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Constitutional Law: The League of Women Voters Caught in the Quagmire of a State Action

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As communications in society advance technologically, the First Amendment has served as the guardian of this growth. However, sometimes technological advances in communications create problems that are not dealt with by existing First Amendment case law. Such a circumstance has arisen with media pooling agreements.[1] *WPIX, Inc. v. League of Women Voters*[2] *("WPIX")* brought to light one such circumstance, when, in 1984, the League of Women Voters implemented a media pooling agreement for the broadcast coverage of the 1984 presidential and vice-presidential debates. WPIX was dissatisfied with this agreement and sought an injunction to gain access to the debates.[3] This case raises several First Amendment issues, but the fundamental issue was to determine when a private actor's actions constitute a state action for purposes of invoking the First Amendment.[4]

I. MEDIA POOLING AGREEMENTS

The history of media pooling agreements is nebulous at best. Voluntary press pools have been, and are, used by reporters out of the need for professional cooperation.[5] These voluntary pooling arrangements were

1. WPIX, Inc. v. League of Women Voters, 595 F. Supp. 1484 (S.D.N.Y. 1984). The League of Women Voters' television consultant explained how media pools work: "pooled coverage allows every television news organization access to the same pictures and sounds of an event and makes its coverage available to all. Any organization who participates in the pool and shares its product (feed) also shares equally in the cost of coverage." *Id.* at 1489.

2. *Id.*

3. *Id.*

4. *See infra* note 39. The *WPIX* court found that it was not clear whether WPIX was likely to win on the merits of its First Amendment claim, and thus did not grant the injunction. The court was not persuaded that the importance of WPIX's news gathering activity and the degree of the restraint imposed by the pooling agreements were greater than the state interest served. Thus, the court went on to address whether WPIX would have been irreparably harmed and whether there were any equitable considerations favoring WPIX. The court here found that WPIX was not irreparably harmed in that WPIX could re-edit the feed to provide its own perspective of the debates. Additionally, all the equitable considerations went against WPIX. The court mainly focused on what it characterized as WPIX's concern for economic profit rather than a true concern for loss of First Amendment freedoms. Also relevant was WPIX's failure to appear at the League's first meeting at which the pooling agreement was discussed, and WPIX's failure to object in a more timely fashion.

5. Interview with Charles L. Whipple, reporter, editor of the editorial page, and ombudsman for the Boston Globe from 1936 to 1978 (Dec. 28, 1986).

frequently used during the Eisenhower and subsequent presidential campaigns. Voluntary pools were used when numerous events occurred simultaneously and a single reporter representing a news organization was unable to cover all of the events.[6] As a result, reporters would make informal agreements among themselves whereby each reporter would cover one of the events. After the events were over, the reporters would share their notes.[7]

As presidential campaigns became more widely covered by the press during the sixties, access to the candidates became increasingly limited. This was because it was no longer physically or temporally feasible for all of the reporters to have access to the candidates. One consequence was that President Kennedy, during the 1960 presidential campaign, had a single reporter traveling with him. The reporter that Kennedy chose was Robert L. Healy of the *Boston Globe,* who frequently traveled with Kennedy on his plane. Mr. Healy in turn passed information on to his colleagues who represented other news organizations. This was an informal arrangement, however, and Mr. Healy tended to keep the more spectacular stories to himself.[8]

By the 1970's, coverage of presidential campaigns had become more sophisticated. Part of this sophistication was a standardization of media pools. For example, in 1971, during the George McGovern presidential campaign:

> [e]veryday a "pool" of one or two reporters was delegated to stay close to the candidate at those times (i.e., during motorcades, small dinners, fund raising parties) when the entire press corps could not follow him. . . . After each event, the pool wrote a report which was posted in the press room, and was usually xeroxed by the candidate's press staff and distributed. . . . The reports usually dealt in trivia—what the candidate ate, what he said, whose hand he had shaken.[9]

The pool reporters were chosen on a rotational basis from reporters fol-

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6. *Id.*

7. *Id.*

8. *Id.*

9. TIMOTHY CROUSE, THE BOYS ON THE BUS (1972). "It wasn't long before White House Press Secretaries began to see that the news might be controlled or manipulated through pooling agreements. If they pooled correspondents who were friendly and favorable toward the president as the 'pool,' the chances were that only favorable stuff would be given to the rest of the press corps; also, hostile critical questions were less likely to be asked. White House press coverage would also be at least partially controlled by having the President call for questions mostly from correspondents he knew were friendly." Letter from Charles L. Whipple, (October 30, 1986)(discussing media pools).

