Duquesne Law Review

Volume 14
Number 4 *Symposium on Energy and the Environment: Is Coal the Key to the Solution?*

Article 14

1976

Constitutional Law - Fourteenth Amendment - Due Process - State Action - Termination of Service by a State-Regulated Public Utility

Stephen Jurman

contractual interest is not absolutely required, the "focus should be on a particular project."[67] In the event the individual challenging the ordinance has neither a property interest which is adversely affected nor a sufficient personal interest in a recently proposed housing project, he has no other presently available avenue of attack.

Viewed against the background of the standing doctrine as it has developed since *Data Processing, Warth* may be seen as foreshadowing a reversal of the recent plaintiff-oriented philosophy; it may also be interpreted as a refusal to open the courts' doors any further. With increasing attention being given to zoning patterns in suburban communities and their effect upon minority residents in urban areas who desire better living conditions, *Warth* shows the Court's reluctance to break down long held notions of the right of residents to control the development of their communities with a minimum of outside intervention. In light of the departure of Justice Douglas, who has long been a vigorous proponent of a liberalized standing doctrine, the chances of a reversal in the current philosophy of the Court appear dim.

Walter John Rackley

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—DUE PROCESS—STATE ACTION—TERMINATION OF SERVICE BY A STATE-REGULATED PUBLIC UTILITY—The Supreme Court of the United States has held that the Commonwealth of Pennsylvania's connection with the termination of service by a public utility corporation was insufficient to make the utility's conduct attributable to the state for purposes of the fourteenth amendment.

1208 (8th Cir. 1972) (standing was granted to plaintiffs who wished to move into a specific project in which corporate plaintiffs had made a substantial investment); Crow v. Brown, 457 F.2d 788 (5th Cir. 1972), *aff'g* 332 F. Supp. 382 (N.D. Ga. 1971) (individual plaintiffs were on a waiting list to move into planned low income apartments upon completion); Kennedy Park Homes Ass'n v. Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971) (corporate plaintiffs had committed themselves contractually and federal assistance had been approved); Dailey v. Lawton, 425 F.2d 1037 (10th Cir. 1970), *aff'g* 296 F. Supp. 266 (W.D. Okla. 1969) (corporate plaintiff needed only a zoning amendment to commence construction and individual plaintiff was a potential renter in that project). *Cf.* United Farmworkers Housing Project, Inc. v. Delray Beach, 493 F.2d 799 (5th Cir. 1974) (once municipal services are extended to outsiders, such extensions must be granted in a nondiscriminatory manner).

67. 422 U.S. at 508 n.18.

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

Metropolitan Edison Company was a privately owned and operated Pennsylvania corporation holding a certificate of public convenience issued by the Pennsylvania Public Utilities Commission (PUC). Petitioner Jackson brought suit against Metropolitan for damages and injunctive relief under the Civil Rights Act of 1871,[1] alleging that respondent had terminated electric service to her home without notice, hearing or an opportunity to pay any amounts due.[2] The United States District Court for the Middle District of Pennsylvania granted respondent's motion for dismissal[3] on the ground that the termination did not involve state action.[4] The United States Court of Appeals for the Third Circuit affirmed,[5] and certiorari was granted.[6]

---

1. The Civil Action for Deprivation of Rights, originally the Civil Rights Act of 1871, was enacted to implement the fourteenth amendment. It states:

> 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.

42 U.S.C. § 1983 (1970).

2. The petitioner, Catherine Jackson, received electrical service from the respondent at her home until September, 1970. At that time her account was terminated for delinquency in payments allegedly due; service was resumed in the name of James Dodson, another occupant of the residence. Whether Dodson paid his bills was an unsettled factual dispute. He left the residence in August of 1971 without informing the respondent, which continued service for a time without receiving any payment. Petitioner asserted no bills arrived during that time. Respondent's employees visited the residence on October 6, 1971, inquiring for Dodson. Another employee came the next day and informed petitioner that the meter had been tampered with and would not register current used. Petitioner claimed ignorance of this, and asked that the account be shifted to the name of Robert Jackson, later identified as petitioner's 12 year old son. Four days later respondent terminated service without further notice. Brief for Petitioner at 4-7, Brief for Respondent at 2-3, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

3. Jackson v. Metropolitan Edison Co., 348 F. Supp. 954 (M.D. Pa. 1972).

4. State action is the level of involvement of government in the actions of private individuals which brings their conduct within the strictures of the fourteenth amendment, which provides:

> *No State shall* make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall *any State* deprive any person of life, liberty, or property, without due process of law. . . .

U.S. CONST. amend. XIV, § 1 (emphasis added). Thus the wrongful act of an individual or private corporation, unsupported by state authority or assistance, is beyond the purview of the fourteenth amendment or the Civil Action for Deprivation of Rights, 42 U.S.C. § 1983 (1970). Civil Rights Cases, 109 U.S. 3, 17 (1883).

