

When Is Private Public?

State Action in the Era Of Privatization and Public-Private Partnerships

**by Sheila Suess Kennedy
Assistant Professor of Law and Public Policy
School of Public and Environmental Affairs
Indiana University-Purdue University Indianapolis**

George Mason Civil Rights Law Review, March 2001

I.

Introduction

The Charitable Choice provisions of the “Personal Responsibility and Work Opportunity Act of 1996,”¹ encourage states to contract with Faith Based Organizations (FBOs) for delivery of social services to welfare recipients. The relevant language of the Act allows such FBOs to retain their pervasively sectarian nature. They may require that employees share their faith, but may not use tax dollars for overtly religious purposes, or condition receipt of benefits upon religious participation. Charitable Choice legislation was premised upon the assumption that FBOs do a better job at lower cost than traditional social service providers (an assumption that is neither supported nor contradicted by available data, because no comprehensive research on the issue is available.)

Charitable Choice thus extends to a large number of religious organizations an invitation to participate in a trend that has been reshaping government—particularly at the state and local level—for at least the past twenty years.² That trend is often referred to as “privatization” or “reinvention;” however, those terms are more general and encompass a large number of programs and initiatives, including outright sales of government

¹ Cite. Charitable Choice also raises First Amendment issues not immediately relevant to this discussion. *See, e.g.* Martha Minow, “Choice or Commonality: Welfare and Schooling after the End of Welfare as We Knew It.” *Duke Law Journal*, Vol.49, p.493. 1999.

² This trend is not restricted, of course, to the United States. Developing nations, in particular, have increasingly turned to NonGovernmental Organizations (NGOs) for the provision of public goods. *See* Timothy Besley & Maitreesh Ghatak, “Public-Private Partnerships for the Provision of Public Goods: Theory and an Application to NGOs” 1999, and sources cited therein. *See also* “The Privatization Challenge: A Strategic, Legal and Institutional Analysis of International Experience. Pierre Guislain, World Bank Regional and Sectoral Studies Series, 1997.

operations.³ Charitable Choice legislation is the most recent example of the most prominent of these methods to “reinvent” government: the vastly increased use of private for-profit and nonprofit providers to deliver government services pursuant to contractual agreements. While government has always purchased goods and services in the market, the practice has grown significantly⁴ and has extended into social services where contractors are more likely to be nonprofit agencies with social missions than business organizations seeking profits, and where it presents issues quite different from agreements to purchase computers or to pave city streets.⁵

As contracting out becomes a more and more common method of delivering government services, the nature of “the state” and hence of “state action” as that term is used in constitutional analysis becomes an evolving concern.⁶ There is significant evidence that the growth of contracting, coupled with an unrealistic and narrow understanding of state action, has created a jurisprudence that is, as one scholar has put it, “significantly underprotective of constitutional rights.”⁷

³ Technically, privatization refers to transactions which return such operations to the private marketplace, where they pay taxes and compete with other private operations. However, for purposes of this paper, the term is used interchangeably with “contracting” and “contracting out.”

⁴ See Guislain, Note 2, *infra*.

⁵ For an excellent discussion of issues inherent in government contracting, see Kettl, *Sharing Power*. Brookings Institution, 1993. Besley and Ghatak, note 2 *supra*, make the point—often overlooked—that much activity in the private sector is *value* driven, rather than profit seeking, and that this reality distinguishes social service contracting from procurement contracts.

⁶ See, e.g., Robert S. Gilmour and Laura S. Jensen, “Reinventing Government Accountability: Public Functions, Privatization, and the Meaning of State Action.” *PAR*, Vol. 58, No.3. 1998

⁷ Ronald J. Krotoszynski, Jr. “Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations.” *Michigan Law Review*, November, 1995. Vol. 94, No. 2. p. 305

II.

Context of the Inquiry: The Invisible State

In traditional political discourse, we consider the nature of government or debate the proper role of the state. Rarely do we turn to discussion of what the state *is*. One can refer, of course, to Augustine's "Earthly City," Aristotle's *polis*, or Kant's "system of public right," but I think D.D. Raphael accurately summarizes the contemporary idea of the state by defining it as "an association having universal compulsory jurisdiction within territorial boundaries."⁸ The two elements of that definition—territoriality and a monopoly on the right to use certain types of force or power—are arguably integral to popular understanding of the concept of statehood. Both elements, however, are undergoing redefinition.

In industrialized nations, and perhaps elsewhere, the growth of the global economy and the worldwide penetration of the Internet are increasingly challenging traditional notions of territorial jurisdiction. In America, the steady expansion of government since the New Deal has already required us to rethink the relationship between government power and fundamental rights. While rights were traditionally defined as limitations on the coercive power of the state, lawyers and political philosophers now speak of both negative and positive liberties and debate the propriety of recognizing affirmative "entitlements."