lowing the campaign.[10]

The use of media pools has not been limited to the coverage of political campaigns. Due to space limitations and security considerations, the number of media representatives covering a presidential event often must be limited, thus requiring the use of pools.[11] Consequently, media pools have been frequently used by President Reagan and his predecessors.[12] For example, during the Eisenhower Administration, when Prime Minister Nehru of India visited the White House, President Eisenhower only allowed a few reporters into the White House to interview the Prime Minister. In turn, these reporters were required to share their interviews with other reporters.[13]

Additionally, media pools have commonly been used during military operations, where unregulated access would otherwise force the military to exclude the media entirely.[14] In response to the dissatisfaction expressed by journalists in not being allowed to cover the invasion of Grenada, the Pentagon selected a pool of eleven journalists to accompany American forces into battle.[15] There are other military situations that create the need for media pools. For example, because of limited satellite access and other technical restrictions during the Falkland Island war in 1982, United States broadcast news organizations had to pool their coverage of the war.[16]

With the advent of news cameras in state courtrooms,[17] courts have developed rules limiting the number of cameras allowed access, requiring news organizations to pool their coverage of trials.[18] Cameras have also been required to be pooled in the coverage of executions.[19]

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10. TIMOTHY CROUSE, THE BOYS ON THE BUS (1972).

11. Cable News Network v. CBS, 518 F. Supp. 1238, 1239-40 (N.D. Ga. 1981).

12. *Id.*

13. Interview with Charles L. Whipple, *supra* note 5.

14. *WPIX*, 595 F. Supp. at 1489.

15. Wall Street Journal, Oct. 11, 1984, at 10, col. 1. The decision to form a standing pool of reporters grew out of the uproar that followed the Pentagon's exclusion of journalists from last year's invasion of Grenada. General John Vessey, chairman of the Joint Chiefs of Staff, appointed a commission of military officials and retired journalists to devise a plan for allowing reporters to observe future American military operations, even if the operations are launched on short notice. . . . The panel recommended that the Pentagon form a pool of reporters who could accompany American troops and file reports to be distributed to news organizations if military leaders deemed it impossible to allow broader coverage of battles. *Id.*

16. Interview with Tom Hall, Engineer for KNBC News, Los Angeles (Nov. 15, 1986).

17. *See* Note, *Cameras in the Courtroom: Guidelines for State Criminal Trials*, 84 MICH. L. REV. 475 (1985).

18. *Id.*

19. *See* Garrett v. Estelle, 556 F.2d 1274 (5th Cir. 1977), *cert. denied*, 438 U.S. 914 (1978).

Today, the major networks routinely use pooling agreements.[20] The networks find pooling agreements necessary when they do not have the resources to cover a variety of news events or because of space limitations.[21] Space limitations are caused in part because of the increase in the number of news broadcasters resulting from the addition of cable broadcasters. Also, increased camera coverage of public events has occurred because of technological advancements, such as the development of small, affordable portable video recorders, which allow a television station to cover more events.[22]

II. *WPIX* CASE

In *WPIX,* the plaintiff, WPIX, operated a local television station and produced daily half-hour national news programs, which it syndicated through its Independent Network News ("INN") division to UHF stations nationwide. The defendant League of Women Voters ("the League"), arranged the 1984 presidential and vice-presidential debates.[23] On September 18, 1984, the League issued a press release notifying the media community of a meeting to discuss the television coverage of the debates. The meeting was called for September 19 and National Broadcasting Company, Columbia Broadcasting System, and American Broadcasting Companies attended. The three networks offered to form a pool. No other pool proposals were received by the League, nor did any other organization request to participate in the pool.[24]

On October 5, 1984, INN demanded access for its cameras to the debates, the first of which was scheduled for October 7. INN claimed that the fee being charged by the feed from the pool was excessive. The League rejected these demands.[25]

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20. Interview with Tom Hall, *supra* note 14.

21. *Id.* As an example, such a situation could arise during a natural catastrophe. Limitations could be caused by a lack of physical access to the site, e.g., an explosion of a volcano causing restriction by the state on the number of vehicles allowed access in the area of the explosion or, there may be a limited number of satellite transponders available at a given geographical location. Thus, television news organizations would have to share coverage of the event and possible time or feed to and from a satellite transponder. *Id.* The *WPIX* case is an example of the need for a pooling agreement because of limited space.

