

1979

State Action and the Public Function Doctrine: Are There Really Public Functions?

William A. Diamond
University of Richmond

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>

 Part of the [Public Law and Legal Theory Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

William A. Diamond, *State Action and the Public Function Doctrine: Are There Really Public Functions?*, 13 U. Rich. L. Rev. 579 (1979).
Available at: <http://scholarship.richmond.edu/lawreview/vol13/iss3/9>

This Comment is brought to you for free and open access by UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

STATE ACTION AND THE PUBLIC FUNCTION DOCTRINE: ARE THERE REALLY PUBLIC FUNCTIONS?

I. INTRODUCTION

*Flagg Bros., Inc., v. Brooks*¹ is the latest in a series of cases pertaining to the issue of state action. In that case, the Court decided that "dispute resolution" was not a public function² such that the actions of a private party must adhere to constitutional standards. Mr. Justice Rehnquist, in delivering the opinion of the Court, added that, when considering such functions as education, police and fire protection, and tax collection: "We express no view as to the extent, if any, to which a city or State might be free to delegate to private parties the performance of such functions and thereby avoid the strictures of the Fourteenth Amendment."³ It is the purpose of this comment to consider if, or under what circumstances, these or other functions would be classified as public functions so that the state action principle would apply.⁴

The state action principle is important because certain constitutional standards must be adhered to only by the states and their subdivisions.⁵ A litigant seeking to impose such standards on a private party must prove a relationship between the private party and the state so that the action of the private party may be attributed to the state itself. If proven, the action of the private party is said to be "state action" and the constitutional standards are imposed on such action.⁶

1. 436 U.S. 149 (1978). Respondent had been evicted from her apartment and appellant had been called to store her possessions. For failure to pay the storage charges, appellant notified respondent of its intention to sell her possessions as per New York Uniform Commercial Code § 7-210. Subsection (1) of that provision reads in part ". . . a warehouseman's lien may be enforced by public or private sale of the goods. . . ." *Id.* at 151. Respondent did not assert that appellant violated this statute.

2. *Id.* at 161.

3. *Id.* at 163-64. Mr. Justice Rehnquist refers in a footnote here to the case of *Griffin v. Maryland*, 378 U.S. 130 (1964), which he states does not apply. *Griffin* concerned the arrest of Negroes on private property for criminal trespass by an agent of the property who had been deputized by the local sheriff's department. Since the agent acted not under the authority of a private police department, but rather "under color of his authority as a deputy sheriff," the Court held that when "an individual is possessed of state authority and purports to act under that authority, his action is state action." *Id.* at 131, 135. The concept of the public function doctrine was thus inapplicable in *Griffin*.

4. There are other doctrines, not the subject of this comment, under which state action may be found. The inapplicability of the public function doctrine does not preclude a finding of state action for another reason. See *Flagg Bros., Inc. v. Brooks*, 436 U.S. at 164.

5. See L.H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1147 (1978).

6. *Id.* See also *Cooper v. Aaron*, 358 U.S. 1, 16-17 (1958).

II. THE PUBLIC FUNCTION DOCTRINE

A. Overview

Over the years several doctrines have evolved which categorize the kinds of situations under which state action may be found.⁷ This comment is concerned with only one of these doctrines, that of the public function. Though it may be difficult to determine in a given case which doctrine was the basis of the holding,⁸ the essence of the public function doctrine is that certain functions are public in nature, and that, even in the absence of any other reason for finding state action, a private party performing that function will be held to the constitutional standard.⁹ A significant problem, however, is that “[n]o satisfactory criteria exist to determine what is or is not inherently governmental for this purpose.”¹⁰ Recognizing this, various legal writers have sought to develop alternatives for the traditional ways in which the Supreme Court decides state action cases.¹¹ Without accepting or rejecting such alternatives, an attempt will be made here to formulate a basis for anticipating the Supreme Court’s application of the public function doctrine in various situations. This is not to suggest that the term “public function” shall be defined; rather, that the concept of “public function doctrine” may be examined, notwithstanding the absence of such a definition.

