Amendments.[21] Though the Act's intent was enforcement, it remained dormant until *Monroe v. Pape* in 1961.[22] In *Monroe*, the plaintiff homeowners sued law enforcement for what they argued to be an unconstitutional search of their home without a warrant.[23] The plaintiffs' approach was novel. They brought a claim for violations of the Fourteenth Amendment via 42 U.S.C. § 1983.[24] On review of the Seventh Circuit's adverse judgment against the plaintiffs, the Supreme Court reversed and allowed the plaintiffs to bring a § 1983 cause of action.[25] This decision recognized Congress's original intent for the Act was to enforce the

[17] 42 U.S.C. § 1983.

[18] Victoria W. v. Larpenter, 369 F.3d 475, 482 (5th Cir. 2004) (The Court cites Bush v. Viterna, 795 F.2d 1203, 1208 (5th Cir. 1986) for the elements of the 42 U.S.C. § 1983 cause of action but adds a convenient numbering scheme to keep track of the elements).

[19] Elements two and three pose their own issues, but are beyond the scope of this comment, which focuses on the first element.

[20] Jacob E. Meyer, "*Drive-By Jurisdictional Rulings": The Procedural Nature of Comprehensive-Remedial-Scheme Preclusion in § 1983 Claims*, 42 COLUM. J.L. & SOC. PROBS. 415, 419 (2009).

[21] *Id.*

[22] 365 U.S. 167 (1961), *overruled in part on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978); George M. Weaver, *Ratification as an Exception to the § 1983 Causation Requirement: Plaintiff's Opportunity or Illusion?*, 89 NEB. L. REV. 358, 359 (2010).

[23] 365 U.S. at 170.

[24] *Id.* at 170–71.

[25] *Id.* at 170.

Thirteenth, Fourteenth, and Fifteenth Amendments against the states.[26] The Court later incorporated the Bill of Rights through the Fourteenth Amendment to apply to the states, expanding the scope of Section 1983.[27]

Now, § 1983 is the primary tool for citizens to enforce their constitutionally protected rights against state actors that violate them.[28] Hence, a significant factor to consider when there is a potential change to § 1983 jurisprudence is whether that change will further the goal of § 1983: to enforce the citizens' rights against a state actor.[29] Courts ought to embrace changes that further the goal of greater state accountability to the citizens for their constitutional rights.

II. THE STATE ACTION REQUIREMENT: THE DOCTRINE AND ITS EXCEPTIONS

As § 1983 makes clear, state actors, specifically state and local governments, are the only party liable in a civil suit for violations of constitutionally protected rights.[30] The U.S. Supreme Court decided in its seminal case *United States v. Stanley* in 1883 that plaintiffs may only sue state actors for breaches of the Civil Rights Act because of the Fourteenth Amendment Due Process Clause.[31] As the Court wrote, the State Action Requirement exists because the Fourteenth Amendment to the Constitution prohibits certain state actions.[32] When a state actor breaches those limits, there must be a penalty for the breach.[33] Conversely, a private individual cannot typically be liable for breaching the limits on the state because the individual is not the state.[34]

The Court continued this jurisprudence in *Lugar v. Edmondson Oil Co.*, where it reaffirmed the essential holding of *Stanley* by ruling that the

[26] *Id.* at 170–71.

[27] 16B AM. JUR. 2D *Constitutional Law* § 933, Westlaw (database updated Feb. 2023).

[28] Weaver, *supra* note 22, at 359.

[29] *E.g.*, *Monroe*, 365 U.S. at 167.

[30] *See generally* 42 U.S.C. § 1983. United States v. Stanley, 109 U.S. 3, 11 (1883). The Civil Rights Act of 1875 is a separate piece of legislation from 42 U.S.C. § 1983. The applicability of § 1983 to the federal government is known as the *Bivens* Exception and is beyond the scope of this comment.

[31] 109 U.S. at 11–12.

[32] *Id.* at 11.

[33] *Id.* at 11–12.

[34] *Id.* at 25–26.

petitioner had correctly stated a § 1983 claim.[35] The Court remanded the case because it held the petitioner had sufficiently demonstrated the state action element.[36] The jurisprudential requirement that the offending party must be a state actor is called the State Action Requirement.[37]

In *United States v. Morrison*, the Court held that constitutionally protected rights, including those found in or incorporated through the Fourteenth Amendment, restrict state actions, not private actions.[38] The Court affirmed the boundary Congress set between state and private actors through these decisions.

A. Public Function Exception

In 1945, the Court recognized that the congressionally established boundary, the State Action Requirement, eliminated obvious cases of quasi-government actors' constitutional violations from review.[39] Hence, the Court reinterpreted what constitutes a state actor for the purposes of the State Action Requirement in *Marsh v. Alabama*.[40] The rule the Court established was that a private entity that executed a traditionally public function is a state actor for purposes of § 1983.[41] In *Marsh*, a Jehovah's Witness attempted to proselytize in a privately owned and operated town.[42] The town had posted signs that prohibited solicitation and similar activities.[43] Ignoring the signs, the woman continued attempting to distribute literature to passersby.[44] She persisted through warnings from law enforcement, who ultimately arrested her.[45] To resolve the matter, the Supreme Court held that the private town was a state actor under its newly announced Public Function Exception.[46] Therefore, the town was subject to constitutional restrictions.[47]

[35] 457 U.S. 922, 942 (1982).

[36] *Id.*

[37] *Id.*

[38] 529 U.S. 598, 621 (2000).

[39] *See generally* Marsh v. Alabama, 326 U.S. 501 (1945).

[40] *Id.* at 505.

[41] *Id.* at 505–07.

[42] *Id*. at 503–04.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* at 509–10.

However, the Court did not herald this apparent break with precedent as a free pass to fasten any private actor performing a vaguely public function with constitutional bindings. The Court reinforced the boundaries of the Public Function Exception in cases such as *Jackson v. Metro. Edison Co*.[48] In *Jackson*, the Supreme Court refused to recognize an expansion of the Public Function Exception to electrical companies because power delivery was not a traditionally exclusively government function.[49]

B. Entanglement Exceptions

As cases have arrived at the Supreme Court, it has continued to modify the State Action Requirement beyond the Public Function Exception to address situations where private actors acted indirectly at the behest of the state.[50] Hence, it developed the other major category of State Action Requirement exceptions, the Entanglement Exceptions. Three types of Entanglement Exceptions exist: the Joint Action Exception, the Symbiosis Exception, and the Nexus Exception.[51]

1. The Joint Action Exception

The Joint Action Exception applies when the government and private actors explicitly act in concert toward the same purpose that forms the basis of a plaintiff's complaint.[52] In *United States v. Price*, the Court described the exception:

> Private persons, jointly engaged with state officials in the prohibited action, are acting under color of law for purposes of the statute. To act under color of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents.[53]

[48] *E.g.*, 419 U.S. 345, 352–53 (1974).

