

# TERMINATION OF SERVICE BY PRIVATELY-OWNED PUBLIC UTILITIES: THE TESTS FOR STATE ACTION

FRANK A. ISLER\*

In light of our society's almost complete dependence on electricity, natural gas and water, the termination of these services by a public utility may work severe hardships on the utility consumer.<sup>1</sup> At the very least, termination would be a severe inconvenience and in some reported incidents, has had more serious consequences.<sup>2</sup> Termination normally occurs when the customer fails to pay his utility bill.<sup>3</sup> The

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\* A.B., Union College, 1973; J.D., Washington University, 1976.

1. A detailed analysis of the hardships arising from the termination of utility services appears in Brief for Legal Services for the Elderly Poor and The Nat'l Senior Citizens Law Center as Amicus Curiae, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). This brief primarily deals with the great impact public utility termination practices have on elderly consumers. Aside from the more obvious threats to the physical health of the elderly, the brief notes that termination may also have severe psychological effects. *Id.* at 10.

2. Deaths from exposure have been reported when heat was terminated for non-payment of bills. *Boston Globe*, Feb. 9, 1974, at 17, col. 1 ("Man, Seventy-One, Freezes to Death After Utility Shuts Off Gas"); *N.Y. Times*, Dec. 26, 1973, at 26, col. 1 ("Elderly Couple Found Frozen in Syracuse Home"); *NEWSWEEK*, Jan. 8, 1974, at 28 ("A Winter's Tale").

3. Existing termination procedures follow a common pattern. After payments become due, the utility sends out a termination notice, usually giving the consumer a few days to pay before termination. If payment is not received within that period, services are cut off. The use of notice of termination is widespread and is primarily intended as a threat to coerce payment. The Philadelphia Gas Works bills 500,000 customers monthly. Approximately 38,000 of them fail to pay on time, requiring the company to send out shut-off notices. These notices are viewed as a vital part of the collection of revenues enabling the utility to continue supplying service. Although the company mails 38,000 termination warnings per month, the actual number of shut-offs for non-payment is 20,000 per year. Brief for City of Philadelphia as Amicus Curiae at 2-3, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). In light of the tremendous number of notices of termination that are sent out monthly, the City of Philadelphia argued that pre-termination hearings would prove physically impossible. *Id.* at 3.

public utility may be justified in cutting off service until the arrearages are satisfied.<sup>4</sup> Due to human or mechanical error, however, services have been terminated when in fact the consumer has been paying his bills. In attempting to remedy such errors, the customer often finds himself confronted with an unresponsive public utility.<sup>5</sup> Thus a customer whose service has been improperly terminated may literally be left out in the cold.

The due process clause of the fourteenth amendment<sup>6</sup> may protect the consumer from unjustified termination of his utility services without a prior hearing.<sup>7</sup> But before the merits of a consumer's due process claims are addressed, an initial inquiry must be made to determine whether the conduct of privately-owned utility companies is subject to constitutional limitations. It must be demonstrated that the termination of utility services by a privately-owned utility company constitutes "state action." This Note will consider the state action problem in light of *Jackson v. Metropolitan Edison Company*.<sup>8</sup>

## I. THE REQUIREMENT OF STATE ACTION

By the terms of section one of the fourteenth amendment,<sup>9</sup> the rights guaranteed therein are protected only from violations by government. No protection is available when purely private conduct deprives others of their fourteenth amendment rights.<sup>10</sup> This dichotomy between state

4. The public utility is justified in cutting off its services if the unpaid bills accurately reflect the consumer's obligations. It is possible, however, that the customer has at that particular time, a valid reason for non-payment, e.g., lack of immediate funds. In such a case some payment schedule should be worked out in order to continue the utility's service.

5. The difficulties a consumer may face in attempting to have the public utility correct its errors and restore its services have been described by one court as an "Orwellian nightmare." *Bronson v. Consolidated Edison Co.*, 350 F. Supp. 443, 444 (S.D.N.Y. 1972). See also *Palmer v. Columbia Gas, Inc.*, 479 F.2d 153, 158 (6th Cir. 1973).

6. U.S. CONST. amend. XIV.

7. New York has established an extensive pre-termination procedure. Under New York Public Service Commission regulations, consumers can challenge bills first with the utility company and if unsuccessful, the consumer can take the matter to the Commission. During this period services are maintained. For a detailed explanation of the New York procedure see Brief for Public Service Commission of the State of New York as Amicus Curiae, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

8. 419 U.S. 345 (1974).

9. U.S. CONST. amend. XIV, § 1. The pertinent part of the amendment reads as follows:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

10. Debate has raged concerning Congress' ability to reach purely private conduct

and private action was established almost one hundred years ago in the *Civil Rights Cases*<sup>11</sup> and has been continually adhered to by the United States Supreme Court.<sup>12</sup> The requirement of state action is also embodied in section 1983 of the Civil Rights Act,<sup>13</sup> which creates liability for any person who, acting "under color of any statute, ordinance, regulation, custom, or usage" of a state, deprives another of his rights, privileges or immunities secured by the United States Constitution.<sup>14</sup>

The requirement that there be state action serves a dual function. It imposes constitutional obligations on a "private" actor when the state is sufficiently involved with his conduct. Since the state is obligated to act within constitutional limits, the state action doctrine prevents the state from doing indirectly through private parties what it can not do directly.<sup>15</sup> The requirement that there be state action before constitu-

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under § 5 of the fourteenth amendment. In *United States v. Guest*, 383 U.S. 745 (1966), three judges stated "there now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights." *Id.* at 762 (Clark, J., concurring). See also *Hempflill, State Action and Civil Rights*, 23 *MERCER L. REV.* 519 (1972).

11. 109 U.S. 3, 11 (1883): "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment."

12. See, e.g., *Moose Lodge v. Irvis*, 407 U.S. 163 (1972); *Evans v. Newton*, 382 U.S. 296 (1966); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

13. 42 U.S.C. § 1983 (1970):

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.

14. The "under color of" language of § 1983 is generally held to be synonymous with the "state action" language of § 1 of the fourteenth amendment. See, e.g., *U.S. v. Price*, 383 U.S. 787, 794 n.7 (1966); *Terry v. Adams*, 345 U.S.461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Murphy v. Society of Real Estate Appraisers*, 388 F. Supp. 1046, 1049 (E.D. Wis. 1975).

15. 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 for them. Government is the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct. Therefore something is uniquely amiss in a society where the government, the authoritative oracle of community values, involves itself in racial discrimination. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 190 (1970) (Brennan, J., concurring in part, dissenting in part). The purpose of the doctrine is further described by one commentator: "There is a need to maintain the constitutional integrity of government resources, to protect against misuse by private persons of powers or aid received from government, and to protect against use by government of private individuals to accomplish government objectives without constitutional restraint." Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 *COLUM. L. REV.* 656, 656-57 (1974) [hereinafter cited as Note, *State Action: Theories*]. See also *Greco v. Orange Memorial Hospital Corp.*, 513 F.2d 873, 879 (5th Cir. 1975).

tional duties will be imposed on conduct also protects purely private life and decisionmaking from government intrusion.<sup>16</sup> Thus, no matter how discriminatory or unfair one's private conduct might be, no constitutional restrictions will be placed on it.<sup>17</sup>

## II. THE TESTS

Although the state action doctrine is easily stated, its application is often difficult.<sup>18</sup> Determining at what point the state has sufficiently infused itself into what would otherwise be private conduct has continually troubled the courts.<sup>19</sup>

Due to the wide spectrum of factual settings in which various constitutional challenges are made to innumerable types of private conduct, no hard and fast tests have been created for establishing the presence of state action. The search for state action of necessity must be made on a case-by-case basis.<sup>20</sup> "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."<sup>21</sup> Two different approaches have been taken by the courts in examining private conduct for state action. One can be labelled the "quantitative" approach, and the other the "balancing" approach.<sup>22</sup>

The "quantitative" approach focuses on the nature of the government involvement in the challenged conduct. A survey of the relationship between the private actor and the government is made to determine the degree to which the private conduct has become "entwined with governmental policies or . . . impregnated with a governmental character."<sup>23</sup> The "quantitative" method has been applied by the courts in two different ways. The broader view takes into consideration the involvement of the government in the overall conduct of the private actor.<sup>24</sup> A

16. Note, *State Action and the Burger Court*, 60 VA. L. REV. 840, 841 (1974) [hereinafter cited as Note, *The Burger Court*].

