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Beyond Weighing and Sifting: Narrowing Judicial Focus as an Alternative to *Burton v. Wilmington Parking Authority*

INTRODUCTION

The language of the First,¹ Fourteenth,² and Fifteenth³ Amendments to the Constitution, as well as the Civil Rights Act of 1871,⁴ prescribes governmental action. The effects of these provisions are to protect against certain forms of "state ac-

1. The First Amendment reads:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Section 1 of the Fourteenth Amendment reads:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

3. Section 1 of the Fifteenth Amendment reads:

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

4. 42 U.S.C. § 1983 reads:

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.

The Supreme Court of the United States has held the phrase "under color of" is to be interpreted so as to require a showing of "state action" similar to that required under the Fourteenth Amendment. *United States v. Price*, 383 U.S. 787, 794 n.7 (1966).

tion.”⁵ The requirement of state action is a recognition that private parties are not held to the same constitutional standards as are governments.⁶ Claims that constitutional rights have been deprived must necessarily then involve a defendant who engaged in state action. The requirement is easily met where the state itself is the offending party.

Where the culprit is a private party who is involved with, supported by, or performs a function of the state, the question becomes more difficult. Shall we hold such nominally private persons to constitutional standards? If we do, what showing must be made in order to find that a private party has engaged in state action? The problem is ascertaining at what point a private party has so clothed itself with the habiliments of the state as to be chargeable with constitutional standards of conduct.

The answer most often given by the courts and by commentators can be found in *Burton v. Wilmington Parking Authority*:⁷ “only by sifting facts and weighing circumstances can the non-obvious involvement of the state in private conduct be attributed its true significance.”

The analysis employed by the majority in *Burton* called for a careful judicial scrutiny of the defendant, Eagle, for the presence of contacts between himself and the state. The Court found the following: public financing of the parking facility which itself leased space to the defendant;⁸ rent paid by the defendant to the Parking Authority;⁹ construction of the facility on public land;¹⁰ public funds used to acquire the land upon which the parking facility was to be built;¹¹ leasing the premises to the defendant was an integral part of the plan for operating the facility;¹² public funding for facility maintenance;¹³ the fact

5. Throughout this comment the term “state action” is to be used in the generic sense as applying to all levels of governmental action. State action is the more familiar term and the one most frequently used by courts and scholars alike.

6. The Civil Rights Cases, 109 U.S. 3, 11 (1883) first delineated the state/private action dichotomy by holding: “It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the (Fourteenth) Amendment.”

7. 365 U.S. 715, 722 (1961).

8. *Id.* at 723.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 724.

13. *Id.*

that certain tax benefits allowed to the facility flowed to the defendant;¹⁴ and the fact that the facility was dedicated to public use.¹⁵ The aggregate of this evidence was then considered to determine if the total amounted to state action.¹⁶ After the computations were complete the Court commented: "(t)he State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity. . . ." ¹⁷

The *Burton* approach, then, utilizes an aggregate analysis, requiring a court to look at the full relationship between a private entity and the state and then determine that state action permeates the entire ambit of the ostensibly private entity's actions.¹⁸

The *Burton* approach has certain disadvantages. First, it requires state involvement such that the private entity is trans-

14. *Id.*

15. *Id.*

16. *Id.* at 725.

Because readily applicable formulae may not be fashioned, the conclusions drawn from the facts and circumstances of this record are by no means declared as universal truths . . . a multitude of relationships might appear to fall within the Amendment's embrace, but that, it must be remembered, can be determined only in the framework of the particular facts and circumstances present.

17. *Id.*

18. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) (in a suit to compel private broadcasters to accept editorial advertisements, Chief Justice Burger, with Justices Stewart and Rehnquist concurring, held the relationship between the FCC and CBS were not such as to find "governmental action." The Court did not consider the FCC's involvement with the particular CBS policy on editorial advertisements under attack); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (court rejected a claim that a state liquor license converted the discriminatory conduct of the club into state action. Justice Rehnquist writing for the majority held the degree of services provided to the club were not "significant" enough to constitute state action. This writer suggests that "significant" as used in this context means percentage of contacts when compared with private actions.); *Derrington v. Plummer*, 204 F.2d 922 (5th Cir. 1956), *cert. denied*, 353 U.S. 924 (1957) (a county built and equipped cafeteria leased to a private person who discriminated as to race held to be state action); *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974) (the question presented to the Court was the propriety of a federal injunction barring the city from letting its recreational facilities be used by segregated private schools. The Court had great difficulty in applying *Burton* analysis because it said the record of contacts were not well presented. It remanded the case for further consideration giving the lower court guidance in its deliberations by emphasizing the need for a particularized examination of the facts of the case in light of the *Burton* decision).

