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John A. Scanlan

RACIALLY-PREFERENTIAL POLICIES IN INSTITUTIONS OF HIGHER EDUCATION: STATE ACTION LIMITATIONS ON 42 U.S.C. § 1983 COMPLAINTS

I. Introduction: The Problem and Its Background

In 1971, the University of Washington Law School, a state institution, rejected an application for admission presented by a white, male, in-state resident, Marco DeFunis. DeFunis brought suit in the Washington state courts,[1] seeking to overturn the school's decision. Although his initial argument was based on his Washington residency, litigation quickly centered on the racially-preferential features of the law school's admissions policies. It was admitted that the law school had numerically ranked the qualifications of students seeking admission,[2] and that a number of minority students had been accepted with lower numerical scores than DeFunis under a special plan designed to increase minority enrollment.[3]

DeFunis challenged the implementation of this plan on the grounds that it deprived him of "equal protection of the law" under the fourteenth amendment. This argument was rejected by the Supreme Court of Washington.

In 1973, the Supreme Court of the United States agreed to review the case[4] and later heard oral arguments. However, because DeFunis had been granted provisional admission at the law school during litigation, and would graduate irrespective of any decision by the Court, the majority availed themselves of the opportunity to vacate their decision to review on the grounds of lack of standing.[5] Only Justice Douglas expressed any position on the merits of the case.[6] Nothing in the majority holding or in the dissenting opinion on the question of standing indicated an acceptance of DeFunis' view that the fourteenth amendment prohibits all classifications based on race.[7] Additionally, no decision was reached regarding the right of the Washington Law School to use racially-preferential policies to choose its students.

Although several non-education cases since *DeFunis* have involved claims

1 DeFunis filed a suit for admission in August 1971 in the Superior Court of King County. Oral judgment was rendered in his favor. The University lodged a direct appeal to the Supreme Court of Washington. For a discussion of lower court proceedings, *see* R. O'NEIL, DISCRIMINATING AGAINST DISCRIMINATION: PREFERENTIAL ADMISSIONS AND THE DEFUNIS CASE 12-17 (1975).

2 *See* DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169 (1973). For a detailed account of the admissions policies employed, *see also* DeFunis v. Odegaard, 416 U.S. 312, 345-48 (1974) (appendix to Justice Douglas' opinion); R. O'NELL, *supra* note 1, at 9-11.

3 416 U.S. at 326. Justice Douglas quoted the Washington Law School Dean's testimony to the effect that "some minority students [were admitted] who at least, viewed as a group, have a less such likelihood [of success as measured by numerical standards] than the majority student group taken as a whole."

4 414 U.S. 1038 (1973).

5 416 U.S. at 319-20.

6 *Id.* at 320-45.

7 *Id.* at 336-37.

> There is no constitutional right for any race to be preferred. . . There is no superior person by constitutional standards. A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner.

of unconstitutional "reverse discrimination,"[8] none of the Court's decisions have directly addressed the specific issues raised there. None of these decisions has been framed so broadly as to provide any generally-applicable rule of law about the constitutionality of racially-preferential policies designed to benefit minority members of society. In the state and lower federal courts, however, a growing number of majority applicants to colleges and professional schools have challenged their rejections on essentially the same "equal protection" grounds employed by Marco DeFunis.[9] Still other majority members have challenged racially-preferential scholarship programs administered by institutions of higher education.[10]

Apparently spurred to action by this mass of litigation, which has produced widely disparate results, the Supreme Court has recently granted certiorari in the case of *Bakke v. Bd. of Regents of the University of California*.[11] Although the racially-preferential admissions program at issue in *Bakke* involves numerical quotas rather than a special numerical weighing of a minority applicant's qualifications, the case otherwise presents a constitutional question identical to that posed in *DeFunis*. It is a sign of changing judicial attitudes that the appeal in *Bakke* was lodged by the State of California, rather than by a rejected applicant. The appeal was necessitated because the Supreme Court of California, unlike the Supreme Court of Washington, found the preferential admission policy employed by the public professional school a violation of the majority applicant's fourteenth amendment rights.[12]

It is likely that the majority applicant in *Bakke* will ultimately prevail before the Supreme Court of the United States. If the decision turns on a broad prohibition against racially-preferential policies,[13] the case will have sweeping constitutional implications. Such a finding will have the effect of demanding that the Equal Protection Clause be read literally and applied in essentially the same manner to the claims of all plaintiffs, whatever their race. In that event, the only racially-preferential programs clearly permissible would be those required by a court, or legislatively enacted in order to overcome the effect of a party's past overt and intentional acts of discrimination. It is clear that the courts will allow such remedial measures to continue, as their use is well established today.[14]

8 *See, e.g.*, Franks v. Bowman, 424 U.S. 747 (1976) (modification of contractual seniority clause upheld to help remedy past racial injustice); Village of Arlington Hgts. v. Metropolitan Housing Dev., 97 S. Ct. 555 (1977) (village cannot be required to submit to judicial order integrating public housing absent evidence of past discrimination); McDonald v. Santa Fe Transp. Co., 96 S. Ct. 2574 (1976) (corporate disciplinary procedures must be enforced with regard to the race of the alleged offender).

9 *See, e.g.*, Alvey v. Downstate Medical Center, 39 N.Y.2d 326, 384 N.Y.S.2d 82 (1976); Stewart v. New York University, F. Supp. (S.D.N.Y. 1976); Timmerman v. University of Toledo, 421 F. Supp. 464 (N.D. Ohio 1976); Hupart v. Board of Educ., — F. Supp. — (S.D.N.Y. 1976); Rosenstock v. Board of Governors of Univ. of North Carolina, 473 F. Supp. 1321 (M.D.N.C. 1976).

10 *See* Flanagan v. President and Directors of Georgetown College, — F. Supp. — (D.D.C. 1976).

11 553 P.2d 1152, 132 Cal. Rptr. 660 (1976), *cert. granted*, 45 U.S.L.W. 3553 (U.S. Feb. 22, 1977) (Doc. No. 76-811).

12 *Id.* at 1172.

13 If the plaintiff in *Bakke* does prevail, it is possible that the Court will either avoid the issue of racially-preferential admissions entirely in its opinion, or draw a fine distinction between impermissible quotas and other types of "reverse discrimination" arguably more "benign."

14 The Court in Washington v. Davis, 426 U.S. 227 (1976), asserted: "The central purpose of the Equal Protection Clause of the Fourteenth Amendent is the prevention of official conduct discrimination on the basis of race." The series of public school desegregation cases

Although *Bakke* is not likely to discuss the policies of private schools, a broad decision could even raise questions about their practices for it is not clear whether even a private institution not guilty of past discriminatory conduct would be permitted to exercise any racial preferences in its future affairs.

It is this last question which prompts the present study. More precisely, this analysis seeks to provide a partial answer to the question of what effect a finding in favor of the plaintiff in *Bakke* would have on the constitutionality of racially-preferential admissions and scholarship programs currently in effect at private institutions of higher education. As has been noted already, the challenged policy in *Bakke,* like that in *DeFunis,* involves the relationship of a public professional school to those members of the public seeking admission. However, a growing number of challenges to acts of alleged "reverse discrimination" within the educational arena involve private institutions.[15] Although the courts have not as yet provided a clear and consistent response to these challenges, most have found jurisdictional barriers blocking the path of plaintiffs seeking to enjoin the preferential policies of private schools. In the pages that follow, the relevance, underlying rationale, and constitutional implications of the most common jurisdictional barrier, *i.e.,* the "state action" requirement for claims brought under 42 U.S.C. § 1983,[16] will be discussed.

Since the availability of a "reverse discrimination" claim against a private institution of higher education will be analyzed solely in terms of the state action doctrine, this study does not claim to be complete. Thus, as has been noted by several commentators recently,[17] it might be possible for a plaintiff to pursue a *DeFunis*-type action under 42 U.S.C. § 1981, and completely avoid the jurisdictional problems attending a state action claim.[18] Alternatively, it might be pos-

including busing demonstrates that this purpose can be fulfilled by court-ordered remediation. In Green v. County School Bd., 391 U.S. 430 (1968), the Court posited the existence of "affirmative duty to take whatever steps might be necessary" to overcome past discrimination. *Id.* at 437-38. *See* Swann v. Charlottee-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Franks v. Bowman, 424 U.S. 747 (1976).

15 As will be noted below, the distinction between "public" and "private" is not always clear. *See* Stewart v. N.Y.U., — F. Supp. — (S.D.N.Y. 1976); Flanagan v. President and Directors of Georgetown College, — F. Supp. — (D.D.C. 1976). *See also* Cannon v. University of Chicago, 406 F. Supp. 1257 (N.D. Ill. 1976); Timmerman v. University of Toledo, 421 F. Supp. 464 (N.D. Ohio 1976); Op. Minn. Att'y Gen. 618-a-15 (Mar. 25, 1972).

16 *Civil action for deprivation of rights.* 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 persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the person injured in an action of law, suit in equity, or other proper proceedings for redress.

17 *See* Jones, *Affirmative Inaction,* 6 BALSA REP. 1. 15-16 (1976); Note, *The Expanding Scope of Section 1981: Assault on Private Discrimination and a Cloud on Affirmative Action,* 90 HARV. L. REV. 412 (1976).

18 Runyon v. McCrary, 96 S. Ct. 2586 (1976). The Court held in *Runyon* that 42 U.S.C. § 1981 "prohibits racial discrimination in the making of *private* contracts" and does so "whether or not" such discrimination occurred "under color of law." *Id.* at 2593-95 (emphasis added). In so arguing, the Court has applied its earlier holding in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) to § 1981 actions. *Jones* dealt with an action arising under 42 U.S.C. § 1982. In *Jones,* the Court overruled nearly a century of precedent, and held that a party bringing an action under that statute was not required to demonstrate that the private discriminator was in any sense a state actor, *i.e.,* acting "under color of law." *Id.* at 440-41. A searching critique of the Court's decision in *Jones,* centering on its reading of the relevant legislative history, is provided in Casper, *Jones v. Mayer: Clo, Bemused and Confused Muse,* 1968 SUP. CT. REV. 89.

The decision in *Runyon* also relied heavily on language in Johnson v. Railway Express

sible for a plaintiff to test a racially-preferential policy under the administrative provisions of Title VI of the Civil Rights Act of 1964.[19] Arguably, jurisdiction in Title VI cases is broad enough that in some instances, at least, it would afford the complainant direct access to the federal courts without the need to establish any state—as opposed to federal—involvement with the defendant school or its challenged policies. Admittedly, if Title VI and § 1981 provide such readily available means of review, a strong argument can be made for asserting that state action is worth considering only in those rare instances where § 1983 is the only remedy available.[20] No detailed attempt will be made here to refute the view that jurisdiction under § 1981 or Title VI, or both, is readily obtainable.

However, the failure to consider the full import of § 1981 and Title VI here is not meant to be interpreted as an acceptance of the argument that these channels of relief afford the opponent of "reverse discrimination" with significantly more opportunity to overturn institutional policies than are afforded by the state action doctrine. In fact, the contrary will be urged. It will be argued that the survey of state action decisions in the areas of civil rights and higher education which follows has predictive value, irrespective of the particular statute under which the racially-preferential policies of private colleges and professional schools are challenged. Basically, the state action doctrine will be treated as the best available indicator of those public policy considerations which have already shaped the judicial response to "reverse discrimination" allegations in higher education, and which can be expected to continue to do so in the future.

State action decisions provide a paradigm useful for estimating the most extreme probable effect of *Bakke* on private schools. To demonstrate their paradigmatic nature, a key premise will be developed and illustrated. This premise is that "state action" is a highly discretionary doctrine which in almost all instances is used to withhold or find jurisdiction only after considering the substantive nature of the offense charged. In some instances, most notably those involving education, the particular status of the alleged offender is also considered. Making its decision only after examining these factors, the court is thus capable of manipulating this jurisdictional doctrine to determine substantive results. The case law seems to indicate that such manipulation has frequently been employed to grant jurisdiction to sympathetic plaintiffs, or to withhold it to protect specially-favored defendants. Thus, in all cases in which state action is not palpable, *i.e.*, in which the connection between the state and the alleged offender is less

Agency, 421 U.S. 454, 459 (1975), which stated that "§ 1981 affords a federal remedy against discrimination in private employment on the basis of race."

19 42 U.S.C. § 2000d (1970) provides that:

> No person in the United States 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.

Section 2000d-1 invests each "Federal department and agency . . . empowered to extend Federal financial assistance to any program or activity" with the authority to promulgate "rules, regulations, or orders of general applicability" binding grantee institutions.

Section 2000d-2 provides an aggrieved party with the opportunity of seeking judicial review of administrative decisions affecting his or her rights.

20 Such an instance could occur if the school received no significant federal aid under Title VI, and if the party suing the school could not meet the general jurisdictional requirements of 28 U.S.C. § 1332, (1970), or the requirements of 28 U.S.C. § 1391 (1970). Standards for determining "significant aid" to private institutions of higher education are contained in 45 C.F.R. § 80.3(b)(6) (1975).

than that of a principal and agent, the jurisdictional decision will usually give a reasonable indication of where the court stands on the underlying request for relief.

Courts employing the state action doctrine thus use it in much the same way as they use differential standards of review when considering the substantive merits of "equal protection" or "due process" claims. They usually subject policies tending toward the absolute exclusion of any racial or ethnic group to the state action equivalent of a "strict scrutiny" standard of review. "Strict scrutiny" in substantive decision-making subjects a party whose policies adversely affect politically-disadvantaged minority members[21] to a searching investigation into their fairness and motives.[22] Such a party bears a heavy burden of self-justification which he is seldom able to meet.[23] Similarly, in state action cases parties accused of excluding minority members from their premises bear a heavy burden of proving that they are not state actors. They are seldom successful in doing so. The technical effect of finding them state actors is solely to find them subject to the court's jurisdiction. Yet, in racial exclusion cases, jurisdiction is really the only issue. For it has been clear since *Brown v. Board of Education*[24] that discrimination of this magnitude, when performed by any party acting in the name of the state, is unconstitutional.