B. Historic Application

The public function doctrine was initially developed in *Marsh v. Alabama*,¹² a case which involved a town that was totally owned and operated by a private company.¹³ It was held that the constitutional standards of free speech could not be abridged by the company on the basis of private property rights.¹⁴ Since the company was performing all the normal munic-

7. See note 4 *supra*. These other doctrines may be expressed under such terms as “authorization and encouragement” or “nexus.” See *Flagg Bros., Inc. v. Brooks*, 436 U.S. at 164; *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) (a public utility is not subject to the state action principle merely because it is state regulated when the function is not a state obligation and the wrong complained of was not sufficiently connected to the state).

8. *Flagg Bros., Inc. v. Brooks*, 436 U.S. at 158.

9. *TRIBE*, *supra* note 5, at 1163.

10. *Id.*

11. J.E. NOWAK, R.D. ROTUNDA AND I.N. YOUNG, *CONSTITUTIONAL LAW* 473-75 (1978); *TRIBE*, at 1147-74; Thompson, *Piercing The Veil of State Action: The Revisionist Theory and a Mythical Application to Self-Help Repossession*, 1977 *WIS. L. REV.* 1

12. 326 U.S. 501 (1946).

13. *Id.* at 502.

14. *Id.* at 508-09.

ipal functions, it must be bound by the restrictions imposed on municipalities, and these superseded private property rights.¹⁵

In every other public function case to be decided by the Supreme Court, the issue was narrowed to the consideration of a single function, as opposed to the broad spectrum of powers held by the company in *Marsh*. Specifically, the election process¹⁶ and municipal parks¹⁷ were held to be controlled by the public function doctrine. Yet a public utility was not so controlled.¹⁸ There appears to be no rational basis for these decisions if only the function itself is considered.¹⁹ The Court itself has stated that the specific facts of the case must be considered,²⁰ but it is possible to anticipate future cases by analyzing the criteria applied by the Court in such cases.

C. *Criteria for Application of the Public Function Doctrine*

A specific test for the application of the public function doctrine has never been created by the Court,²¹ but two tests can be formulated from the statements made by the Court on various occasions.

The first test is created by considering the following limitations: 1) the private party is exercising powers traditionally and exclusively reserved to the state,²² 2) the power is traditionally associated with sovereignty,²³ 3) the power is one which the state itself is obligated to perform,²⁴ and 4) the power is an exclusive prerogative of the sovereign.²⁵

Though not appearing in all of these limitations, exclusivity is a necessity under this test, as stated in *Flagg Bros.*²⁶ The word itself is not defined in *Flagg Bros.* or other public function cases, but Mr. Justice Rehnquist indicates its meaning in *Flagg Bros.* when he states that "the proposed sale . . . is not the *only means* of resolving this purely private dispute."²⁷

15. *Id.* at 509.

16. *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932).

17. *Evans v. Newton*, 382 U.S. 296 (1966).

18. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

19. *See* TRIBE, *supra* note 5, at 1163.

20. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

21. *See* TRIBE, *supra* note 5, at 1148-49; NOWAK, *supra* note 11, at 456.

22. *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 352.

23. *Id.* at 353.

24. *Id.*

25. *Flagg Bros., Inc. v. Brooks*, 436 U.S. at 160. *See also* *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 353 (exclusive prerogative of the state).

26. *Flagg Bros., Inc. v. Brooks*, 436 U.S. at 158-59.

27. *Id.* at 160 (emphasis added).

For the most part, these limitations appear to be merely restatements of each other, each perhaps adding a further refinement. The "traditionally associated with sovereignty" limitation, is clearly incomplete by itself according to Mr. Justice Rehnquist.²⁸ Exclusivity must be added. The term "reserved" appears to be more limiting than "associated,"²⁹ but when the latter is read as "exclusively associated" the difference fades. "Prerogative" refers to an exclusive privilege,³⁰ and so merely paraphrases the other terms. As to any distinction between the terms "state" and "sovereign," it has already been held that states are sovereign, except as limited by the United States Constitution.³¹

