American Manufacturers Mutual Insurance Company v. Sullivan: "Meta-Analysis" as a Tool to Navigate through the Supreme Court's "State Action" Maze

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NOTE

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY V. SULLIVAN:
"META-ANALYSIS" AS A TOOL TO NAVIGATE THROUGH THE SUPREME COURT'S "STATE ACTION" MAZE

Gregory D. Malaska, Esq.*

Looking For The Next Best Thing

Warren Zevon¹

INTRODUCTION

The Fourteenth Amendment² of the United States Constitution protects individuals from public discrimination and infringement upon their right to procedural due process.³ Congress utilized its enforcement authority under this Amendment⁴ to enact the Civil Rights Act of 1871 (42 U.S.C. § 1983),⁵ which permits private redress for alleged civil rights

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¹ WARREN ZEVON, Looking for the Next Best Thing, on A QUIET NORMAL LIFE: THE BEST OF WARREN ZEVON (Asylum Records 1986).

² All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

³ See id. If the public action is taken by a federal actor, similar protection is provided by the Equal Protection Clause of the Fifth Amendment. U.S. CONST. amend. IV.

⁴ U.S. CONST. amend. XIV, § 5.

⁵ Every person who, under 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
violations against those parties acting "under color of state law." These five words have spawned a great deal of discussion and conflict since the Act's inception, yet federal courts have been unable to interpret the phrase with any consistency.

The "state action" doctrine essentially limits the scope of actions brought under 42 U.S.C. § 1983 to those carried out against the elusively-defined "state actor." Although the Supreme Court has acknowledged that it might be an impossible task to formulate a succinct formula to define a state actor, the Court addresses this problem by employing four separate tests to determine state action: the symbiotic relationship test, the public function test, the close nexus test, and the joint participation test. Federal courts apply these tests in a somewhat random fashion, combining bits and pieces of each test for each case. In
addition, the doctrine has been interpreted both broadly and narrowly, based in part on the evolving makeup of the court, thus providing a confusing backdrop for future interpretation and predictability in due process decision-making.

Several legal scholars have strongly criticized the lack of consensus on the proper "state action" test. Some scholars advocate the use of a meta-analysis test to better incorporate the individual values of the four tests currently used by the Court. In one of the Court's more recent decisions involving § 1983, American Manufacturers Mutual Insurance Co. v. Sullivan, the Supreme Court failed to utilize this unique approach, instead producing a decision that continues to examine the state action trees at the expense of the forest.

The primary goal of this Note is to outline the Court's journey through the state action maze and to review each of the separate approaches taken by the Court, all in an attempt to highlight the value of the meta-analysis approach. As stated so succinctly in the lyric beginning this Note, there may not be a perfect test for state action determinations under § 1983, but the incorporation of the meta-analytical approach is the next best option.

Part I begins with an introduction to the state action doctrine. Emphasis is placed on the doctrine's historical origins and development throughout the twentieth century by looking at various cases involving discrimination and deprivation of procedural due process. The first part also delineates the separate, fragmented approaches developed by the


17. See generally, note 7.

18. See Krotoszynski, supra note 7, at 304.


20. Professor Krotoszynski recognizes this problem and also advocates the use of a "contextual approach." See Krotoszynski, supra note 7, at 305.

21. Although Sullivan involves a deprivation of procedural due process, it is important to note that much of the State Action doctrine's development has focused on cases involving public discrimination.
Supreme Court in its state action jurisprudence and provides an introduction to the "meta-analysis" approach.22

Part II establishes the fundamental workings of the workers' compensation system, with special emphasis placed on the evolution of the Pennsylvania Workers Compensation Act23 (the Act). This part also outlines some of the current debate on the costs of workers' compensation and the potential importance of utilization review procedures. Part II focuses on the major changes in the Act that occurred in the mid-1990s, which implemented the utilization review program. Next, Part II supplies a brief survey of lower court decisions addressing problems with § 1983 actions involving workers' compensation and other similar health care review systems. Part II concludes with a discussion of the split between the Third and Fifth Circuits which led to the Court's decision in Sullivan.

Part III provides the factual layout of Sullivan and reviews the findings of the District Court and the Third Circuit Court of Appeals. A thorough examination of Chief Justice Rehnquist's opinion, along with the concurrences of Justices Ginsburg, Breyer, and Souter, as well as the brief dissent by Justice Stevens,24 provides a more comprehensive discussion of the case. Part IV includes a test-by-test analysis for each of the state action approaches used by the Court and a demonstration of the use of the meta-analysis as applied to the Sullivan decision. Part V concludes the piece by advocating a reevaluation of the role and function of the state action doctrine in light of Sullivan, while providing some predictions for future § 1983 actions.

I. THE DEVELOPMENT OF THE STATE ACTION DOCTRINE

A private remedy is available to any citizen of the United States under 42 U.S.C. section 1983 whenever an individual's civil rights have been violated by a party acting under color of state law.25 This is what is commonly referred to as the State Action doctrine. § 1983, however, does not allow a remedy against similar constitutional claims made against

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22. See Krotoszynski, supra note 7, at 330.
24. The Rehnquist opinion is split between a state action inquiry and a discussion of the protected property interests. Although the property interest issue is important and will be dealt with in some detail as part of the discussion of the Supreme Court's opinion in Sullivan, the primary focus of this Note is state action.
strictly private actors, in essence, protecting a private individual or business from actions that would be illegal if performed by a public official, agency, board, commission, or department.

The State Action doctrine first appeared in *The Civil Rights Cases*, where the United States Supreme Court faced numerous complaints involving racially discriminatory practices by several private parties. In an opinion by Justice Bradley, the Court interpreted the Civil Rights Act of 1875 as preventing private rights of action "until some state law has been passed, or some state action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the fourteenth amendment."

Some sixty-five years later, Chief Justice Vinson clarified the state action concept in *Shelley v. Kraemer*, where the Court concluded that a private, racially-restrictive land covenant, by itself, was not a violation of the Fourteenth Amendment. However, once a state court enforced the covenant, state action attached and established a violation. The *Shelley* Court reinforced the holding of *The Civil Rights Cases* by ruling that "[t]he [Fourteenth] Amendment erects no shield against merely private conduct, however discriminatory or wrongful." Thus, in order for a plaintiff to establish state action under present § 1983 caselaw, two requirements must be met: 1) the violation or deprivation must be caused by a right, privilege, or policy created by the state or by someone for whom the state is responsible; and 2) the violator "must fairly be said to be a state actor."

Both the *Civil Rights Cases* and *Shelley* lay the foundation for a series of cases in which four "distinct" state action tests have emerged. These tests create a doctrinal headache for many judges and legal scholars.

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27. Lawrence, supra note 7, at 647-48.
29. Id. at 4.
30. Id. The case references the Civil Rights Act, passed March 1, 1875, entitled ‘An act to protect all citizens in their civil and legal rights.’ 18. St. 335. Id.
31. Id. at 13.
32. 334 U.S. 1 (1948).
33. Id. at 13.
34. Id. at 20.
35. Id. at 13.
37. Id.
38. Some commentators have referred to state action as a "doctrinal briar
Each of the four tests will be discussed below in order of its respective development and then they will be contrasted with the meta-analysis approach.

A. The Public Function Test

The first state action model arose when the Supreme Court decided *Marsh v. Alabama*, just two years before *Shelley*. In *Marsh*, police arrested a Jehovah's Witness for distributing religious literature in Chickasaw, Alabama, a company town owned by the Gulf Shipbuilding Corporation. The town functioned much like a normal municipality, yet corporate officers, rather than municipal officers, adopted a law prohibiting solicitation without a permit. The plaintiff brought an action against the company town claiming a violation of her First and Fourteenth Amendment rights, arguing that the private corporation functioned under color of state law. In an opinion that found state action present, Justice Black explained, "since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation." Thus, under the public function test as defined in *Marsh*, if a private entity assumes the role of the state by engaging in what is traditionally an exclusive public function and proceeds to violate the Fourteenth Amendment rights of any person, that entity assumes the role of a state actor and can be liable under § 1983.