Claims against a private institution of higher education, however, have been treated in a very different way. In essence, they have been subjected to the state action equivalent of an extremely deferential or "weak" standard of review.[25] Such a standard, in substantive decision-making, requires the defendant to advance little in the way of justification for his decisions, and makes no serious attempt to uncover impermissible motives.[26] Similarly, private colleges, univer-

21 In United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), Chief Justice Stone suggested that "[t]here may be a narrower scope for the presumption of constitutionality" in situations where legislation has adversely affected "racial minorities" because "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied on to protect minorities, and which may call for a correspondingly more searching judicial inquiry." Elsewhere in the note, he referred to the standard to be employed to protect fourteenth amendment rights as "more exacting judicial scrutiny."

22 *See* G. GUNTHER, CONSTITUTIONAL LAW (1975) where he states:

> The intensive review associated with the strict scrutiny of the new equal protection imposed two demands—a demand not only as to means but also as to ends. Legislation qualifying for new equal protection strict scrutiny required for a far closer fit between classification and statutory purpose, a far closer fit between means and ends, then the rough and ready flexibility traditionally tolerated by the old equal protection. Moreover, equal protection becomes a source of ends scrutiny as well: legislation in the areas of new equal protection had to be justified by 'compelling' state interest.

Id. at 658.

23 *Id.* "[T]his scrutiny . . . was 'strict' in theory and fatal in fact." Where a court has employed the "strict scrutiny" test, it appears that the defendant has always failed to meet its demanding terms.

24 347 U.S. 483 (1954).

25 The classic statement of this standard of review, which is the functional opposite of strict scrutiny is contained in Williamson v. Lee Optical Co., 348 U.S. 483 (1955):

> [T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.

Id. at 487-88.

26 In *Williamson,* for example, the state was not required to explain what rationale lay behind its requirement that opticians supply lenses only after the patient has obtained a

sities, and professional schools, by simple virtue of their private origins and educational roles, have seldom been subjected to very intensive review of their actual relationship with the state. As a consequence, plaintiffs lodging a variety of allegations against them have seldom been able to secure the jurisdiction necessary to pursue their claim.

The elaboration of these divergent standards of review within the context of particular cases will be demonstrated. In this demonstrative process, the points at which a private school is likely to be found a state actor will be set forth with as much certainty as the law will allow.[27] Particular attention will be paid to the potential conflict between "strict" and "weak scrutiny" in instances in which a favored institution is charged with the arguably disfavored act of denying equal access to its benefits to a majority member of society. The probable judicial method of avoiding this conflict will also be indicated.

The discussion thus begins with a general consideration of the state action doctrine as a discretionary tool in the hands of the judiciary. From that general premise, it will proceed to show how that tool has been used in the area of racial discrimination, and the way in which it customarily has been used to evaluate the practices of private colleges, universities, and professional schools. The extent to which these uses are in actual or apparent conflict will then be considered within the particular context of a legal action similar to that brought in *DeFunis* or *Bakke*. Out of this analytical process will emerge a conclusion emphasizing the substantial difficulties which a plaintiff suing a private college should have in persuading a court to grant him the same relief which it might be inclined to grant the plaintiff in *Bakke*. These difficulties arise from past judicial interpretations of the state action doctrine. Because that doctrine has been used to shape relief in accordance with unstated underlying policy considerations, it will be argued that the limitations imposed by the state action doctrine in the area of alleged "reverse discrimination" in the schools are likely to re-emerge when § 1981 claims and Title VI complaints are ultimately tested in the higher courts.

II. "State Action" as a Discretionary Doctrine

From 1875 until 1946, when the Supreme Court decided *Marsh v. Ala-*

prescription from an ophthalmologist or optometrist. *Id.* at 487. The Court gave no consideration at all to the question of whether the prescription law was motivated by monopolistic pressure groups.

27 The cases demonstrate a clear general reluctance to find private colleges "state actors." But that reluctance is not absolute. Most courts have at least heard evidence of "state involvement" when considering "state action" claims. Different circuits have tended to weigh that evidence differently. The Second Circuit, under Judge Friendly, has been the most deferential to the colleges in its rulings. *See, e.g.*, Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968); Wahbar v. New York University, 492 F.2d 96 (2d Cir. 1974), *cert. denied*, 419 U.S. 874 (1974). *See also* Grossner v. Trustees of Columbia University, 287 F. Supp. 535 (S.D.N.Y. 1968); Stewart v. New York University, — F. Supp. — (S.D.N.Y. 1976); *but see* Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1970). The Third Circuit, and more particularly, the Eastern District of Pennsylvania, has been consistently less deferential, and on several occasions has found the "state involvement" to hold a "private" school as a "state actor." *See* Braden v. University of Pittsburgh, 477 F.2d 1 (3rd Cir. 1973), *rev'g* 343 F. Supp. 836 (W.D. Pa. 1972); Isaacs v. Bd. of Trustees of Temple University, 385 F. Supp. 473 (E.D. Pa. 1974); Rackin v. University of Pennsylvania, 386 F. Supp. 992 (E.D. Pa. 1974). *But see* Sament v. Hahnemann Medical College & Hospital, 413 F. Supp. 434 (E.D. Pa. 1976).

bama,[28] the state action doctrine stood as a bulwark of judicial conservatism.[29] Private conduct having as its objective the exclusion of blacks from privately-owned property was declared to be beyond the reach "of any grant of legislative power made by the Fourteenth Amendment."[30] Criminal statutes prohibiting conspiracies to interfere with civil rights or acts of racially motivated violence were either interpreted narrowly, or ruled unconstitutional.[31] Lynchers were allowed to go free under the theory that:

> The fourteenth amendment prohibits a state from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen against another.[32]

With *Marsh,* however, the Supreme Court initiated a review of the state action requirement which notably expanded the jurisdictional scope of the doctrine. That expansion continued without significant abatement through the 1960's. It was achieved by construing a number of heretofore "private" activities in novel ways. In some instances, by emphasizing the close analogy between the activities of the ostensibly "private" actor and the state engaged in its customary course of conduct, the Court attributed an "essentially . . . public function" to "private" conduct. This "public function"[33] was adjudged sufficient to find jurisdiction under the fourteenth amendment.

In other instances, the Court found "state action" inherent in apparently private activities because of the degree of state involvement in that activity.[34] The requisite amount of involvement necessary to invoke the Court's jurisdiction was formulated in a number of ways. Minimally, if a discriminator used any power of the state to achieve his ends, such action could be construed as sufficient state involvement to invoke the state action doctrine. In *Shelley v. Kramer,*[35] the mere availability of judicial procedures through which a discriminator could enforce a restrictive covenant was found by the Court to bring the covenant within the scope of fourteenth amendment "equal protection" review.[36] Under the test urged in the later case of *Burton v. Wilmington Parking Authority,*[37] the Court appeared to adopt slightly more restrictive jurisdictional standards. In that case the Court stated:

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28 326 U.S. 501 (1946).

29 In the later years of the nineteenth century and early years of the twentieth, a plethora of cases adopted the position, stated in Virginia v. Rives, 100 U.S. 313 (1879), that the fourteenth amendment provisions "all have reference to state action exclusively, and not to *any* action of private individuals." *Id.* at 318 (emphasis added). This position was not challenged at all until after World War II.

30 Civil Rights Cases, 109 U.S. 3, 18 (1883).

31 *See, e.g.,* United States v. Cruikshank, 92 U.S. 542 (1875); United States v. Harris, 126 U.S. 629 (1882).

32 109 U.S. at 554-55.

33 326 U.S. at 506.

34 Professor Gunther characterizes the search for "state involvement" as the " 'nexus' approach." He identifies its essential characteristics thus: "it seeks to identify points of contact between the private actor and the state—contacts adequate to justify imposing constitutional restraints on the private actor of commanding state disentanglement." G. GUNTHER, *supra* note 22, at 917.

35 343 U.S. 1 (1948).

36 *Id.* at 20.

37 365 U.S. 715 (1961).

> It is clear, as it always has been since the Civil Rights Cases, that "individual invasion of individual rights is not the subject-matter of the [fourteenth] amendment," and that private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the state in any of its manifestations has been found to have become involved in it.[38]

It must be noted, though, that *Burton* made no attempt to define involvement "to some significant extent." Instead, it left that determination to the lower courts on a case by case basis. In entrusting them with the task of "sifting facts and weighing circumstances"[39] in all instances where the state involvement was "nonobvious,"[40] and in refusing "to fashion . . . a precise formula for recognition of state responsibility under the Equal Protection Clause,"[41] the Court entrusted the judiciary with considerable discretion in making that determination. Arguably, the factual situation in *Burton* itself, despite the finding of "significant involvement," manifested nearly as little contact between the private actor and the state as was demonstrated in *Shelley*.

A number of more recent decisions dealing with the question of "state involvement" and "public function" appear to have imposed more substantial limitations on the power of the courts to find state action. These new limitations may indicate current change in attitude making the doctrine generally more restrictive. The preliminary point which must be made, however, is that prior to 1972,[42] there were no clear limitations on the "public function" test. Furthermore, prior to that year[43] there were no apparent limitations on the "state involvement" test other than those vague and highly-discretionary references to "significant" ties in *Burton*.

From its inception through the early 1970's, the "state action" concept evolved into an extremely open-ended doctrine. This open-ended quality, which apparently could make every private act sufficiently public to afford federal jurisdiction, drew the special attention of commentators. Professor Black the noted constitutional scholar,[44] viewed the doctrine as having particular historical applicability to the claims of those who had suffered past racial discrimination,

38 *Id.* at 722.
39 *Id.*
40 *Id.*
41 *Id.*
42 In 1972, two cases arising outside the area of civil rights sharply limited the scope of *Marsh*, and overruled its most extreme successor, Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 328 (1968). *Logan Valley* analogized a shopping center to the company town in *Marsh*, held that it fulfilled essentially the same "public function," and refused to allow the interests of privacy to prevail over first amendment picketing rights. In 1972, *Logan Valley* was expressly overruled on constitutional grounds in the case of Central Hardware Co. v. NLRB, 407 U.S. 539 (1972). Lloyd Corp. v. Tanner, 496 U.S. 551 (1972), a companion case dealing with first amendment rights, made the limits of the "public function" test clearer. In that case, the Court asserted that "property [does not] lose its private character merely because the public is generally invited to use it for designated purposes."
43 In 1972, the Court issued its opinion in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). Its chief importance is the clear and novel content which it gave to the requirement expressed in *Burton* that the state must have "significantly involved itself with invidious discriminations."
44 Professor C. L. Black's article, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967) [hereinafter cited as Black] is one of the most frequently cited and most thorough discussions of the historical development and policy implications of the "state action" doctrine.

and felt that the requirement of showing any state action ran counter to the need for racial equality. He advocated "retiring" the doctrine altogether, basing his argument in large part on two factors. The first of these was the vagueness and "plasticity" of past judicial attempts to define the scope of the doctrine: "there were and are no clear and concrete tests of state action; the concept is notoriously, scandalously lacking in these; it is nothing but a catch phrase."[45] The second factor Professor Black emphasized was that the doctrine afforded continuously expanding jurisdiction in matters involving a variety of traditionally private defendants.[46] He implied that the expansive nature of the doctrine was due, at least in part, to the particular concern of judges with the essential fourteenth amendment problem: racial injustice.[47] Hence, he assigned special significance to those state action cases expanding the right of black defendants to sue traditionally private parties in an attempt to secure their civil rights.[48]

What is significant here, however, is that the "plasticity" of the doctrine can be inferred, not only from its nebulous nature but also from the differential results obtained by courts applying it to different social problems. Professor Wechsler,[49] inveighing against the "unprincipled" decision-making he felt was characteristic of the civil rights cases of the 1950's, placed particular emphasis on the result-oriented texture of the cases following *Shelley*.[50] Judge Friendly expressed a critical view of a number of theories[51] about the nature of the state action doctrine, stating:

> Decision of actual controversies . . . is not helped over much by first making an extremely broad proclamation as to what constitutes state action and then limiting the vision to racial discrimination, and even as to that only with respect to "salient aspects of the public life" without defining what life is public or what aspects are salient. . . .[52]

However, his discomfort with this formulation was apparently matched only by his awareness that existing case law constituted a "jurisprudential vacuum."[53]

45 *Id.* at 88.

46 Professor Black noted several cases not dealing with racial discrimination, including *Marsh* and Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952). Significantly, he argued that these latter cases provide a *better* clue to judicial attitudes in the area of racial discrimination than they do with regard to other allegations of state action in violation of the fourteenth amendment. *Id.* at 86, n.69. The reason for this assertion is clear when it is recalled that his entire thesis as to the proper limits of the state action doctrine turns on the identification of an underlying judicial policy anxious to limit racial discrimination by extending § 1983 jurisdiction.

47 *Id.* at 70. "[T]he post-civil war amendments ought to be taken as applying with special force to the racial field."

48 Most of the cases discussed by Professor Black address this concern. Noting the expanded jurisdictional scope to be found in a few non-racial cases, he urges that their holdings "would apply *a fortiori* to racial discrimination."

49 Professor Wechsler's article, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1 (1957), is the classic attack on the judicial standards of the Warren Court.

50 *Id.* at 29.

51 H. FRIENDLY, THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA 16-17 (1969) [hereinafter cited as DARTMOUTH COLLEGE]. It is not totally clear whose views Judge Friendly is portraying, although the context suggests that he is broadly summarizing the positions of Professors Black, Lewis, Pollack, and perhaps, Van Alstyne and Karst. *See* Lewis, *The Meaning of State Action,* 60 COLUM. L. REV. 1083 (1960); Pollack, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler,* 108 PA. L. REV. 1 (1959); Van Alstyne & Karst, *State Action,* 14 STANFORD L. REV. 3 (1961).

52 DARTMOUTH COLLEGE, *supra* note 51, at 17.

53 *Id.* at 16.

That vacuum arose out of the failure of the courts to elucidate any principles definitively limiting the scope of the doctrine. An "exceedingly broad application"[54] of state action, even though he disagreed with it, therefore appeared to Judge Friendly to be the current norm. That norm arose, however, within the particular context of racial discrimination cases.

