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Constitutional Law - State Action - Participation by State Racing Officials in Racetrack's Decision to Terminate Private Stall Agreement Constitutes State Action

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CONSTITUTIONAL LAW—STATE ACTION—PARTICIPATION BY STATE RACING OFFICIALS IN RACETRACK'S DECISION TO TERMINATE PRIVATE STALL AGREEMENT CONSTITUTES STATE ACTION.

Fitzgerald v. Mountain Laurel Racing, Inc. (1979)

Mountain Laurel Racing, Inc. (Mountain Laurel)[1] terminated its private "stall agreement"[2] with William Fitzgerald, a state-licensed harness racing driver and trainer,[3] and, as a practical consequence, evicted Fitzgerald from the Mountain Laurel racetrack.[4] Before expelling Fitzgerald for inconsistent driving,[5] the racetrack management met with two state racing officials—the racing secretary and the presiding racing judge—who were privately employed by the racetrack but licensed by the Pennsylvania State Harness Racing Commission (Racing Commission) to enforce Racing Commission rules.[6] These officials confirmed the racetrack's suspicions that Fitzgerald had engaged in inconsistent driving.[7] Pursuant to the management's deci-

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1. Fitzgerald v. Mountain Laurel Racing, Inc., 464 F. Supp. 263 (W.D. Pa.), *aff'd*, 607 F.2d 589 (3d Cir. 1979). Mountain Laurel is a private Pennsylvania corporation leasing and operating the privately owned Meadows Race Track for a profit. 607 F.2d at 592. As a prerequisite to the operation of such an enterprise, Mountain Laurel was licensed by the Pennsylvania State Harness Racing Commssion to conduct harness racing in the Commonwealth. *Id.* *See* note 14 *infra*.

2. The "stall agreement" between Mountain Laurel and the individual trainers and drivers extended free stall space at the track to trainers and drivers as long as the horses involved were run in races and managed according to the terms of the contract. 607 F.2d at 592. In the agreement, Mountain Laurel reserved the unrestricted right to revoke the agreement upon giving the owner or trainer 72 hours notice to vacate the premises. *Id.* Mountain Laurel also reserved the right to reject any entry and to refuse admittance to, or eject from the track, individuals whom it considered to be undesirable. *Id.* at 592-93. The approval of the Pennsylvania State Harness Racing Commission was required before the racetrack was permitted to use the stall agreement. *Id.* at 592.

3. *Id.* at 593. In Pennsylvania, all persons directly involved in harness racing must be state licensed. *Id.* at 592. Drivers, trainers, grooms and owners of horses are licensed by the Pennsylvania State Harness Racing Commission before they may engage in harness racing. *Id.*

4. *Id.* at 601.

5. "Inconsistent driving" refers to the driver's racing in a manner inconsistent with an established pattern of prior performances and implies an improper motive on the part of the driver. *Id.* at 604 n.1 (Adams, J., dissenting). As the *Fitzgerald* court stated: "The gist of the offense is that the driver is not giving the best performance possible, which detracts from the quality of the race." *Id.* at 593.

Judge Adams' dissent, however, characterized the underlying cause of the revocation of the stall agreement as Fitzgerald's driving horses that had been racing inconsistently. *Id.* at 604 (Adams, J., dissenting). In other words, the charge referred "only to the performance of the *horses*," not "improper motive or lackadaisical behavior on the part of the *driver*." *Id.* at 604 n.1 (Adams, J., dissenting) (emphasis in original).

6. *Id.* at 592-93. As explained by the court, "[t]he presiding judge is charged by the Racing Commission with the task of enforcing the rules and regulations of the Commission, supervising all other licensed race officials, and with rendering daily records to the Commission of the activities and conduct of the race meetings." *Id.* at 592. The racing secretary "performs certain administrative duties, specifically fixed by the Racing Commission, including the establishing of standards for horses." *Id.* (citation omitted).