Probably the best example of the Court's public function analysis came in *Jackson v. Metropolitan Edison Co.*, where a public utility provider terminated the plaintiff's electricity service for failure to maintain her monthly payments. The plaintiff subsequently filed a claim under § 1983, alleging a violation of procedural due process, claiming that the public utility company functioned as a state actor when it deprived her of

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40. Id. at 503-04.
41. Id. Permits were required for all materials, yet the company town would not grant a permit to the Petitioner for the distribution of religious materials.
42. Id.
43. Id. at 506.
46. Id. at 347.
her utility service without a hearing. The Court disagreed, first recognizing that Pennsylvania law did not consider the furnishing of public utility service as either a state or municipal function. Second, the Court found that providing goods and services "affected with a public interest" did not convert the private utility company into a state actor.

In spite of these holdings, the public function test has not found many arrangements to constitute state action. Furthermore, many modern cases have narrowed its scope and the frequency with which it is used. Recent cases have narrowly construed its appreciation, excluding from § 1983 suits cases brought against public defenders, amateur sports corporations, nursing homes, schools for maladjusted children, private parties selling goods subject to statutory lien, and intercollegiate sports organizations.

Although the 1980s saw a general narrowing of the scope of the public function doctrine, two cases decided in the early 1990s provided further

47. Id. at 347-48.
48. Id. at 353.
49. Id. at 354.
50. A few early cases found state action in certain private activities that were considered traditional public functions. In Evans v. Newton, 382 U.S. 296 (1966), the Court found state action in the operation of a local park (which was donated by a private individual) in a racially discriminatory manner, ruling: "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." Id. at 299. See also Terry v. Adams, 345 U.S. 461 (1953) (covering primary elections).
51. See supra note 50.
58. Not all cases saw the Court failing to find state action under a traditional public function approach. In West, the Court ruled that a physician who provided services for a state prison was a state actor when it held: [I]t is the physician's function within the state system, not the precise terms of his employment, that determines whether his actions can fairly be attributed to the State. Whether a physician is on the state payroll or is paid by contract, the dispositive issue concerns the relationship among the State, the physician, and the prisoner.
487 U.S. at 55-56.
uncertainty for the future use of the doctrine.\textsuperscript{59} In \textit{Edmonson v. Leesville Concrete Co., Inc.}\textsuperscript{60} the Court ruled that a private party's racially-motivated use of peremptory challenges during a civil trial violated § 1983. The Court elevated the defendant to state actor status because it believed that the objective of the peremptory challenge was to determine the makeup of a government body, the jury, which performs a traditional public function.\textsuperscript{61} Shortly afterward, the Court, in \textit{Georgia v. McCollum},\textsuperscript{62} extended similar state actor status to private litigants who used race-based peremptory challenges in criminal trials. \textit{McCollum} specifically relied on \textit{Edmondson} in extending § 1983 to criminal trials,\textsuperscript{63} stating that the conclusions of \textit{Edmondson} "apply with even greater force in the criminal context because the selection of a jury in a criminal case fulfills a unique and constitutionally compelled governmental function."\textsuperscript{64}

Although these two cases appeared to liberalize the strict interpretation of the public function doctrine used by the Rehnquist Court,\textsuperscript{65} they are too closely linked factually and legally in that they focus only on peremptory challenges used to empanel juries to be a valid predictor of future decisions. The traditional public function test is becoming increasingly concerned with the exclusivity of the function and less focused on tradition.\textsuperscript{66}

\textbf{B. Symbiotic Relationship Test}

The "symbiotic relationship" test describes a unique relationship between the state and private actors, such that the private actor becomes a mutual partner with the state. The test first appeared in \textit{Burton v. Wilmington Parking Authority},\textsuperscript{67} where the plaintiff filed a § 1983 action against a restaurant that leased a portion of the Authority's parking lot when it refused service to an African-American man because of his race.\textsuperscript{68}

\begin{footnotes}
\item[59.]{See PRACTICING LAW INSTITUTE, State Action and the "Under Color of Law" Requirement of 42 U.S.C. 1983, 553 PLI/Lit 567, 611 (1996).}
\item[60.]{500 U.S. 614 (1991).}
\item[61.]{Id. at 626.}
\item[62.]{505 U.S. 42 (1992).}
\item[63.]{Id.}
\item[64.]{Id.}
\item[65.]{See generally, Strickland, supra note 7.}
\item[66.]{Notes taken from edited copy of a previous draft of this Note made by Professor Ronald Krotoszynski, Spring 2000. See also Krotoszynski, supra note 7, at 304, n.12.}
\item[67.]{365 U.S. 715 (1961).}
\item[68.]{Id. at 720.}
\end{footnotes}
The Court found state action existed because of the unique and mutually-beneficial relationship between the parking authority and the restaurant.\footnote{69}{Id. at 724.} The relationship arose because of a long-term lease and because the Authority provided heat, gas, and structural repairs to the exterior surfaces on the premises.\footnote{70}{Id.} The relationship between the Authority and the restaurant was so interdependent that the Court saw a joint enterprise and, thus, state action for Fourteenth Amendment purposes.\footnote{71}{Id. at 725.}

The Burton Court recognized that developing a concrete state action test was impossible. Therefore, Burton stated that courts must emphasize the importance of making such determinations on a case-by-case basis.\footnote{72}{Id. at 722.} In fact, the Court specifically limited the scope of its ruling to the facts of Burton,\footnote{73}{Burton, 365 U.S. at 725-26.} making it the Court's most expansive reading of the state action doctrine. This interpretation has been widely criticized since its creation.\footnote{74}{The Supreme Court limited the ruling of Burton to the specific facts of the case in Moose Lodge, where the Court coined the term symbiotic relationship. 407 U.S. at 175. The Supreme Court referenced Burton in Jackson, yet failed to expand the scope of the symbiotic relationship test to the relationship between a private utility provider and the state. 419 U.S. at 358. Although the case has never been overruled, Burton has been very narrowly interpreted since. See SCHWARTZ & KIRKLIN, supra note 7, at 526.}

In two decisions released on the same day in 1982, the Court rejected the application of the symbiosis analysis in *Blum v. Yaretsky*\footnote{75}{457 U.S. 991 (1982).} and *Rendell-Baker v. Kohn*.\footnote{76}{457 U.S. 830 (1982).} In Blum, Justice Rehnquist reviewed the issue of whether a state may be held responsible for the alleged procedural due process violations of a nursing home that participated in Medicaid.\footnote{77}{Blum, 457 U.S. at 993-95.} In rejecting Burton, the Blum Court held that even extensive state regulation and funding did not make the nursing home a state actor.\footnote{78}{Id. at 1011.} In Rendell-Baker, the Court continued its attack on the Burton rationale finding the fiscal relationship between the state and a school for maladjusted high school students similar to the relationship between a state and a general contractor of services, neither of which rose to the symbiotic level of Burton.\footnote{79}{Rendell-Baker, 457 U.S. at 842-43.} Although the Court has never expressly overruled Burton, the
modern Court’s weak attraction to the symbiotic relationship analysis, as evidenced in its decisions in Blum and Rendell-Baker, places its future usefulness in question.

C. Close Nexus Test

A close analogy to the symbiotic relationship model is the close nexus test. This analytical model, in comparison to the symbiotic relationship test, seeks to focus on the degree of interrelationship between the state and the private actor.

A good example of the symbiotic relationship analysis is seen in Jackson v. Metropolitan Edison Co.\(^8\) In that case, plaintiff Catherine Jackson had her electricity service terminated by a privately-owned and operated utility company after becoming delinquent in her payments.\(^81\) Jackson filed suit under § 1983, alleging that the utility company violated her procedural due process rights and assumed the role of a state actor primarily because of the Commonwealth of Pennsylvania’s extensive regulation of the entity.\(^82\) Justice Rehnquist’s opinion recognized that even if a private entity is extensively regulated by the state, the proper 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.”\(^83\) The opinion continued by stating that a private party’s exercise of a choice provided by state law does not automatically transform the private party into a state actor under § 1983.\(^84\)

In Flagg Brothers, Inc. v. Brooks,\(^85\) the Court established the general test for state action under the “close nexus” model. In Flagg Bros., a landlord evicted a married couple from their apartment and stored their belongings at the Flagg Brothers warehouse.\(^86\) Pursuant to a New York statute, the plaintiffs were required to pay for the storage and the stored property was subject to a warehouseman’s lien if payment was not

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81. Id. at 347.
82. Id. at 347-48. The Plaintiff claimed that the state regulatory scheme effectively granted the utility company monopoly status. In addition, the state’s extensive and continuing regulation of the provider transformed the action of the private utility company into the action of the state. Id. at 351-52.
83. Id. at 351 (citing Moose Lodge No. 107 v. Irvis, 407 U.S. 176 (1972)).
84. Id. at 357.
86. Id. at 153.
received. A dispute arose between Flagg Brothers and the evicted plaintiffs. The dispute culminated in a letter by Flagg Brothers demanding payment within ten days and threatening sale of the property at auction if the deadline was not met. The Brooks brought suit under § 1983 seeking an injunction against the sale, claiming that Flagg Brothers' proposed sale violated their procedural due process rights and that the storage company's actions were attributable to the state.

