The Color of State Law in the Sixth Circuit: Invisible with Regard
to Privatization of State Agencies in Michigan?

Since the passage of the Klu Klux Klan act of 1871,1 private plaintiffs have had federal statutory
remedies available to vindicate violations of their rights, either those guaranteed under the United States Constitution,2 or those conferred by federal statute.3 Clearly, the "most popular vehicle to vindicate a deprivation of a constitutional or statutory right is 42 U.S.C. §1983."4 This statute allows private plaintiffs to sue for violations of their rights, if such violations are at the hands of one acting under the "color of" any statute, ordinance, regulation, custom, or usage of any State or Territory, or the District of Colombia."5 In the parlance of practice, §1983 is used to prevent violations at the hands of one acting "under color of state law."6


2. The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873) (denying §1983 claims brought under the Privileges and Immunities Clause).


Thus, §1983 has two broad requirements: one, the right alleged to have been violated is one secured by the Constitution or laws of the United States; and two, the violator was acting under color of state law. As applied, the first stage in a §1983 inquiry borrows established doctrine, or at least looks to a separate body of law to determine if a violation of a constitutional or statutory right has occurred. Because the first prong of the §1983 analysis does not necessarily create a body of law on its own, this paper will concentrate on the second §1983 requirement, the determination of whether the defendant was acting "under color of state law."

The "color of state law" requirement has developed a substantive body of law all its own, based on tests created by the Supreme Court and honed by the federal circuits. As such, the Sixth Circuit has developed a restrictive view on whether a defendant is acting under "color of state law," and has narrowed the circumstances under which §1983 claims may be brought. In short, the color of state law in the Sixth Circuit is almost invisible. It is increasingly difficult, even in the context of institutions held out to the public to be state agencies, to prove to the courts that the color of law threshold has been reached.

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7. Section 1983 does not itself confer any substantive rights. As a result, Plaintiffs utilize existing constitutional or statutory law, and a violation thereof, to establish the first element under §1983. There are some areas where the "violation of rights" analysis is slightly different in a §1983 context than otherwise. For example, in the context of retaliatory discharge suits, where the plaintiff asserts that they were discharged from public employment for exercising a free speech right, that speech must be "related to a matter of public concern," and must have been a "substantial" and "motivating" factor in the decision to dismiss an employee. Mount Healthy City Sch. Dist. Bd. of Ed. v. Doyle, 429 U.S. 274, 287 (1977). In this context, the speech element in the first prong of the §1983 analysis creates a different test than that of the more frequent Due Process wrongful discharge suits. However, these speech-related employment deprivation cases are respectively rare.
Enter privatization, which has been a policy goal in Michigan, especially under the Engler Administration. Once-public agencies are being privatized at an ambitious rate, from the Accident Fund, the state's one time worker's compensation provider, now privatized and competing on the open market for customers, to many mental health services, child services, and truck driver safety programs. While not addressing the politics behind privatization, this paper will look at some of its effects, specifically in terms of assessing §1983 liability to former state agencies, now privatized. The tendency in the Sixth Circuit to deny the presence of state action has placed an extra hurdle in front of §1983 claimants, and has proven to be a boon to the defense side in these claims.

Part one of this paper will outline the traditional U.S. Supreme Court tests to determine whether one has in fact acted under color of state law. Part two will look at some Sixth Circuit cases applying these tests, in the privatized state agency context, and other similar contexts. Part three will offer analysis, and reflect this author's perspective that the existing color of state law tests should be applied more liberally, in the interest of maintaining accountability for constitutional violations by actors engaged in public work, or the private delivery of public services. A conclusion will follow.

1. Tests to Determine Whether One is Acting Under Color of State Law for §1983 Purposes

The U.S. Supreme Court has developed three tests for the courts to use in determining whether one has acted "under color of state law." In cases where the state involvement is not obvious and unavoidable, courts are to consider the action of the defendant to determine whether the
defendant is engaged in the exercise of a “traditional public function.” Another test considers whether “state compulsion” has caused a private actor to deprive a claimant of their rights. Finally, there is a test to determine whether the private actor and the state have a “symbiotic relationship” or a “substantial nexus” between them, which will allow the conduct of the actor to be “fairly attributed to the state.” If a private actor, or privatized agencies’ supervisors or employees do not meet any of these three tests, no §1983 liability will follow.