5. Jackson v. Metropolitan Edison Co., 483 F.2d 754 (3d Cir. 1973).

6. Jackson v. Metropolitan Edison Co., 415 U.S. 912 (1974).

THE OPINION

Petitioner alleged state action on the grounds that the respondent was a state-sanctioned monopoly,[7] that electricity was an essential of life, the delivery of which by a private entity was a "public function,"[8] and that the Commonwealth of Pennsylvania was significantly involved with the activities of the respondent.[9] Justice Rehnquist, speaking for six members of the Court,[10] denied each contention. The Court doubted that the State had actually granted or guaranteed the respondent a monopoly;[11] even if it existed, a monopoly would not be determinative of whether termination of service was state action. The petitioner argued that state action existed on the basis of *Public Utility Commission v. Pollak*,[12] in which the Court found a sufficiently close relation between the actions of a congressionally mandated but privately owned monopoly and the federal government. But the *Pollak* Court, wrote Justice Rehnquist, had not based its finding of governmental action on the transit company's monopoly.[13] He also observed that no state action

7. Brief for Petitioner at 13-15.

8. *Id.* at 15-21.

9. *Id.* at 21-27.

10. Burger, C.J., Stewart, White, Blackmun, and Powell, JJ. joined in the opinion.

11. Justice Rehnquist found neither respondent's certificate of public convenience, issued as a prerequisite to operating a utility under PA. STAT. ANN. tit. 66, § 1121 (1959), nor any other statute indicated that respondent had been granted or guaranteed a monopoly. In fact, respondent faced competition within some portions of its territory. 419 U.S. 351 n.8.

12. 343 U.S. 451 (1952). The Capital Transit Company operated the public transit facilities of the District of Columbia. It installed loudspeakers in its buses and streetcars, through which it piped in music, commercials and news. After receiving a number of protests, the District Public Utilities Commission investigated the broadcasting practice, which it found was not "inconsistent with public convenience, comfort, and safety." The PUC dismissed its investigation and denied reconsideration; the irked commuters took their protest to the federal courts, contending that the broadcasting violated the right of privacy guaranteed by the first amendment without the due process of law guaranteed by the fifth. *Id.* at 453-61. The Supreme Court found that a "sufficiently close relation" between the federal government and the radio broadcasting required consideration of the constitutional claims. *Id.* at 462. Because *Pollak* arose in the District of Columbia, the issue was "governmental" rather than "state" action. The principal was, however, the same.

13. 419 U.S. at 352. Justice Rehnquist wrote that the *Pollak* Court had "expressly disclaimed reliance" on the transit authority's monopoly status. Justice Burton had stated in *Pollak* that in finding a "sufficiently close relation" between the government and the utility, the Court had not relied on the "mere fact" that the utility operated under congressional authority and as a result enjoyed a substantial monopoly. The Court relied "particularly" on the fact that the PUC, a government agency, had investigated and approved the practice in question. 343 U.S. at 462.

was found in *Moose Lodge No. 107 v. Irvis*,[14] where "certain monopoly aspects were presented." In neither *Pollak* nor *Moose Lodge* was there a sufficient relationship between the challenged activities and the entities' monopoly status.[15]

The petitioner contended that respondent provided an essential public service necessary to life and required by statute to be furnished on a reasonably continuous basis.[16] Although the Court recognized that state action had been found in the exercise by private entities of powers traditionally reserved exclusively to the states,[17] the majority found no such "public function" in *Jackson*. The delivery of utility service was not considered a power traditionally associated with sovereignty, such as eminent domain; moreover, the statutory duty to furnish the service was imposed on the utility, not on the state.[18] The petitioner asserted that since a public utility acted in the public interest in delivering essential services, it could not terminate service without procedural due process.[19] The Court interpreted this reasoning as an invitation to declare that all businesses "affected with the public interest" are state actors in all their actions; the Court declined the invitation, citing its decision in *Nebbia v. New York*[20] that there is no distinct class or category of business "affected with a public interest." The phrase means only that an industry is justifiably subject to regulation for the public good; such a public interest nature without more does not convert otherwise private action into state action.[21]

Justice Rehnquist rejected the contention that the state had "specifically authorized and approved"[22] the termination procedure.[23] Provisions specifying respondent's right to terminate for nonpayment had for many years been inserted in each of respondent's

14. 407 U.S. 163 (1972). *See* text at notes 45-47 *infra*.

15. 419 U.S. at 352.

16. The statute provides in pertinent part that "every public utility shall furnish . . . reasonable service. . . . Such service also shall be reasonably continuous and without unreasonable interruptions or delay." PA. STAT. ANN. tit. 66, § 1171 (1959).

17. 419 U.S. at 352.