[49] *Id.*

[50] *Id.*

[51] United States v. Price, 383 U.S. 787, 794 (1966) (Joint Action Doctrine); Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) (Symbiosis Exception); Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (Nexus Exception).

[52] *Price*, 383 U.S. at 794.

[53] *Id.* (emphasis added) (internal quotations omitted).

In *Price*, the Court applied the doctrine to a particularly egregious set of facts in which state officials and private parties worked together to release, intercept, assault, and kill prisoners summarily.[54] The Court held that the direct conspiracy between the government officials and private actors towards a specific end under the color of law made the private parties into state actors for the purposes of the Fourteenth Amendment.[55]

Since *Price*, the Court has reaffirmed the uses and limits of the Joint Action Exception. For example, in *Adickes v. S. H. Kress & Co.*, the Court reviewed a case stemming from a restaurant's refusal to serve a white customer accompanied by several black customers.[56] The authorities arrested the white customer for breaching what appeared to be racially motivated vagrancy codes.[57] In its ruling, the Court noted that the Joint Action Exception might apply to the restaurant if the plaintiff could demonstrate that the restaurant was acting in concert with a state-enforced custom of racial discrimination.[58] The critical question for determining whether the private actor qualified as a state actor was whether the state and private actor were explicitly working in concert toward the same end.

2. The Symbiosis Exception

In keeping with the overall goal of Entanglement Exceptions, the Supreme Court designed the Symbiosis Exception to apply to suspect fact patterns involving private actors and states that do not neatly fit into the other categories. The Symbiosis Exception applies when a state actor does not explicitly agree to a private party's conduct but knows of the conduct, receives some benefit from the conduct, and can stop the conduct but refrains from doing so.[59]

The Supreme Court recognized this doctrine in *Burton v. Wilmington Parking Authority*.[60] There, a café racially discriminated by refusing to provide service to a customer.[61] The complicating factor was that no direct

[54] *Id.* at 795.

[55] *Id.* at 795–96.

[56] Adickes v. S. H. Kress & Co., 398 U.S. 144, 144–45 (1970).

[57] *Id.*

[58] *Id.* at 152.

[59] Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961).

[60] *Id.*

[61] *Id.* at 716.

state action supported the café's discrimination.[62] However, the café rented space in a building city-owned and operated.[63] Understanding that the city indirectly discriminated via the café, the Court adopted another exception to the State Action Requirement. The Court described the basic outline of the Symbiosis Exception when it wrote:

> By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its ***power, property and prestige*** behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.[64]

In applying the exception, the Court found that under the totality of the circumstances, a private entity and the city had a sufficiently close relationship such that they were joint participants in unconstitutional discrimination.[65]

One of the most consequential cases on the Symbiosis Exception is *Blum v. Yaretsky* because of how the Supreme Court opened the door to possibly recognizing the Nexus Exception in a future case.[66] In *Blum*, a nursing home in New York City was treating two patients, both Medicaid recipients.[67] Believing that the patients' high degree of care was unnecessary, the nursing home officials sought to transfer the patients to a lower-care facility.[68] After notice and requisite administrative proceedings in an attempt to transfer the patients, state social security officials delivered an ultimatum to them: accept a transfer to a lower-care facility or no longer receive Medicaid benefits.[69] The patients filed a class action suit against various New York health officials and agencies in response.[70] Because of the regulatory interaction between the

[62] *Id.* at 716–17.

[63] *Id.* at 717–19.

[64] *Id.* at 725 (emphasis added).

[65] *Id.* at 724–26.

[66] 457 U.S. 991, 1004–05 (1982).

[67] *Id.* at 995.

[68] *Id.*

[69] *Id.*

[70] *Id.* at 995–96.

New York health authorities and the nursing homes, the prior Court's judgments directly enjoined specific regulatory actions of the state authorities.[71] However, they had the effect of enjoining the non-defendant nursing homes.[72]

Hence, an integral part of the Court's analysis turned on the relationship between the private party nursing homes and the New York authorities.[73] Reversing the prior courts, the Court concluded that the patients failed to establish how the nursing homes constituted state actors under the Symbiosis Exception.[74] Specifically, the Court noted that doctors and nurses, the individuals initiating the transfer procedures jeopardizing Medicaid benefits, are private parties whose decisions state health authorities do not influence.[75]

A vital aspect of the decision is the Court's recognition of the substantial regulations placed on health care professionals, and its rejection that those regulations alone forced professionals to make a decision that would tie them integrally to the government.[76] Take note: the Court examined whether the healthcare professionals were state actors by examining the incentive structure surrounding the nurses as opposed to examining how the state and private actors covertly operated in tandem or by examining how the government could have acted to end discrimination but did not.[77] Though the Court does not explicitly state a rule for the Nexus Exception, the Court's analysis is foundational to establishing the final exception, the Nexus Exception.[78]

Notably, each exception relies on the same logic. The Public Function, the Joint Action, and the Symbiosis Exceptions all require the plaintiff to show the court that an ostensibly private actor acts toward an end so related to the government that the court can rightly call the private actor a state actor for 42 U.S.C. § 1983's State Action Requirement.

[71] *Id.* at 998, 1003–04.

[72] *Id.*

[73] *Id.* at 1003–04.

[74] *Id.* at 1004–05.

[75] *Id.* at 1005.

[76] *Id.* at 1004–05, 1010.

[77] *See generally id.* at 991.

[78] *See infra* Part III.A.