A. The Public Function test

The public function test requires a private actor to be engaging in a traditional public function to incur §1983 liability. The list of services that are considered to be traditional government functions is extremely narrow. Nationwide, only two areas have been held to amount to such an exercise: the holding of elections; and, the incarceration of criminals. As an exemplar of the generally restrictive view all federal circuits have taken regarding §1983 liability, this list is more instructive for the activities which have been held not to be “traditional public functions” than it is helpful for finding circumstances that amount to acting under color of state law.

11. See Akins, supra, note 8 at 4.
12. Id.
13. Street v. Corrections Corp. of America, 102 F.3d 810, 814 (6th Cir. 1996)(discussing traditional public function test, and holding that incarceration of criminals is a traditional public function).
The Sixth Circuit, occasionally borrowing from other federal courts, has excluded a considerable list of services from the realm of traditional public functions. These include, but are not limited to the delivery of mental health services (even when publicly funded and heavily state regulated); the provision of medical care to inmates; involuntary commitment to private hospitals per state statute; foster parenting services; the collection of tolls for a municipal Bridge Authority; and the education of emotionally disturbed or otherwise disabled children. The operation of truck safety education programs, and the regulation of motor freight carriers may yet be added to this list.

14. Wolotsky v. Huhn, 960 F.2d 1331 (6th Cir. 1992) (private party must exercise powers traditionally and "exclusively" reserved to the state, which excludes mental health services).

15. Sherlock v. Momefoi Med. Cen., 84 F.3d 522 (6th Cir. 1996) ("[F]act that independent contractor provided medical care to inmates may make it a state actor for the purposes of 1983 claims as they relate to administering that care, but that fact does not make it a state actor in terms of employment decisions."). Id. at 527 (emphasis added). While it appears here that providing medical care is a public function, that question was not reached on the merits, as Sherlock reviewed a motion for summary judgment. Thus, any intimation that providing medical care may create a state actor in any non-incarceration situation is purely dicta.


20. Patrick v. Davis, No. 5-97-CV-246. (W.D. MI) (March 15, 1999). The U.S. District Court for the Western District of Michigan, recently had before it the question of whether supervisors in the Michigan Truck Safety Commission Education Center, a newly privatized wing of the public Michigan Truck Safety Commission, were state actors for §1983 purposes. The case settled out
Thus, based upon a brief survey of some Sixth Circuit treatment of this traditional government function test, it appears unlikely that any plaintiff will be able to attach §1983 liability by pointing to the task accomplished by the private actor, and finding an analogue in government. If the actor is not in the area of corrections, or does not provide voting booths under government contract (or some such election-related task that might be imagined), plaintiffs will not have success applying the traditional government function test to other areas, despite the fact that no private entity had ever performed that agency’s tasks prior to privatization.

B. The state compulsion test

This test, as the name implies, requires the state to have compelled the private actor to deprive another of their statutory or constitutional rights. As applied in the Sixth Circuit, a state must take an active role in the deprivation, or exercise literal coercion over the private or quasi-public actor before that actor will face §1983 liability.21 The test language “requires that a state exercise such coercive power or provide such significant encouragement, either overt or covert, that in law the choice of the private actor is deemed to be that of the state.”22

before the color of law issue was reached on the merits. This case had the potential of establishing far-reaching rules regarding quasi-public and recently privatized state agencies. With a continued emphasis on privatization of state agencies in the Michigan Legislature, this question is likely to resurface.

21. Wolotsky v. Huhn, 960 F.2d 1331 (6th Cir. 1992) (finding no state compulsion in quasi-public agency that terminated state pensioner without pre-deprivation hearing or post-deprivation redress, in light of an extensive list of indicators of state action).