III. Jurisdiction in Racial Discrimination Cases

Traditionally, state action cases have most often involved the claims of minority members excluded from some benefit by a private party. Since World War II, an increasingly large number of these plaintiffs have been granted relief. In so granting, the courts have significantly expanded the grounds for finding the requisite jurisdiction under § 1983.[55] The formulas they have used for achieving this result have usually been general, their ultimate scope vague, their underlying policy assumptions unstated. The cases, however, as many commentators have noted, have tended toward promoting a particular result. That result, broadly stated, has been the guaranteeing of full societal rights to minority members.

In 1967, Professor Black proposed that the courts adopt the following "principled position" with regard to the scope of the doctrine of state action:

> [E]qual protection of the laws is denied by the state whenever the legal regime of the state, which numbers amongst its ordinary police powers the power to protect the Negro against discrimination based on his race, elects not to do so—choosing instead to surround the discriminators with the protections and aids of law and with the assistance of communal life.[56]

Under this formula, any action or any inaction on the part of the state arguably contributing to the maintenance of discrimination against a racial minority would trigger fourteenth amendment review. As long as the private discriminator received aid, or indeed, tolerance, from the state, his "private" status would not shield him from fourteenth amendment prosecution. Such aid or tolerance could be expected to inhere in most instances of discrimination. The advocate of this position therefore urged burying the state action doctrine altogether when racism is an issue.[57] Perhaps more accurately, he urged the end of lip service to a doctrine which he thought the courts had already killed.

When Professor Black made the foregoing proposal, he was convinced that at least in the area of segregationist practices, the state action doctrine was a

54 *Id.* at 17.

55 28 U.S.C. § 1343(3) (1970) grants the United States District Courts "original jurisdiction of any civil action" brought:

> 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.

The effect of this statute is to find federal jurisdiction whenever a plaintiff can demonstrate the existence of state action on the part of the alleged discriminator. The legal requirements for finding state action are contained in the essentially identical language of § 1983.

56 Black, *supra* note 44, at 108.

57 *Id.* at 100.

"corpse,"[58] or at least an entity "show[ing] few signs of life."[59] His conviction arose from a detailed study of extant case law. He believed that not a single "decisive"[60] case had yet employed the doctrine to bar a black applicant from having his equal protection claim heard in federal courts.[61] Further, he argued that the frequent references of the courts to the doctrine were merely "concessive 'acceptances' of the state action limitation,"[62] intimating no true acceptance of the need to limit the scope of review.[63]

Professor Black based this last view on the theory that the few cases of the 1950's and 60's finding a state action limitation were never formally endorsed by the Supreme Court. His apparent belief that they would never receive such an endorsement has recently been disproven in several cases. Together, these cases prove that state action has more than a "concessive," rhetorical life. Yet to date, only *Moose Lodge No. 107 v. Irvis,*[64] has revived the doctrine in the area of racial discrimination. As will be noted below, there may be special considerations limiting the impact of that revival. Whatever the present significance of *Moose Lodge,* however, it is clear that Professor Black was correct about the general leniency of the state action doctrine in finding jurisdiction over racial complaints from the time of *Shelley* to the early 1970's.

A quick survey of the principal cases reveals that state action difficulties were overcome by black plaintiffs seeking to break the color barrier in a large number of areas traditionally viewed as private. Successful § 1983 actions were maintained against those who engaged in the following practices: refusing to sell land under the terms of a racially-restrictive private covenant;[65] excluding blacks from a private amusement park with the aid of deputized security guards;[66] enforcing the terms of private express trusts excluding blacks from the trusts' benefits;[67] excluding blacks from the selection process of a "political club" which had strong ties with the Democratic Party of the State of Texas;[68] and excluding blacks from a variety of privately-owned or privately-leased lunch counters, restaurants, and shops.[69]

The usual rationale underlying these cases was that the state somehow had involved itself in the activity of the private actor. Although Justice Douglas made a particular effort to find jurisdiction in the area of civil rights by employing the "public function" test as well,[70] the rest of the Court followed this approach only infrequently in dealing with racial discrimination. *Terry v. Adams*[71]

58 *Id.* at 108.
59 *Id.*
60 *Id.*
61 *Id.* at 87: "[There is] really—only one precedent to cite [on the other] side—The Civil Rights Cases."
62 *Id.*
63 *Id.* at 85 n.64.
64 407 U.S. 163 (1972).
65 Shelley v. Kreamer, 334 U.S. 1 (1948).
66 Griffin v. Maryland, 378 U.S. 130 (1964).
67 Pennsylvania v. Bd. of Trustees, 353 U.S. 230 (1957) (private school); Evans v. Newton, 382 U.S. 296 (1966) '(private park).
68 Terry v. Adams, 345 U.S. 461 (1952).
69 *See, e.g.,* Lombard v. Louisiana, 373 U.S. 267 (1963); Peterson v. Greenville, 373 U.S. 244 (1963); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).
70 *See* Lombard v. Louisiana, 373 U.S. 267, 275-78 (Douglas, J., concurring).
71 345 U.S. 130 (1964).

can perhaps be cited as the most notable exception to this tendency. For although the various opinions in the case are difficult to reconcile,[72] it appears that the majority concurred in finding a political club's election procedures and election purposes sufficiently similar to those associated with a state-conducted political primary to justify finding state action. In *Evans v. Newton,*[73] a case effectively prohibiting the enforcement of the provisions of a private express trust dictating the exclusion of blacks from a park in Macon, Georgia, the Court did adopt as one of its grounds a "public function" rationale.[74] But the subsequent opinion in *Evans v. Abney*[75] appears to have had the effect of minimizing the importance of the "public function" analysis.

Theories of "state involvement" thus provide the key to understanding the state action perspective on racial discrimination through the 1960's.

Practical difficulties arising out of this almost exclusive proscription with "state involvement" will be noted below when a comparison is drawn between prevailing jurisdictional standards in the areas of racial discrimination and higher education. Here, however, it is sufficient to note that the "state involvement" tests actually employed by the Court in the racial area were, in practical effect, almost limitless in their ability to find jurisdiction. A cursory look at two types of decisions, those dealing with restaurant admissions, and those dealing with property rights, demonstrate this point adequately.

In *Lombard v. Louisiana,*[76] a case decided two years after *Burton,* Justice Douglas, concurring, asserted:

> Business, such as this restaurant, is still private property. Yet there is hardly any private enterprise that does not feel the pinch of some public regulation—from price control, to health and fire inspection, to zoning, to safety measures, to minimum wages and working conditions, to unemployment insurance. When the doors of a business are open to the public, they must be open to all regardless of race if *apartheid* is not to become engrained in our public places. It cannot by reason of the Equal Protection Clause become so engrained with the aid of state courts, state legislatures, or state police.[77]

The implications of this view, if taken literally, would appear to be extreme. Any instance of government involvement with the private discriminator would justify a finding of federal jurisdiction. It would be immaterial whether such involvement was "substantial," or in any sense directed toward the specific activity

72 Although the case was decided in favor of plaintiff by a 7-1 vote, no majority opinion was offered.

73 382 U.S. 296 (1966).

74 *Id.* at 301-02. "The service rendered even by a private park is municipal in nature . . . Mass recreation through the use of parks is plainly in the public domain; and state courts that aid private parties to perform the public function on a segregated basis implicate the state in conduct proscribed by the Fourteenth Amendment."

75 396 U.S. 435 (1970). *Abney* allowed the reverter provisions of the disputed trust to be enforced, ruling that racial exclusion was an essential element of the original grant of park land to the city. As a consequence, the trust, which had been held to be governed by the fourteenth amendment in *Newton* under the "state action" theory, was terminated. In effect, the Court refused to implement the open accommodation implications of its original ruling by holding the desires of the dead grantor enforceable, at least with regard to the disposition of his property.

76 373 U.S. 267 (1963).

77 *Id.* at 280-81.

giving rise to the action. Involvement arguably far more remote than the governmental lease which gave rise to the jurisdictional finding in *Burton* would be sufficient to transform a private actor into a "state actor."

The majority in *Lombard* expressed neither approval nor disapproval of this extension of the *Burton* "substantial" involvement test. The ground on which it did base its decision, however, also took an extremely broad view of what activities constituted sufficient state involvement in private acts. Thus, the majority held that even though there was no ordinance requiring segregation, public attitude, as expressed by officials of the City of New Orleans, established state support of segregationist policies.[78] That support, inferentially demonstrated, validated the petitioners' jurisdictional claim.

A year after *Lombard,* the Court again held in favor of plaintiffs in *Bell v. Maryland.*[79] At issue was a criminal conviction for trespass. A number of civil rights demonstrators, including several blacks, were arrested for not leaving a lunch counter at the manager's request. The store had a policy of not serving blacks. Yet the trespass law under which the conviction was obtained was not directed specifically at racial offenses, and appeared to be neutral on its face. Aside from enforcing this statute, no state involvement in the discriminatory operation of the lunch counter was shown beyond the usual state regulation of business. Nevertheless, the Court reversed the conviction. The majority based its decision on a recent change in Maryland law banning discrimination in public accommodations.[80] Three members of the Court, however, argued that the simple use of a neutral state statute to enforce private discriminatory choice should, in and of itself, constitute evidence of state action.[81]

Sixteen years after *Shelley,* it was therefore clear that a substantial portion of the Court was still liberally applying its holding to sit-in cases. As noted earlier, that test treated any evidence of even indirect state aid to the discriminating party as sufficient to establish state action. "Excerptions of the state's power in all forms,"[82] if capable of use by the discriminator in furtherance of his objective would, without regard to the state's own attitude or intent, establish the basis for jurisdiction. Although *Burton* suggested that the state involvement should somehow be more "substantial," nothing in the outcome of the various restaurant decisions suggested that such substantiability was, in fact, anything other than a rhetorical requirement. A number of property cases raising issues similar to those in *Shelley* suggested that substantial involvement might not be a requirement at all. Instead, they gave some indications that the already open-ended ability to find jurisdiction might be broadened still farther.

These property cases approached jurisdiction in two ways. *Jones v. Albert H. Mayer Co.,*[83] decided in 1968, managed to avoid the requirement for demonstration of state action altogether. It did so by re-interpreting the jurisdictional

78 *Id.* at 273-74.
79 378 U.S. 226 (1964).
80 *Id.* at 228.
81 *Id.* at 308-10 (Warren, C. J., Goldberg, Douglas, J.J., concurring).
82 334 U.S. 1, 20 (1948).
83 392 U.S. 409 (1968).

requirements of 42 U.S.C. § 1982[84] in the light of the thirteenth amendment. It found that the act "bars *all* racial discrimination, private as well as public, in the sale or rental of property."[85] It therefore granted a black plaintiff the right to sue a white real estate developer who had refused to sell plaintiff a house on the basis of race.[86]

The ultimate jurisdictional implications of *Mayer* in the realm of racial discrimination have not yet been fully clarified. Arguments about whether or not the case has established a reading of the thirteenth amendment reaching all racially-motivated, private conduct are beyond the scope of this article; nevertheless, the discussion of policy limitations on the state action doctrine that follows will suggest reasons why *Mayer* and its successors should not be read so expansively. Even though *Mayer* resolved state action limitations on jurisdiction by avoiding the doctrine altogether, other property cases had largely avoided those limitations while still acknowledging the doctrine's theoretical relevance.

Barrows v. Jackson[87] and *Reitman v. Mulkey*[88] provide two examples of this trend. *Barrows* is chiefly significant because it provides broad inferential avoidance of the Court's lax jurisdictional standards in the area of racial exclusion. This evidence is contained in the Court's willingness to hypothesize an area of merely potential state involvement in order to justify a finding of requisite jurisdiction. In *Barrows,* the essential question before the Court was the right of a white covenantor to sue a white co-covenantor in order to enforce a racially-restrictive property covenant by means of a damage judgment.[89] The Court found the requisite state involvement in the access to the courts which would be required to enforce the covenant.[90] It reasoned that although such judicial action would not drive the black lessee from the property, it might have the effect of raising rents when the white lessor was required to pay the awarded damages.[91] It therefore linked the state's machinery of judicial enforcement to a probable, although indirect discriminatory effect, and based its finding of state action on that connection.

Reitman expanded state action jurisdiction in a more straightforward, and more comprehensive manner. It dealt with a proposed California constitutional amendment which in itself only barred the passage of legislation establishing duties to sell or rent property without regard to race, color, or creed.[92] The Supreme Court upheld the Supreme Court of California, which had found the proposed amendment unconstitutional.[93] It held that the California court had correctly concluded that the sort of inaction contemplated in the amendment could constitute state involvement in, and encouragement of, racial discrimi-

84 *"Property Rights of Citizens.* All citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, sell, hold, and convey real and personal property."
85 392 U.S. at 437.
86 *Id.* at 412-13.
87 346 U.S. 249 (1953).
88 387 U.S. 369 (1967).
89 346 U.S. at 251-52.
90 *Id.* at 254.
91 *Id.*
92 See 387 U.S. at 371 for a description of "proposition 14," art. I, § 26 Calif. Constitution.
93 *Id.* at 373.

nation.[94] It therefore accepted the notion that apparent inaction which might popularly be viewed as acquiescence in racial discrimination could be treated as involvement on the part of the state. It accepted the notion that such oblique and passive acquiescence could validly support a finding of state action.

With *Reitman,* the Court thus came close to holding that almost any degree of state action or inaction could be construed as providing a basis for a fourteenth amendment jurisdictional claim, provided that this state "involvement" (or non-involvement) could be tied to probable racially discriminatory effect. Under this view, state action as a barrier to jurisdiction became little more than a catch-word. In the entire area of exclusionary racial discrimination, at least prior to 1972, the doctrine tended toward the leniency of *Reitman.* This leniency stood in marked contrast to the prevailing state action law in the arena of education.

