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THE GOVERNMENT-ACTION REQUIREMENT IN AMERICAN CONSTITUTIONAL LAW

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I. INTRODUCTION

Most constitutional limits apply only to the government.[1] Unreasonable searches and seizures by private parties do not violate the fourth amendment.[2] Deprivations of life, liberty, or property by private parties are not subject to the due process clauses.[3] Private parties may abridge free speech without violating the first amendment[4] and may discriminate against racial minorities without violating the equal protection clause.[5] With two exceptions, constitutional claims are valid only if the harm was caused by government action.[6]

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1. *E.g.*, Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 156 (1978) ("most rights secured by the Constitution are protected only against infringement by governments"). "With the exception of the Thirteenth Amendment, the guarantees of the Constitution run only against national and state governments." J. BARRON & C. DIENES, CONSTITUTIONAL LAW IN A NUTSHELL 344 (1986). Actually, there is a second exception, as the ensuing discussion explains.

2. "[T]he Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative." Skinner v. Railway Labor Executives Ass'n, 109 S. Ct. 1402, 1411 (1989).

3. "[T]he Due Process Clause protects individuals only from governmental and not from private action." Lugar v. Edmondson Oil Co., 457 U.S. 922, 930 (1982).

4. *E.g.*, Hudgens v. NLRB, 424 U.S. 507 (1976).

5. *E.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972).

6. The government-action requirement is often referred to as the "state action" requirement. "Government action" is a more apt term, however, for two reasons. First, the requirement may be satisfied by federal government action as well as state government action. " '[S]tate action' is a misnomer as the issue arises in an identical manner when the federal government or its agents are involved in a case." J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 498 (1983). Second, the requirement may be satisfied by action of counties, municipalities, and other local government entities such as special districts. All such branches of local government are considered agencies of the State.

Government action, in short, is a standard preliminary requirement in constitutional cases.[7] This article describes the structure of government-action analysis as set forth in Supreme Court cases. Its purpose is to help law students and lawyers understand and apply the several strands of Supreme Court law in this often confusing field.

The major principles of government-action law are summarized in the following outline.

Government-Action Requirement: Basic Analysis

A. Applicability
   1. General rule: constitutional claimants must prove that government action was present.
   2. Exceptions
      a. Thirteenth amendment
      b. Certain privileges of United States citizens, such as the privilege to use public roads

B. Compliance
   1. Action by government official
      a. General rule: action by a government official is government action.
      b. Exception: action unrelated to the official's government duties
   2. Joint action by government official and private party
      a. General rule: action by private party is government action when undertaken jointly with government official.
      b. Exception: scope unclear
   3. Action by private party
      a. General rule: action by a private party is not government action.
      b. Exceptions
         1) Where the private party is performing a public function
         2) Where a sufficient nexus (connection) exists between the government and the private party's conduct

7. *See* Galloway, *Basic Constitutional Analysis*, 28 SANTA CLARA L. REV. 775 (1980).

a) Compulsion: when the government compels the private conduct, the conduct is government action.
b) Encouragement: when the government substantially encourages the private conduct, the conduct may be government action.
c) Entanglement/symbiotic relationship: when the government and the private party are entangled so that each profits from the other's involvement, the private conduct may be government action.

Let us translate this outline into prose. A claimant seeking redress for an alleged violation of the United States Constitution must show, as a preliminary matter, that the government-action requirement is either inapplicable or satisfied. Government-action analysis proceeds in two steps. One must determine, first, whether the government-action requirement is applicable. If so, one must determine, second, whether the requirement is satisfied.

Applicability. As a general rule, constitutional limits apply only to the government, so a claimant seeking relief for a constitutional violation must show that the harm resulted from government action. Only two exceptions exist. First, the thirteenth amendment applies to private as well as government action. Second, certain privileges of federal citizens, such as the privilege to use public roads, are protected against private infringement.

Compliance. If the government-action requirement is applicable, claimant must show that the harm alleged was, in fact, the result of government action. Such cases fall into three categories, involving 1) conduct by government officials, 2) joint government and private conduct, and 3) con-

duct by private parties.[8] These categories are covered by different rules.