formed into a state entity as that relates to its entire ambit of activity. This would permit constitutionally egregious conduct to go without remedy, even though the state is directly and significantly involved with conduct which would otherwise be constitutionally impermissible, simply because, in the aggregate, such state involvement is not "substantial." Conversely, private activity could be designated state action even though the state had no involvement in the private acts because, in its total operation, the private entity had quantitatively numerous state contacts. Finally, aggregate analysis does not adequately account for a growing body of case law holding that state financial aid alone does not amount to state action,¹⁹ or that where particular equal protection issues are involved a lesser showing of state involvement will amount to state action.²⁰

19. An excellent example of this precise problem can be found in the following cases: *Grossner v. Trustees of Columbia University*, 287 F. Supp. 535 (S.D.N.Y. 1968), (court held that 59.7 million dollars funnelled to the University from the various federal agencies of a total budget of 134 million, roughly 45% of the total, did not constitute state action). In the Howard University line of cases, the courts held general financial support or assistance did not amount to state action. *Sanford v. Howard University*, 415 F. Supp. 23 (D.D.C. 1976) (federal funding of 58% of total budget not state action). *Williams v. Howard University*, 528 F.2d 658 (D.C. Cir. 1976) (court held no state action despite "substantial federal funding"). *Greene v. Howard University*, 271 F. Supp. 609 (D.D.C. 1967), *rev'd on other grounds*, 412 F.2d 1128 (D.C. Cir. 1969) (court held no state action where "a large percentage of its expenses" are paid by the federal government). When the state contributes financially to the extent of nearly 50% of the private entity's entire operation, how can it be said there is no state action? Surely where, but for the state, many private entities could not financially continue operation, there must be sufficient involvement to constitute state action. This is especially true in the case of Howard University where the University is chartered by the federal government and financed by Congressional appropriation. This is a prime case for finding state action. The court in *Grossner, supra*, 287 F. Supp. at 548, states its concern for holding state action where only state financial aid is involved: "otherwise, all kinds of contractors and enterprises dependent on government business for much larger portions of income than those here would find themselves charged with state action" The obvious response to this concern is a simple one; why should that matter? Where the public's funds are used, to a significant extent, by private entities, the people have a right to expect those funds will be used according to the standards of conduct as established in the Constitution. In an effort to avoid the harshness of the rule, some of the circuits hold that where racial discrimination is involved, there is a lower standard for finding state action. The better approach would seem to be an admission by the court that state action was indeed present in some aspects of Howard University and then look to see if the state is involved with the particular private conduct which produced the harm. This is precisely the approach the court took in *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968).

20. The issue of racial discrimination and state action has been treated by the commentators. See, e.g., Silarel, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966), or Bassett, *The Reemergence of the "State Action" Requirement in Race Relations Cases*, 22 CATHOLIC U. L. REV. 39 (1972). This paper shall confine itself to arguing the thesis that where racial discrimination is alleged a lesser or more permissive standard is used to find state action.

Burton has been extensively discussed by the commentators and while none are particularly impressed with its analysis, most consider it as making the best of a difficult legal problem.²¹ This paper will attempt to illustrate an alternative to the *Burton* approach which has heretofore received little or no scholastic recognition but which is increasingly being applied by the federal courts. Additionally, the paper will seek to illustrate its application to two lines of cases in the state action area: (1) financial aid and the levels required to find state action and (2) equal protection claims that trigger a lower standard for finding state action.

NARROWING JUDICIAL FOCUS²²

Beginning in 1968 a few federal courts have taken a somewhat more precise approach in state action analysis than that utilized in *Burton*. Rather than considering the private entity in the aggregate, such courts have narrowed their focus, attempting to ascertain the relationship of the state to the particular private

21. The *Burton* mechanics for state action analysis have been praised either as the best means of accomplishing the greatest good for all, *see, e.g.*, Lewis, *Burton v. Wilmington Parking Authority—A Case Without Precedent*, 61 COLUM. L. REV. 1458 (1961) (the author suggests the advantage of this approach is that it allows for case-by-case resolution of problems without setting troublesome precedents), and Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961) (the article urges the case-by-case approach even though it brings no certainty in the area), or as the only rational explanation of the myriad of conflicting state action cases. *See e.g.*, Note, *State Action and the Burger Court*, 60 VA. L. REV. 840, 841 (the authors take the position: "These cases offer no general formulas to explain the presence of state action in the pre-Burger Court decisions and its absence in current controversies . . . [T]he Court can neither fashion any rigid, precise formulas nor construct any criteria to serve as an adequate standard in this area. . . ." One widely cited article which contributes much to ordering the state action concept is Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1971). *See also* Bassett, *The Reemergence of the "State Action" Requirement in Race Relations Cases*, 22 CATHOLIC U. L. REV. 39 (1972).