With the advent of widespread contracting, where a growing number of services are provided by and paid for by government but delivered by contractors, we must ask new

⁸ D.D. Raphael, "Problems of Political Philosophy." 2d ed. Humanities Press International. New Jersey, 1990.

questions as well. Some are technical: should contractors have the same First Amendment free speech rights as government employees⁹? Should the definition of government power include the power of the purse? Other questions are political: are partnerships with businesses and nonprofit organizations creating a new definition of government? Is privatization extending, rather than shrinking, the state? Does the substitution of an independent contractor for an employee equate to a reduction in the scope of government, as proponents believe? Or, as Donald Kettl has suggested,¹⁰ does the substitution operate instead to shift the locus but not the scope of government activity, and thereby blur the boundaries between public and private, making it ever more difficult to decide where “public” stops and “private” begins?¹¹ If we are altering traditional definitions of public and private by virtue of these new relationships, what is the effect of that alteration on a constitutional system that depends upon the distinction as a fundamental safeguard of private rights?

However we understand government, a central tenet of democratic regimes is that the state must be accountable to its citizens. Contracting out complicates accountability in a number of ways.¹² In an important book published in 1993, *Nonprofits for Hire*, Steven Rathgeb Smith and Michael Lipsky explored a variety of issues raised for government and the nonprofit sector by virtue of the increasing reliance upon government contracts.

“American social policy is in the midst of a dramatic restructuring of the

⁹ *Board of County Commissioners, Wabaunsee County v. Umbehr*, 518 U.S.668(1996)

¹⁰ Kettl, Note 4, *supra*.

¹¹ This is as much or more a concern of the nonprofit sector as it is for government. As Smith and Lipsky have noted, “When public funds play so vital a role in private agency budgets, it is disingenuous to think that the nonprofit sector would not be in danger of losing its separate identity.” Steven Rathgeb Smith and Michael Lipsky, “*Nonprofits for Hire*” Harvard University Press, 1993. p.12

¹² See Gilmour and Jensen, Note 6, *supra*.

way public social services are provided. Although government funding of nonprofit service organizations dates to the colonial period, only in the last 25 years did this government-nonprofit strategy emerge as a widespread and favored tool of public service delivery. But entrusting the most vulnerable citizens and the most delicate service tasks to private agencies is not simply a matter of choice between “making” or “buying” services. This might be the case when one considers contracting out for pencils, computer services, or strategic weapons. But when it comes to purchasing the care and control of drug addicts, the safety and nurturing of children, the relief of hunger and the regulation of family life (through child protective activities) from private agencies, other values than efficiency are at stake. We contend that the impact of this transformation on the future of the American welfare state has not received adequate attention.”¹³

Among the issues Smith and Lipsky explore is the transfer of state power to private providers.

“Like teachers, police officers and welfare workers, service providers in the nonprofit sector manage scarce resources by coping with their jobs in such a way as to render them not simply implementers of public policy, but ‘makers’ of public policy.”¹⁴

¹³ Smith & Lipsky, p.11

¹⁴ Smith & Lipsky, p.116

Smith and Lipsky contend that workers in nonprofit agencies executing government contracts must be considered agents of government,¹⁵ and express concern that political accountability has been compromised by the lack of transparency which is an inevitable component of such arrangements. As they note, from the point of view of welfare state clients, advocacy groups, and the general public, the state has disappeared, making it extremely difficult to assess political responsibility¹⁶ or ensure accountability.¹⁷ That difficulty will inevitably be compounded when government services are provided by pervasively sectarian, faith-based organizations pursuant to Charitable Choice.¹⁸

One traditional way to enforce government accountability is through the courts. Just as a lack of transparency in contracting relationships can impede political accountability, I will argue in Section III that the failure of the state action doctrine to keep pace with the political reality of government contracting significantly undermines our ability to achieve constitutional accountability. That said, however, an appropriate solution must be carefully crafted, as I discuss in Section IV. If the state action doctrine does not change to accommodate new realities, we are in danger of losing an important constitutional check on the exercise of administrative power. But if contractors become state actors for

¹⁵ *Id.*

¹⁶ *Id.* at 118

¹⁷ There is a significant literature dealing with political accountability issues which, while not relevant to the issue of state action, suggests additional areas of concern. As David H. Rosenbloom, James D. Carroll and Jonathan D. Carroll note in Constitutional Competence for Public Managers, “One of the most common disparities between democratic constitutionalism and administrative efficiency centers on accountability. Accountability requires *red tape*—vouchers, forms, approvals and oversight by inspectors general, legislatures, courts and others—which clearly militates against administrative efficiency.” P.129

¹⁸ Despite persistent attacks on the concept of separation of church and state by the religious right, most citizens have long since internalized that concept, and see government and religious organizations as distinctly separate spheres. The average welfare client is arguably unlikely to recognize services received through a religious organization or church as being provided by the government.

all or most purposes, such an extension of the doctrine would further blur our ability to define government in a way that allows us to hold it *politically* accountable.