In summarizing the attitude of the Supreme Court toward jurisdiction in "state action" cases involving racial exclusion, the current significance of *Moose Lodge*[95] must be noted. In *Moose Lodge* a claim was made to revoke the liquor license of a private social club which excluded blacks. The Court refused to require the revocation of the license. In so deciding, it adopted the express standard of *Burton, i.e.,* that the state must have "significantly involved itself with invidious discriminations" before state action would be recognized.[96] Unlike *Burton,* however, the requisite "significant" involvement was not present. Instead, in a manner unique to racial discrimination cases since *Shelley,* the Court gave specific content to the common assertion that a threshold of state involvement must be demonstrated before fourteenth amendment jurisdiction can be found.[97] Specifically, it held that the licensing arrangement did not indicate that the threshold limits had been surpassed.[98] It also made it clear that incidental exercises of "public regulation" would not give rise to jurisdiction.[99] Instead, it imposed the more stringent requirement that the particular *type* of regulation involved must bear some specific causal or contributory relationship to the plaintiff's asserted injury.[100]

Although *Moose Lodge* clearly imposed limits on the state action doctrine in the racial arena, it is not certain yet whether this revival will, as a practical matter, mean that all racial exclusion cases will stand on an identical footing with non-racial state action cases when jurisdictional questions are raised. For example, it is arguable that a plaintiff suing an electric company on the basis of a racially-neutral service termination policy might be required to show more

94 *Id.* at 375-76.
95 407 U.S. 163 (1972).
96 *Id.* at 173.
97 *See, e.g.,* Shelley v. Kraemer, 334 U.S. 1, 22-23 (1948); Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961); Reitman v. Mulkey, 387 U.S. 369, 378 (1967).
98 407 U.S. at 173.
99 Such incidental regulations were urged as being a sufficient basis for a state action finding by Justice Douglas in Lombard v. Virginia, 373 U.S. 267, 280-81 (1963).
100 In *Moose Lodge* the Court stated: "However detailed this type of regulation may be in some of its particulars, it cannot be said to in any way foster or encourage racial discrimination." 407 U.S. 176-77. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). There the Court contended:

> [T]he inquiry must be whether there is a sufficiently close nexus between the state and the *challenged action* of the regulated entity so that the action of the latter may be fairly treated as that of the state itself.

Id. at 351 (emphasis added).

contact between the state and the company than would be necessary in a suit lodged against a municipality for allowing a segregated school to use its facilities.[101] Further, while the threshold ruling in *Moose Lodge* may provide guidelines for further decisions inside and outside[102] the area of racial exclusion, it remains unclear whether the Court was more disposed to be deferential to the defendant in *Moose Lodge* because of the defendant's status as a private social club.[103] Arguments that private clubs are constitutionally entitled to engage in more discrimination than "public accommodations"[104] have been made frequently before the Supreme Court, and appear to have found surprisingly wide judicial favor.[105]

Even assuming that *Moose Lodge* has established a standard for finding jurisdiction which treats all racial and all non-racial cases alike, that fact should not vitiate the significance of racially exclusionary cases already mentioned. That survey demonstrated that the Supreme Court has traditionally used the state action doctrine in a result-oriented, policy-centered manner. While the adoption of a single jurisdictional standard might appear to give state action the appearance of principled neutrality,[106] it may also indicate that the Court's past commitment to the goals of the civil rights movement has waned.[107] While such a waning may

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101 *Compare* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) *with* Gilmore v. City of Montgomery, 413 U.S. 556 (1974).

102 *See* note 100, *supra,* which indicates how some of the language in *Moose Lodge* modifying *Burton's* standards has been amplified in *Jackson.*

103 *See, e.g.,* the dissent of Justice Douglas in *Moose Lodge.*

> The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. . .
>
> . . .
>
> [A single private club] is not in the public domain . . . and the fact that a private club gets some kind of permit from the state does not make it ipso facto a public enterprise or undertaking, any more than the grant to a householder in the public domain.

407 U.S. at 179-80 (Douglas, J., dissenting). In order to justify his argument that "state action" should be found in *Moose Lodge,* Justice Douglas emphasized that something more than the grant of a liquor license was involved in the *Moose Lodge* situation. "Special circumstances" included the relative "sincerity" of available licenses: "state-enforced security of licenses restricts the ability of blacks to obtain liquor." *Id.* at 182.

Compare the above with Justice Douglas' position in Garner v. Louisiana, 368 U.S. 157, 183 (1961) and Lombard v. Virginia, 373 U.S. 267, 282-83 (1963). In both of these cases, not involving private clubs, he argued that state licensing or regulation should serve as per se evidence of state action on the part of the licensed or regulated establishment.

104 The Pennsylvania courts later determined that under state law, Moose Lodge was a "public accommodation," and could be ordered to stop its racially discriminatory practices. *See* 448 Pa. 451, 294 A.2d 594, 597-98 (1972) (on remand).

105 In addition to Justice Douglas's dissent in *Moose Lodge,* noted at note 103, *supra, see* Runyon v. McCrary, 96 S. Ct. 2586, 2595 n.10 (1976) in which the Court stated:

> This case does not raise the issue of whether the 'private club or other [private] establishment' in § 201 (e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(e) operates to narrow § 1 of the Civil Rights Act of 1866 . . . [T]hat exemption, if applicable at all, comes into play only if the establishment is 'not in fact open to the public. . . .'

It must be noted, however, that a club which has racial exclusivity as its only, or primary, "private" characteristic will not be considered immune from constitutional attack under either § 1981 or § 1982. *Id.* at 2602 (Powell, J., concurring). *See also* Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 438 (1973). *C.f.* Sullivan v. Little Hunting Park, 396 U.S. 229, 236 (1969).

106 *See* Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1 (1957).

107 Recent decisions refusing to find unconstitutional discrimination in certain official act having an arguably adverse effect on minority attempts to secure equality might be interpreted to support the view that minority rights are no longer a priority item with the Court. *See, e.g.,*

make the doctrine less discretionary in its future application, it leaves the essential message of past discretion intact. That message is that certain racial wrongs are particularly worthy of judicial review, whether perpetrated in the name of the state, or in the name of a private party. The fourteenth amendment is used as the means of securing review, despite continued rhetorical acknowledgment of state action jurisdictional limitations.

However, as the rest of this study will show, even as the Court has expanded the scope of the doctrine in the racial area, it has also invoked the doctrine's traditional limits in other areas in order to preserve some degree of jurisdictional immunity for "private" defendants. This continued recognition of a more than rhetorical fourteenth amendment right of privacy rests on a number of policy assumptions potentially in conflict with those underlying the jurisdictional leniency in the majority of the racial exclusion cases. The chief assumption is that certain institutions have a traditional right to conduct their affairs unhindered by significant governmental oversight.[108] Private clubs, like the defendant in *Moose Lodge,* have traditionally been granted the most latitude in their affairs. But private colleges, universities, and professional schools are also accorded considerable deference by the courts. That deference will be treated next. Its success and specific limits will also be considered.

IV. Jurisdiction in Education Cases

A. *The Special Status of Private Schools*

In setting forth the standards they have used to determine jurisdiction over state action claims, the courts have frequently relied on general language. *Burton*'s requirement that plaintiff demonstrate state involvement "to some significant extent"[109] is fairly typical. The real task performed by the courts, at least until the recent decisions like *Moose Lodge* and *Jackson v. Metropolitan Edison Co.*,[110] has not been to formulate broad principles under which every state action claim could be evaluated according to some clear test. Instead, it has been "to [sift] facts and [weigh] circumstances"[111] in a manner calculated to conform jurisdictional findings to policy decisions already made about the subject matter of the claim, and the particular status of the parties bringing it, or defending against it.

Milliken v. Bradley, 418 U.S. 717 (1974) (suburban schools' *de facto* segregation not sufficient cause to support lower court order of interdistrict bussing); Washington v. Davis, 426 U.S.— (1976) '(exclusionary effect of employment exam not grounds for barring its use in absence of evidence of suspect motives on the part of those administering it); Village of Arlington Hghts. v. Metropolitan Housing Dev., 97 S. Ct. 555 (1977) (racially exclusionary effect of zoning law not judicially actionable in absence of discretionary motive).

But see Runyon v. McCrary, 96 S. Ct. 2586 (1976) (private proprietary schools barred from excluding black students); United Jewish Organizations v. Cary, 45 U.S.L.W. 4221 (March 1, 1977) (city permitted to redistrict with express purpose of giving black minority enhanced political power despite absence of evidence of prior discrimination).

108 *See* notes 103, 105, *supra;* DARTMOUTH COLLEGE, *supra* note 51, describing in broad terms the historical deference paid by the courts to eleemosynary institutions in general, and private colleges in particular.

109 365 U.S. 715, 722 (1961).

110 419 U.S. 345 '(1974).

111 365 U.S. at 722.

As has already been noted, one effect of this discretionary approach has been to grant special consideration to the claims of minority members asserting the deprivation of their rights. Historically coexisting with this lenient approach to jurisdiction, however, has been another view making it difficult for plaintiffs to find enough state involvement to transform certain private parties into state actors. This view, which gives the benefit of any jurisdictional doubt to the defendant, is predicated on a premise that some associations and institutions have a right of privacy which is particularly worth preserving. Private colleges clearly fall within this specially protected category. To preserve their privacy, the courts have made little effort to assert their jurisdiction over them. Instead, they have generally refused to scrutinize the relationship between the colleges and the state with the same thoroughness and suspicion that have, for example, characterized the judicial response to claims involving segregated lunch counters.

Although it is not always admitted by the courts, and although the process may now be undergoing a change, it can thus be asserted that state action decision-making has traditionally involved the use of a differential standard of review geared to the prevailing view of what interests are particularly worth protecting. Justice Thurgood Marshall, desirous of protecting the favored position of minority claimants, has laid heavy emphasis on this point in his dissent in *Jackson*.[112] In the process, he has given a concise account of the Supreme Court's current attitude toward colleges, universities, and professional schools, and some insight into the basis of that attitude.

Justice Marshall began by emphasizing the general format of the traditional view:

> What is perhaps most troubling about the Court's opinion is that it would appear to apply to a broad range of claimed constitutional violations by the company. The Court has not adopted the notion, accepted elsewhere, that different standards should apply to state action analysis when different constitutional claims are presented. Thus, the majority's analysis would seemingly apply as well to a company that refused to extend service to Negroes [and] welfare recipients. . . .[113]

In expressing this opinion, he was recognizing the tendency of the state action cases to look with special favor on the claims of minority members of society. It appears, in fact, that he was consciously echoing Justice Stone's suggestion in the famous *Caroline Products* footnote that:

> [P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[114]

In arguing that the Court should adopt relatively "strict scrutiny" when making jurisdictional choices affecting the rights of powerless minorities, Marshall

112 419 U.S. at 373-74.
113 *Id.* at 373-74.
114 304 U.S. 144, 152 n.4 (1938).

also acknowledged the existence of other circumstances in which judicial intervention would be less defensible:

> Private parties performing functions affecting the public interest can often make a persuasive claim to be free of the constitutional requirements applicable to governmental institutions because of the value of preserving a private sector in which the opportunity for individual choice is maximized . . . Maintaining the private status of parochial schools . . . advances just this value. In the due process area, a similar value of diversity may often be furthered by allowing various private institutions the flexibility to select procedures that fit their particular needs.[115]

Nowhere in his opinion did Justice Marshall specify that private institutions of higher education fall within the category of parties with a "persuasive claim" to judicial deference. Standards applicable to private parochial schools need not be applicable to private nonsectarian colleges or professional schools. Yet it is fairly clear that Justice Marshall had private colleges in mind when he wrote his opinion in *Jackson*. His citations in support of freeing certain parties from "the constitutional requirements applicable to governmental institutions" almost compel this conclusion. His chief authorities are works by Judge Friendly which deal specifically with the advisability of preserving the "privacy" of private colleges[116] when interpreting state action.

Justice Marshall's citations of Judge Friendly's views are presented in a dissenting opinion dealing with the policies of an electric company, not a college. As such, they can hardly be said to constitute an authoritative adoption by the Court of Judge Friendly's detailed arguments in favor of maintaining a broad jurisdictional immunity for colleges and other similarly situated institutions. In fact, no modern Supreme Court case has dealt with the state action doctrine in its relationship to the practices of private colleges, universities, and professional schools. A number of recent decisions arising outside the state action area have made it clear that educational institutions are not immune from government regulation.[117] Some of these cases have involved the admissions practices of private schools.[118]

115 419 U.S. at 372.

116 Justice Marshall cites Judge Friendly's DARTMOUTH COLLEGE (see note 51, *supra*), and an opinion written by Judge Friendly in Wahba v. New York University, 492 F.2d 96 (2d Cir. 1974), *cert. denied,* 419 U.S. 874 (1974). Judge Friendly's monograph is perhaps the most thoughtful and thorough defense of traditional state action immunity for private colleges. *Wahba* is one of several Second Circuit cases applying its rationale. Justice Marshall cites another of these cases, Powe v. Miles, 407 F.2d 73 (2d Cir. 1968), elsewhere in his dissent, and also makes reference to another case which employed Judge Friendly's arguments, Grossner v. Trustees of Columbia University, 287 F. Supp. 535 (S.D.N.Y. 1968).

117 For a case allowing federal regulation because of a voluntary relationship obtaining between the institution and the federal government, *see* Flanagan v. President and Directors of Georgetown University, — F. Supp. — (D.D.C. 1976) (receipt of Title VI funds). The ability of individual states to regulate college affairs in a wide number of areas has been the subject of extensive litigation. *See* Shelton College v. State Bd. of Educ., 48 N.J. 501, 251 A.2d 498 (1967) for a case asserting broad state regulatory powers. *But see* Frank Briscoe Co., Inc. v. Rutgers, 130 N.J. Super. 327 A.2d 687, 692-93 (1974), limiting the power of a state to affect by regulation or statute the legal status of a college or a university chartered before the American Revolution. *C.f.* Trustees of Dartmouth College v. Woodward, 19 U.S. (4 Wheat.) 519 (1819). *But see also* Railway Mail Ass'n v. Corsi, 326 U.S. 88, 93-94 (1945).

118 *See, e.g.,* Norwood v. Harrison, 413 U.S. 455 (1973); Runyon v. McCrary, 96 S. Ct. 2586 (1976).

Although recent case law suggests some practical limits to their immunity, it seems clear that Justice Marshall is correct in suggesting that private institutions of higher education have been treated with considerable deference by the courts. It also seems clear that this deference has manifested itself in state action theory, and that it is likely to continue to manifest itself in state action case law. For, as Judge Friendly has urged, such deference in the state action area is a necessary implication of the holding in the *Trustees of Dartmouth College v. Woodward*.[119] Although that case was resolved nearly 160 years ago, the Supreme Court has given no definitive sign of retreating from some of its broader doctrinal implications.

