Public Utilities and State Action: The Supreme Court Takes a Stand

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and would not discriminate against proprietary vocational schools as a class. Most important, the consumer-student would be afforded a better opportunity to make an informed choice of educational alternatives. The proposed trade regulation rule has such potentially far reaching effects that the Commission ought to consider and evaluate all policy issues before it is implemented.

Standing on the threshold of an expansion of its rulemaking power into an area traditionally policed by the states, the FTC has proposed one of the strongest remedies to date. It must temper a vigorous pursuit of its objective with reason and formulate a rule which meets statutory and judicial standards of fairness. If the proposed rule is implemented with the suggested changes, the Commission will have accomplished this goal.

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PUBLIC UTILITIES AND STATE ACTION:
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Whether a state regulated, privately owned public utility may terminate a customer's service for nonpayment without first satisfying requirements of fundamental fairness contained in the due process clause of the fourteenth amendment1 is a question of considerable controversy. Only where there is significant state involvement in a deprivation of life, liberty, or property are these constitutional due process protections available.2 A number of federal


2. See Burton v. Wilmington Parking Author., 365 U.S. 715, 722 (1961), in which the Court stated that "private conduct abridging individual rights does no violence to the [fourteenth amendment] unless to some significant extent the state in any of its manifestations has been found to have become involved in it." This state action doctrine had its judicial origins in the Civil Rights Cases, 109 U.S. 3 (1883), in which the Supreme Court established the scope and breadth of the fourteenth amendment. The requirement of significant state involvement has been stated in nearly all state action cases. See, e.g., Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972); Reitman v. Mulkey, 387 U.S. 369, 380 (1967) (legislation pursuant to citizen initiative which effectively authorized racial discrimination in housing significantly involved state in private discrimination and was thus invalid).
courts have concluded that essential utility services are "property" within the meaning of the fourteenth amendment, and that a company's termination of a customer's service for nonpayment constitutes state action. This application of the state action doctrine is a direct consequence of extensive regulatory schemes under which states severely restrict, as well as benefit, privately owned public utilities.

Through heavy regulation the states have thoroughly involved themselves in the business of providing utility service to the consumer. Undoubtedly, the essential nature of commodities such as heat, electricity, and water, and the dire consequences resulting from their unavailability, have contributed to both their pervasive state regulation and recent court decisions entitling consumers to procedural due process before service disconnections are allowed. Yet, the determination that a service disconnection for


[W]hatever the classification of utility services, be they rights, privileges, or entitlements, such life-sustaining services would seem to fall within the same constitutional protections afforded welfare benefits, wages, drivers' licenses, reputation in the community, and possession of personal property, all as has been previously decided by the United States Supreme Court.


4. For example, in Pennsylvania, the Public Utilities Commission is delegated extensive control over privately owned utility companies. See Pa. Stat. Ann. tit. 66, §§ 1101-1535 (1959). This control encompasses rate regulation, see id. § 1141, regulation of character and quality of utility services and facilities, see id. §§ 1171, 1182-83, the power to receive and investigate complaints, see id., §§ 1391, 1398, and the regulation and supervision of activities, rules, and contractual undertakings of utilities, see id. §§ 1171, 1341-43, 1360. Many other states have regulatory schemes of comparable or greater breadth. See, e.g., 49 Ohio Rev. Code Ann. §§ 4901-99 (Supp. 1973); 5 Colo. Rev. Stat. Ann. § 115 (1963).


6. See cases cited note 3 supra.
nonpayment constitutes state action has not been unanimous. Several courts have asserted that extensive state regulation of public utilities does not, by itself, transform essentially private action into state action. This minority view has stressed adherence to a restrictive interpretation of the state action doctrine, concluding that absent specific state involvement in the act of termination itself, the service disconnection must be considered a private act free from the fourteenth amendment proscription.

These conflicting views of state action in the public utilities context arose in *Jackson v. Metropolitan Edison Co.* Resisting the lower court trend, the United States Supreme Court declined to find state action when a privately owned public utility terminated the petitioner's electrical service for nonpayment. The majority held that the mere existence of extensive state regulation of the public utility, in conjunction with a statutorily mandated partial monopoly and the state's passive acquiescence in the company's termination procedure, did not amount to state action of enough significance to justify application of the due process clause.