The Court, in an opinion written by Justice Rehnquist, ruled that a claimant must prove that: 1) a private party acted under "color of state law;" and 2) the private party's actions were properly attributable to the state. The majority failed to find a sufficient link between the warehouseman's lien provision in the challenged state statute and the private repossession absent a hearing to establish a nexus relationship. The opinion reaffirmed the Court's reluctance to define the degree of interrelationship necessary to establish state action, merely stating that the Court "has never held that a State's mere acquiescence in a private action converts that action into that of the state."

Flagg Bros. is a good example of how the nexus test can be narrowly construed. Subsequent cases with similarly close relationships between public and private actors have also failed to establish the required nexus between the two sectors necessary to a finding of state action. The close nexus test is very similar to the symbiotic relationship test, yet to this date, the Supreme Court has rarely found state action solely based on the close nexus test alone.

87. Id. at 152-53 n.1 (describing § 7-210 of New York's Uniform Commercial Code).
88. 436 U.S. at 153.
89. Id. at 153-54.
90. Id. at 156.
91. Id. at 153.
92. Id. at 166.
93. Id. at 163-64.
94. In Blum, the Court found no state action when a private nursing home participating in the Medicaid program terminated the benefits of one of its patients without a hearing. The Court, citing Jackson, ruled that

the purpose of this [nexus] requirement is to assure that constitutional standards are invoked only when it can be said that the state is responsible for the specific conduct of which the plaintiff complains. The importance of this assurance is evident when, as in this case, the complaining party seeks to hold the State liable for the actions of private parties.

457 U.S. at 1004.
The Supreme Court has applied the three prior tests in a somewhat random fashion, rarely finding state action under any of the approaches. These tests appear more rigid because they set a very high threshold for finding state action. The public function test seems to have evolved from some list of activities traditionally exclusive to the state that, unfortunately, has not been clearly defined. Symbiotic relationship acts like a label that just happened to fit the peculiar facts in Burton. Moreover, the close nexus test envisions some unrealistic, organic relationship between the state and the private sector that always seems out of reach. The most realistic of the four tests is the one which has most regularly found state action in private conduct, the joint participation test.

D. Joint Participation Test

Although the previous three tests focus on the interrelatedness of the private and state actor, the joint participation test concentrates on the interaction between the two. In part, this test is successful because it does not require the requisite degree of "sameness" between public and private actors, nor does it apply a label to the public/private relationship in order to find state action. The joint participation test addresses those relationships where the state encourages, coerces or maintains a joint partnership with a private party, such that the private actor is cloaked with the authority of the state.

The Supreme Court developed the joint participation approach in Adickes v. S.H. Kress & Co. In Adickes, a plaintiff was refused service in a restaurant "because she was a 'Caucasian in the company of Negroes'" and was subsequently arrested under Mississippi’s trespass statute. In her § 1983 action, the plaintiff argued that a conspiracy existed between the restaurant owner and the local police officer whereby the police

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95. Professor Krotoszynski has also raised concern about what actions are included in the “exclusive state function group.” See Krotosznksi, supra note 7, at 319.

96. See Krotoszynski, supra note 7, at 345 n.227 (citing Charles L. Black, Jr., The Supreme Court, 1966 Term—Foreword: “State Action,” Equal Protection, and California’s Proposition 14, 81 HARV. L. REV. 69, 88 (1967)). Krotoszynski also recognized the potential damage that can be done by courts that make state action determinations based on certain buzzwords rather than thorough explanation. See Krotoszynski, supra note 7, at 305.

97. See SCHWARTZ & KIRKLIN, supra note 7, at 550-60.


99. Id. at 147-48.
enforced the local custom of segregation. After applying the joint participation test, the Supreme Court ruled that the actions of the police and the restaurant owner constituted state action, and thus, a violation of § 1983. The Court concluded that acting under color of state law did not require a party to be an officer of the state, but that willful participation in a joint activity with the state or its agents would establish state action.

The joint participation found in *Adickes* has expanded to address non-conspiratorial public/private interaction in several later cases. In *Lugar v. Edmonson Oil Co.*, the Supreme Court reviewed the validity of a Virginia prejudgment attachment statute. Specifically, the statute required that a petitioner allege that the debtor might dispose of the disputed property to defeat his creditors in order to gain a writ of attachment carried out by the local sheriff. After resorting to the legislative history of the Civil Rights Act of 1871, the Court broadened the scope of the joint participation test, finding that: "while private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action." 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."

The *Lugar* decision focused on the fact that the sheriff, a public official, had taken part in the private collection as the basis for its finding a state action. In so finding, the Court stated, "Whatever may be true in other

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100. *Id.* at 148.
101. *Id.* at 152.
102. *Id.* In *United States v. Price*, 383 U.S. 787, 794 (1966), the Court also acknowledged that the requirements for "state action" were the same as for actions "under color of state law." *Id.* at 794 n.7.
103. In contradiction, the Court in *Jackson* failed to find state action despite the strong interrelationship and regulation between the state and the public utility provider. 419 U.S. 345 (1974). Similarly, in *Blum*, the Court strictly construed the joint participation test, ruling that: "our precedents indicate that 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." 457 U.S. at 1004 (citing *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 166 (1978)).
105. *Id.* at 924-25.
106. *Id.* at 934.
107. *Id.* at 941.
108. *Id.*
contexts, this is sufficient when the State has created a system whereby state officials will attach property on the ex parte application of one party to a private dispute." The joint participation test is the easiest to apply because it focuses on what the state and private actor do, not on how they are related to each other. Unfortunately, its practicality and simplicity have not affected the confusion surrounding application of the other three tests.

E. The Meta-Analysis Approach

The previous sections highlighted some of the approaches used by the Court in making state action determinations under § 1983, yet no hard and fast test exists to determine whether state action has occurred. Most decisions discussed above incorporated several approaches and blended some of the ingredients of each separate analysis, leading to a high degree of confusion and unpredictability. The lack of boundaries and synergy between the four tests shows the need for a new approach, one that sees the "forest" rather than the "trees."

In response to frustrations surrounding the use and function of the four previous tests, Professor Ronald Krotoszynski, Jr. has proposed a unique, commonsense approach to the confusing state action problem. Krotoszynski's analysis attempts to liken constitutional analysis to scientific analysis, recognizing that while the existing state action tests should not be completely discarded, they should also not be mechanically applied. The meta-analysis approach should be applied taking into account the totality of the circumstances to determine whether state action exists.

This approach recognizes that in science, a study must have a ninety-five percent confidence rating before it can be accepted as valid. Under

109. *Lugar*, 457 U.S. at 942. Subsequent cases have also established that if a private party makes use of state procedures with the overt, significant assistance of state officials, they can be deemed state actors for Fourteenth Amendment purposes. *See Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486 (1988) (involving an Oklahoma nonclaim statute).

110. Krotoszynski similarly recognizes that there are no clear and concrete state action tests available. *See Krotoszynski, supra* note 7, at 318 n.77.


112. *Id.* at 304.

113. *Id.* Krotoszynski states that "'meta-analysis' involves grouping data from separate scientific studies to reach the 95% confidence interval required to substantiate scientific claims." *Id.* at n.15.

114. *Id.* at 337.
scientific meta-analysis, if any one test does not reach the ninety-five percent level, several tests can be combined to achieve the greater than ninety-five percent threshold, making the analysis valid. Professor Krotoszynski proposes performing the individual tests for state action, and if none support a state action finding individually, their findings should be combined to see if the ninety-five percent threshold is met.

Thus, the totality/meta-analysis approach adheres to the conclusion in Burton that state action determinations should be made on a case-by-case basis, yet provides the flexibility to use any or all of the tests to establish state action. This approach, in addition to providing more flexibility, allows the retention of each case's uniqueness, while still providing a uniform test for state action.