17. See, e.g., *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948).

18. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349-50 (1974); *Moose Lodge v. Irisv*, 407 U.S. 163, 172 (1972); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 723 (1961).

19. See, e.g., cases cited in note 18 *supra*.

20. *Palmer v. Columbia Gas, Inc.*, 479 F.2d 153, 162 (6th Cir. 1973).

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

22. See 24 EMORY L.J. 511, 512 (1975).

23. *Evans v. Newton*, 382 U.S. 296, 299 (1966).

24. See *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Lavoie v. Bigwood*, 457 F.2d 7 (1st Cir. 1972); *Ihrke v. Northern States Power Co.*, 459 F.2d 566 (8th Cir.), *vacated as moot*, 409 U.S. 815 (1972).

more restrictive view examines the degree of state involvement in the specific conduct challenged; a sufficient nexus must exist between the challenged conduct and the government to establish state action.<sup>25</sup> The "quantitative" approach reflects the concern that the government must assume responsibility for private conduct that infringes upon any constitutional rights of individuals when the government has become sufficiently entwined with that conduct.<sup>26</sup>

The "balancing" approach does not focus solely on the degree of government involvement but contemplates the weighing of three operative factors: the degree of state involvement; the constitutional rights raised by the party that challenges the conduct; and the rights of the party whose conduct is at issue.<sup>27</sup> Since some constitutional rights are afforded greater protection than others, the requisite degree of state involvement will vary depending upon the rights asserted.<sup>28</sup> Consideration must also be given the private actor's right to be free from government intrusion. Thus the "balancing" approach is underlined by a concern for protecting the realm of private life and decisionmaking.<sup>29</sup>

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25. See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Moose Lodge v. Irisv.*, 407 U.S. 163 (1972); *Kadlec v. Illinois Bell Tel. Co.*, 407 F.2d 624 (7th Cir. 1969). See generally 24 CATHOLIC U.L. REV. 622, 625 (1975); 24 EMORY L.J. 511, 524.

26. *Terry v. Adams*, 345 U.S. 461, 473 (1953) (Frankfurter, J., concurring).

27. See, e.g., *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Weise v. Syracuse Univ.*, 522 F.2d 397 (2d Cir. 1975). *Marsh v. Alabama*, *supra*, is illustrative of this balancing approach. See notes 70-74 and accompanying text *infra*. See generally Note, *The Burger Court*, *supra* note 16 (author hails the Burger Court's revitalization of the balancing approach). For a discussion of the Burger Court's halt to the expansive trend of the state action concept in general and its limiting application of constitutional restrictions on private activity, see Hemphill, *supra* note 10, at 546; 24 EMORY L.J. 511, 519-22.

28. For this reason, there exists a "willingness to find state action in racial discrimination cases although the same state-private relationship might not trigger such a finding in a case involving a different dispute over a different interest." *Weise v. Syracuse Univ.*, 522 F.2d 397, 406 (2d Cir. 1975). The Ninth Circuit has also expressed an awareness that different constitutional rights trigger different degrees of state involvement. In determining whether state action existed when a creditor exercised self-help repossession, the court was not convinced that its decision should be controlled by state action cases dealing with racial discrimination. *Adams v. Southern Cal. First Nat'l Bank*, 492 F.2d 324, 333 (9th Cir. 1973). In a footnote, however, the court took an apparently inconsistent position, stating that the "balancing" approach should not result in a hierarchy of rights. *Id.* at 333 n.23. In *Greco v. Orange Memorial Hospital Corp.*, 513 F.2d 873 (5th Cir. 1975), the court noted that courts give the state action issue closer scrutiny when it arises in a non-racial setting: "The potentially explosive impact of the application of state action concepts designed to ferret out racially discriminatory policies in areas unaffected by racial considerations has led courts to define more precisely the applicability of the state action doctrine." *Id.* at 879. See also *Jackson v. Statler Foundation*, 496 F.2d 623, 628-29 (2d Cir. 1974). See generally 24 EMORY L.J. 511, 516-17.

29. The "balancing" approach also alters the nature of the state action determination.

### III. APPLICATION OF STATE ACTION TO PUBLIC UTILITY TERMINATION PROCEDURES

In analyzing the state action problem involved when privately-owned utility companies terminate service for non-payment, courts have not expressly employed the "balancing" approach<sup>30</sup> but rather have based their decisions upon a "quantitative" analysis. In determining whether the state government has become sufficiently entwined with the public utility's conduct to render the termination of services state action, the federal district and circuit courts have relied on four factors that have been articulated in other state action cases. These factors are: 1) the degree of government regulation of the conduct in question; 2) the public function served by the private actor; 3) whether the government and the private actor are involved in a joint venture; and 4) whether the private actor enjoys a state created monopoly.<sup>31</sup> Since it is not unusual for more than one of these factors to appear in the public utility area, the courts must also determine if they are to look to the aggregate effect of all four factors, or to deal with each factor separately.<sup>32</sup>

#### A. Government Regulation

One factor in determining the degree of government involvement in "private" conduct is the extent to which the private actor is regulated by the government through its legislature and administrative agencies. Government regulation as an indicium of state action is based on the theory that through such regulation the state becomes entwined with the management or control of the private entity.<sup>33</sup>

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Under the "quantitative" approach, the state action question is a threshold issue. If no state action is found the court dismisses and never reaches the merits. Under the "balancing" analysis, the court does delve into the merits by considering not only the degree of state involvement, but the interacting rights of the parties involved. 24 EMORY L.J. 511, 519.

30. In those cases in which state action was not found, it can be inferred that the courts were evaluating more than simply the degree of state involvement and were concerned with the ability of the companies to conduct day-to-day business without governmental interference. *Kadlec v. Illinois Bell Tel. Co.*, 407 F.2d 624, 626 (7th Cir. 1969). *See also Lucas v. Wisconsin Elec. Power Co.*, 466 F.2d 638 (7th Cir. 1972) (en banc), *cert. denied*, 409 U.S. 1114 (1973).

31. Both courts and commentators have broken the factors into different groupings though the same concepts are involved. *See, e.g., Palmer v. Columbia Gas, Inc.*, 479 F.2d 153 (6th Cir. 1973); *Lucas v. Wisconsin Elec. Power Co.*, 466 F.2d 638 (7th Cir. 1972) (en banc), *cert. denied*, 409 U.S. 1114 (1973); Haydock, *Public Utilities and State Action: The Beginning of Constitutional Restraints*, 49 DENVER L.J. 413 (1973); 14 B.C. IND. & COMM. L. REV. 317 (1973).

32. *See Lavoie v. Bigwood*, 457 F.2d 7, 10 (1st Cir. 1972). *See also Note, Constitutional Safeguards for Public Utility Customers: Power to the People*, 48 N.Y.U.L. REV. 493, 510-11 (1973) [hereinafter cited as Note, *Constitutional Safeguards*].

33. Note, *Constitutional Safeguards*, *supra* note 32, at 503. In addition to mere regula-

The principal case establishing the government regulation theory as a basis for finding state action is *Public Utilities Commission v. Pollak*<sup>34</sup> in which passengers of a street railway company claimed that the company's broadcast of radio programs in the streetcars violated their first and fifth amendment rights.<sup>35</sup> The company operated in the District of Columbia under a franchise granted by Congress,<sup>36</sup> and its service and equipment were subject to regulation by the Public Utility Commission of the District of Columbia.<sup>37</sup> The question confronting the Court was whether the broadcasts constituted government action. The Court held that the close regulation of the company by the Public Utility Commission constituted government action.<sup>38</sup> In so holding the Court relied particularly upon the fact that the agency had investigated and ruled on the practice in question.<sup>39</sup> *Pollak*, however, seemed to open the door for a finding of state action whenever a private actor is merely subjected to close governmental regulation.