Conduct by a government official *is* government action unless the conduct is not related to the official's government duties. The general rule, in other words, is that conduct by a government official is government action. The exception is conduct unrelated to the official's government duties.

Similarly, conduct by a private party is government action if it is undertaken jointly with a government official. Presumably there are exceptions, but the Supreme Court has not spelled them out in detail. Indeed, the joint-participation rule may be limited to cases involving use of state-created attachment procedures.

In contrast, conduct solely by a private party who is not a government official is *not* government action unless it is a "public function" or a sufficient "nexus" (connection) exists between the government and the conduct. The general rule, in other words, is that such conduct is not government action. But there are two exceptions. First, where the conduct is a public function, government action is present. Second, where the government has a sufficient nexus with the conduct so that the government may justifiably be considered responsible for the conduct, government action is present.

A sufficient nexus may be shown in several ways. First, if the government compelled the conduct, a sufficient nexus is present, and the conduct is government action. Second, if the government substantially encouraged the conduct, a sufficient nexus may be found. Third, where a symbiotic relationship exists between the government and the private actor so that each profits from the other's involvement, the entanglement may be a sufficient nexus, although this is not as clearly settled as the exceptions based on government compulsion and encouragement.

The next section discusses each step of government-action analysis in more detail.

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8. "[T]he party charged . . . must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

II. DISCUSSION

In every constitutional case, one should consider the government-action issue. One should determine, first, whether the government-action requirement is applicable. If so, one should determine, second, whether the requirement is met.

A. *Is the Government-Action Requirement Applicable?*

1. *General Rule*

The government-action requirement is, as a general rule, applicable to constitutional claims, because most constitutional limits apply only to the government.[9] Therefore, if one is pursuing a constitutional claim, it should be assumed that the government-action requirement must be satisfied, unless an exception is present.

2. *Exceptions*

The Supreme Court has recognized only two exceptions to the general rule that constitutional claimants must satisfy the government-action requirement.

First, the thirteenth amendment[10] applies to private conduct as well as government action.[11] Thus, a claimant who alleges that he/she has been subjected to slavery or involuntary servitude need not prove that government action was involved.

Second, the Court has stated that the privilege of United States citizens to use public roads is protected against private as well as governmental infringement.[12] This rule may extend to other, similar privileges of United States citizens as well.

If one of these two exceptions is applicable, the government-action requirement does not apply, and one may proceed to analyze other components of the constitutional claim. If, on the other hand, neither of these exceptions is applica-

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9. *See supra* note 1.

10. The amendment provides, "Neither slavery nor involuntary servitude . . . shall exist within the United States . . . ." U.S. CONST. amend. XIII.

11. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

12. United States v. Guest, 383 U.S. 745, 765 (1966).

ble, the government-action requirement does apply, and one must analyze whether the requirement is met.

B. *Is the Government-Action Requirement Satisfied?*

If the government-action requirement is applicable, claimant must show that it is met. The controlling rules vary depending on whether the conduct that caused claimant's harm was performed solely by a government official, jointly by a government official and a private party, or solely by a private party.

1. *Conduct by Government Officials*

a. *General Rule*

Conduct by a government official is, as a general rule, government action, if it is related to the official's governmental duties.[13] Thus, the government-action requirement is presumptively satisfied if the conduct that harmed the claimant was performed by a government official, whether legislative, executive, or judicial.[14] This is true even if the official's conduct was *ultra vires*, i.e., contrary to legal restrictions.[15]

b. *Exception*

Conduct by a government official is not government action, however, if the conduct is performed in a purely private capacity and is unrelated to the actor's duties as a gov-

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13. *E.g.*, West v. Atkins, 108 S. Ct. 2250, 2255 (1988) ("[S]tate employment is generally sufficient to render the defendant a state actor.") *quoting* Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 n.18 (1982).

14. "When a legislature, executive officer, or a court takes some official action against an individual, that action is subject to review under the Constitution, for the official act of any governmental agency is direct governmental action and is therefore subject to the restraints of the Constitution." J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 6, at 421. "State action . . . may emanate from rulings of administrative and regulatory agencies as well as from legislative or judicial action." Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179 (1972). "That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State . . . , is a proposition which has long been established by decisions of this Court . . . . State action . . . refers to exertions of state power in all forms." Shelley v. Kraemer, 334 U.S. 1, 14 (1948).