22. Wall Street Journal, May 12, 1975, at 26, col. 1. "Since 1975 with the utilization of videotape, it has been much easier and cheaper for a television news station to cover an event. Video tape cameras, because of compactness, allow cameras access to areas not otherwise available to the more bulky traditional cameras." Thus, television stations can cover more events. *Id.*

23. *WPIX*, 595 F. Supp. at 1488-89.

24. *Id.* at 1485-86.

25. *Id.* at 1486. In an October 5 letter to the League, the president of INN stated: "You

On October 9, INN demanded access to the vice-presidential debate scheduled for October 21. As an alternative to access for its cameras, INN requested access to the pool on a reasonable financial basis. Again the League rejected INN's demands.[26]

On October 10, WPIX filed a temporary restraining order to prohibit the League from denying INN's cameras access to the final debates. The application for preliminary injunctive relief was denied as to the vice-presidential debate and the court ordered an expedited discovery as to whether relief should be granted for the final presidential debate. WPIX moved for a preliminary injunction to prohibit the League from denying INN's cameras access to the final presidential debate, based on a denial of their First Amendment rights.[27]

The League argued that no infringement of WPIX's First Amendment rights had occurred because there was no state action.[28] First, the League argued that it had decided unilaterally to require pooled coverage of the debates, without any input from President Reagan, former Vice-President Mondale, or their representatives.[29] Second, it argued that "[i]rrespective of the degree of candidate involvement in the debate format, cooperation with political candidates does not turn the League's decision regarding pooled coverage into a form of state action."[30]

Before determining whether WPIX was entitled to injunctive relief, the *WPIX* court had to first determine if a state action existed. Constitutional restrictions do not apply to private parties unless the court finds that a state action exists.[31] The court found a state action because, according to its analysis, the League's actions were sufficiently interwoven with the state to bring the League under the purview of 42 U.S.C. § 1983.[32]

In finding a state action, the court applied a five-prong test set forth

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have also failed to adopt appropriate pool arrangements that would allow us reasonable access to Sunday night's [presidential] debate." *Id.*

26. *Id.* at 1486.

27. *Id.* at 1486-87.

28. *Id.*

29. *Id.* at 1487.

30. *Id.* at 1488.

31. Gitlow v. New York, 268 U.S. 652, 666 (1925).

32. 42 U.S.C. § 1983 (1982) states:

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

42 U.S.C. § 1983 (1982).

in *Jackson v. Statler Foundation.*[33] However, rather than show which facts supported which prong of the test and why, the *WPIX* court simply listed the applicable facts along with the relevant case law and concluded that the requirements of the test were met.[34]

The *WPIX* court first focused on the public nature of the candidates. In addressing the candidates' role in the debates, the court pointed to the fact that the current president and former vice-president of the United States were involved. The court stated that the League was not acting unilaterally, as it claimed it was, but that the president and vice-president were actively involved in the execution of the debates. According to the court, it was necessary for the League to get the concurrence of both men on the format of the debate, which effectively was an approval of the pool coverage. Additionally, the fact that the candidates received millions of dollars in public campaign financing and were protected by the Secret Service appeared to be important to the court.[35]

The court also focused on the nature of the debates. The court found that the League was extensively regulated in that the "debates were broadcast over the airwaves in accordance with regulations promulgated by the Federal Election Commission and the Federal Communications Commission."[36]

Next, the court looked at the public nature of the League itself. The court found that the League had "institutionalized" its role by being selected as the organizers of the presidential debates for the last three presidential elections. The court also found that the League was serving a public purpose in providing the debates.[37]

Finally, the court considered, as relevant the fact that the League's decision to pool coverage may have had substantial First Amendment considerations; thus, it looked at the public policy benefits of finding a state action.[38]

The court concluded that these facts were sufficient to find that

33. 496 F.2d 623 (2d Cir. 1973), *cert. denied*, 420 U.S. 927 (1975). The test for a state action articulated in *Statler* was as follows: (1) The degree to which the private organization is dependent on governmental aid; (2) the extent and intrusiveness of the governmental scheme; (3) whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotations; (4) the extent to which the organization serves a public function or acts as surrogate for the state; and (5) whether the organization has legitimate claims to recognition as a private organization in association or other constitutional terms. *Id.* at 629.

34. *WPIX*, 595 F. Supp. at 1487-89.

35. *Id.* at 1488.