II. THE PENNSYLVANIA WORKERS' COMPENSATION SYSTEM AND THE DEVELOPMENT OF UTILIZATION REVIEW SYSTEMS

A. Background

The passage of workers' compensation laws across the nation provided injured workers a form of redress outside of traditional tort remedies. In Pennsylvania, workers' compensation is the sole remedy for workers injured on the job, and the Pennsylvania Supreme Court has ruled that the Workers' Compensation Act "must be liberally construed to effectuate its humanitarian objectives."

115. Id. (citing Michael D. Green, Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of Agent Orange and Benedictin Litigation, 86 NW. U. L. REV. 643, 683-85, 685 n.184 (1992)).
116. See Krotoszynski, supra note 7, at 337. Professor Krotoszynski uses only three tests, combining the nexus and joint participation tests in his analysis.
118. See Krotoszynski, supra note 7, at 333. Krotoszynski likens the current state action doctrine to a child's cobbler's bench. Much like the individual pieces and holes in the bench, if the facts of a particular case (pieces) do not fit into one of the available state action tests (holes), it will be discarded.
121. 77 PA. CONS. STAT. § 481(a) (1992).
Pennsylvania enacted its Workers' Compensation Act in 1915. The program is currently administered by the Bureau of Workers' Compensation (BWC) within the Department of Labor and Industry (L&I). Under the Act, all employers who meet the statutory requirements must obtain workers' compensation insurance for their employees. The Act gives employers the option to self-insure, purchase insurance from the State Workmen's Insurance Fund (SWIF), or contract with a private insurer for coverage. Those who choose to self-insure must apply to L&I to determine whether it is financially able to provide for the necessary coverage. If an employee is injured on the job, the insurer or self-insuring employer must make all payments for medical services within thirty days of receipt of the bills and report this information to the service provider.

B. Growing Problems Within the Workers' Compensation System and the Utilization Review Solution

As the sole remedy available for injured workers, the function, scope and cost of the workers' compensation system have expanded, much to the fiscal detriment of many Pennsylvania employers. In 1985, the Pennsylvania Chamber of Commerce and Industry conducted a statewide poll to determine the level of support for legislative reforms to the

126. 77 PA. CONS. STAT. § 701 (1998). The State Workmen's Insurance Fund (SWIF) is "the State-operated insurance carrier from which workmen's compensation insurance policies may be purchased by employers to cover all risks of liability under this act including those declined by private carriers." Id.
127. See TORREY, supra note 119.
128. See id.
129. The 1993 and 1996 changes implemented a utilization review system which allows for an automatic suspension of the payment of benefits pending a determination of the reasonableness and necessity of the individual charges. This will be discussed in the following section involving utilization review.
130. See 34 PA. CODE § 127.208(a) (2000).
131. Prior to implementation of the utilization review program, an insurer was unable to recoup payments made for treatments that were later found unnecessary and unreasonable. Their only recourse was to retrieve funds for such claims from the SWIF. See Sullivan v. Barnett, 526 U.S. 40, 45 n.2 (1999).
workers' compensation system. The survey found that seventy-five percent of those surveyed (whose operations accounted for over 350,000 employees) rated workers' compensation reform as a high priority. An alarming thirty percent stated that workers' compensation costs had affected, or may affect, their future expansion in the state. A 1993 report prepared by the Professional Insurance Agents Association also found that Pennsylvania's workers' compensation costs were noticeably higher than those costs in neighboring states.

In response to the growing concerns of both business and labor organizations, the Pennsylvania General Assembly passed Act 44 of 1993. The primary change in the new law was the implementation of a voluntary utilization review program to provide flexibility for insurers in an attempt to reduce the program's costs. Under Act 44, L&I could authorize the use of utilization review organizations (UROs) to determine the reasonableness and necessity of certain treatments. These UROs were required to be composed of either an impartial physician, surgeon or other health care provider, or a panel of such professionals and providers. Once authorized by L&I, the composition of the UROs would be published in the Pennsylvania Bulletin. The UROs would apply generally accepted treatment protocols to each case reviewed to determine whether each disputed charge was necessary and reasonable.

The new program functions as follows: once an employee is injured on the job and the insurer or self-insuring employer receives the bills for

133. Id.
134. Id.
135. Insurance Agents Association of Pennsylvania, Maryland and Delaware, Inc., Workers' Compensation Rate Comparison for Pennsylvania and Bordering States, (February 1993). Also, prior to Act 44, an insurer could not recover for treatments which were later found to be unnecessary or unreasonable. Sullivan, 526 U.S. at 45 n.2.
136. Act of July 2, 1993, No. 44 (codified at 77 PA. CONS. STAT. § 531 (West 1998)).
137. Id. § 306(f)(2)(ii).
139. Id. The Pennsylvania Bulletin is the state equivalent of the Federal Register.
140. 34 PA. CODE § 127.467 (2000).
141. 34 PA. CODE § 127.470.
the incident, the insurer has the right to petition L&I for utilization review (UR) to determine the reasonableness and necessity of any of the charges. The insurer requesting UR must then serve all interested parties with a copy of the request. Before randomly assigning the request to a licensed URO, L&I must review the one-page form to determine its completeness and provide a notice of the URO assignment to all parties involved.

Once the request for UR is received, the thirty-day payment period is tolled, allowing the insurer to suspend payment of benefits to the injured worker pending the results of UR. If any party is not satisfied by the results of the UR, that party can file a petition for review with L&I, which will then assign the request to a workers' compensation judge. That judge can then consider the UR report, but is not bound by its findings.

The injured worker is notified at two stages: 1) when the insurer requests review which usually suspends payment of benefits pending utilization review; and 2) when the request is forwarded (Notice of

143. See 77 PA. CONS. STAT. § 531(5). In addition, the party requesting UR is required to pay the costs of the review. 77 PA. CONS. STAT. § 531(6)(iii).
144. 34 PA. CODE § 127.452(b) (2000). Previously, the injured employee was not notified that his benefits might be terminated.
145. 34 PA. CODE § 127.453(a).
146. Id. § 127.452(b).
147. The UR must be completed within 30 days. Under the regulations, the insurer's right to suspend payment continues beyond the UR process until a final determination is reached. 34 PA. CODE § 127.208. During the pendency of the proceedings, a Claimant can continue to receive treatment, yet the doctor cannot receive actual payment for the services by the employer until the UR process is completed.
148. Under the old system (prior to Act 57 of 1996), if an employee failed to win his review during reconsideration, the losing worker was required to pay for the costs of reconsideration. As stated in the text, under the new system, the reconsideration step is removed and the case goes before a workers' compensation judge. See Sullivan v. Butler, 1996 WL 654032 at *2-3(E.D. Pa. 1996). If the WCJ rules against the Claimant, the injured worker can appeal to the Workers' Compensation Appeals Board within L&I. If this appeal is also unsuccessful, the Claimant can appeal to the state's Commonwealth Court, which has appellate jurisdiction over cases decided by any state agency.
150. See Respondent's Brief, American Mfg. Mut. Ins., Co. v. Sullivan, 1998 WL 847509 at *10 (3d Cir. 1998) (quoting the pre-Act 44 portion of the law which stated that the petition for Department review would not act as an automatic supersedeas, and would mandate that employers maintain payments during review (formerly 77 PA. CONS. STAT. § 531)).
Assignment) to a URO. At this stage, the employee may submit a personal statement regarding his or her view of the necessity and reasonableness of the treatment.\footnote{151}

Under the law, an injured employee awaiting the results of the UR process, even if able to pay, would not be allowed to personally pay for the services.\footnote{152} The employee is, in effect, a captive of the insurer and the utilization review process. He or she is forced to await findings, and may incur massive debt, while the treating physician tries to recover the treatment costs that may not be covered by the employer.\footnote{153}