22. Id. at 1335.
However, when the state compulsion test was first formulated by the Supreme Court in *Adickes v. Kress & Co.*, it had a broad and expansive character, and was not as difficult for a plaintiff to meet as the modern formulation has become. The High Court phrased this test in these expansive terms:

The involvement of a state official in such a conspiracy plainly provides the state action essential to show a violation of Petitioner’s Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized or lawful. Moreover, a private party involved in such a conspiracy, even though not an official of the State, can be liable under §1983. “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 [s]he is a *willful participant in joint activity with the State or its agents.*”

This language, as it appears in *Adickes*, is cited by page reference in *Wolotsky*, and is the Supreme Court authority for the state compulsion test as formulated in the Sixth Circuit. It is

23. 398 U.S. 144 (1970)(finding § 1983 liability for restaurant owner under state compulsion test, as he for colluded with the police to have white patron arrested for eating with blacks).

24. *Id.* at 151 (quoting United States v. Price, 383 U.S. 787, 794 (1966)) (internal citations omitted, emphasis added).

interesting to note how this test, which arrived wearing the clothes of an expansive interpretation of the “color of law” requirement, has subsequently been applied in the Sixth Circuit.\textsuperscript{26}

For example, in \textit{Wolotsky}, the Sixth Circuit analyzed various factual circumstances under the state compulsion test, and in effect, removed them from the list of factors that the district court may consider as possible of action under the color of law.\textsuperscript{27} Unpersuasive were the facts that: Wolotsky was a former state worker who was allowed to continue in the Ohio public employees pension fund; Wolotsky and others in his agency were considered state employees for worker’s compensation purposes; Wolotsky worked for a privatized non-profit mental health services provider with the state as its client; the state of Ohio leased a building to the defendant agency for nominal consideration; the mental health agency was completely governed pursuant to state regulation; and, nearly all funding for the defendant agency came from public sources.\textsuperscript{28}

As an additional limitation, the state compulsion test now requires the state to “exercise coercive power,”\textsuperscript{29} or figuratively speaking, hold a gun to the head of the private actor and command that private actor to deprive others of their constitutional or statutory rights. In the Sixth Circuit, the

\textsuperscript{26} \textit{Adickes}, 398 U.S. at 147. This expansive view allowed Ms. Adickes to recover from a restaurant who was held to be acting in conspiracy with the police officer that arrested her for vagrancy. These charges were actually leveled against her because she was “in the company of negroes” at the restaurant, and thus not served a meal, not because of her actual vagrancy. \textit{Id.}

\textsuperscript{27} \textit{Wolotsky}, 960 F.2d at 1336.

\textsuperscript{28} \textit{Id.} Appellant was aware that there was case law in the Sixth Circuit and the Supreme Court wherein each fact mentioned here was not considered, \textit{alone}, to be sufficient to create action under color of state law. However, Appellant asserted, and rightfully so, that the combination of these factors should have made Appellees state actors for these purposes. \textit{Id.} at 1336-37.

\textsuperscript{29} \textit{Id.} at 1335.
“state compulsion” test could be re-named the “state coercion” test. Further, Sixth Circuit has held that “mere approval or acquiescence by the state in a challenged decision is not enough to make the decision one which is deemed in law to be that of the state.” As such, even state ratification of an unconstitutional or unlawful activity does not meet the requirements of the state compulsion test in the Sixth Circuit.

C. The symbiotic relationship or nexus test

On its face, this test requires either a close relationship between the private actor and the state, or requires a nexus between the deprivation and a state law or policy. In practice there is overlap between the nexus test and the state compulsion test, as facts that give rise to a state compulsion analysis will frequently be analyzed under the nexus test in one case, and analyzed under the state compulsion test in another. Regardless of the occasional imprecision, there is a cohesive body of analysis under the symbiotic relationship or nexus test which provides specific answers to the question of “what is a ‘symbiotic relationship,’ or a ‘substantial nexus?’”

Burton v. Williamston Parking Authority is widely-cited as marking the genesis of the symbiotic relationship or substantial nexus test. The Sixth Circuit has departed from the Supreme Court’s application of the nexus test in Burton, in a similar manner as is narrowed the state compulsion test.

