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Constitutional Law -- State Action and Tax Benefits to Private Charitable Organizations

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NOTES

Constitutional Law—State Action and Tax Benefits to Private Charitable Organizations

Since June 1971, a series of federal court decisions has sustained attacks on state and federal tax exemption and deduction provisions as applied to racially segregated charitable and educational organizations.[1] The principle emerging from these cases is that tax administrators are under an affirmative duty to insure that recipients of the tax benefits generally available to private charitable and educational institutions do not practice racial discrimination in their admissions and membership policies. All of these decisions have profound implications for federal, state, and local tax administration.[2] One of them, *Pitts v. Department of Revenue*,[3] in its application of the state action doctrine, appears to bring fourteenth amendment prohibitions more directly to bear on private conduct than any case since *Burton v. Wilmington Parking Authority*.[4]

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[1]Pitts v. Department of Revenue, 333 F. Supp. 662 (E.D. Wis. 1971); Green v. Connally, 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 92 S. Ct. 564 (1971); McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972).

[2]The decree in Green v. Connally, 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 92 S. Ct. 564 (1971), illustrates the kind of administrative action necessary to implement the decisions. The Internal Revenue Service is enjoined from granting tax exempt status to any Mississippi private school and from allowing deductions for contributions to any such school, except upon a showing of compliance with detailed advertising requirements establishing nondiscriminatory policies in school administration, admissions, scholarship and loan programs, and athletic and extra-curricular activities. In addition to the advertising requirements, the school must furnish the Service with information "which the court finds material in order for the Service to be in an effective position to determine whether the school has actually established a policy of nondiscrimination . . . ." Included in this information is the racial composition of the school's student body, applicants for admission, faculty, and administrative staff; the amount of any scholarship aid and the racial composition of recipients; a list of incorporators, founders, board members, and donors, and a statement as to whether any of them are identified with segregationist organizations. 330 F. Supp. at 1180. A comment on the case has suggested that its impact on actual Service practices may be minimal because of the sheer manpower limitations. "Investigation of hiring or admissions policy and substantive determination of whether the activities of each of some 400,000 groups conflict with public policy presents a far more massive task than the largely mechanical decision making previously employed. The practical restrictions will probably influence courts to avoid sweeping mandates, leaving the assault on charitable exemptions to private litigants on a case by case basis." Note, *Federal Taxation—Charities—Taxpayers May Contest IRS Allowance of Exempt Status, and Organizations whose Activities Violate Public Policy May Not Be Accorded Favored Tax Treatment*, 50 TEXAS L. REV. 544, 549 (1972).

[3]333 F. Supp. 662 (E.D. Wis. 1971).

[4]365 U.S. 715 (1961).

Wisconsin, like most states, exempts from taxation the property and income of organizations that may be called charitable institutions.[5] The statutes, drafted in broad terms, exempt the *property and income*[6] of all churches, private schools, historical societies, women's clubs, libraries, and fraternal orders such as Elks and Moose lodges, and the *income*[7] of "other corporations or associations of individuals not organized or conducted for pecuniary profit." The plaintiffs in *Pitts* claimed to represent a class of non-Caucasian Wisconsin taxpayers and Caucasian taxpayers not affiliated with or members of organizations that discriminate in membership on the basis of race.[8] Focusing their attack on the exemption of fraternal orders, they sought a declaration that the exemption statutes were unconstitutional as applied to organizations that discriminate in membership on the basis of race and an injunction prohibiting the Department of Revenue from enforcing the statutes as to those organizations.

The proposition that government must not fiscally subsidize racist organizations seems scarcely debatable in the year 1971. Numerous legal theories bolster this principle,[9] and under most of them a plaintiff's

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[5]The Wisconsin statutes exempt from property taxation all

> [p]roperty owned and used exclusively by educational institutions . . . churches or religious educational or benevolent associations . . . women's clubs . . . domestic, incorporated historical societies . . . domestic, incorporated, free public library associations [and] fraternal societies operating under the lodge system . . . .

WIS. STAT. § 70.11(4) (1967). Exempted from income tax is the income of "all religious, scientific, educational, benevolent or other corporations or associations of individuals not organized or conducted for pecuniary profit." WIS. STAT. § 71.01(3)(a) (1967). Although the *Pitts* plaintiffs attacked only the exemptions of private fraternal orders, the court's holding applied to all of the above-named exemptees. 333 F. Supp. at 670.

[6]WIS. STAT. §§ 70.11(4), 70.01(3)(a) (1967).

[7]*Id.* § 70.01(3)(a) (1967).

[8]333 F. Supp. at 669-70. The district court, relying on Flast v. Cohen, 392 U.S. 83 (1968), held that plaintiffs' standing as taxpayers was sufficient to invoke federal jurisdiction. 333 F. Supp. at 669-70. In *Flast* the Supreme Court held that a federal taxpayer has standing to challenge Congressional spending programs alleged to be in violation of specific constitutional limitations on the power of the federal government. Whether *Flast* properly applies to state fiscal matters, whether it applies to exemptions from taxation as well as to appropriations, and whether the equal protection clause is a "specific limitation" are questions beyond the scope of this note.