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tion, on occasion the state delegates some of its power to a private entity, thereby allowing the private actor to exercise power it would not have had otherwise. *Id.* When this occurs, a finding of state action is warranted. *Railway Employees' Dep't AFL v. Hanson*, 351 U.S. 225 (1956) (suit challenging discriminatory practices of the union). The union was acting pursuant to the Railway Labor Act. Since the federal government was the source of the power exercised by the union, government action was found, enabling the court to reach the fifth amendment questions. *Id.* at 232.

The states often grant special powers to utility companies, including eminent domain authority, the right to enter private property, and the use of public lands. *See, e.g., Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Palmer v. Columbia Gas, Inc.*, 479 F.2d 153 (1973); *Ihrke v. Northern States Power Co.*, 459 F.2d 566 (8th Cir.), *vacated as moot*, 409 U.S. 815 (1972).

34. 343 U.S. 451 (1952).

35. *Id.* at 453. Just as state action must be found before constitutional limits can be placed on conduct challenged under the fourteenth amendment, government action must be found before first and fifth amendment rights can be enforced. *Id.* at 461. *See Corrigan v. Buckley*, 271 U.S. 323, 330 (1926); *Talton v. Mayes*, 163 U.S. 376, 382 (1896).

36. 343 U.S. at 454.

37. *Id.* at 458. Due to complaints concerning the broadcasts, the Commission held an investigation and approved the company's practice. The investigation focused on public convenience, comfort and safety. The Commission found that the broadcasts had no adverse effect on these factors. *Id.* at 459.

38. *Id.* at 462-63. The Court specifically stated that in finding government action, it was not relying on the fact that the company enjoyed a substantial monopoly or that it was a public utility under authority of Congress. *Id.* at 462. It should be noted that although the Court found government action, it found no violation of the first or fifth amendments. *Id.* at 463-66.

39. *Id.* at 462. Although consumers challenging utility termination procedures rely on a broad reading of *Pollak*, it can be argued that in analyzing the "quantity" of government regulation, a key factor in the decision was the government's involvement in the specific conduct challenged. *See* discussion of the "broad" and "narrow" views taken under the "quantitative" approach, notes 24-25 and accompanying text *supra*.

Any possibility for a broad interpretation of *Pollak* was put to rest by the Burger Court in *Moose Lodge v. Irvis*,<sup>40</sup> in which the Court severely limited the use of government regulation as a means of finding state action.<sup>41</sup> Justice Rehnquist, writing for the majority, found that the state's issuance of a liquor license to a private social club did not sufficiently involve the state in the club's policy of racial discrimination. Although all state liquor licensees were subjected to detailed regulation by a state commission, including scrutiny of employees and records, the Court found that the mere fact that a private entity was regulated by the state would not automatically require a finding of state action.<sup>42</sup> The state regulation must "foster or encourage"<sup>43</sup> the challenged conduct. There must be a direct nexus between the regulation and the conduct.<sup>44</sup>

Read together, *Pollak* and *Moose Lodge* establish the parameters within which government regulation of a private entity can become grounds for a finding of state action. Termination of services by a public utility, however, falls within the problem area between express state approval of the utility's termination procedure and mere state regulation of the overall operation of the company.

Privately-owned public utilities are unique creatures in the American system of free enterprise. "The right to engage in the public utility business, unlike most other business, exists only with the permission of public authority."<sup>45</sup> Once granted the right to do business as a public

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40. 407 U.S. 163 (1972).

41. The *Moose Lodge* decision is consistent with the Burger Court's attempts to halt the expansion of the state action doctrine. See Hemphill, *supra* note 10, at 546; 24 EMORY L.J. 511, 519-22.

42. 407 U.S. at 173.

43. *Id.* at 176-77. It is interesting to note that if the Court had applied a "balancing" approach to the state action determination, *see* notes 28, 29 *supra*, a different result may have been reached. Since racial discrimination was involved, less state involvement would have been required for a finding of state action.

44. Note, *Constitutional Safeguards*, *supra* note 32, at 503. Justice Rehnquist did find a direct nexus in one aspect of the case. The Pennsylvania Liquor Control Board promulgated one regulation requiring club licensees to adhere to all the provisions of the club's constitution and by-laws. Moose Lodge required racial discrimination in its constitution. Justice Rehnquist found that application of the regulation "in a case where the constitution and by laws of a club required racial discrimination would be to invoke the sanctions of the State to enforce a concededly discriminatory private rule." 407 U.S. at 178-79. The Court, however, did not find Moose Lodge's conduct violative of the equal protection clause but instead enjoined the Liquor Control Board's regulation.

Justice Douglas, both in his concurring opinion in *Garner v. Louisiana*, 368 U.S. 157 (1961), and his concurring opinion in *Reitman v. Mulkey*, 387 U.S. 369 (1967), felt that mere state licensing of businesses for *public uses*, was sufficient to constitute state action in racial discrimination cases.

45. Haydock, *supra* note 31, at 421.



utility, the company subjects itself to extensive control by the government, usually through a public utility commission.<sup>46</sup> Although most public utilities promulgate their own rules and regulations, the validity of these regulations are commonly dependent upon the commissions' review and approval.<sup>47</sup> Since the public utility's termination procedures for non-payment are normally included in its rules and regulations submitted to the state agency, the question arises whether the commission's approval of the entire package of regulations, without express approval of the termination provisions, constitute "government approval" and thereby establishes the necessary nexus between the government and the company's termination procedure to satisfy the requirements of *Moose Lodge* and *Pollak*.<sup>48</sup>

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46. "Public utility commissions have the power to review, approve, modify, or impose regulations and rules of conduct involving relations with consumers." *Id.* at 425. Arguably, extensive state control of the utility company by these commissions would be sufficient in itself to constitute state action under the rationale of *Pollak*. Note, *Constitutional Safeguards*, *supra* note 32, at 504.

47. See, e.g., *Ihrke v. Northern States Power Co.*, 459 F.2d 566 (8th Cir.), *vacated as moot*, 409 U.S. 815 (1972); *Lucas v. Wisconsin Elec. Power Co.*, 466 F.2d 638, 641 n.41 (7th Cir. 1972) (en banc), *cert. denied*, 409 U.S. 1114 (1973); *Bronson v. Consolidated Edison Co.*, 350 F. Supp. 443 (S.D.N.Y. 1972).

48. Lower federal courts were split on this question. Perhaps the easiest case for finding state action through regulation is *Palmer v. Columbia Gas, Inc.*, 479 F.2d 153 (6th Cir. 1973). *Palmer* involved a challenge to a gas company's termination procedures. These procedures were specifically set out in a state statute which permitted the company to obtain both a warrant and the assistance of a constable when a customer refused to allow a company employee to come onto his property and cut off the gas service. *Id.* at 162. Mindful that mere regulation is not sufficient to sustain a finding of state action, the court set out the following test for evaluating the effects of the regulations: "The important factor is not the number of statutes and regulations which pertain to the operation of a utility company, but the extent to which the state has reserved power to control the operations of a public utility, and the amount of power given to the utility which is usually reserved to the state." *Id.* at 164. In examining the termination statute, the court found that the state had effectively placed its police power in the hands of the public utility when it met resistance in terminating service. *Id.* at 162. The direct nexus found lacking in *Moose Lodge* is readily in existence in *Palmer*. A finding of state action would appear to be mandated when a state legislature not only speaks directly to the challenged conduct but also enhances the powers of the actor in relation to this conduct. This may still be the case even after the Supreme Court's decision in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). A case presenting a more common fact pattern is *Stanford v. Gas Service Co.*, 346 F. Supp. 717 (D. Kan. 1972). State action was found primarily because the state utility commission oversaw every aspect of the utility company's business. It would appear that this decision has been overruled by *Jackson*.