The limitation that the state itself must be obligated to perform the function does add something new, although not inconsistent with the others. The other limitations state that *only* the state may perform the function. As a corollary, the state *must* perform the function if it is to be done at all. This limitation was the primary reason that no public function was found in *Jackson v. Metropolitan Edison Co.*, since the state in that case regulated public utilities but was under no obligation to perform those activities itself.³²

The sum of these limitations is the first test, which may be stated: the public function doctrine will apply if a private party performed a function which is traditionally, exclusively reserved to the state, and the state is obligated to perform that function.³³ *Flagg Bros.* did not discuss the second half of this test, but it was not necessary since exclusivity was found not to be present.³⁴

If this were the only test, the decision in *Evans v. Newton*³⁵ is not explained. In that case, a city was devised land to be used as a park for white persons only.³⁶ After building, operating and serving as trustee of the park for a number of years, the city asked the lower court to be relieved as

28. *Id.* at 158.

29. Compare "reserve" as having been set apart, and "associate" as connected in any of various ways. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1931 and 132 (1971).

30. BLACK'S LAW DICTIONARY 1345 (rev. 4th ed. 1968).

31. *Skiriotes v. Florida*, 313 U.S. 69, 77 (1941).

32. *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 353.

33. This will be referred to throughout this comment as the first test. Note particularly the use of the word "perform." A performer is the party acting, in this case acting in lieu of the government. A mere "consumer" of the function is thus not included. In addition, there is nothing in this test (or the subsequent test) to suggest that all actions of such a party are subject to the doctrine, for it is only those relating to performance of the function in question that are affected.

34. *Flagg Bros., Inc. v. Brooks*, 436 U.S. at 160.

35. 382 U.S. 296 (1966).

36. *Id.* at 297.

trustee because it could not comply with the discriminatory provisions of the will.³⁷ Private trustees were then appointed.³⁸ Although the record was unclear as to whether the city continued to maintain the park,³⁹ the Supreme Court held that the private trustees could not discriminate either.⁴⁰

In *Flagg Bros.*, Mr. Justice Rehnquist explains *Evans* by suggesting that the issue of exclusivity was not relevant there.⁴¹ Rather, he suggests, the fact that the city continued its maintenance of and concern for the facility implicated direct state activity and not the state action principle involving a private party.⁴² While reasonable on its face, this comment does not consider several important factors: 1) While the city may have continued its "maintenance and concern," this is not stated in the record,⁴³ 2) The Court in *Evans* made these statements:

Like the streets of the company town in *Marsh v. Alabama, supra*, the elective process of *Terry v. Adams, supra*, and the transit system of *Public Utilities Comm'n v. Pollak, supra*, the predominant character and purpose of this park are municipal.

Under the circumstances of this case, we cannot but conclude that the public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law.⁴⁴

This strongly suggests that the public function doctrine was being applied; and 3) In *Jackson*, the Court includes municipal parks as public functions, citing *Evans*.⁴⁵

If Mr. Justice Rehnquist is correct, then the only relevant limitations in *Evans* are that the city had formerly owned the facility and that it still provided maintenance and concern for it. That the facility is a park is irrelevant. Maintenance and concern are not defined. Conceivably, cutting the grass under contract and providing for police patrols could qualify. Only if maintenance and concern are equated with "control" does Mr. Justice Rehnquist's statement seem reasonable, and there is little basis for

37. *Id.* at 297-98.

38. *Id.* at 298.

39. *Id.* at 301, 304 (concurring opinion of Mr. Justice White).

40. *Id.* at 302.

41. *Flagg Bros., Inc. v. Brooks*, 436 U.S. at 159 n.8.

42. *Id.*

43. See note 39 *supra*.

44. *Evans v. Newton*, 382 U.S. at 302. Note, however, the reference to *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952) which, at 462, indicates it was decided on the "nexus" doctrine. This is reiterated in *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 352, and further demonstrates confusion as to which doctrine is being applied.