15. "[T]he actions of a state officer who exceeds the limits of his authority constitute state action." *Lugar*, 457 U.S. at 929. "It is clear that the acts of officials, federal or state, even if the acts violate the law, constitute 'state action.'" J. BARRON & C. DIENES, *supra* note 1, at 349.

ernment official. For example, if a sheriff hits a pedestrian while driving the family car to the store to buy family groceries, that is not government action. Similarly, a police officer searching his/her child's room to collect dirty clothes for the wash is not engaged in government action.

2. *Conduct Involving Joint Participation by Government Officials and Private Parties*

Conduct undertaken jointly by government officials and private parties may be government action, but the scope of this rule is unclear. The leading recent case is *Lugar v. Edmondson Oil Company*,[16] which held that attachment proceedings initiated by a private creditor were government action, where the writ of attachment was issued by a state clerk and executed by the sheriff.[17]

It is unclear how broadly the joint-participation rule sweeps. *Lugar* suggests two possible limits. First, the rule may only apply where "the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority."[18] In *Lugar*, for example, claimant "invok[ed] the aid of state officials to take advantage of state-created attachment procedures."[19] Second, the rule may apply only to prejudgment attachments.[20] If the latter limit is good law, the exception nearly swallows the rule, and it may not make sense to call the joint-participation doctrine a "general rule."

3. *Conduct by Private Parties*

The most troublesome government-action issues arise when the conduct that harmed claimant was performed by a private party, i.e., a person or entity not involved in an agency relationship with the government or acting jointly with a government official. The general rule is that such conduct is

16. 457 U.S. 922 (1982).

17. Justice White's opinion for the Court stated, "[W]e have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." *Id.* at 941.

18. *Id.* at 939.

19. *Id.* at 942.

20. As the *Lugar* majority put it, "The holding today . . . is limited to the particular context of prejudgment attachment." *Id.* at 939 n.21.

not government action, and the major issues concern the scope of the exceptions.

a. *General Rule*

Conduct by a private party, i.e., a party who is not a government official, is not, as a general rule, government action.[21] Thus, if the government-action requirement is applicable and the conduct that harmed claimant was performed by a private party, the claim must be dismissed unless an exception is present.

b. *Exceptions*

The main issue in government-action law is when conduct by a private party is government action, i.e., "What must be shown to subject seemingly private actors to the constitutional guarantees ordinarily applicable only to government?"[22] This issue has spawned many famous and complex Supreme Court cases, but the decisions holding conduct by private parties to be government action fall into two main categories which comprise the two exceptions to the rule that conduct by private parties is not government action. These exceptions have been labelled the "public function" and "nexus" exceptions.[23]

1) *Public Function Exception*

Conduct by a private party is government action if it is a "public function."[24] A public function is a function tradi-

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21. *See supra* notes 2-5 and accompanying text.

22. G. GUNTHER, CONSTITUTIONAL LAW 866 (1985).

23. *Id.* at 866-67:

> That search for indicia of state action follows two distinguishable routes. One may be called the 'nexus' approach: it seeks to identify sufficient points of contact between the private actor and the state to justify imposing constitutional restraints on the private actor . . . . The alternative to that 'nexus' analysis is the 'public function' approach. Instead of searching for formal contacts between the state and the private [actor], it focuses on the nature of the activity the private [actor] engages in.

24. *E.g.*, Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1975); Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Evans v. Newton, 382 U.S. 296 (1966); Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501

tionally exclusively reserved to the government.[25] The public function exception is not favored,[26] and this restrictive definition is applied strictly to keep the exception within "carefully confined bounds."[27]

The scope of the public function doctrine is uncertain. Only two kinds of conduct have been definitively identified as public functions: running towns[28] and conducting elections of public officials.[29] The Warren Court held that running a shopping center is a public function,[30] but the Burger Court overruled the decision,[31] so running a shopping center is not a public function. Similarly, the Warren Court once declared that running a public park is a public function,[32] but the Burger Court later repudiated the statement.[33] Chief Justice Rehnquist has suggested that condemnation of property pursuant to the eminent domain power is a public function.[34] And Justice Stevens has suggested that "maintenance of a police force is a unique sovereign function,"[35] although this is doubtful in light of the past and present existence of private police forces such as Pinkerton guards, company police, and private neighborhood patrols.