The principal lower court decision finding that the requisite nexus between state regulation and private conduct did not exist is *Kadlec v. Illinois Bell Tel. Co.*, 407 F.2d 624 (7th Cir. 1969). In *Kadlec* a privately-owned telephone company, following its own regulations, terminated plaintiff's call-pak service. The court found only one apparent connection between this termination and the state: the company's regulations were required to be filed with the state. The court concluded that this requirement in itself did

This question was squarely dealt with by the Supreme Court in *Jackson v. Metropolitan Edison Co.*<sup>49</sup> Pursuant to a filing requirement,<sup>50</sup> Metropolitan Edison submitted its amended general tariff<sup>51</sup> to the Pennsylvania Public Utility Commission (Pa. P.U.C.)<sup>52</sup> which contained a provision for discontinuance of service.<sup>53</sup> The Court noted that the

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not sufficiently involve the state in the termination. *Id.* at 626. Termination by the company was motivated by purely private economic interests and pursuant to its own regulations. Since no prior state approval was required before these regulations were to become effective, the court found that the state in no sense benefited from, encouraged, or cooperated in the termination. *Id.* One factor possibly underlying the result may have been that only certain telephone services provided to plaintiff were terminated. Although this is unarticulated in the decision, the court may have felt that deprivation of such service was not critical to plaintiff but was merely inconvenient.

In an enlightening concurring opinion, Judge Kerner set out seven facts, that if found to be in existence, would create a sufficient nexus between the public utility and the state. He noted that the result in each case would depend upon its facts. The seven factors are: 1) close regulation by statutorily created body; 2) regulations filed with the body as a condition of the utility's operation; 3) regulations to be approved in order to be effective; 4) a total or partial monopoly; 5) regulatory body control of rates and/or specific services; 6) public utility actions which are subject to review by a regulatory body; 7) state regulations permit public utilities to perform acts they could not otherwise do without violating the law. *Id.* at 628. The Seventh Circuit reaffirmed *Kadlec* in *Lucas v. Wisconsin Elec. Power Co.*, 466 F.2d 638 (7th Cir. 1972) (en banc), *cert. denied*, 409 U.S. 1114 (1973).

These lower court cases reflect the wide range of regulatory schemes involving termination of service by public utilities. At one extreme are statutes directly authorizing certain procedures (*Palmer*). At the other are state agencies that merely oversee the overall operations of the utilities (*Kadlec*). These cases demonstrate the various courts' attitudes toward applying the "regulation" factor as a means of determining the presence of state action. Compare *Stanford v. Gas Service Co.*, *supra*, with *Lucas v. Wisconsin Elec. Power Co.*, *supra*.

49. 419 U.S. 345 (1974).

50. Pennsylvania Public Utility Code, PA. STAT. ANN. tit. 66, § 1142 (1959).

51. General tariffs are the embodiment of the utility's rules and regulations. Provisions for amending tariffs are found in Pa. P.U.C. Tariff Regulations, § II: "Unless the Commission otherwise orders, no public utility to which these rules apply shall make any change in any existing and duly established tariff except after sixty (60) days' notice to the public."

52. The Commission is established under PA. STAT. ANN. tit. 66, § 452 (1959). Among other powers, the Commission has general administrative power to supervise and regulate all public utilities. The Commission has the power to make regulations in the exercise of its powers under the act, *id.* § 1341. The Commission, if dissatisfied with company regulations, can set its own standards of service and facilities. *Id.* § 1182. The Commission can also regulate service when it finds the company's service to be "unreasonable, unsafe, inadequate, insufficient or unreasonably discriminatory, or otherwise in violation of this act." *Id.* § 1183.

53. Rule 15 of the general tariff provided:

Company reserves the right to discontinue its service on reasonable notice and to remove its equipment in case of nonpayment of bill or violation of the Pennsylvania Public Utility Commission's or Company's Rules and Regulations, or, without notice, for abuse, fraud, or tampering with the connections, meters or other equipment of

amended tariff was filed solely because the company desired to obtain a rate change.<sup>54</sup> The provision concerning termination was submitted unchanged from prior tariffs.<sup>55</sup> Hearings were held by the Pa. P.U.C. on the amended tariff, but were limited to the proposed rate increases.<sup>56</sup> No challenge was made to the termination procedures. Under state law,<sup>57</sup> absent disapproval by the commission,<sup>58</sup> the provision became effective after a 60-day notice period.

The factual pattern of *Jackson* thus appears to be one step removed from that of *Pollak*.<sup>59</sup> The agency was presented with the challenged provision and through its inaction permitted the provision to take effect. Justice Rehnquist, writing for the majority, held that the state's "inaction" did not establish a sufficient nexus between the state and the challenged conduct.<sup>60</sup> *Pollak* was quickly distinguished on the ground that in *Jackson* there was no direct agency sanction of the conduct.<sup>61</sup> Thus *Pollak* was limited to its facts requiring *express* state approval

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Company. Failure by Company to exercise this right shall not be deemed a waiver thereof.

Rule 15 is included in the general tariff due to the requirement of Pa. P.U.C. Tariff Regulations, § VIII: "Every public utility that imposes penalties upon its customers for failure to pay bills promptly, or allows its customers discounts for prompt payment of bills, shall provide in its posted and filed tariffs a rule setting forth clearly the exact circumstances and conditions in which the penalties are imposed or discounts are allowed." Pa. P.U.C. Regulations can be found in Brief for Petitioner at Appendix A 12a-13a, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). Although this regulation seems to require the utility to include termination procedures in its tariff, the Court in *Jackson* felt that the regulation dealt only with monetary penalties. 419 U.S. at 355 n.14.

54. 419 U.S. at 354 n.10.

55. *Id.* at 354. The Court noted that the termination provisions of earlier tariffs were never the subject of hearings or investigations by the Commission. *Id.*

56. *Id.* at 355.

57. PA. STAT. ANN. tit. 66, § 1148 (1959). This provision primarily deals with rate changes. A company, subject to the act and Pa. P.U.C. regulations and orders, may have "reasonable rules and regulations governing the conditions under which it shall be required to render service." *Id.* § 1171.

58. The Court questioned whether the Pa. P.U.C. actually had the power to disapprove the termination provisions. 419 U.S. at 355. The Court reasoned that it was unclear whether the utility was required to include such a provision in its tariff. If termination provisions were not required, then Pa. P.U.C. would not have the authority to disapprove them. The Court ignored Pa. P.U.C. Regulations § VIII, *supra* note 53. Also, pursuant to PA. STAT. ANN. tit. 66, § 1183 (1959), the Pa. P.U.C. has the power to scrutinize the service provided by Metropolitan Edison which would seem to encompass the company's means of collecting revenue and terminating service.

59. See notes 34-39 and accompanying text *supra*.

60. Justice Rehnquist reiterated the *Moose Lodge* test: "[T]he 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." 419 U.S. at 351.

61. *Id.* at 356-57.

before state action will be found.<sup>62</sup> But the Court went one step further in restricting *Pollak* and held that not all instances of state approval would constitute state action:

The nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. Approval by the state utility commission of such a request from a regulated utility, *where the Commission has not put its own weight on the side of the proposed practice by ordering it*, does not transmute a practice initiated by a utility and approved by the Commission into "state action."<sup>63</sup>

The Court concluded that the Pa. P.U.C.'s failure to disapprove of the termination provision of the company's tariff amounted to no more "than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired."<sup>64</sup>

This new standard requiring something more than mere approval of a state regulatory body leaves several questions unanswered. What kinds of conduct would sufficiently place the commission's "weight on the side of the proposed practice by ordering it?" Does this mean that before a utility's conduct can become state action, the agency regulating it must "order" the challenged conduct?<sup>65</sup> If this is so, the Court has in effect overruled *Pollak*, for in that case the agency did not order the streetcar company to broadcast the challenged radio programs, but merely held an investigation into the practice and determined that the conduct did not endanger the safety of the passengers.<sup>66</sup> It is evident that at least under *Jackson*, the state agency must speak specifically to the challenged regulation when approving the utility company's package of rules. Thus the effect of the *Jackson* Court's extremely restrictive reading of *Pollak* is to remove state regulation as a factor in determining whether private conduct constitutes state action.<sup>67</sup>

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62. *Id.* at 371 (Marshall, J., dissenting).

63. *Id.* at 357 (emphasis added).

64. *Id.*

65. One commentator reads *Jackson* as expressly requiring the state to "order" the conduct. 9 U. RICHMOND L. REV. 760, 763 (1975).