1. Lower Courts’ Responses to Similar State-Authorized Private Review Systems

Prior to the Supreme Court’s ruling in \textit{Sullivan}, several lower courts reviewed the state action implications of quasi-governmental health care review systems and returned with mixed reactions.\footnote{154} In \textit{Grenz v. EBI/Orion Group, Inc.}, the Ninth Circuit Court of Appeals addressed a facial challenge to a provision of the Montana Workers’ Compensation Act that required that an injured worker be examined by a panel of physicians to determine whether the recipient’s benefits continued.\footnote{155} The plaintiff in \textit{Grenz} sued his insurance provider for invoking a medical review panel to evaluate his benefits.\footnote{156} In finding that the state of Montana did not participate in the review of the medical panel or the subsequent response by the insurer, the Ninth Circuit held that no state action existed for § 1983 purposes.\footnote{157} The Ninth Circuit focused on the fact that the insurer, not the state, determines the membership of the panel and that use of the panel was not mandatory.\footnote{158}

\begin{itemize}
\item \footnote{151} Pennsylvania Department of Labor and Industry, Notice of Assignment of Utilization Review Request, Form LIBC-514 5-98. Prior to the Third Circuit’s decision, the employee was not allowed the opportunity to provide any input into the UR process. \textit{Sullivan v. Barnett}, 139 F.3d 158, 171 (3d Cir. 1998).
\item \footnote{152} 77 PA. CONS. STAT. § 531(5) (2000). Only employers and insurers can pay for the treatments.
\item \footnote{153} See Respondent’s Brief at **7, \textit{American Mfg. Mut. Ins. Co.}, 1998 WL 847509. If the treatments are ultimately found unreasonable and unnecessary, the doctor is then forced to try to recover the costs from the state Supersedeas fund. 34 Pa. Code § 127.208(f) (2000).
\item \footnote{154} For a general discussion on the state action implications of several new public/private endeavors, see Barak-Erez, \textit{supra} note 7.
\item \footnote{155} 968 F.2d 1220, 1992 WL 158158 (9th Cir. 1992) (unpublished decision).
\item \footnote{156} \textit{Id.}
\item \footnote{157} \textit{Id.} at *1.
\item \footnote{158} \textit{Id.}
In *Fleming v. Workers' Compensation Commission*, the United States District Court for the Eastern District of Virginia upheld the validity of a Virginia statute that allowed a private insurer to terminate benefits without a hearing. The plaintiff in *Fleming* missed a work hardening evaluation for fear of the pain involved, which led the private insurer to invoke the Virginia rule and to terminate the plaintiff's benefits. The court, relying on *Grenz*, dismissed the § 1983 complaint, and ruled that although the state extensively regulates the workers' compensation process, the decision to terminate benefits is made solely by the private insurer.

Furthermore, in *Stanescu v. Aetna Life and Casualty Ins. Co.*, the Second Circuit Court of Appeals used a similar approach when it affirmed a federal court's ruling that a private insurer did not function as a state actor by refusing to pay the medical costs of an injured worker. Despite plaintiff's arguments that there was a degree of interdependence between the private insurer and the state that rose to the level of a monopoly, the court concluded that the private insurer's refusal to settle the plaintiff's claim did not make the insurer a state actor.

Although these recent decisions failed to find state action when a private insurer used state-authorized peer review bodies in workers' compensation cases, at least one court has found that private insurers can qualify as state actors under these circumstances. In *Catanzano v.*

160. *Id.* at 855 n.1. Virginia Workers' Compensation Commission Rule 1.4(C)(2) allows termination of coverage if a recipient refuses a medical examination. *Id.*
162. *Id.* at 860-61. The court here also focused on the fact that the state's involvement was limited to the adjudication of the application's merits.
164. *Id.* at *1*.
165. *Id.* at *1-2.
166. This is not to say that all workers' compensation cases involving § 1983 complaints have failed to find state action. Most notable is *Baksalary v. Smith*, 579 F. Supp. 218 (E.D. Pa. 1984), which formed the primary basis for the Third Circuit's decision in *Sullivan* and was a major component in the Circuit split resolved by the Supreme Court.
167. In Pennsylvania, courts have also failed to find state action in the actions of a private service which designated resource hospitals as part of a larger emergency medical service system program, see *Community Med. Ctr. v. Emergency Med. Serv. of Northeastern PA*, 712 F.2d 878 (3d Cir. 1983), and peer review organizations who evaluate medical claims under the Pennsylvania Motor
a plaintiff sued a Certified Home Health Agency (CHHA) when her Medicaid benefits were reduced below her doctor’s recommendations by a quasi-governmental health care entity. The United States Court of Appeals for the Second Circuit found state action based on a New York Statute that provided for private determinations of the appropriateness and medical necessity of home health services covered by Medicaid.\footnote{169} Further, the court also found that the services provided by the CHHA were part of an interdependent system designed to carry out the state’s Medicaid program.\footnote{170} The court stated that “the CHHAs [were] not independent actors doing business with the state, but are entities that have assumed the responsibility for the State’s mandated health care duties.”\footnote{171}

The Catanzano Court’s ruling placed some emphasis on the nature of the service provided and whether the service was traditionally provided by the state. This same emphasis was used in a Pennsylvania case from the 1980s, Baksalary v. Smith.\footnote{172} This case led to a subsequent split between the Third and Fifth Circuits on the state actor issue and forced the United States Supreme Court to determine the scope and role of state-authorized peer review organizations involved in workers’ compensation programs.

2. Baksalary\footnote{173} and Barnes\footnote{174} - The Courts Divide on the Role of Peer Benefits Review in Workers’ Compensation Programs

The primary issue faced by the court in Baksalary was whether a private insurer’s suspension of an injured employee’s workers’ compensation benefits pending a state-authorized review procedure violated the Fourteenth Amendment.\footnote{175} In Baksalary, the United States District Court for the Eastern District of Pennsylvania found that a pre-Act 44 version of the Pennsylvania Workers’ Compensation Act violated

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168. 103 F.3d 223, 226 (2d Cir. 1996).

169. Id. at 226. The statute at issue was §§ 3602(3) and 3614(1) of New York’s Public Health Law. N.Y. Pub Health Law §§ 3602(3), 3614(1) (1987).

170. Catanzano, 103 F.3d at 227.

171. Id.


173. Id.


175. See Baksalary, 579 F. Supp. at 218.
the plaintiff's due process rights. Under review in Baksalary was the supersedeas provision included in § 413 of the Act that permitted insurers and employers to petition for review of workers' benefits, effectively terminating benefits pending the referee's review. The complex class action suit questioned the process where an insurer or employer without notice or opportunity to be heard by the injured worker would file a petition for review and receive a completeness review from the state, which then would forward the petition to a worker's compensation referee, effectively suspending the injured worker's benefits during the pendency of the review.

Following the analysis used in Lugar, the court found that the worker's continued receipt of workers' compensation benefits constituted a property right that was violated by the employers and insurers who were imbued with the authority of the state. In applying the first part of the Lugar analysis, that is, whether a protected property interest existed, the court concluded that the potential for an injured worker to be without benefits for several months constituted the deprivation of a constitutionally protected property interest. The court, utilizing the "close nexus" approach, held that since "the deprivation requires a special filing process specifically created by the state," there was state action. This conclusion recognized that the private use of the supersedeas provision, which required state approval of the petition, constituted joint participation and thus, state action.

The Fifth Circuit faced a similar benefit termination procedure in

176. Id. at 219.
177. Id. A supersedeas is "A writ or bond that suspends a judgment creditor's power to levy execution, usu[ally] pending appeal." BLACK'S LAW DICTIONARY 1452 (7th ed. 1998). In this case, the supersedeas is the termination of the injured worker's receipt of workers' compensation benefits pending utilization review. Supersedeas is also an emergency remedy available to employers who object to the questionable payment of benefits.
178. The actual discovery for this case lasted for five years. Baksalary, 579 F. Supp. at 220.
179. Id. at 221-22.
180. Id. at 228.
181. Id. at 224-25. The District Court found no difference between the workers' compensation benefits at stake in the present case with the state disability benefits upheld in Mathews v. Eldridge, 424 U.S. 319 (1976), discussed infra at footnote 201.
182. Baksalary, 579 F. Supp at 228.
183. Id. at 231-32.
Barnes v. Lehman, yet failed to find state action in light of the Baksalary decision. At issue was a section of the Texas Workers’ Compensation Law that allowed an insurer to terminate workers’ compensation benefits based on the review of a private physician. In Barnes, an injured worker brought a § 1983 action against the reviewing doctor and the insurer for the same reasons as the plaintiff in Baksalary; however, unlike the previous case, the injured Texas worker was left without a remedy. The court, relying on Blum rather than Lugar, refused to adopt the “joint participation” approach, emphasizing that the doctor’s and insurer’s actions were purely private actions, not those of the state. The court found that “[T]exas, like most other states, endorses a compensation system as a matter of policy. Approval of the system, however, does not automatically burden the state with responsibility for every instance of its application.

The divergent outcomes from similar private party based review provisions provided the impetus for the Supreme Court to grant certiorari.