Dartmouth College was the result of a conflict between the college and the State of New Hampshire arising out of the State's attempt to exercise certain controls over the institution inconsistent with the school's charter.[120] The Supreme Court refused to allow the state to override the specific terms of that charter.[121] Today, the states have wide latitude to impose regulations on most educational institutions, and have the power to exercise at least some of the control immunized by the *Dartmouth College* decision.[122] Dicta in the case relating generally to the relationship between private colleges and governmental units are apparently still significant, however. Chief Justice Marshall drew a distinction between those administering institutions in the name of the government, and those administering *Dartmouth College,* whom he characterized as not being:

> [P]ublic officers, invested with any portion of political power, partaking in any degree in the administration of civil government, and performing duties which flow from the sovereign authority.[123]

Implicit in his logic is a sense of some clear distinction between governmental and nongovernmental institutions, and an acceptance of the idea that the administrators of private schools are somehow performing functions which even in the state action context are particularly private.

Despite the development of substantial links between most educational institutions and governmental funding agencies, and despite the development of a full-blown "public function" theory, both of Chief Justice Marshall's assumptions continue to find favor, most frequently in lower court decisions. In *Timmerman v. University of Toledo,*[124] for example, the court cited two cases indicating "that colleges and universities are not subject to the supervision of review of the

119 17 U.S. (4 Wheat.) 418 (1819).

120 *Id.* at 538-40. The legislature of New Hampshire sought to amend the charter of Dartmouth College, to expand the board of trustees and empanel public officers on the board, and to make the college financially accountable to the state.

121 *Id.* at 710.

122 DARTMOUTH COLLEGE, *supra* note 51, at 11. Judge Friendly states:

> Suppose that a college declined to accept Jewish students. It is plain that a state could constitutionally force her to do so . . . directly. A state could do this to a college generally secular in bent even if its charter stipulated the necessity of racial or religious exclusion.

Judge Friendly cites Railway Mail Ass'n v. Corsi, 326 U.S. 88, 93-94 (1945), in support of this point. Justice Douglas' opinion in Bell v. Maryland, 378 U.S. 226, 242, 284-85 (1964), lists a number of state laws prohibiting discrimination in private schools.

123 17 U.S. (4 Wheat.) at 632.

124 421 F. Supp. 464 (N.D. Ohio 1976).

courts in the uniform application of their academic standards."[125] It then extended this principle of immunity into the area of admissions decisions, arguing that

> the courts have no power to fix college admission requirements since these deal with purely mechanical standards . . . There is no reason to distinguish in this regard between requirements for entrance to or completion of a course of study.[126]

The Supreme Court has never taken the opportunity[127] to expressly define those areas in which the decisions of college administrators will be given special deference. It is not clear whether any particular immunity is entailed by the setting of "purely academic standards." No Supreme Court decision has yet put the admissions process of any college, public or private, outside the potential scope of its review. Yet it is reasonably certain that the Court has adopted the general principle that private colleges, universities, and professional schools are somehow special, and should not be compelled to have all of their decisions judicially examined.

The relatively favored position of private schools appears to be implicit in both the majority and minority opinions in *Evans v. Newton,*[128] the first of two cases involving the legal status of a private park in Macon, Georgia which, under the terms of a trust, excluded blacks. The majority found jurisdiction in that case under a "public function" theory. While it did not clarify the potential limits of that theory, it did assert that its decision was not meant to intimate that private schools fell within the theory's range.[129] Justice Harlan, dissenting, attacked the open-endedness of the "public function" theory, and its potential future application to the policies of private schools:

> For all the resemblance [between private parks and private schools], the majority assumes that its decision leaves unaffected the traditional view that the Fourteenth Amendment does not compel private schools to adapt their admission policies to its requirements. . . I find it difficult, however, to avoid the conclusion that this decision opens the door to reversal of these basic constitutional concepts, and at least in logic, jeopardizes the existence of denominationally restricted schools while making of every college entrance rejection letter a potential Fourteenth Amendment question.[130]

Subsequent developments in the law outside the state action area arena have lent credence to Justice Harlan's concern. The decision of the present Court in *Runyon McRary,*[131] has clearly rendered an indefinite number of private school entrance rejection letters subject to potential thirteenth amendment ques-

125 *Id.* at 475, *citing* Gasper v. Burton, 513 F.2d 843, 850 (10th Cir. 1975) and Mahavongsanan v. Hall, 529 F.2d 448, 449-50 (5th Cir. 1976).
126 *Id.*
127 Such an opportunity was declined by the Court when it denied certiorari in Wahba v. New York University, 419 U.S. 874 (1974).
128 382 U.S. 296 (1966).
129 *Id.* at 300.
130 *Id.* at 322.
131 96 S. Ct. 2586 (1976).

tions.[132] In that decision, the refusal of several hundred proprietary primary and secondary schools to admit black children was ruled violative of 42 U.S.C. § 1981, which bars racial discrimination in the formation of contracts.[133] Heavily emphasized, however, was the semi-public nature of the defendant schools. Significantly, the defendant schools had no religious affiliation,[134] no apparent academic admissions standards, and were operated for profit. In addition, they advertised widely for students, and made no attempt to portray themselves as selective in any nonracial manner. In no sense were they custodians of a scarce commodity necessitating denial of benefits to some applicants.[135]

Justice Powell indicated that he concurred in the opinion only because the defendants operated an alternative school system which, except for its racial restrictions, was no more selective than its public counterpart.[136] It is arguable that the Court could have reached the same result under the fourteenth amendment by employing a similar sort of "public function" analysis relied on by the majority in *Newton*. It is certain that some of the same concerns influenced both decisions.

To suggest that the spectre of "public function" has not been totally exorcised from educational case law does not imply that it is likely to be easily found, however. It is far from clear, for instance, whether any member of the *Runyon* Court, which at least considered "public function" factors in its holding, although not employing the state action doctrine, would have reached the same decision under other circumstances. As will be noted, restrictive admission policies involving less than total exclusion of a particular racial or ethnic group might have entailed a different result. But, it is also unclear whether the result would have been different if the defendants had been academically selective, religiously affiliated, or had been institutions of higher education. Significantly, perhaps neither of Justice Harlan's particular concerns in his *Newton* dissent were directly affected by the decision in *Runyon*.[137]

Recent decisions sharply limiting the rights of college faculty members to pursue due process remedies[138] are perhaps better indicators of the judicial attitude toward institutions of higher education than is a non-college case like *Runyon*. In the most notable of these cases, *Board of Regents v. Roth*,[139] a teacher at a public college was summarily dismissed at the end of his contract term. The Court rejected his claim that he had a property right in his job, arguing that:

132 *Id.* at 2594. The Court stated:
> Statutes prohibiting "all racial discrimination" are within Congress' power under § 2 of the Thirteenth Amendment "rationally to determine what are the badges and the incidents of slavery. . . ."

133 *"Equal Rights Under the Law.* All persons . . . shall have the same right—to make and enforce contracts . . . as is enjoyed by white citizens."

134 96 S. Ct. at 2592-93.

135 *Id.* at 2602-03.

136 *Id.*

137 *See* 382 U.S. 296, 322 (1966). Justice Harlan expressed the fear that the majority decision in *Newton* "[jeopardize] the existence of denominationally restricted schools" and affect the freedom of private colleges to make their own admissions decisions.

138 *See* Roth v. Bd. of Regents, 408 U.S. 564 (1972); *c.f.* Perry v. Sindermann, 408 U.S. 593 (1972).

139 408 U.S. 564 (1972).

> To have a property interest in a benefit, a person clearly must have more than an abstract need of desire for it. He must, instead, have a legitimate claim of entitlement to it. . . Property interests are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source. . . .[140]

The Court found no such "independent source" of the right to continued employment in state law, and none in the complaining non-tenured teacher's employment contract.[141] It therefore concluded that he had "secured absolutely no interest in re-employment for the next year."[142] In his dissent, Justice Douglas argued that the majority decision might have been more defensible had the defendant institution been a private, rather than a public, entity.[143]

Similar implicit distinctions between the status of private and public institutions have crept into a number of Supreme Court decisions dealing with the due process and first amendment rights of students. These cases, which invariably have involved public institutions,[144] have found protectible rights on a number of occasions.[145] Significantly, however, most have coupled their discussion of these rights with some reference to the public nature of the institution involved. Typical is a statement in *Tinker v. DesMoines School District*[146] that "[i]n our system, state-supported schools may not be enclaves of totalitarianism."[147] Similarly, in *Goss v. Lopez,*[148] a careful indication was made that the hearing rights afforded an expelled student related to the plaintiff's status as a user of public facilities.

The relevant case law amply supports Justice Marshall's view that private schools in general, and private institutions of higher education in particular, can make a "persuasive claim to be free of the constitutional requirements applicable to governmental institutions."[149] How persuasive that claim will be when measured against a *DeFunis* or *Bakke*-type claim is another question, to be discussed more fully below.

The immediate focus of the materials which follow, however, lies in answering a more fundamental question: namely, under what circumstances is a college, university, or professional school likely to be deemed private? To the fullest extent possible, that question will be answered by focusing on the relationships between

140 *Id.* at 577.
141 *Id.* at 578.
142 *Id.*
143 *Id.* at 581.
144 Neither *Runyon* nor *Harrison,* which both involved *private* segregated schools, reached any specific due process questions, though both involved first amendment claims by the defendant institutions.
145 *See, e.g.,* Goss v. Lopez, 419 U.S. 565 (1975) (students facing disciplinary suspension entitled to formal hearing); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (wearing of symbolic armbands in class protected first amendment right); Healy v. James, 408 U.S. 169 (1972) (S.D.S. Chapter permitted to hold meetings on college campus); Grayned v. City of Rockford, 408 U.S. 104 (1972) (public school appropriate forum for expression of student dissent).
146 393 U.S. 503 (1969).
147 *Id.* at 511.
148 *See* 419 U.S. at 573-75. *See also* Isenbarger v. Bright, 445 F.2d 412 (7th Cir. 1971) (student at *private* secondary school has no right to appeal expulsion); Wright, *The Constitution on Campus,* 22 VAND. L. REV. 1027, 1037 (1969), "the first amendment applies with full vigor on the campus of a public university."
149 419 U.S. at 373.

defendant institutions and the state, as those relationships have been discussed in the cases. When the cases themselves appear to have taken the disadvantaged status of the plaintiff into account that fact will be noted. Standards for finding institutional privacy and granting concomitant jurisdictional immunity will be analyzed first in terms of the "public function" test, then in terms of the "state involvement" test. Such a procedure will indicate how judicial deference toward institutions of higher education has actually manifested itself within the context of the state action doctrine. It will also provide a clearer contrast with the sort of standards employed in the racial cases already discussed.

B. *The "Public Function" Test*

It has already been noted that the Supreme Court has, in a variety of contexts, acknowledged some distinction between the functions of private and public educational institutions. On a number of occasions, this acknowledgment has emphasized the particular distinction between private and public colleges and universities. Some of the statements drawing the latter distinction have served as dicta in state action cases. Yet it appears that only one state action case before the Supreme Court has presented directly the issue of whether an allegedly private college, university, or professional school should be deemed a state actor. That case, *Pennsylvania v. Board of Trustees,*[150] apparently turned on the state's involvement with Girard College, rather than with that college's adoption of an educational role similar to that which might have been exercised by the state acting alone.

A number of lower court cases have addressed the "public function" question more specifically, however. Only a few have employed anything resembling a "public function" rationale in finding the existence of state action. There are a number of cases which have found state action, or the possibility of state action, based on agency principles. Such principles, if construed broadly, could require very little direct contact between the defendant university and the state. It might even be possible to infer the defendant's authority to act in the name of the state, rather than require a showing of such authorization. However, agency principles have not actually been analyzed so drastically in the education area. Instead, agency findings have required some independent evidence of the state's actual involvement with the defendant. It can be asserted on the basis of cases such as *Braden v. University of Pittsburgh*[151] and *Powe v. Miles,*[152] that nominally private institutions are not going to fail the "public function" test and thereby lose their immunity from suit unless they are clearly agents, acting for the state purposely with either the state's knowledge or active cooperation, or both.

In *Braden,* for example, the question arose as to whether the University of Pittsburgh could be considered an agent of the state for the purposes of a fourteenth amendment suit.[153] The court remanded the case with instructions that agency be determined with reference to the actual circumstances tying university

150 353 U.S. 230 (1957).
151 477 F.2d 1 (3d Cir. 1973).
152 407 F.2d 73 (2d Cir. 1968).
153 477 F.2d at 3.

administration and financing to the state.[154] In *Miles,* one of the two institutional defendants the State College of Ceramics, was found to be an agent of the State of New York.[155] In so finding, the Court emphasized the historical and formal relationships obtaining between the defendant and the State University of New York.[156] Another college on the same campus, however, was found not to be a state actor by virtue of the fact that its historical and administrative ties were with the private Alfred University, rather than with the state system.[157]

Aside from these agency cases, which could be dealt with under the "state involvement" test as well, there appears to be little support for the "public function" theory in the area of higher education. Justice Harlan's dissent in *Newton,* expressing the fear that an overly broad definition of "public function" would threaten the privacy of every educational institution apparently has been influential. Even the court in *Isaacs v. Board of Trustees of Temple University,*[158] which adopted a liberal reading of the "state involvement" test accepted the force of Justice Harlan's reasoning:

> The 'public function' theory has a pleasing simplicity about it, and would permit summary disposition of the issue presently before this court. It is, however, a slender analytical reed upon which to lean, for it admits of practically no limitation. Every individual or institution performing a function that the state, in its own panoply of activities, performs, would become an agent of the state. 'State action' would be present in the operation of every non-public school, for example, because education is solely a state function. Such an expansion of the scope of the Fourteenth [Amendment] would be clearly unwarranted, and I hazard no such expansion here.[159]

The Courts in *Grossner v. Trustees of Columbia University*[160] and *Miles*[161] adopted essentially the same position in rejecting the specific "public function" claims raised by those seeking to establish the requisite elements of jurisdiction. In the case of *Blackburn v. Fisk,*[162] the court refused to find a "public function" basis for state action despite substantial evidence that the defendant college had most of the characteristics of a "company town." It thus refused to extend the argument of one of the earliest public function cases, *Marsh v. Alabama.*[163] Thus, while the courts have not ignored the possibility of finding jurisdiction over an institution of higher education by employing the "public function" test, the doctrine has not been embraced. The difficulty of distinguishing the operational characteristics of one university from any other is readily apparent, since all are designed to convey information about a reasonably consistent body of knowledge, and prepare their students for reasonably similar roles after graduation. Rather than attempting to make role distinctions between public and private institutions, or between different private institutions, the courts have tended to shy away from

154 *Id.* at 6-7.
155 407 F.2d at 82-83. Significantly, the bulk of the opinion was devoted to showing that the College of Liberal Arts at Alfred University was not a "state actor."
156 *Id.* at 82 n.7.
157 *Id.* at 79-82.
158 385 F. Supp. 473 (E.D. Pa. 1974).
159 *Id.* at 486.
160 287 F. Supp. 535 (S.D.N.Y. 1968).
161 407 F.2d at 81.
162 443 F.2d 121 (6th Cir. 1971).
163 326 U.S. 501 (1946).

the "public function" test altogether, and have employed a standard which makes it easier to justify extending jurisdictional immunity to most institutions. That standard measures the actual involvement of the state in the affairs of the allegedly private actor.