36. *Id.*

37. *Id.*

38. *Id.*

WPIX had "raised a substantial possibility that it will be able to prove that the League's decision to deny access to any but the pooled cameras [was a] state action."[39]

III. ANALYSIS OF THE LAW

In order to determine whether the Fourteenth Amendment has been violated when a private entity holds a public event and excludes certain media representatives from covering that event, the first question to resolve is whether or not a state action exists.[40] A state action must be established in order to bring a potentially private defendant within the scope of the Fourteenth Amendment.

A. Application of the Second Circuit Test

The test articulated in *Jackson v. Statler Foundation*[41] combined the approaches taken by the Supreme Court before 1973 in determining whether or not there was a state action. If the *WPIX* court had properly applied the elements of the *Statler* test to the facts of the case, they would have found that no state action existed. The first element of the test required a court to examine "[t]he degree to which the private organization is dependent on governmental aid." In the court's decision there is no mention of the League receiving or being dependent on any governmental aid. The court confused public financing of the candidates with the League's role in the debates. It is the League that must be receiving the governmental aid in order for this element of the test to apply.

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39. *Id.* The court based its decision that there was probably a state action on Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). This case involved the operator of a restaurant who refused to serve the plaintiff because he was black. The restaurant was located in a parking structure which was owned and operated by the Wilmington Parking Authority, an agency of the State of Delaware. Before getting to the equal protection aspects of the case, the court had first to determine if a state action existed. This case developed the "symbiotic relationship test," used to determine if a state action exists when a private party is involved. In view of the facts of this case, that the restaurant was physically and financially an integral part of a public building, built and maintained with public funds, devoted to a public parking service, and used and operated by an agency of the state for public purposes, the state was a joint participant in the operation of the restaurant, and its refusal to serve the plaintiff violated the equal protection clause of the Fourteenth Amendment. *Burton*, 365 U.S. 715.

In coming to its conclusion that a state action existed, the Supreme Court added: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance." After weighing the circumstances, the Court concluded that "the State has so far insinuated itself into a position of interdependence with the defendant that it must be recognized as a joint participant in the challenged activity . . . ." *Id.* at 720.

40. *WPIX*, 595 F. Supp. at 1491-93. *See supra* note 31 and accompaning text.

41. 496 F.2d 623, 629 (2d Cir. 1973), *cert. denied*, 420 U.S. 927 (1975).

The second element of the test was "the extent and intrusion of the governmental regulatory scheme." The court held that because the debates were broadcast in accordance with both the Federal Election Commission ("FEC") and the Federal Communications Commission ("FCC") regulations, the League was a highly regulated entity.[42] FCC regulations, however, are not relevant to the League because the League was not broadcasting the debates—the networks were, and such regulations would only apply to broadcasters.[43] Similarly, FEC regulations apply to candidates and campaigning, not to the holding of debates.[44] It is the League's conduct in relation to the managing of the debates and the media pools that must fall within extensive governmental regulation to meet this element of the test. Thus, for the League to meet this element of the test they must directly be regulated, and the court made no mention of any regulations directly concerning the League.

The third element of the *Statler* test—"whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotations"—is also not met by the facts of this case. This element depends on the second element being met, for there must be a governmental scheme to promote and regulate debates.[45] Even if the second element were met, the third element would not have been met because neither the FEC nor the FCC regulations encouraged or approved the League's conduct in holding presidential and vice-presidential debates.

Next, the court looked at "the extent to which the organization serves a public function or acts as a surrogate for the state." This was probably the strongest argument favoring the *WPIX* court's decision. The court primarily focused on the facts related to this element. In particular, it noted that the League's motive for sponsoring the debates was to provide a public service by educating voters, and that the debates were public in nature. However, there is a difference between providing a public service and performing a public function. A public function is a function that has traditionally exclusively been performed by the state, such

42. 47 U.S.C. § 151 (1986) only applies to broadcasters using interstate transmissions, and in no way would encompass the League as a sponsor of debates (FCC); 2 U.S.C. § 431 (1982) is designed to regulate and monitor funding for candidates campaigning for federal office (FEC).

43. 2 U.S.C. § 431 (1982).

44. 47 U.S.C. § 151 (1986).