III. THE SULLIVAN DECISION

A. District Court Dismissal

In Sullivan, a group of injured workers, along with two workers’ organizations, brought a class action suit against state officials, several

184. 861 F.2d 1383 (5th Cir. 1988).
185. Id. at 1384.
186. Id. at 1386.
187. Id. at 1387.
188. Id. at 1388.
189. The actual clash was between Barnes and the Third Circuit’s decision in Sullivan v. Barnett, which based much of its reasoning on Baksalary.
193. Johnny Butler, Secretary of Labor and Industry; Richard Himler, Executive Director of the Bureau of Workers’ Compensation; Insurance Commissioner Constance Foster; State Treasurer, Catherine Baker Knoll; and SWIF director, John O’Malley. Complaint at ¶¶ 18-27.
insurers and the School District of Philadelphia, alleging a violation of the plaintiff class' due process rights under § 1983. Prior to argument before the United States District Court for the Eastern District of Pennsylvania, the claims against the private insurers, who had previously requested utilization review, were dismissed as the court held that no state action existed. After the injured workers and labor organizations were certified as a class, the remaining defendants filed a motion to dismiss, claiming that due process did not prohibit the supersedeas pending UR and that the procedures in place provided adequate due process protections.

The district court set forth a three-part test to determine if the challenged provisions caused a deprivation of due process: 1) was there a deprivation of a constitutionally-protected liberty or property interest?; 2) did the method deprive the claimant of due process?; and 3) did a state actor cause the deprivation?

Relying on Baksalary, the court found that the injured workers were deprived of a constitutionally protected property interest. Yet, using the Mathews factors, the court failed to find a due process violation.


195. The six-count complaint alleged that: 1) the automatic supersedeas provision in § 306(f)(1) violated plaintiffs' right to procedural due process; 2) the same sections failed to provide the plaintiffs with an opportunity to be heard; 3) the assessment of the reconsideration fee without notice or opportunity to be heard by the injured worker violated the plaintiffs' procedural due process rights; 4) the reconsideration fee violated plaintiffs' substantive due process rights; 5) the lack of governing regulations regarding review of the URO process violated procedural due process; and 6) the deprivation of medical benefits deprived the injured plaintiffs of liberty without due process of law. Complaint at ¶¶ 265-82.


197. On May 28, 1996, the plaintiffs moved for class certification for all workers who have had or will have the payment of their medical benefits affected. Sullivan v. Barnett, 139 F.3d at 166. See also Sullivan v. Barnett, 526 U.S. at 47 n.6.


199. Id.

200. Id. at *5.

201. In Mathews, the Supreme Court established a test to determine whether a benefit termination system complies with due process. Specifically, courts were to review the following criteria to determine whether there was a Fourteenth
ruling that: 1) the fact that injured workers may have alternative forms of income and that other remedies were available under the system “lessens the potential harm” to a worker’s interest in his or her uninterrupted receipt of workers’ compensation benefits;202 2) the UR system employed several other safeguards that reinforced the objectivity of the medical analysis to protect against an erroneous deprivation;203 and 3) it was clear that the UR program was created in response to the government’s interest in controlling the high costs of insurance and medical treatment.204 Finding that the UR program adequately addressed the Mathews due process concerns, the court decided not to address the state action issue205 and granted the government defendants’ motion to dismiss.206

B. Third Circuit Reversal207

On review, the Third Circuit began its analysis of the dismissal by reinforcing the confusion brought about by the inconsistent application of the state action doctrine.208 The opinion established that since the Commonwealth created the entitlement of workers’ compensation, continued receipt of these benefits transformed the system into a constitutionally-protected property interest for the injured plaintiffs.209

Next, the court addressed the state actor issue, focusing on the unique Amendment violation: 1) the private interest involved; 2) the risk that the procedures would result in an erroneous deprivation of the interest; and 3) the governmental interests involved, including administrative burdens and available alternatives.424 U.S. at 335.

202. Sullivan v. Butler, 1996 WL 654032 at *5-6. The court mentioned two specific remedies still available to the injured worker, namely that: 1) an injured worker is entitled to his/her award plus interest if they are successful in a URO appeal; and 2) the injured worker may also recover litigation costs. Id. at *6.

203. Id. at *6-8. Specifically, the court focused on: 1) the fact that the URO’s decision had to be based on a medical determination; 2) the URO’s decision had to be based only on the physician’s records and testimony; and 3) many of the notice problems involved in Baksalary had been remedied under the Act 44 system. Id.

204. Id. at *8.

205. Id. at *9.

206. Sullivan v. Butler, 1996 WL 654032 at *12. The court also failed to find a due process violation in the imposition of reconsideration fees or the lack of regulations promulgated for the program.


208. Id. at 167.

209. Id. at 168. Both parties stipulated to this fact.
“self-contained” nature of the utilization review system. Interestingly, the court approached the issue from three different perspectives. First, the court recognized that, traditionally, only the state had the power to invoke supersedeas procedures and that, under the new system, the private insurer possessed the ability to utilize this traditional public function. Second, the court suggested a possible nexus relationship between the insurers and the state, noting that the supersedeas procedures were not self-executing and that the insurer could not move forward without the state’s approval. Finally, the court employed a joint participation approach and found that the mandatory state program “inextricably entangles the insurance companies in a partnership with the Commonwealth such that they become an integral part of the state in administering the statutory scheme.”

The court reiterated the importance of doing a fact-specific analysis in state action determinations, criticizing the Fifth Circuit’s decision in *Barnes v. Lehman* by outlining several significant differences between the Texas and Pennsylvania systems. After finding that state action existed, the Third Circuit criticized the analysis of the district court, finding that the supersedeas procedures in question survived the *Mathews* test. The court ruled that the current utilization review procedures violated due process, and mandated the defendants make several changes to the program. Specifically, the court mandated that injured employees be given: 1) timely and reasonable notice of the imminent suspension of the medical benefits and treatment before the suspension takes effect; 2) a description of the reasons why utilization review has been invoked; 3) an opportunity and time to submit a personal statement in writing regarding the employee’s view of the reasonableness and/or necessity of the disputed medical treatments; and 4) a description of the procedures under which the employee can appeal an adverse

210. Id.
211. Id.
212. Id.
214. Id. The court found several differences between the Texas and Pennsylvania schemes, specifically that: 1) the provisions permitting termination were not the same; 2) it was unclear whether the Texas program was an opt-in program; and 3) under the Texas program, it was unclear whether state involvement was necessary prior to termination.
215. Id. at 171-76.
216. Id. at 176.
After the Third Circuit's reversal, L&I changed the regulations to incorporate the court's mandates, providing more opportunities for input and notice. Although the new regulations appeared more generous to injured workers, the fundamental issues of whether the system transformed private insurers into state actors and whether this violated due process still remained in dispute.

C. The Supreme Court's Analysis

1. State Action Analysis

Chief Justice Rehnquist began his opinion by outlining the proper analysis for review of a facial challenge to the Pennsylvania Workers' Compensation Act. Specifically, the Court employed the two-part Lugar test which sought to determine: 1) whether the deprivation was caused by a state-created right or privilege, under a state-imposed rule, or carried out by someone for whom the state assumed responsibility, and 2) whether the defendants could fairly be said to be state actors. The Court found a deprivation of a constitutionally protected right; however, it failed to find state action by the private insurer.

The Court approached the "fairly attributable" part of the Lugar analysis from several angles. First, the Court, citing Jackson and Blum, ruled that no sufficiently close nexus existed to constitute state action by the private insurers. Further, the decision to invoke utilization review of workers' compensation claims was not made by the state, but by the private insurers themselves. The opinion then recognized that, standing alone, the Court has never held that the private use of a state-created

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217. Id. at 178.
218. American Manufacturers' Mutual Ins. Co. v. Sullivan, 526 U.S. 40, 46 n.3 (1999). Justice Stevens' concurrence also approves of the Third Circuit's changes to the previously deficient regulations mandating that: 1) injured workers be notified that the request for utilization review could result in the suspension of their benefits; and 2) the same workers would be allowed the opportunity to present a personal statement. Id. at 64.
219. Id. at 40.
220. Id. at 50.
221. Id. Here, the Court recognized that even though the UR was not "self executing," the Respondents still had to prove the other part of the Lugar test. Id. at 50 n.9.
222. Id. at 52.
223. Id.
remedy could establish state action. The Court distinguished the challenged UR system as more akin to "state inaction" and possibly even "a legislative decision not to intervene in a dispute between an insurer and an employee over whether a particular treatment is reasonable and necessary.