After petitioner Jackson's electrical service was initially terminated, another occupant of her residence opened an account. Subsequently, that person moved from the premises and ceased payment. Two months later, employees of Metropolitan Edison Company questioned petitioner Jackson with regard to the delinquent payments and the location of the holder of the account. She denied having received any bills since her co-occupant's departure, and the Metropolitan employees discovered that the house meter had been altered in such a way that it failed to register the amount of electricity

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8. The standards enunciated in the *Civil Rights Cases*, 109 U.S. 3 (1883), are to be narrowly applied under a restrictive interpretation of the state action doctrine:

[U]ntil some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment nor any proceeding under such legislation, can be called into activity . . . .

*Id.* at 13.


10. Justice Rehnquist wrote the majority opinion in which Chief Justice Burger and Justices Stewart, White, Blackmun, and Powell joined; Justices Douglas, Marshall, and Brennan dissented. Justice Brennan's dissent did not reach the merits, but was based on his belief that no actual controversy existed since the petitioner was not the customer of record when her service was cut off.

11. The court did not reach the issue of whether utility services were property within the meaning of the fourteenth amendment. Cases which have reached that issue are cited in note 3 *supra*. 
used. Jackson requested that a new account be opened under a different name. Shortly after receiving this request, however, and without giving further notice, Metropolitan terminated her service. Thereafter, Jackson brought suit against Metropolitan for damages and injunctive relief, alleging that she was entitled to continuous service, and that termination could be allowed only after she was provided with notice, a hearing, and an opportunity to pay any outstanding bills. The petitioner claimed entitlement to due process protections in light of the Pennsylvania Public Utilities Commission's authorization of Metropolitan as a producer of electricity for the area in which she resided, and the express recognition, included in the authorization tariff filed at the Commission, of Metropolitan's right to discontinue service for nonpayment. Jackson asserted that termination of her service was state action which deprived her of property in violation of the fourteenth amendment. Stating that the termination was a private act, thus rendering the fourteenth amendment inapplicable, the district court granted Metropolitan's motion to dismiss. The Third Circuit affirmed.

The Supreme Court's decision in Jackson produced two significant consequences. It repudiated the concept that extensively regulated, privately owned public utilities are state actors. In addition, it severely limited the state action doctrine by effectively requiring direct state participation in a specific private act, as opposed to merely state involvement in a private entity, for a finding of state action.

12. Suit was brought under 42 U.S.C. § 1983 (1970). This statute, enacted pursuant to the fourteenth amendment, gives to private parties equitable and legal remedies for violations of their fourteenth amendment rights resulting from acts taken under color of any statute, ordinance, regulation, custom, or usage of any state or territory. Technically, when an action is brought under section 1983, it is necessary for the plaintiff to establish both that the defendant acted under color of state law and that his action deprived the plaintiff of rights secured to him by the Constitution and laws of the United States. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970). There is authority in support of the proposition that the phrase "under color of law" precludes a section 1983 suit against private individuals acting symbiotically with a state. See Screws v. United States, 325 U.S. 91, 147-49 (1945) (Roberts, Frankfurter, & Jackson, J.J., dissenting). This argument, however, was made with respect to a criminal statute, 18 U.S.C. § 242 (1970), and was a minority view. The weight of authority holds that the phrases "state action" and "under color of law" are synonymous. See United States v. Price, 383 U.S. 787, 794 n.7 (1966) (dismissal of complaint against three law enforcement officials and fifteen private citizens alleged to have conspired to deprive three individuals of their fourteenth amendment rights reversed and remanded).


15. 483 F.2d 754 (3d Cir. 1973).
I. STATE ACTION: AN HISTORICAL ENIGMA

A distinguished commentator has written that "the literature of state action is the literature of a nonconcept." This "nonconcept" is particularly elusive in the area of public utilities because the standard for designating the act of a private individual as the act of the state usually can be satisfied only where the state is involved to a significant extent in the particular act complained of. When privately owned public utilities terminate a customer's service for nonpayment, they rarely solicit the aid of police officials or the judicial process to accomplish their purportedly private deed. Consequently, under a literal reading of the original state action formula, state action or complicity in the private act is nearly impossible to establish where public utilities are concerned. As a result, those who contend that utility service shutoffs for nonpayment constitute state action necessarily take a more expansive view of the doctrine.

