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State Action and Public Utilities - Jackson v. Metropolitan Edison Co.

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STATE ACTION AND PUBLIC UTILITIES— *JACKSON v. METROPOLITAN EDISON CO.*

In *Jackson v. Metropolitan Edison Co.*[1] the United States Supreme Court effectively immunized public utilities from constitutional responsibility by holding that the termination of electric service by a privately owned, heavily regulated utility company is not action by the state within the meaning of the fourteenth amendment.[2] Despite the existence of a partial monopoly and approval by a state agency of the utility's termination procedure, no state action was found.[3]

The petitioner Jackson, a welfare recipient, was a utility customer of Metropolitan Edison Co. in York, Pennsylvania. Her service was terminated without notice because of allegedly delinquent payments. Filing suit under the Civil Rights Act,[4] Ms. Jackson sued for damages and an injunction ordering Metropolitan Edison to provide power to her residence until she had been afforded notice, hearing, and an opportunity to pay any delinquent amounts.

The district court dismissed the plaintiff's petition for want of subject matter jurisdiction, holding that the defendant did not act under color of state law.[5] The United States Court of Appeals for the Third Circuit af-

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1. 95 S. Ct. 449 (1974).

2. Civil Rights Act, 42 U.S.C. §§ 1981, 1982 and 1985 (1970) may still provide methods for obtaining certain constitutional rights from utility companies. *See also* note 116 *infra.*

3. 95 S. Ct. at 457. While not articulating the *Evans v. Newton* test, the Court found that the conduct of Metropolitan Edison was not "so entwined with governmental policies or so impregnated with a governmental character" as to bring the company within the scope of the fourteenth amendment. Evans v. Newton, 382 U.S. 296, 299 (1966).

4. Civil Rights Act, 42 U.S.C. § 1983 (1970) provides:

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

5. 348 F. Supp. 954 (M.D. Pa. 1972). It is interesting to note that in relating the procedural history, Justice Rehnquist states that the action was dismissed because the termination "did not constitute state action." 95 S. Ct. at 452. This evidences the generally accepted proposition that the adequacy of color of law is measured by

firmed the order dismissing the complaint.[6] They held there was no state action since "the action of the company in terminating the service . . . was taken pursuant to its own regulations and using its own personnel, without entering onto the customer's private property, without utilizing any state statute or regulations. . . ."[7]

By granting certiorari in *Jackson*, the Supreme Court was presented with the opportunity to clarify several problem areas in the law. These include: (1) the continued viability of the state action doctrine; (2) the function of state action in connection with procedural due process; (3) alternatives to the state action analysis for due process questions; and (4) the significance of the monopolists' relation to both state action and procedural due process. The Court failed to examine these issues. Instead, it framed its conclusions in terms of state action standards developed in the equal protection area. These standards were given novel interpretations which severely undercut existing state action frameworks.[8]

This Comment will examine the use of traditional state action standards and their application in *Jackson* as well as discuss whether such standards are actually applicable in due process areas, particularly where the concern lies with state-granted monopolies such as public utilities. It will also suggest that the Court demands a greater degree of state involvement to find state action for procedural due process purposes than it does when racial discrimination is involved.

USE OF TRADITIONAL STATE ACTION STANDARDS

Perhaps because the state action doctrine is continually maligned as being ill-defined and indeterminate, it has never found itself wanting for commentators. Still, its meaning is undetermined.[9] Section one of the

state action standards. *See* United States v. Price, 383 U.S. 787, 794 n.7 (1966) which establishes the equivalency of the terms. *But cf.* Lavoie v. Bigwood, 457 F.2d 7, 15 (1st Cir. 1972) where the court, discussing Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) observes: "[B]oth Justice Harlan for the majority, at 171, (by implication), and Justice Brennan, in dissent, at 210, indicated that at least in some cases, 'under color of' law requires more than 'state action.' "

6. 483 F.2d 754 (3d Cir. 1973).

7. *Id.* at 758.

8. 95 S. Ct. at 459 (Douglas, J., dissenting).

9. In Terry v. Adams, 345 U.S. 461, 475 (1953) state action is explained by Justice Frankfurter, one of the most precise jurists of all time, as a notion requiring that "somewhere, somehow, to some extent, there be an infusion of conduct by officials panoplied with state power." *See also* HORAN, *Law and Social Change: The Dynamics of the "State Action" Doctrine*, 17 J. PUB. L. 258, 260 (1968), where the author describes what state action means today.

[It] is at best a matter ofconjecture; the reluctance of the Supreme Court to

fourteenth amendment is a restrictive clause;[10] both on its face and through interpretation it prohibits the government from indulging in public discrimination or misdeeds violative of due process. When a state, through an agent or official, deprives an individual of guaranteed rights, that individual is clearly protected by the amendment.[11] Problems arise, however, when an organization, other than the state, is involved in the deprivation of protected rights. Whether there has been a violation of the fourteenth amendment will depend on the type and form of state activity involved.

If the court determines that the state has significantly involved itself, it decrees that state action exists and the question of the violation of constitutional rights can be considered.[12] If, however, as in *Jackson*, the state's involvement is less than sufficient, the entity is free to commit what would otherwise constitute unconstitutional acts.

State action is a concept which has grown in different shapes and forms since its beginning in the *Civil Rights Cases*.[13] Those decisions, which have established that only state activity is limited by the fourteenth amendment, have become the bedrock upon which the court has been struggling. In its struggle, the Court has described the state action doctrine under four or five main rubrics, all of which stem from two basic analyses: either (1) the private entity assumes powers or functions comparable to that of the state, or (2) the government subtly or directly infiltrates the private activity to a considerable extent.

A finding of state action resolves only the first part of a two-part inquiry into the constitutionality of an action. It does not, per se, mandate a finding that a given act violates the fourteenth amendment; it merely allows for examination of that question.

A. The Public Function Theory

Public nature, public function, and functional equivalent are labels given to the public function theory. Where such a title is appropriate, the private activity becomes that of the state for fourteenth amendment

provide even an approximate operational definition of the term differs only in degree from its general unwillingness to examine the state action problem at all.

10. U.S. Const. amend. XIV, § 1 provides in part: "[N]or shall any state deprive any person of life, liberty, or properth, without due process of law. . . ."

11. Williams v. United States, 341 U.S. 97 (1951); Screws v. United States, 325 U.S. 91 (1945). Both were brought under 18 U.S.C. § 242, the criminal counterpart of § 1983.

12. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

13. 109 U.S. 3 (1883).

purposes. Exactly what makes an activity public is open to interpretation. Usually no direct government action is involved. The theory is that in some form the private entity has assumed the equivalent of government powers because it possesses the authority to deprive a general segment of the public of rights protected by the Constitution.[14]

The first case to adopt this concept was *Marsh v. Alabama*,[15] in which a company-owned town refused to permit a Jehovah's Witness to distribute literature on a street corner. The Court held that since the privately owned town did not functionally differ from any other town, the private managers could not stifle first amendment rights.[16]

The theory was subsequently reaffirmed in *Terry v. Adams*,[17] the most important of those cases now known as the "white primary" cases.[18] A private organization, the Jaybird Democratic Organization, had controlled county politics through their own pre-primaries for sixty years and had continually discriminated against blacks. Since the Jaybird primaries had become an "integral part, indeed the only effective part, of the elective process,"[19] the Court reasoned that the position of the organization was virtually indistinguishable from the powers which the state had. Therefore, it was subject to the same limitations as the state.[20]

In *Amalgamated Food Employees v. Logan Valley Plaza*,[21] the Supreme Court again dealt with a private entity which had assumed a public function. As in *Marsh*, first amendment freedoms were being protected. The Court required a private shopping mall to allow picketing on its premises because it was open to the public and had effectively taken the place of the town square.[22] In *Evans v. Newton*,[23] the Court refused to allow

14. Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 691 (1974).

15. 326 U.S. 501 (1946).

16. *Marsh* is noted perpetually for the public function test. It is also important because state action was found for first amendment purposes. This may have been the first time state action was found outside of the area of racial discrimination.

17. 345 U.S. 461 (1953).

18. Smith v. Allright, 321 U.S. 649 (1944); United States v. Classic, 313 U.S. 299 (1941); Grovey v. Townsend, 295 U.S. 45 (1935), *overruled* 321 U.S. 649; Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927).

19. 345 U.S. at 469.

20. *Id.* at 469-70.

21. 391 U.S. 308 (1968).

22. *But see* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) where a new analysis of this case was established. Picketers are allowed only where their action is directly related to activities in the mall and no alternative area exists to effect their purposes. The decision changed the emphasis of the analysis from the role of the place alone, to the content of the speech and its connection with the place in which it was spoken.

segregation of a privately owned park. The land for the park was granted in a trust which required the park managers to use it exclusively for white people. Finding a violation of the fourteenth amendment, despite an absence of direct governmental involvement, the Court stated, "conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."[24]

These cases focus on the nature of the activity rather than on actual intrusion of the state into private affairs. The chief characteristic of all the public function cases is not only the traditional assocation of the activity with the state, but also its performance of important services for the benefit of the public.

B. Totality of Circumstances: Significant Involvement

1. Joint Participation

The focus of the second theory of state action is on the interrelation between the state and the private actors rather than on the function performed. This is known as "joint participation,"[25] "sum of the indicia,"[26] or the "symbiotic relation."[27] In these situations the court determines whether "the sum of various indicia of state participation in an enterprise or institution are [*sic*] a sufficient basis"[28] for the finding of state action.

The classic case illustrating this theory is *Burton v. Wilmington Parking Authority*,[29] in which the defendant Authority leased a building to the Eagle Coffee Shoppe, a restaurant which refused to serve the plaintiff because of his race. In reversing the Supreme Court of Delaware's finding that the Eagle was a private entity not subject to constitutional limitations, the Supreme Court scrutinized the government's ownership of the

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See also Diamond v. Bland, 11 Cal. 3d 331, 521 P.2d 460, 113 Cal. Rptr. 468 (1974) where the court, following *Lloyd*, decided property interests outweighed first amendment rights.

23. 382 U.S. 296 (1966).

24. *Id.* at 299. *But see* Evans v. Abney, 396 U.S. 435 (1970) where the Court held the trust from which the park was created invalid, since the trust doctrine of *cy pres* was inapplicable.

25. Note: *Constitutional Safeguards for Public Utility Consumers: Power to the People*, 48 N.Y.U.L. Rev. 493, 508 (1973).

26. Note, *Developments in the Law: Academic Freedom*, 81 HARV. L. REV. 1045 (1968).

27. R. TURKINGTON & J. SHAMAN, CASES AND MATERIALS ON THE CONSTITUTIONAL PROCESS, 585 (1974).

28. *See* Note, *supra* note 26, at 1057.

29. 365 U.S. 715 (1961).

land on which the restaurant stood, and the government powers and functions given to the Authority-lessor. It decided that these features, in the aggregate, indicated "that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn."[30] Furthermore, the state "so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity. . . ."[31]

2. Endorsement, Encouragement and Support by the State

Reitman v. Mulkey,[32] which held unconstitutional article 1, section 26 of the California Constitution,[33] built on the dicta of *Burton* which suggested that where the prestige of the state is lent to an activity, such activity becomes that of the state. Thus *Reitman* forbids private discrimination endorsed by the state through a constitutional amendment.[34]

Where legislation converts private action into state action, sufficient involvement has been found . In *Hall v. Garson*,[35] the court said that where a private individual acted pursuant to statutory authority, giving a landlord a lien on the tenant's property and allowing him to enter the tenant's premises to obtain items, "the action taken, the entry into another's home . . . was an act that possesses many, if not all, of the characteristics of an act of the state."[36]

The cases resulting from the litigation under the repossession and disposition statutes, Uniform Commercial Code §§ 9-503 and 9-504, evidence the unsettled definition of state action.[37] In *Adams v. Southern*

30. *Id.* at 724.

31. *Id.* at 725.

32. 387 U.S. 369 (1967).

33. Article I, § 26 provides in part:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

The ratification of this amendment reversed existing state laws which prohibited discrimination in the sale of residential real estate.

34. *See also* Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948).

35. 430 F.2d 430 (5th Cir. 1970).

36. *Id.* at 439. *Cf.* Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973) and Collins v. Viceroy Hotel Corp., 338 F. Supp. 390 (N.D. Ill. 1972).

37. An excellent article on the subject is Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 46 S. CAL. L. REV. 1003 (1973). Also consider Male v. Crossroads Assoc., 469 F.2d

California First National Bank,[38] the court found state involvement in a repossession case insufficient to invoke procedural due process rights. The court held that codification of existing law involving prejudgment self-help, where the state had no intent to authorize violation of the fourteenth amendment, and which did not deal with racial discrimination, was not sufficient state action.[39]

The comparison of *Reitman* with the repossession cases noted above demonstrates the double standard subscribed to in *Jackson*. That is, when the constitutional injury lies in the equal protection sphere, courts have been eager to find the state involvement significant. Where due process questions are raised, however, state action has not readily been found.[40]

3. *Government Control Theory*

A final theory of state action is the government control theory. Licensing or regulation,[41] without any other state intrusion, would be insufficient state involvement to invoke any constitutional rights.[42] Usually, however, regulation is accompanied by other forms of government control such as state creation of a monopoly or state granted franchises.