To determine whether conduct is a public function, one must apply the *Jackson-Flagg Brothers* test that focuses on whether the conduct is traditionally exclusively reserved to

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(1946); Smith v. Allwright, 321 U.S. 649 (1941).

25. *Flagg Bros.*, 436 U.S. at 158 ("functions . . . 'exclusively reserved to the state.'"); *Jackson*, 419 U.S. at 352 ("powers traditionally exclusively reserved to the State"). *Accord* Blum v. Yaretsky, 457 U.S. 991, 1005, 1011 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982).

26. "[T]he modern Court does not look with favor upon efforts to expand the 'public function' analysis . . . ." G. GUNTHER, *supra* note 22, at 871.

27. *Flagg Bros.*, 436 U.S. at 163.

28. *Marsh*, 326 U.S. 501 (1946), holding that the private owner of a company town may not ban distribution of religious literature. *Marsh* only applies, however, "when privately owned property is the 'functional equivalent' of a municipality." J. BARRON & C. DIENES, *supra* note 1, at 351.

29. Smith v. Allwright, 321 U.S. 649 (1944), holding that a state party convention may not ban black persons from voting in primary elections. *Cf.* Terry v. Adams, 345 U.S. 461 (1953).

30. Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

31. Hudgens v. NLRB, 424 U.S. 507 (1976).

32. Evans v. Newton, 382 U.S. 296, 301-02 (1966).

33. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 161 n.11 (1978).

34. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352-53 (1974).

35. *Flagg Bros.*, 436 U.S. at 172 n.8 (Stevens, J., dissenting).

the government. Obviously, this requires examining the history of the particular conduct to see whether it has sometimes been performed in the past by private parties. Thus, for example, making an arrest is presumably not a public function, because citizens' arrests have long been authorized. On the other hand, operating the private, corporate prisons that have emerged in recent years may be a public function, since incarceration of duly charged or convicted criminals has traditionally been an exclusive government function.

In deciding whether the Court is likely to recognize new categories of public function, one should bear in mind the Court's hostility toward the public function doctrine.[36] This hostility is demonstrated by the Burger Court's two leading public function cases. In *Jackson v. Metropolitan Edison Company*,[37] the Court held that supplying gas and electricity to the public is not a public function although governments often choose to provide these services and the utility had a statutory monopoly and was heavily regulated. In *Flagg Brothers, Inc. v. Brooks*,[38] the Court held that the forced sale of stored goods pursuant to a statutory warehouseman's lien is not a public function, even though three Justices concluded that nonconsensual transfers of title have traditionally been reserved exclusively to the government. "Thus, it would appear that few public functions will be found beyond those most essential services which are provided by governments and which have no direct counterpart in the private sector."[39]

If the conduct that harmed claimant is a "public function," the government-action requirement is met even though the actor is ostensibly a private party.

2) *Nexus Exception*

Conduct by a private party will also satisfy the government-action requirement if there is a sufficient nexus (connection) between the government and the private conduct to

36. "While the Burger Court continues to accept the public function theory of state action, its doctrinal scope has been severely restricted." J. BARRON & C. DIENES, *supra* note 1, at 352.

37. 419 U.S. 345 (1974).

38. 436 U.S. 147 (1978).

39. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 6, at 506.

justify the conclusion that the government is responsible for the private party's decision to engage in the conduct.[40] This is the second exception to the general rule that conduct by private parties is not government action. The nexus exception has at least two and perhaps three strands: government compulsion, government encouragement, and perhaps government entanglement (symbiotic relationship).