Where the state's relationship with a private entity is so involved that the state becomes a joint venturer in the activities of the private entity, state action has been found. In Burton v. Wilmington Parking Authority, which involved a private restaurant's act of discrimination in refusing service to a black person, the Supreme Court held that the combination of several factors established the existence of a symbiotic relationship between the restaurant and the municipality. These factors included the restaurant's leasing of space in a publicly owned building; the mutually beneficial nature of the arrangement which existed between the municipality and the private entity; the municipality's failure to insert a nondiscrimination provision into the lease; and the direct financial benefit conferred on the state by the restaurant's discriminatory policy, which attracted considerable business. Though the state was not significantly involved in the objectionable act of discrimi-


18. See note 2 supra.


nation, the multiple factors cited, taken together, evidenced a degree of interdependence which led the court to conclude that the restaurant's discriminatory act was state action.

Public Utilities Commission v. Pollak\(^{21}\) also reflected this more flexible approach to state action. In Pollak, the Supreme Court found that a state regulated, private bus company's practice of piping music into its streetcars and buses amounted to state action because the public utility commission had affirmatively approved the objectionable practice. As in Burton, there was no significant state involvement in the private act itself.

Another theory seems clearly applicable to public utility situations. Indirectly, the Supreme Court has given impetus to the concept of the state abetted monopoly, by which state protection of a private monopoly transforms the private entity's action into state action. It appears implicit in Pollak that the Court's state action determination was based on the state's conferral of an exclusive franchise to the bus company. This status, together with the commission's approval of radio broadcasts on the buses, precluded the riding public from avoiding the objectionable practice without also giving up public transportation. Conversely, in Moose Lodge No. 107 v. Irvis\(^{22}\) the state's issuance of a liquor license to a private club which discriminated against blacks did not transform the club's actions into state action, at least in part because the state had not conferred an exclusive liquor franchise on the lodge.\(^{23}\) Had the state issued a license solely to the Moose Lodge, the petitioner's impaired ability to socialize would have been directly attributable to the state. Several Supreme Court decisions have also held actions of a railway union and a state bar association to constitute state action because each enjoyed exclusive authority in the regulation of certain areas of employment.\(^{24}\)

\(^{21}\) 343 U.S. 451 (1952). Passengers on a busline had complained that radio broadcasts violated their first and fifth amendment rights of communication and privacy. While the Court did find state action, it rejected the claim that the practice violated the passengers' constitutional rights.

\(^{22}\) 407 U.S. 163 (1972).

\(^{23}\) The Court did not state that this was a major factor in its decision, but it seems implicit that the presence of a monopoly would have moved the Court to implement constitutional restraints since the injury to petitioner would be more grievous and state responsibility would have been more concrete. The Court expressly relied on the absence of state involvement in the formulation of regulations followed by its licensees.

\(^{24}\) In Railway Employees' Dept v. Hanson, 351 U.S. 225 (1956), a private contract between the union and the employer providing for a union shop was made enforceable by the Railway Labor Act of 1951, 45 U.S.C. § 152 (1970). Passage of the statute made the act of exclusion government action. In Lathrop v. Donohue, 367 U.S. 820 (1961), the Wisconsin Supreme Court's requirement of membership in the state bar to practice law was found to be state action.
These situations reflect the longstanding acknowledgement by the Court that monopoly status seriously affects the positions of parties to a dispute. Furthermore, several circuits have declared that privately owned public utilities which hold exclusive franchises are exempt from antitrust laws because, as heavily regulated private entities providing essential services, their actions are effectively those of the state.  

Closely related to the state action concept is the public function theory under which a private entity performing a public function is a state actor subject to constitutional restraints. The theory originated in *Marsh v. Alabama*, in which the Supreme Court found that the operators of a privately owned company town performed a public function and consequently could not impinge upon the residents' freedom of press and religion. In another case, the Court brought a private shopping center within the proscriptions of the fourteenth amendment by equating its public function activities to those of a city business district. Similarly, the Supreme Court held that a board of trustees in control of a private park with a predominantly municipal character carries on functions governmental in nature, thereby becoming an agent of the state subject to constitutional proscriptions. Finally, state delegation of a significant aspect of the elective process to a private group moved the Court to impose constitutional restraints which would normally be applied only to a state.