18. *Id.* at 353. The Pennsylvania courts had rejected the contention that the delivery of certain utility services was a state or municipal duty. *See* Baily v. Philadelphia, 184 Pa. 594, 39 A. 494 (1898) (natural gas); Girard Life Ins. Co. v. City of Phila., 88 Pa. 393 (1879) (water).

19. Brief for Petitioner at 18-19.

20. 291 U.S. 502, 536 (1934).

21. 419 U.S. at 353-54.

22. Brief for Petitioner at 27-33.

23. 419 U.S. at 354.

general tariffs submitted for approval to the PUC; hearings had been held on the rate portions of those tariffs, but the termination provision had never been "the subject of a hearing or other scrutiny by the Commission."[24] Under Pennsylvania law, the provisions became effective automatically after sixty days when not specifically disapproved by the PUC;[25] in the Court's view, that type of review was not sufficient to constitute state action. In this part of her argument petitioner relied again on *Pollak*, which Justice Rehnquist distinguished because the PUC in that case specifically investigated and explicitly approved the challenged activity; the Pennsylvania PUC had never taken notice of nor any action upon the respondent's termination procedures. Noting that a regulated private utility was often required by law to obtain approval for practices that any unregulated business could freely institute, the Court held that approval of such a request by a state utility commission was not state action if the commission did not put its weight on the side of the proposed practice by ordering it.[26]

Extensive state regulation did not in itself create state action, but the acts of a heavily regulated utility something like a government-protected monopoly might more readily be found to involve state action. The test was whether a "sufficiently close nexus" between the state and the challenged actions of the utility justified treating the actions as those of the state.[27] In the Court's view, the petitioner had shown only that Metropolitan was a heavily regulated privately owned utility enjoying at least a partial monopoly, which had terminated service in a manner which the Pennsylvania PUC found permissible under state law. Such a showing was insufficient to connect the state with the challenged practice for the purposes of the fourteenth amendment.[28]

---

24. *Id.*

25. PA. STAT. ANN. tit. 66, § 1148 (1959).

26. 419 U.S. at 357.

27. *Id.* at 350-51.

28. *Id.* at 358-59. Because the issue of state action was resolved against the petitioner, the Court did not decide whether electric service was property for purposes of the fourteenth amendment. Justices Douglas, Brennan and Marshall each filed a dissent. Justice Douglas felt the majority had erred by considering in isolation each factor advanced by the petitioner and dismissing each as individually insufficient for a finding of state action. He believed that under Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), the aggregate weight of the factors controlled the determination. 419 U.S. at 359-61.

Justices Douglas and Marshall each found state approval of Metropolitan's termination provisions in the PUC's failure to challenge them. In Justice Douglas's opinion, the inaction

ANALYSIS

The Court considered each of petitioner's many arguments in isolation and rejected each as individually insufficient upon which to find state action. This analysis seemingly varies with the authority of *Burton v. Wilmington Parking Authority*,[29] in which the aggregate weight of the factors was considered. In *Burton*, the parking authority was a state agency which leased space in one of its municipal parking garages to the private Eagle Coffee Shoppe; the rent paid by the restaurant partially defrayed the costs of the facility. The appellant was refused service by the restaurant because of his race. The question was whether Delaware's involvement with the admittedly private restaurant amounted to state action such that the Eagle's discrimination violated the fourteenth amendment.[30] "Only by sifting facts and weighing circumstances," wrote the *Burton* Court, "can the nonobvious involvement of the State in private conduct be attributed its true significance."[31] The Court listed the various links between the state and the restaurant and then expressly stated that the sum of the factors indicated a degree of involvement which the fourteenth amendment condemned.[32] Del-

constituted more than mere passive approval; it was abandonment of the agency's duty of supervision under state law. *Id.* at 361-62. Justice Marshall saw the PUC's approval of respondent's general tariff as specific approval of all measures, including the termination provision, contained therein. *Id.* at 370.

The two Justices placed great emphasis on the respondent's monopoly. In response to the majority position that a state-granted monopoly would not be conclusive of state action, the two dissenters maintained a monopoly would at least be highly relevant to the inquiry. *Id.* at 360-61, 366-67. Justice Douglas found the respondent's services were "affected with a public interest," especially since Metropolitan was the only utility furnishing electric power. *Id.* at 361. Justice Marshall pointed out that a state-granted monopoly has been held to involve state action. *Id.* at 366-67.

Justice Marshall also took issue with the majority over the question whether the delivery of electrical service was a "public function." The majority found such delivery was not a power "traditionally associated with sovereignty"; in Justice Marshall's view, utility service was traditionally identified with the states because states which do not provide the service themselves always subject the private providers of service to an all-embracing regulatory scheme. *Id.* at 372. Finally, Justice Marshall expressed fear that because the Court had never accepted the premise that state action analysis should apply different standards in response to different types of constitutional claims, a state-regulated and monopolistic utility might now refuse service on a discriminatory basis with impunity. *Id.* at 373-74.