7. *Id.* at 592.

sion, and while in the presence of the racing judge, the racing secretary notified Fitzgerald of his expulsion.[8]

Fitzgerald brought an action under section 1983 of the Civil Rights Act of 1871 (section 1983)[9] in the United States District Court for the Western District of Pennsylvania[10] seeking to enjoin the racetrack operators from precluding him from racing at the track.[11] The plaintiff contended that, in evicting him without a hearing, the defendants[12] had denied him due process of law in violation of the fourteenth amendment.[13] The district court, finding a close nexus between Mountain Laurel's expulsion of Fitzgerald and the state's extensive regulation of harness racing,[14] and considering the involvement of state officials in this particular decision to evict, decided that "state action" was involved[15] and granted the plaintiff's motion for a pre-

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8. *Id.* at 593.

9. 42 U.S.C. § 1983 (1976) (originally enacted as Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13). Section 1983 provides in pertinent part:

> Every person who, under color of any . . . regulation . . . of any State . . ., subjects, or causes to be subjected, any citizen of the United States . . . 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.

Id.

The jurisdictional counterpart to § 1983 is § 1343(3) of the Judicial Code. 28 U.S.C. § 1343(3) (1976). Section 1343(3) provides in pertinent part:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
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> . . . .
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> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

Id.

10. 464 F. Supp. at 263.

11. *Id.* at 264. The Third Circuit noted on appeal that the district court had treated the complaint as a request for a temporary restraining order under rule 65(b) and a preliminary injunction under rule 65(a) of the Federal Rules of Civil Procedure. 607 F.2d at 593. *See* FED. R. CIV. P. 65(a)-(b). The plaintiff's petition for the issuance of a temporary restraining order was denied. 464 F. Supp. at 264.

12. The defendants in this suit were Mountain Laurel Racing, Inc.; Kenneth Marshall, the track racing secretary; and John Knight, the track presiding judge. 607 F.2d at 593.

13. *Id. See* U.S. CONST. amend. XIV, § 1. The fourteenth amendment provides in pertinent part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law." *Id.*

14. 464 F. Supp. at 267. In Pennsylvania, as in most states, harness racing is a heavily regulated activity. 607 F.2d at 592. Private racing associations engaged in pari-mutuel betting are required to obtain licenses from the state before commencing operations. *Id.* Officers and stockholders of such associations are subject to the approval of the Racing Commission. *Id.* In addition, the state collects revenues by taking a percentage of the track's betting income, while at the same time providing funds for the track's "breakage"—that is, splitting the difference between the computer set odds and the actual mathematical payoff to the bettors at the track. *Id.* at 592 & n.2. Moreover, the state provides funds for the Pennsylvania Sire Stakes races held at various tracks. *Id.*

15. 464 F. Supp. at 267. Because the fourteenth amendment to the Constitution restricts only state governments, a claim alleging deprivation of rights guaranteed by these provisions must demonstrate "state action." *See* Note, *State Action: Theories for Applying Constitutional*

liminary injunction.[16] On appeal, the United States Court of Appeals for the Third Circuit affirmed,[17] *holding* that the participation of state officials, with delegated authority to enforce state laws, in a private decision to terminate a contractual agreement for violation of a State Racing Commission rule constitutes state action for purposes of section 1983.[18] *Fitzgerald v. Mountain Laurel Racing, Inc.*, 607 F.2d 589 (3d Cir. 1979).

In the *Civil Rights Cases* of 1883,[19] the United States Supreme Court recognized the dichotomy between state action subject to the restrictions of the fourteenth amendment and private action which falls outside the realm of constitutional scrutiny.[20] This distinction was advanced primarily to promote the private structuring of relationships and to prevent arbitrary interference by state governments.[21] Because there is no precise formula with which to make the determination, the question of whether particular state

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Restrictions to Private Activity, 74 COLUM. L. REV. 656 (1974). The Third Circuit has stated that "[t]he requirement that actions challenged under Section 1983 be taken 'under color of' state law has been treated as the equivalent of the element of 'state action' essential under the fourteenth amendment." Braden v. University of Pittsburgh, 552 F.2d 948, 955 n.34 (3d Cir. 1977) (en banc) (citations omitted). For the pertinent text of § 1983, *see* note 9 *supra*.