C. *The "State Involvement" Test*

What contacts between the private institution of higher education are, in the words of Professor Gunther, "adequate to justify imposing constitutional restraints on the private actor or commanding state disentanglement?"[164] When will a state be deemed sufficiently involved with the private institution to justify finding jurisdiction under the fourteenth amendment? The variety of ways in which states have involved themselves with private schools make both questions difficult to answer. Further complicating the matter are the different standards employed by the various circuits in evaluating the significance of particular sorts of contact. However, a categorical review of the relevant cases will show that the courts have usually required one of the following to establish jurisdiction: substantial financial support for the private actor; substantial control over the private actor; significant financial support coupled with significant exercise of state control; or state support to, or state control over, the specific activity of the private actor giving rise to the state action claim.

1. Chartering and Licensing

The recent trend in Supreme Court cases, including *Moose Lodge* and *Columbia Broadcasting System v. Democratic Nat'l Comm.*,[165] a case finding no state action in the practices of a television network operating by virtue of a federal broadcasting license, strongly suggests that mere licensing will not support a finding of state action. Such a position is consistent with the view, widely held since *Dartmouth College*,[166] that the chartering of a private institution by the state does not, in and of itself, make that institution an agent or instrument "of civil government."[167] Federal and state courts alike have held, almost unanimously, that the existence of a charter does not provide a sufficient tie between the state and the private educational institution to justify a finding of state action. Cases which have so held in the last several years include *Miles*[168] and *Fisk*,[169] dealing with private colleges, and *Bright v. Isenbarger*,[170] dealing with a private sectarian high school.

An argument has been made that the chartering or licensing of professional schools should stand on a different footing. A number of claimants have urged that the continuing state control over the professions after graduation, and state input into the professional school curriculum requirements while a student is in attendance, indicate a particularly strong interest in controlling private profes-

164 G. GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 917 (1975).
165 412 U.S. 94 (1973).
166 17 U.S. (4 Wheat.) 519 (1819).
167 *Id.* at 633.
168 407 F.2d at 80.
169 443 F.2d 121 (6th Cir. 1971).
170 445 F.2d 412 (7th Cir. 1971).

sional schools. They have argued that licensing requirements are a manifestation of that interest, and that they indicate an inextricable tie between the private actor and the state. This argument was treated and rejected in *Sament v. Hahnemann Medical College and Hospital.*[171] In that case, the court said:

> Quite clearly, defendant's being chartered by the commonwealth is of no significance. The granting of a corporate charter is a ministerial governmental function, and does not involve the state to any appreciable degree in either the management or the promotion of a chartered corporation. . . . [T]he commonwealth's reservation of the right to approve the medical certificates of matriculating students is merely a ministerial exercise of its police power rather than any extensive participation or involvement in the selection of students. . . .[172]

A similar result was reached with regard to a private law school in *Grafton v. Brooklyn Law School.*[173] That case adopted the earlier Second Circuit holding in *Miles*[174] that the existence of a charter was not per se evidence of state action.[175] It also considered in detail the apparent connections between the state and the processes of legal education, and concluded that they were insufficient to support a finding of jurisdiction.

For colleges, universities, and professional schools alike, a "state involvement" standard has emerged which does not attempt to make the minimal and essentially ministerial controls of chartering and licensing a basis for state action. Such a standard is consistent with the present status of state action law outside the area of education.

2. Regulation and Control

While the cases already examined did not find sufficient grounds for implying state action from chartering and incidental regulations, it is clear that more extensive or more restrictive regulations might have yielded different results. In *Isaacs v. Board of Trustees of Temple University,*[176] for instance, the following factors were considered significant in defining the University as a state actor:

> [I]ntensive contacts between Temple and the Commonwealth throughout the annual budgetary process; continuing oversight by the Commonwealth of all of Temple's affairs through the mechanisms of annual audits and reports and; on two occasions at least, faculty productivity studies; an important contribution by Commonwealth-appointed trustees to the management of Temple's affairs. . . .[177]

Similarly, in *Miles,* the court found one of two defendants to be a state actor.[178] One of the reasons it gave was the clear intent of the state legislature

171 413 F. Supp. 434 (E.D. Pa. 1976).
172 *Id.* at 439. Omitted cites include: Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat) 518, 635-39 (1819); Greenya v. George Washington University, 512 F.2d 556 (D.C. Cir. 1975); Blackburn v. Fisk University, 443 F.2d 121 (6th Cir. 1971); Isaacs v. Board of Trustees of Temple University, 385 F. Supp. 473, 488 (E.D. Pa. 1974).
173 478 F.2d 1137 (2d Cir. 1973).
174 407 F.2d 73 (2d Cir. 1968).
175 *Id.* at 79-82.
176 385 F. Supp. 473 (E.D. Pa. 1974).
177 *Id.* at 484.
178 407 F.2d 73 (2d Cir. 1968).

to retain control over a state-supported educational institution with regard to discipline and educational policies.[179]

In a more restrictive vein, the same court in *Coleman v. Wagner College*,[180] found possible state action in a private college's apparent reliance on the particular provisions of a city ordinance proscribing penalties against certain student demonstrators. Significantly, however, this decision argued that the ordinance would be relevant only if the college believed itself to be bound by the ordinance's provisions, and only to the extent that its terms related to the specific claim being raised by the plaintiffs.[181] The case thus anticipated the requirement in *Jackson v. Metropolitan Edison Co.*,[182] that the asserted relationship giving rise to the state action claim "be between the state and the challenged action,"[183] *i.e.*, establish a tie between the plaintiff's asserted injury and the particular manifestation of asserted state involvement.[184] Known in the educational area as the "Doctrine of *Powe v. Miles*,"[185] this requirement re-emerges when dealing with the significance of state economic aid to a private institution. It will be treated in that context below.

Summarizing the judicial attitude toward public regulation of private colleges, it thus appears that when there is evidence of considerable state involvement in institutional policy-making, or in the day-to-day administration of institutional affairs, involvement may be sufficient to establish the existence of state action. Since many of the cases describing such regulation also contain a record of state financial aid,[186] it appears fairly certain that regulation will seldom be a factor considered by itself, but instead will be judged as a part of a general pattern of school-state relationships. In rare instances, however, an institution which appears to be generally independent of the state may become a state actor by virtue of its adoption and imposition of specific regulations. *Coleman* provides the example of Wagner College's adoption of a state disciplinary statute. Thus, in the unlikely instance that a state would impose an admissions or scholarship quota on a private institution of higher education, it is clear that the institution which observed such a quota would be deemed a state actor.[187]

179 *Id.* at 82-83.
180 429 F.2d 1120 (2d Cir. 1970).
181 *Id.* at 1123 n.3.
182 419 U.S. 345 (1974).
183 *Id.* at 356.
184 *Id.* at 352 where the Court states, "In each of these cases, there was insufficient relationship between the challenged actions of the entities involved and their monopoly status." *See* Wahba v. New York University, 472 F.2d 96, 100 (2d Cir. 1974):

> As indicated in Powe v. Miles [cite omitted] and Grafton v. Brooklyn Law School [cite omitted], we do not find decisions dealing with one form of state involvement and a particular provision of the Bill of Rights at all determinative in passing upon claims concerning different forms of government involvement and other constitutional guarantees.

185 *See* Isaacs v. Board of Trustees of Temple University, 385 F. Supp. 473 (E.D. Pa. 1974), which cites the "Doctrine of *Powe v. Miles*."
186 *See, e.g.*, Braden v. University of Pittsburgh, 477 F.2d 1 (3rd Cir. 1973), *rev'g* 343 F. Supp. 836 (W.D. Pa. 197); Rackin v. University of Pittsburgh, 386 F. Supp. 992 (E.D. Pa. 1974); Isaacs v. Board of Trustees of Temple University, 385 F. Supp. 473 (E.D. Pa. 1974); *c.f.* Powe v. Miles, 497 F.2d 73 (2d Cir. 1968).
187 If the federal government imposed such a quota requirement, observance of the quota would probably be reviewable under Title VI of the Civil Rights Act of 1968, but not under the "state action" statutes.

3. Tax Exemptions

In a recent article discussing government regulation of private schools, it was stated that "exemption from taxation does not transform a private university into a state institution."[188] There is substantial case law to support this assertion. In 1970, the Supreme Court decided *Walz v. Tax Commission,*[189] holding that a state did not violate the establishment clause of the first amendment by allowing a church and church-related property to be treated as tax exempt. Interpreting *Walz,* Professor Gallagher has argued that because the Supreme Court allows a religious body to secure a tax exemption from the state, it has determined that such an exemption is not a constitutionally significant benefit.[190] Such an interpretation is consistent with the Court's frequent insistence that the states not act to destroy the separation of church and state, and is buttressed by language in *Walz* holding that the state had maintained its "neutrality"[191] when granting the tax exemption. If a state can be viewed as neutral when allowing a tax exemption in an area where traditionally there has been suspicion of aid, that neutrality would seem to be even more evident when describing the relationship between the state and a non-sectarian private college.[192]

The education cases which have considered state action have almost all viewed tax exemption as essentially irrelevant, even in the presence of other regulations or aid.[193] A characteristic response is given in *Browns v. Mitchell:*

> Assuming that the special tax exemption is tantamount to a financial contribution and that it was intended to and does generally promote public education there is nothing in the record to indicate that this grant is or can be utilized in any way to dictate the administration of university affairs. And even more critically there is no suggestion that the claimed involvement is in any way associated with the challenged activity.[194]

Noteworthy in this response is the adoption of a standard consistent with requiring a specific relationship between the area of state involvement and the plaintiff's complaint.[195] In terms of state action it is difficult to hypothesize what allegation of wrong, if any, could logically involve a private college's tax exemption. It is potentially significant, however, that in at least two cases outside the area of education which dealt with instances of absolute exclusionary racial dis-

188 Faccenda & Ross, *Constitutional and Statutory Regulation of Private Colleges and Universities,* 9 VAL. L. REV. 539, 545 (1975).

189 397 U.S. 664 (1970).

190 *See* Gallagher, *"The Effect of the Proposed Equal Rights Amendment on Single-Sex Colleges,"* 18 ST. LOUIS L.J. 56 (1973).

191 397 U.S. at 669.

192 Gallagher, *supra* note 190, at 56-57.

193 Broderick v. Catholic University of America, 365 F. Supp. 147 (D.D.C. 1973). *See* Blackburn v. Fisk University, 443 F.2d 121, 123 (6th Cir. 1971): "State involvement sufficient to transform a 'private' university into a 'state' university requires more than merely . . . granting . . . tax exemptions." *Accord* Stewart v. New York University, —— F. Supp. —— (S.D.N.Y. 1976).

194 409 F.2d 593, 596 (10th Cir. 1969). But note that in Rakin v. University of Pittsburgh, 386 F. Supp. 972, 1004-05 (E.D. Pa. 1974), and in Isaacs v. Board of Trustees of Temple University, 385 F. Supp. 473, 485-93 (E.D. Pa. 1974), tax exemption is one of many factors considered in weighing "state involvement."

195 *See* note 184, *supra* and the discussion of financial aid which follows this treatment of tax exemption.

crimination, a court found state action based on tax exemption.[196] The significance of these and similar determinations may reside in the greater tendency to find "state involvement" outside the area of education.

4. Financial Support

Judge Friendly, hardly a whole-hearted advocate of state action in private education, has nevertheless asserted:

> Cases where the state has not merely stood aside and granted tax exemptions and the services customarily furnished to all citizens but has supplied pecuniary aid afford much stronger grounds for applying constitutional guarantees. Here the state has become an actor, at least of a sort.[197]

In making this assertion, however, he did not imply that every instance of financial aid would support a finding of jurisdiction. Instead, in his academic writings and in his opinions,[198] he has tested the significance of financial aid by considering its amount, source, and purpose. Although his method of analysis has not been adopted *in toto* by every court, it is in accord with existing Supreme Court precedent, and has been influential; thus, it provides a framework for discussion here.

a. *Amount*

In considering the significance of the amount of aid, Judge Friendly has stated:

> I would rank as another easy case for nonapplication of the [Fourteenth] Amendment one where the grants to an institution with practices not conforming to constitutional guarantees were miniscule in comparison with the institution's total expenditures, particularly where they were made on a nondiscriminatory basis to students or professors rather than to the institution itself.
>
> At the other end of the spectrum there are equally easy cases where action by the "private" institution stands no differently from that of the state. One such is where, although the original endowment was private, the relative amount of public support is now so great that in practical effect the state has simply chosen to allow private trustees to operate a public agency. Another is where the state supplies a private institution with plant and money to conduct a particular school, for example, of agriculture, mining, or forestry. In such cases the trustees are agents of the state and their activities must be judged in that light.[199]

The standard elucidated here, while seldom literally expressed in a judicial opinion, is consistent with the majority of decisions in the area of state financial

196 Falkenstein v. Dept. of Revenue, 350 F. Supp. 887 (D. Or. 1972) (three judge court), *appeal dismissed,* 409 U.S. 1799 (1973); Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974).