45. *Statler*, 496 F.2d at 633. The court suggested that if the government singles out a particular segment of society, such as allowing tax exemptions to non-profit organizations, that segment of society/organization may be laboring in the public interest, and may be participating in a state action. *Id.*

as eminent domain, primaries, and providing municipal services.[46] From a public policy standpoint it would be imprudent to expand the scope of public function to include public services provided by private parties. To allow such an expansion would bring every person who performs a public service under the scope of the Constitution, possibly discouraging privately provided services.[47]

Finally, the court examined "whether the organization has legitimate claims to recognition as a private organization in association or other constitutional terms." The court concluded that this element favored WPIX in finding a state action because the League did not assert any private property rights. However, this factor in itself is not sufficient to find that the League's conduct constituted a state action. The *Statler* court in formulating this test said that each of the above factors is important and no one factor in itself is conclusive.[48]

After applying each of the factors of the *Statler* test to the facts, it is not persuasive that there is a state action. The problem with court's analysis is that it lost sight of which party was supposed to have committed a state action. The court should have focused on the League and its conduct to determine whether a state action existed, and not on the independent actions of the candidates and the news media.

Another, and perhaps more glaring, flaw in the *WPIX* court's opinion is that it applied a Second Circuit Court of Appeals test that is possibly in conflict with recent Supreme Court decisions. Not only was the *Statler* decision a questionable one when decided,[49] but in light of recent Supreme Court decisions, at least, it is clearly superannuated.

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46. *See, e.g., Jackson*, 419 U.S. at 353; Terry v. Adams, 345 U.S. 461 (1953) (primaries); Marsh v. Alabama, 326 U.S. 501 (1946) (company towns); Evans v. Newton 382 U.S. 296 (1966) (municipal parks). Additionally, Justice Rehnquist, writing for the majority, suggested in Flagg Bros, Inc. v. Brooks, 436 U.S. 149, 163 (1978) that state functions such as education, tax collection, fire and police protection if delegated to a private party would no longer be considered state functions. In a footnote in *Jackson*, 419 U.S. at 355 n.9, Justice Rehnquist again writing for the majority, citing Evans v. Newton, 382 U.S. 296, 300 (1966), stated that the maintenance of schools is not a function traditionally exclusively reserved to the state.

47. Churches holding fundraisers, broadcasters presenting public service commercials, or private clubs doing charity work could be defendants in a state action suit. In turn, because of increased liability, organizations would be less inclined to perform public services.

48. *Jackson*, 419 U.S. at 629.

49. *Statler*, 496 F.2d at 629; *see supra* note 33. Judge Friendly in his dissent to the *Statler* court's denial of reconsideration en banc, questioned the *Statler* decision. Judge Friendly stated "[i]t is analytically unsound, dangerous, open-ended, and at odds with controlling precedent both in the Supreme Court and in this circuit." *Id.* at 636.

The crux of Judge Friendly's dissent was that the standard set forth was not only unworkable but also too lenient. The test would bring otherwise private parties under the purview of 42 U.S.C. § 1983. In quoting Wabba v. New York Univ., 492 F.2d 96, 102 (2d Cir. 1974), Judge Friendly stated "courts should pay heed, testing for government actions, to the

B. United States Supreme Court Approach

In analyzing whether a private party's conduct is sufficient to constitute a state action, the Supreme Court in the past defined state action on a case-by-case basis. It was not until *Lugar v. Edmonson Oil*[50] that the Supreme Court developed a systematic standard. According to *Lugar,* conduct allegedly causing the deprivation of a constitutional right must be fairly attributable to the state.[51]

> In determining the question of "fair attribution," (a) the party charged with the deprivation must be a person who may fairly be said to be a state actor, either 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, [and] (b) the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by it or by a person for whom it is responsible.[52]

'value of preserving a private sector free of the Constitutional requirements applicable to a government institution.' " He added that:

> [t]he interest in preserving an area of untrammeled choice for philanthropists is very great. The decision will spawn countless civil rights suits against charitable foundations by disgruntled minority applicants, add unnecessarily to the crushing burden on the district courts and the courts of appeals, and, worst, of all, seriously discourage private philanthropy by subjecting donors to the necessity of justifying their decision in court.

Id. at 639-40.

50. 457 U.S. 922 (1982).

> In 1977 petitioner, a lessee-operator of a truckstop in Virginia was indebted to his supplier, Edmonson Oil. Edmonson sued on the debt in a Virginia state court. Ancillary to that action and pursuant to state law, Edmonson sought prejudgment attachment of certain of the petitioner's property. Acting upon that petitioner [petition submitted by Edmonson Oil], a clerk of the state court issued a writ of attachment, which was then executed by the County sheriff. Pursuant to the statute, a hearing on the propriety of the attachment and levy was conducted thirty-four days after the levy, and a state court trial ordered the attachment dismissed . . . .
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> Lugar subsequently brought an action under 42 U.S.C. § 1983 against Edmonson Oil.

Id. at 923-24.