22. The term "narrowing the focus" for lack of better description was coined by Prof. James McGoldrick in his Constitutional Law classes to define a phenomenon where a court, in looking at a private entity to see if state action is present, will not consider the private entity in the aggregate but rather will look only at that point of the private entity's total activities which produced the alleged constitutional violation. Having done this, the next step in the court's analysis is to ascertain the proximity of the state involvement in that particular aspect of the private entity, rather than attempting an analysis of the state/private relationship in the aggregate.

activity alleged to have produced the harm. In *Powe v. Miles*,²³ seven students claimed a denial of their civil rights following their suspension from Alfred University. The University consisted of four colleges, including the College of Ceramics. Under New York education laws, the College of Ceramics was under contract with the state,²⁴ which paid all expenses and allowed the college's employees to participate in state retirement programs.²⁵ In administration the college was part of Alfred University which, in all other respects, was purely a private school. Of the seven students suspended, four of them attended the "private sector" colleges with the remaining three attending the College of Ceramics.²⁶ The Court of Appeals held, that as to suspension of the four students attending the Liberal Arts College, there was no state action, but as to suspension of the students attending the College of Ceramics, there was state action.²⁷

The court's language is important:

The amount of aid Alfred receives from the state other than for the Ceramics College is small This is a long way from being so dominant as to afford a basis for a contention that the state is merely utilizing private trustees to administer a state activity We do not have at all a case where the wholly state-supported activity is so dominant that the private activity could be deemed to have been swallowed up.²⁸

The court could not find, by looking at Alfred University in the aggregate, sufficient state involvement to find state action. More important, however, was the court's comment regarding the parameter of the state involvement:

[The] essential point [is] that the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff *but with the activity which caused the harm*. Putting the point another way, the state action, not the private action, must be the subject of complaint.²⁹ (emphasis added).

To find state action as to the College of Ceramics, the court had first to narrow its focus to the activity which caused the harm and second, determine whether state action existed as to that particular activity. As to the College of Ceramics and the administration of that College's policies, Alfred University was

23. 407 F.2d 73 (2d Cir. 1968).

24. *Id.* at 75.

25. *Id.* at 76.

26. *Id.* at 79.

27. *Id.* at 80, 82.

28. *Id.* at 81, 82.

29. *Id.* at 81.

in reality an "agent of the state."³⁰

The *Powe* court seemingly did not fully apply its own analysis. Having narrowed the focus to the College of Ceramics the court's next inquiry could have carefully examined the relationship between the State of New York and the suspension of the plaintiffs. Did the state condone, promote, ratify, encourage and participate in the suspensions? Could the action not have occurred but for the State of New York? Was the College of Ceramics so involved with the state that it was, in reality, a part of the state education system? On these issues the opinion is less clear and the answers most likely much closer than the decision leads one to believe. The approach of the court, however, establishes a preferred method of state action analysis. It recognizes that resolution of a state action question requires more careful evaluation of a defendant than the formalistic and abstract compilation of state contacts utilized by the *Burton* court.

The Ninth Circuit has taken an approach similar to that of *Powe* in *Scott v. Eversole Mortuary*.³¹ In *Scott*, Eversole Mortuary was under contract with Mendocino County to transport corpses to the mortuary, embalm them, prepare them for autopsies and provide facilities for autopsies.³² Pursuant to that contract, Eversole picked up relatives of the plaintiff Scott who had been killed in an auto accident.³³ The decedants were all Native Americans. The mortuary performed all services required under the contract with the state, but refused, after being requested to do so, to provide funeral services allegedly because the decedants were Indians.³⁴

Scott filed suit alleging, among other things, discrimination by the mortuary.³⁵

The court of appeals, in reviewing the trial court's dismissal for failure to state a cause of action, affirmed, holding that mortuary services, as contrasted with morgue services, did not involve state action.³⁶ The majority argued:

30. *Id.* at 83.

31. 522 F.2d 1110 (9th Cir. 1975).

32. *Id.* at 1111.

33. *Id.* at 1112.

34. *Id.*

35. *Id.*

36. *Id.* at 1115.