[9]Charitable institutions are not taxed because they fulfill a "public purpose," which is also a limitation on the taxing and spending power of a state legislature. However, the beneficiaries of a charitable activity need not include the entire public; a use is charitable if its accomplishment "is of such social interest to the community as to justify permitting the property to be devoted to the purpose in perpetuity." RESTATEMENT (SECOND) OF TRUSTS § 368, comment *b* at 248 (1959). Thus an activity is charitable if it achieves a result that otherwise would be achieved only at public expense. Union & New Haven Trust Co. v. Eaton, 20 F.2d 419, 421 (D. Conn. 1927); *cf.* H.R.

principal burden would be the largely factual one of establishing the proposition as an apt characterization of the particular transactions involved: at issue would be whether a tax exemption is a significant subsidy in light of the total financial structure of a given organization or class of organizations and the weight to be accorded a policy of restricted participation in organizational activities where the otherwise charitable purposes and effects of such activities are assigned to justify the favored treatment. It may be that no public benefit can outweigh the interest of the victim of racial prejudice practiced by the one who confers the benefit, and certainly categorizing an institution as charitable cannot immunize it from judicial scrutiny in terms of contemporary standards of social benefit and public good. To be sure, the courts' freedom to apply these tests to legislative enactments is more circumscribed than it is when the subject before them is the validity of a charitable trust.[10] But this does not mean that the tests are not appropri-

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REP. NO. 1860, 75th Cong., 3d Sess. 19 (1938). *See generally* Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979 (1957). But racial discrimination *arbitrarily* excludes a part of the public and therefore may defeat the public character of an activity.

> The individual philanthropist cannot be indulged in his own vagaries as to what is charitable; he must conform to some kind of norm, else he cannot obtain subsidy or tax exemption. Similarly the general principle of a "desire to benefit one's own kind" is an acceptable incentive to philanthropy as applied to a wide range of causes. But it takes on a different and unacceptable hue when it is manifested as racial discrimination.

Green v. Connally, 330 F. Supp. 1150, 1163 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 92 S. Ct. 564 (1971), discussed in text accompanying notes 33-35 *infra*. Note also the statement in McGlotten v. Connally, 338 F. Supp. 448, 456 n.38 (D.D.C. 1972):

> We do not find it significant that plaintiff does not allege . . . that the charitable purposes to which the federal funds are put are in themselves discriminatory. Plaintiff alleges that he and others in his position are denied the opportunity to help determine the purposes to which the funds are devoted. Paternalism should not be confused with equality.

McGlotten is discussed in text accompanying notes 58-60 *infra*.

As for federal tax benefits, the *McGlotten* case held that INT. REV. CODE OF 1954, §§ 170(a), (c) and 501(c)(8) constitute "federal financial assistance" within the meaning of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-4 (1970), and that plaintiffs had a cause of action under § 601 of the Act, 42 U.S.C. § 2000d, which provides that "[n]o person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." For a discussion of state and federal statutory bases for withdrawing tax benefits to private segregated schools, see Note, *Federal Tax Benefits to Segregated Private Schools*, 68 COLUM. L. REV. 922, 940-50 (1968).

[10]The Wisconsin cases, for example, while implicitly recognizing that there are limits beyond which the legislature may not go, allow a wide berth for legislative discretion. *See* Fulton Foundation v. Department of Taxation, 13 Wis. 2d 1, 14, 108 N.W.2d 312, 319 (1960); Lawrence Univ. v. Otugamie County, 150 Wis. 244, 246, 136 N.W. 619, 620 (1912).

ate guides to statutory construction. Nor is it necessarily true that where there is no room for construction in conformity with these standards the legislative determination that they are met is conclusive: concepts of public purpose have their constitutional basis in due process principles that are as binding on the legislatures as on the courts. It is too often forgotten that most state constitutions have due process clauses and that the demise of "substantive due process" that has restricted judicial review of such legislative judgments has been for the most part a phenomenon peculiar to the federal fifth and fourteenth amendments.[11]

The plaintiffs in *Pitts*, however, selected an approach designed to obtain an adjudication of federal constitutional right: they contended that Wisconsin's allowance of tax benefits in favor of segregated fraternal orders was state action fostering racial discrimination in violation of the equal protection clause of the fourteenth amendment. Inevitably a high degree of risk attends an unnecessary forcing of constitutional issues. In this case there was the additional factor that the constitutional frame of reference within which the court was asked to operate was so fraught with contrary precedent[12] and conflicting principles that the court could sustain the plaintiffs' claim against the presumption of the statute's constitutionality only "with the unfortunate certainty of complicating the already complex state action concept."[13]

The Wisconsin Department of Revenue's defense was based on the statute's "neutrality" in the matter of race. It pointed out that the criteria for exempt status were set out in terms of institutional objectives and that any fraternal or benevolent organization meeting the requirements was granted the exemption without regard to internal (member-

[11]*See generally* Carpenter, *Economic Due Process and State Courts*, 45 A.B.A.J. 1027 (1959); Horn, *Judicial Power Over Policy Under State Constitutions*, 6 PUB. POLICY 47 (1955); Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 92 (1950). Substantive due process is not dead, of course, even in the federal practice. *See* Packer, *The Aims of the Criminal Law Revisited: A Plea for a New Look at "Substantive Due Process,"* 44 S. CAL. L. REV. 490 (1971).

[12]In addition to the Seventh Circuit cases discussed in text accompanying notes 16-21 *infra*, *see also* Guillory v. Administrators of Tulane Univ., 212 F. Supp. 674, 685 (E.D. La. 1962) ("a simple tax benefit [does not evoke] state action. [Otherwise,] every legal creature would be within the proscription of the Fourteenth Amendment."); Eaton v. Grubbs, 329 F.2d 710, 713 (4th Cir. 1964) (tax exemption not sufficient by itself to impose fourteenth amendment restrictions but "may attain significance when viewed in combination with other attendant state involvements") (dictum); Smith v. YMCA, 316 F. Supp. 899, 906 (M.D. Ala. 1970) (same) (dictum).