The case was appealed to the Supreme Court, which held that there was a state action: Edmonson's conduct could be ascribed to the government and Edmonson was a state actor because it acted in joint participation with the state in attaching Lugar's property. However, there was not a valid cause of action under § 1983 insofar as the plaintiff alleged misuse or abuse of the statute, for such abuse would not have been pursuant to a government created rule of conduct. *Id.* at 942.

51. *Id.* at 937.

52. *Id.* at 923. In *Lugar,* the Court tried to make some logical sense out of all the prior cases, which had not followed any systematic analysis. However, in doing so, the Court has severely restricted the breadth of the state action doctrine. Today, it is very difficult to meet both prongs, and in applying the two-prong test to past cases, the Court would probably not find a state action, as it did in Burton v. Wilmington Park Auth., 365 U.S. 715 (1961). Even if

1. State Actor

The *Lugar* Court in formulating this two-pronged test provided that the following be used in determining whether or not a private party could be considered a state actor: the "public function," "symbiotic relationship" and "state compulsion" tests. In *Jackson v. Metropolitan Edison Co.*,[53] the premise of the public function test was whether or not the private party was performing a function traditionally reserved to the state. The Court held that a state regulated utility company, with a partial monopoly, serving the public was not a public actor.[54] According to the *Jackson* Court, a public function only applies when the private party is performing a function traditionally exclusively reserved to the state. Therefore, the supplying of electricity was not a function traditionally exclusively reserved to the state.[55]

Another decision cited by the *Lugar* Court exemplifying a public function was *Terry v. Adams*.[56] The *Terry* decision involved a private association known as the Jaybirds, which held closed political primaries for Democrats running for political office. These primaries decided which Democratic candidate the association would endorse. The result of such an endorsement was that the candidate receiving the endorsement almost always ran unopposed in the Democratic primary. The Court held that in essence the Jaybirds were controlling a political primary and political primaries were part of the state's function. Therefore, the Jaybirds were state actors because they were performing a state function.[57]

In *Marsh v. Alabama*,[58] the Court held that a private company controlling a company town was performing a public function. The basis of the Court's decision was that the company town maintained residences,

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the defendant in that case was a state actor, its conduct was not pursuant to a government created rule of conduct. *See* note 39.

53. 419 U.S. 345 (1974). The defendant in this case was a privately owned and operated utility corporation which held a certification of public convenience issued by the Pennsylvania Utility Commission. The defendant was heavily regulated by the state with a partial monopoly. The cause of action was because the defendant discontinued electrical service to the plaintiff for nonpayment of past services. The plaintiff argued that a state action was present because the respondent provided an essential public service required to be supplied on a reasonably continuous basis and hence performed a public function. In rejecting this argument the Court raised the standard for state function from traditionally, to traditionally exclusively reserved to the state. *Id.* at 346-52.

54. *Id.* at 358.

55. *Id.* at 353.

56. 345 U.S. 461 (1953).

57. *Id.* at 469-70.

58. 326 U.S. 501 (1946).

streets, a system of sewers, and a business area. The town provided all the services that a municipality otherwise would, and therefore it was logical to conclude that the company was performing a public function.[59]

The "symbiotic relationship" test mentioned by the *Lugar* Court was orginally articulated in *Burton v. Wilmington Parking Authority.*[60] The symbiotic relationship test is based on the notion that when governmental regulations and a private party's conduct are so interwoven, they become one in the same.[61]

The final test mentioned by the *Lugar* Court was the "state compulsion" test, based on the *Adickes v. S.H. Kress & Co.*[62] decision. A private party can become a state actor when he is a medium for the state. In other words, if the private entity chooses to perform a particular function and, by doing so, falls within a state regulating scheme that requires the individual to take a particular course of action, then the private individual can be subject to a state action. Not only will the private party become a state actor, but he will also be pursuing an activity pursuant to a government created rule of conduct—thus meeting both prongs of the *Lugar* test.[63]

2. Activity Pursuant to a Government Created Rule of Conduct

In setting out the second prong of the test, the *Lugar* Court focused on two cases in particular: *Moose Lodge No. 107 v. Irvis,*[64] and *Flagg Brothers, Inc. v. Brooks.*[65] The *Moose Lodge* case involved a private club that denied service to a black man. The only state regulation concerning the club was a Pennsylvannia state liquor license. Although the Pennsylvannia Liquor Control Board required an establishment to meet certain requirements in order to retain a liquor license, the *Moose Lodge* Court held that the liquor regulation did not foster or encourage racial discrimination, thus there was no state action. In summarizing the *Moose Lodge* decision, the *Lugar* Court stated: "the decision to discriminate could not be ascribed to any governmental decision; those govern-

59. *Id.* at 507-08.