Strangely, the Court found that while the URO itself functioned as a state actor, a private insurer's use of this legislatively-created mechanism did not provide enough evidence to conclude that the state encouraged the action. In direct conflict with the ruling in Baksalary, the Court found that "nothing in Pennsylvania's constitution or statutory scheme obligates the State to provide either medical treatment or workers' compensation benefits to injured workers." Expanding on this analysis, the Court held that the creation of the SWIF, to guarantee benefits in the event that an insurer becomes insolvent, did not suggest that the state imposed on itself the obligation to provide benefits to injured workers.

The Court concluded its state action analysis by incorporating the public function approach used in Jackson and Blum. First, the majority held that because the state has recognized, restricted and restored the private insurer's right to withhold benefits, this legislative involvement did not act as a delegation of a traditional exclusive public function. Chief Justice Rehnquist further stated that heavy state regulation of the UR practice, by itself, did not alter the fact that decisions to invoke utilization review were made by private insurers. After applying this rationale to the facts of the instant case, the Court failed to find state action in the private insurer's actions.

2. Protected Property Interest Analysis

Even though the respondent's claim was terminated by a finding of "no state action," the Court nonetheless decided to address the protected

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225. Id.
226. Id. at 54.
227. Id. at 55-56.
228. Id. at 56 n.11.
229. Id. at 57.
231. Id.
232. The Court was concerned that the Third Circuit had "fundamentally misunderstood" the workers' property interest and believed that if the issue was not readily addressed, it could have drastic ramifications for the state, the private insurers, and the SWIF. Id. at 58.
interest analysis. The court applied a two-step due process test, seeking to determine: (1) whether a property or liberty interest had been deprived and (2) whether the state’s procedures protected the claimant’s due process rights.

On the property interest issue, the Court found that the termination of workers’ compensation benefits was a fundamentally different interest from those evident in Goldberg v. Kelly. In the present case, Pennsylvania law did not entitle employees to payment of all medical treatment, but rather to payment of those charges deemed “reasonable and necessary” after utilization review. In order for the property interest in workers’ compensation benefits to rise to the same level as the welfare benefits in Goldberg, the Court ruled that the employee must establish employer liability, in addition to the reasonableness and necessity of the treatment. Because the Respondent failed to show that a property interest existed, namely, that the treatments were reasonable and necessary, the Court did not reach the Mathews process analysis when it reversed the judgment of the Third Circuit.

Justice Ginsburg’s concurrence expressed concerns about the Court’s decision to conduct the property interest analysis after it had found no state action. Although she recognized that the workers’ compensation program required fair procedures to adjudicate the injured workers’ claims, she cautioned the Court to exercise judicial restraint, absent a necessity to reach the remainder of the analysis. Justices Breyer and Souter joined in a separate concurrence, taking issue with the Court’s property interest analysis. Specifically, Justices Breyer and Souter expressed their belief that there may be certain factual circumstances where the receipt of continued medical benefits might create a property interest.

233. Id. at 59.


236. Id. The Court believed that the respondent class had failed “to make good on their claim that the particular medical treatment they received was reasonable and necessary.” Id.

237. Id. at 61.

238. Id. at 62.

239. Id. at 63.

240. Id.

Justice Stevens' dissent also focused on the property interest argument, concluding that the review procedures must be fair because the UROs are state actors.\textsuperscript{242} He stated that the original procedures were constitutionally deficient, but expressed no disagreement with the amended procedures subsequent to the Third Circuit's ruling.\textsuperscript{243} His two primary concerns were: 1) the focus should have been placed on the UROs, not the insurers, in determining the fairness of the procedures, and 2) the majority failed to discern whether the procedures were fair prior to or after the Third Circuit's ruling.\textsuperscript{244}

The Court's reversal in \textit{Sullivan} was based on the use of a disjointed state action analysis that led to an incorrect and unfair result. The Court looked at an individual state action test and discarded its entire value when all the elements of the test were not satisfied. The better course of action is to combine the state action indicators from each of the four tests to make a "totality of the circumstances" determination.

Justice Ginsburg's concurrence outlined the second major flaw with the decision.\textsuperscript{245} Once the Supreme Court failed to find state action, it did not have to reach the second part of the § 1983 inquiry, specifically, whether the termination of workers' compensation benefits constituted a protected property interest and what process inquiry was to be used to determine that issue. The Court's holding goes against the findings of the district court, the Third Circuit, and the Pennsylvania Supreme Court, three tribunals which properly found a protected property interest. In fact, the potential damage from the Court's ruling could seriously inhibit the development of innovative workers' compensation review mechanisms on the state level.

Further, the \textit{Sullivan} decision has serious ramifications for workers' compensation systems, utilization review programs, and injured workers nationwide. After the Third Circuit decision, the Pennsylvania Department of Labor and Industry incorporated changes mandated by the court in its utilization review program. After \textit{Sullivan}, what is the status of those changes? Will the Department of Labor and Industry, or the Pennsylvania General Assembly make any changes to remedy or prevent some of the backlash that may occur in the workers' compensation program? The \textit{Sullivan} decision seems to have created more questions than it answered.

\textsuperscript{242} \textit{Id.} at 64.  
\textsuperscript{243} \textit{Id.} at 64-65.  
\textsuperscript{244} \textit{Id.} at 62.  
\textsuperscript{245} \textit{See} Krotoszynski, \textit{supra} note 7, at 337.
IV. SULLIVAN UNDER THE META-ANALYSIS MICROSCOPE

Since the Supreme Court failed to find state action after applying several different state actor tests in isolation, substantive application of Professor Krotoszynski's "meta-analysis" approach to the private insurers' use of utilization review could effectively transform the insurers into state actors and establish a due process violation. The meta-analysis approach is simple. If the findings of any one of the four state action tests, by themselves, do not establish a ninety-five percent state action confidence rating, the findings of all four tests should be applied and the successful elements of each combined to see if the ninety-five percent threshold can be met.

In applying Professor Krotoszynski's meta-analytical approach to this legal quagmire, difficulties abound, i.e., how to quantify the findings of each analysis. The factors used in this analysis were drawn from a survey of the important Supreme Court cases utilizing the four State Action tests and factor values were assigned as follows:

1 = Factor strongly suggests state action
.5 = Factor mildly supports state action
0 = Factor provides no support for state action.

Although it is difficult to assign a quantitative value to any test or factor in such an analysis, this Note's purpose is to show the need for a synergy between the findings of the four tests that will produce a more balanced conclusion.

A. Public Function Analysis

Although the exclusive public function test has been narrowly interpreted in recent years, factors gained from previous applications of this test will be of value in a state action meta-analysis to Sullivan. Piecing together the fifty-plus years of "exclusive public function" caselaw, several questions/issues have emerged under which the Sullivan facts can be reviewed, namely:

246. Id. Krotoszynski's article applies meta-analysis to three tests, the exclusive government function test; the nexus test; and the symbiotic relationship test. Id. at 324-25. Based on other sources, another approach identifies the joint participation test, which is included in the meta-analysis of Sullivan. See generally, Schwartz & Kirklin, supra note 7, at 520.

247. See supra Section I.A.

248. Marsh v. State of Alabama, 326 U.S. 501, 506 (1946). As mentioned earlier, this is a very amorphous list and an even more puzzling determination.
• whether the activity is a public function
• whether the activity is delegated by the state to the private actor
• whether the activity is one which is under the exclusive prerogative of the state
• how the private entity functions within the system

Applying this issue framework to Sullivan, answers to two of the questions point strongly toward state action, one slightly for, and one against. The Third Circuit established that the ability to invoke a supersedeas was traditionally the function of the state, and through Act 44, the state delegated the power to invoke the suspension to the private parties. Next, the review and termination of benefits is not traditionally the exclusive prerogative of the state, but the termination cannot go forward without L&I determining whether the UR request is complete. Last, the private insurer’s role in the system does not point directly toward state action because the private insurer is merely given the opportunity to request utilization review.

Because the public function doctrine has been narrowly interpreted by the current Court, there is no state action using the test in isolation, but two of its factors strongly suggest state action and one factor mildly supports state action. These two and a half out of four favorable state action factors will be combined with the findings of similar reviews for the other three tests.