We rely upon our understanding of the state action doctrine in order to know when we may ask the courts to restrain government agencies. If we do not have comprehensible rules defining those actions we may legally attribute to the state, the efficacy of constitutional litigation is undermined. If we are unable to convey to citizens the boundaries of government's legal responsibilities, our ability to fashion appropriate political remedies will also be compromised.

III

Current State Action Doctrine

In a 1995 case, *Lebron v. National Railroad Passenger Corporation*,¹⁹ Justice Scalia began his state action analysis with an almost breathtaking understatement: "It is fair to say that our cases deciding when private action might be deemed that of the state have not been a model of consistency." In fact, even the most diligent attempt to rationalize doctrine in the area is arguably doomed.

"State Action" was first defined by the Supreme Court in 1883, in the *Civil Rights Cases*²⁰. Passage of the Fourteenth Amendment had prohibited states from denying, to

¹⁹ 513 U.S. 374 (1995)

²⁰ *Civil Rights Cases*, 109 U.S. 3 (1883)

persons otherwise entitled to them, the “privileges and immunities” of citizenship. The Court was addressing the scope of that prohibition.

“The Fourteenth Amendment expresses prohibitions (and consequently implies corresponding positive immunities), limiting State action only, including in such action, however, action by all State agencies, executive, legislative, and judicial, of whatever degree.

.....

It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws.’²¹

As the Court recently restated the doctrine,

“[E]mbedded within our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to strict scrutiny under the Amendment’s Due Process Clause, and private conduct, against which the Amendment affords

²¹ *Civil Rights Cases*, 109 U.S. 3 (1883)

no shield, no matter how unfair that conduct may be.²²

The Court has thus established a distinction between invasions of rights that are constitutionally forbidden (“public” invasions) and those that are not (“private” invasions), and that distinction rests upon the identity of the actor. The Bill of Rights was initially designed to limit the reach of the federal government; the Fourteenth Amendment later extended those limitations to bar similar action by the states.²³ Over the years, by the process known as “selective incorporation,” most of the original eight amendments have been held to apply to state and local government units as well as to the federal government.²⁴ But the citizen’s protection is against the public actor only.

Discriminatory acts, or denials of due process, or restrictions on speech by private parties are constitutional; indeed, they are entirely legal unless prohibited by virtue of legislation like the Civil Rights Act of 1964²⁵ or the Americans with Disabilities Act.²⁶

The distinction between public and private acts loses clarity in a number of contexts (indeed, it has been referred to as a ‘conceptual truth’²⁷), and the Court has been obliged to develop a jurisprudence allowing certain private acts to be attributed to government.²⁸

²² *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179, 191 (1988)

²³ The Fourteenth Amendment reads, in pertinent part, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; no shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Constitution, Amendment IV, Section One.

²⁴ *See, e.g. Twining v. New Jersey*, 211 U.S. 78 (1908); *Palko v. Connecticut*, 302 U.S. 319(1937); *Adamson v. California*, 322 U.S. 46 (1947). *See also*, “R. Berger, Government by Judiciary (1977), and J.Ely, Democracy and Distrust (1980).

²⁵ 42 U.S. Code, Section 1983.

²⁶ Americans with Disabilities Act, cite

²⁷ “The Constitution and the Problem of Private Power,” *Constitutional Law*, Little, Brown & Co.,1986. Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein & Mark V. Tushnet

²⁸ For a good overview of the doctrine of state action, *see* Laurence H.Tribe, “Refocusing the ‘State Action’ Inquiry: Separating State Acts from State Actors in Constitutional Choices (1985)

As Robert Gilmour and Laura Jensen have noted,

“When the relationship between government and citizen becomes more complex than that between a mere commodity or service provider and its customers, more than marketplace efficiency is required to hold the government and its proxies and surrogates accountable for their exercise of authority on behalf of the state.”²⁹

Acknowledging the need for such rules and actually fashioning them have proved to be very different matters. As one commentator has wryly noted, the Court’s ‘sifting’ and ‘weighing’ in state action cases “differs from Justice Stewart’s famous ‘I know it when I see it’ standard for judging obscenity mainly in the comparative precision of the latter.”³⁰ On one hand, the mere fact that a regulatory agency exercises oversight of a licensee and has thus implicitly approved the licensee conduct at issue has been held insufficient to attribute an action to the state.³¹ On the other hand, where government intentionally funds an unconstitutional program conducted by private actors, the Courts have generally found state action.³²

In *Jackson v. Metropolitan Edison Co.*³³ Justice Rhenquist summarized what has been called the “nexus theory” of state action jurisprudence.³⁴

²⁹ Note 6, *infra*.

³⁰ Brest, Paul. “State Action and Liberal Theory” University of Pennsylvania L.R. 130(6) 1296-1330. Quoted in Gilmour and Jensen, Note 6, *supra*.