The first significant case in the area of government control was *Public Utilities Commission v. Pollak*.[43] This case concerned the broadcast of radio programs in the public street-railway of the District of Columbia. The Court, on finding a sufficient nexus between the government and the transit system determined that there was federal action, without finding a violation of first amendment rights. The decision emphasized the regulatory power exercised by the Public Utilities Commission, which had been authorized by Congress, and which had explicitly approved the challenged activities only after a lengthy investigation. It specifically disclaimed reliance on the congressionally granted franchise and considered only the

616 (2d Cir. 1972) and Colon v. Tompkins Square Neighbors, Inc., 294 F. Supp. 134 (S.D.N.Y. 1968).

38. 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 95 S. Ct. 325 (1974).

39. *Accord*, Gibbs v. Titelman, 502 F.2d 1107 (3d Cir. 1974). *Contra*, Cockerel v. Caldwell, 378 F. Supp. 491 (W.D. Ky. 1974).

40. Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973); Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1970); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968); Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968). *But see* Jackson v. Statler Found., 496 F.2d 623 (2d Cir. 1974); Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964); Simkins v. Moses H. Cone Mem. Hosp., 323 F.2d 959 (4th Cir. 1963).

41. Moose Lodge v. Irvis, 407 U.S. 163 (1972).

42. *See* Note, *supra* 14, at 684.

43. 343 U.S. 451 (1952).

regulatory aspects of the case.[44] *Pollak* seemed to establish a means to find governmental action where the agency specifically approved a utility's challenged conduct.

Another form of regulation, and certainly of control, is the state's granting of monopoly power to a private entity. By this government granted restrictive device, the grantee's powers are enormously enhanced. What results is a closely woven amalgam of state and private business.[45] Before *Jackson*, some courts had used the state-awarded monopoly as a basis for a finding of state action.[46] The view that constitutional obligation should attach where state-granted monopoly power exists follows precisely from the other theories of state action, specifically that of private assumption of government powers.

In *Moose Lodge v. Irvis*,[47] the Court specifically veered away from the monopoly issue, stating that the factual situation "falls far short of conferring upon club licencees a monopoly in the dispensing of liquor in any given municipality. . . ."[48]

The two theories discussed, the public function theory and the totality of circumstances theory, overlap at several points and are often used in conjunction with each other. Nonetheless they are meant to serve as guidelines in the discussion of state action.

PUBLIC UTILITIES AS STATE ACTORS

Several of the state action models described in the preceding section are applicable to public utilities,[49] even with the recent limitation on the public

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44. *Id.* at 462.

45. *See* Lavoie v. Bigwood, 457 F.2d 7 (1st Cir. 1972) involving judicial recognition of governmental obligations which accrue when the government places monopoly status in private hands. Here, as a result of a city zoning ordinance, the defendant owned the only mobile home park in the area. The Court held that therefore the tenants' first amendment rights of association could not be infringed by the owner. *See also* Lathrop v. Donohue, 367 U.S. 820 (1961); Railway Employes Dept. v. Hanson, 351 U.S. 225 (1956).

46. Palmer v. Columbia Gas of Ohio, Inc., 479 F.2d 153, 164-65 (6th Cir. 1973); Ihrke v. Northern States Power Co., 459 F.2d 566, 570 (8th Cir. 1972), *vacated as moot*, 409 U.S. 815 (1972); Bronson v. Consolidated Ed. Co., 350 F. Supp. 443, 446 (S.D.N.Y. 1972); Stanford v. Gas Service Co., 346 F. Supp. 717, 722 (D. Kan. 1972). *Contra*, Martin v. Pacific Nw. Bell Tel. Co., 441 F.2d 1116, 1118 (9th Cir. 1971), *cert. denied*, 404 U.S. 873 (1971).

47. 407 U.S. 163 (1972).

48. *Id.* at 177.

49. The state action problem does not exist in all utility situations because the utilities are part of the state or municipal government and are therefore state actors. The only issue then is exclusively whether there is a property interest for due process

function theory.[50] The *Marsh* and *Terry* cases are still relevant where a private firm obtains powers which the government alone holds. For example, most state statutes governing public utilities allow eminent domain rights and entry by employees onto private property. To the customer of a public utility, it seems that the company holds many of the powers of the government. Vehemently dissenting in *Lucas v. Wisconsin Electric Company*,[51] Judge Sprecher said:

> Not only is the defendant electric company in this case "accessible to and freely used by the public in general;" not only are its "predominant characteristic and purpose . . . municipal." Wisconsin citizens are actually compelled to use its facilities. . . . It is difficult to imagine a more thoroughly state-integrated government-substitute than a public utility. . . .[52]

Historically, it may be added that public utilities have always been considered public callings, a term used to include those occupations which provide goods or services used by the entire public. These public callings, because of their potential for causing great harm, are regulated by the state.[53]

The joint participation theory is equally applicable to public utilities. The standard criteria, enunciated in *Burton v. Wilmington Parking Authority*,[54] for determining the collusive action is whether, after analysing all the facts, "the nonobvious involvement of the State in private conduct [can] be attributed its true significance."[55] This standard intentionally allows for judicial discretion.

Before *Jackson* closed the issue, several lower courts had found state action through the sum of extensive regulation, monopoly position and other powers, and had demanded constitutional responsibility from the companies.[56] For example, the Sixth Circuit stated, "Virtually every aspect of this Company's operations are subject to the dictates of state statute or to the regulation of the Public Utility Commission."[57]

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purposes. *See* Davis v. Weir, 328 F. Supp. 317 (N.D. Ga. 1971); Lamb v. Hamblin, 57 F.R.D. 58 (U.S. Dist. Minn. 1972) (both involving city water departments).

50. Lloyd v. Tanner, 407 U.S. 551 (1972).

51. 466 F.2d 638 (7th Cir. 1972) (Sprecher, J., dissenting).

52. *Id.* at 665.

53. *See* Barnes, *Government Regulation of Public Service Corporations*, 3 MARQ. L. REV. 65 (1918); Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 COLUM. L. REV. 514 (1911); Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156 (1904).

54. 365 U.S. 715 (1961).

55. *Id.* at 722.

56. *See* cases cited *supra* note 46.

57. Palmer v. Columbia Gas of Ohio, Inc., 479 F.2d 153, 164 (6th Cir. 1973).

Despite the holding in *Jackson*, the following should be considered: (1) public utilities are state sanctioned monopolies placed in an exclusive and favored position by the state; (2) public utilities act in the public interest by providing essential services; (3) public utilities are responsible to the Public Utilities Commission (or similarly named commission), an agent of the state, which approves the utilities' policies. The *Burton* criteria, it was thought, could not demand any more.