III. THE NEXUS EXCEPTION: THE CATEGORICALLY UNIQUE EXCEPTION

The final exception to the State Action Requirement, the Nexus Exception, categorically differs from the other state action exceptions. Whereas the others focus on action, the Nexus Exception focuses on structure. Unlike the other exceptions, the Supreme Court has not recognized the Nexus Exception expressly, but appellate courts have recognized the exception. This comment will examine how the Nexus Exception fits with existing Supreme Court precedent (as well as exploring the Court's decisions supportive of the exception albeit not directly addressing it), as well as the First Circuit's and Fifth Circuit's differing views on the exception and its scope. The examples discussed in Parts III.A, III.C, and III.D will show that the Nexus Exception addresses the same fundamental consideration as the other three exceptions concerning who has the final say on the entity's decisions.[79] However, the Nexus Exception differs from the other exceptions because it concerns the decision-making matrix between a private entity and the state by looking at the financial and regulatory ties between the private entity and the state instead of the state's actions in actively guiding private conduct.

A. Burton *and* Blum

The circuit courts derived the Nexus Exception from the Supreme Court's analyses in *Burton* and *Blum* discussed above. Concerning state action, the *Blum* Court stated that a private entity could be public if "there is a sufficiently close nexus" between the private and public actors.[80] The Court went on to describe, in turn, each of the recognized exceptions to the State Action Requirement.[81] The *Blum* Court's analysis of the Symbiosis Exception diverged materially from its approach in *Burton* by focusing on incentive structures from the perspective of the private actor rather than looking at the state actor's specific actions or the intentional lack thereof.[82]

The *Blum* Court analyzed the entwinement of private and state actors in the context of the regulatory framework around healthcare physicians and

[79] *See infra*, Part III.A, C, and D.

[80] 457 U.S. at 1004.

[81] *Id.* at 1004–05.

[82] *E.g.*, *id.* at 1007–10.

facilities.[83] Compare this to the Court's approach in *Burton*, involving the café discussed above.[84] In *Burton*, the Court focused first on facts showing that the city owned the building where the café rented space and that the city promised to maintain the building instead of examining a regulatory relationship between the two.[85] The Court specifically named the City's direct title to the land as a consideration in finding state intertwinement with a private party.[86] The Court further listed Wilmington's promises to service much of the property, including gas service for the boiler room, structural repairs, and exterior surface repairs.[87]

The *Burton* Court also based its decision on the benefits Wilmington received from the building lease to the café.[88] Without the café's rent contributions, Wilmington's project was not sustainable.[89] The City had the opportunity to place a non-discrimination clause in the lease and did not.[90] Hence, the Court recognized the City's tacit approval and support for the discrimination because it benefited from the discriminatory café.[91]

The *Burton* opinion did not rely on regulatory ties between the city and the café.[92] The *Burton* Court expressly mentioned that the city failed to regulate the café's discrimination, so no regulatory ties existed.[93]

Therefore, the Court's copious references to the healthcare regulatory framework in *Blum* constitute a significant departure from the analysis in *Burton*.[94] In *Burton*, the Court focused on the state ownership of the facility where the alleged violation occurred and the benefits the state received due to its role as landlord.[95] The *Blum* Court's analysis relied far more on whether regulations forced healthcare providers to act in a certain way than on what benefit the government might receive from unconstitutional behavior.[96] To

[83] *Id.* at 1007–09.

[84] *See generally* 365 U.S. 715, 725 (1963).

[85] *Id.* at 719–20.

[86] *Id.* at 718, 723–24.

[87] *Id.* at 720, 723–24.

[88] *Id.* at 723–24.

[89] *Id.*

[90] *Id.* at 720.

[91] *Id.* at 723–24.

[92] *See id.* at 715.

[93] *Id.* at 720.

[94] *Cf. id.*, *with* Blum v. Yaretsky, 457 U.S. 991 (1982).

[95] *See generally* 365 U.S. at 715.

[96] *See generally* 457 U.S. at 991.

the extent the Court considered monetary benefits, it was in the context of reducing Medicaid payments, which more directly concerned benefits to private parties as opposed to the government.[97] Again, the *Blum* Court phrased this analysis in the context of Symbiosis Analysis, but its application of law to facts varied substantially from the Symbiosis Test it established in *Burton*.[98]

Blum thus opened the door to the possibility of a new exception, and several circuits have since recognized it as doing such—resulting in the Nexus Exception.

B. The General Circuit Split on the Nexus Exception

Every circuit recognizes the existence of the basic Nexus Exception analysis.[99] Yet only three circuits created specific tests for the Nexus Exception other than general entwinement language.[100] There are three groups of circuit views on the Nexus Exception. There are those circuits that conflated the Nexus Exception with other forms of state action exceptions, those circuits that recognized a separate Nexus Exception but have no additional test, and those circuits that recognized and developed a test for the Nexus Exception.

[97] *E.g.*, *id*. at 1014, 1018.

[98] *Compare Blum*, 457 U.S. at 991 (utilizing new, unrelated factors in the context of the Symbiosis Exception), *with Burton*, 365 U.S. at 715 (establishing the general Symbiosis Exception test).

[99] NB v. District of Columbia, 794 F.3d 31, 43 (D.C. Cir. 2015); Emmanuelli v. Priebus, 500 F. App'x 886, 889 (11th Cir. 2012); VDARE Found. v. City of Colorado Springs, 11 F.4th 1151, 1160 (10th Cir. 2021); Doe v. Google LLC, No. 21-16934, 2022 U.S. App. LEXIS 31922, at *7 (9th Cir. 2022); Stanko v. Bosselman Enters., 732 F. App'x 484, 485 (8th Cir. 2018); L.P. v. Marian Cath. High Sch., 852 F.3d 690, 696 (7th Cir. 2017); Hardy v. Cmty. Mental Health, No. 17-2181, 2018 U.S. App. LEXIS 18781, at *9 (6th Cir. 2018); Daigle v. Opelousas Health Care, Inc., 774 F.2d 1344, 1348–49 (5th Cir. 1985); Philips v. Pitt Cnty. Mem'l Hosp., 572 F.3d 176, 181–82 (4th Cir. 2009); Boyle v. Governor's Veterans Outreach & Assistance Ctr., 925 F.2d 71, 76 (3d Cir. 1991); Fabrikant v. French, 691 F.3d 193, 207 (2d Cir. 2012); Ponce v. Basketball Fed'n of P.R., 760 F.2d 375, 377 (1st Cir. 1985).

[100] *Google LLC*, 2022 U.S. App. LEXIS 31922, at *7; *Hardy*, 2018 U.S. App. LEXIS 18781, at *9; *Ponce*, 760 F.2d at 377.