The acts complained of did not directly occur as a result of the contract between the county and Eversole. Eversole performed its contractual obligation with respect to the decedants without regard to race. There is no allegation that the morgue services were refused or substantially modified, whether due to racial bias or otherwise. Appellant's claim is based upon Eversole's failure to provide funeral services *subsequent* to the completion of morgue services. These, to us, appear to be separate services and that separation is significant.³⁷

The approach of the court is more sharply defined by Judge Ely in his dissent:

The majority appears to reason that when the corporate appellee officially seized the Indian bodies under the authority conferred by the state, embalmed the remains, and furnished the facilities for autopsy, all in its official capacity as the agents of the state's coroner, it acted under the color of state law. But thereupon, say my Brothers, its official capacity terminated, and hence, when it declined the request of the bereaved survivors for funeral services and the purchase of caskets for their beloved, the corporate appellee had suddenly been transformed into a mere private person. . . .³⁸

As in *Powe*, the court in *Scott* did not evaluate the aggregate defendant; had they done so, Judge Ely argues they would have been compelled to find state action.³⁹ Rather, the court narrowed its focus to the conduct allegedly producing the harm and then determined whether state action existed as to that particular activity. The analysis is much more precise and addresses more sharply the threshold question—did denial of mortuary services by a private mortuary constitute state action?

Justice Rehnquist, writing for the majority in *Jackson v. Metropolitan Edison Co.*,⁴⁰ appears to use the more precise analysis of *Powe* and *Scott*. In *Jackson* a public utility had cut off the petitioner's services for nonpayment of bills. The petitioner alleged this was done without sufficient procedural due process. The court, in finding no state action, looked closely at the administrative rule which authorized termination of services to see to what extent the state Public Utilities Commission had supported, condoned or encouraged it. The court found:

The nature of governmental regulation of private utilities is such that a utility may frequently be required by state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without approval from a regulatory body. Approval by a 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 the utility and approved by the commission into "state action." At most, the Commission's failure to overturn this practice

37. *Id.*

38. *Id.* at 1117.

39. *Id.* at 1119.

40. 419 U.S. 345 (1975).

amounted to no more than a determination that a Pennsylvania utility is authorized to employ such practices if it so desired.⁴¹

The thrust of Justice Rehnquist's analysis is this: the state involvement with the regulation under attack was non-existent. The utility had adopted the regulation by its own authority. There was no review of that decision by the Public Utilities Commission nor did the Commission approve or disapprove it. The only possible state connection lay in the grant of state power to the utility to make rules generally, and that, according to the majority, was insufficient state involvement to constitute state action.⁴² Using *Burton* analysis, the dissent argued, state action in the aggregate was clearly present.

As our subsequent discussion in *Burton* made clear, the dispositive question in any state action case is not whether any single fact or relationship presents a sufficient degree of state involvement, but rather whether the aggregate of all relative factors compels a finding of state responsibility.⁴³

The majority rejected that approach preferring instead to narrow its focus to the activity allegedly producing the harm and searching for state connections with that.

Finally in *Jackson v. American Bar Association*,⁴⁴ five law students, who were members of the ABA's Law Student Division, sued the ABA alleging that a change in the ABA/LSD bylaws amounted to discrimination against them and deprivation of property without due process of law.⁴⁵ Finding no state action present, the court held that while the ABA received "substantial state funding,"⁴⁶ those funds went into a separate entity known as the Fund for Public Education which had no direct relationship to the management and operation of the ABA itself. Relying on *Powe v. Miles*,⁴⁷ the court found the federal funds in question were not involved in the activity alleged to have produced the harm.⁴⁸

41. *Id.* at 357.

42. *Id.*

43. *Id.* at 360.

44. 538 F.2d 829 (9th Cir. 1976).

45. *Id.* at 830.

46. *Id.* at 832.

47. 407 F.2d at 81.

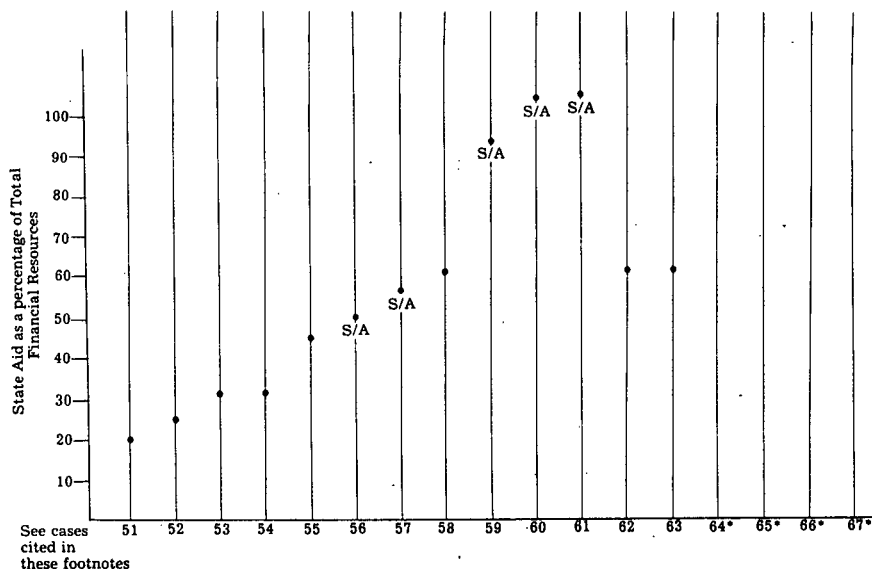
48. 538 F.2d at 833.