Another theory important to the finding of state action in the public utility cases is the degree of government control and regulation. After *Moose Lodge*'s weaking of *Pollak*, it is clear that controls alone are insufficient for a finding of state action. In the public utility situation, however, there is much more. State franchise bars entry by any competitor and monopolistic status leads to inequality of bargaining power. Both, arguably result in more callous treatment of consumers.[58]

Jackson's PERVERSION OF STATE ACTION

Prior to *Jackson v. Metropolitan Edison Co.*, the Supreme Court had twice been offered the opportunity to resolve the precise issue:[59] whether the fourteenth amendment requires privately owned public utilities to grant procedural due process rights to a customer before terminating service. The matter was finally confronted in *Jackson*.

Justice Rehnquist, speaking for the majority, reiterates the state-private dichotomy established in the *Civil Rights Cases*.[60] He comments that the finding of state action on the one hand and private action on the other "frequently admits no easy answer."[61] Yet shortly thereafter he makes

58. Ironically, public utilities have successfully exempted themselves from antitrust laws not on the basis of their monopoly status, but rather because of the degree of state involvement in their activities which has made them state actors. *See* Gas Light Co., v. Georgia Power Co., 440 F.2d 1135, 1140 (5th Cir. 1971), *cert. denied*, 405 U.S. 969 (1972), where the court said, "Defendants' conduct cannot be characterized as individual action when we consider the state's intimate involvement with the rate-making process." Washington Gas Light Co., v. Virginia Electric & Power Co., 438 F.2d 248 (4th Cir. 1971) which held administrative silence, not affirmative approval, was considered sufficient for state action. Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), where an antitrust action was successful against a public utility, does not overrule these cases. Rather, the same standard is applied with a contrary finding; state action does not exist because the challenged conduct was *not* subject to specific state regulation or authority, hence the utility could not claim the state actor exemption established in Parker v. Brown, 317 U.S. 341 (1943).

59. Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir. 1973), *vacated as moot*, 409 U.S. 815 (1972); Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973).

60. 95 S. Ct. at 453.

61. *Id.*

the statement that mere regulation alone cannot convert private into state action, citing *Moose Lodge*.[62] The decision in *Moose Lodge*, however, was based not on regulation but merely on licensing;[63] whereas in *Jackson*, licensing alone is not at issue, nor, in fact, is mere regulation. The involvement emphasized here is a state-created monopoly which, in addition, involves regulation and control.

Public Utilities Commission v. Pollak[64] was the first case in which comprehensive regulation was held sufficient for state action. *Moose Lodge* apparently narrowed *Pollak* to the situation where the state specifically encourages the alleged unconstitutional activity. Although *Jackson* does not overrule *Pollak*, its precedential value appears to be substantially weakened by the facts of *Jackson*. The Court admits that "it may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be state acts than will the acts of an entity lacking these characteristics."[65] The Court proceeds to re-emphasize and adopt the *Moose Lodge* test: "But the 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."[66] The Court concludes that the nexus is not sufficient.

Justice Rehnquist next considers and rejects the petitioner's argument that state action is present because of the monopoly situation. He reasons that either utility companies, often considered natural monopolies,[67] never obtained monopolistic insulation from the state, or if they do, that this factor is not conclusive for a finding of state action.

This reasoning is both inaccurate and irrelevant as well as an improper

62. *Id.*

63. *Contra*, Seidenberg v. McSoreleys' Old Ale House, Inc., 317 F. Supp. 593 (S.D.N.Y. 1970) was an exception decided before *Moose Lodge*. The court accepted the argument that state action could be based on licensing. Here, the granting of a liquor license with its attendant regulations, resulted in requiring tavern service to both sexes on an equal basis.

64. 343 U.S. 451 (1952). Because this case arose in the District of Columbia, it involved the fifth, not the fourteenth amendment. Although, as in *Jackson*, the Public Utility Commission was involved, the degree of supervision by the state was greater in *Pollak*.

65. 95 S. Ct. at 453.

66. *Id.*

67. Natural monopolies are those which have constantly increasing returns to scale. That is, because of certain technological conditions, the marginal cost curves decline in the vicinity of the industry demand curve. Natural monopolies are distinguished from other forms of monopoly which use collusion and suppression of competition to attain their position. *See* G. BECKER, ECONOMIC THEORY 94-98 (1971), and P. SAMUELSON, ECONOMICS 115-16 (9th ed. 1973).

application of the public function theory of state action. While it is true that a natural monopoly would not require a state franchise to insure its position of insulation, it is unclear that public utilities are necessarily natural monopolies. As Justice Marshall observes in his dissent:

> [I]t is far from obvious that an electric company would not be subject to competition if the market were unimpeded by governmental restrictions. Certainly the "start-up" costs of initiating electric service are substantial, but the rewards available in a relatively inelastic market might well be sufficient under the right circumstances to attract competitive investment. Instead the State has chosen to forbid the high profit margins that might invite private competition. . . .[68]

The majority assumption that utility competition would be perpetually avoided in a free market situation is not necessarily accurate.[69]

More significant, however, is the fact that the distinction drawn is pointless. Whether the monopoly is a result of technological necessities or state forces, two factors are evident: (1) the ramifications of the monopoly position are the same, and (2) the government is entangled in the business of public utilities. Whatever the origins of the public utility, it cannot be ignored that at the present time government regulation permeates all aspects of utility function.[70] To distinguish between types of monopolies serves no purpose, because either through their creation or their function they would be subject to the state action doctrine.

The Court next deals with the public function concept. The public function arena has always been confusing since its standards are subject to such fluctuation.[71] The criteria for public function has been limited to those situations where a private entity assumed government power.[72] Now, in *Jackson*, the Court re-emphasizes the point that such situations which acquire state action exist only if the powers were "traditionally exclusively reserved to the State."[73]

The Court's finding that such a situation did not exist seems to be erroneous. On one hand, many powers of the public utilities *were* in fact those usually reserved exclusively to the state. For example, eminent do-

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68. 95 S. Ct. at 462 (Marshall, J., dissenting).

69. *See* Demsetz, *Why Regulate Utilities?* 11 J. LAW & ECON. 55 (1968).

70. 95 S. Ct. at 458 n.3 (Douglas, J., dissenting).

71. *See* Evans v. Newton, 382 U.S. 296 (1966) (Harlan, J., dissenting).