66. See notes 34-39 and accompanying text *supra*.

67. 24 CATHOLIC U.L. REV. 622, 625. See 24 EMORY L.J. 511, 531 ("the quantitative approach taken by the Court and its insistence on focusing only on the challenged activity leaves little room for consideration of the rights of the parties involved").

It would appear that the public would now be wise to thoroughly challenge the proposed regulations of public utilities before the state regulatory body. If the agency approves the provisions, a later constitutional challenge to the company's procedures would seem to overcome the initial state action barrier. Thus a tangential ramification of *Jackson* may be

### B. *Public Function*

The public function concept, is premised on the theory that when a private actor assumes responsibilities normally attributed to the state, the conduct of the private actor becomes state action.<sup>68</sup> The doctrine "focuses on the nature of a challenged activity rather than on the actual role of the state. A private organization which exercises significant control over the operation, management or supply of a governmental or public service is a state actor for purposes of Section 1983."<sup>69</sup>

In *Marsh v. Alabama*<sup>70</sup> the Supreme Court articulated the public function theory. In *Marsh*, a Jehovah's Witness attempted to distribute religious literature in a company-owned town.<sup>71</sup> When the company prohibited the distribution, plaintiff brought suit challenging the company's action on first amendment grounds.<sup>72</sup> Since the company town had all the attributes of any other American town,<sup>73</sup> the Court found that its conduct had to conform with the constitutional limitations placed upon all municipal governments.<sup>74</sup>

The public function doctrine has been used not only when a private actor takes on the attributes of government, but also when the actor supplies a service customarily offered by the state.<sup>75</sup> In *Evans v. Newton*,<sup>76</sup> land was devised to the city of Macon, Georgia, to be used as a park for whites only. After acting as trustee of the park for several years, the city, realizing the possible constitutional problems involved

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more detailed and prolonged hearings before the state regulatory agency studying new utility rules and regulations.

68. Note, *Constitutional Safeguards*, *supra* note 32, at 506.

69. *Id.*

70. 326 U.S. 501 (1946).

71. *Id.* at 503-04.

72. *Id.* State action must be found before first amendment rights can be enforced. *See Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 461 (1952).

73. 326 U.S. at 502. Although *Marsh* dealt specifically with a company-owned town that assumed all of the characteristics of government, the court stated that such a complete similarity may not be necessary for a finding of state action. *Id.* at 506. The *Marsh* doctrine was applied to find state action when a shopping center prohibited picketing associated with labor disputes, *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), but the Burger court halted the expansion of the *Marsh* doctrine in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

74. 326 U.S. at 508.

75. Supplying services normally performed by the state can occur either by the private actor merely assuming a role in the area or through delegation of the responsibility by the state. *See, e.g.*, the White Primary Cases: *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

76. 382 U.S. 296 (1966).

in maintaining the park for whites only, sought to be removed as trustees.<sup>77</sup> The state court appointed private trustees to assume operation of the park.<sup>78</sup> The Supreme Court held that the continued discrimination by the private trustees constituted state action: "[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations."<sup>79</sup> The Court felt that the nature of the services rendered by the park buttressed its finding of state action. It found that the park was predominantly municipal in nature and analogous to fire and police services that traditionally serve the public.<sup>80</sup>

Courts and commentators have differed on whether the public function doctrine is applicable to public utilities.<sup>81</sup> If one views electricity, gas or water as necessities of life,<sup>82</sup> then it would seem to follow that their supply constitutes a public function: if private companies did not render these services, the state would have to provide them.<sup>83</sup> Thus, by granting franchises to public utilities,<sup>84</sup> the state effectively delegates to private actors a function that it would otherwise have to perform.<sup>85</sup>

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77. *Id.* at 297-98.

78. *Id.* at 298.

79. *Id.* at 299.

80. *Id.* at 302. The Court continued: "Like the streets of the company town in *Marsh v. Alabama* . . . the elective process of *Terry v. Adams* . . . and the transit system of *Public Utilities Comm'n v. Pollak* . . . the predominant character and purpose of this park are municipal." *Id.* See *Hampton v. City of Jacksonville*, 304 F.2d 320 (5th Cir.), *cert. denied*, 371 U.S. 911 (1962). The majority's holding was severely criticized in a dissent by Justice Harlan, in which he argued that the public function theory lacked doctrinal support. 382 U.S. at 321.

81. Compare *Jackson v. Metropolitan Edison Co.*, 483 F.2d 754 (3d Cir. 1973), with *Palmer v. Columbia Gas, Inc.*, 479 F.2d 153 (6th Cir. 1973) and *Lucas v. Wisconsin Elec. Power Co.*, 466 F.2d 638 (7th Cir. 1972) (Sprecher, C.J., dissenting), *cert. denied*, 409 U.S. 1114 (1973). See also Haydock, *supra* note 31, at 434; Note, *Constitutional Safeguards*, *supra* note 32, at 507.

82. Justice Rehnquist, in *Moose Lodge* acknowledged that such services are necessities of life. 407 U.S. at 173. In *Jones v. City of Portland*, 245 U.S. 217, 223 (1917), fuel was regarded as an indispensable necessity of life. See also notes 1 & 2 *supra*.

83. See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 372 (1974) (Marshall, J., dissenting): "[W]hen the activity in question is of such public importance that the State invariably either provides the service itself or permits private companies to act as state surrogates in providing it, much more is involved than just a matter of public interest." See also Brief for National Consumer Law Center as Amicus Curiae at 28, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); Note, *Constitutional Safeguards*, *supra* note 32, at 507.

84. The state may also grant police powers including eminent domain and right of entry onto private property. See note 33 *supra*.

85. Metropolitan Edison argued that as a factual matter the state would not have the responsibility of supplying utility service, if such service was not provided by a private

Arguments against applying the public function doctrine are based primarily on the view that although society relies heavily on utility services, their absence does not pose an immediate threat to life and therefore cannot be characterized as "necessities."<sup>86</sup> Since these services are not essential to survival, the state would not be obligated to furnish them if they were not supplied by private utility companies.<sup>87</sup>

The Supreme Court dealt with the public function argument in *Jackson* summarily. It found that supplying utility services is not traditionally associated with the power of the sovereign.<sup>88</sup> The state has no obligation to supply its citizens with such services: "[W]hile the Pennsylvania statute imposes an obligation to furnish service on regulated utilities, it imposes no such obligation on the State."<sup>89</sup> Since providing utility services is not a traditional state activity, as is maintaining parks<sup>90</sup> or conducting elections,<sup>91</sup> such activity, when performed by

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company: "Even today, there are a relatively few residents of the Commonwealth who do not receive electric service and the Commonwealth has not assumed any responsibility to provide such service to them." Brief for Respondent at 12-13, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

Another argument for a finding of public function is based on the statutory framework in which public utilities operate. Under state laws, e.g., PA. STAT. ANN. tit. 66, § 1171 (1959), public utilities are obligated to provide reasonably continuous service to their customers. In reviewing the activities of the public utilities, state agencies consider the public's interest and as a result the utilities operate in the public interest. Thus their activities cannot legally be motivated by their purely private interests. Brief for Petitioner at 18-19, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). See *Lucas v. Wisconsin Elec. Power Co.*, 466 F.2d 638, 663 (7th Cir. 1972) (Sprecher, C.J., dissenting), *cert. denied*, 409 U.S. 1114 (1973).

86. *Jackson v. Metropolitan Edison Co.*, 483 F.2d 754, 760-61 (3d Cir. 1973). It is questionable whether the service provided by a private actor need be "necessary" to maintenance of life. It would seem under *Evans* that service need only be regarded as that customarily associated with the state.

87. See note 85 *supra*. To buttress this point, it has been observed that as of this time, no state is obligated to furnish electricity free of charge to indigent citizens. *Jackson v. Metropolitan Edison Co.*, 483 F.2d at 760 & n.9. A more involved analysis of this point would render its significance nugatory since the amount of welfare benefits paid to indigents takes into consideration utility expenses. Thus, although the state is not obligated to provide free electricity, the same result is achieved by giving money to recipients who use it to pay utility bills.