II. PUBLIC UTILITIES AS STATE ACTORS IN THE LOWER COURTS

A survey of lower federal court decisions concerning utility service termi-
nations for nonpayment reveals a discernible trend. A majority of these courts have found state action where regulation is so extensive that the objectionable private action is for all practical purposes a state function. The few courts that have ruled otherwise base their findings on a restrictive interpretation of the doctrine, requiring that a state be significantly involved in the specific act of terminating service.

In Burton, the Supreme Court indicated that state action determinations were to be made on a case by case basis. The only guideline provided was the requirement that the state be involved in the private activity to a significant extent. The two circuits which have found significant state action in utility service shutoffs apparently did not base their rulings on the mere finding that the defendant was a heavily regulated public utility. In Palmer v. Columbia Gas of Ohio, Inc., a privately owned public utility's entry onto a customer's premises, termination of service, and removal of equipment, pursuant to specific statutory authorization, was found to constitute state action. The Sixth Circuit did refer to the state's overall extensive regulatory scheme as justification for its ruling. However, the statutory authorization of the private act of termination of service was controlling, particularly where the private act complained of was the termination itself. Even assuming that such a statutory grant of authority would not withstand the stricter test requiring significant involvement in the disputed act itself, it is certainly analogous to the Pollak situation, where the state's affirmative approval of the challenged activity was held to warrant a finding of state action.

In Ihrke v. Northern States Power Co., the court's state action determination hinged on an agreement between the utility company and the state which permitted the state to collect five percent of the company's yearly gross earnings. Since its unobstructed termination policy saved the company money,


31. See cases cited note 7 supra.

32. See 365 U.S. at 722.

33. 479 F.2d 153 (6th Cir. 1973).

34. 49 OHIO REV. CODE ANN. § 4933.10 (Supp. 1973) provides: "If authorized in writing by the president, treasurer, agent, or secretary of a gas company, its officer or servant may enter, at any reasonable time, any premises lighted with gas supplied by such company, to examine or remove the gas meters."

35. "[T]he state of Ohio is significantly involved in virtually every one of the company's activities. . . ." 479 F.2d at 165.

36. 459 F.2d 566 (8th Cir. 1972), vacated and remanded with instruction to dismiss as moot, 409 U.S. 815 (1972).
the state directly benefited from the disputed termination.\textsuperscript{37} The situation was analogous to that in \textit{Burton}, in which the state was found to have directly benefited from the lessee restaurant's profitable business, largely as a consequence of the race discrimination policy to which the petitioner had objected. As in \textit{Palmer}, the Ihrke court made constant reference to the overall regulatory supervision of the state as constituting the basis for its conclusion that the company's act of termination was state action.\textsuperscript{38} Nevertheless, the state's interest in company profits was dispositive.

Three district courts have taken a somewhat broader approach to the state action issue by placing less emphasis on specifics and more on overall state regulation and aggregate control. In \textit{Bronson v. Consolidated Edison Co.},\textsuperscript{39} the court found state action since "[t]he State of New York, by an extensive statutory and regulatory scheme, has circumscribed almost every aspect of the utility's activities,"\textsuperscript{40} including the right to terminate service for nonpayment. In \textit{Hattel v. Public Service Co.},\textsuperscript{41} state action was found where the company enjoyed an exclusive franchise granted by the city, was heavily regulated, and was permitted to enter private property to terminate service. Finally, in \textit{Stanford v. Gas Service Co.},\textsuperscript{42} the court noted the presence of a monopoly and extensive regulation by the state before concluding that "[s]uch public utilities, beyond question, perform public functions in the public interest under public regulation. As such, they are subject to constitutional restraint."\textsuperscript{43}