72. Lloyd v. Tanner, 407 U.S. 551 (1972).

73. 95 S. Ct. at 454. The government has, of course, provided electric service both through municipal agencies and government-owned enterprises like the Tennessee Valley Authority, so that the argument can be met on its own terms.

main[74] and entry onto private property[75] are statutory determinations of powers usually not granted to ordinary businesses. On the other hand, while the election cases uniquely fall within traditional state powers, many other public function cases do not.[76]

Nebbia v. New York,[77] quoted at length in the majority opinion, is almost entirely inapplicable. *Nebbia* signaled the close of the *Lochner*[78] era in which substantive due process had enjoyed its heyday striking down economic regulation throughout the various states. A finding of state action for a state created and a state infiltrated public utility is not comparable to the post-*Lochner* policy of deferring to the legislatures in economic matters. Furthermore, *Nebbia* itself precisely distinguishes public utilities from upstate dairy farmers declaring that "the dairy industry is not, in the accepted sense of the phrase, a public utility."[79] The effect of *Nebbia*, in part, was the finding that public utilities were so significantly clothed with a public interest as to warrant regulation.[80] The other post-*Lochner* era cases would have been better chosen to explain the judicial reach to such interest.[81]

The Court also rejects the notion that the state in any way authorized or approved the specific termination procedure.[82] The need for authorization or approval stems from *Moose Lodge*'s redefinition of the *Pollak* standards. Until *Moose Lodge*, pervasive regulation appeared sufficient for a finding of state action. Affirmative encouragement was not a known

74. Pa. Stat. Ann. Tit. 66, § 1124 (Supp. 1975-76).

75. Petitioner's Brief at 25, *citing* Pa. Util. Comm'n Elec. Reg. Rule 14D.

76. Evans v. Newton, 382 U.S. 296 (1966) (private park); Boman v. Birmingham Transit Co., 280 F.2d 531 (5th Cir. 1960) (transit system); Davis v. Weir, 328 F. Supp. 317 (N.D. Ga. 1971) (water service).

77. 291 U.S. 502 (1934).

78. Lochner v. New York, 198 U.S. 45 (1905).

79. 291 U.S. at 531.

80. Plainly the activities of railroads, their charges and practices so nearly touch the vital economic interests of society that the police power may be invoked to regulate their charges, and no additional formula of affection or clothing with a public interest is needed to justify the regulation. And this is evidently true of all business units supplying transportation, light, heat, power and water to communities, irrespective of how they obtain their powers. *Id.* at 534.

81. *E.g.*, Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952); Olsen v. Nebraska, 313 U.S. 236 (1941); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). Unlike *Nebbia*, these cases do *not* specifically exempt the utility company situations.

82. Metropolitan Edisons Rule 15, "Cause for discontinuation of service," was filed in a general tariff with the Pa. P.U.C., pursuant to notice requirements of 66 Pa. Stat. Ann. tit. 66, § 1142 (1959), because the general tariff included a rate increase. The Rule had been a part of all earlier tariffs filed. Public hearings were held on the rate increase with no mention of the shut-off provision.

prerequisite. *Jackson* reaffirms *Moose Lodge*'s narrowing of *Pollak*, and further questions whether state action was present in *Pollak*. "It is not entirely clear whether the Court alternatively held that Capital Transit's action was action of the state for First Amendment purposes, or whether it merely assumed, *arguendo*, that it was and went on to resolve the First Amendment question adversely to the bus riders."[83] Pervasive state regulation, it seems, is no longer a viable state action doctrine.[84]

Finally, the Court finds unpersuasive the plaintiff's argument that a symbiotic relation exists between the utility company and the state. The court lists Metropolitan Edison's private attributes, but seems to give no more than a short acknowledgement to the extensive regulation by the state. Since the threshold requirement of state action is not met, the Court is not required to determine the second half of the due process inquiry whether the plaintiff was deprived of a property interest.[85]

Clearly *Jackson* tightens state action requirements. Apparently, *Pollak* and its interpretation of state action is of no precedential value. The sum of the indicia concept also seems to have fallen.[86] As Justice Douglas observes in dissent, "Though the Court pays lip-service to the need for assessing the totality of the State's involvement in this enterprise, . . . its underlying analysis is fundamentally sequential rather than cumulative."[87]

The majority approach towards involvement of the state heralds a significant change in attitude. Although argument has long been had with the elements necessary to the totality, the emphasis on the totality itself has never been questioned. Justice Douglas emphasizes, "[i]t is the aggregate [of all relevant factors] that is controlling."[88] Indeed, it always has been so although the majority fails to implement this. The result is that the earlier state action cases are limited to their peculiar facts so that their precedential value is questionable.

Perhaps the most devastating implication of *Jackson* is its failure to allow for a different result where a different constitutional injury is asserted. Under the *Jackson* holding, the immunity of public utilities from constitutional responsibility seems absolute. However, Justice Rehnquist suggests

83. 95 S. Ct. at 456.

84. Because the cases cited in note 46 *supra*, were based both on the monopoly factor and federal legislation the holdings probably have not been made invalid by the decline of the regulation theory of state action.

85. *See* Arnett v. Kennedy, 416 U.S. 134 (1974); Mitchell v. W.T. Grant, 94 S. Ct. 1895 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

86. *See* Notes 26-31 and accompanying text *supra*.

87. 95 S. Ct. at 459.

88. *Id.* at 458.

that if facts had shown that government-like powers were responsible for the constitutional violation, different results could occur.

Danger lies in the absolute denial of state action recognition. It means, as Justice Marshall observes in his dissent, that utilities could discriminate against blacks, women or welfare recipients with impunity.[89] Yet because state action has almost always been found in equal protection cases, no matter how small the state's involvement, this seems an unlikely result. The implication is that the Court has tacitly adopted a sliding scale of state action. That is, denial of due process is perceived as a lesser evil than racial discrimination, and where a less severe constitutional right is violated, a greater degree of state involvement appears to be required.

The Court's reasoning would have been more sound had they admitted that state involvement was present but that it was insufficient for procedural due process purposes. In this way they could have avoided the state action issue, while still resolving the case in favor of the utility. It would have been a far more coherent rationale. The reasoning on these lines would be consistent with the equal protection analysis long subscribed to by the Court.[90] The appropriate standard of review would be determined by the established formulas of rational basis, fundamental interests, and suspect classes.

The Court declines to do this and serious consequences may result by its failure to enumerate a *ratio decidendi*. The resultant vagueness makes subsequent decisions unpredictable. One unintended result may be that public utilities are granted far more constitutional freedom than the Court desired.