FINANCIAL AID AS AN INDICIUM OF STATE ACTION

A good illustration of the use of narrowed judicial focus can be found in the cases testing the existence of state action where the principle contact between the state and the defendant is in the form of state financial aid. The issue simply stated is whether the presence of state funds, by itself, can trigger a finding of state action. If the federal courts were following the *Burton* approach, it would seem reasonable to hypothesize that as the private entity becomes increasingly dependant upon state financial aid, i.e., by comparing the amount of financial aid with total financial resources, there would be a greater likelihood of finding state action. This is especially true where such dependence allows independent financial resources to be used in other aspects of the private enterprise.⁴⁹ Such does not appear to be the law. Rather, the conclusion drawn by many courts is that general state financial aid, by itself, is not enough to convert private action into state action. There is some difficulty in properly analyzing this area of the law because there are so few "clean cases" which squarely present this issue.⁵⁰ Of those cases where financial aid is a major contact considered by the court in determining the presence of state action, the result generally reached is a finding of no state action. This can be demonstrated in the following manner: looking at 17 recent state action cases where financial aid was a principal contact considered by the court, most courts held state action was not present regardless of the percentage of financial aid involved. Graphically the cases take on the following pattern:

49. That is the argument made in *State Action*, *supra*, note 21, at 674. That author argues that such not only should be the law but, with few exceptions, is the law.

50. Many courts distinguish the financial aid cases this way: general financial aid absent racial discrimination, will not trigger a finding of state action; where there exists general financial aid coupled with an allegation of racial discrimination, there will be a lower threshold for finding state action. *See, e.g.*, *Grunya v. George Washington University*, 512 F.2d 356, 360 n.6 (D.C. Cir. 1975); *Spark v. Catholic University of America*, 510 F.2d 1277, 1281, 1282 (D.C. Cir. 1975).



* These cases do not give the amount of financial aid nor do they indicate a percentage of aid in relation to total revenues.

S/A This symbol is used to indicate the court found state action present.

51. *Wahba v. New York University*, 492 F.2d 96 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974) (involving a private university where 20% of the funds involved in a NIA research project was not sufficient federal involvement to find state action as to a participant in the project).

52. *Sparks v. Catholic University of America*, 510 F.2d 1227 (D.C. Cir. 1975) (25% of revenues coming from the federal government were not sufficient to find state action).

53. *New York City Jaycees v. United States Jaycees*, 512 F.2d 856, 858 (2d Cir. 1975) (31.4% of national organizations' funds coming from the federal government were not sufficient to find state action).

54. *Junior Chamber of Commerce of Kansas City, Missouri v. Missouri Chamber of Commerce*, 508 F.2d 1031 (8th Cir. 1975), citing *New York Jaycees v. United States Jaycees*, 377 F. Supp. 481, 487 (S.D.N.Y. 1974) (31.4% federal assistance to National Jaycees which in turn distributed funds nationally would not convert private state chapters into state action).

55. *Grossner v. Trustees of Columbia University*, 287 F. Supp. 585 (S.D.N.Y. 1968) (45% of University funds from state not sufficient to find state action).

56. *Simkin v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963), (private hospital receiving Hill-Burton funds totalling 50% of cost to build the hospital held state action).

57. *Isaacs v. Board of Trustees of Temple University*, 385 F. Supp. 473, 479 (E.D. Pa. 1974) (54.2% of school's income from the state constitutes state action).

58. *Sanford v. Howard University*, 415 F. Supp. 23 (D.D.C. 1976) (58% federal funding not sufficient to constitute state action).

1. *Financial aid less than 50% of private financial resources*

The cases at the lower end of the spectrum are fairly consistent in holding no state action where the extent of financial aid falls below the 50% mark. Such results seem fairly consistent with a *Burton* form of state action analysis because the quantitative number of contacts are few. The results do not appear to support the narrowed judicial focus form of analysis because qualitative, rather than quantitative, contacts are considered and very little state financing could amount to state action if the state contacts are directly involved with the private conduct complained of.