³¹ *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). But see *Public Utilities Commission v. Pollack*, 343 U.S. 451 (1952), where the Court held that explicit regulatory approval of an action would support a finding of state action. See also Daphne Barak-Erez, “A State Action Doctrine for an Age of Privatization,” Syracuse L.R. 45, 1169.

³² *Norwood v. Harrison*, 413 U.S. 455 (1973)

³³ Note 13, *supra*.

“While the principle that private action is immune from the restrictions of the Fourteenth Amendment is well established and easily stated, the question whether particular conduct is “private” on the one hand, or “state action” on the other, frequently admits of no easy answer...[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.”³⁵

The nature and degree of interrelationship sufficient to establish such a nexus remains uncertain. As commentators have noted,³⁶ there are three general theories pursuant to which the courts have found a sufficient nexus to support state action: the public function test; the government ‘entanglement’ theory, and cases where there has been specific authorization or encouragement of the challenged activity. The public function test was established in *Marsh v. Alabama*.³⁷ *Marsh* involved the distribution of religious literature on the streets of a so-called “company town,” where all property, including the streets, was privately owned. In language that arguably foreshadows the instant inquiry, the Court found state action in “permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties.”³⁸

³⁴ Note 12, supra.

³⁵ Note 13, supra

³⁶ Barak-Erez, Note 12, supra; David D. Rosenbloom, James D. Carroll, Jonathan D. Carroll, Chapter Three, Constitutional Competence for Public Managers, F.E. Peacock Publishers, Inc. 2000

³⁷ 326 U.S.496 (1946)

³⁸ 326 U.S. at 509.

Marsh has been so strictly limited as to suggest a very narrow scope indeed for the public function test. In *Flagg Bros. v Brooks*³⁹ the Court considered whether action taken by a New York warehouseman, explicitly permitted by the New York version of the Uniform Commercial Credit Code, was attributable to the state by virtue of that statutory authorization. Plaintiffs, not unreasonably, had argued that when a state legislature passes a law expressly authorizing a private party to take an action previously reserved to the state, that authorization should be held to be state action. The “primary contention was that New York had delegated to Flagg Brothers a power traditionally exclusively reserved to the State.”⁴⁰ Writing for the Court, Justice Rhenquist began his analysis by stating “While many functions have been traditionally performed by governments, very few have been ‘exclusively reserved to the State.’” The “mere acquiescence” with a private action by government was insufficient to make that action attributable to the State, and the state action doctrine would not apply to “a number of state and municipal functions,” among them education, fire and police protection, and tax collection.⁴¹ Rhenquist did add a disclaimer of sorts, noting that “we express no view as to the extent, if any, to which a city or State might be free to delegate to private parties the performance of such functions and thereby avoid the strictures of the Fourteenth Amendment.”⁴² That question has gained urgency with the proliferation of contracting; it remains essentially unanswered.

In language that is prescient for purposes of this inquiry, the dissent in *Flagg* protested that

³⁹ 436 U.S. 149 (1978)

⁴⁰ *Id.*

⁴¹ *Id.* at 163.

⁴² *Id.* at 163-64

“[T]he distinctions between “permission” and “compulsion” on the one hand and “exclusive” and “nonexclusive” on the other, cannot be determinative factors in state action analysis. There is no great chasm between “permission” and “compulsion” requiring particular state action to fall within one or the other definitional camp.”⁴³

And in a footnote, the dissent worried that under the majority’s theory, “[T]he State can shield its legislation affecting property interests from due process scrutiny by delegating authority to private partners.”⁴⁴

The Court has found state action when cooperation between the public and private sectors is so close as to render them substantially inseparable. This is inevitably a fact-sensitive inquiry, and relatively minor factual distinctions have produced very different results. In *Burton v. Wilmington Parking Authority*,⁴⁵ for example, the Court noted the “public aspects” of a restaurant charged with racial discrimination, primarily attributable to the fact that it was a lessee in a publicly owned building. However, the ruling made it clear that not every lease of public property would be considered a sufficient entanglement to justify a finding of state action. Licensing and regulation have sometimes been held sufficient, but only when these activities are deemed “intensive.”⁴⁶ The mere approval of

⁴³ In 1982, the Court would hold otherwise on very similar facts, by a slim 5-4 margin, distinguishing *Flagg* in terms that virtually defy analysis. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

⁴⁴ Note 21, *supra*.

⁴⁵ 365 U.S. 715 (1961)

⁴⁶ Barak-Erez at 1179. See also discussion in text, *supra*.

a liquor license has been held insufficient⁴⁷ as has regulation of and payment for nursing home care⁴⁸ and the grant by government of a monopoly to represent the United States in the Olympics.⁴⁹

The 1983 case of *Blum v. Yaretsky*⁵⁰ is an excellent example of the inadequacies of current state action doctrine. The case involved an alleged due process violation arising out of involuntary discharges and transfers of Medicaid patients in a nursing home.