THE PLACE OF STATE ACTION IN PROCEDURAL DUE PROCESS CASES

A. Development of State Action in Equal Protection Area

Grounds for the unusual legal reasoning found in *Jackson* can only be explained by the fact that the state action doctrine was born and bred of equal protection challenges. The demand for a finding of state action in procedural due process cases is relatively recent.[91] If the area was confused in racial discrimination cases, where courts have had a hundred years to define it, the difficulty in applying it to a new area is overwhelming.

89. *Id.* at 465.

90. *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Korematsu v. United States, 323 U.S. 214 (1944).

91. *See* Note, *supra* note 14, at 691.

The fourteenth amendment was intended to give "Congress the power to insure that the care of the civil rights of the recently emancipated Negroes would be firmly in the hands of the federal government."[92] Protection of blacks from the caprice of southern legislators bent on maintaining discrimination was the goal sought to be enforced.

The equal protection clause was expected to be the primary vehicle giving form and substance to the fourteenth amendment. However, the judicial creation of the state action concept arose as an unanticipated obstacle. Challenges to legislation and customs through the equal protection clause nonetheless abounded. After the *Civil Rights Cases*, the Court reaffirmed the requirement of state involvement to obtain constitutional protection[93] and the trend has been increasingly accepted.[94] Many of these early cases resolve the question with a finding of no state action.

After the first World War, however, reflecting a moderate degree of changed racial attitudes, the Court began to scrutinize more carefully the hidden involvements of the government. The "white primary" cases produced much of the litigation in this area.[95] In 1945, the Fourth Circuit found that state action existed when a black woman was, on the basis of her race, denied admission to a library training program.[96] Ever since the decision of *Shelley v. Kraemer* in 1948, the equal protection challenge has generally been sustained whenever racial discrimination can be linked to some degree of state involvement.[97]

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92. Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 346, 349 (1963). *See also* Frank & Munro, *The Original Understanding of "Equal Protection of the Laws"*, 50 COLUM. L. REV. 131 (1950); B. SCHWARTZ, THE LAW IN AMERICA: A HISTORY (1974).

93. *Cf.* United States v. Price, 383 U.S. 787 (1966) resulting from the murder of civil rights workers Goodman, Schwerner and Chaney in Neshoba County, Mississippi. The Court said, "To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents." *Id.* at 794. The case was brought under 18 U.S.C. § 242 (1964), the criminal counterpart of 42 U.S.C. § 1983 (1964).

94. Hodges v. United States, 203 U.S. 1 (1906); James v. Bowman, 190 U.S. 127 (1903); Logan v. United States, 144 U.S. 263 (1892); Baldwin v. Franks, 120 U.S. 678 (1887); *Ex parte* Yarborough, 110 U.S. 651 (1884).

95. See cases compiled at note 18 *supra.*

96. Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir. 1945).

97. A notable exception is *Moose Lodge.* But the equal protection area has been expanded to include discrimination resulting from administrative decision, Robinson v. Florida, 378 U.S. 153 (1964) and custom enforced by state or local governments or governmental agents, Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). Jackson v. Statler Found., 496 F.2d 623 (2d Cir. 1974) presents an example of the extent to which some courts will find state action in order to obviate racial discrimination. Here the court held that tax exempt charitable foundations that were extensively regulated by the state came within the sphere of the fourteenth amendment prohibitions.

B. *Due Process and State Action*

In recent years, the Supreme Court has not determined the extent of state involvement required to decide whether there is a denial of due process.[98] Lower courts have thus been left on their own. Although it can be generally stated that findings of *no* state action are more common in the due process area than in the equal protection area,[99] the results have nevertheless, presented inconsistencies. These inconsistencies appear to be the result of the use of different criteria in determining state action in due process cases as opposed to equal protection cases. Yet with the exception of a series of Second Circuit decisions by Judge Friendly[100] and Judge Eschbach's decision in *Bright v. Isenbarger*[101] very few courts have admitted to the possibility of more than one standard. This situation has now been epitomized in *Jackson*, where no reference is made to the distinction between the two standards. Had Justice Rehnquist acknowledged such a distinction, he could have eliminated some of the confusion by simply requiring a higher degree of state involvement for a due process challenge.

It is vital to note that had the court found state action, and proceeded to find a property interest in life-sustaining electric service,[102] it would have been the first time that due process was thrust on a supposedly private entity. The desire not to establish such a precedent could well explain *Jackson's* outcome.

Some decisions, however, have made reference to a differing standard. Supreme Court recognition appears most notable and possibly exclusively in *Adickes v. S. H. Kress. & Co.*[103] The Second Circuit, however, in a series of school disciplinary cases, distinguished the constitutional injury of

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98. Interestingly, some of the first cases brought under the fourteenth amendment involved due process. *See, e.g.*, The Slaughter-House Cases, 83 U.S. 36 (1873) (fourteenth amendment held inapplicable on the grounds that its purpose was to eliminate race discrimination, not economic discrimination).

99. *See* Note, *supra* note 26, at 1060.

100. *See* notes 103-04 and accompanying text *infra.*

101. 314 F. Supp. 1382 (N.D. Ind. 1970), *aff'd*, 445 F.2d 412 (7th Cir. 1971), where no state action was found which would limit parochial school expulsions, although dicta left open the possibility of constitutional limitations were race discrimination at issue.

102. *See* Stanford v. Gas Service Co., 346 F. Supp. 717, 720 (D. Kan. 1972), where the court notes that "unheated shelter affects life itself." Bronson v. Consolidated Ed., 350 F. Supp. 443, 447 (S.D.N.Y. 1972) where the court notes that "beyond doubt that electric service can become as vital to the existence and livelihood of an individual as a driver's license or a welfare check. . . ."

103. 398 U.S. 144, 190-91 (1970) (Brennan, J., dissenting).

procedural due process from racial discrimination, and considered the former less serious.

The school cases began in 1968 with *Grossner v. Trustees of Columbia University*[104] and *Powe v. Miles*.[105] Students in these cases were challenging disciplinary proceedings absent procedural rights. Both cases were dismissed for want of state action. Judge Friendly's dictum in *Powe* is significant, however. After determining that funds and scholarships did not lead to significant state involvement he stated, "[w]hether this would be true if Alfred [University] were to adopt discriminatory admissions policies . . . is a different question we need not here decide."[106] Concurring in *Coleman v. Wagner College*,[107] Judge Friendly decided that the "state action line has here been crossed"[108] where school regulations on demonstrations were in direct response to a legislative mandate. Three years later he found insufficient state action to warrant due process protection when a student was dismissed from law school for failing to meet the established academic standards.[109] Still he reemphasized his point: "[W]hile a grant or other index of state involvement may be impermissible when it 'fosters or encourages' discrimination on the basis of race, the same limited involvment may not rise to the level of 'state action' when the tion in question is alleged to affront other constitutional [sic] rights."[110]

The public utility cases which failed to find state action do not suggest that different tests were employed because a racial question was not involved. Without exception, they held that any state involvement was insignificant and the challenged action resulted from the company's own private rules unsupported by the state.[111] It was this attitude which was

104. 287 F. Supp. 535 (S.D.N.Y. 1968) (involving a student strike at Columbia University).