60. 365 U.S. 715 (1961).

61. *See supra* note 39.

62. 398 U.S. 144 (1970).

63. An individual must put himself in the position where the state compels a particular course of action. This is distinguishable from *Lugar* in that the defendant in *Lugar* chose to use a state created rule of conduct by using the state's prejudgment attachment law in taking the plaintiff's property. The defendant was not compelled in any way to attach the property because of its position of being a warehouse and being owed money. *Lugar,* 457 U.S. at 932 n. 15.

64. 407 U.S. 163 (1972).

65. 436 U.S. 149 (1978).

mental decisions that did affect the Moose Lodge were unconnected with its discriminatory policies."[66] Thus, as the test is set forth today, prong (b) would not be met.

The *Flagg Brothers* decision involved a New York statute that allowed a warehouseman to sell goods stored in his warehouse if storage fees were not paid. No hearing was necessary subsequent to the sale of stored goods. The *Flagg Brothers* Court said that a private party must both act under the color of the challenged statute and their actions must be properly attributable to the state.[67] Using this decision as support, the *Lugar* Court stated that an "[a]ction by a private party pursuant to [a] . . . statute, without something more, was not sufficient to justify a characterization of that party as a state actor."[68]

Another Supreme Court decision distinguishing between a state actor and an activity pursuant to a government created rule of conduct is *Polk County v. Dodson.*[69] Here the Supreme Court found that a public defender was a state actor, but his conduct was not pursuant to a government created rule of conduct, so no state action existed.[70] The plaintiff brought a 42 U.S.C. § 1983 action alleging that the defendant, an attorney in the Polk County Offender Advocate's Office, had failed to represent him adequately in an appeal to the Iowa Supreme Court. According to the Court, a lawyer's traditional function was not to follow a governmental rule of conduct, but rather was guided by professional standards promulgated by the American Bar Association.[71] Although the defendant was an employee of Polk County, and thus a state actor, his conduct was pursuant to standards created by the American Bar Association, not pursuant to a government created rule of conduct.[72]

Finally, in *Blum v. Yaretsky,*[73] the Supreme Court held that a state reimbursement to nursing homes for the care of patients, along with extensive state regulation, was not sufficient to create a state action. Here the Court stated that there was neither a high degree of regulation suffi-

66. *Moose Lodge,* 163 U.S. at 176. The Lodge as an applicant for a club license had to make such physical alterations in its premises as the Board might require, had to file a list of names and addresses of its members and employees, and had to maintain extrinsic financial records. *Id.* at 176-77.

67. *Flagg Brs,* 436 U.S. at 156.

68. *Lugar,* 454 U.S. 312 (1981).

69. *Id.*

70. *Id.* at 324. Although the *Polk* Court did not make the distinction between state actor and pursuant to a government rule of conduct as did *Lugar*, the *Lugar* Court said the distinction could be culled from the the case. *Lugar,* 457 U.S. at 935 n.18.

71. *Polk,* 454 U.S. at 321.

72. *Id.*

73. 457 U.S. 991 (1982).

cient to turn the nursing homes into state actors, nor did the state, through regulations, direct the nursing homes to operate in the manner for which the cause of action was based.[74]

C. *Application of Recent Supreme Court Decisions*

In applying the *Lugar* two-pronged test, it is even more unlikely that a state action existed in *WPIX*. The first step in analyzing a state action as set forth in *Lugar* is to determine whether or not the League was a state actor.[75] Under the "symbiotic relationship" test the state must be involved in the League's activity in order to create a close relationship resulting in some form of interdependence. Regulation of a private party is often used to show a relationship between the state and the regulated entity. The *WPIX* court referred to the fact that a sitting president and a former vice-president participated in deciding on the format of the debates. Thus, the court assumed the government was involved in the debates. This is a faulty assumption, for the candidates were only acting as representatives of their respective political parties and not fulfilling their duties as government representatives. The fallacy of this argument is bolstered by the fact that Vice-President Mondale did not hold any political office at the time of the debates. Therefore, since the League was not regulated by the state nor was it working with the state in presenting the debates, this first test is not met.