[13]333 F. Supp. at 669.

ship) policies.[14] From this premise the court was asked to conclude that since the exemption provisions "do not isolate the factor of racial discrimination either by their terms or application, plaintiffs cannot argue . . . that the state encourages or is involved in private discriminations."[15] The Department of Revenue relied primarily on two recent cases involving tax exemptions. In *Walz v. Tax Commission*,[16] the Supreme Court held that a grant of tax exemption to religious organizations did not violate the establishment clause of the first amendment, because the exemption amounted to only a "benevolent neutrality" and a "minimal and remote involvement." In *Chicago Joint Board, Amalgamated Clothing Workers of America v. Chicago Tribune*,[17] the plaintiff union claimed that by granting a use tax exemption to a newspaper publishing company the state had so insinuated itself as to become the author of the newspaper's denial to plaintiff of a medium of speech. The Seventh Circuit rejected the contention in these words:

> The use tax exemption, which newspapers share in common with magazines and periodicals . . . does represent a "state involvement" in the limited sense that any tax exemption does, but not to a degree which constitutes state participation in the conduct or action of the enterprise granted the exemption.[18]

The *Pitts* court discussed one other recent case. In *Bright v. Isenbarger*[19] students in a parochial school claimed that their summary expulsion by school officials violated their rights of procedural due process. The *Bright* court, citing *Burton v. Wilmington Parking Authority*, held that a tax exemption in favor of parochial schools, even when

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[14]Where the state's involvement in discriminatory acts is established, this "neutrality" argument is subject to the stock response that "equal protection of the laws is not achieved through indiscriminate imposition of inequalities." Shelley v. Kraemer, 334 U.S. 1, 22 (1948). The neutrality asserted here, however, goes to the question of state involvement and is more substantial. *See* Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1108 (1960):

> The important consideration for the state action problem is whether exemption involves the government in an endorsement of the specific policies and goals of an exempt organization. In the case of tax exemptions for charitable institutions, applying to very broadly defined private activities diverse in makeup and purposes almost beyond imagination, the theory that the state and federal governments provide the assistance in an indiscriminate manner will withstand scrutiny.

[15]Brief for Defendant at 10.

[16]397 U.S. 664, 676 (1970).

[17]435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971).

[18]*Id.* at 477 (citations omitted).

[19]314 F. Supp. 1382 (N.D. Ind. 1970), *aff'd per curiam*, 445 F.2d 412 (7th Cir. 1971).

coupled with state supervision of private education, did not "so insinuate the State into a position of interdependence with [the school] that it must be recognized as a joint participant in the challenged activity."[20]

In discussing *Walz*, the *Pitts* court appears to have perceived some difference between the state action doctrine and the principle applicable to discovering a violation of the establishment clause: the *Walz* opinion had not discussed "the state action doctrine as such" but had only "weighed factors similar to those relevant to determination of state action issues."[21] The court's basis for distinguishing the *Chicago Joint Board* and *Bright* cases is even more problematical and more significant. The court accorded special importance to the fact that these cases involved respectively the right of freedom of expression and the right to procedural due process. On the basis that "equal protection rights are to be accorded a special significance where governmental or state action is in question," the court held that "[w]hatever its nature in other contexts, a tax exemption constitutes affirmative, significant state action in an equal protection context where racial discrimination fostered by the State is claimed," and added: "Inherent in our decision . . . and in any distinction of *Walz, Chicago Joint Board* and *Bright,* is a determination that a different standard must be applied to ascertain state action in cases involving equal protection than in cases involving other rights."[22] The court did not define the "different standard" that applies to equal protection cases. Just what it is about a tax exemption that "significantly involves" the taxing authority in the racially discriminatory membership policies of private institutional recipients of exemptions is left for determination by the process, at best speculative, of interpreting the result in the light of the particular facts. For its part, the court chose to rest the decision on the conclusory observation that tax exemptions "obviously" encourage the activities, "including racial discrimination," of exempted organizations.[23]

Two other cases have enjoined enforcement of tax benefits in favor of segregated institutions. *McGlotten v. Connally,*[24] which involved federal Internal Revenue Code income tax benefits (including income tax deductions for donors) for *Pitts*-type institutions, was decided three

[20] *Id.* at 1396.
[21] 333 F. Supp. at 665.
[22] *Id.* at 668.
[23] *Id.* at 669.
[24] 338 F. Supp. 448 (D.D.C. 1972).

months subsequent to and in substantial accord with *Pitts* on fifth amendment grounds. In *Green v. Connally*,[25] also a federal income tax case, the question of the constitutionality of exemptions and deductions as applied to private segregated schools was not reached. Rather, the court construed the challenged sections as not applying to such schools. Moreover, the fact that the institutional recipients in *Green* were schools rather than clubs or fraternal orders suggests the possibly critical distinction that the governmental aid represented by tax benefits, especially charitable contribution deductions, was shown to be supportive of efforts by white Mississippians to circumvent court-ordered desegregation.[26] Nevertheless, in view of the heavy reliance on *Green* by the *Pitts* court, a brief treatment of the *Green* opinion at this point is in order.