88. 419 U.S. at 353. The Court noted that if the conduct challenged had involved the public utility's exercise of eminent domain power obtained from the state, then this would have been a different case. *Id.*

89. *Id.* The Court cited two Pennsylvania decisions, *Guard Life Ins. Co. v. City of Philadelphia*, 88 Pa. 393 (1879) and *Bailey v. Philadelphia*, 184 Pa. 594 (1898), both decided late in the 19th century, for the state's view that furnishing utility services are neither state functions nor municipal duties. 419 U.S. at 353.

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

91. See note 75 *supra*.

private companies, does not constitute state action under the public function doctrine.<sup>92</sup>

The Burger Court's handling of the public function doctrine in *Jackson* is consistent with its desire to prevent expansion of the state action doctrine.<sup>93</sup> In *Lloyd Corp. v. Tanner*,<sup>94</sup> the Court refused to extend the public function doctrine in a *Marsh*-type setting where a private actor has assumed the attributes of the government.<sup>95</sup> In *Jackson*, the Court refused to extend the doctrine in an *Evans*-type situation, where a service previously provided by the state is now provided by a private actor, to a situation in which the service supplied by the private actor would of necessity be supplied by the government should the private actor abdicate.<sup>96</sup>

### C. Joint Venture

State action can also be found when the state and private actor participate in a joint venture.<sup>97</sup> There is no requirement that the state and the private actor consent or even be aware of the agency relationship. The scope of the doctrine was articulated in *Burton v. Wilmington Parking Authority*.<sup>98</sup> The Wilmington Parking Authority, a state agency, owned and operated a public parking facility. Pursuant to its leasing power, the Authority leased a portion of the parking building to a private restaurant<sup>99</sup> which pursued a policy of racial discrimination.<sup>100</sup> Although the lease did not require the restaurant to serve the general public,<sup>101</sup> the

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92. The Court in *Jackson* rejected petitioner's contention that the public function test is satisfied when conduct is affected with the public interest. The Court noted that if this is sufficient to find state action, then conduct of doctors, lawyers and all other regulated businesses would be state action. 419 U.S. at 353-54. See also 9 U. RICHMOND L. REV. 760, 765.

93. See Hemphill, *supra* note 10, at 546; 24 EMORY L.J. 511, 519-22.

94. 407 U.S. 551 (1972).

95. In *Lloyd*, state action was not found to be present when a shopping center prohibited anti-war leafletting. Unlike the company-owned town in *Marsh*, the shopping center did not possess sufficient attributes of government to transform its actions into state action. 407 U.S. at 568-70.

96. See *New York City Jaycees, Inc. v. United States Jaycees, Inc.*, 512 F.2d 856, 860 (2d Cir. 1975) (the "service involved must not only be one which is traditionally the exclusive prerogative of the state but that it must in addition be one which the state itself is under an affirmative duty to provide"). See also notes 75-80 and accompanying text *supra*.

97. Note, *Constitutional Safeguards*, *supra* note 32, at 508.

98. 365 U.S. 715 (1961).

99. *Id.* at 717-18.

100. *Id.* at 716.

101. *Id.* at 720.



situation of the parties would give the public the impression that the state was integrally involved with the conduct of the restaurant.<sup>102</sup> The Court found that a symbiotic relationship<sup>103</sup> existed between the state and the private actor, rendering the latter's conduct state action.

The Court closely scrutinized the relationship between the restaurant and the state, and found determinative the fact that the relationship conferred mutual benefits on both.<sup>104</sup> These benefits were primarily monetary. The leasing arrangement was an indispensable part of the state's plan to operate the parking facility as self-supporting. Thus the profits earned by the restaurant were important elements in the financial success of the government agency.<sup>105</sup> Both the state and the restaurant benefited from the location of the restaurant in the parking facility: "Guests of the restaurant are afforded a convenient place to park. . . . Similarly, its convenience for diners may well provide additional demand for the Authority's parking facilities."<sup>106</sup> The existence of these mutual benefits sufficiently entwined the state with the private actor's discriminatory conduct. "The State has so far insinuated itself into a position of interdependence with Eagle [the restaurant] that it must be recognized as a *joint participant* in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment."<sup>107</sup>

In light of *Burton*, a determination of whether joint participation exists between the state and the utility company depends upon an analysis of the benefits each derives from the relationship. Upon examination this relationship appears to satisfy the *Burton* requirements. First, it is clear that both the state, through its legislature and its agencies, and the company share a common goal in providing service to all citizens who qualify.<sup>108</sup> Second, both the state and the company share mutual benefits from their relationship. The company receives from the

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102. *Id.* at 724. The restaurant operated in a publicly-owned building located on publicly-owned land. Thus the building gave the appearance of being dedicated to "public uses." *Id.* at 723.

103. *Id.* For another example of joint participation giving rise to a symbiotic relationship see *Brown v. Lynn*, 385 F. Supp. 986 (N.D. Ill. 1974).

104. 365 U.S. at 724.

105. *Id.* The fact that the restaurant profited by its discrimination was affirmatively alleged by the restaurant when it claimed that service to blacks would injure its business. *Id.*

106. *Id.*

107. *Id.* at 725 (emphasis added).

108. Note, *Constitutional Safeguards*, *supra* note 32, at 509. See also Brief for Petitioner at 21, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

state: 1) protection as a monopoly; 2) a guaranteed fair return on its investment; 3) powers of eminent domain and the right to enter private property for the maintenance and operation of its equipment; and 4) power to promulgate regulations which have the force of law.<sup>109</sup> The state also benefits from this relationship. It often receives direct pecuniary gain<sup>110</sup> and is assured that its citizens will receive reasonably continuous service.<sup>111</sup> There is one additional benefit to the state stemming directly from the termination procedures of the utility company. By terminating service for non-payment, utilities reduce their operating costs. Since this reduction is reflected in lower rates, the state's regulatory interest in maintaining reasonable rates is thereby served.<sup>112</sup>

Despite the rather strong arguments in favor of applying the joint venture theory to public utilities,<sup>113</sup> the Supreme Court needed only two paragraphs to find the doctrine inapplicable in *Jackson*.<sup>114</sup> The Court emphasized that the utility was privately owned and did not lease its facilities from the state.<sup>115</sup> The fact that the company was heavily regulated did not establish the necessary symbiotic relationship. The Court also stated that the company, like all corporations in Pennsylvania, pays taxes to the state, implying that the state did not receive special monetary benefits from the operation of the utility.<sup>116</sup> Based on

109. Note, *14th Amendment Due Process in Terminations of Utility Services for Non-Payment*, 86 HARV. L. REV. 1477, 1492 (1973) [hereinafter cited as Note, *14th Amendment*]. See Brief for Petitioner at 24-25, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). See also Note, *Constitutional Safeguards*, *supra* note 32, at 509.

110. See, e.g., *Ihrke v. Northern States Power Co.*, 459 F.2d 566 (8th Cir.), *vacated as moot*, 409 U.S. 815 (1972) (city received 5% of the company's gross earnings). See also *Salisbury v. Southern New England Tel. Co.*, 365 F. Supp. 1023 (D. Conn. 1973) (56% of the public utility commission's expenses were apportioned and assessed among all public service companies).

In Pennsylvania, utilities must pay, aside from normal corporation taxes, a unique Utilities Gross Receipt Tax, PA. STAT. ANN. tit. 72, § 8101 (Supp. 1976). Under this tax, utilities must pay to the state a tax of forty-five mills upon each dollar of its gross receipts from the sale of its utility services. Brief for Petitioner at 26, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

111. Note, *14th Amendment*, *supra* note 109, at 1493. See Brief for Petitioner at 25, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

112. Note, *14th Amendment*, *supra* note 109, at 1493. See Brief for Petitioner at 26-27, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

113. See Note, *Constitutional Safeguards*, *supra* note 32, at 510 ("Although the utility company may not intend to join with the state, the two organizations operate as mutually necessary partners in the provision of services; such a relationship is sufficient under the joint participation doctrine.").

114. 419 U.S. at 357-58.

115. *Id.* The Court noted that the *Burton* case limited its actual holding to lessees of public property.