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

30. *Id.* at 716-22.

31. *Id.* at 722.

32. *Id.* at 723-24. Justice Harlan described this cumulative process as "undiscriminatingly throwing together various factual bits and pieces." *Id.* at 728 (Harlan, J., dissenting).

aware had "so far insinuated itself into a position of interdependence with Eagle" that it had to be recognized as a "joint participant" in the challenged activity.[33]

The *Jackson* Court wrote that state utility commissions were often statutorily required to approve various business practices of regulated utilities. When these practices were those any unregulated business would be free to institute, commission approval did not convert the practices into state action unless the commission put its weight on the side of the practice by ordering it. This emphasis on command rather than approval, though limited in application to regulated utilities, did not comport with earlier precedents. In *Burton*, where Delaware did not exercise its power to require that the Eagle Coffee Shoppe not discriminate, the Court held that no state could abdicate its responsibilities of equal protection and that Delaware became a party to the discrimination by its inaction. The inaction was in fact an election by the state "to place its power, property, and prestige" behind the challenged act.[34] A number of other cases also held that approval or something less was sufficient to involve state action.[35]

A. *Mutual Benefit*

Mutual benefit to the parties was a major factor in the *Burton* finding that Delaware was a "joint participant" in the coffee shop's racial discrimination.[36] The petitioner in *Jackson* emphasized the mutually beneficial relationship between Pennsylvania and Metropolitan Edison,[37] but neither the majority nor the dissenters expli-

33. *Id.* at 725.

34. *Id.*

35. The Civil Rights Cases, 109 U.S. 3 (1883) speak only of the state sanctioning the challenged act in some way. In Reitman v. Mulkey, 387 U.S. 369 (1967), the Court found state action in a California constitutional amendment neutral on its face but intended to authorize discrimination in housing at the seller's individual choice. In CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973) and Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), the Court pointed out that the state regulatory bodies had not "fostered or encouraged" the action. In *Pollak*, the PUC approved the practice after it had begun, 343 U.S. at 456. Mere statements by public officials that civil rights sit-ins would not be tolerated were sufficient to find state action in the refusal of service by private merchants in Lombard v. Louisiana, 373 U.S. 267 (1963).

36. 365 U.S. at 723-25.

37. Brief for Petitioner at 21-27. *See* Note, *Fourteenth Amendment Due Process In Terminations of Utility Services for Nonpayment*, 86 HARV. L. REV. 1477, 1492-93 (1973) [hereinafter cited as *Terminations*].

citly considered the issue. The utility had a protected, if not guaranteed, monopoly over most of its territory; a practically, if not legally, guaranteed "fair rate of return"; and, for limited purposes, the power of eminent domain and the right to enter on private property.[38] The state benefitted by the insurance of reasonably adequate utility service to its citizens.[39] In addition, the state collected revenue on the utility's gross receipts;[40] the majority discounted this, stating that all corporations pay taxes to the state. In the case of a public utility, however, the state may exercise direct control over the amount of revenue received by setting rates and changing regulations.[41] Thus, the state benefitted directly from the essentially unfettered termination procedures challenged in *Jackson*. Unrestricted termination is a valuable and cheap collection tool:[42] it lowers utility rates by lowering operating costs, which benefits utility subscribers and ultimately the state. Moreover, tax revenues were directly affected by the cost and efficiency of debt collection.[43]

B. *Monopoly*

The petitioner especially alleged that the respondent held a monopoly granted and guaranteed by the state. The Court accepted the premise arguendo, but rejected the conclusion that state action resulted. The majority relied on *Pollak*, in which the Court "expressly disclaimed reliance on the monopoly status of the transit authority," and on *Moose Lodge*, in which "certain monopoly aspects were presented" but state action was not found.[44]

Moose Lodge concerned the refusal of a chapter of a national fraternal organization to serve liquor to the black guest of a member. State action was alleged to arise from the lodge's Pennsylvania liquor license and the extensive regulation to which licensees were

38. 419 U.S. at 368 n.1; City of Pgh. v. Pennsylvania PUC, 182 Pa. Super. 551, 128 A.2d 372 (1956); *Terminations, supra* note 37, at 1492 n.89.

39. *See Terminations, supra* note 37, at 1493, and cases cited therein.

40. PA. STAT. ANN. tit. 72, § 8101 (Supp. 1975).

41. *See* Ihrke v. Northern States Power Co., 459 F.2d 566, 570 (8th Cir.), *vacated as moot*, 409 U.S. 815 (1972).

42. Brief for City of Philadelphia as Amicus Curiae at 2, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); *Terminations, supra* note 37, at 1481-82.

43. Pennsylvania profited by the procedures under attack in *Jackson* just as Delaware profited by the action challenged in *Burton*. Because the Eagle Coffee Shoppe asserted that integrating its service would injure its business, the Court found the discrimination financially benefitted the state agency. 365 U.S. at 724.