The Green plaintiffs were black children attending Mississippi public schools, and their parents. They sought alternative declaratory relief, arguing first that sections 170 and 501 of the Internal Revenue Code[27] did not authorize tax benefits operating to the advantage of deliberately segregated private schools in Mississippi and, second, that those sections were unconstitutional to the extent they so authorized tax benefits. Noting its pendent jurisdiction to decide the claim based on statutory

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[25]330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 92 S. Ct. 564 (1971).

[26]*Cf.* Coffey v. State Educ. Fin. Comm'n, 296 F. Supp. 1389 (S.D. Miss. 1969) (historical maintenance of segregated public school system imposes affirmative duty to establish a system of integrated public education, making state tuition grants to private segregated institutions in derogation of that duty unconstitutional). *See also* Poindexter v. Louisiana Financial Assistance Comm'n, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968) (aid to segregated schools that is the product of the state's policy of fostering segregated schools is unconstitutional). "We distinguish . . . state aid from tax benefits, free schoolbooks, and other products of the state's traditional policy of benevolence toward charitable and educational institutions." *Id.* at 854. The court in *Green* was careful to point out that its decision "goes beyond the class of schools considered in our prior opinion [Green v. Kennedy, 309 F. Supp. 1127, 1132-37 (D.D.C.), *appeal dismissed*, 400 U.S. 986 (1970)] where we discussed the constitutional problems inhering in providing tax benefits for private schools forming 'a system of segregated private schools as an alternative available to white students seeking to avoid desegregated public schools.'" 330 F. Supp. at 1164. But the opinion also makes clear that its inclusion of "all private schools, without reference to any finding or determination that such schools were formed for the purpose of avoiding a unitary school system," is based on federal public policy and not on equal protection principles. *Id.* Moreover, even if the constitutional question were regarded as identical where there is no finding of purposeful avoidance, education, "a matter affected with the greatest public interest . . . whether . . . offered by a public or private institution" and a function historically associated with the state, presents considerations which distinguish schools from the private charitable institutions involved in *Pitts*. Guillory v. Administrators of Tulane Univ., 203 F. Supp. 855, 858-59, *vacated on rehearing*, 207 F. Supp. 554 (E.D. La.), *aff'd per curiam*, 306 F.2d 489 (5th Cir. 1962).

[27]INT. REV. CODE OF 1954, §§ 170(a), (c) allow a deduction for charitable contributions to defined organizations. *Id.* §§ 501(a), (c) exempt the income of such organizations.

construction, the court embarked on an extended discussion of the "underlying" law of charitable trusts.[28] Citing cases and treatises for the rule that a limitation to accomplish a purpose contrary to public policy will cause a charitable trust to fail, the court observed a modern trend in the case law to deny enforcement of discriminatory provisions in educational trust instruments by means of a variety of judicial techniques ranging from *cy pres* to reverter. The court concluded, "There is at least a grave doubt whether an educational organization that practices racial discrimination can qualify as a charitable trust under general trust law."[29] With this perspective the court proceeded to construe the relevant Internal Revenue Code provisions in light of federal public policy. Finding a federal policy against federal support for segregated private schools in the post-Civil War amendments, various Supreme Court decisions in the wake of *Brown v. Board of Education*,[30] and the Civil Rights Act of 1964, the court held:

> The Internal Revenue Code provisions on charitable exemptions and deductions must be construed to avoid frustrations of Federal policy. Under the conditions of today they can no longer be construed so as to provide to private schools operating on a racially discriminatory premise the support of the exemptions and deductions which Federal tax law affords to charitable organizations and their sponsors.[31]

As for the *Green* plaintiffs' fourteenth amendment claims, the court remarked only that "[t]he propriety of the interpretation approved by this court is underscored by the fact that it obviates the need to determine such serious constitutional claims."[32]

Despite the relatively narrow holding of *Green* and its pointed refusal to decide the constitutional issue, the court in *Pitts* viewed *Green* as indistinguishable. Ignoring the basis of the *Green* decision, it instead

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[28]330 F. Supp. at 1157-61.

[29]*Id.* at 1157. It is well established that judicial enforcement of a racially discriminatory limitation in a trust instrument or of a racially restrictive covenant in a deed is unconstitutional state action. Evans v. Newton, 382 U.S. 296 (1966); Shelley v. Kraemer, 334 U.S. 1 (1948). The suggestion in *Green* is of something quite different: that a charitable trust which provides a racially discriminatory use will be invalidated as a matter of common law, at the instance of the heirs or residuary legatees or by the court on its own motion, by subjecting the limitations to the Rule Against Perpetuities, the rules regarding accumulations, and those against remoteness in vesting and suspension of the power of alienation.

[30]347 U.S. 483 (1954).

[31]330 F. Supp. at 1164.

[32]*Id.* at 1165.

directed its attention to that part of the opinion rejecting the claim of the intervenors, representatives of a class of white students enrolled in the private schools and their parents. The intervenors had contended that construction of the Code to exclude them and their schools from the exemptions and deductions would violate their first amendment rights to freedom of association. In response to these claims the court declared that the governmental interest in preventing racial discrimination is "dominant over other constitutional interests to the extent that there is complete and unavoidable conflict"[33] and observed that the "governmental and constitutional interest of avoiding racial discrimination in educational institutions embraces the interest of avoiding even the 'indirect economic benefit' of a tax exemption."[34]

Thus these statements—which, *Pitts* concludes, compel the result that tax exemptions for racially restricted clubs constitute unconstitutional state action—were actually made in the course of a ruling that the right to free association in the form of private segregated education does not include a right to governmental support through tax benefits. The statements mean only that the state has, consistent with the freedom of association, a constitutional interest in discouraging racial discrimination which justifies it in withdrawing all forms of support from discriminatory organizations, not that it has a constitutional obligation to do so. Yet *Pitts* held that *any* governmental financial assistance, however economically negligible and however benign its purpose, is unconstitutional state action if it appears that the recipient in some way, whether or not related to the purpose of the assistance, practices racial discrimination. The implications of this holding must be examined in its historical context.