The "public function" test was also not met. Political debates are not traditionally exclusively reserved to the state. The Supreme Court

74. *Id.* The state of New York was a participant in the Federal Medicaid program. The defendants, New York nursing homes, were directly reimbursed by the state for the reasonable cost of health services with Medicaid funds. Federal regulations required each nursing home to establish and use a review committee of physicians to determine whether a Medicaid assisted patient should stay in the facility. The *Blum* Court conceded that the defendant nursing homes were extensively regulated, but, reiterating the language in *Jackson*, 419 U.S. at 345, concluded that "the mere fact that a business is subject to state regulation does not by itself convert its action into that of the state for the purpose of the Fourteenth Amendment." The complaining party must also show that "there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that action of the latter may be fairly treated as that of the state itself." *Id.* at 1004.

The *Blum* Court also stated a second alternative for when a state action may exist: 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. Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify finding the state to be responsible for these initiatives under the terms of the Fourteenth Amendment. *Id.* at 1005.

Finally, the Court presented a third situation in which a state action may exist. "The required nexus may be present if the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.' " *Id.*

75. *Lugar*, 457 U.S. at 922. *See supra* note 50.

has found that private parties holding electoral primaries are state actors.[76] However, debates are distinguishable in that they are not an essential element in the electoral process—debates do not determine who will be chosen to run or hold a political office, nor do they affect whether or not a citizen can vote. Therefore, the League in this case should not be considered a state actor.

By holding debates, the League did not place itself in a position where its conduct would be regulated and directed by the state, therefore the "state compulsion" test was not met. As discussed, there is no regulatory scheme directing how debates should be handled.

Even if the League were to be considered a state actor, it would not meet the second prong of the *Lugar* test: exercising some right or privilege created by the state. The League was not acting pursuant to any governmental regulatory scheme either authorizing political debates or dictating how such debates should be conducted.

Therefore, under both requirements set forth in *Lugar*, the League's conduct cannot logically be considered to constitute a state action.

To carve out a judicial exception for political debates and their coverage may produce burdensome and generally undesirable ramifications. For example, if the Supreme Court were to find a state action as did the district court in *WPIX,* it could be argued that all candidates running for elected office, the media, and other affected parties could be a subject to a constitutionally based cause of action.[77] The threat of litigation could then produce the negative effect of discouraging organizations like the League from holding debates. The public would then not even have the opportunity to observe the main political party candidates debate, a much worse result than being deprived of INN's coverage.

A second result could be that an organization holding a political debate would require that all candidates be allowed to participate, which in turn, would lead to the main political party candidates not participating in debates because of not wanting to contend with candidates from fringe parties. The result would again be that the voters would be deprived of valuable information.

Finally, the sponsors of debates may be forced to allow such a large number of media cameras to cover the debates that production of the debates would not be practical. Or the courts could require an elaborate means by which to decide who shall constitute a media pool and how it

76. Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).

77. This line of reasoning would give the President the "Midas Touch"—every event in which he participates would turn into a state action. This is a result that hopefully no clear thinking court would promote.

should be managed. Sponsors of debates would then be discouraged from holding debates or related public events because of the transaction costs resulting from extensive regulation.

Alternatively, when considering the impact that media coverage has on national as well as state elections—thus affecting the composition of elected representatives—it is tempting to find a state action.[78] It may be desirable to bring only the presentation of debates under the scope of a state action, since debates are so important to the electoral process. However, to do this, the courts would have to completely revamp the present state action doctrine, or create an unprincipled state action exception. Such an exception would be best accomplished by the legislative branch. The legislature could establish a cause of action and remedies, which would cover all aspects of equal access to political debates.

IV. CONCLUSION

As the Supreme Court has set out the state action test in *Lugar*, it is very difficult to find that a private party's actions constitute a state action. Although the standard is narrow, it is both predictable and sound. Thus, Congress, through its legislative powers, should tailor a law regulating political debates. Otherwise, a judicial exception as to the presentation of political debates would result in many of the negative ramifications discussed above, ramifications that would far outweigh the positive benefits to the electoral process.

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78. *See* American Broadcast Co. v. Cuomo, 570 F.2d 1080 (2d. Cir. 1977). This case involved the exclusion of ABC's news representatives from covering the campaign facilities of Mr. Koch and Mr. Cuomo during the Democratic mayoral race for New York City in 1977. The candidates contended that their campaign facilities were private and only those with an invitation should be allowed to enter. Additionally, the candidates pointed out that they were not yet elected officials. However, the court held that it was not important that they were not elected officials. Rather, the nature of the candidates was sufficient to bring the event within the meaning of 42 U.S.C. § 1983. *Id.* at 1084.

This case was decided before *Lugar*, and in light of *Lugar*, the district court probably would not have found a state action, if the case was decided today.