44. 419 U.S. at 352.

subject.[45] Club licensees were permitted to serve liquor during longer hours than retail licensees, so that for a significant time each week drinks could be purchased only at private clubs. Since no more licenses were available from the state, Moose Lodge and other club licensees held some degree of control over the sale of liquor by the drink;[46] this oligopolistic edge was the "monopoly aspect" noted in *Jackson*. The *Moose Lodge* majority held that the state regulatory scheme did not "foster or encourage" racial discrimination, and was not enough to make the state in effect a partner or joint venturer of the club; therefore, Pennsylvania was not sufficiently implicated in the lodge's discriminatory policies to make them state action.[47]

Justice Rehnquist wrote in *Jackson* that state action was not present in *Pollak* and *Moose Lodge* because there was an insufficient relationship between those entities' monopoly status and the challenged actions. He continued that there was "no indication of any greater connection" in the present case.[48] This reading of the two precedents is somewhat questionable. In *Pollak* the Court did not expressly disclaim reliance on the monopoly status of the transit authority; it did disclaim reliance on the *mere fact* that the authority enjoyed a substantial monopoly by reason of federal authority.[49] The deciding factor in *Pollak* clearly was not monopoly status, but rather the PUC's specific investigation and approval of the challenged practice; nevertheless, the PUC involvement seemed only the foremost among several relevant considerations.[50]

The challenged broadcasting in *Pollak* was objectionable to the unhappy listeners because due to the transit authority's monopoly they had no alternative transportation. But the practice was in no way dependent on the monopoly; the transit company was not able to broadcast because it held a monopoly, nor would it necessarily have had to stop the music had the monopoly ceased. In *Jackson*, however, there was a greater connection because the efficacy of unrestricted utility terminations as a collection device and the harm

45. 407 U.S. at 164-65.

46. *Id.* at 176-77; *id.* at 183 (Douglas, J., dissenting).

47. *Id.* at 176-77.

48. 419 U.S. at 352.

49. 343 U.S. at 462.

50. *Id.* It is curious that the *Jackson* majority relied on the "monopoly aspects" of *Moose Lodge*, for the same six Justices comprised the majority in *Moose Lodge*, where they wrote that the licensing quota system "falls far short of conferring upon club licensees a monopoly in the dispensing of liquor . . . ." 407 U.S. at 177.

which may result from such terminations were directly dependent on the utility's lack of competition.[51] The majority never expressly recognized that point; it seemed to suggest a special category for the monopoly status of a regulated utility. The Court noted that utilities are "natural monopolies" created by the enormous capital requirements and economies of scale involved in their industries. State regulation did not create these monopolies; it merely recognized them and intervened to safeguard the public interest by serving as a substitute for competition.[52] The implication seemed to be that while a monopoly was an important factor in considering the presence of state action, a "natural" monopoly was of less importance. The respondent may have been a natural monopoly whose status was not protected by the state. However, a potential competitor could not operate without a certificate of public convenience issued by the PUC,[53] and the state had a clearly enunciated policy against competition in the provision of utility services.[54]

---

51. *See Terminations, supra* note 37, at 1487-91.

52. 419 U.S. at 351 n.8.

53. *Id.* at 368 & n.1. The Public Utility Code provides that "[a] certificate of public convenience shall be granted . . . *only if and when* . . . the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public . . . ." PA. STAT. ANN. tit. 66, § 1123 (1959) (emphasis added). Thus a potential competitor may enter the field only at the pleasure of the state.

54. Dublin Water Co. v. Pennsylvania PUC, 206 Pa. Super. 180, 213 A.2d 139 (1965); Painter v. Pennsylvania PUC, 194 Pa. Super. 548, 169 A.2d 113 (1961) (competition within same area by noncarrier public utilities such as water companies is deleterious and not in public interest, except in rare instances). For the view that utilities may not be natural monopolies see *Terminations, supra* note 37, at 1489 n.70 and materials cited therein. Similar state authorization of a monopoly has been found to create state action. The Federal Railway Labor Act authorized railroads and railway labor unions to enter into exclusive union shop agreements previously prohibited by Nebraska's right-to-work statutes. It was held that employees in that state whose constitutional rights might be violated by the federally authorized union shop contracts would have a remedy under the fourteenth amendment. Railway Employees Dep't v. Hanson, 351 U.S. 225 (1956). It has been argued that the union shop was an otherwise "natural monopoly" which had been restrained artifically by Nebraska law; the federal law in effect authorized or granted a monopoly. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 366-67 (1974) (Marshall, J., dissenting); *Terminations, supra* note 37, at 1489-90.