In each case, the required nexus must be shown between the government and the precise conduct which claimant alleges to be unconstitutional.[41] At one time, the Court seemed to believe that multiple contacts between the government and the private party would suffice even if the government did not compel or encourage the specific conduct that harmed claimant,[42] and several Justices believe this should still be the law.[43] But the majority has made it clear that general government involvement in the affairs of the private actor is not enough and that the claimant seeking to invoke this exception must demonstrate a government nexus with the precise conduct challenged.[44]

a) *Private Conduct Compelled by the Government Is Government Action.*

Government compulsion of conduct by a private party is a sufficient nexus to make that conduct government action.[45] The compulsion may arise from several sources. Pri-

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40. "[T]he 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." *Jackson*, 419 U.S. at 351. "[C]onstitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." Blum v. Yaretsky, 457 U.S. 991, 1004 (1982). "Our cases have accordingly insisted that the conduct allegedly causing the deprivation . . . be fairly attributable to the State." Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982).

41. *Blum*, 457 U.S. at 1004 ("close nexus between the State and the challenged action"); *Jackson*, 419 U.S. at 351 ("sufficiently close nexus between the State and the challenged action"); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173, 176-77 (1972).

42. The best example is Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). *See also* Evans v. Newton, 382 U.S. 296 (1966).

43. *See, e.g., Blum*, 457 U.S. at 1013, in which Justice Brennan's dissenting opinion, joined by Justice Marshall, argued that the test should be the government's "involvement in the total context of the action taken."

44. *See* authorities cited in *supra* note 41. The first case that made this doctrine clear was *Moose Lodge*, 407 U.S. 163 (1972).

45. "Our cases state 'that a State is responsible for [the] act of a private

vate conduct required by legislation (statute, ordinance, regulation) is government action.[46] Similarly, private conduct required by court order is government action.[47] And private conduct compelled by threats of retaliation by executive officials is government action.[48] This strand of the nexus exception is well settled and has not been questioned by the current Court.

b) *Private Conduct Substantially Encouraged by the Government May Be Government Action.*

Government encouragement of conduct by a private party may also provide a sufficient nexus to make that conduct government action.[49] No precise formula exists for determining when government encouragement is sufficient to support the conclusion that conduct by a private party is government action; one must weigh all the facts and circumstances.[50] But the current Court has been strict in requiring encouragement so substantial that the government must be deemed responsible for the private decision to undertake the action in question.

The nadir of the encouragement theory was *Flagg Brothers, Inc. v. Brooks*,[51] in which the private conduct was a warehouseman's sale of stored goods pursuant to a statute explicitly authorizing the sale and defining the specific procedures to be followed. Although the statute no doubt substan-

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party when the State, by its law, has compelled the act.'" Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164 (1978).

46. *E.g.*, Skinner v. Railway Labor Executives Ass'n, 109 S. Ct. 1402, 1411 (1989) (federal regulation requiring private railroads to give their employees drug tests); Peterson v. City of Greenville, 373 U.S. 244 (1963) (local ordinance requiring segregation of restaurants). "When state legislation commands a certain activity . . . , there is no question but that state action is present whenever someone follows the guidelines of the statute." J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 6, at 508.

47. Shelley v. Kraemer, 334 U.S. 1 (1948) (court order enforcing restrictive covenant is state action), is often cited as the leading case on this point, but *Shelley* may be a "government official" case rather than a "nexus-compulsion" case.

48. *E.g.*, Lombard v. Louisiana, 373 U.S. 267 (1963).

49. *E.g.*, *Skinner*, 109 S. Ct. at 1411-12. Reitman v. Mulkey, 387 U.S. 369 (1967), has been called the "high point of this 'encouragement approach' to state action." J. BARRON & C. DIENES, *supra* note 1, at 357.

50. *Skinner*, 109 S. Ct. at 1411; *Reitman*, 387 U.S. 369 (1967); *cf.* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

51. 436 U.S. 149 (1978).

tially encouraged the sale, the Court held the nexus exception inapplicable. After *Flagg Brothers*, it appeared that the encouragement doctrine might be moribund,[52] but the Court later indicated that government encouragement of private conduct may still be enough to satisfy the government-action requirement.[53] *Flagg Brothers* and other cases make clear, however, that the encouragement must be very significant.[54]

Earlier cases suggested that government authorization, approval, or even passive acquiescence might be a sufficient nexus so that private conduct satisfies the government-action requirement,[55] but these dicta have been emphatically rejected by the current Court.[56]

c) *Private Conduct with Which the Government Is Entangled in a Symbiotic Relationship May Be Government Action, Although This Is Not Clear.*