Rhenquist, writing for the Court, declined to find state action. He articulated the standard to be met in the following language:

“...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.”

Acknowledging that over 90% (and perhaps as many as 99%) of the patients in the facility were being paid for by the government, and that the nursing home was subject to pervasive governmental regulation, the Rhenquist majority nevertheless held

“That programs undertaken by the State result in substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business.”

⁴⁷ *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

⁴⁸ *Blum v. Yaretsky*, 457 U.S. 991 (1983)

⁴⁹ *San Francisco Arts & Athletics v. United States Olympic Committee*, 483 U.S. 522 (1987)

⁵⁰ 457 U.S. 991 (1983)

In an acerbic dissent joined by Marshall, Justice Brennan underscored the facile nature of this analysis. Noting that a determination whether state action is present will depend upon “a realistic and delicate appraisal of the State’s involvement in the total context of the action taken,” Brennan wrote

“The Court’s analysis in this case [proceeds] upon a premise that is factually unfounded. . . . A doctor who prescribes drugs for a patient on the basis of his independent medical judgment is not rendered a state actor merely because the State may reimburse the patient in different amounts depending upon which drug is prescribed. But the level of care decisions in this case, even when characterized as the ‘independent’ decision of the nursing home, have far less to do with the exercise of independent professional judgment than they do with the *State’s* desire to save money. . . . On the contrary, the two levels of long-term institutionalized care enshrined in the Medicaid scheme are legislative constructs, designed to serve governmental cost-containment policies.

In my view, an accurate and realistic appraisal of the procedures actually employed in the State of New York leaves no doubt that not only has the state established the treatment levels and utilization review in order to further its own fiscal goals, but that the State [has] set forth precisely the standards upon which the level-of-care decisions are to be made, and has delegated administration of the program to the nursing home operators,

rather than assume the burden of administering the program itself.⁵¹

(emphasis in original)

Brennan and Marshall dissented again in *Rendell-Baker v. Kohn*,⁵² a case involving the education by a private institution of “problem children” referred to the school by state officials. Nearly all of the school’s funding came from the state, the facility was heavily supervised and regulated, and almost all its students were assigned to it by the state. Nevertheless, the Court declined to find state action, holding that “the school’s fiscal relationship with the State is not different from that of many contractors performing services for the government.” Critics of current state action jurisprudence would agree—and would note that so crabbed a view of the doctrine produces equally inequitable results in the context of disputes arising out of those “other” relationships.

The inequities are not necessarily confined to the client population. As privately operated prisons have become more common, cases involving the operation of those facilities have begun to work their way through the judicial system.⁵³ One of the more noteworthy of those was *Richardson v. McKnight*.⁵⁴ A prisoner brought action for a federal constitutional tort against guards at the Tennessee South Central Correctional Center, and the Court declined to find that the guards were entitled to qualified immunity, despite the fact that such immunity would clearly have been available to them had they been employed directly by the state. The *Richardson* majority reasoned that immunity of state

⁵¹ Id at

⁵² 457 U.S. 830 (1982)

⁵³ For discussion of this and other cases involving privatization of corrections, see Robbins, “Legal Dimensions of Private Incarceration,” 38 Amer.L.R. 531 (1989); Robbins, “Privatization of Prisons: an Analysis of the State Action Requirement of the 14th Amendment and 42 USC Section 1983.” 20 Conn.L.Rev. 1988, and Trant, “*Richardson v. McKnight*: Are Private Prisons Engaged in State Action for Purposes of 1983?” New England Journal on Confinement (1999)

⁵⁴ 117 S.Ct. 2100 (1997)

guards was an incident of the employment relationship rather than a functional outcome, and noted “correctional functions have never been exclusively public.”⁵⁵

While the Court’s decision in *Richardson* was limited to the immunity issue, and did not explicitly address the question of state action, lower courts have not hesitated to find state action in private prison and institutional detention cases,⁵⁶ often noting that the power to deprive an individual of liberty is a quintessentially governmental power.⁵⁷ This line of reasoning is persuasive, but it is difficult to reconcile with cases like *Wade v. Byles*,⁵⁸ where a private company providing security to a public housing project was held not to be a public actor despite the fact that the guards had authority to carry guns, arrest people, and use deadly force.⁵⁹

Complicating state action jurisprudence even further is the tendency of reviewing courts to apply different standards of analysis depending upon the nature of the Constitutional right involved, without, however, articulating the basis for those differences.