105. 407 F.2d 73 (2d Cir. 1968) (involving anti-R.O.T.C. demonstrations at Alfred University).

106. *Id.* at 81 (citation omitted).

107. 429 F.2d 1120 (2d Cir. 1970).

108. *Id.* at 1126 (Friendly, J., concurring).

109. Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973).

110. *Id.* at 1142. For a recent decision requiring due process in public schools, *see* Goss v. Lopez, 95 S. Ct. 729 (1975), where a class action was brought by an Ohio high school student who was suspended for ten days without a procedural hearing. The challenged regulation was held unconstitutional on due process grounds.

111. Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638 (7th Cir. 1972) (discontinuation of service for non-payment of charges is not state action); Particular Cleaners, Inc. v. Commonwealth Ed. Co., 457 F.2d 189 (7th Cir. 1972) (requirement of security deposit prior to commencement of service is not state action); Martin v. Pacific Nw. Bell Tel. Co., 441 F.2d 1116 (9th Cir. 1971) (employment discrimination on religious grounds was not state action); Kadlec v. Illinois Bell Tel. Co., 407 F.2d 624 (7th Cir. 1969) (termination of Call-Pak service was not state action).

reconfirmed by the Supreme Court in *Jackson*. Ironically, just before *Jackson* was decided, at least one federal district court believed sufficient state action existed in public utility cases to invoke due process rights.[112]

C. *Policies Behind Due Process and Its Application to Monopolies*

Due process is a right granted to any person to assure that certain procedures will be followed before the state deprives him of his property, his freedom, or his life. Its purpose is to protect the individual from the tyranny of the state.

If the courts relied on the policies underlying due process, more concrete constitutional holdings would result. One commentator has suggested that persons exercising peculiarly government functions which carry "ominous potential in their misuse,"[113] act in the status of government and should be treated as such for fourteenth amendment purposes.

A monopoly situation, by definition, is not an ordinary business competing with numerous other firms. A state-governed, privately-owned, public utility is a "state-bestowed, state-protected and state-regulated na-

But see Salisbury v. Southern New England Tel. Co., 365 F. Supp. 1023 (1973) (discontinuation of telephone service did constitute state action).

112. Limuel v. Southern Union Gas Co., 378 F. Supp. 964 (W.D. Tex. 1974). A variety of other types of cases have dealt with due process state action questions. A significant group has resulted from the Uniform Commercial Code §§ 9-503, 9-504, the self-help provision for creditors where the debtor defaults on a contract. Bond v. Dentzer, 494 F.2d 302 (2d Cir. 1974); Fletcher v. Rhode Island Hosp. Trust Nat'l Bank, 496 F.2d 927 (1st Cir. 1974); Gibbs v. Titelman, 502 F.2d 1107 (3d Cir. 1974); James v. Phinnix, 495 F.2d 206 (5th Cir. 1974); Bickel Optical Lab., Inc. v. Marquette Nat'l Bank, 487 F.2d 906 (8th Cir. 1973). All concurred with Adams v. Southern Calif. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 95 S. Ct. 325 (1974), finding no state action on similar self-help remedies. *Contra*, Cockerel v. Caldwell, 378 F. Supp. 491 (W.D. Ky. 1974) (based on a Kentucky garageman's sale statute, not the U.C.C.). In the area of landlord-tenant relations, *see* Caulder v. Durham Housing Auth., 433 F.2d 998 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971); Escalera v. New York City Housing Auth., 425 F.2d 853 (1970), *cert. denied*, 400 U.S. 853 (1970) (where state action was found for federally funded, locally administered housing authorities); Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973) (state action exists everywhere apartments are privately owned if they are administered by the National Housing Act); Male v. Crossroads Associates, 469 F.2d 616 (2d Cir. 1972); McQueen v. Drucker, 438 F.2d 781 (1st Cir. 1971). Receipt of federal Hill-Burton funds establishes state action requiring some due process. *See* Citta v. Delaware Valley Hosp., 313 F. Supp. 301 (E.D. Pa. 1970) (hearing necessary only after suspension of doctor). Acquisition of federal construction subsidies and eminent domain powers required acceptance of black doctors and patients as well as granting them equal protection under the laws. *See* Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964); Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963). *See also* Perez v. Sugarman, 499 F.2d 761 (2d Cir. 1974) (state action inured where city welfare department placed children in private institutions).

113. *See* Note, 74 COLUM. L. REV. 656, 704 (1974).

tural monopoly to which every citizen is compelled to resort."[114] Due process rights are necessary to maintain individual integrity in the face of such power. If the state action model cannot deal with this situation, a substitute must be found.

WHAT IS TO BE DONE?

Jackson demonstrates what occurs when rigid doctrine is applied to a situation requiring flexibility. The doctrine itself begins to lose validity. For more than a decade writers have been forecasting and encouraging the demise of state action.[115] Courts, however, have refused to abandon it. If maintenance of the state action theory is sustained, new and careful construction of the requirements should be enunciated. The degree of state involvement and the nature of the constitutional injury must be considered. The amount of state entanglement with a private entity has always been considered in terms of the state action theories. The nature of the harm, only recently expanded beyond racial discrimination, is also slowly being recognized as a variable with which the court must deal.

Under the existing state-private dichotomy, three methods of analysis are available to the courts in deciding fourteenth amendment cases.[116] The first is an independent state action test. That is, only the *amount* of state involvement is weighed to determine its sufficiency. A decision is arbitrarily made that if state involvement reaches a certain level, state action will be found and constitutional violations considered. Here the facts are analyzed to determine the degree of state involvement in the private activity.

The *Jackson* court uses this approach by purportedly giving an in-depth

114. Lucas v. Wisconsin Elec. Co., 466 F.2d 638, 663 (7th Cir. 1972) (Sprecher, J., dissenting).

115. Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966). Some authors contend that the question is really whether the particular state action is constitutional under various federal constitutional restrictions. *See* Horowitz, *The Misleading Search for "State Action" under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957); Williams, *supra* note 92.