Decisions issued by the liberal-activist Court of the 1960's suggested that conduct by a private party is government action if the government is significantly entangled in the conduct, even though the government neither compelled nor encouraged the conduct.[57] This doctrine appeared mori-

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52. "Increasingly, 'encouragement' of private action is giving way to a requirement that the state 'command' the particular decision or action being challenged." J. BARRON & C. DIENES, *supra* note 1, at 356. "Despite the far-reaching statements about 'authorization' and 'encouragement' in the cases of the 1960s, the modern Court has refused to apply these concepts broadly." G. GUNTHER, *supra* note 22, at 894.

53. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982): "[A State] normally can be held responsible for a private decision only when it has exercised a 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." *Accord* Rendell-Baker v. Kohn, 457 U.S. 830, 839-43 (1982).

54. Another case that makes this clear is *Blum*, 457 U.S. 991 (1982), which held that decisions to transfer patients out of private nursing homes are not government action even though the government wrote the rules for such transfers and imposed monetary sanctions on nursing homes for failure to comply with the rules.

55. *E.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967).

56. "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible . . . ." *Blum*, 457 U.S. at 1004. *Cf.* Flagg Bros. Inc. v. Brooks, 436 U.S. 149 (1978), which held that execution of a warehouseman's lien was not government action despite statutory authorization.

57. The classic example is Burton v. Wilmington Parking Auth., 365 U.S. 715

bund after *Jackson v. Metropolitan Edison Company*,[58] which held that conduct by a privately owned public utility was not government action despite numerous entanglements with the government.[59] But *Jackson* did suggest that entanglement that takes the form of a "symbiotic relationship," i.e., a relationship in which the government profits from the challenged private conduct and the private party profits from the government's involvement, might still be enough to provide the requisite nexus.[60] And the Burger Court referred to the symbiotic relationship concept with apparent approval in several other cases.[61]

So perhaps the entanglement strand of the nexus exception is still alive if claimant can show that the government is symbiotically entangled in the specific conduct challenged. On the other hand, it may be that evidence of a symbiotic relationship in which the government profits from the challenged private conduct is more accurately viewed as proof of government encouragement and that the entanglement strand no longer has independent status.

III. CONCLUSION

The government-action requirement is a standard ingredient of constitutional analysis. Since nearly all constitutional limits apply only to the government, constitutional claimants must normally show that the harm of which they complain was caused by government action. Government-action analysis proceeds in two steps.

First, one must determine whether the government-action requirement is applicable. The requirement is applicable in all constitutional cases except those based on the thirteenth amendment and certain privileges of United States

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(1961) (refusal by private retaurant in public parking authority to serve blacks is government action).

58. 419 U.S. 345 (1974).

59. *Cf.* Blum v. Yaretsky, 457 U.S. 991, 1004 (1982), which stated, "[The government] 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."

60. *Jackson*, 419 U.S. at 357: "We also find absent in the instant case the symbiotic relationship presented in *Burton* . . . ."

61. Rendell-Baker v. Kohn, 457 U.S. 830, 842-43 (1982); CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 119 (1973); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175 (1972).

citizens, including the privilege to use public roads. If one of these exceptions is applicable, government action is not required. In all other constitutional cases, the government-action requirement must be satisfied by claimant.

Second, if the requirement is applicable, one must determine whether it is met, i.e., whether the claimant's harm was caused by government action. If the conduct causing the harm was performed solely by a government official, it is government action unless it was wholly unrelated to the official's government duties. If the conduct was performed jointly by a government official and a private party, it may be government action, although the scope of this rule is unclear. If the conduct was performed by a private party, government action is not present unless the conduct was a public function or there was a sufficient nexus between the government and the private conduct in the form of government compulsion, encouragement, or perhaps symbiotic entanglement.

If the government-action requirement either is not applicable or is satisfied, the constitutional analysis may proceed to other issues, including the merits of the constitutional claim. If on the other hand, the government-action requirement is applicable and not satisfied, the constitutional claim should be dismissed without reaching the merits.

The current Court is extremely strict in enforcing the government-action requirement, and one should expect that claimant will lose in most close cases, at least those involving activity by a private party.