1. Circuits that Conflate the Nexus Exception with Another Exception

Many federal appellate circuits believe that the Nexus Exception is a part of one or all of the previously discussed exceptions. These circuits are the D.C., Eleventh, Ninth, Fourth, Third, and Second Circuits.[101] As this comment discusses in Part III.A, the Nexus Exception is an independent test from the other exceptions to the state action doctrine as it addresses the categorically unique concern of pure decision structure and incentives.[102]

2. Circuits that Recognize the Nexus Analysis with No Further Test

The Eighth, Seventh, Sixth, and Fourth Circuits recognize the Nexus Exception as an independent test from the other exceptions.[103] These courts' basic recognition of the Nexus Exception arise from the Supreme Court's reasoning in *Blum*, which diverged from the inquiry used in *Burton* to determine whether the Symbiosis Exception applies.[104] However, these circuits have failed to thoroughly consider the Nexus Exception or otherwise articulate a clear test for applying the exception.

3. Circuits with Specific Nexus Exception Tests

This leaves three circuits, the First, Fifth, and Tenth Circuits, which thoroughly considered the Nexus Exception and clearly identified further tests.[105] This comment examines the First and Fifth Circuit approaches as normative options for the Supreme Court to adopt in Parts III.C, III.D, and

[101] *NB*, 794 F.3d at 43 (holding that the nexus analysis is a factor in the Joint Action Exception); *Emmanuelli*, 500 F. App'x at 889 (holding that the nexus analysis is part of the Symbiosis Exception); *Doe*, 2022 U.S. App. LEXIS 31922, at *7 (holding that the nexus analysis is part of the Public Function, Joint Action, and Symbiosis Exceptions); *Philips*, 572 F.3d at 181–82 (holding that the nexus analysis is a factor in the Symbiosis Exception); *Boyle*, 925 F.2d at 76 (holding that the nexus analysis is part of the Joint Action and Symbiosis Exceptions); *Fabrikant*, 691 F.3d at 207 (holding that the nexus analysis is part of the Public Function, Joint Action, and Symbiosis Exceptions).

[102] *See supra* Part III.A; *see also infra* Part IV.

[103] *Stanko*, 732 F. App'x at 485; *Marian Cath. High Sch.*, 852 F.3d at 696; *Hardy*, 2018 U.S. App. LEXIS 18781, at *9; *Philips*, 572 F.3d at 181–82.

[104] *See supra* Part III.A; *See also infra* Part IV.

[105] *VDARE Found.*, 11 F.4th at 1160; *Daigle*, 774 F.2d at 1348–49; *Ponce*, 760 F.2d at 377.

III.E.[106] The Tenth Circuit approach is relatively simple. The Tenth Circuit lays out seven non-dispositive factors to determine if a private actor is a state actor for § 1983 purposes.[107] While these factors are persuasive for any court to consider when deciding if the Nexus Exception applies, they are not helpful enough to be normative. Each factor represents considerations that courts that apply the Nexus Exception already use.[108] Therefore, the First or Fifth Circuit approaches would serve the Supreme Court better because they utilize specific, additional tests to clarify the applicability of the Nexus Exception.[109]

C. The First Circuit's Nexus Exception

Three years after the Court's *Blum v. Yaretsky* opinion, the First Circuit Court of Appeals became the first circuit to draw out and clearly state a workable Nexus Exception distinct from the Symbiosis Exception. It did so in *Ponce v. Basketball Federation of P.R.*[110] The controversy arose when a basketball organization suspended a professional player from playing in the league tournament due to eligibility requirements.[111]

The Basketball Federation of Puerto Rico, a private organization, organized and oversaw Puerto Rican amateur basketball.[112] Among other requirements, the Federation mandated that each player in one of its leagues have at least one parent born in Puerto Rico or have resided in Puerto Rico for the past three years.[113] Mistakenly, the plaintiff-player believed his adoptive father was born in Puerto Rico when he was born in California.[114] As the plaintiff did not meet the residency requirement either, the Federation suspended his eligibility to play.[115]

Subsequently, the player sought and won an injunction against the Federation for violations of the Fourteenth Amendment's Equal Protection Clause in part because the district court found that the league constituted a

[106] *Infra* Parts III.C and III.D.

[107] *VDARE Found.*, 11 F.4th at 1161.

[108] *See generally* the cases cited *supra* in notes 103 and 105.

[109] *Infra* Parts III.C and III.D.

[110] Ponce v. Basketball Fed'n of P.R., 760 F.2d 375, 382 (1st Cir. 1985).

[111] *Id.* at 376.

[112] *Id.*

[113] *Id.*

[114] *Id.* at 376–77.

[115] *Id.* at 377.

state actor.[116] On review, the First Circuit vacated the prior court's ruling because the player had not sufficiently established how the Federation met any State Action Requirement exceptions.[117]

The First Circuit covered three out of four State Action Requirement exceptions in its analysis.[118] Interestingly, the First Circuit addressed the Nexus Exception first, writing:

> [The Nexus Exception asked] whether there was an ***elaborate financial or regulatory nexus*** between appellants and the government of Puerto Rico which compelled appellants to act as they did . . . [and that there must be] 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.[119]

The First Circuit conspicuously listed the Nexus Exception separately alongside the Public Function Exception and the Symbiosis Exception.[120] In its enunciation of the Nexus Exception, the First Circuit directly cited *Blum v. Yaretsky*.[121] The First Circuit adopted and expanded the *Blum* decision's evaluation of regulatory frameworks and added a structural investigation of financial ties between the private and public actors.[122] These two factors, regulation and financial ties, are one of the best and most straightforward statements of the Nexus Exception.

Ultimately, the First Circuit rejected the plaintiff-player's assertion that the Federation was a state actor under all four exceptions.[123] The First Circuit rejected the applicability of the Nexus Exception because it believed the Federation and its leagues were private companies that happened to receive some special legal privileges and government aid through the Puerto Rican Sports and Recreation Department rather than being true public entities.[124]

The First Circuit placed a limiting criterion on the analysis that a plaintiff must demonstrate the decision-making authority lay with the government to

[116] *Id.*

[117] *Id.* at 382.

[118] *See generally id.*

[119] *Id.* at 377 (citing Blum v. Yaretsky, 457 U.S. 991, 1004–05 (1982)) (emphasis added).

[120] *Id.*

[121] *Id.* at 377–78.