30. Id.

31. See generally, Wolotsky (analyzing facts under the state compulsion test); compare Bier v. Fleming, 717 F.2d 308, 310 (6th Cir. 1983) (analyzing similar facts, to the extent that a private party was led or encouraged by a state official, under the substantial nexus test).

At issue in *Burton* was whether a private enterprise operating a restaurant within a public parking structure could be operating under color of law when it denied service Burton, an African American woman.\textsuperscript{33} The *Burton* Court examined the facts as known,\textsuperscript{34} and emphasized a handful of facts that indicated a symbiotic relationship or nexus between the state and the private restaurant. Of import were the facts that: the land for the parking structure was publicly owned; the structure was dedicated to public use; public funds financed the maintenance of the restaurant building in the structure; and the parking ramp and the attached restaurant conferred mutual benefits to each other.\textsuperscript{35}

As well, the state could have demanded, as a term in the lease, that the restaurant follow the dictates of the Fourteenth Amendment, despite any ambiguity concerning the public/private nature of the restaurant.\textsuperscript{36}

On these facts alone, the Court determined that the nexus or symbiotic relationship had been met. To wit:

By its inaction . . . the state has not only made itself a party to the refusal of service, but has elected to place its property, power and prestige behind the admitted discrimination. The state has so far insinuated itself into a position of interdependence with Eagle [coffee shop] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be

\textsuperscript{33} *Burton*, 365 U.S. at 716.

\textsuperscript{34} As the "trial court's disposal of the issues on summary judgment has resulted in a rather incomplete record," only a limited set of facts appear to have been analyzed. *Id.* at 722.

\textsuperscript{35} *Id.* at 723-24.

\textsuperscript{36} *Id.* at 724.
considered to have been so "purely private" as to fall without the scope of the
Fourteenth Amendment.\textsuperscript{37}

At its genesis, Court articulated an expansive symbiotic relationship or nexus test, allowing
state property ownership to be lynchpin for the §1983 color of law requirement.\textsuperscript{38} However, as with
the state compulsion test, the Sixth Circuit has significantly narrowed the nexus test in practice. This
narrowing has occurred specifically through analysis of the color of law requirement as applied to
once-public and quasi-public agencies and institutions. \textit{Wolotsky}, while admittedly mixing analysis
between the two tests, found that substantial state funding, pervasive regulation, a lease for a
nominal fee, and exclusive work under government contract were not enough to establish either the
required state compulsion or a symbiotic relationship.\textsuperscript{39}

The Sixth Circuit has limited the nexus and state compulsion tests in \textit{Sinescu v. Emmet Cty. Dep't. of Social Serv's},\textsuperscript{40} a case analyzing similar factual circumstances, by analyzing the state
compulsion of a private actor as a factual circumstance, as opposed to treating state compulsion as
a separate test to establish the color of law requirement.\textsuperscript{41} Presenting state compulsion merely as a
fact that may be used to establish a nexus indicates that the nexus test may have swallowed state

\textsuperscript{37} \textit{ld.} at 725.

\textsuperscript{38} \textit{ld.}

\textsuperscript{39} \textit{Wolotsky}, 960 F.2d at 1335.

\textsuperscript{40} 942 F.2d 372 (6th Cir. 1991) (analyzing quasi-public day care facility on the color of law
issue).

\textsuperscript{41} \textit{ld.}
compulsion theory altogether. The Sixth Circuit’s combining of analyses in Simescu is troubling, as it may lead to the outright elimination of the state compulsion test therein. Eliminating such a test will certainly limit the potential accountability for constitutional violations at the hands of quasi-public actors.

II SIXTH CIRCUIT CASES THAT HAVE APPLIED AND LIMITED THE STATE COMPULSION TEST AND THE SYMBIOTIC RELATIONSHIP/NEXUS TEST

Two Sixth Circuit cases will be the focus of the following section, as illustrations of how the once-expansive state compulsion test and symbiotic relationship/nexus test have been narrowed significantly in practice. As both relate to an analysis of privatized or quasi-public institutions, they should prove instructive for illuminating the way by which these types of institutions escape §1983 liability.