16. 464 F. Supp. at 269. The district court enjoined Mountain Laurel from denying Fitzgerald "the right to stall horses, drive horses, train horses, and make other use of the facilities." 607 F.2d at 593. The district court also denied Mountain Laurel's motion to invoke disciplinary procedures under the rules and regulations of the Racing Commission which would have afforded Fitzgerald a hearing in an attempt to correct the due process violation. *Id.*

After the grant of the preliminary injunction, Fitzgerald continued to train and race horses until the close of the 1978 racing season, at which time he voluntarily left the track. *Id.* at 594. Nevertheless, the controversy was not considered moot because the preliminary injunction was not limited to the 1978 season and Fitzgerald could demand that Mountain Laurel permit him to train and race horses in the future. *Id.*

17. 607 F.2d at 604. The case was heard by Circuit Judges Adams and Rosenn, and Judge Lacey of the United States District Court for the District of New Jersey, sitting by designation. Judge Rosenn wrote the majority opinion and Judge Adams filed a dissenting opinion.

18. The court also held that Fitzgerald "met the essential requirements for issuance of a preliminary injunction." *Id.* at 604. *See* note 62 *infra*.

19. 109 U.S. 3 (1883) (in the absence of state action, Congress has no power under the fourteenth amendment to enact legislation guaranteeing the right to the enjoyment of public accommodations regardless of race).

20. *Id.* at 11. This dichotomy has been reaffirmed in subsequent Supreme Court cases. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972); Boddie v. Connecticut, 401 U.S. 371, 376-77 (1971); Burton v. Wilmington Parking Auth., 365 U.S. 715, 721 (1961); Shelley v. Kraemer, 334 U.S. 1, 13 (1948). As explained by Chief Justice Vinson in *Shelley v. Kraemer*,

> [s]ince the decision of this court in the *Civil Rights Cases* . . . the principle has become firmly embedded in our constitutional law that the action inhibited by . . . the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

334 U.S. at 13 (citation and footnote omitted).

21. Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 46 S. CAL. L. REV. 1003, 1016 (1973). Other underlying reasons for the state action doctrine include the promotion of federalism and the insurance of separation of powers. *Id.* at 1014-17.

involvement[22] is so significant[23] as to constitute state action must be answered on a case-by-case basis "by sifting facts and weighing circumstances."[24]

The Supreme Court has promulgated two different tests[25] in order to determine the presence of state action—the "symbiotic relationship" test[26] and the "close nexus" test.[27] In *Burton v. Wilmington Parking Authority*,[28] the Court found that the state's "symbiotic relationship"[29] with a privately owned restaurant located within an off-street automobile parking building owned and operated by a state agency[30] supported a finding of discriminatory state action in violation of the equal protection clause of the fourteenth amendment.[31] Describing the state as a "joint participant in the challenged activity,"[32] the Court noted the "incidental variety of mutual benefits" con-

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22. State action may be found not only where there is state involvement, but also where private parties perform a "public function"—*i.e.*, functions which are "so clearly governmental in nature that the state cannot be permitted to escape responsibility by allowing them to be managed by a supposedly private agency." New York City Jaycees v. United States Jaycees, 512 F.2d 856, 860 (2d Cir. 1975), *quoting* Powe v. Miles, 407 F.2d 73, 80 (2d Cir. 1968). So, too, the enforcement of private agreements by government officials or institutions, such as the enforcement of a restrictive covenant, has been found to constitute state action. Shelley v. Kraemer, 334 U.S. 1 (1948). *See* Note, *supra* note 15, at 677-80.

23. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972). In *Moose Lodge*, the Court stated: "Our holdings indicate that where the impetus for the discrimination is private, the State must have *'significantly* involved itself with invidious discriminations' . . . in order for the discriminatory action to fall within the ambit of the constitutional prohibition." *Id.* at 173, *quoting* Reitman v. Mulkey, 387 U.S. 369, 380 (1967) (emphasis added).

24. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961). In *Burton*, the Court explained: "Owing to the very 'largeness' of government, a multitude of relationships might appear to some to fall within the [Fourteenth] Amendment's embrace, but that, it must be remembered, can be determined only in the framework of the peculiar facts or circumstances present." *Id.* at 725-26. *See also* Magill v. Avonworth Baseball Conf., 516 F.2d 1328, 1332 (3d Cir. 1975) (baseball conference operated once a year by a nonprofit corporation on public playing fields and using public school facilities did not involve state action). For a discussion of *Burton*, *see* notes 28-35 and accompanying text *infra*.

25. Although the Supreme Court has made no distinction between the "symbiotic relationship" test and the "close nexus" test, the Third Circuit has differentiated the two analyses. *See* Braden v. University of Pittsburgh, 552 F.2d 948, 956-58 (3d Cir. 1977) (en banc); notes 48-50 and accompanying text *infra*.

26. Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). A "symbiotic relationship" is one in which benefits accrue both to the state and to the private individual. Note, *State Action: The Significant State Involvement Doctrine After* Moose Lodge *and* Jackson, 14 IDAHO L. REV. 647, 670 (1978). To constitute state action, the benefits to the state must be significant. *Id.*

27. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). For a discussion of *Jackson* and the "close nexus" test, *see* notes 42-47 and accompanying text *infra*.

28. 365 U.S. 715 (1961).

29. *Id.* at 725.

30. *Id.* at 716. The state agency, the Wilmington Parking Authority, was created to provide adequate parking facilities for the convenience of the public in order to relieve the parking crisis in that area. *Id.* at 717. *See* DEL. CODE ANN. tit. 22, §§ 501-15 (1974).

31. 365 U.S. at 717. The equal protection clause of the fourteenth amendment provides, in part, that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

32. 365 U.S. at 725. The Court held that

> [t]he State has so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.

Id.

ferred on both the restaurant and the state.[33] In particular, not only did the restaurant benefit from being located in a publicly owned and maintained building,[34] but also the state benefited financially from the lease payments and the increased demand for the public parking facility by the restaurant's patrons.[35]

In *Moose Lodge No. 107 v. Irvis*,[36] however, the Court specified that the state's involvement must, in some way, "foster or encourage" the challenged activity or establish "in any realistic sense" a joint business relationship.[37] Despite extensive regulation by the Pennsylvania Liquor Control Board, including the grant of a liquor license,[38] the *Moose Lodge* Court declined to find a symbiotic relationship between the state and a private social club operating in a private building.[39] Further limiting the symbiotic relationship test, the Fifth Circuit, in *Fulton v. Hecht*,[40] found that, because the state's regulation of dog racing was intended to protect the public rather than to make the state a "partner" in private dog racing club endeavors, there was no symbiotic relationship between the state and such a private club.[41]

The "close nexus" test was first formulated in *Jackson v. Metropolitan Edison Co.*,[42] in which the Supreme Court considered "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that

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33. *Id.* at 724. *See* notes 34-35 and accompanying text *infra*.

34. 365 U.S. at 724. The state provided all upkeep and necessary repairs to the building. *Id.* In addition, the restaurant was able to offer convenient parking, thereby enhancing its customer appeal. *Id.*

35. *Id.*

36. 407 U.S. 163 (1972).

37. *Id.* at 176-77.