197 DARTMOUTH COLLEGE, *supra* note 51, at 24.

198 *See* note 116, *supra. See also* Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973); Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1970).

199 DARTMOUTH COLLEGE, *supra* note 51, at 25-26.

aid to private educational institutions. For example, the broad financial involvement of the Commonwealth of Pennsylvania in the affairs of Temple University, the University of Pennsylvania, and the University of Pittsburgh would justify the finding of "agency" under Judge Friendly's test, just as it did for the Pennsylvania federal courts in three cases.[200] Conversely, in *Wahba*[201] and *Grafton*,[202] it is clear that the relative insignificance of the state aid actually rendered contributed to the court's finding of no state action. In *Wahba*, the state founding did not stem from any broad categorical aid program. Instead, it consisted almost entirely of isolated instances of founding to individual researchers.[203] In *Grafton*, the state aid asserted consisted of a one-time bidding preference on a plot of land which had been exercised before the case arose,[204] and a continuing *per capita* state aid formula allowing $400 to the school for most matriculating students.[205]

Between the wide-ranging and substantial aid given in *Isaacs*, and the relatively small amount of categorical aid given in *Wahba*, there is considerable room for judicial discretion to find—or not find—grounds for state action. Although the only cases treating a private institution as a state actor have thus far involved other manifestations of state contact, most generally including some state interference with institutional policy-making, there can be no doubt that the size of the state's financial commitment, in and of itself, was significant to the court in *Isaacs*,[206] and was a clear contributory factor to the decision in *Rackin*.[207] The assertion that "receipt of money from the state is not, without a good deal more, enough to make the recipient an agency or instrumentality of the government . . ."[208] is probably over-general, since it fails to take into account the relevance of amount of monies received. It remains true, however, that even substantial grants have often been ignored by the courts in the furtherance of what appears to be a general policy of shielding private universities from state action claims.[209] But any institution which depends on massive infusions of governmental

200 *See* note 194, *supra*.
201 492 F.2d 76 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974).
202 478 F.2d 1137 (2d Cir. 1973).
203 492 F.2d at 102.
204 478 F.2d at 1141.
205 *Id.* at 1142. The court in *Grafton* did note that the $402 grant, considered in the light of a claim of racial discrimination in the admissions process, might support a finding of "state action." *Id.* at 1138. Other cases requiring more than a de minimis showing of financial support include Browns v. Mitchell, 429 F.2d 593 (10th Cir. 1969); Broderick v. Catholic University of America, 365 F. Supp. 147 (D.D.C. 1973). Stewart v. N.Y.U., —— F.2d —— (S.D.N.Y. 1976) has reached the same conclusion with regard to a "reverse discrimination" claim. *But see* Buckton v. National Collegiate Athletic Ass'n, 366 F. Supp. 1152, 1156 (D. Mass. 1973), which suggests that *any* state involvement in funding might give rise to state action jurisdiction.
206 385 F. Supp. 473 (E.D. Pa. 1974). There the court stated:

> The great bulk of the mutual benefits in the instant case can scarcely be described as 'incidental' . . . Chief among [the benefits received by Temple University] is the massive sums of public monies supplied by the Commonwealth . . . for operating expenses and capital development.

Id. at 483.
207 386 F. Supp. 992, 998-99 (E.D. Pa. 1974).
208 287 F. Supp. 535, 547 (S.D.N.Y. 1968).
209 *See, e.g.*, Sament v. Hahnemann Medical College and Hospital, 413 F. Supp. 434, 440 (E.D. Pa. 1976), where the annual receipt of more than $2,000,000 in state funds was found less than substantial. Similarly, the court in *Grossner*, found the annual receipt of several times that amount insignificant. 287 F. Supp. at 547 n.17.

aid to support its day-to-day operations would appear for that reason alone to stand some chance of being regarded as a state actor.

b. *Source*

In present case law, considerable uncertainty attaches to the significance of the source of governmental aid to colleges, universities, and professional schools. In a number of noneducation cases, courts in the First and Fourth[210] Circuits have found state action even though the funds supporting the jurisdictional finding came from the federal government. The Third Circuit apparently is in sympathy with this view, although it has not had occasion to rule on the matter directly.[211] On the other hand, educational cases in the Second,[212] Sixth,[213] and Tenth[214] Circuits have all held that state action must be grounded on state, rather than federal funding. A similar view has been expressed in several non-education cases in the Fifth and Ninth Circuits.[215]

It is unclear which of these positions will ultimately prevail in the education area. However, the view popularized in the Second Circuit, giving a liberal reading to the state action requirement appears to be more consistent with the general tendency of the education cases to seize on every available device to limit jurisdiction, and to adopt high thresholds of "state involvement" when examining jurisdictional claims. The position which examines governmental aid without reference to its source is difficult to justify for several reasons. If the state action doctrine is based on any underlying principle at all, that principle is that the private actor can be reached because of its analogical or instrumental relationship with the state. The fourteenth amendment does not apply to the federal government except through an indirect process of incorporation.[216] Furthermore, to the extent that a fourteenth amendment claim does involve the federal government, it would always appear amenable to other remedies. For example, in an education case involving federal funding, assuming that the funding meets cer-

210 The most notable of those cases involved aid to hospitals under the federally funded Hill-Burton program, which provided funds for hospital construction. The court found the receipt of these monies to constitute sufficient "state involvement" to justify a finding of state action. *See* Simkins v. Moses H. Cone Memorial Hospital, 323, F.2d 959 (4th Cir. 1963), *cert. denied,* 376 U.S. 938 (1964). A similar result was reached in a case involving federally funded housing. *See* McQueen v. Drucker, 317 F. Supp. 1122, 1133 (D. Mass. 1970), *aff'd,* 438 F.2d 781 (1 Cir. 1971).

211 *See* Isaacs v. Trustees of Temple University, 385 F. Supp. at 491-93 (E.D. Pa. 1974).

212 *See* Wahba v. New York University, 492 F.2d at 101; Grossner v. Trustees of Columbia University, 287 F. Supp. at 543.

213 *See* Blackburn v. Fisk University, 443 F.2d at 123 (6th Cir. 1971).

214 *See* Browns v. Mitchell, 409 F.2d 593, 595 (10th Cir. 1969).

215 *See* Norton v. McShane, 332 F.2d 855, 862 (5th Cir. 1964), *cert. denied,* 380 U.S. 981 (1965). For a Ninth Circuit, *see* Ascherman v. Presbyterian Hospital, 507 F.2d 1103 (9th Cir. 1974).

216 The obligations of the federal government to its citizens are defined by the Bill of Rights. Traditionally, however, fifth amendment "due process" guarantees have been held to include all the obligations imposed on the states by the fourteenth amendment. The reverse is not completely true, though, because the fourteenth amendment has not been held to incorporate every provision of the Bill of Rights, though most have been applied against the states in a piece-meal fashion. *See* Duncan v. Louisiana, 391 U.S. 145 (1968) for a detailed discussion of the relationship between the fourteenth amendment and the Bill of Rights, and a review of most of the relevant cases.

tain criteria,[217] the plaintiff will be able to pursue a remedy under Title VI of the Civil Rights Act of 1968. A universal feature of federal funding programs is that they supply aid subject to the limiting provisions of various civil rights enactments,[218] the majority of which provide some recourse to an injured beneficiary of that aid.

Despite the logic of tying state action exclusively to state funding, it is important to note that the other position has its own policy justification. *Simkins v. Moses H. Cone Memorial Hospital,*[219] the most frequently cited case in support of the position that funding from any governmental source can support a finding of state action, arose in the context of the civil rights struggle of the early 1960's. In holding a hospital accountable for its use of federal funds under a state action theory, the Supreme Court was clearly following in the activist tradition of *Kramer* and the various sit-in cases. Although recently the Supreme Court has done little to encourage that activist tradition, it may still survive in some of the circuits. It is possible that a court might want to bring *Simkins* into the area of education in order to prevent racial injustice. It is also possible that a court might follow the line of Justice Douglas in *DeFunis,* and decide that any racially-preferential policy of a private school constitutes such injustice. However, for reasons which will be set forth below, the second possibility seems unlikely to occur.

c. *Use and Purpose of Aid*

In a manner which may be peculiar to courts considering the specific question of aid to educational institutions, the purpose or use of the aid is often emphasized. At least in the Second Circuit, it has been emphasized since 1968. Thus, the Doctrine of *Powe v. Miles* antedated the *Jackson* decision by six years.

217 Specific regulations pertaining to a college or professional school's disbursement of federal funds and barred racially discriminatory practices are contained in rules promulgated by HEW. If promulgated in accord with the administrative requirements imposed by 42 U.S.C. § 2000 d-1 (1970), these regulations have the force of law.

Relevant regulations include 45 C.F.R. §§ 80.4(d)(2), 80.3(b)(6)(ii), 80.5(j) (1975). Section 80.4(d)(2) establishes a presumption that *any* aid will provide grounds for agency review unless the recipient can demonstrate "to the satisfaction of the responsible Department official" that the particular fund received is completely divorced from the alleged act of discrimination giving rise to a claim. Sections 80.3(b)(6)(ii) and 80.5(j) clearly ban "discriminatory policies" governing aid or admissions. But they specifically permit "affirmative action" programs without, however, indicating the proper scope of the term. As a consequence, it is unclear whether some, any, or all acts of "reverse discrimination" fall under the regulations' prohibitions.

Cases dealing with the problems of deciding when an institution has adequately proved that monies received have in "no way affect[ed] its practices" in other areas, or of deciding whether a particular "affirmative action" program violates anti-discrimination provisions have been scarce and in conflict with each other. *Compare* Stewart v. New York University, —— F. Supp. —— (S.D.N.Y. 1976) (applying the Doctrine of Powe v. Miles to find insufficient aid, and finding a racially-preferential admissions program not suspect) *with* Flannagan v. President and Directors of Georgetown College, —— F. Supp. —— (D.D.C. 1976) (finding sufficient aid, and finding that a racially-preferential scholarship program violated anti-discrimination regulations).

218 *See, e.g.,* Title VI of the Civil Rights Act of 1964 (prohibiting discrimination "under any program or activity receiving federal financial assistance"); Title VII of the Civil Rights Act of 1968 (prohibiting discrimination in employment on all projects financed with federal funds); Title VIII of the Civil Rights Act of 1968 (prohibiting discrimination, *inter alia,* in dwelling owned or financed by the federal government).

219 323 F.2d 959 (4th Cir. 1963), *cert. denied,* 376 U.S. 938 (1964).

The widespread use of this doctrine by a number of courts before *Jackson* testifies to the innate jurisdictional conservatism of state action law in the area of education. The doctrine is incompatible with the generalized approach to "state involvement" characteristics of noneducation cases such as *Shelley,*[220] *Lombard v. Virginia,*[221] and *Reitman v. Mulkey.*[222]

The doctrine has found its most influential expression in Judge Friendly's assertion that to find state action:

> [T]he state must be involved not simply with some activity of the institution alleged to have inflicted injury on a plaintiff but with the activity that caused the injury.[223]

A number of jurisdictions immediately employed this doctrine in education cases.[224] A few courts, however, appear to have rejected it.[225] To the extent that *Jackson* requires a particularized account of the involvement of the state in the alleged injury to support a state action claim, the *Powe v. Miles* Doctrine appears to be in accord with prevailing Supreme Court standards.

In tracing the source of monies received to determine the extent of state involvement, this doctrine has generally served to limit the availability of fourteenth amendment remedies to private claimants. It should be noted, though, that it can have the reverse effect when a very limited amount of aid is allocated for a specific purpose, and a potential beneficiary of that aid claims unequal access to its benefits. Professor Gallagher has written:

> Some circumstances, such as those evolving out of a particular grant program having a unique requirement or potential for entanglement, or unique public function aspects, or arising out of the peculiar one-to-one relationship between the recipient of subsidy and the public funding agency would require a conclusion that the receipt has been, as it were, 'bought' by the public and must be held to governmental standards.[226]

In a similar vein, the Second Circuit Court in *Grafton*[227] looking at the relationship between a state categorical grant based on the number of students admitted to a private law school and a fourteenth amendment claim based on unequal treatment with regard to suspension policies, stated:

> It could well be that such grants by the state, even though they represent only a small part of the cost of affording three years of legal training, would afford a ground for constitutional complaint if the charge here were an

220 334 U.S. 1 (1948).
221 373 U.S. 267 (1963).
222 387 U.S. 369 (1967).
223 Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968).
224 *See, e.g.,* Robinson v. Davis, 447 F.2d 753 (4th Cir. 1971); Blackburn v. Fisk University, 443 F.2d 121 (6th Cir. 1971); Brownley v. Gettysburg College, 338 F. Supp. 725 (M.D. Pa. 1972); Counts v. Voorhees College, 312 F. Supp. 598 (D.S.C. 1970). *See also,* Stewart v. New York University, —— F. Supp. —— (S.D.N.Y. 1976).
225 Isaacs v. Board of Trustees of Temple University, 385 F. Supp. at 440; Braden v. University of Pennsylvania, 477 F.2d 1 (3rd Cir. 1973); *c.f.* Flannagan v. President and Trustees of Georgetown College, —— F. Supp. —— (D.D.C. 1976).
226 Gallagher, *supra* note 192, at 60.
227 478 F.2d 1137 (2d Cir. 1973).

> admission policy discriminating against racial or religious groups . . . But while a grant or other index of state involvement may be impermissible when it 'fosters or encourages' discrimination on the basis of race, the same limited involvement may not rise to the level of 'state action' when the action in question is alleged to violate other constitutional rights.[228]

The meaning of this assertion is not clear. One reading supports the notion that a lower threshold for finding state action may be involved whenever racial discrimination is directly alleged in a complaint. Such a notion, and its limits, are discussed immediately below. The other reading which is suggested indicates that it is the relationship of admissions funding to admissions practices that triggers the state action finding. This interpretation is fully consistent with the doctrine of *Powe v. Miles.*

Seen in this light, any state aid going to the admissions policies or procedures of a college, or to its scholarship program, might have the effect of making the state a "joint participant" in those specific areas, thus stripping the private institution of its fourteenth amendment immunities when dealing with an applicant seeking admission or scholarship aid. The absence of cases reaching this conclusion suggests, however, that the failure to transform evidence of even fairly substantial state aid into evidence of state action may stem from an often concealed general policy in favor of preserving the private nature of private universities.