116. *Id.* The Court makes no mention of the unique tax levied on public utilities. See

these considerations, the Court found that *Burton* did not apply and that no state action could be found based on the joint participation doctrine. In so holding, the Court is apparently restricting the use of the joint venture doctrine to lease arrangements between the state and the private actor. Thus, the joint participation doctrine will no longer be a useful factor in establishing state action in most cases following *Jackson*.<sup>117</sup>

#### D. Monopoly

The granting of monopoly status to a private actor places great power in the private actor in his relations to his customers. Since the state has created this monopoly status, state action can be found when the private actor infringes the constitutional rights of others.<sup>118</sup>

In the landmark case *Lavoie v. Bigwood*,<sup>119</sup> a tenant brought a civil rights action challenging his eviction from a mobile home court, claiming that he was evicted because of his activities in a tenants' association.<sup>120</sup> The tenant claimed state action existed by virtue of the town's

note 110 *supra*. The Court's treatment of joint participation lacks even minimal analysis of the mutual benefits enjoyed by both the state and the public utility in their combined effort to assure citizens of the state reasonably continuous service.

117. In discussing the effects of *Jackson*, one court has concluded that the joint venture doctrine is still viable:

It is noteworthy that, although the Supreme Court in *Jackson* seemingly limits the actual holding in *Burton* to a lessor-lessee relationship, it recognizes joint participation in an undertaking between the state and a private institution as a significant factor in determining state action whether or not a particular transaction may have been specifically sanctioned by the State. The Court did not disturb the *Burton* doctrine that inaction on the State's part does not foreclose the issue of the State's involvement in a challenged activity. Moreover, the Court . . . makes note of the fact that in *Jackson* the utility company was the sole owner of all the property utilized in its business.

*Braden v. University of Pittsburgh*, 392 F. Supp. 118, 125 (W.D. Pa. 1975).

118. Note, *State Action: Theories*, *supra* note 15, at 664-65.

119. 457 F.2d 7 (1st Cir. 1972). See also Note, *State Action: Theories*, *supra* note 15, at 665; Note, *14th Amendment*, *supra* note 109, at 1487.

Although the granting of a monopoly has not been specifically found by the Supreme Court to be a basis for finding state action, with the possible exception of *Railway Employees' Dep't. AFL v. Hanson*, 351 U.S. 225 (1956) (discussed in note 33 *supra*), several decisions apparently have left this question open thus giving the impression that the grant of a monopoly could be grounds for finding state action. In *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 462 (1952), the Court expressly stated that the finding of state action was not based on the fact that the transit company had been granted a monopoly. This did not mean that the Court could not consider this factor. In *Moose Lodge v. Irvis*, 407 U.S. 163, 176-77 (1972), the Court held that mere limits on the number of liquor licenses available was not enough to constitute grounds for state action. It can clearly be inferred from the opinion that the opposite result would have been reached had the private club enjoyed an exclusive monopoly. See also *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 175 (1973) (Brennan, J., dissenting); *Steele v. Louisville & N.R.R. Co.*, 323 U.S. 192, 208 (1944) (Murphy, J., concurring).

120. 457 F.2d at 8.

exercise of its zoning power, through which it limited the locations of mobile home courts.<sup>121</sup> Such zoning effectively conferred a monopoly on his landlord.<sup>122</sup> The United States Court of Appeals for the First Circuit held that the landlord's actions constituted state action. Although the court noted that neither the state nor the town had participated in the particular eviction,<sup>123</sup> it found that the state-created monopoly restricted the tenant's alternatives. A finding of state action was therefore warranted "where the state gives special support to a nominally private party or, for other purposes, markedly restricts alternatives to dominion by a private party."<sup>124</sup>

By a state-granted franchise or license, public utilities enjoy the right to do business free from competition.<sup>125</sup> Knowing that its customers cannot turn elsewhere for the essential services provided by the public utility, the company has superior bargaining power.<sup>126</sup> This monopoly status "puts such utilities in a unique position of being able to dictate to their customers terms of payment, and procedures for readjusting unfair charges."<sup>127</sup> In light of its monopoly status, the public utility is fully aware of the coercive effects its termination of service notices have on its consumers, and uses them freely to effectuate collection.<sup>128</sup> Fearing termination and aware that he cannot obtain necessary utility services elsewhere, the consumer may be forced to make unjustified payments. Although a consumer with sufficient funds could make the disputed payments first and then complain, consumers living on more limited budgets would suffer undue hardships if required to follow a pay first, complain later procedure.<sup>129</sup> Thus "although termination is not itself an unusual power, its effectiveness is greatly increased by the

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121. *Id.* at 9-10.

122. *Id.* at 10.

123. *Id.* at 12.

124. *Id.* at 14. *But see* *Martin v. Pacific Northwest Bell Tel. Co.*, 441 F.2d 1116 (9th Cir. 1971). "The fact that a private corporation, such as Pacific Bell, enjoys an economic monopoly which is protected and regulated by the state does not necessarily bring its every act within the purview of Section 1983." *Id.* at 1118. *See also* Note, *State Action: Theories*, *supra* note 15, at 664. *Lavoie* and *Martin* reflect the two differing views of applying the "quantitative" approach. *See* notes 24-25 and accompanying text *supra*.

125. *Palmer v. Columbia Gas, Inc.*, 479 F.2d 153 (6th Cir. 1973). *See also* Brief for National Consumer Law Center as Amicus Curiae at 19-20, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

126. Note, *14th Amendment*, *supra* note 109, at 1487.

127. Note, *State Action: Theories*, *supra* note 15, at 669, 672.

128. *See* note 3 *supra*.

129. The Third Circuit in *Jackson* felt that payment first/complain later was sufficient protection to the consumer. 483 F.2d at 761.

grant of monopoly.”<sup>130</sup> Since this heightened effectiveness is derived directly from the state grant of monopoly status, some courts have held that termination of services constitutes state action.<sup>131</sup>

The Supreme Court in *Jackson* rejected plaintiff’s monopoly arguments.<sup>132</sup> The Court held that there appeared to be no greater relationship between the challenged conduct and the company’s monopoly status than was found to exist in *Moose Lodge* or *Pollak*,<sup>133</sup> and thus a finding of state action was unwarranted.<sup>134</sup> While this is apparently the sole basis for the Court’s holding, the Court indicated in a footnote other bases for holding that the company’s monopoly status does not constitute state action. First, the Court noted that as a factual matter Metropolitan Edison does face competition especially from municipalities.<sup>135</sup> Second, and more importantly, the Court noted that the utility is a “natural” monopoly and therefore the state has not in fact created the company’s monopoly status.<sup>136</sup> The court felt that the company’s status was established by economic forces: “[S]uch public utility companies are natural monopolies created by the economic forces of high threshold capital requirements and virtually unlimited economy of scale.”<sup>137</sup> The Court indicated that the state’s involvement serves only to protect the public interest by regulating an already existing monopoly.<sup>138</sup> Since the state did not create and does not foster the monopoly status, its involve-

130. Note, *14th Amendment*, *supra* note 109, at 1487.

131. *Palmer v. Columbia Gas, Inc.*, 479 F.2d 153 (6th Cir. 1973); *Ihrke v. Northern States Power Co.*, 459 F.2d 566 (8th Cir.), *vacated as moot*, 409 U.S. 815 (1972). In his dissenting opinion in *Jackson*, Justice Marshall noted that an important implication of the state’s policy of granting utility monopolies to private companies is the state’s desire to “cooperate with and regulate the company in a multitude of ways to ensure that the company’s service will be the functional equivalent of service provided by the State.” 419 U.S. at 368. *But see Lucas v. Wisconsin Elec. Power Co.*, 466 F.2d 638, 657 (7th Cir. 1972) (*en banc*), *cert. denied*, 409 U.S. 1114 (1973) (the utility’s threat of termination is more effective due to the state’s protection of the company’s monopoly, but such monopoly status is of no consequence in determining whether state action exists).

132. 419 U.S. at 352.

133. *See* note 119 *supra*.

134. 419 U.S. at 352.

135. *Id.* at 351-52 n.8. This is a bit deceptive. Municipalities have the right under state law to provide services themselves. This is not competition because the municipalities and the private companies would probably not be serving the same areas.