38. *Id.* at 176. The state Liquor Contol Board (Board) required applicants to make necessary physical alterations to their premises, to file a list of the names and addresses of its members and employees, and to keep extensive financial records. *Id.* Furthermore, the licensed premises were subject to unannounced inspections by the Board at any time when patrons, guests, or members were present. *Id.*

The Court noted that, in granting the license, the state did not confer upon Moose Lodge a monopoly in the dispensing of liquor. *Id.* Even so, mere monopoly status is not determinative in a state action inquiry. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974); Public Utilities Comm'n v. Pollak, 343 U.S. 451, 462 (1952).

39. 407 U.S. at 176-77. The Court did find, however, that the plaintiff was entitled to a decree enjoining the enforcement of a state regulation which required compliance by Moose Lodge with certain provisions of the club's constitution and by-laws which contained racially discriminatory provisions. *Id.* at 179.

40. 545 F.2d 540 (5th Cir.), *cert. denied*, 430 U.S. 984 (1977). In *Fulton*, suit was brought under § 1983 by a dog racer seeking to enjoin a private dog racing club's refusal to renew a booking contract. 545 F.2d at 541.

41. 545 F.2d at 542. In addition to the regulations, the state's involvement included the sharing of dog racing revenues and the auditing of the racetrack's books. *Id.* Distinguishing *Burton*, the Fifth Circuit further supported its finding of no symbiotic relationship by observing that the club did not lease public property. *Id.* at 542-43.

42. 419 U.S. 345 (1974). The *Jackson* case was heard by the United States Supreme Court on appeal from the Third Circuit. *See* Jackson v. Metropolitan Edison Co., 483 F.2d 754 (3d Cir. 1973), *aff'd*, 419 U.S. 345 (1974).

of the State itself."[43] The unilateral termination, without a hearing, of a customer's electric service by a privately owned utility company after the customer failed to pay her bills[44] was found not to constitute state action in spite of extensive state regulation of public utilities[45] and in spite of the fact that the termination procedure was contained in a tariff which had been approved by the State Public Utility Commission (PUC).[46] Mere approval of the termination procedure by the PUC was not enough to constitute state action, the Court held, because "the commission ha[d] not put its own weight on the side of the proposed practice by ordering it."[47]

Although *Jackson* made no distinction between the close nexus test and the symbiotic relationship test articulated in *Burton*,[48] the Third Circuit, in *Braden v. University of Pittsburgh*,[49] recognized the tests to be separate and distinct and held that state action would be present if either test is satisfied under the facts of the particular case.[50]

After setting forth this historical perspective, the *Fitzgerald* court concluded that extensive regulation by the Racing Commission was not enough, in and of itself, to establish state action under the *Burton* symbiotic relationship test.[51] Following the lead of *Moose Lodge*, the majority found that the state was neither a partner in the racetrack's endeavors, nor a joint venturer.[52] The court added that financial benefits to the state do not automatically convert private acts into state action.[53] Furthermore, the court noted that, unlike the restaurant in *Burton*, Mountain Laurel was not a lessee of public property.[54]

Turning to "the nature and extent of the State's involvement in the expulsion of Fitzgerald under the stall agreement,"[55] the court concluded

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43. 419 U.S. at 351.

44. *Id.* at 346.

45. *Id.* at 350.

46. *Id.* at 354. The *Jackson* Court noted that it was unclear whether the utility company was *required* to file the termination procedure as part of its tariff and whether the PUC had the power to disapprove it. *Id.* at 355.

47. *Id.* at 357.

48. For a discussion of *Burton* and the close nexus test, *see* notes 28-35 and accompanying text *supra*.

49. 552 F.2d 948 (3d Cir. 1977) (en banc). In *Braden*, a sex discrimination case, the Third Circuit held that state action was present because 1) a specific statute authorized the university to act as an instrumentality of the state; 2) the university received substantial state funding; and 3) one-third of the university's board of trustees was made up of state officials or state-appointed individuals. *Id.* at 958-61.

50. 552 F.2d at 958. In determining whether state action is present, Judge Friendly of the Second Circuit has suggested a three-part analysis—*i.e.*, courts must consider 1) the degree of government involvement; 2) the offensiveness of the conduct complained of; and 3) the value of preserving a private sector free from government influence. Wahba v. New York Univ., 492 F.2d 96, 102 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974).