[122] *Id.*

[123] *Id.* at 382.

[124] *Id.* at 379–80.

ensure that the new exception did not get out of hand.[125] The First Circuit explained this limit to the Nexus Exception through cases where it has found the exception applicable as well as where it has rejected the exception's applicability, as this comment explores below.[126]

An example of these limits is *Lovell v. Peoples Heritage Savings Bank*.[127] Here, the controversy arose from Peoples Heritage Bank converting a mutual savings bank into a stock savings bank.[128] Disgruntled account holders sued under 42 U.S.C. § 1983, alleging violations of the Due Process Clause, Contract, and Equal Protection Clauses.[129] The defendants moved for summary judgment on the § 1983 claims.[130] When the motion came before the court, the district court granted it in part and denied it in part.[131]

Key to the ruling is the court's analysis dedicated to the Nexus Exception.[132] Distinguishing *Jackson*—where the Supreme Court decided an electric company was not a state actor—the district court specifically noted the regulatory requirement that the state approves bank conversions.[133] Further, the district court noted that the limiting criterion of examining where the decision-making capacity lay was a vital distinguishing factor from other similar State Action Doctrine cases using other exceptions.[134] In simpler terms, the district court recognized the bank was a private actor in form, but in function, the decision-making matrix, at least regarding bank conversions, lay with the state, making it a state actor for § 1983 purposes.[135] Compare this with *Jackson*, where the Supreme Court found that mere regulations, which did not move the decision-making matrix out of the private entity to the state, do not convert a private actor to a state actor.[136] As a result, the

[125] *E.g.*, Lovell v. Peoples Heritage Sav. Bank, 776 F. Supp. 578, 585 (D. Me. 1991) (applying the Nexus Exception with a limiting criterion of requiring a plaintiff to show the decision-making matrix of the private entity lay with the state actor because of the financial and regulatory ties).

[126] *Infra* Part III.C.

[127] *See* 766 F. Supp. at 583.

[128] *Id.* at 580.

[129] *Id.*

[130] *Id.*

[131] *Id.* at 592.

[132] *Id.* at 588.

[133] *Id.* at 583–84.

[134] *Id.* at 584, 588–89.

[135] *Id.*

[136] Jackson v. Metro. Edison Co., 419 U.S. 345, 350 (1974).

district court concluded that the bank was a state actor without deciding the merits of the claims.[137]

Following this order, the district court considered another motion for summary judgment purely on the merits of the claims.[138] It assumed, *arguendo*, that the bank was a state actor and granted the motion entirely to the defendants because the plaintiffs had failed on the merits of their claims.[139] The First Circuit Court of Appeals affirmed the ruling and issued a *per curiam* opinion on the merits of the claims.[140]

The poor outcome for the plaintiffs should not distract from the importance of this case. The plaintiffs had their claims resolved on the merits rather than the state action doctrine barring their claims. They got their day in court. Here, the Maine District Court identified a case of proper application of the Nexus Exception to a private entity using an easily identifiable and applicable criterion.[141] Namely, the district court articulated the Nexus Exception factor and a limiting criterion.[142] The limiting criterion is that a plaintiff must prove how the entwinement between public and private actors placed the decision-making capacity with the state.[143]

The First Circuit also frequently shows restraint by refusing to grant just any assertion of the Nexus Exception. For example, in *Rodriguez-Garcia v. Davila* the First Circuit reviewed whether Puerto Rico Maritime Management, Inc., a state-owned and created business entity, PRMMI for short, qualified as a state actor after the government sold it to a private company.[144] Two former vice presidents of PRMMI sued their company's purchaser under the Fourteenth Amendment and 42 U.S.C. § 1983 after the purchaser fired them.[145] The First Circuit held that after "going private," PRMMI did not constitute a state actor under relevant nexus analysis.[146] First, it rejected the appellants' application of the Nexus Exception because

[137] *Lovell*, 776 F. Supp. at 588–89.

[138] *See generally* Lovell v. Peoples Heritage Sav. Bank, 818 F. Supp. 427 (D. Me. 1993).

[139] *See id.* at 431.

[140] *See generally* Lovell v. Peoples Heritage Sav. Bank, No. 93-1552, No. 93-1553, 1994 U.S. App. LEXIS 178, at *2 (1st Cir. 1994); *see also* Lovell v. Peoples Heritage Sav. Bank, 14 F.3d 44 (1st Cir. 1994).

[141] *Lovell*, 776 F. Supp. at 587–88.

[142] *Id.*

[143] *Id.*

[144] Rodriguez-Garcia v. Davila, 904 F.2d 90, 92–94 (1st Cir. 1990).

[145] *Id.*

[146] *Id.* at 97.

the government's management contract, part of the sale agreement, did not constitute a regulation.[147] The Puerto Rican government created PRMMI to provide management services to the government.[148] The Court held that even though the now-private company exclusively provided services to the government, it was not a state actor because the decision-making matrix did not lie with the government.[149] Second, it rejected the nexus application after evaluating the financial ties between PRMMI and the government, which comprised less than 2.5% of the company's yearly revenue.[150] Since the aggrieved parties could not demonstrate sufficient connections under either factor of the Nexus Exception, the parties failed to satisfy the State Action Requirement.[151]

Another example of the First Circuit's restraint on the Nexus Exception is *Barrios-Velazquez v. Associcion De Empleados Del Estado Libre Asociado*.[152] Here, disgruntled public sector employee association members sued the association under the Fourteenth Amendment and 42 U.S.C. § 1983.[153] On appeal, the First Circuit held that the Association of Employees of the Commonwealth of Puerto Rico did not constitute a state actor under the relevant nexus analysis.[154] Crucially, the petitioners focused solely on the perceived regulatory framework without discussing financial entanglements.[155] Unsurprisingly, that single-factor analysis failed to persuade the First Circuit of the Nexus Exception's applicability.[156] Together, these cases show that the First Circuit created a robust but limited test.

D. The Fifth Circuit's Nexus Exception

The Fifth Circuit has interpreted *Blum* differently than the First Circuit, such that its understanding of the Nexus Exception proves to be "fatal in fact" to any plaintiff bold enough to assert it. In its decisions, the Fifth Circuit

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *See id.*

[151] *Id.*

[152] Barrios-Velazquez v. Associcion De Empleados Del Estado Libre Asociado, 84 F.3d 487, 492 (1st Cir. 1996).