Commentators have noted that, in cases involving racial discrimination or implicating First Amendment religious liberties, the Court has been much more willing to find—or assume--state action.⁶⁰

⁵⁵ 521 U.S. at 404

⁵⁶ See, e.g., *Blumel v. Mylander*, 919 F.Supp. 423 (M.D. Fla. 1996); see also cases cited in Note, “*Richardson v. McKnight*” in Volume 25 of *Criminal and Civil Confinement*. P577 (Summer 1999)

⁵⁷ *Plain v. Flicker*, 245 F. Supp.898 (D.N.J. 1986)

⁵⁸ 83 F.3d 902 (7th Cir. 1996)

⁵⁹ *Id.* at 906

⁶⁰ *Burton*, *supra*; *Shelley v. Kraemer*, 334 U.S. 1 (1948). *Shelley* was very controversial when it was handed down, because it could be read to mean that any court involvement in a private dispute would satisfy the state action requirement. Commentators have suggested that a narrower reading is more consistent with the facts, and that the court action found to be sufficient was a selective enforcement pattern. See Krotoszynski, *supra*. In fact, *Shelley* provides evidence of the existence of very different levels of scrutiny in state action

A recent controversy in Kentucky⁶¹ illustrates this double standard in the public/private distinction, and highlights some of the issues that are likely to become more urgent as states implement Charitable Choice legislation. The Kentucky Baptist home for Children serves 3,600 orphaned, dependent, abused and neglected children on an annual budget of \$15.6 million. Approximately \$12 million of that amount comes from the State of Kentucky, which is also responsible for placing with the Home the vast majority of the children served. The home is the largest state-contracted provider of such services in the state.

The Home's mission statement includes the following language:

“We are a Christian ministry that, through God’s direction and leadership, reaches out to children and families with Christ’s love and compassion. We are committed to presenting a clear message of Christian values.”

A female social worker with the home was terminated in October, 1998. The letter of termination explicitly stated that the termination was because her “admitted homosexual lifestyle is contrary to Kentucky Baptist Homes for Children’s core values.” (There was no dispute about the reason for the termination, no suggestion that the employee was unqualified or had failed to perform adequately. Indeed, the home had actively recruited

inquiries, with First Amendment religion clause violations and racial discrimination cases requiring far less in the way of government activity to support a finding of constitutional violation. “In the two decades following *Shelley*, the Court never denied relief [in a racial discrimination case] on the grounds that no state action was present.” O’Brian, *Constitutional Law and Politics*, 2d ed. Vol. 2, “Civil Rights and Civil Liberties.” P.1279. W.W. Norton (1995)

⁶¹ Memorandum, ACLU Gay Rights Project. 1999.

her from her prior position.) The day she was terminated, the following memorandum was circulated to the entire staff, announcing a new Board employment policy. That policy read, in pertinent part,

“Homosexuality is a lifestyle that would prohibit employment with Kentucky Baptist Homes for Children. The Board does not encourage or intend for staff to seek out people within the organization who may live an alternate lifestyle; we will, however, act according to Board policy if a situation is brought to our attention.”

As a private religious organization, the Home has a free exercise right to insist that its employees adhere to its “core values.” If it were a government-run institution, however, the termination just as clearly would run afoul of the Fourteenth Amendment. The legal question raised by the facts of this case is “whether the Establishment Clause permits state funding to a faith-based institution for the provision of care and counseling to at-risk youth, when the institution adopts a Christian-based, anti-gay employment policy.”⁶² It is significant that the legal issue has been framed in terms of the Establishment Clause for purposes of seeking redress, because existing case law suggests that a court would not find state action for purpose of most other constitutional deprivations⁶³. First Amendment precedents, however, make it likely that Kentucky’s support of the Children’s Home violates the Establishment Clause.⁶⁴ This raises a paradox: how do we

⁶² Id.

⁶³ The exception is racial discrimination. See note 58, *supra*.

⁶⁴ See *Everson v. Board of Education*, 330 U.S. 1(1946); Tribe, *American Constitutional Law*, pp. 816-817 (1978). See also *Lemon v. Kurzman*, 403 U.S. 602 (1971), which identified a three-prong test to determine whether a statute violates the Establishment Clause.

understand the application of the Establishment Clause in the absence of state action?⁶⁵

What will be the implications of this case, as it plays out in the courts, for the contract relationships specifically sanctioned by the Charitable Choice provisions?

The lack of clarity and consistency in the application of state action doctrine, and judicial reluctance to find state action where ordinary people would see it, is one reason for current disquiet over Charitable Choice and other programs to contract out social services to faith-based organizations. Members of minority religious faiths, in particular, are sensitive to the dangers of turning vulnerable client populations over to well-meaning ministries arguably unconstrained by the Fourteenth Amendment.⁶⁶ Those concerns are not limited to client proselytizing. Will States discriminate against “nontraditional” faith organizations in the award of contracts?⁶⁷ Will contract monitoring amount to “entanglement” for Establishment Clause purposes?⁶⁸ What about employment discrimination—will the legislative provision allowing faith-based organizations to discriminate in hiring withstand constitutional muster?⁶⁹ If so, what are the implications? What if a faith-based provider is accused of discriminating among beneficiaries on the basis of race or gender or sexual orientation?

⁶⁵ It will be interesting to see how this “double standard” plays out in Charitable Choice litigation.