The Seventh Circuit has unequivocally rejected this broader approach. Two decisions in that forum have determined that public utility terminations of service are not state action despite extensive regulatory schemes and obvious state involvement. Refusing to find state action on the grounds that no specific authorization of the termination procedure existed, the court in \textit{Lucas v. Wisconsin Electrical Power Co.}\textsuperscript{44} distinguished the situation in \textit{Palmer}. The court stated, however, that a different issue would have been

\begin{itemize}
  \item \textsuperscript{37} The benefit rationale for state action findings has been deemed nondeterminative unless the specific activity complained of is directly related to the benefit enjoyed by the state. \textit{See} Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972).
  \item \textsuperscript{38} \textit{See} 459 F.2d at 569. This overall control included the city council's right to review and reject all company regulations, and the state's grant of an exclusive franchise to the company.
  \item \textsuperscript{39} 350 F. Supp. 443 (S.D.N.Y. 1972).
  \item \textit{Id.} at 445.
  \item \textsuperscript{40} 350 F. Supp. 240 (D. Colo. 1972).
  \item \textsuperscript{41} 346 F. Supp. 717 (D. Kan. 1972).
  \item \textsuperscript{42} \textit{Id.} at 722.
  \item \textsuperscript{43} 466 F.2d 638 (7th Cir. 1972). (Sprecher & Swygert, JJ., dissented on the grounds that state action was clearly present and due process protections had not been afforded).
\end{itemize}
presented had such specific state authority for the contested activity existed. According to the court, the sole authority behind the termination of services for nonpayment was the company's own regulation, to which it traced private, but not state action. Rather than address the aggregate scheme of extensive state regulation, the court focused on the particular objectionable activity to determine if the state's involvement was significant. The court noted that the company's monopoly status was not a crucial factor in public utility disconnection controversies. Further, the Lucas majority believed that remedies which comported with due process standards were already available to customers, to such an extent that given the presence of state action, constitutional restraints flowing therefrom would not assure customers of any more fairness than they already received. The court stressed the extent of state involvement in the disconnection itself, and concluded that state support of that particular act was, at best, insignificant. In so doing, the Seventh Circuit followed its earlier ruling in Kadlec v. Illinois Bell Telephone Co., in which company regulations filed with state authorities permitted termination of a customer's service for misuse. The Kadlec court conceded that filing evidenced state involvement, but concluded that this alone was insufficient to constitute state action. Judge Kerner's concurring opinion enumerated a number of factors which, although not pleaded, if present, could justify a finding of state action. These factors were subsumed in the following issues: whether the utility is subject to close regulation; whether regulations filed with state authorities require state approval; whether the utility company was granted a total or partial monopoly; whether the regulatory body controls rates charged and services offered; and whether the actions of the company are subject to revision. Interestingly, most of these questions were raised by the plaintiff in Lucas and answered in the affirmative. Nevertheless, the court dismissed them as well as the state action claim, relying on the absence of significant state involvement in the utility shutoff itself.

However, a majority of these cases reflects the trend among the lower federal courts to view utility service terminations for nonpayment as state ac-

45. "If that [statutory] authority were invoked by the defendants in this case, an entirely different issue would be presented." Id. at 656.
46. See id. at 657.
47. 407 F.2d 624 (7th Cir. 1969). Another seventh circuit case decided after Kadlec but prior to Lucas held that execution of a utility company's deposit policies did not constitute state action where the complaint did not challenge the propriety of any action of the state or the commission order providing for collection of security deposits, but rather challenged the policy and representatives of the company itself. See Particular Cleaners, Inc. v. Commonwealth Edison Co., 457 F.2d 189 (7th Cir. 1972). Of course, state regulations pertaining to the company's challenged deposit policy had been promulgated.
48. 407 F.2d at 628.
Primarily, this state action has been found as a consequence of pervasive state regulation affecting all phases of a company's operation. It is unlikely, however, that this trend can accurately be interpreted as a statement by the courts that mere status as a public utility warrants the conclusion that all actions of the company are state actions. The requirement that state involvement be significant has necessitated a case by case determination and certain courts have been reluctant to find state action unless the state itself has become deeply enmeshed in the particular activity which is the object of the actual complaint. For example, the *Lucas* court stated that it might have reached a different conclusion had the obviously significant state involvement in the company as a whole been equally obvious in the act of termination itself.50