It is familiar learning that, with scattered few exceptions here immaterial, constitutional prohibitions are addressed to government. This follows not only from the literal terms of the constitution but also from the essential character of constitutional government. Constitutions are written to define the scope of governmental interference in the affairs of constituents. Although the understanding with respect to the validity of these general observations as applied to the fourteenth amendment has been the subject of some controversy among scholars,[35] the Su-

[33] *Id.* at 1167.

[34] *Id.* at 1169.

[35] Several writers maintain that the judicial distinction between state and private action is a departure from the original understanding of the fourteenth amendment. *See* A. BLAUSTEIN & C.

preme Court very early registered its adherence to the position that the amendment's prohibitions operate only on the states.[36] Verbal reaffirmance of the rule is still a ritual with the modern judiciary, most scrupulously observed where it appears least reconcilable with the result. A strict requirement of state action, however, assumes an anachronistic model of social organization. Oriented toward a time when government was the only institution sufficiently powerful to pose any threat to individual liberty, it is ill-equipped to account for the potential impact on personal liberty of modern corporate social structure. An accommodation had to be made, because eventually it became apparent that certain freedoms had to be protected from private infringements as well as from governmental ones. Thus, modern state action doctrine developed as a device for bringing fourteenth amendment proscriptions to bear on private conduct by ascribing that conduct to the state.[37] To those who value predictability in the law, "state action" is an exasperating subject. The extreme difficulty of making any meaningful statement about state action generally is a consequence of the manifold contexts in which the problem is presented: the permutations of the claims of constitutional right and the instances of private-governmental interaction are virtually limitless. But whether the case is one of governmental control over the

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FURGESON, DESEGREGATION AND THE LAW 92 (1957); H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 277 (1909); Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963). *But see* Avins, *State Action and the Fourteenth Amendment*, 17 MERCER L. REV. 352 (1966).

[36]United States v. Cruikshank, 92 U.S. 542, 554-55 (1875); Virginia v. Rives, 100 U.S. 313, 318 (1880); United States v. Harris, 106 U.S. 629, 643-44 (1882).

[37]Actually, two theoretical directions have been taken. Marsh v. Alabama, 326 U.S. 501 (1946), and Smith v. Allwright, 321 U.S. 649 (1944), head a line of cases enforcing constitutional prohibitions against private organizations engaged in a public or governmental function. This kind of enforcement, relatively restricted in its application, is an extension of the meaning of "state" to include not only the official organs of state government but also the arrogation of governmental authority or power in the exercise of an activity normally associated with the state or traditionally within its province. *See* Note, *Applicability of the Fourteenth Amendment to Private Organizations*, 61 HARV. L. REV. 344 (1948). Of course, principles derived from the public function cases influence the decision of governmental action cases, and vice versa. For example, the Court in Evans v. Newton, 382 U.S. 296 (1966), relied both on the public nature of the recreational facility and on the fact that court appointment of private trustees in order to preserve the segregated character of the park is state action. Similarly, one interpretation of *Marsh* is that the state's enforcement of its trespass laws against the defendants for exercising protected freedoms is critical to the case. *See* Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion through Economic Power*, 100 U. PA. L. REV. 933 (1952). Despite the overlap, the classification is well enough defined so that discussion of public function authority is not helpful in analyzing the type of state action case under discussion—public aid to private institutions.

private actor's general operation,[38] judicial enforcement of private discriminatory[39] or otherwise injurious[40] conduct, or legislative encouragement of or complicity in private activity,[41] enforcement has hinged on a finding of some causal relation between the state and private activity that would support an attribution of that activity to the state.[42]

The problem of state aid to private institutions has never lent itself well to this kind of analysis.[43] Of course, state assistance can take many forms: direct financial assistance in the form of legislative appropriations, use of government property on advantageous terms, loan guarantees, or allowing the beneficiary to exercise the power of eminent domain. The kind of financial assistance represented by a tax exemption, however, is a conspicuously nebulous factor in the relationship between the state and the recipient.[44] Prior to 1961, the case law clearly supported the comment by one writer that "the fact that a state appropriates money to a private . . . institution has nothing to do with the determination of whether the acts of the . . . institution constitute state

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[38]*E.g.*, Moose Lodge No. 107 v. Irvis, 40 U.S.L.W. 4715 (U.S. June 13, 1972), *rev'g.* Irvis v. Scott, 318 F. Supp. 1246 (M.D. Pa. 1970).

[39]Shelley v. Kraemer, 334 U.S. 1 (1948).

[40]New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[41]Reitman v. Mulkey, 387 U.S. 369 (1967).

[42]The requirement of a causal relation between the state and private activity was recently articulated in Powe v. Miles, 407 F.2d 73 (2d Cir. 1968). Responding to the claim that New York's regulation of educational standards in private colleges renders a college's acts in curtailing protest the acts of the state, Judge Friendly noted that the contention

> overlooks the essential point—that the state must be involved not simply with some activity of the institution alleged to have inflicted the injury but with the activity that caused the injury. . . . [T]he fact that New York has exercised some regulatory powers over the standard of education offered by [the college] does not implicate it generally in [the college's] policies toward demonstrations and discipline.