Capital investment, economies of scale, and other natural forces aside, state regulation removes the legal barriers to monopoly. In Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248 (4th Cir. 1971) and Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), private antitrust suits against regulated public utilities were dismissed on the basis that the utilities' actions were the states' actions by virtue of the state regulatory schemes, and therefore exempt from federal antitrust statutes. *Accord*, Parker v. Brown, 317 U.S. 341 (1943). It is not clear whether fourteenth amendment state action is the same as state action in the antitrust sense. Since different policies are concerned the two standards

C. *Public Function and Public Interest*

The Court recognized that state action is present when a private entity exercises powers and functions traditionally reserved to the state; it found the delivery of electricity was not such a public function.[55] Justice Marshall, dissenting, argued that utility service was in fact an accepted public function.[56] Although the state did not provide electric power,[57] it did more than merely regulate the private corporations that did provide service. The state reserved the power to dictate rates, accounting procedures, and standards for facilities and service; the state conferred on utilities a limited power of eminent domain, the right to enter on private property, and the authority to issue regulations with the force of law.[58] Justice Marshall felt this indicated a conscious choice by the state to utilize private entities for the delivery of utility services, and to convert those private corporations into quasi-governmental agencies.[59]

The public function argument includes the public interest aspect. The Court reasoned that all business activities which touch the public's well being are affected with a public interest, and that therefore such status alone does not involve state action. As a general proposition, that was unarguably correct; but the Court ignored *Burton*'s admonition to sift facts and weigh circumstances, and did not inquire into the *extent* to which the respondent was affected with a public interest. Justice Douglas observed that the respondent was the only available source of electric power, an indispensable element of life in today's society.[60]

State Action and Balancing

The concept of state action has drawn critical fire for its imprecision and difficulty of application.[61] *Jackson* should add to the com-

need not be identical, but the concept seems the same: whether the state is so involved that the activity may reasonably be treated as the state's.

55. 419 U.S. at 352-53.

56. *Id.* at 371.

57. The state does authorize its municipalities to provide electric services at their election. *See, e.g.*, PA. STAT. ANN. tit. 53, § 38575 (1959) (cities of the third class).

58. 419 U.S. at 368 n.1; Brief for Petitioner at 21-27.

59. 419 U.S. at 368 n.1.

60. *Id.* at 361. For documentation of the deaths of elderly residents due to utility terminations see Boston Globe, Feb. 9, 1974, at 17, col. 1; N.Y. Times, Dec. 26, 1973, at 26, col. 3; Pittsburgh Press, Jan. 21, 1976, at 1, col. 3; NEWSWEEK, Jan. 8, 1974, at 28.

61. Black, *The Supreme Court, 1966 Term, Forward: State Action, Equal Protection, and*

mentators' consternation. The majority purported to apply the standard for state action enunciated in *Moose Lodge*: whether there is such a "sufficiently close nexus" between the state and the challenged activities of the regulated body that it is reasonable to treat the activities as those of the state.[62] The Court drew a line, with *Burton* on one side and *Moose Lodge* on the other, and asked on which side *Jackson* fell; they placed it on the *Moose Lodge* side, where no state action was found.[63] On its facts, however, *Jackson* seems to belong with *Burton*. Utilities are subject to unique and pervasive regulation and are public as in *Burton*, not private as in *Moose Lodge*.[64] This inconsistency indicates the Court may be implicitly considering other factors. Commentators have suggested the finding of state action is in reality a policy decision arrived at by balancing competing rights.[65] The clash has generally been between property rights and those rights, especially equal protection, which are guaranteed by the first and fourteenth amendments. If the rights asserted by the challenger are found dominant, the Court announces that state action is present and applies the fourteenth amendment. If the defendant's claimed rights prevail, the Court denies the existence of state action.[66]

California's Proposition 14, 81 HARV. L. REV. 69, 89, 91 (1967).

62. 419 U.S. at 351.

63. *Id.* It is not at all clear from their respective facts that state action existed on the *Burton* rather than the *Moose Lodge* side. The mutual benefits arising from each relationship are at least equal and probably greater in *Moose Lodge*. The Eagle Restaurant in *Burton* leased its space on somewhat favorable terms and the Parking Authority used the rents to offset the costs of building and operating its parking garage; it has been strongly suggested that the Moose Lodge owed its success and possibly its very existence to its possession of the liquor license. Brief for Appellee at 61-62, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); 8 N. ENG. L. REV. 251, 269-71 (1973). Furthermore, the state received significant income as the monopoly liquor dealer, and whatever intangible social benefits the legislature foresaw in enacting the regulatory scheme. The degree of state control was definitely greater and more direct in *Moose Lodge*. In *Burton*, the state had a right of control through its general police powers and in its role as a lessor. But in describing the powers of control in *Moose Lodge*, the district court stressed "the uniqueness and all-pervasiveness of the regulation of the dispensing of liquor under licenses granted by the state." Irvis v. Scott, 318 F. Supp. 1246, 1248 (M.D. Pa. 1970). *See also* 8 N. ENG. L. REV. 251, 252 (1973).