45. *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 352.

such equation in *Evans*.⁴⁶ To accept his statement is to expand the concept of state action beyond previous limits.⁴⁷

Rejecting his statement does not necessarily mean that *Evans* is good law. *Evans* essentially stated that where 1) there is a tradition of municipal control, 2) the tradition had become firmly established, and 3) the function is open to all persons, the public function doctrine applies.⁴⁸ Two cases, *Jackson* and *Flagg Bros.*, must be examined to see if they overrule *Evans* by implication.⁴⁹

Part of the test previously stated is that the state must be obligated to perform the function. This requirement was established in *Jackson*.⁵⁰ If the facts of *Jackson* are not distinguishable from *Evans*, then the requirement in *Jackson* should apply to *Evans*. In *Jackson*, the state had in fact not performed the function, certainly not exclusively.⁵¹ The *Jackson* Court clearly states that the "case would be quite a different one" if the function was "traditionally associated with sovereignty" and only then goes on to discuss the obligation to perform.⁵² *Evans*, involving a function that was actually performed, is thus threatened only on the basis of exclusivity.⁵³ But *Evans* was decided after several other public function doctrine cases, each of which met the exclusivity limitation.⁵⁴ If, as the *Jackson* Court stated, *Evans* was a public function case,⁵⁵ then either the exclusivity limitation did not apply, or exclusivity meant something different in *Evans*.

46. In *Evans v. Newton*, 382 U.S. at 301, the Court states it may be "assumed" that before the city relinquished its status as trustee it "swept, manicured, watered, patrolled, and maintained" the park. The Court then continues: "If the municipality remains entwined in the management or control of the park, it remains subject to the restraints of the Fourteenth Amendment . . ." (emphasis added). It is possible that the court was directly implying that such activities constitute management and control, but the mere provision of such services, to the extent that they are not routinely provided to private property owners, does not necessarily indicate who is paying for or has decision-making ability over such services.

47. If, for example, the city sold any property (not a park) and continued to perform any maintenance activities, as under a contract or lease agreement, the actions of the new owner as related to that property would be state action.

48. *Evans v. Newton*, 382 U.S. at 301.

49. Numerous cases since 1966 have referred to *Evans*, but it appears that only the two cases cited actually consider the issue of a park as a public function in such reference.

50. *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 353.

51. *Id.* at 351 n.8.

52. *Id.* at 353. The inference is that if the state in fact performed or, in the absence of actual performance at least had an obligation to perform, then the public utility would have been a public function. The obligation is not in addition to actual performance, but is in lieu of it.

53. "Tradition" is not in question, the *Evans* Court having decided that it applied in that case. 382 U.S. at 301.

54. *Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 326 U.S. 501 (1946).

55. *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 352.

The problem is that the word "exclusively" does not stand alone in the first test; it is connected to "reserved," or, alternatively, to "associated" or "prerogative." This means that only the state has the right to perform the function, absent a delegation. The words used by the *Evans* Court do not suggest that "reserved" or "associated" or "prerogative" apply. Rather, the *Evans* Court indicated that its concern was with the actual performance, rather than the right to perform.⁵⁶

Application of the word "exclusive" to the *Evans* decision is therefore not inappropriate, but there is exclusivity only in the sense of performance. Any private party may have the right to perform (i.e., operate a park), but where only the state or its subdivision actually performs, *Evans* suggests that the function may be subject to the public function doctrine.⁵⁷

To determine exactly when that doctrine will apply, the three *Evans* limitations must be examined. The first is that there is a tradition of municipal control.⁵⁸ As explained above, in light of *Jackson*, "control" must be understood to mean actual performance. Mere regulatory control is insufficient.⁵⁹

"Tradition" is a part of both the first and second *Evans* limitations; in the second instance, the tradition (of municipal control) must be firmly established.⁶⁰ In *Evans*, the city had operated the park for about fifty years.⁶¹ The *Evans* Court did not dwell on this point, however, and a more reasonable interpretation of "tradition" and "firmly established" is a subjective one. The question would be whose standards would apply. The basic issue is, of course, whether this is a public function, and the courts will ultimately decide the question. But, as a reference, and one that is reasonable in *Evans*, the persons who are users, or potential users, of the facility would determine the question.⁶² Restated, it is suggested that the

56. *Evans v. Newton*, 382 U.S. at 301.

57. It is not that *Evans* asserts the right of others to perform, but that *Evans* does not prohibit it. To hold otherwise would be inconsistent with the fact that parks are involved, and there exists no requirement, at least none suggested in *Evans*, that parks may only be operated by the state.