51. 607 F.2d at 596. For a discussion of the *Burton* symbiotic relationship test, *see* note 26 *supra*; notes 28-35 and accompanying text *supra*. The dissent agreed that there was no symbiotic relationship. 607 F.2d at 605 (Adams, J., dissenting).

52. 607 F.2d at 596. *See* notes 36-41 and accompanying text *supra*.

53. 607 F.2d at 596.

54. *Id.* *See* notes 34-35 and accompanying text *supra*.

55. 607 F.2d at 597.

that, by personally and actively *participating* in their official capacities in the decision to expel Fitzgerald, the state racing officials "put their weight" behind the summary expulsion,[56] thereby establishing state action under the *Jackson* close nexus approach.[57] The Third Circuit found that since Fitzgerald's expulsion was apparently contingent upon confirmation by the state racing officials of the allegations of inconsistent driving, a critical factor in the decision was the action of the racing officials "acting pursuant to their delegated authority from the State."[58] The court reconciled the *Jackson* court's failure to find a close nexus by arguing that the PUC's mere approval of a general termination procedure in *Jackson* did not constitute active participation in the termination of the particular plaintiff's electrical service.[59] Similarly, the majority distinguished *Fulton*, noting that the state in that case neither regulated booking contracts nor participated directly or indirectly in the dog racing club's decision not to renew the dog racer's contract.[60] In rejecting Mountain Laurel's contention that the eviction for inconsistent driving was a valid exercise of its private property rights,[61] the court observed that "whatever private rights were exerted were specifically linked to the enforcement of Racing Commission Rules."[62]

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56. *Id.* at 599. The majority framed the key issue as "whether the State participated in the challenged conduct itself by 'putting its weight' behind the challenged activity." *Id.* at 597. For a critical discussion of the majority's analysis, *see* notes 75-79 and accompanying text *infra*.

57. 607 F.2d at 599. The court considered whether there was "a sufficiently close nexus between the State's participation in harness racing and Mountain Laurel's act of expelling [the plaintiff] so that Mountain Laurel's act 'may be fairly treated as that of the State itself.' " *Id.* at 597, *quoting* Jackson v. Metropolitan Edison Co., 419 U.S. at 351. For a discussion of *Jackson* and the "close nexus" test, *see* notes 42-50 and accompanying text *supra*.

58. 607 F.2d at 598.

59. *Id.* at 599. *See* notes 44-47 and accompanying text *supra*. In contrast, according to the *Fitzgerald* court, it was the official opinion of the racing officials which "precipitated" Fitzgerald's expulsion. 607 F.2d at 599.

60. 607 F.2d at 599. *See* notes 40-41 and accompanying text *supra*. The Third Circuit observed that, not only was the stall agreement in *Fitzgerald* state-approved, but also the state officials had participated in the management's decision to expel Fitzgerald. 607 F.2d at 599. The court stated: "We emphasize that it is the participation in the challenged activity which is the critical factor in establishing state action, and not the mere state approval of the stall agreement." *Id.* at 599 n.13.

61. 607 F.2d at 597. Under the terms of the stall agreement, Mountain Laurel, as lessor, reserved the right to expel Fitzgerald "for any reason." *Id.*

62. *Id.* at 598. The Third Circuit then affirmed the district court's findings that the four requirements for a preliminary injunction had been satisfied since 1) plaintiff Fitzgerald would suffer irreparable harm to his business and reputation if relief were not granted; 2) defendant Mountain Laurel would not be gravely harmed if Fitzgerald were allowed to continue racing activities at the track; 3) the public would not be injured if relief were granted; and 4) the plaintiff's "liberty" interest in his employment reputation made it likely that he would prevail on the merits of his claim of denial of due process under the fourteenth amendment. *See id.* at 600-01, 604.