64. The mutual benefits present in *Jackson* were much like those held important in *Burton*. *See* notes 36-43 and accompanying text *supra*.

65. *See* Comment, *State Action and the Burger Court*, 60 VA. L. REV. 840 (1974).

66. An interesting case in light of this thesis is CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973), in which both parties asserted first amendment rights. The network had declined to sell airtime to the Democrats; in the court struggle that ensued, CBS claimed freedom of the press while the Democrats declared that their right to be heard had been violated. The Court upheld CBS's position, but splintered on the question of whether a Federal Communi-

The results, if not the purported rationales, of the cases in question are more comprehensible in light of this hypothesized "balancing doctrine." The property rights in *Burton* were less compelling because the private property involved was open to the public; there was no associational right asserted in *Burton*. In *Moose Lodge*, however, the right of free association was central; the private property was ostensibly not open to the general public, and the injury to the plaintiff's equal protection rights was relatively slight. Similarly, *Jackson* fell on the *Moose Lodge* side of the line in part because racial discrimination was not a factor on the plaintiff's side of the scales.[67] Viewed this way, the determination of the state action issue in *Jackson* was in fact an implicit weighing and balancing of the nature of the right asserted,[68] the potential harm of denying the right,[69] the potential costs to Metropolitan and its subscribers of

---

cations Commission ruling in support of CBS constituted governmental action; six separate positions were expressed on the issue.

67. One of the foremost concerns of the Court over the past three decades has been the elimination of racial discrimination; most cases in which state action has been found have involved this discrimination. Bright v. Isenbarger, 314 F. Supp. 1382, 1392-93 (N.D. Ind. 1970) (the state action doctrine developed in response to efforts to eliminate forms of private racial discrimination). Some courts and judges have openly acknowledged a policy of eradicating state involvement, "however subtle and indirect," in ostensibly private discrimination; this was typified by the statement of Justice Brennan that the "state action doctrine reflects the profound judgment that denials of equal treatment, and particularly denials on account of race or color, are singularly grave when government has or shares responsibility." Adickes v. S.H. Kress & Co., 398 U.S. 144, 190 (1970) (Brennan, J., concurring and dissenting). *See also* Bright v. Isenbarger, 314 F. Supp. 1382, 1392-93 (N.D. Ind. 1970) and materials cited therein.

Therefore a claim of constitutional infringement based on race is most likely a great influence on the Court's implicit or explicit balancing of conflicting rights.

68. The right asserted is the due process right of a hearing prior to the severance of a property right. Whether electric service to the home *is* a property right was an issue not reached by the *Jackson* Court, although the parties had briefed it thoroughly. *See* Board of Regents v. Roth, 408 U.S. 564 (1972) (employment); Fuentes v. Shevin, 407 U.S. 67 (1972) (household goods); Bell v. Burson, 402 U.S. 535 (1971) (driver's license); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare payments); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (wages).

69. Terminations may produce even fatal results. *See* note 60 *supra*. The cases considering the issue have found utility company error rates to be as high as 16%, Bronson v. Consolidated Edison Co., 350 F. Supp. 443, 448 n.11 (S.D.N.Y. 1972), although there is some question as to the meaning of such figures. The literature speaks of such social costs as frustration and alienation; *see Terminations*, *supra* note 37, at 1482.

The cases have described the utilities' capacity for incompetence and callousness as "Orwellian," *Bronson*, *supra*, at 444, and have cataloged numerous individual instances of stupidity and rude indifference. Palmer v. Columbia Gas, Inc., 479 F.2d 153, 158 (6th Cir. 1973). The consumer's plight was eloquently recognized over eighty years ago in Wood v. City of Auburn, 87 Me. 287, 32 A. 906, 908 (1895).

affirming the right sought,[70] and the value to society of the right to enjoy property undisturbed.

If the Court actually is applying this implicit approach, there is a problem in that the balancing *is* implicit; the observer does not know which factors were weighed and which ignored, or their relative importance. For example, before *Moose Lodge* reached the Supreme Court, at least one commentator predicted with satisfaction that the Court would at last be faced with an overall examination of the right of free association.[71] However, the Court avoided the issue of free association entirely;[72] because it found no state action, it was unnecessary to decide among the conflicting constitutional assertions.[73] A further problem is that although the process of decision may be a delicate case-by-case balancing, the printed decision is stated in straightforward, unequivocal, and therefore potentially overbroad terms. In *Jackson*, this gave rise to the fear expressed by Justice Marshall that such language, if construed literally by some future court, would inevitably lead to the result that a public utility could refuse service to minorities or any other group with impunity from constitutional attack.[74] That result was incredible to Justice Marshall, and probably to at least a majority of the Court, but the language of *Jackson* would appear to permit it.