Thus, the courts seem divided in their analytical approach as to what constitutes significant state involvement; some courts judge by the state's aggregate involvement with the company whereas others judge by the degree of company-state collusion in a specific act. The Seventh Circuit has apparently favored the latter method. *Palmer* and *Ihrke* probably embrace the aggregate state involvement approach employed by the district courts,51 which were not as concerned with whether the state was actually present when service was cut off. They shared the *Palmer* court's view that "[t]he important factor . . . [is] 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."52

III. RESTRICTIVE STATE ACTION ANALYSIS IN THE SUPREME COURT

In *Jackson*53 the Supreme Court ignored the lower court trend in applying a restrictive interpretation of the state action doctrine. This interpretation resulted in substantially more than a mere failure to find that public utilities possessed of certain unique characteristics54 must be considered state

49. Of the cases constituting the minority view, *Kadlec* involved termination for misuse of a special telephone service, not nonpayment, and *Lucas* involved a disputed payment. For purposes of the state action discussion, however, these distinctions are insignificant.

50. See 466 F.2d at 657 & n.49.

51. See cases cited note 30 supra. The district courts cited specific aspects of state regulation but clearly emphasized the aggregate.

52. 479 F.2d at 164.


54. Justice Douglas succinctly summed up the unique characteristics possessed by Metropolitan:

[These factors depict a monopolist providing essential public services as a licensee of the State and within a framework of extensive state supervision and
actors. The Court actually departed from past state action analysis in at
least two significant ways.

The majority's sequential rather than cumulative treatment of the bases for the petitioner's state action claim marked the Court's first major departure from traditional state action analysis. Each individual factor was separately discarded as either insufficient or inapplicable, while the aggregate scheme was ignored. According to the Court, the proper inquiry was whether a sufficiently close nexus existed between the state and the specifically challenged action so as to transform the private act into state action for purposes of the fourteenth amendment. The restrictive application of this formula suggests the Court's rejection of the less rigid interpretation of the state action doctrine applied in numerous of its past cases. As Justice Douglas noted in his dissent, the Court's lack of concern with overall state involvement constituted a departure from past state action analysis. Justice Douglas reasoned that "the dispositive question in any state-action case is not whether any fact or single relationship presents a sufficient degree of state involvement, but rather whether the aggregate of all relevant factors compels a finding of state responsibility."

Since the requisite state involvement in the act of termination was not shown, the majority found no state action. The mere presence of extensive and detailed state regulation was held insufficient to convert the utility's actions into those of the state. The existence of a state sanctioned monopoly was likewise held to be nondeterminative. On the grounds that no obligation to furnish the public with utility services had ever been imposed on the states, the Court rejected petitioner's public function claim, reasoning that the theory was inapplicable absent delegation of recognized governmental functions to a private entity. Though conceding that the disputed termination provision was filed with the commission, the majority denied that this constituted state

55. See, e.g., Robinson v. Florida, 378 U.S. 153 (1964) (racial segregation by a private entity pursuant to the requirements of state regulatory scheme constitutes state action); Lombard v. Louisiana, 373 U.S. 267 (1963) (racial segregation by private entity pursuant to public statements by mayor and police superintendent constitutes state action); Peterson v. City of Greenville, 373 U.S. 244 (1963) (racial segregation by private entity pursuant to local city ordinance constitutes state action).
56. 419 U.S. at 360 (Douglas, J., dissenting).
57. The Court, citing Nebbia v. New York, 291 U.S. 502 (1934), for the proposition that mere provision of services to the public does not make a business a state actor, declined the petitioner's "invitation" to characterize the public function line of cases in terms of a broad principle that all businesses affected with the public interest be regarded as state actors. Id. at 353.
approval or authorization of the regulation; even the presence of such approval and authorization would not necessarily warrant a finding of state action. Curiously, Pollak was distinguished by the Court on the grounds that affirmative state authorization of the objectionable practice existing in that case was absent in Jackson. Concluding its sequential analysis, the Court denied that a symbiotic relationship between the utility and the state such as that found in Burton was present in Jackson, and declared as well that the application of Burton was restricted to lessees of public property.