Id. at 81.

[43]Part of the reason for the uneasy fit of governmental assistance cases is the lack of any authoritative consideration of the problem in the Supreme Court. Lower courts have had to deal with the problem by drawing on principles developed in often radically different contexts. Of course, since use of governmental property is one form of state assistance, the leading case on the use of governmental property, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), suggests itself. But the multiplicity of factors on which the Court based its finding of state action in *Burton* makes it extremely difficult to isolate those properly labeled "assistance" from their opposites—facts establishing the benefits flowing to the municipal corporation. The only true similarity *Burton* bears to *Pitts* is the innocence with which the state activity was undertaken. The *Burton* finding of state action must rest in the last analysis on public ownership of the leased property. Lewis, *Burton v. Wilmington Parking Authority—A Case Without Precedent*, 61 COLUM. L. REV. 1458, 1464-65 (1961).

[44]*See* Lewis, *supra* note 43, at 1464 n.23.

action."[45] The matter was consistently viewed by the courts as one of agency, financial assistance being relevant only as it bore on the question of state control.[46] As one court put it:

> It is well settled that aid given by a government to a private corporation is not enough in itself to change the character of the corporation from private to public.
> . . . If each time a government lends its assistance to a private institution it were to acquire that institution as an arm of government, then government would indeed become a many armed thing.[47]

The erosion of the agency approach began in 1961 with the Supreme Court's decision in *Burton v. Wilmington Parking Authority*.[48] The question there was whether a private restaurateur, the lessee of space in a municipal parking facility, could constitutionally refuse to serve Negroes. In holding the discrimination to be state action, the Court pointed to a number of contacts between the lessee and the municipality—such as public ownership of the real estate and the consequent tax exemption for any improvements made by the lessee, the Authority's responsibility for upkeep and maintenance, and the fact that rental revenue was an "indispensable part of the State's plan to operate its project as a self-sustaining unit."[49] Describing its approach as one of "sifting facts and weighing circumstances [so that] the nonobvious involvement of the State in private conduct [can] be attributed its true significance,"[50] the court concluded that "[t]he State [had] so far insin-

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[45]Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375, 391 (1958). The author suggests that while financial aid alone may be irrelevant, it would be unconstitutional if coupled with (1) a degree of control which is "unusual" in the sense that it is distinguishable in some way from that under the general police power or with (2) impermissible motive, as where a state appropriates money to a private institution in order that the recipient might be able to accomplish a purpose which the state could not accomplish directly. *Id.* at 390; *cf.* Griffin v. County School Bd., 377 U.S. 218 (1964).

[46]*Compare* Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir.), *cert. denied*, 326 U.S. 721 (1945) (library required to admit blacks to its training course where 99% of its budget was financed by the city), *with* Norris v. Mayor & City Council, 78 F. Supp. 451 (D. Md. 1948) (state and city annual appropriations, plus lease of building for nominal rental, not state action requiring private school to admit blacks), *and* Mitchell v. Boys Club of Metropolitan Police, 157 F. Supp. 101 (D.D.C. 1957) (use of municipal property for meetings, cooperation of police in securing members and donations, and services of policemen in coordinating club activities did not require Boys Club to integrate).

[47]Mitchell v. Boys Club of Metropolitan Police, 157 F. Supp. 101, 107-08 (D.D.C. 1957).

[48]365 U.S. 715 (1961).

[49]*Id.* at 723-24.

[50]*Id.* at 722.

uated itself into a position of interdependence with [the restaurant] that it must be recognized as a *joint participant* in the challenged activity . . . ."[51] While it is clear that the *Burton* case repudiated the strict agency test without replacing it, it is just as clear that "significant involvement" contemplates something more than the mere grant of tax exempt status to private charitable organizations. The move from *Burton* to *Pitts* is aided by principles stemming from another recent Supreme Court decision, *Reitman v. Mulkey*,[52] holding unconstitutional an amendment to the California constitution prohibiting open housing legislation because it "significantly encourage[d] and involve[d] the State in private discriminations."[53]

Pitts, then, represents a synthesis of *Reitman* and *Burton* that equates "encouragement" of racial discrimination with "significant involvement." However, neither *Reitman* nor *Burton* justifies the court's abandonment of the causation principle. The *Pitts* court looked at the legislative enactment of tax benefits—clearly state action—and at the fact that the private recipients of those benefits practice racial discrimination, but it never examined the relationship between the state and private activities to see if one is in any way responsible for the other. The court betrayed this cumulative reasoning process by its declaration that a "different standard must be applied to ascertain state action in cases involving equal protection than in cases involving other rights."[54] If this statement means that the same state activity may constitute a violation of some rights and not of others, it accords with the weight of modern authority: a finding of state action violating a particular right does not render the private actor a plenary state agent subject to all constitutional prohibitions.[55] But in a later passage the court says that it cannot decide the state action question "in a vacuum" but must examine the state conduct "both in the light of the right it allegedly violates and in the light of the right under which it is asserted to be proper."[56] The constitutional interests to be balanced, the opinion con-

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[51] *Id.* at 725 (emphasis added).

[52] 387 U.S. 369 (1967).

[53] *Id.* at 381.

[54] 333 F. Supp. at 668.