58. *Evans v. Newton*, 382 U.S. at 301.

59. *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 353, citing *Nebbia v. New York*, 291 U.S. 502 (1934).

60. *Evans v. Newton*, 382 U.S. at 301.

61. This is approximate, the date of acquisition not being stated. *Id.* at 297.

62. This reference is not stated, or even suggested, in *Evans*, but there must be some basis to determine when a function is "firmly established" as under municipal control. If all parks were considered, then there would never be a basis to so hold, since some are privately owned. So this one park must be the reference, and the issue would be whether *this* park was so established. But if this park was created just last year, would that be sufficient? The resolution is not a matter of law, but of fact, and to determine that fact a standard must be

public function doctrine would apply when, in the opinion of the court, the persons actually and potentially⁶³ served by the function commonly understand that the function is a public function, such understanding being shaped by the actual history of that particular function. Alternatively, is it reasonable to think that such persons would consider this to be a public function?

This is not the entire test of *Evans*; it also includes exclusivity and actual performance. In addition, there is the third *Evans* limitation: that the function is open to all persons.⁶⁴ This third limitation is also denoted by such catchwords as "municipal in nature,"⁶⁵ "serves the community,"⁶⁶ "public character"⁶⁷ and "public institution."⁶⁸ Interestingly, the *Evans* Court refers to fire and police departments as being similar in character.⁶⁹ There is no reference in *Evans* or elsewhere as to the limitations such phrases have, except possibly the previously discussed footnote in *Flagg Bros.*⁷⁰ As was there suggested, an overly broad reading of *Evans* could destroy the conceptual limits of state action. But not everything a state or municipality does is open to all persons or serves the community. Some government activities merely relate to the business of running a government and relate to service to the community only in the sense that it is a government, and not a business, that is performing. While it may be unwise to create an unbending rule on this subject, a rough guide might be whether a class of persons may benefit from or be affected by the function. "Class" is used because there are many functions which serve the community but have certain requirements which exclude some persons. Indeed, in *Evans*, not only non-whites but even white adult males could be excluded by the terms of the applicable Georgia law.⁷¹ The mere fact that white men could be excluded should not take the park out of the public function class, if it otherwise belongs there.⁷² By limiting the guide to those

established. *Evans* assumes that the control had been firmly established without specifying why. The attempt here is to suggest a basis for making that determination.

63. If only those *actually* served are to be considered, then the understanding of the non-whites who were denied access to the park in *Evans* would be irrelevant.

64. *Evans v. Newton*, 382 U.S. at 301 ("It is open to every white person, there being no selective element other than race.").

65. *Id.*

66. *Id.* at 302.

67. *Id.*

68. *Id.*

69. *Id.*

70. See note 41 *supra*.

71. *Evans v. Newton*, 382 U.S. at 305 n.1 and accompanying text.

72. Other examples might be a public library which restricts use to those who pay a fee; a public school which limits enrollment by grades, tests scores, etc.

functions which benefit or affect the class, mere housekeeping chores of the government would be eliminated, except in the unusual circumstance that a class of persons actually was affected. "Class" is restricted to the concept of a named group of persons, and a government action benefitting or affecting only certain designated persons would not apply.⁷³

Thus, the second test, announced in *Evans* and modified somewhat by *Jackson* is: the public function doctrine will apply if a function was actually performed by the state or its subdivision and not performed within that state or subdivision by a private party, if the function benefited or affected a class of persons within the state or subdivision, and if the persons benefitted or affected, whether actually or potentially, perceived the function to be a public function.⁷⁴

Having thus stated the test, it yet remains unresolved that it was not overruled by *Flagg Bros. Evans* was not explicitly overruled, but this may be because of the *Flagg Bros.* Court's interpretation of *Evans*.⁷⁵ Implicitly, there are two indications that *Evans* was not overruled. First, the opinion specifically states that *Gilmore v. City of Montgomery* is not overruled.⁷⁶ While it is arguable that *Gilmore* was a public function case,⁷⁷ the *Flagg Bros.* Court indicates that it so interprets it.⁷⁸ *Gilmore* concerned exclusive use of public parks by segregated private schools, the park being operated by the YMCA.⁷⁹ While the user of the park was an educational institution,⁸⁰ the function actually involved was a park, not education.⁸¹ Consequently,

73. A private bill naming an individual or a government contract with a single named party would not constitute a "class," but that bill or contract could fall within the doctrine if a class of persons not a party to the bill or contract was affected by it.