In finding that damage to employment reputation constituted a valid liberty interest because of the consequent deprivation of the opportunity to earn a livelihood, the Third Circuit broadly construed the Supreme Court's definition of liberty. *Id.* at 602 & n.19. *See* Paul v. Davis, 424 U.S. 693, 701 (1976) ("reputation alone, apart from some more tangible interests such as employment" is not "liberty" for purposes of invoking procedural due process); Board of Regents v. Roth, 408 U.S. 564, 573-75 (1972) (failure to renew employment contract, absent charges of dishonesty or immorality foreclosing other employment, is not tantamount to deprivation of liberty).

In his dissenting opinion, Judge Adams found fault with the majority's application of the close nexus test,[63] concluding that Mountain Laurel, *alone*, had exercised its right under the terms of the stall agreement to terminate Fitzgerald's privileges, and inferring that management's "consultation" with the racing officials before making that decision was not sufficient to transform this otherwise private act into state action.[64] Emphasizing that the racing officials lacked any power to terminate stall privileges, Judge Adams took the view that the racing secretary merely acted "as a messenger for his employer, the racetrack," in communicating the track's decision to Fitzgerald.[65] Judge Adams feared that the majority's opinion might discourage management of extensively regulated businesses, such as commercial banking or casino gambling, from confirming its suspicions through government officials before discharging an employee for misconduct[66] in order to avoid findings of state action and the resulting burden of required due process hearings.[67]

It is submitted that the Third Circuit correctly concluded that the state's connections with Mountain Laurel did not rise to the level of a "symbiotic relationship."[68] In contrast to the restaurant in *Burton*,[69] Mountain

63. 607 F.2d at 605-06 (Adams, J., dissenting). Judge Adams specifically criticized the majority's holding that "the presiding racing judge and racing secretary, acting in their official capacities, *participated* in the decision to expel Fitzgerald." *Id.* at 606 (Adams, J., dissenting) (emphasis in original). Judge Adams also expressed concern that the court's holding was contrary to recent cases indicating the Supreme Court's refusal to define state action liberally in procedural due process cases and evidencing a reluctance on the part of the Court to impose constitutional limitations on the manner in which private parties choose to transact business. *Id.* at 606 & n.5 (Adams, J., dissenting), *citing* Flagg Bros. Inc. v. Brooks, 436 U.S. 149 (1978) (warehouseman's proposed sale of goods entrusted to him for storage, as permitted by New York Uniform Commercial Code § 7-210, did not constitute state action); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

64. 607 F.2d at 606 (Adams, J., dissenting). Judge Adams noted that Mountain Laurel pursued the only logical and prudent course available when it sought to confirm its suspicions by meeting with the racing officials, whose duty it was to monitor racing behavior. *Id.* Further, Judge Adams found the record "totally barren" of any suggestion that the racing officials told Mountain Laurel's management to terminate Fitzgerald's stall privileges or even advised them to do so. *Id.*

65. *Id.* at 607 (Adams, J., dissenting). Judge Adams observed that the secretary lacked the authority to terminate the stall agreement and to discipline Fitzgerald for "driving inconsistent horses." *Id.*

66. *Id.* The majority attempted to allay the dissent's apprehension by pointing out that the judge and racing secretary did more than just meet with management to confirm their suspicions—they officially participated in the decision to expel. *Id.* at 600 & n.15. On the other hand, in the dissent's hypotheticals, no official actually participated with management in the decision to discharge—the investigators only reported their findings. *Id.*

67. *Id.* at 608 (Adams, J., dissenting). Alternatively, Judge Adams doubted that stigma to reputation and the consequent loss of future employment possibilities give rise to a cognizable liberty interest under the pertinent Supreme Court cases. *Id.* at 609 (Adams, J., dissenting), *citing* Bishop v. Wood, 426 U.S. 341 (1976); Paul v. Davis, 424 U.S. 693 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972). Furthermore, Judge Adams concluded that the plaintiff had failed to demonstrate 1) irreparable harm to himself if the injunction were not granted; 2) that, on balance, the plaintiff would suffer greater injury from denial of the injunction than the defendant or the public would suffer if relief were granted; and 3) that the plaintiff was reasonably likely to succeed on the merits of his claim. *See* 607 F.2d at 610 (Adams, J., dissenting).