136. *Id.*

137. *Id. But see id.* at 367-68 (Marshall, J., dissenting).

138. The view that a state must initiate the monopoly status is inconsistent with Justice Rehnquist’s own statement in *Moose Lodge* that “the impetus for the forbidden discrimination need not originate with the State if it is state action that enforces privately originated discrimination.” 407 U.S. at 172. *See also Holodnak v. AVCO Corp.*, 514 F.2d 285, 288 (2d Cir. 1975).

ment with the company's monopoly status is not sufficient to constitute state action.<sup>139</sup>

The door left open in *Moose Lodge* that would have made possible a finding of state action when a private actor enjoys a full monopoly<sup>140</sup> has been effectively closed by *Jackson*.<sup>141</sup> The *Jackson* decision places the rationale of *Lavoie* in severe jeopardy,<sup>142</sup> and most likely has struck the death blow to the monopoly theory as a basis for finding state action.

#### IV. THE IMPACT OF *Jackson*

Unless *Jackson* is subsequently limited, the Court's restrictive application of the factors commonly used to uncover state action will present a formidable barrier to plaintiffs trying to challenge private conduct on constitutional grounds. The question that remains is whether after *Jackson* these factors retain any vitality.

A claim that state action is present due to extensive government regulation of private conduct is not likely to meet with success after *Jackson* unless a direct nexus can be found between the government and the specific conduct.<sup>143</sup> Not only must it be demonstrated that the regulations govern the conduct, but that through regulation, the government has affirmatively placed its weight behind the activity.<sup>144</sup> Furthermore, it is possible to read *Jackson* as requiring that the regulation be mandatory rather than permissive.<sup>145</sup>

*Jackson's* impact on the application of the public function doctrine is less radical than its effect on the regulation factor. The Court did not narrow the applicability of the doctrine but merely refused to extend it

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139. The Court took no notice of the antitrust cases in which utilities have successfully defended on the basis that their conduct was state action and thus not under the purview of the Sherman and Clayton antitrust acts. See, e.g., *Gas Light Co. v. Georgia Power Co.*, 440 F.2d 1135 (5th Cir. 1971); *Washington Gas Light Co. v. Virginia Elec. & Power Co.*, 438 F.2d 248 (4th Cir. 1971).

140. 407 U.S. 163, 177 (1972).

141. The Court's determination may not have entirely eradicated state-granted monopoly status as a possible factor for finding state action in other areas. There appears to be a small area between the facts of *Moose Lodge* and *Jackson* in which it is conceivable that state action might be found. *Moose Lodge* rejected the monopoly argument because the grant of the liquor license was not exclusive. It can be argued that the court in *Jackson* rejected the monopoly argument because the monopoly status was not created by the state. If both exclusivity and state creation were found to exist simultaneously, it is conceivable that state action might be found.

142. *Lavoie v. Bigwood*, 457 F.2d 7 (1st Cir. 1972), may be distinguishable since the monopoly was created by the state. See notes 119-21 and accompanying text *supra*.

143. See notes 49-67 and accompanying text *supra*.

144. See note 63 and accompanying text *supra*.

145. See notes 64-65 and accompanying text *supra*.

beyond its existing parameters.<sup>146</sup> Before state action can be found based on a public function theory, it must be demonstrated that the private actor is performing a service that has been traditionally supplied by the government.<sup>147</sup> If this can be shown, plaintiffs will successfully meet the state action requirement.

The *Jackson* decision appears to narrow the factual settings in which the symbiotic relationship between the government and private actor necessary to the joint venture doctrine can be found: the private activity being challenged must be conducted on government-owned property, a lessor-lessee relationship must exist between the actor and the government.<sup>148</sup> On two occasions after *Jackson*, however, federal courts have held that state action can be found based on the joint venture theory in situations where no lessor-lessee relationship exists.<sup>149</sup> Both courts felt *Jackson* did not foreclose a finding of state action when the symbiotic relationship between the government and the private actor was thoroughly proved.<sup>150</sup> If these decisions are indicative of how courts generally will construe *Jackson*, then state action based on a convincing showing of interdependence between the government and the private actor is still a viable avenue open to plaintiffs challenging the private actor's conduct on constitutional grounds.

Reliance on state-granted monopoly power as a means of finding state action after *Jackson* will probably prove a fruitless endeavor. As was the case with state regulation, the Court requires an extremely close nexus between the grant of the monopoly status and the challenged conduct before state action will be found.<sup>151</sup> The monopoly must not only be state created but also must be exclusive. Furthermore, the conduct challenged must directly stem from an exercise of the special status.

The net effect of *Jackson* is to limit severely the ability of plaintiffs to challenge successfully private conduct on constitutional grounds. By

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146. See notes 88-96 and accompanying text *supra*.

147. See notes 94-96 and accompanying text *supra*.

148. See notes 114-17 and accompanying text *supra*.

149. *Holodnak v. AVCO Corp.*, 514 F.2d 285 (2d Cir. 1975); *Braden v. University of Pittsburgh*, 392 F. Supp. 118, 125 (W.D. Pa. 1975).

150. *Holodnak v. AVCO Corp.*, 514 F.2d 285, 289 (2d Cir. 1975); *Braden v. University of Pittsburgh*, 392 F. Supp. 118, 125-26 (W.D. Pa. 1975). See also *Scott v. Eversole Mortuary*, 522 F.2d 1110, 1119 (9th Cir. 1975) (Ely, J., dissenting) ("*Jackson* . . . may control when the only factors are heavy state regulation and a partial monopoly, but it is not conclusive when a symbiotic state-private relationship is also thoroughly demonstrated.").

151. See notes 132-42 and accompanying text *supra*.

considering and rejecting each of the various grounds for establishing state action separately rather than in the aggregate,<sup>152</sup> the decision has made the state action requirement an even more difficult obstacle to overcome.

The *Jackson* decision is also significant in that the Court adopted the narrower view of the "quantitative" approach to state action.<sup>153</sup> Thus the Court required that state involvement be directly related to the conduct involved, and also required a greater degree of involvement than was found necessary in the past.<sup>154</sup> If such an approach will be mandated in future state action cases involving private conduct, there will be little, if any, room for consideration of the conflicting rights of the parties involved.<sup>155</sup> The *Jackson* decision can therefore be read as discarding the "balancing" approach.<sup>156</sup>

In *Jackson v. Metropolitan Edison Co.* the Supreme Court has narrowed its definition of state action and, in so doing, has freed a correspondingly greater sphere of private activity from constitutional challenge.<sup>157</sup> Future abuse of termination procedures, however, may serve to expose the need for reform of such procedures and thus subject public utilities to even closer state regulation.

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152. This is aptly pointed out in Justice Douglas' dissent, 419 U.S. at 360. See note 32 and accompanying text *supra*. See also *Jackson v. Statler Foundation*, 496 F.2d 623 (2d Cir. 1974) (aggregation found necessary); *Male v. Crossroads Associates*, 469 F.2d 616 (2d Cir. 1972) (aggregation found necessary); 16 B.C. IND. & COM. L. REV. 867, 877 (1975); 24 CATHOLIC U.L. REV. 622, 633; 9 U. RICHMOND L. REV. 760, 766 ("the failure to follow a cumulative approach in its analysis of state action permits the Court to pass over the true extent of a state's involvement with a private entity").

153. See notes 24, 25 and accompanying text *supra*.

154. 16 B.C. IND. & COM. L. REV. 867, 869.

155. 24 EMORY L.J. 511, 531. See 16 B.C. IND. & COM. L. REV. 867, 879 (the court's rejection of a balancing approach forces the Court to analyze the sufficiency of state involvement in a vacuum). Justice Marshall was concerned with what the Court would do if the utility were discriminating against blacks. 419 U.S. at 374 (Marshall, J., dissenting). Would the Court still take such a strict "quantitative" approach or would it distinguish *Jackson* and apply a form of "balancing" in order to reach the equal protection question? See 24 EMORY L.J. 511, 532.

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

157. 16 B.C. IND. & COM. L. REV. 867, 887.