74. This will be referred to as the second test, or the *Evans* test. It may be suggested that this second test, if good law, totally supplants the first test. While the second test may be less restrictive in many situations, this is not always true. Under the second test, a defendant private party may escape imposition of the doctrine by showing that other private parties had previously performed that same function within the jurisdiction of that government. Under the first test, since the function is the prerogative of the state and reserved to it, the mere fact that others had performed the function and thus usurped state power would be immaterial.

75. See note 41 *supra*.

76. *Flagg Bros., Inc. v. Brooks*, 436 U.S. at 163.

77. "[H]ere, as in *Burton*, the question of the existence of state action centers in the extent of the city's involvement in discriminatory actions by private agencies using public facilities . . ." making the city a "joint participant." *Gilmore v. City of Montgomery*, 417 U.S. 556, 573 (1974). This is essentially the "nexus" doctrine as opposed to the public function doctrine.

78. Section III of *Flagg Bros., Inc. v. Brooks*, 436 U.S. at 157-64, is exclusively concerned with consideration of the public function doctrine.

79. *Gilmore v. City of Montgomery*, 417 U.S. at 560, 566.

80. *Id.* at 565-66.

81. *Id.*

in *Flagg Bros.*, *Gilmore* is considered a public function case. and the function in question was a park, and parks cannot meet the strict first test stated earlier, as formulated in *Jackson* and repeated in *Flagg Bros.* Thus, if parks may be a public function, the only case to so hold is *Evans*, and that must still apply.⁸² The second indication that *Flagg Bros.* did not overrule *Evans* is that the *Flagg Bros.* decision would not have been different under *Evans*. The primary reason for this result is that the second test's exclusivity rule is not met. Traditionally, private parties could resolve disputes without state action.⁸³ Considering only the specific type of dispute in question does not change this. At most, the available remedy might differ if the state was involved,⁸⁴ but this does not change the nature of the function. Even as to remedies, the parties might have reached the same result in the absence of state involvement.⁸⁵ Additionally, although only as an evidentiary matter, the complainant in *Flagg Bros.* had apparently not proven that the necessary perception existed, as required in the second test.⁸⁶

III. APPLICATION OF THE TESTS

A. Prior Cases

One of the basic problems with understanding the public function doctrine has been the relationship between the doctrine and the function itself.⁸⁷ Under the two tests above, however, it is evident that a given function may or may not cause invocation of the doctrine depending on several variables.

In each case in which the public function doctrine was applied, there was a qualification made to the assertion that the case was decided on a public function basis. In *Marsh*, there was a balancing of the rights of the parties.⁸⁸ In *Nixon v. Condon*, the Court left unresolved the right of the Democratic Party members to set membership standards.⁸⁹ In *Terry v. Adams*,

82. If *Gilmore* is not a public function case, then this argument does not strictly apply; but since the opinion in *Flagg Bros.* viewed *Gilmore* along such lines, it does weigh upon the intent of *Flagg Bros.* to overrule *Evans*.

83. *Flagg Bros., Inc. v. Brooks*, 436 U.S. at 160-61.

84. *Id.* at 162 n.12.

85. *Id.*

86. At most, the respondents merely assert that they perceived dispute resolution as a public function. *Id.* at 157.

87. Compare, for example, "our cases make it clear that the conduct of the elections themselves is an exclusively public function" with "[t]he doctrine . . . encompasses only state-regulated elections or elections conducted by organizations which in practice produce 'the uncontested choice of public officials'." *Id.* at 158.