Conclusion

It has been widely stated that *Moose Lodge* halted a continuous

---

70. The power of unrestricted termination is an often-used, potent collection tool. *See* note 42 *supra*. If due process protections were applicable in termination cases, the mandated hearing would need not be a full trial; the Court has held that due process is flexible in its demands, and that the form of hearing may be adapted to fit the circumstances. Fuentes v. Shevin, 407 U.S. 67, 90 n.21 (1972). *See Terminations, supra* note 37, at 1494-1504.

71. Comment, *Private Clubs: Freedom of Association Overlooked in Effort to Guarantee Equal Protection*, 23 Syracuse L. Rev. 905, 917 (1972).

72. 8 N. Eng. L. Rev. 251, 267 (1973).

73. Another way of stating this result is that because the Court had already decided between the conflicting assertions, it found no state action.

74. Justice Marshall stated:

> Today the Court . . . adopts a stance that is bound to lead to mischief when applied to problems beyond the narrow sphere of due process objections to utility terminations. . . . The Court has not adopted the notion . . . that different standards should apply to state action analysis when different constitutional claims are presented. . . . *Thus, the majority's analysis would seemingly apply as well to a company that refused to extend service to Negroes . . . or any other group that the company preferred . . . not to serve.*

419 U.S. at 366, 373-74 (Marshall, J., dissenting) (emphasis added).

expansion of the state action doctrine,[75] even though the case could be held closely to its particular facts. *Jackson* clearly forces a significant retreat in the doctrine, because it represents probably the most extreme set of circumstances in which the state may be involved with a private actor possessing a most public nature.

The post-*Jackson* cases have shown a tendency to follow it closely, though few exceptionally compelling claims have yet been presented.[76] The language most cited from *Jackson* is the "nexus" test,[77] which seems to have become the standard in state action cases; the test has so far been strictly applied.[78] Several cases have indicated in dicta that Justice Marshall's fears are unfounded; they suggest that racial discrimination will remain a special category with its own apparently lower standards for determining state action.[79] On the other hand, federal courts thus far have not found *Jackson* an absolute bar to the finding of state action. *Jackson* admits that state action may exist in a private party's performance of a function traditionally associated with sovereignty,[80] and subsequently courts have found state action in the private sale by a lienor of the debtor's goods[81] and the possibility of state action in the determination of entry to a licensed profession.[82] Despite the apparent evisceration of *Burton*, two courts have recognized its continuing vitality by finding "joint ventures" between government and a

75. *See, e.g.*, 26 RUT. L. REV. 888 (1973).

76. *But see* Greco v. Orange Memorial Hosp. Corp., 513 F.2d 873 (5th Cir. 1975). No state action was found in the decisions of the defendant, a private non-profit corporation which leased its facilities and all its equipment from Orange County for one dollar per year. In addition, 8-½% of all county revenues went to retiring the bond issue and time warrants sold to finance construction of the hospital. Although *Jackson* was cited in reaching this questionable result, its true significance to the circuit court is unclear.

77. *See* note 27 and accompanying text *supra*.

78. *See, e.g.*, Junior Chamber of Commerce v. Missouri State Junior Chamber of Commerce, 508 F.2d 1031, 1033 (8th Cir. 1975); Stearns v. VFW, 394 F. Supp. 138, 143 (D.D.C. 1975) (sex discrimination); Spencer v. Community Hosp., 393 F. Supp. 1072, 1075 (N.D. Ill. 1975) (hospital staff privileges); Murphy v. Society of Real Estate Appraisers, 388 F. Supp. 1046, 1051 (E.D. Wis. 1975) (entry to a profession); Mattheis v. Jockey Club, 387 F. Supp. 1126, 1127 (E.D. Ky. 1975) (horse-breeders' association).

79. Greco v. Orange Memorial Hosp. Corp., 513 F.2d 873, 878 n.9 (5th Cir. 1975); Spark v. Catholic Univ. of America, 510 F.2d 1277, 1281-82 (D.C. Cir. 1975). Both cases suggest that a different and greater involvement is necessary to find state action when racial discrimination is not a factor.

80. 419 U.S. at 352.

81. Caesar v. Kiser, 387 F. Supp. 645 (M.D.N.C. 1975).

82. Murphy v. Society of Real Estate Appraisers, 388 F. Supp. 1046 (E.D. Wis. 1975).

private entity.[83] Nevertheless, in its revisionist reading of *Pollak*, its weakening of *Burton*, and especially its extension of *Moose Lodge*, *Jackson* vigorously suggests the Court will in the future be extremely reluctant to apply constitutional strictures to private parties.

Stephen Jurman

83. Holodnack v. Avco Corp., 514 F.2d 285 (2d Cir. 1975); Braden v. University of Pgh., 392 F. Supp. 118 (W.D. Pa. 1975).