2. *Financial aid exceeding 50% of private financial resources*

Where the level of financial aid approaches or exceeds 50% of the total financial resources of the private entity, the cases are much closer. Of those cases identified where there was substantial state financial aid, most held that the presence of general financial aid was not sufficient, by itself, to trigger a finding of state action.⁶⁸ In those cases where the court did find state action, the presence of financial aid was not considered crucial or determinative in the court's analysis. Rather the court looked at the state regulations accompanying the financial aid and found state action based on the nature of the regulations.⁶⁹

59. *McQueen v. Drucker*, 438 F.2d 781 (1st Cir. 1971) (up to 90% of the cost of construction comes from the state and federal governments, court found state action).

60. *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964) (Supreme Court found that total state support for private school tuitions amounted to state action).

61. *Norwood v. Harrison*, 413 U.S. 455 (1973) (Supreme Court found total state support for school text book program amounted to state action as applied to private schools).

62. *Williams v. Howard University*, 528 F.2d 658 (D.D.C. 1976) ("substantial state funding" did not amount to state action).

63. *Green v. Howard University*, 271 F. Supp. 609 (D.D.C. 1967), *rev'd. on other grounds*, 412 F.2d 1128 (D.C. Cir. 1969) (federal financing of a "large percentage of expenses" not state action).

64. *Junior Chamber of Commerce of Rochester, Inc. v. United States Jaycees*, 495 F.2d 883 (10th Cir.), *cert. denied*, 419 U.S. 1026 (1974) (local distribution of \$985,000 of state funds not sufficient to find state action).

65. *Blackburn University v. Fisk*, 443 F.2d 121 (6th Cir. 1971) (financial aid by itself not sufficient to find state action).

66. *Grunya v. George Washington University*, 512 F.2d 556 (D.C. Cir. 1975) (federal contracts and money paid pursuant thereto not state action).

67. *Grafton v. Brookland Law School*, 478 F.2d 1137 (2d Cir. 1973) (general state aid plus \$400 per graduate not sufficient to find state action).

68. See notes 49, 50, 54, 55, 57, *supra*.

69. In *Isaacs*, *supra*, note 57, 385 F. Supp. at 447-81, the court emphasized that what most tipped the scales in favor of finding state action were the state regulations accompanying the financial aid. *McQueen*, *supra*, note 59, also in-

This grouping of cases appears in sharp contrast with *Burton's* aggregate analysis. Based on aggregate contacts, it would seem reasonable that where the state is responsible for half of a private enterprise's financial assets, such would amount to state action. The federal courts seem to reject that argument, preferring instead to narrow their focus to find the presence of state action at the point of conduct allegedly producing the harm.

3. Total state financial aid

At the extreme end of the spectrum, total state funding will, by itself, result in a finding of state action under either theory of state action analysis. At this point the private entity is so entwined in the arms of the state that the differentiation between state action and private action can no longer be made.⁷⁰ The private entity is absorbed by the Fourteenth Amendment into the state.

Those cases in which financial aid was the major contact between the state and a private entity defendant illustrate that federal courts are moving away from aggregate analysis in finding state action. Even when state financial aid is a significant element of the private entity's total assets, that alone is not sufficient to find state action present.

EQUAL PROTECTION CLAIMS AND STATE ACTION

A hybrid specie of narrowed judicial focus has been developing over the years which involves a multi-level state action analysis depending on the nature of the constitutional issue involved in the plaintiff's claim. While not a pure form of narrowed judicial focus, as this comment has defined that phrase, it is a process whereby the federal courts will focus on the con-

involved extensive state regulations of the private entities conduct. In the *Howard University* line of cases, the presence of large grants of federal aid, without the attendant regulatory control over that money, was not sufficient to find state action.

70. Both *Griffin, supra*, note 60 and *Norwood, supra*, note 61, involve total state support. In *Griffin*, the state financed the cost of segregated private school tuition. In *Norwood*, the state provided, free of cost, text books to private schools.

stitutional issues of a given case and apply different levels of state action analysis depending on the issues involved.