88. *Marsh v. Alabama*, 326 U.S. at 509.

the Court emphasized that the winner of the Jaybird primary was virtually assured of winning the actual election.⁹⁰ In *Evans*, there is a suggestion that state action is involved because the courts are enforcing a discriminatory provision.⁹¹ If company towns, elections and parks were always public functions subject to constitutional standards, all of these things would be totally irrelevant. Whether or not such points are irrelevant can best be seen by considering these cases under the two public function doctrine tests established above.

Marsh clearly falls under the first test, since the overall operation of a municipal government is traditionally and exclusively reserved to the state, and the state, through its subdivision, is obligated to and does in fact exercise such operations.

Nixon v. Condon, however, was decided on the basis of a grant of power by the state to the Executive Committee of the Democratic Party.⁹² The Committee would otherwise not have had such power.⁹³ The first test requires that the function be traditionally, exclusively reserved to the state. Yet the *Nixon* Court conceded that the function under dispute was reserved not to the state, but to the party members meeting at convention.⁹⁴ The second test likewise would not apply because the requirement that the function not be performed by a private party cannot be met, assuming that at some prior time the party members had in fact exercised their powers.⁹⁵ Under other state action doctrines, this case may have been properly decided, but it is not a public function doctrine case. Consider, though, that this could have been a public function doctrine case if the Court had not relied on the statutory grant of power or left unresolved the right of the members in convention to discriminate.⁹⁶

Terry considered a pre-primary system which determined the results of the actual election.⁹⁷ If the Jaybirds in *Terry* had conducted the formal election, the doctrine would apply because of the first test: tradition, exclusivity, reserved to the state, and state obligation. Since the result of the Jaybird primary was, in effect, to determine the election, the first test

89. 286 U.S. at 84. This issue was resolved in *Smith v. Allwright*, 321 U.S. 649 (1944).

90. 345 U.S. at 469.

91. *Evans v. Newton*, 382 U.S. at 302.

92. 286 U.S. at 85, 89.

93. *Id.* at 88.

94. *Id.* at 84.

95. Regardless of whether the party members had specifically acted in convention to prohibit non-whites from joining or voting in primaries, it is not unreasonable to assume that the members had made, at some time, rules relating to membership or voting requirements.

96. See *Smith v. Allwright*, 321 U.S. 649 (1944).

97. *Terry v. Adams*, 345 U.S. at 469-70.

would apply for the same reasons. But *Terry* leaves open the question of infringements which do not actually affect the right to vote. If the conduct of the pre-primaries themselves is a state function meeting either test, then it makes no difference that the results of the pre-primary do not conclusively determine the outcome of the actual election. The public function doctrine will apply. But where the pre-primaries are not public functions under either of the two tests, mere regulation by the state is insufficient, and the doctrine will not apply except when the pre-primary is determinative of the actual election.⁹⁸

In *Evans*, even if the function is limited to the one park in question, the first test does not apply because of the lack of any state prerogative. The second test does apply because: 1) the city had performed; 2) only the city had operated the park; 3) it served the community; and 4) there was cause to believe that people regarded the park as a public function. The second test does not require that the city continue to maintain an interest in the park once all of the test's elements have been met.⁹⁹

B. *Application of the Tests to Education, Fire and Police Protection and Tax Collection*¹⁰⁰

1. Education

As a general rule, education lacks exclusivity and would meet neither

98. In *Smith v. Allwright*, 321 U.S. 649 (1944), the Court held that non-whites could not be barred from Democratic primaries. The Court indicated two explanations for its opinion: 1) that the conduct of the primaries was a function of the state and the Democrats were acting under delegated power (public function doctrine); or 2) that primaries were subject to state regulation and an absence of regulations on this particular topic was deliberate (authorization and encouragement).

99. Under both tests, exclusive performance by the state precludes, in fact if not in law, performance by private parties. If the public function issue is to be raised at all, a private party must actually perform the function at some point. Under the first test, any such performance is sufficient to invoke the doctrine if only the state had the right to perform. Under the second test, however, the question is whether such performance *invokes* the doctrine on the one hand, or invalidates it (on the basis of non-exclusive performance) on the other. Although the facts of *Evans* do not suggest an answer, altering those facts somewhat might suggest one approach. Assume all the facts of *Evans*, except that suit was not brought until ten years after the private trustees took control of the park. The relevancy of the second test has not altered, except that the "common understanding" requirement *may* no longer be present. It is suggested that this is the key: that once the requirements of the second test are met, they continue to be met notwithstanding private performance, so long as the common understanding that it is a public function still exists. As a practical matter, the more time that has elapsed since private performance began, or the greater the number of private performers, the more difficult it will be to demonstrate such a common understanding.