(Favorable %: 2.5 (1 + 1 + .5) out of 4 = 63% favorable rating)

249. Evans v. Newton, 382 U.S. 296, 299 (1966). It is important to note that in Flagg Bros. Inc. v. Brooks, the Supreme Court refused to express their view as to what exact scope of delegation would bring a private delegee under the regulation of the Fourteenth Amendment. 436 U.S. at 163-64.


252. Sullivan v. Barnett, 139 F.3d 158, 168 (3d Cir. 1998). The Supreme Court heavily relied on Jackson in the Sullivan decision, but a closer review of Jackson showed that the specific “public function” at issue (the provision of public utility service) was specifically rejected as not being a public function by the Pennsylvania Supreme Court in Girard Life Ins. Co. v. City of Philadelphia, 88 Pa. 393 (1879). No such ruling on a benefit termination was present in Sullivan.

253. See generally Strickland, supra note 7.


255. See generally, Strickland, supra note 7.

B. Symbiotic Relationship Analysis

Perhaps the most confusing (or unstructured) analysis involved in state action determinations is the symbiotic relationship test, which has been used successfully only once. Since its decision in Burton, the Supreme Court has never found state action based solely on this theory. By parsing some of the cases that apply this test, several characteristics might establish the degree of interdependence found sufficient in Burton. Such factors include:

- mutually-conferred benefits
- a close fiscal relationship
- a lessor/lessee relationship

Applied to this case, the only factor that points toward state action is the mutually-conferred benefit. Specifically, the fact that the state created the utilization review mechanism to alleviate burdensome costs, while outsourcing certain review functions previously provided by the public sector, points toward state action. This factor will only provide one favorable state action factor out of three and will be of marginal weight as a part of the overall state action meta-analysis of Sullivan.

(Favorable %: 1 of 3 = 33% favorable rating)

C. Close Nexus Analysis

Closely tied to the symbiotic relationship test is the close nexus test, where a private party can be deemed a state actor if a sufficiently close nexus exists between the two entities after a detailed inquiry. Some questions which may be asked in this determination are:

- Is there extensive state regulation?
- Is there monopoly status?
- Is the state specifically responsible for the contested conduct?
- Is the party a government contractor?

257. Id. at 724.
259. See Burton, 365 U.S. at 726.
261. See id. at 350.
262. See id. at 358.
263. See Blum, 457 U.S. at 1004.
• Is the state necessary in order to activate or allow the activity in question to commence?\textsuperscript{266}  
• Is there evidence of pervasive and substantial involvement by the state?\textsuperscript{267}  
• Does the state-created framework governing the conduct provide the private actor with a "mantle of authority?"\textsuperscript{268}

Unlike the first two tests, several factors in the nexus analysis point toward state action in \textit{Sullivan}. Two strongly suggest state action, two hint at it, and three do not support state action at all. First, the state is specifically responsible for the program, the General Assembly created it. Most importantly, the insurer cannot move forward without the authorization of the state. The state's role is to determine the completeness of the UR request. Although the state's action is characterized as solely administrative, the fact remains that the process cannot go forward without L&I's approval. Those factors that mildly suggest state action are the extensive regulation of workers' compensation systems by the Commonwealth of Pennsylvania and the state's pervasive and substantial involvement in the operation of the system.\textsuperscript{269}

Finally, there is no evidence of a state monopoly. The URO, not the insurer, acts like an independent contractor, and it would be difficult to show that the private insurer acts under a mantle of authority. Nevertheless, many of the close nexus factors are illustrated in \textit{Sullivan} and will augment the confidence rating established by the two prior tests.

(Favorable %: 3(1 + 1 + .5 + .5) of 7 = 43% favorable rating)

\textbf{D. Joint Participation Analysis}

The final test is probably the most flexible and easiest to apply. The joint participation test seeks to ascertain whether the state has mandated, coerced or encouraged the alleged wrongful conduct. Some of the factors that need to be considered are:

• Is the private party a willful participant in a joint activity with the state or its agents?\textsuperscript{270}  
• Is there a state official engaged in a conspirational sense in the forbidden activity?\textsuperscript{271}

\textsuperscript{266} Id.  
\textsuperscript{268} See supra Part II.  
- Can the state be seen as a joint venturer in the activity? 272
- Has the state encouraged or exercised coercive power over the activity? 273
- Do state officials overtly assist in the private use of state-created procedures? 274
- Is there significant state assistance? 275
- Did the state create the statutory scheme that led to the forbidden private conduct? 276
- Is the private actor the state’s agent? 277

Once again, the facts of Sullivan do not satisfy enough of the factors of this particular approach to establish state action; a significant amount are present to make a difference in the cumulative state-action confidence rating. Factors strongly indicating state action are: 1) the state was a willful participant in the scheme it created; 2) the state-created scheme shows that the state overtly encouraged and assisted private participation; and 3) the UR process cannot move forward without state monitoring and assistance at several stages in the process. Although, the private insurer is not an agent or joint venturer of the state, or involved in a conspiracy with state officials, there is enough state involvement to attribute state actor status to private insurers participating in the utilization review which ultimately leads to the supersedeas.

(Favorable %: $5 \left(1 + 1 + 1 + 1 + .5 + .5\right) = 8 = 63\%$ favorable rating)

**E. Combining the Four Tests**

When combined, the favorable ratings for the four tests are as follows:

- Public Function = 63%
- Symbiotic Relationship= 33%
- Close Nexus= 43%
- Joint Participation=63%
- TOTAL= 202%

Although a 202% favorable rating is difficult to comprehend, it is entirely

272. *See Blum*, 457 U.S. at 1004.
276. *Id.* at 193.
conceivable that a similar analysis could generate the ninety-five percent confidence rating needed to establish state action. In this case, two of the four tests had a confidence rating of over fifty percent, with nexus carrying several important factors and the remaining symbiosis test being the test least frequently used by the Court.

Although a precise quantification of the value of each factor would have to be done on a case-by-case basis, this basic analysis shows that the mechanical application of discrete tests is both ineffective and allows for too much uncertainty in state action decision-making. This uncertainty could be alleviated easily through a similar, yet more detailed meta-analysis of each state action case. As the previous section shows, each of the four tests had some hints of state action when applied to Sullivan, but more importantly, when combined, there was enough state action confidence to reach the ninety-five percent threshold advocated in Krotoszynski's article.

Under the Court's present approach, it can pick and choose the individual state action test(s), apply it (them) to the current set of facts, and completely discard any value the test may have on the decision if the case does not "pass." It is important to recognize that the much-needed synergy between the four approaches have their own, somewhat distinguishable requirements. When brought together, the findings of the four tests make much more sense out of the confusing statutory and regulatory scheme seen in Sullivan than do each of the individual approaches on their own.

**CONCLUSION**

State action continues to be a thorny subject, with the Supreme Court's decision in Sullivan failing to make the doctrine any clearer. The Court failed to see the bigger picture. Instead, it employed a narrow, parochial approach to the state action doctrine and reached a very unsettling conclusion. Its decision reinforces the need for the Court to look for a new, more predictable approach to these difficult problems.

In examining Sullivan and the development of the state action doctrine in Supreme Court caselaw, this Note reaches five conclusions, only one of which is positive. These conclusions are: 1) the entire system is confusing and ineffective; 2) there are several models which the Court can use (depending on the source, three or four options are available) and each

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278. *Id.* at 333.


280. *Id.*
model seems to assume its own prongs of each test; 3) there is a fair amount of overlap between the tests, with some tests being nearly identical; 4) there does not seem to be any synergy between the tests and 5) the Court continues to adhere to the admonition in Burton that all state action determinations need to be made in a case-by-case manner. (I think a sixth conclusion is that NONE of the cases fits neatly into any one of these tests!)

The use of meta-analysis can fix many, if not all of these flaws in the Court’s decision-making. First, the approach would allow each test to be used and evaluated on its merits, and those findings retained to be compiled with the results of other tests. Thus, each separate (or not-so-separate, as the case may be) test can build upon each other, developing synergy and creating a better understanding of the larger state action issue. Second, the Court could continue to make state action determinations on a case-by-case basis. Most importantly, meta-analysis could make the system less confusing by allowing a court to incorporate and adhere to the decisions of the past while utilizing several analytical options in a synergistic, not isolated manner. This approach could produce a less confusing and hopefully, more predictable analytical construct for state action determinations in the future.

This entire analysis has focused on the confusion that is characteristic of the Court’s state action jurisprudence. After Sullivan, neither the doctrine, nor the future role of utilization review in the workers’ compensation system, is any clearer.