⁶⁶ The Anti-Defamation League calls Charitable Choice “unconstitutional, bad public policy, and fundamentally bad for religion.” www.adl.org/Charitable_Choice_a.htm, while Americans United for Separation of Church and State says it “amounts to federally-funded employment discrimination.” www.au.org/ashcroft.htm

⁶⁷ A complaint has already been lodged by a Wiccan coven in Wisconsin, alleging bias in favor of more traditional religious providers. *Church & State* (1998) Political realities make it unlikely that contracts will be awarded to controversial groups such as the Nation of Islam.

⁶⁸ Excessive entanglement between government and religion is one of the three prongs of the test set out in *Lemon v. Kurtzman*, *supra*, Note 62.

⁶⁹ The Charitable Choice provisions allow FBOs to hire in accordance with their religious beliefs. Some will hire only from their own faith, others will restrict the role of women, refuse to hire gays, etc. Martha Minow has predicted that the purported “exemption” from the Establishment Clause will be struck down. *See Minow, supra*, Note 1.

Ironically, in litigation involving Charitable Choice, the First Amendment may provide a remedy unavailable in other privatization contexts. In a sense, the Establishment Clause allows the courts to evade the state action issue, by recasting the issues in terms of government support of religion. But finding a violation of the Establishment Clause also requires the presence of state action, whether that requirement is articulated or not. A recent Sixth Circuit case is illustrative of the point: *Hartman v. Stone*⁷⁰ involved a free exercise challenge to a U.S. Army regulation prohibiting authorized child care providers on military bases from engaging in any type of religious activity in the home while providing child care. The Army conceded that the prohibition burdened the free exercise rights of those using the child care services, since only “authorized” child care providers could operate on the base. The Army justified its regulation on the grounds that *the providers were acting as a proxy for government*, and therefore religious activity was inappropriate under the Establishment Clause. The Sixth Circuit rejected the Army’s argument not because of any disagreement with the theoretical construct, but because it found that the providers were not, in fact, proxies for the government. It is difficult to argue that such analyses are somehow distinct and distinguishable from the state action cases; indeed, asking whether a private party is a “proxy” for government is asking whether the *state has acted* through that party. It does not further clarity or consistency to approach state involvement for purposes of Establishment Clause or Equal Protection⁷¹ jurisprudence as if it were conceptually divorced from conventional state action analysis.

⁷⁰ 68 F.3d 973 (6th Cir.1995)

⁷¹ *Shelley v. Kraemer, supra*. See also discussion in O’Brian, Constitutional Law & Politics, *supra*.

If certain liberties protected by the Establishment Clause and the Equal Protection doctrine are to be accorded a greater importance than, say, due process guarantees, the Courts should say so explicitly, and should just as explicitly justify the distinction.

IV.

Discussion

How *should* the concept of state action be understood? What would a coherent jurisprudence look like? The Warren Court seemed to be groping toward a holistic approach that was promising⁷²; however, the Berger and Rhenquist courts have retreated from that analytical approach, restricted the scope of the doctrine and arguably further confused the issues.⁷³

Any workable state action doctrine will require flexible application, especially during a period in which we are “reinventing” government. Flexibility need not trump consistency and predictability, however. Certain characteristics of the relationship between government and private entities will always be relevant to the inquiry whether an action can be fairly attributed to the state. Among the dispositive elements will be the existence, nature and extent of government funding; the nature and extent of government control of the activity in question; the extent to which government has authorized a contractor to exercise government powers; and a functional (holistic) analysis. All of these tests have

⁷² This approach was not dissimilar to the “meta-analysis” advocated by Krotoszynski, Note 7, *supra*.

⁷³ In his discussion of racial discrimination and the State Action doctrine, O’Brian states, “Whereas the Warren Court looked at the totality of interrelationships between government and private activities, the Burger and Rehnquist Courts tend to scrutinize and then dismiss various arguments for extending the doctrine of state action.” O’Brian, Constitutional Law and Politics, *supra*.

been used to determine the presence or absence of state action, and none would require a paradigm shift in our approach to the law in this area.

Money: Where government money passes to a presumptively private entity, a threshold inquiry should be whether the transaction is a purchase of goods or services, which should not constitute state action, and other types of funding, which may. Purchase involves a product or service that is generally available and relatively standardized, where production of the good or performance of the service is substantially, if not entirely, controlled by the vendor. When the state goes into the market looking for computer support or engineering services, for accountants to perform an audit, for asphalt to use in paving projects, or similar widely traded goods and services, it is relatively clear that government is simply making a purchase. Even where the transaction is apparently a purchase of services, however, a significant long-term relationship between a contractor and government, where the government's business constitutes a majority of the contractor's income, should be held to raise a rebuttable presumption of state action. When a single "customer" accounts for most of a contractor's income, that customer clearly has the power to dictate behavior. The existence of that leverage justifies raising the presumption, which can be rebutted by evidence that no active participation by government in fact occurred.