[55] *See, e.g.*, Lefcourt v. Legal Aid Soc'y, 445 F.2d 1150, 1155 & n.6 (2d Cir. 1971); Wolin v. Port Authority, 392 F.2d 83, 89 (2d Cir. 1968), *cert. denied*, 393 U.S. 940 (1969); Powe v. Miles, 407 F.2d 73, 81-82 (2d Cir. 1968); Lewis, *supra* note 14, at 1119-20. *But see* Abernathy, *supra* note 45, at 416-17.

[56] 333 F. Supp. at 669.

tinues, are the "right to equal protection of the laws against a right of certain organizations to discriminate in their membership on the basis of race . . . ."[57] In thus focusing on the plaintiffs' rights as against those of the charitable organization, instead of on the plaintiffs' rights against the state, the court is allowing the enormity of the violation charged—racial discrimination—to compensate for the deficiency of the state's involvement in it. If the necessary state activity is minimal in racial discrimination cases, it is submitted that the reason is because the substantive right is more easily violated, that less activity on the part of the state may be required to encourage racial discrimination than to encourage deprivation of freedom of expression or procedural due process.

The question is whether "significant encouragement" means actual encouragement of the discriminatory conduct or merely a showing that the actor, as distinguished from his acts, is in some way supported by the state. It is on this point that the *McGlotten* court's approach differs from that in *Pitts*. The *McGlotten* court framed the issue this way:

> To demonstrate the unconstitutionality of the challenged deductions plaintiff must . . . show that they in fact aid, perpetuate, or encourage racial discrimination. . . . Every deduction in the tax laws provides a benefit to the class who may take advantage of it. . . . An additional line of inquiry is essential, one considering the nature of the Government activity in providing the challenged benefit and necessarily involving the sifting and weighing prescribed in *Burton*.[58]

The *McGlotten* court specifically found the Internal Revenue Code provisions for charitable contribution deductions to be a stamp of approval[59] of discriminatory activities and concluded that

> [t]he public nature of the activity delegated to the organization in question, the degree of control the Government has retained as to the purposes and organizations which may benefit, and the aura of Government approval inherent in an exempt ruling by the Internal Revenue Service, all serve to distinguish the benefits at issue from the general run of deductions available under the Internal Revenue Code.[60]

However accurate or inaccurate the *McGlotten* court's factual ap-

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[57] *Id.*
[58] 338 F. Supp. at 455-56.
[59] *Id.* at 456.
[60] *Id.* at 457.

praisal, its approach is in marked contrast to that in *Pitts*. The *Pitts* decision goes a long way toward imposing on government a constitutional duty to insure that no recipient of its financial aid practices racial discrimination.[61] Almost a decade ago scholars began to prophesy the end of the distinction between state and private action under the fourteenth amendment.[62] The courts have not yet abandoned the distinction, but the *Pitts-McGlotten* fact situation presents the terminal case. The reason the state action analysis breaks down at this point lies in its origin as a largely ad hoc reconciliation between the early judicial interpretation of the fourteenth amendment and the necessity of insuring the continued vitality of constitutionally guaranteed civil rights and liberties. Enforcing the fourteenth amendment against private acts almost invariably requires the court to balance a claim of right based on the amendment's violation against an opposing claim that the challenged activity is itself constitutionally protected. A doctrine developed in this

[61]The implicated tax laws alone present a parade of horrors to give any court pause. Are not estate and gift tax deductions for charitable bequests subject to invalidation under the *Pitts* reasoning if the bequest is to a racially discriminatory institution? What about the income tax deduction for mortgage interest where the taxpayer refuses to sell his residential property to a black? Will the same homeowner lose his standard deduction? What about accelerated depreciation, capital gains treatment, and ordinary and necessary business expense deductions? As to expense, interest, and depreciation deductions, one writer, pointing out that "even criminal enterprises may deduct their business expenditures," suggests that exemptions that stem from the definition of taxable income—from the policy of taxing net income rather than gross receipts—should not be subjected to equal protection challenges based on the taxpayer's bigotry. Note, 68 COLUM. L. REV., *supra* note 9, at 938. Accelerated depreciation and capital gains rates can be distinguished on the ground that whereas charitable exemptions and deductions advance "social" goals, "a provision purporting to serve macroeconomic ends is not necessarily anomalous or objectionable even where the institution it aids is an objectionable one." *Id.* at 939. It is difficult to see how either of these distinctions has any bearing on the "significant involvement" of the state under the *Pitts* reasoning, where the mere fact of financial support controls and the nature or purpose of the aid is not deemed a proper subject of consideration.

The *McGlotten* court distinguished between provisions that "operate to provide a grant of . . . funds through the tax system" and those that are "part and parcel of defining appropriate subjects of taxation" in discussing the deduction for "exempt function income" of private clubs provided by INT. REV. CODE OF 1954, § 501(c)(7). 338 F. Supp. at 458. But the decision—that INT. REV. CODE OF 1954, § 501(c)(7) as applied to segregated organizations was constitutional while the § 501(c)(8) exemption of "passive investment income" of fraternal orders was unconstitutional when so applied—was not based on this distinction. The court noted the arm's-length nature of the lease in *Burton* and concluded that the fact "that the Government provides no monetary benefit does not . . . insulate its involvement from constitutional scrutiny." 338 F. Supp. at 458. Section 501(c)(8) was distinguished on the narrow ground that it "does not limit its coverage to particular activities; exemption is given to 'clubs organized and operated exclusively for pleasure, recreation *and other nonprofitable purposes* . . . .'" *Id.* (Emphasis by the court)