Simescu, an appeal of a §1983 claim which fell to a defense Motion for Summary Judgment, presented an interesting question in light of some rather disturbing facts. The Simescus brought suit against various entities involved in operating the Children’s Learning Center (CLC), a formerly public, but presently private non-profit day care facility, which offered subsidized care for emotionally challenged children.\(^{42}\) The Center was housed in a building owned by the state, at North Central Michigan College.\(^{43}\) Pursuant to a state contract, CLC would on occasion receive workers placed under the Community Work Experience Program (CWEP). This program required welfare recipients to work for their benefits, through state placement in either public, private non-profit, or

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42. *id.* at 373.

43. There was no issue as to whether North Central Michigan College was a “public corporation,” and the college settled out of the litigation prior to appeal, despite the award of a MSJ in their favor at the trial court. *id.* at 272 (caption), 273 (procedural history).
grant-funded agencies.\textsuperscript{44} CWEP placed a man at the CLC who was known to have had a history of child abuse.\textsuperscript{45} After such placement, workers from Child Protective Services, attending the CLC on other business, recognized the man and alerted the CLC of his history of child neglect and abuse.\textsuperscript{46} Thereafter, this man went on a child molesting spree at the CLC, and while the specific conduct is not in this record, “several of the children at the CLC” were molested.\textsuperscript{47} This man was convicted of first and second degree criminal sexual conduct, for an undisclosed number of counts, and sentenced to life in prison.\textsuperscript{48}

Parents of the molested children brought suit under §1983 claiming that the relationship between the CLC and the state, and the fact that the state placed a known child abuser in a day care center through a state “workfare” program either amounted to state action outright, or created a

\textsuperscript{44} \textit{Id.} at 373.

\textsuperscript{45} \textit{Id.} This man had his children taken by Child Protective Services on at least two occasions: (“children had been removed from his home on more than one occasion for neglect.”) \textit{Id.} His wife and children had taken refuge at a woman’s shelter, fleeing verbal abuse. \textit{Id.} The state Department of Social Services revealed that his home was completely unsanitary, \textit{id.} at 375, and there was evidence in the record that he had physically abused his children. \textit{Id.} at 375-76.

\textsuperscript{46} \textit{Id.} at 373.

\textsuperscript{47} \textit{Id.}

\textsuperscript{48} \textit{Id.}
symbiotic relationship or nexus sufficient to rise to the level of state action. Recovery was premised on a substantive Due Process theory.

In Wolotsky v. Huhn, there was a similar issue concerning state action and Portage Path, a private non-profit or quasi-public agency that provides mental health services pursuant entirely to state contract. Portage Path is 25% funded from patient fees, and 75% funded through a combination of county, state, and federal dollars. Portage Path is completely governed by state regulation, and is even required to submit all financial records and a review of care given to the state of Ohio for annual. The governing board of Portage Path is somewhat insulated from state control, in terms of selection of members, but all of its actions must conform to rigorous state regulatory guidelines.

Wolotsky was hired as a social worker at Portage Path and was participating in Ohio’s public employee retirement system (PERS). Portage Path was housed a state building for which it paid

49. ld. The court, however, does not list all the possible angles the plaintiffs pleaded, or could have pleaded, beyond the symbiotic relationship or nexus claim. The analysis above merely reads between the lines of what is analyzed by the court. If the plaintiffs’ attorneys were even marginally competent, multiple areas for recovery would have been pleaded at trial. For instance, plaintiffs’ attorneys brought gross negligence claims against the undisputed state actors and against the CLC, in the event the CLC was found to be a state actor for these purposes. ld. at 375.

50. 960 F.2d 1331 (6th Cir. 1992).

51. ld. at 1331.

52. Id. While my thesis here is to explore privatization and quasi-public agencies in Michigan, this case comes from Ohio. It is included here as it is exemplary of the Sixth Circuit approach to the issues surrounding the color of state law requirement in §1983 claims.

53. ld.