Control: Where government controls the manner in which work is done, there should be a finding of state action, without requiring a finding of explicit authorization of the

disputed act.⁷⁴ This rule is consistent with the Court’s current articulation of the law, if not its practice. Mere regulation should continue to be insufficient, but something less than direct or total control should implicate the state. Where the regulatory scheme substantially limits the options available to the private entity, or prescribes goals and delimits acceptable methods for achieving them, the state should bear responsibility for the results. Indicators relevant to the issue of control—besides money—are ownership, relationship, degree of regulatory supervision and authority, and the actual course of dealing between the parties. Courts might helpfully analogize with existing tests to determine whether a worker is an employee or an independent contractor. Many of the same considerations will be relevant.⁷⁵

Agency. When the state authorizes a private entity to act on its behalf, it creates an agency relationship. When the agent is authorized to exercise powers that are essentially, even if not exclusively, governmental, we are justified in finding that government has acted through that agent.⁷⁶ Here, the law of agency and partnership could be particularly helpful and relevant, and it is curious that those principles have not been applied, even by

⁷⁴ This requirement of a “smoking gun” or express government approval is, in practice, an evasion of the central inquiry, since an express approval is an act by a government official and actionable on that basis. The query in these cases is: when is it fair to *attribute* private acts to the government.

⁷⁵ Independent contractors differ from agents in that (a) they are engaged in a distinct occupation or business; (b) the work is skilled and/or typically done by specialists without supervision; (c) the contractor supplies the tools and place of work; (d) services are rendered within a relatively abbreviated time period; (e) payment is per job, or per item, and not for time spent; (f) the work is part of the separate, regular business of the contractor; and (g) the intent of the parties.

⁷⁶ Smith & Lipksy, *supra*

analogy. When government cloaks a contractor with real or apparent authority to act on its behalf, the ensuing actions should be deemed governmental.⁷⁷

Function: Each of these inquiries is an attempt to answer the question whether the private entity is acting as a proxy for government under the facts of the case. If the contractual relationship has replaced government employees who were previously providing the service, common sense suggests the contractor is a government proxy. Where government is responsible for delivery of the service, there should be at least a rebuttable presumption of state action. The “exclusive function” test is not good public policy, because the issue is not whether the activity is one that only government does or has ever done, or should do. The issue is whether it is government that is *actually “doing” the activity in question.*⁷⁸ Where government undertakes an activity, funds it, authorizes a contractor to act on its behalf, and effectively dictates the manner in which it is done, that activity should fairly be attributed to government.

Courts have been reluctant to burden governmental units—and ultimately taxpayers—with liability for the actions of private contractors, but the concern is arguably misplaced.

Government can protect tax dollars by contracting for hold harmless or other indemnification provisions. Liability is a recognized cost of doing business, and the

⁷⁷ Widely used jury instructions define an “agent” as “a person who at a given time is authorized to act for in place of another person,” and specifies that it is not necessary that the conduct of the agent be expressly authorized by the principal for such conduct to be “within the scope” of the agent’s authority. If the conduct is “incidental to, customarily connected with, or reasonably necessary for” the performance of an authorized act, it is within the scope of authority and, if wrongful, can give rise to liability.

⁷⁸ As Robert Gilmour and Laura Jensen framed the issue in “Reinventing Government Accountability,” Note 6, *supra*, “Privatization in the United States is thus more likely to represent a change in form rather than function, i.e., the substitution of a ‘private’ contractor or other nongovernmental designee to act as a proxy for government officials and employees in performing public tasks under the aegis of governmental authority and paid from the public purse.” P. 247

allocation of costs is a proper subject for contractual negotiation. Indeed, it could be argued that a refusal to allow government to evade its constitutional responsibilities through contracting will force an explicit recognition and accommodation of potential liability costs. Such a result would benefit everyone: private contractors, government units, and most of all citizens who have a right to demand fiscal, political and legal accountability from those they elect to office.

When government acts, government should be accountable. The instrument government chooses should not alter that result. Whether government delivers drug counseling or job placement or any other service through a state agency or a faith-based organization, the program is state action. Courts should recognize that reality and require adherence to constitutional standards.

V.

Conclusion

Sometimes the most obvious rules produce the most tortured applications. It is a truism of every high school and college government class that the Bill of Rights applies only to the government, that there must be state action in order to find a constitutional infringement. But by “reinventing” government, we have created mutants and hybrids, neither public nor private, but some admixture of the two. The courts have encountered those mutations much as the blind men encountered the elephant: one finding a snake, one a wall, one a tree trunk. Unless the courts can come to grips with the whole animal, protean and evolving as it is, and fashion a coherent jurisprudence that will safeguard the

distinction between public and private and thus protect constitutional liberties without engulfing truly private enterprises, we will find ourselves dealing with 19th century animals in a 21st century legal zoo.