[153] *Id.* at 490.

[154] *Id.* at 493.

[155] *Id.*

[156] *Id.*

examines the intertwining of private and public but only insofar as the act forming the basis of the complaint is concerned.[157] The Fifth Circuit first outlined this principle post-*Blum* in the case *Daigle v. Opelousas Health Care, Inc*.[158] Here, grandchildren sued a nursing home facility for the death of their grandmother, specifically alleging battery and negligence of one of its employees.[159] They prayed for damages under 42 U.S.C. § 1983.[160] The district court dismissed their claims under § 1983 because it held the defendants were private companies and individuals, not state actors.[161]

In reaching its ruling on review, the Fifth Circuit examined the freshly minted Nexus Exception and outlined its understanding:

> The inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. The involvement must be directly related to the action that gives rise to the § 1983 claim. State action can be found only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains. A state is not responsible for a private party's decisions unless 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. The state's role must be active; approval or acquiescence in a private party's actions is not enough.[162]

This approach diverges from the First Circuit because the Fifth Circuit focuses on only the action that is the basis of the complaint and the directly relevant factors. In this version of the Nexus Exception, the Fifth Circuit demands that the plaintiff prove that a public actor imposed a decision subject to § 1983 on a private actor.[163] Further, it requires the plaintiff to show how the state and private actors are intimately connected, but it curtails the consideration to only those actions giving rise to the § 1983 claim.[164] Contrast

[157] Daigle v. Opelousas Health Care, Inc., 774 F.2d 1344, 1347–48 (5th Cir. 1985).

[158] *Id.*

[159] *Id.* at 1345–46.

[160] *Id.*

[161] *Id.* at 1346.

[162] *Id.* at 1348–49 (internal citations omitted, emphasis added).

[163] *Id.*

[164] *Id.*

this against the First Circuit's interpretation which is concerned with regulations and financial ties that generally intertwine the private and state actors.[165]

Predictably, the Fifth Circuit rejected the petitioners' application of the Nexus Exception in *Daigle* because they could not show the necessary degree of co-dependence between public and private entities through their § 1983 allegations.[166] The Fifth Circuit's reasoning in *Daigle* haunts the viability of the Nexus Exception in the circuit.

For example, in the 2003 case, *Richard v. Hoechst Celanese Chemical Group, Inc.*, the Fifth Circuit reviewed the appeal of the class action suit the district court had dismissed for failing to state a claim upon which relief could be granted.[167] The case arose from the private plumbing installation to facilitate public utilities that damaged the class and class representative's homes.[168] Because of its widespread installation, the plaintiff, for himself and as the class representative, sued various companies responsible for manufacturing, promoting, and selling the plumbing system.[169] Among the claims, the plaintiff alleged violations of constitutional rights brought via 42 U.S.C. § 1983.[170]

On review, the Fifth Circuit affirmed the same test it used in *Daigle* to measure the applicability of the Nexus Exception.[171] Once again, the Fifth Circuit rejected the appellants' application of the Nexus Exception because of the "fatal in fact" nature of the test. The Fifth Circuit also required that the plaintiffs show how the acting party was a state actor using only those factors related to the act forming the basis of the complaint.[172] The plaintiffs could not meet the imposed burden because an inquiry into whether a private entity could be called a public entity by entwinement requires examining more potential factors than only those directly related to the act forming the subject of the complaint.[173] Complete analysis required examining what regulatory ties, besides faulty plumbing installation, tied the private actors to the state. Just as relevant, the plaintiffs would need to produce an array of financial

[165] *E.g.*, Lovell v. Peoples Heritage Sav. Bank, 776 F. Supp. 578, 588 (D. Me. 1991).

[166] 774 F.2d at 1349.

[167] 355 F.3d 345, 347–48 (5th Cir. 2003).

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *See Richard*, F.3d 345 at 352; *Daigle*, 774 F.2d at 1348–49.

[172] *Id.* at 352–53.

[173] *Id.* at 355.

incentives connecting the private actors to the state outside of the incentives directly related to installing those specific, defective pipes. If, as the First and Fifth Circuits hold, the Nexus Exception deals with regulatory and financial ties, all regulatory and financial ties are relevant because they show whether the private actor acted independently of the state or if the decision-making matrix lies with the state.[174]

Perhaps the clearest example of this reasoning coming to fruition is the 2005 case, *Cornish v. Correctional Services Corp*.[175] Here, the Fifth Circuit reviewed the termination of a privately owned prison employee.[176] After a series of employee reports to employment authorities and the resulting fallout with the management, the company terminated the employee.[177] The employee sued.[178] Among other claims, he sued under 42 U.S.C. § 1983 for violations of the First and Fourteenth Amendments.[179] The district court dismissed his claims for failing to demonstrate how the private employer qualified as a state actor for purposes of constitutional restrictions.[180]

On appeal, the Fifth Circuit explored the question of the § 1983 State Action Requirement by briefly but separately describing each of the four exceptions: the Public Function Exception, the Joint Action Exception, the Nexus Exception, and the Symbiosis Exception.[181] Almost immediately after, it questioned whether the Nexus and Symbiosis Exceptions are materially different tests "or simply different ways of characterizing [this] necessarily fact-bound inquiry."[182] This observation conflicts with the purpose of the Nexus Exception, which is to examine the structural relationship between the state and a private actor instead of merely focusing on actions or lack thereof.

The Fifth Circuit went on to examine the Nexus Exception only to hold that mere regulation does not render a private actor a state actor.[183] Additionally, it noted that the petitioner had attempted to use factors outside the complained-of action, which fell outside the scope of the Fifth Circuit's

[174] *See supra* Sections B, C, D.

[175] Cornish v. Corr. Servs. Corp., 402 F.3d 545 (5th Cir. 2005).

[176] *Id.* at 547.

[177] *Id.* at 548.

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.* at 549–50.

[182] *Id.* at 550.