54. ld. at 1333. State law allowed Wolotsky, through arrangement with the applicable county mental
nominal consideration.\textsuperscript{55} Further, the building was constructed with federal grant monies that required that a mental health provider occupy the space. If there was not a mental health provider at that location, the state would have to repay the building construction costs to the federal government pursuant to the original grant requirements.\textsuperscript{56}

Wolotsky was terminated without warning, notice or pre-deprivation hearing,\textsuperscript{57} following first-hand allegations that Wolotsky “had performed homosexual acts” on a patient.\textsuperscript{58} Wolotsky brought a §1983 claim for procedural Due Process violations, a §1985 conspiracy claim, and state law defamation claims, as the allegations were later proven to be groundless.\textsuperscript{59}

III. ANALYSIS

The holdings in Simescu and Wolotsky were similar. In each, the entities were held not to be acting under color of state law, and the respective determinative factors in each case can be considered together. In each suit, the Sixth Circuit found the fact that the entity in question was

\textsuperscript{55} \textit{Id.} The actual amount of consideration was not mentioned in the opinion, it was simply characterized as “nominal” by the Sixth Circuit.

\textsuperscript{56} \textit{Id.}

\textsuperscript{57} \textit{Id.} The lack of a pre-deprivation hearing was the lynchpin for a procedural Due Process claim, as the deprivation for §1983 purposes, if Portage Path was found to be a state actor.

\textsuperscript{58} \textit{Id.} There is no indication in the record whether the acts were alleged to have been consensual, though the allegation, as described by the court, makes it clear that the patient was thought to be a victim.

\textsuperscript{59} \textit{Id.} (claims brought), \textit{Id.} at 1338 (“unfounded allegations”).
housed in a public facility was not enough to meet the color of state law threshold. Appropriately
so, under modern §1983 analysis, but none the less a departure from the expansive view of the
Supreme Court in Burton v. Wilmington Parking Authority.\textsuperscript{56}

In Burton, the fact that the Eagle Coffee Shop was located within a public parking structure
was enough to show the required nexus between private and state actors, and enough to make the
state a colorable participant in discrimination.\textsuperscript{61} Further, the location of the Eagle Coffee Shop in the
public parking structure "conferr[ed] on each an incidental variety of mutual benefits."\textsuperscript{62} It is difficult
to distinguish the day care center in Semescue, and even more difficult to distinguish the mental
health facility in Wolotsky from the coffee shop in Burton, especially when the mental health facility
provided the State of Ohio the benefit of not having to repay building construction costs to the
federal government.\textsuperscript{63} Unlike the Eagle Coffee Shop in Burton, whose patrons likely entered without
conscious thoughts of the state, Portage Path, located in a state office building, likely created the
impression that Portage Path was a government facility. In effect, Portage Path (Wolotsky) and the
Children's Learning Center (Simescu) were holding themselves out to the public as government
agencies.

On the question of public financing to the defendant institutions in Wolotsky and
Simescu, the Sixth Circuit held that such financing schemes, either the exclusive contract system in

\textsuperscript{60} 365 U.S. 715 (1961).

\textsuperscript{61} \textit{id.} at 723.

\textsuperscript{62} \textit{id.}

\textsuperscript{63} Wolotsky, 960 F.2d at 1336.
Semescu,64 or the 75% public funding scheme in Wolotsky,65 were not enough to show the required nexus between the state and the quasi-public entities in question. There appeared to be no significance to the fact that Portage Path was required to submit to annual state audit in Wolotsky, nor did it appear to be significant in Semescu that the state of Michigan actively placed a known child abuser in the day care center, entirely pursuant to a state-funded program. Rather, both Sixth Circuit panels dismissed these relationships as simply being contractual in nature. To wit: "[a]cts of a private contractor do not become acts of the government by reason of their significant or even total engagement in performing public contracts."66 Likewise, "[t]he mere existence of a contract between a governmental agency and a private party is insufficient to create state action."67

When a contract is the only connection between the state and a private or quasi-public entity, it is understandable that a contract alone is insufficient to create the required nexus between the state and the deprivation. However, such is not usually the case, and was not the case in Semescu, Wolotsky, or even Burton. In each case, the contractual relationship between the state and the entity was one of several connections between the state and the conduct, which when taken together should have shown (Semescu and Wolotsky) or did actually show (Burton) the required nexus. To put a finer point on it, regarding quasi-public bodies and the color of state law, the Sixth Circuit has devised a divide-and-conquer policy, and has pulled Burton too far from its moorings in the process.