[62]*See* Williams, *supra* note 35.

context is of very little usefulness in coming to grips with the sort of pocketbook interest asserted in *Pitts* and *McGlotten,* in which the plaintiffs did not even suggest that the organizations the tax benefits of which they attacked do not have the right to discriminate in their choice of associates.[63] However salutary the result in *Pitts* and *McGlotten,* it should not rest on a finding that unnecessarily undermines the freedom to engage in an activity that is not even challenged.[64] As far as the state's "significant involvement" is concerned, it is not clear on what basis past financial aid can be distinguished from a continuing subsidy. How far removed is the *Pitts* holding from one that finds in the *historical* grant of tax benefits sufficient state action to compel private clubs to open their doors to persons of all races?[65] Compulsory association of this sort may be the inevitable upshot of modern judicial attitudes in the area of race relations, and it may even reflect good social policy.[66] But the conflicting interests to be adjusted have nothing to do with the *Pitts* problem, where plaintiffs asserted only the right of a taxpayer not to have his tax burden increased as a result of exclusion from the tax base of the income and property of organizations that exclude him solely because of his race.

Sooner or later the Supreme Court must address the problem of

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[63]Abernathy, *supra* note 45, at 390-91, 394, suggests that where the state aid itself is challenged the proper analysis is under the due process clause. *But see* Lewis, *supra* note 14, at 1105-06.

An attack on state assistance at its source after conceding the private character of the recipient was tried in both the *Norris* and *Mitchell* cases, discussed note 46 *supra.* In each instance the claim based on the rights of complainants as citizens and taxpayers was rejected. Assuming the applicability to exemptions of the *Flast* doctrine, the question remains whether the difference in the nature of the right claimed puts a different substantive constitutional question before the courts. The court in *Pitts* recognized the difference in remedial postures but failed to accord it the proper significance, concluding only that it "may bear upon the weight to be accorded to the prerogatives of private organizations in balancing them against the rights asserted. . . . [I]n neither instance will the tax exemption transgress the Fourteenth Amendment unless with respect to the particular rights said to be infringed, the state involvement can be asid to be significant." 333 F. Supp. at 666.

[64]Although the court notes that "nothing in the present record indicates that the court could order desegregation of the organizations the right of which to tax exemptions is challenged," 333 F. Supp. at 667 n.10, it also states, apparently recognizing the implications of its finding of "significant involvement," that "any private right to discriminate is not constitutionally protected." *Id.* at 664 n.4.

[65]*Cf.* Evans v. Newton, 382 U.S. 296, 301 (1966), in which the Court held that the "momentum" gained by a segregated park from its history of, *inter alia,* tax exempt status was "certainly not dissipated ipso facto by the appointment of 'private' trustees."

[66]*See generally* Black, *Foreword to The Supreme Court, 1966 Term,* 81 HARV. L. REV. 69 (1967).

state financial aid to restricted clubs.[67] A definitive statement in this area is long overdue, and the delay is largely responsible for the divergent paths taken by the lower federal courts in *Pitts, McGlotten,* and *Green.* When it comes, it is to be hoped that the Court will adopt an approach that focuses on the real interests at stake, one more intellectually coherent than the almost metaphysical attempt to find "significant state involvement" in the mere grant of tax benefits.

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Constitutional Law—The Equal Protection Clause and the Student's Right to Vote Where He Attends School

The right of students to vote in the communities where they attend school has become an issue of vastly greater significance since the twenty-sixth amendment was ratified on June 30, 1971. Now that the age barrier has fallen,[1] the number of eligible student voters has increased, as have fears in some college communities that students may now be able to control local elections. Whether this spectre will materialize depends on many factors, but the principal obstacle remaining is

[67]The district court decision in *Green* was affirmed *per curiam.* Coit v. Green, 92 S. Ct. 564 (1971). In *Pitts* the defendant did not appeal, and there has been no reported Supreme Court disposition in *McGlotten.* Any future disposition of a recent Alabama federal district court decision, Gilmore v. City of Montgomery, 337 F. Supp. 22 (M.D. Ala. 1972), should be noted. The court there held that the city of Montgomery may not permit the use of its recreational facilities by private segregated academies, saying "what is important is the *effect* the state's aid has on the maintenance of a racially balanced public school system, but . . . the *extent* of the aid provided is immaterial." *Id.* at 24. Turning to the problem of use of the same facilities by private groups other than schools, the court felt

> the test should be somewhat different. Whereas state and city officials are under an affirmative obligation to end discrimination in situations involving education, this affirmative duty does not extend to cases involving private groups other than those affiliated with schools. Consequently, although state aid to such a group is unconstitutional if the organization discriminates on the basis of race, the mere fact that such an organization is segregated is not enough to render state aid to it *per se* constitutionally improper.

Id. at 25-26.

[1]A recent California case held unconstitutional the presumption that the residence of unmarried minors is at the home of their parents. The fact that students brought the suit was only incidental since the discrimination was "on account of age." Jolicoeur v. Mihaly, 5 Cal. 3d 565, 570-575, 96 Cal. Rptr. 697, 699-703, 488 P.2d 1, 4-7 (1971); *accord,* Ownby v. Dies, 337 F. Supp. 38 (E.D. Tex. 1971) [declaring TEX. ELECTION CODE art. 5.08(m) (Supp. 1972) unconstitutional].