Commentators have been arguing for some time that there needs to be different state action analysis applied to equal protection cases than that which is applied to due process cases.⁷¹ In the area of racial discrimination, there is a growing body of case authority indicating that when racial discrimination is one of the plaintiffs' substantive claims, less state involvement, qualitatively, will be needed to support a finding of state action. In *Coleman v. Wagner College*,⁷² the Federal Court of Appeals was presented with a charge of racial discrimination when the college, a private school with religious affiliations and supported almost totally by private funds, attempted to discipline students according to school regulations. The first hurdle the plaintiffs had to overcome was the state action issue. The court in remanding the case to the district court for a full hearing on the state action issue said:

Racial discrimination is so peculiarly offensive and was so much the prime target of the Fourteenth Amendment that a *lesser degree of involvement may constitute "state action"* with respect to it than in other contexts.⁷³ (emphasis added).

In a number of cases involving private schools, a finding of state action has been made where allegations of racial discrimination were present even though, in factually similar due process cases, no state action was found.⁷⁴ In *Jackson v. Statler Foundation*,⁷⁵ Reverend Jackson sued the Foundation, alleging racial discrimination in the selection of Foundation directors. In considering the kinds of contacts between the state and the Foundation, the court reviewed a number of preceding cases and concluded that:

71. See, Antoun, Jr., *State Action: Judicial Perpetuation of the State/Private Distinction*, 2 OHIO NORTHERN U. L. REV. 722 (1975) and *State Action*, *supra*, note 21 at 858-863.

72. 429 F.2d 1120 (2d Cir. 1970).

73. *Id.* at 1127.

74. See, e.g., *Grafton v. Brookland Law School*, 478 F.2d 1137 (2d Cir. 1973); *Blackburn University v. Fisk*, 443 F.2d 121 (6th Cir. 1971); *Grunya v. George Washington University*, 512 F.2d 556, 560 (D.C. Cir. 1975) (the court said: "With the possible exception of racial discrimination by recipients of government funding, we believe mere financial support . . . represents insufficient government involvement."); *Powe v. Miles*, 407 F.2d 73, 82 (2d Cir. 1968) (court refused to label private school state action for purposes of due process but indicated that charges of racial discrimination would have subjected the school to constitutional restraints); *Edwards v. Haniel*, 397 F.2d 687 (D.C. Cir. 1968) (court recognized that private conduct might constitute state action under the Fourteenth Amendment but not for purposes of the First Amendment). See *generally* note 19, *supra*.

75. 496 F.2d 623 (2d Cir. 1974).

Significantly, these cases divide into two groups: Where racial discrimination is involved, the courts have found "state action" to exist; where other constitutional claims are at issue (due process, freedom of speech), the courts generally have concluded no "state action" has occurred.⁷⁶

The rationale for the *Statler* holding is explained by the Second Circuit in *Weise v. Syracuse University*.⁷⁷ Relying on *Statler*, the court acknowledged the existence of a "double standard in state action—one, a less onerous test for cases involving racial discrimination and a more rigorous standard for other claims."⁷⁸ The reason given for such a double standard was that discrimination is peculiarly offensive conduct.⁷⁹ In *Granfield v. Catholic University*,⁸⁰ reviewing the line of cases just discussed, the court summarized what it considered to be the present state of the law by declaring: "It has increasingly become clear that with respect to racial discrimination, courts are willing to condone less state involvement than would be permitted in other contexts."⁸¹

Tax exempt status has historically not been a reliable indicator of the presence of state action,⁸² but in *Pitts v. Department of Revenue*,⁸³ the federal district court held that tax exemptions of racially discriminatory organizations were sufficient state involvement to constitute state action. In its opinion the court said the thrust of the decision "is a determination that a different standard must be applied in cases involving equal protection (racial discrimination) than in cases involving other constitutional rights."⁸⁴ This is necessitated by the fact that "the prevention of racial discrimination is dominant in any balancing of constitutional interests."⁸⁵

76. *Id.* at 628.

77. 522 F.2d 397 (2d Cir. 1975).

78. *Id.* at 405.

79. *Id.* at 407.

80. 530 F.2d 1035 (D.C. Cir. 1976).

81. *Id.* at 1046 n.29.

82. See, *Jackson v. Statler Foundation*, 496 F.2d at 627-28; *Wulz v. Tax Commission*, 397 U.S. 664 (1970) (tax exemption to religious groups); *Chicago Joint Board v. Chicago Tribune*, 435 F.2d 470 (7th Cir. 1970) (tax exempt newspaper); *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972); *Bright v. Isenburger*, 314 F. Supp. 1382 (N.D. Ind. 1970), *aff'd*, 445 F.2d 412 (7th Cir. 1971).

83. 333 F. Supp. 662 (E.D. Wis. 1971).

84. *Id.* at 668.

85. *Id.* at 669.