[183] *Id.*

considerations for the Nexus Exception. [184] Had the Fifth Circuit not hampered its considerations by exclusively evaluating factors directly related to the complained-of act, the plaintiffs may have successfully asserted the Nexus Exception. Instead, the plaintiffs raised factors related to the relationship between the private actor and the state but unrelated to the complained-of act.[185]

The function of the Nexus Exception is to evaluate the structural incentives (benefits and regulations) between a state actor and a private actor to determine if the Constitution should constrain the private actor.[186] Suppose plaintiffs may use only those factors related to the basis of the complaint and no other structural incentives that would otherwise show that even though the private actor is making the instructions it is doing so essentially as an arm of the state, albeit without direct or covert instruction to do so. In that case, few plaintiffs can plead the Nexus Exception, defeating its purpose. In *Cornish*, the plaintiffs could not meet the Fifth Circuit's standard, providing an example of how the Fifth Circuit's interpretation is nearly impossible for plaintiffs to use.[187]

1. The *Moose Lodge* Hurdle to Application

Frustrating the Nexus Exception further, the Fifth Circuit adopts the one-size-fits-all mindset that *Moose Lodge* prevents courts from applying the Nexus Exception.[188] There is a significant difference between mere regulation as a cost of doing business and voluntarily seeking out regulation by making the state one's business. An example is a private contractor obtaining government contracts as opposed to a bar obtaining a liquor license. In *Moose Lodge*, a private club refused to serve a guest of a member because of the guest's race.[189] The guest sued based on the Equal Protection Clause of the Fourteenth Amendment.[190] The district court found that Moose Lodge violated the equal protection clause by racially discriminating because the club qualified as a state actor due to liquor regulation.[191] On review, the

[184] *Id.*

[185] *Id.* at 550–51.

[186] *See supra* Part III.A and *infra* Part IV.

[187] *E.g.*, *Cornish*, 402 F.3d at 551.

[188] *E.g.*, *id.*

[189] Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 164–65 (1972).

[190] *Id.* at 165.

[191] *Id.* at 165–66.

Supreme Court reversed, holding that mere regulation, even the arduous liquor licensing process, is insufficient to make a private actor into a state actor for constitutional purposes.[192]

The distinction between the Supreme Court's analysis in *Moose Lodge* and the Nexus Exception is that an actor subject to regulation in its public business with private parties categorically differs in terms of constitutional protections from an entity actively seeking business from the federal government. In the first case, regulation is a hurdle to private businesses, for example, private clubs.[193] Private clubs must obtain licenses to operate, but afterward, they are largely free to conduct business how they see fit so long as the business venture is not illegal. In the second, regulation is part and parcel of businesses, for example, banks.[194] Banks' principal venture is loans, which requires they follow strict regulations and constantly do business with the Federal Reserve. Banks have private customers but could not exist in the modern context at the scale they do without their business with the government. This comment explores the implications of the Nexus Exception to private businesses in Part IV.[195]

Additionally, *Moose Lodge* negatively holds that just because a business is regulated and licensed does not make it a state actor.[196] However, the opinion does not support asserting that regulations are irrelevant to whether the private actor is a state actor.[197] Therefore, *Moose Lodge* is not incompatible with the Nexus Exception, and the Fifth Circuit should reconsider how it treats *Moose Lodge* in the context of the Nexus Exception.

IV. THE NEXUS EXCEPTION: WHY DOES IT MATTER?

Ultimately, the Supreme Court should adopt the First Circuit's approach to the Nexus Exception because it fits within the constitutional structure and fills a gap. Specifically, the Nexus Exception reflects the purpose of the U.S. constitutional protections and 42 U.S.C. § 1983 and fills a substantial "loophole" in § 1983.

The Nexus Exception squarely fits within the reasoning behind our constitutional protections and 42 U.S.C. § 1983. The U.S. Constitution

[192] *Id.* at 176–177, 180.

[193] *See id.* at 176.

[194] *See generally* Lovell v. Peoples Heritage Sav. Bank, 776 F. Supp. 578, 588 (D. Me. 1991).

[195] *See infra* Part IV.

[196] 407 U.S. at 175–76.

[197] *Id.* at 176–77.

enunciates a negative theory of power and individual liberties.[198] That is to say, the Constitution grants the federal government certain powers and then announces limits to the extent of those powers through the Amendments.[199] For example, Article I of the Constitution vests in Congress all legislative authority.[200] The Constitution then enumerates how Congress may exercise that legislative power, like the power to regulate interstate commerce in a necessary and proper way.[201] However, the First Amendment to the Constitution restricts congressional legislative power by stating, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[202] This value-laden language expresses the limitations on congressional power negatively by stating, "Congress shall make no law . . ."[203] In the same way, the Fourteenth Amendment protects individual liberties from government overreach by declaring a negative restriction on state power rather than positively enunciating individual liberty.[204]

As explored above in Part I, the Constitution does not create a private right of action for citizens to hold the government accountable for constitutional violations.[205] Without a private means of enforcing constitutional protections, there is no incentive for state actors to respect those rights.[206] Congress passed 42 U.S.C. § 1983 to ensure citizens can hold state actors accountable.[207]

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[198] David M. Howard, *Rethinking State Inaction: An In-Depth Look at the State Action Doctrine in State and Lower Federal Courts*, 16 CONN. PUB. INT. L.J. 221, 224 (2017).

[199] *See id.*

[200] U.S. Const. art. 1, § 1.

[201] U.S. Const. art. 1, § 8, cl. 3; McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 418 (1819).

[202] U.S. Const. amend. I.

[203] *Id.* (emphasis added).

[204] U.S. Const. amend. XIV, § 1. *See* 16B AM. JUR. 2D *Constitutional Law* § 933, Westlaw (database updated Feb. 2023); *see also* 16C C.J.S. *Constitutional Law* § 1837, Westlaw (database updated Apr. 2023).

[205] *Supra* Part I. Erwin Chemerinsky, *Rethinking State Action*, 80 NW. UNIV. L. REV. 503, 505 (1985).

[206] Jacob E. Meyer, *"Drive-By Jurisdictional Rulings": The Procedural Nature of Comprehensive-Remedial-Scheme Preclusion in § 1983 Claims*, 42 COLUM. J.L. & SOC. PROBS. 415, 419 (2009).

[207] *See generally* Monroe v. Pape, 365 U.S. 167 (1961).