68. *See* notes 28-35 and accompanying text *supra*.

69. For a discussion of *Burton*, *see* notes 28-35 and accompanying text *supra*.

Laurel operated on private property.[70] Although the state derived substantial revenues from the racetrack,[71] the court correctly recognized that financial benefits accruing to the state do not automatically convert private acts into state action.[72] Furthermore, the Third Circuit's ruling that extensive state regulation was insufficient to establish a symbiotic relationship appears to be consistent with the Supreme Court's refusal to find state action with respect to the heavily regulated private social club in *Moose Lodge*[73] and the private utility company in *Jackson*.[74]

It is further submitted that the majority was justified in finding state action under the "close nexus" test[75] because the state racing officials participated in and supported Mountain Laurel's decision to terminate Fitzgerald's stall agreement "by telling Mountain Laurel that Fitzgerald was violating Commission Rules and by approving the ensuing expulsion."[76] When state-sanctioned activity so heavily influences private action, it is not unreasonable to require due process of law before any action is taken adversely affecting another's rights.[77]

In basing its decision simply on a vague reference to the state's "putting its weight" behind the challenged conduct,[78] however, it is suggested that the Third Circuit has failed to provide the lower courts with adequate guidance as to when the close nexus test is satisfied. The need for a demonstrable standard is evident considering the potential for too broad an application of the state action concept which would result in unnecessary restriction of private management's ability to discharge, suspend, or evict an undesirable individual by subjecting primarily private decisionmaking to the requirements of procedural due process.[79] From the business viewpoint, such procedural requirements are not only time consuming and expensive, but they may also impose an unreasonable standard of proof on the private enterprise.[80] So, too, the consequent reluctance on the part of private decisionmakers to seek presumably complete and accurate official information will foreseeably promote less well-substantiated decisions.[81]

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70. 607 F.2d at 592.

71. *Id.* *See* note 14 *supra.*

72. 607 F.2d at 596. *See* text accompanying note 53 *supra.*

73. *See* notes 36-39 and accompanying text *supra.*

74. *See* notes 42-47 and accompanying text *supra.*

75. For a summary of the court's reasoning on the state action question, *see* notes 55-62 and accompanying text *supra.* For a discussion of the close nexus test, *see* notes 42-47 and accompanying text *supra.* *See also* Note, *supra* note 26, at 657.

76. 607 F.2d at 599.

77. For a criticism of the manner in which the Third Circuit articulated its rationale, however, *see* notes 78-81 and accompanying text *infra.*

78. *See* 607 F.2d at 598-99. *See* notes 55-58 & 61-62 and accompanying text *supra.*

79. *See* Note, *The State Action Conundrum Reexamined: A New Approach and its Application to the Constitutionality of Creditor Self-Help Remedies*, 62 MARQ. L. REV. 414, 427 (1979).

80. *See* 607 F.2d at 608 n.12 (Adams, J., dissenting).

81. *See* notes 66-67 and accompanying text *supra.*

While the Third Circuit may have been correct in finding state action under the *Jackson* close nexus test,[82] it is submitted that the court did not adequately articulate the type or the extent of state participation in private decisionmaking which will give rise to a finding of state action.[83] As a result, it would appear that the Third Circuit has bypassed an opportunity to provide workable guidelines for lower courts faced with this issue and has failed to meaningfully instruct state-regulated businesses as to when it is necessary for them to extend due process protections to employees before discharge.[84]

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82. *See* notes 75-77 and accompanying text *supra*.
83. *See* notes 78-79 and accompanying text *supra*.
84. *See* notes 79-81 and accompanying text *supra*.