100. The following are hypothetical situations. As noted by Mr. Justice Rehnquist, *Flagg Bros., Inc. v. Brooks*, 436 U.S. at 163 (including n. 14), the Supreme Court has not considered

test.¹⁰¹ However, if a specific school, or a specific form of education, could meet the narrower view of exclusivity in the second (*Evans*) test, then the public function doctrine would apply if the other parts of that test were also met. If only the state had operated medical schools and it was regarded as a public function, a new private medical school would be held to the constitutional standards. Similarly, if a city operated the only vocational schools, but a nearby city had private vocational schools, arguably the local citizens might not regard that activity as a public function.

2. Police

General police functions are actually performed by virtually every state and/or local government, and in most cases both tests would be satisfied; but not all potential police functions are performed by all police departments. The question would be whether a particular police function has been exclusively performed for the citizens of an area by any public police department. If an area had never been served by any public agency performing police functions, then a private police department, even if regulated, would not be subject to the public function doctrine. If there had been such public agency provision, and the public served considered it to be a public function prior to the time the private party began performing, then the public function doctrine would apply.

3. Fire Protection

Fire departments do not exist everywhere, and there is no state agency that would provide most of the services associated with them. As a result, it is less likely that the doctrine will be applied to fire protection than to police functions. Where fire department functions are performed by the state or its subdivision, however, the result would be the same as with police functions. A volunteer fire department would not be subject to the doctrine, even if regulated¹⁰² and/or subsidized¹⁰³ by a public body, as long as such function had not previously been performed by the municipality

any cases involving these functions, nor has the author located lower court decisions relating to such functions in this context.

101. Education also fails the prerogative aspect of the first test, and only in rare circumstances would any facet of education meet this aspect. Thus, the second test would be the more likely means of applying the public function doctrine, if at all.

102. *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 353, 357.

103. "The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or services at all from the State. . . ." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972). However, depending on the nature of the state aid, another (most likely the "nexus") doctrine of state action may be invoked. See *Gilmore v. City of Montgomery*, 417 U.S. at 574.

and the persons served had not regarded it as a public function before the volunteer fire department was created. The public function doctrine would also not apply to a particular function, such as a rescue squad, even though there was a public fire department if it had never operated a rescue squad.

4. Tax Collection

Tax collection is a function which falls under the first test, since it is a function traditionally associated with the state, only the state has the right to levy taxes, and the state does in fact collect taxes. Thus, a private agency which purchased delinquent tax accounts at a discount would be subject to the public function doctrine when it attempted to collect such accounts. Notwithstanding the fact that the relationship between the private agency and the state is merely contractual, all rights the private party has against the delinquent taxpayer arise because the private party is standing in place of the state. The private party is collecting not merely a debt, but a debt which only the state or its delegate may collect.¹⁰⁴

The collection of sales taxes by a merchant is another example. As both tests indicate, the action complained of must result from the performance of the function which is subject to the doctrine.¹⁰⁵ An act by a merchant would invoke the public function doctrine only if such act could be directly related to the collection of the sales tax. Thus, the doctrine would not apply to merely refusing to serve a customer, but would apply to a dispute concerning the payment of the sales tax.

IV. CONCLUSION

The application of the public function doctrine need not be limited to only a few functions, but a particular function will not result in the invocation of the doctrine under all circumstances. The two tests described above are not necessarily desirable, but they do give some indication of when the Supreme Court will apply the doctrine to a given situation.

William A. Diamond

104. Potentially, at least, this may be an example of a function which meets the first but not the second test. The contract between the state and the collection agency would fit the second test only if it affected a class of persons. Arguably, however, it would affect certain named persons (the delinquent taxpayers) but not a class as such. See note 73 *supra*.

105. See note 33 *supra*.