64. 942 F.2d at 373.
65. 960 F.2d at 1333.
67. Semescu, 942 F.2d at 375 (citing Dobyns v. E-Systems, Inc., 667 F.2d 1219, 1227 (5th Cir. 1982)).
This divide-and-conquer technique works in the following manner. When claimants bring a §1983 suit, alleging in the process a series of connections sufficient to show a symbiotic relationship or nexus between the state and the deprivation, the Appeals Court examines each connection individually. Both Wolotsky and the Semescu parents affirmatively asserted, that when taken as a whole, the broad range of contacts between the entity being sued and the state combined to create the required nexus. This proposition is eminently reasonable, as the combining of the various facts indicating a nexus was at the heart of Burton, was essential to its holding, and doubtless brought many subsequent state land lessees into compliance with the dictates of the Fourteenth Amendment.

Toward that end, Burton instructs that “[a]ddition of all these activities, obligations and responsibilities of the [parking] Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building . . . indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to overcome.”

68. “Plaintiff urges that all of Portage Path’s connections with the state of Ohio taken together make it a state actor for the purposes of §1983. However none of the circumstances of this case, taken separately or together, make Portage Path a state actor for §1983 purposes.” Wolotsky, at 1335. Likewise, “Appellants argue that WRC’s participation in the state CWEP program . . . [the] DSS and WRC contractual agreement . . . [the] dual employee of the state and the CLC [that being the molester, who is a dual employee for workers compensation purposes] . . . [the existence of] state training for welfare recipients . . . [and that] WRC’s day care center was operated in a public college and was a highly state-regulated field,” combine to create the required “significant state involvement.” Semescu, at 374-75. Yet it appears by the holdings in each of these cases that the Sixth Circuit does not actually take all these factors together, despite giving lip service to the concept.

However, the Sixth Circuit does not engage in the practice of “addition of all these activities” as Burton still commands. Instead, the Sixth Circuit divides the claims, and conquers many §1983 claimants, especially with the color of state law requirement. Wolotsky and Semescu are perfect examples, for each connector presented between the state and the challenged deprivation in these Sixth Circuit cases was isolated and disposed of individually, without any analysis of the whole relationship between Portage Path, the Children’s Learning Center, and their respective home states. Additionally, the cases cited by the Sixth Circuit to affect this doctrinal manipulation are often distinguishable. Many cases cited in Wolotsky and Semescu involved §1983 claimants that could only point to one lease, one contract, or only state regulation to make their claim of a symbiotic relationship or nexus. These cases certainly did not have the barrage of varied connections to state action that Wolotsky and Semescu presented. In fact, both Wolotsky and Semescu appear to have brought more alternate grounds for finding action color of state law than did the plaintiff in Burton.

70. Burton, while not without its critics, has not been overruled, and is still good law in terms of the symbiotic relationship or nexus test. The criticisms that are out there are in the circuits, the vast majority of which are cases that “declined to extend” the Burton analysis to a given set of facts. Other cases, namely Wolotsky and Semescu appear to simply to pretend that Burton is no longer with us.

71. Semescu, at 375. “The fact that the day care center leased space from a public college also does not transform its actions to those of the state.” Id. (citing Wagner v. Metropolitan Nashville Airport Authority, 772 F.2d 227 (6th Cir. 1985) (leased public land space to airline as the sole alleged nexus)).

72. Id. (citing Dobins v. E-Systems, Inc., 667 F.2d 1219 (5th Cir. 1982)(contract as the sole alleged nexus)).

73. Wolotsky, 960 F.2d at 1336 (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974)(state regulation as sole alleged nexus)).
The difference between the Supreme Court and the Sixth Circuit, in analysis each has presented, is the Sixth Circuit's failure to aggregate all the possible connections between the state and the offending conduct, to create a nexus in the manner commanded by Burton.