While it seems clear that lower federal courts have adopted a double standard in this state action area, the concept has never formally been embraced by the Supreme Court. Indeed it seemed at first the Court would not even deal with the issue. *Moose Lodge No. 107 v. Irvis*,⁸⁶ presented the Court with a claim that a private club, operating with a state liquor license, refused to serve a black guest of one of the Lodge's members. In *Moose Lodge* the majority held that state regulations granting liquor licenses "cannot be said in any way to foster or encourage racial discrimination."⁸⁷ The Court did not seem to even approach the issue of a lesser standard for finding state action where racial discrimination was alleged. Instead it seemed more concerned that finding state action, where only licensing by the state is involved, would almost obliterate the state/private dichotomy recognized in the state action doctrine.⁸⁸ *Moose Lodge* may be distinguishable in a number of ways. First, it represents the outer limits beyond which the courts will not go regardless of the deferential treatment given to allegations of racial discrimination. Even applying the lesser standard of lower federal courts, it is possible that a state licensing scheme, as viewed by the majority, is never going to be a sufficient basis for a finding of state action. Additionally, *Moose Lodge* may be indicative of a balancing test used to find state action where competing associational rights are involved. The majority went to great lengths to balance the associational rights which permit private persons to discriminate against the associational rights of a private person in obtaining access to an all white organization.⁸⁹

In 1973 the Supreme Court in deciding *Norwood v. Harrison*,⁹⁰ held unconstitutional a state program which provided free textbooks to students in segregated private schools. While the Court did not formally apply a lesser standard in finding state action, there is language which arguably stands for that proposition present in the case.

[A]lthough the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections . . .⁹¹

86. 407 U.S. 163 (1972).

87. *Id.* at 175-77.

88. *Id.* at 175.

89. *Id.* at 163.

90. 413 U.S. 455 (1973).

91. *Id.* at 469.

Norwood suggests that where racial discrimination is involved, the Court will relax its standards for finding state action where the remedy sought is an order directing the state to disassociate itself from the private discriminator.⁹²

The result in the racial discrimination cases suggests that courts may be willing to require fewer contacts with the state and a less direct involvement between the state and the private conduct complained of where racial discrimination is at issue. Such a multi-level analysis of state action problems would be seemingly inconsistent with *Burton*, which considers the existence of state action to be solely a function of contacts with the state. Under *Burton*, determination of the presence of state action would precede any consideration of the substantive issues of a case. The approach is more akin to a narrowed judicial focus in that it requires a court to consider carefully what constitutional interests are involved so as to arrive at an initial focal point of analysis, wide angle or relaxed scrutiny where certain equal protection claims are raised, and extreme magnification or strict scrutiny for substantive and procedural due process issues.⁹³

CONCLUSION

Narrowing of judicial focus is a developing tool used by some federal circuits. It allows the court to look closely at the private entity and to scrutinize the specific private conduct which is alleged to have produced the harm at issue. If, in the court's analysis of the private action, it finds the state has sufficiently involved itself with the action in question, there will be a finding of state action. This analysis applies regardless of the aggregate amount of state involvement with the private entity.⁹⁴

92. *Id.*

93. It is not within the scope of this comment to criticize a multi-level approach to state action. One commentator has already argued that given the special protection afforded to race by the Fourteenth Amendment and unique constitutional approach to the substantive analysis of purposeful racial discrimination, it is appropriate that less state involvement should trigger a finding of state action. See generally note 21, *supra*; also *Metropolitan Housing Development Corporation v. City of Arlington Heights*, 429 U.S. 252 (1977).

94. This fact is specially recognized in *Cohen v. Illinois Institute of Technology*, 524 F.2d 818, 825-26 (7th Cir. 1975), where Judge Stevens, now Mr. Justice Stevens, said:

Narrowing of judicial focus is the preferred approach for several reasons. First, it is a more precise form of analysis. It concentrates on the conduct or activity producing the alleged harm rather than on the entire ambit of the private entity's actions. Second, it is a recognition that a finding of significant or insignificant state involvement in the aggregate is not dispositive of the issue. Third, such narrowed focus will require that resolution of the state action issue not take place in a vacuum. Rather the court will survey the entire constitutional problem before it and set an initial focal point of analysis depending upon the substantive issues involved. The court will then search for the presence of state contacts in sufficient proximity with the private conduct under attack. Where there is close and substantial proximity between the state and the private entity, there will be state action.

WILLIAM W. WYNDER

[T]he state's support of I.I.T. is sufficiently significant to require a finding of state action if that support has furthered the specific policies or conduct under attack The state has lent significant support to I.I.T.; it is not, however, alleged to have lent any support to any act of discrimination.

While there may have been state action in the aggregate, there was none at the point of conduct causing the alleged harm.