Noted commentator, Professor Erwin Chemerinsky has argued the State Action Doctrine is outmoded because it no longer fulfills the core function of Section 1983: to protect civil rights.[208] Chemerinsky observes that the State Action Doctrine exists to limit suits on violations of constitutional rights to state actors.[209] The reason why is simple: the Founders and early jurists believed that individuals had natural rights embodied in the common law, and, therefore, the statute only needed to address state actors the common law did not cover.[210] At the time, the courts could invalidate statutes if they contradicted the common law.[211] William Blackstone, the foundational scholar on many legal doctrines, repeatedly wrote that the common law protects individuals from private invasions.[212] Hence, when the Framers wrote the Constitution and early Amendments, there was no need to protect individuals from private actor invasion of their individual liberties; the common law already protected individuals. [213] In fact, Prof. Chemerinsky and Prof. Levy are convinced that the Framers wrote the Bill of Rights to apply common-law liberty protections to the government.[214] It appears the Framers assumed that the Bill of Rights completed the protections of individual liberties by limiting government actors.[215] The assumption was that states were close enough to the citizenry that violations of individual liberties would not occur.[216]

Of course, this perspective that states could be trusted to protect individual liberties without explicit constitutional protections turned out to be naïve. As Prof. Chemerinsky writes, the Civil War and the civil rights fallout proved that there had to be some form of explicit constitutional protection to ensure that states did not violate individual liberties.[217] Yet, even at a time when the states proved the necessity of constitutional protections, the Supreme Court in the *Civil Rights Cases* explored in Part I

[208] *See generally* Chemerinsky, *supra* note 205, at 505.

[209] *Id.* at 511.

[210] *Id.* at 511–12.

[211] *Id.* at 512.

[212] *Id.*

[213] *Id.* at 513.

[214] *Id.* at 514.

[215] *Id.*

[216] *Id.*

[217] *Id.* at 515.

held that the common law protected individuals from private actors, not the Constitution.[218]

However, as Prof. Chemerinsky artfully points out, the Supreme Court's 20th-century spree of finding unenumerated rights via Substantive Due Process and other statutory interpretation doctrines has declared positive individual liberties that the citizenry possesses.[219] The difficulty does not arise from the recognition of previously unrecognized rights. Instead, the problem arises because the common-law protections of enumerated rights have not expanded to cover the gambit of unenumerated rights.[220] This leaves a gap in 42 U.S.C. § 1983 for private actors with state interests to violate private rights with no consequences.

Examples abound of private actors violating individual liberties with no consequences. For instance, Prof. Chemerinsky notes that courts have allowed private hospitals, the epitome of a highly regulated actor with massive monetary incentives from states, to deny patients their constitutionally protected procedures or fire the doctors performing the operations, a form of speech that ought to receive First Amendment protections.[221] Or in another instance, a court denied relief to a school staff member fired due to her free speech activities because the court believed there was no state action even when state funds made up materially all of the financial support for the school.[222]

Prof. Chemerinsky's solution is to do away with the state action requirement and instead return to a common-law protection scheme from private invasions, instead allowing plaintiffs to bring Section 1983 actions directly against the private actors with no need to prove state action.[223] However, this comment proposes a different course: the Nexus Exception.

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[218] *See supra* Part I; *Id.* at 516.

[219] Chemerinsky, *supra* note 205, at 517.

[220] *Id*. at 517–18.

[221] *Id.* at 509–510; *See, e.g.*, Taylor v. St. Vincent's Hosp., 523 F.2d 75 (9th Cir. 1975) (refusal of only hospital in city to provide operation for sterilization dismissed because of lack of state action); Watkins v. Mercy Med. Ctr., 520 F.2d 894 (9th Cir. 1975) (dismissing claim by doctor who was denied renewal of staff privileges by private hospital because he performed legal abortions); Spencer v. Se. Mo. Hosp., 452 F. Supp. 597 (E.D. Mo. 1978) (refusal by private hospital to perform sterilization without spouse's consent dismissed for lack of state action); Jones v. Eastern Me. Med. Ctr., 448 F. Supp. 1156 (D. Me. 1978) (suit against private hospital for refusing to permit abortions dismissed for lack of state action).

[222] Rendell-Baker v. Kohn, 457 U.S. 830, 830 (1982).

[223] *See generally* Chemerinsky, *supra* note 205 (detailing the reasons for abandoning the state action requirement in Section 1983 actions).

The Nexus Exception under the First Circuit's articulation would fill the hole left because of a lack of recognition of a private cause of action for private actors heavily intertwined with the state.

If the Nexus Exception applied in the *Taylor v. St. Vincent's Hospital* case, the plaintiffs could have pursued litigation on their case's merits rather than the court resolving the dispute against them for lack of state action.[224] Specifically, the defendant hospital received sizeable tax incentives from the state as well as receiving state funds between 1956 and 1963.[225] Applying the First Circuit's version of the Nexus Exception, the plaintiffs could have argued, likely successfully based on the precedent in *Lovell*, that the hospital was a state actor because of its financial ties to the state. Therefore, instead of the court resolving the suit against the plaintiffs for lack of state action, the court could have allowed the finder of fact to adjudicate the merits of the claims and vindicate the plaintiff's rights.

If the Nexus Exception applied in *Kohn*, the plaintiff would also have been able to have the court adjudicate their claims on the merits rather than dismissing the case for lack of state action. Ninety percent of the school's budget came from public funds.[226] Further, the school had to comply with various state regulations to be eligible for the funds, including state approval of initial hiring decisions.[227] If the Nexus Exception applied, the plaintiff would have been able to fully vindicate her rights on the merits of her case rather than the State Action Doctrine procedurally barring her claims. The intense degree of public funding and the degree of regulation of the school's activity are textbook examples of the First Circuit's Nexus Exception factors.[228]

Ultimately, the Supreme Court should adopt it as an exception to the State Action Doctrine because it recognizes that private actors with vital government interests are just as capable of chilling or violating constitutional rights as pure government actors. This reflects the reasoning behind constitutional protections and 42 U.S.C. § 1983.

[224] *See generally Taylor*, 523 F.2d at 75.

[225] *Id.* at 75–76.

[226] *Kohn*, 457 U.S. at 832.

[227] *Id.* at 833–34.

[228] *See supra* Part III.C and III.D.

CONCLUSION

Robust constitutional rights guarded by an active citizenry have protected the United States political system for over two hundred thirty years. Yet, it is not perfect. Injustices remain. Fortunately, the United States is a country built to adapt. Such adaption can happen here to rectify an injustice. If the U.S. Supreme Court adopted the clear, workable Nexus Exception of the First Circuit, it would provide the plaintiffs with a new but carefully limited means of seeking justice for constitutional violations from private entities who would otherwise escape liability.