116. For the specific problem of public utilities, a solution already exists within the established state action frameworks through the appropriate regulatory agency. *See* Center for United Labor Action v. Consolidated Ed. Co., 376 F. Supp. 699 (S.D.N.Y. 1974). If the aggrieved party attempts to obtain relief from the public utility commission and is refused, there should be no state action problem. The commission is a branch of the state itself and has denied the petitioner hearing rights before terminating services or raising rates. State encouragement and enforcement of its own regulations is indubitably action of the state for purposes of the fourteenth amendment. Whether a property interest exists would be the next matter of inquiry, but at least the first hurdle could be passed. *See* Sellers v. Iowa Power & Light Co., 372 F. Supp. 1169 (S.D. Iowa 1974).

analysis to all the elements of state concern, summing them, and arriving at a conclusion. With this formula, the constitutional injury is not considered. No harm is more pernicious than any other; nor, as Judge Friendly believes, is one injury made more equal than the rest.[117]

The second method allows for a decision based only on the injury. State involvement is ignored. The inquiry focuses on whether there was a deprivation of property without due process or whether there was discrimination on the basis of race. If the event has occurred, protections inure. Despite the evident conflict with privacy rights, this possibility should be considered, particularly in the area of discrimination.

The final method of state action analysis is what the courts have in fact been using without labeling it as such. That is, both the amount of state involvement and the severity of the constitutional harm are considered. A weighing process occurs. Is the harm such that given the degree of state involvement, constitutional responsibility should result? A decision based on a realistic analysis of both aspects of the problem should lead to well reasoned decisions.

Applying this last method to *Jackson*, the degree of state involvement, or lack thereof, is weighed against the need for procedural rights. Public utilities are created, fostered, and protected by the state; regulation is extensive; quasi-governmental functions are served. The need for procedural rights is essential when balanced against the size and power of the private company.

The alternative is to put aside the state action fiction in favor of a more realistic approach. The traditional doctrine focuses on technicalities, rather than on "the real interests which compete for Constitutional recognition."[118] The new inquiry focuses on the interests at stake which demand or prohibit constitutional invasion into the allegedly private sphere. Privacy, established as a fundamental right,[119] is the primary concern which would prevent fourteenth amendments intrusions. A balancing of interests would not demand application of the constitutional limitations, but it would require a weighing of the need for the protections with the strength of the privacy right.

The essential question is whether a state can legally prefer the private interest of the public utility, which has been legislatively selected, over the

117. A. FRIENDLY, THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA 22 (1968).

118. Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3, 7 (1961).

119. Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632 (1974); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

concern for individual rights. The answer should be determined by the scale of importance established for equal protection. Where no fundamental rights or suspect classifications are concerned, a reasonable basis for the policy should be sufficient to sustain the statute or regulation. Where, however, fundamental interests come into play, only a compelling state interset should be able to override the entitlement to constitutional protection.

> The elimination of state action as a controlling concept does not eliminate the role of the courts. Rather it broadens it. The issue must become one of . . . accomodating the interests, not one in the nature of a formula which is irrelevant to the interests involved.[120]

This concept is not new to constitutional law. However, it offers a new approach which would free the Court of the rigid standards to which they are bound by the *Civil Rights Cases* and their progeny.

Were this approach followed, *Jackson* would have been resolved differently. The prime concern of the Court would have been with the deprivation of access to the essential needs of light and heat. The threshold question of state action would not foreclose such consideration. Rather, the kind and degree of the deprivation would have to be analyzed.

A consumer has neither bargaining power, nor a grievance procedure, and therefore the concern of the courts for the potection of the individual should be great. Furthermore, the burden on the utility would be limited. Hearing procedures would be infrequently demanded, and yet the threat of such an event may act as an incentive to improve service. In addition, hearings do not require the full procedural requirements of a courtroom.[121] The formality of the hearing is variable, so long as due process is granted.[122]

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120. Williams, *supra* note 92, at 390. An analogous model which deals with constitutional interests in the equal protection area is found in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 70 (1973) (Marshall, J., dissenting).

121. The Supreme Court laid out the requirements for a nonjudicial hearing in Goldberg v. Kelly, 397 U.S. 254 (1970). Prior to the hearing, the petitioner must be presented with timely and adequate notice which includes the reason for the action. The petitioner must also be allowed the following: the right to present arguments, the right to counsel, access to written evidence and the right to cross-examination. The hearing must be had before an impartial decision-maker who makes a written statement giving the reasons for his or her decision with reference to the evidence used.

122. In the district court opinion of Palmer v. Columbia Gas of Ohio, Inc., 342 F. Supp. 241 (N.D. Ohio 1972), the court observed "shockingly callous and impersonal attitude" where the utility company made innumerable errors including terminating service at a wrong address and shutting off gas after a bill was paid. *Id.* at 243. In Bronson v. Consolidated Ed. Co., 350 F. Supp. 443 (S.D.N.Y. 1972), the court described the fact situation as "an Orwellian nightmare of computer control." *Id.* at 444.

The privacy contention of the utilities cannot be ignored, but the intrusion into private workings of a company would be minimal. Perhaps the duty to provide due process could be considered the necessary exchange for their continued monopoly power.

Legislation is another possibility. In a closely structured situation such as public utilities this could be very effective. Properly drafted statutes could provide for a hearing with full confrontation of the evidence and avoid the issue of whether public utilities or other monopolies will be held to constitutional standards. If the goal is to protect the consumer from abuse by the utility companies, legislation provides an easy answer.

CONCLUSION

This comment has examined the implications that *Jackson* will have on utility companies, the public, and legal analysts of the state action doctrines. Public utility companies are state-devised and state-regulated. While any of the traditional state action doctrines were available to the Court for a finding of significant state involvement in this particular case, it rejected them all. Furthermore, it rejected them with an analysis that contorts precedential cases and compounds ambiguity making the future decisions in this area more uncertain and unpredictable.

More significantly, the Court failed to distinguish between the criteria it uses in establishing state action in those cases involving equal protection on the one hand, and those involving denial of procedural due process on the other.

If the Court's reasoning in *Jackson* is any indication of the future course of the state action test, then we should seriously entertain alternative guarantees of fourteenth amendment rights. For the relatively simple cases such as monopolies which perform essential services, legislation is a real alternative. For the remainder of cases, a weighing of the constitutionally significant interests involved, either within or without the state action limitations is necessary. Almost a decade ago, the following was written:

> In view of the Supreme Court's recently manifested reluctance to abandon 'state action' constitutional lawyers may discount the probability of a major Fourteenth Amendment re-evaluation. But in a time when the wheel of national sentiment has come full circle to the mood of 1866, the only question about the state action curb is how long it will be before a Supreme Court majority rights the wrongs of 1883.[123]

The question remains unanswered.

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123. *See* Silard, *supra* note 114, at 872.