A second significant departure from past state action analysis was the Court's assertion that state authorization and approval of disputed company regulations would not necessitate a finding of state action. As declared in Justice Marshall's dissent, the abdication of the concept of state responsibility was staggering in view of past decisions "from the Civil Rights Cases to Moose Lodge, [which] have consistently indicated that state authorization and approval of 'private' conduct would support a finding of state action." For example, the Court's new position would apparently require that a state specifically order termination of a utility customer's service before the termination could be designated state action. Mere approval and authorization of the utility's action will not suffice. The state can conceivably approve acts of discrimination by regulated public utilities, as well as any other 'private' entities, without allowing victims of such abuse access to constitutional protections.

Another significant aspect of the majority's opinion is the assertion that the Burton holding is limited to lessees of public property. Presumably, this means that the interdependence and symbiotic relationship found to exist be-

58. Id. at 356-57. The Court's previous statement that state approval and authorization would not necessarily imply state action seems to contradict Pollak rather than distinguish it.

59. Id. at 357-58. Noting that Metropolitan did not lease its facilities from the state, the Court also pointed to its conclusion in Moose Lodge that subjection to extensive regulation does not necessarily make a party a state actor. The Court failed to mention that while the petitioner in Moose Lodge could socialize elsewhere, the petitioner in Jackson was left with no alternative to the monopolist, Metropolitan. Thus the regulatory scheme permitted a direct hardship to be imposed on the petitioner. Id. at 358.

60. Id. at 369 (Marshall, J., dissenting) (citation omitted).

61. Justice Marshall expressed this fear in his dissent:

[T]he majority's analysis would seemingly apply as well to a company that refused to extend service to Negroes, welfare recipients, or any other group that the company preferred . . . not to serve. I cannot believe that this Court would hold that the State's involvement . . . was not sufficient to impose upon the company an obligation to meet the constitutional mandate of nondiscrimination. Yet nothing in the analysis of the majority opinion suggests otherwise. Id. at 374.
tween the restaurant and the state in Burton constituted state action only because the restaurant was a lessee of public property. In all other situations involving any type of "private" entity, such extreme identity of interest, high degree of mutual benefit, and significant involvement will be nondeterminative. Conceivably, state action might never be found where the state has not directly and significantly aided a private entity in the particular act complained of by specifically ordering that act or physically participating in it.6 If indeed the Court intended the emasculation of Burton, the implications of the state action stance in Jackson may extend to other race and sex discrimination controversies as well.

Where a state agent does not actually participate in the termination, findings of state action might conceivably be eliminated in situations such as Ihrke, where the state received direct financial benefit from the private company's challenged termination procedure. Following this logic, Palmer may fall as well, because the enabling statute in that case would merely constitute state approval but not state action. Pollak is also weakened because, while in that case the commission approved the act complained of, it had not actually ordered that it be done in the first place.

The parameters of the public function theory were also delineated by the Burger Court. The majority discarded the concept as applied to public utilities, citing the absence of any statutory or judicial directives that providing essential services to the public is properly a function of the state. The Court concluded that provision of such services is not governmental in nature and therefore can not effectively be delegated by a state to a private entity. Thus, unlike Marsh, where according to the Court the administration of a company town was effectively delegated to the town operators, Jackson did not confer official public function status upon the private entity.

IV. CONCLUSION

As a result of the restrictive state action analysis in Jackson, any notion that the mere presence of factors common to privately owned public utilities will transmute their actions into state actions must be dismissed. Thus, Bronson, Hattel, and Stanford are no longer viable precedents. The strictures of the majority’s analysis may render constitutional protections inaccessible to victims of vital service termination, or harassment, discrimination,
and other abuses at the hands of the private companies authorized to provide the services.

By virtue of the constraints imposed upon state action analysis in *Jackson*, the Court has revived potentially discriminatory practices which it took years to arrest. The refusal to grant utility customers due process protection against arbitrary, harsh and sometimes fatal service cutoffs\(^\text{64}\) may only be the first result of the Court's new state action stance. Favorable readings of the *Jackson* decision could prove equally unfortunate in other instances of state authorized "private" activity.

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\(^{64}\text{See note 5 supra.}\)