To take this analysis one step further, Burton would be dismissed on motion, if brought today in the Sixth Circuit. After all, Burton only had one lease agreement, and a private facility that happened to be within a public structure as facts upon which to show a symbiotic relationship or nexus. This is a troubling notion, as the current status of “color of law” jurisprudence is sure to overlook constitutional wrongdoings at the hands of the many quasi-public and newly privatized agencies in Michigan, for it has become nearly impossible to show that these entities are acting under “color of law.” If one compounds this difficulty by considering the extra hoops that §1983 plaintiffs must jump through in the employment discrimination context, the prospects for bringing a winning claim become slim.

This narrowing of the traditionally expansive “color of law” tests has not been lost on the lower courts. These issues were recently before Judge McKeague in the United States District Court for the Western District of Michigan, in a very low-profile case that had potentially profound

74. Employment claims against quasi-public entities under §1983 in the employment context face additional. For example, first claimants must show that they are public employees and entitled to assert a property interest in their job as a component of a procedural Due Process claim. Wolotsky, supra. Second, they must show a deprivation of that right, and that the deprivation was under color of state law. Even if all those can be shown, many employers are subject to §1983 liability in one context, such as the medical treatment of prisoners pursuant to public contract, but not subject to §1983 liability for employment decisions. Street v. Corrections Corporation of America, 102 F.3d 810 (6th Cir. 1996); Sherlock v. Montefoi Med. Cen., 84 F.3d 522 (6th Cir. 1996) (“fact that independent contractor provided medical care to inmates may make it a state actor for the purposes of 1983 claims as they relate to the administering of that care, but that fact does not it a state actor in terms of employment decisions.” Id. at 527.
political implications. The Michigan Truck Safety Commission Education Center was sued under §1983, for the termination of one Eric Patrick, allegedly in contravention of his First Amendment Speech rights, and his Fourteenth Amendment Due Process rights.  

The education center is a recently privatized wing of the public truck Safety Commission, has supervisory positions filled by both state and private employees, and enjoys free state office space. The employees answer the phone as if they work for the state trucking commission, and most have state employee lodging and travel discount cards. The director of the education center is a former state police lieutenant, (number two in the state police, literally right below the colonel) who enjoys his state pension at the same time he enjoys his 100% state grant-funded salary in his “private sector” position.

Though it was the original inspiration for the author’s exploration of §1983 liability and privatization, this suit was dismissed per stipulation of the parties. The settlement allowed a modest recovery for Patrick, which was roughly equivalent to the cost to the Defendants for drafting and arguing the motion that would have likely resulted in a summary disposition in their favor. This, despite that fact there were several indicators of a nexus between the state and the education center. However, defendants were able to find a case that discounted each particular fact, and would have insisted that the court adhere to the Wolotsky and Semescu formulations of the symbiotic relationship or nexus test.


76. The director was one of the defending parties.
Thus the answer to the specific question presented by *Patrick v. Davis*, whether a recently privatized state agency can be a state actor for §1983 purposes, will have to await another claimant. At such a time, if there is no state action found (a likely result given the Sixth Circuit approach to the issue), a host of quasi-public Michigan will liberated from the constraints of §1983. This result will have palpable legal and political consequences, the worst of which would be to remove an entire class of entities from restraints imposed by the U.S. Constitution.

**CONCLUSION**

Due to the high bar the Sixth Circuit has placed in front of §1983 claimants regarding the "color of law" requirement, quasi-public and recently privatized agencies may be freed from the constraints of the Constitution. Add to this the fact that privatization has become a popular means of cost-cutting, and we are faced with the likelihood that a host of wrongs will go without legal redress. Whenever such a powerful tool for the vindication of Constitutional rights that §1983 presents is made less effective, the cause of civil rights for all of us, irrespective of our status as public or private employees, may be compromised as well. The Sixth Circuit has quietly closed the door on a large section of §1983 claimants, but hopefully scholarship -- and a claimant with heart-wrenching facts and a fine attorney -- can keep that door from being nailed shut.

This is not a problem for many -- in fact to some, this raising of the "color of state law" bar is welcomed. However, for those who believe procedural Due Process rights are an indispensable component of government, union, and professional contract employment, and for those who believe in constitutional accountability in the public sector, there could be dark days ahead.