D. *Summary*

"State action" jurisdiction in the area of education has been considered by a large number of courts. In those cases not involving racial questions, it is clear that there is a general policy presumption against finding the requisites for state action when considering claims against private colleges, universities, and professional schools. That presumption is nearly absolute when the proposed standard for finding jurisdiction is the "public function" test. Courts which have considered allegations of "state involvement" with a private institution have displayed considerable deference toward the institutional defendant. But they have considered the particulars of the alleged involvement, and, in some instances, have found enough of a nexus between the private actor and the state to support a state action finding. In most instances, minimal requirements for that nexus include evidence of substantial state aid, or substantial input into institutional policy-making. In certain circumstances, less extensive involvement will also entail a finding of jurisdiction, provided that the state's involvement is in the particular area giving rise to the plaintiff's claim.

The general trend of state action decisions involving institutions of higher education is thus at odds with the liberal policies toward jurisdiction which have prevailed in the racial area since the 1940's. Although that liberal policy may be weakening today, it is still difficult to reconcile the two lines of jurisdictional case law reflecting different historical concerns and different policy considerations. Taken generally, the civil rights cases seem to support a societal desire to get

228 *Id.* at 1143.

at racial problems by opening the courts to private plaintiffs. But the education cases seem to center on a potentially conflicting desire: namely, the preservation of the privacy of certain institutions.

The extent to which allegations of "reverse discrimination" actually present the conflict between these two jurisdictional lines, and the extent to which case law and policy considerations suggest a resolution, are the subject of the final section of this study.

V. Jurisdiction Over "Reverse Discrimination" Claims in Higher Education

The apparent conflict between present jurisdictional standards in the area of higher education and post-1948 jurisdictional standards in the area of minority claims suggests a conflict between the judicial desire to insure institutional privacy, and the desire to afford broad protection to the disadvantaged. A court confronting the issue of "reverse discrimination" would appear to have three basic choices.

First, it could decide that "reverse discrimination" does involve a violation of those interests which the racially-concerned state action cases have traditionally protected. Additionally, it could decide that these interests were significant enough to outweigh the deference traditionally given to private institutions of higher education. Therefore, it could choose to find jurisdiction in circumstances of relatively little state involvement.

Second, a court could decide that "reverse discrimination" does involve traditionally protected racial interests, but conclude that these interests do not outweigh the traditionally protected interests of the colleges. It could therefore choose to find jurisdiction only in accord with neutral state action principles. Under such principles, the court, in balancing the respective interests of the parties, ends up extending no particular deference to either. As a consequence, it evaluates the state action claim according to the same standards employed in cases which are neither racial nor educational.

Finally, a court could decide that "reverse discrimination" does not involve traditionally protected racial interests, and leave existing educational deference untouched.

The judicial perspective on "reverse discrimination" as it relates to state action has not yet been clarified. Apparently, however, the third alternative mentioned above has been adopted by most courts, and is currently the favored position. The continued deference displayed in these cases toward private educational institutions suggests strongly that it will remain popular. At the least, it can be asserted with some certainty that "reverse discrimination" claims have not yet displayed any tendency to significantly expand state action jurisdiction.

Case law makes it fairly clear that few courts confronted with the question of racially preferential admissions or scholarship programs under the state action theory are likely to adopt a policy providing for broad jurisdictional opportunity. However objectionable some might find such programs, few would assert that the programs' challengers are worthy of more protection under the fourteenth amend-

ment than blacks fighting racially exclusionary policies. Despite developments outside the area of state action, it appears certain that blacks attempting to overcome traditional standards of deference in this area under the state action doctrine would find their task difficult.

Over the years, a number of admissions cases have been heard. Several have involved the claims of minority students systematically excluded from schools on the basis of race. The effect of the decisions rendered in both *Pennsylvania v. Board of Trustees*[229] and *Hammond v. University of Tampa*[230] was to permit black students to enroll at previously all-white colleges. These cases have been interpreted as indicating a more lenient jurisdictional standard in cases involving college admissions practices than in other litigation involving colleges.[231] Such an interpretation probably argues too much, since it is clear that there was long-standing and substantial state involvement in the affairs of Girard College in the *Board of Trustees* case, and municipal support for the defendant in *Hammond*. Several Second Circuit opinions not confronting the racial issue have contained dicta indicating a possible willingness to more strictly scrutinize the racially exclusionary practices of private colleges than they would the college's other affairs.[232] Judge Friendly has lent his support to the notion that when state aid is closely linked in time or effect to the private school's discriminatory conduct, traditional deference should be withdrawn.[233]

Despite these precedents, however, the weight of current opinion analyzing minority admissions claims under the state action doctrine appears to favor no relaxation of jurisdictional requirements. Such opinion must be balanced with the potential breadth of both the jurisdiction and remedy contained in *Runyon*[234] a private secondary school case successfully brought under § 1981. However, since it is not clear which institutions will eventually be affected by *Runyon,*[235] and because the case did not necessarily deal with every act of racial exclusion, much less "reverse discrimination,"[236] the current limits on "state action" jurisdiction are important.

229 353 U.S. 230 (1957).

230 394 F.2d 951 (5th Cir. 1965).

231 Note, *Private Universities: The Courts and the State Action Theories,* 29 WASH. & LEE L. REV. 320, 333 (1972) in which the writer states:

> The courts are clearly not as hesitant to apply the equal protection clause to a racially discriminatory college admissions policy as they are to apply the due process clause of the fourteenth amendment to private university disciplinary hearings.

232 *See, e.g.,* Wahba v. New York University, 492 F.2d 96 (2d Cir. 1974); Grafton v. Brooklyn Law School, 478 F.2d 1137, 1141-42 (2d Cir. 1973).

233 DARTMOUTH COLLEGE, *supra* note 51, at 22-23, 26.

234 96 S. Ct. 2586 (1976).

235 *Id.* at 2592:

> It is worth noting at the outset some of the questions that these cases do not present. . . They do not present any question of the right of a private school to limit its student body to boys, to girls, or to adherents of a particular religious faith, since 42 U.S.C. § 1981 is in no way addressed to such categories of selectivity. They do not even present the application of § 1981 to private sectarian schools that practice *racial* exclusion on religious grounds. Rather, these cases present only two basic questions: whether § 1981 prohibits private, commercially operated, non-sectarian schools from denying admission because they are Negroes, and if so, whether that federal law is constitutional as so applied.

236 It is unclear, for example, whether a private club can be reached at all under § 1981. "[These cases] do not present any question of the right of a private social organization on racial or any other grounds." *Id.* By analogy, it may be equally difficult to proceed under § 1981 against an academically selective, non-commercial, private college.

These limits were first set forth in *Guillory v. Administrators of Tulane University,*[237] where an initial decision by Judge J. Skelly Wright held Tulane University to the same admissions standards as the public colleges.[238] However, Judge Wright was later reversed,[239] and the school, on retrial, was allowed to continue its exclusionary policies.[240] This result, although unusual outside of the area of education, conforms with the traditional deference afforded schools. More recently, a private academy was held not to be a state actor for admissions purposes despite the receipt of incidental state funding.[241] Both cases appear to be consistent with the reluctance of the current Supreme Court to find state action when such a finding is avoidable. *Jackson* clearly demonstrates this reluctance in its requirement that plaintiff show a link between the state and the particular act upon which the complaint is based. It thus appears to be imparting a strict standard for jurisdiction traditionally associated with education into other areas. *Moose Lodge* suggests that the new emerging standard will deny minority plaintiffs their former jurisdictional advantages under the state action doctrine.

Thus, minority group attempts to secure jurisdiction under the state action doctrine against private colleges apparently will stand an increasingly difficult chance of succeeding. Moreover, it would be surprising if attempts made by members of "majority" groups were to stand a better chance of success. However justified such fourteenth amendment claims may be, it is clear that it is not likely they will trigger the state action equivalent of strict scrutiny.[242] Yet it is this sort of scrutiny which alone seems capable of counter-balancing the traditional deference toward institutions of higher education. Even in the Second Circuit, where minority group members might be granted expanded opportunities to secure jurisdiction, those in the "majority" have already been denied the same opportunity. Recently in *Stewart v. New York University,*[243] state action was not found in a "reverse discrimination" suit brought against a private law school. The decision was reached summarily, giving no indication that a "majority" group member was deserving of any special consideration, or that the school was subject to any particularly searching jurisdictional review because of the nature of the offense charged.

Whatever special consideration the Court is now likely to give the claims of minority victims of racial discrimination, it thus appears likely that it will not be manifested in the state action area. The continuing judicial deference to private colleges, universities, and professional schools compels a conclusion that

237 212 F. Supp. 674 (E.D. La. 1962), *rev'g on retrial,* 203 F. Supp. 855 (E.D. La. 1961), *judgment vacated and retrial ordered,* 207 F. Supp. 554 (E.D. La.), *aff'd per curiam,* 306 F.2d 489 (5th Cir. 1962).

238 203 F. Supp. at 858-59.

239 207 F. Supp. 554.

240 212 F. Supp. at 687.

241 McNeal v. Tate County School Dist., 460 F.2d 568 (5th Cir. 1971), *cert. denied,* 413 U.S. 922 (1973).

242 For a detailed discussion of this point, centering on the applicability of "strict scrutiny" tests where discrimination against whites is at issue, *see* Ely, *The Constitutionality of Reverse Racial Discrimination,* 41 U. CHI. L. REV. 723 (1974). For a somewhat different view, *see* Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment,* 61 NW. U. L. REV. 353 (1966).

243 —— F. Supp. —— (S.D.N.Y. 1976).

such special consideration is even more unlikely when these institutions are named as defendants.

At best, minority claimants challenging academic admission or scholarship policies can hope to secure a neutral state action evaluation. Present standards of neutrality demand a fairly close tie between the state and the alleged unconstitutional acts of the institutional defendant.[244] As a consequence, "state action" remains an unlikely source of relief. For those minority claimants subject to absolute exclusory practices, however, *Runyon* probably validates an alternative source of relief under § 1981, providing that the discriminating institution cannot justify its practices on religious grounds.[245] *Runyon* suggests that at least when discrimination is overtly directed at all members of a minority group, the policy factors which informed the racially-concerned "state action" cases of the last thirty years still have significance.

However, by effectively transferring jurisdiction over private acts of racial exclusion from the area of state action into the as yet undefined area circumscribed by § 1981, it is unclear whether the current Court is broadening its ability to reach non-exclusory private acts, or insulating those acts even more completely from judicial review. Despite a few cases granting majority plaintiffs causes of action under § 1981,[246] it is by no means certain that every act arguably denying a contractual right to a majority member will generate a § 1981 remedy, or even § 1981 jurisdiction.[247]

Moreover, it seems unlikely that the courts will find that majority claimants lodging a challenge to a racially preferential admissions or scholarship program have any special interests at stake. The interest the plaintiff seeks to protect is not special in the sense that it reflects a generalized political disadvantage deserving of governmental remediation. As applied to the state action doctrine, such remediation has centered on the granting of jurisdictional advantage. The majority claimant would appear to have no rational reason to expect that advantage and there is no present indication that the courts are willing to grant it. It therefore seems likely that such a claimant will find his state action path barred more completely than a minority plaintiff. Under the state action doctrine courts will be unlikely to revise existing standards of judicial deference toward institutions of higher education. Instead, contemporary judicial tendencies suggest that the opposite result is more likely, since cases like *Jackson* appear to be establishing deference to private actors as a universal norm.

The difficult question which remains is whether majority claimants deprived

244 *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), for what appears to be the current norm in noneducational, nonracially-discriminatory state action cases.

245 *See* note 234, *supra.*

246 *See* McDonald v. Santa Fe Transp. Co., 96 S. Ct. 2574 (1976), in which the Supreme Court explicitly held that "§ 1981 prohibits racial discrimination in private employment against white as well as non-whites," making it clear that the "statute explicitly applies to '*all* persons' . . . including white persons."

247 Section 1981 protects the right "to make and enforce contracts." As was noted in the *Runyon* dissent, the parameters of that right are difficult to define with certainty. *Id.* at 2605. As a consequence, "[i]maginative judicial construction of the word 'contract' is foreseeable." *Id.* at 2614. In his concurring opinion in *Runyon,* Justice Powell urged that the court's holding did "not imply . . . intrusive investigation into the motives of every refusal to contract by a private citizen." *Id.* at 2602. What conduct will eventually be adjudged to fall outside the scope of § 1981 is still uncertain, however.

of a state action remedy in all but those few instances in which expansive "state involvement" exists, should be able to pursue an action under § 1981, or some arguable equivalent. That question cannot be answered without examining the history, scope, and jurisdictional requirements of each alternative. As a general principle, it can be argued that the logic of affording minority claimants an alternative remedy to a state action claim is considerably stronger than it appears to be for their majority counterparts. For the minority claimant, such an alternative remedy is a manifestation of the same basic policies which led to the liberalization of the state action doctrine from *Shelley* through *Reitman*. It is completely consistent with the policy of racial remediation which was the *exclusive* focus of the civil rights cases from the passage of the post-civil rights amendments to *DeFunis*.[248]

On occasion that policy has had the effect of limiting private choice in order to provide equality for a minority of the population. The need for such protection has been apparent due to the absolute nature of the discrimination traditionally lodged against minority members. Such discrimination is easily tied to an underlying exclusionary motive. Discriminating parties have had no policy objectives to promote other than their own asserted right to discriminate. In certain peculiarly intimate relationships it is at least arguable that such a right exists and should be preserved.[249] Yet, for a considerable period of time it has been clear to courts and commentators alike that "associational rights" have been rendered less than absolute by the post-civil war amendments and a century of civil rights legislation.

To extend an equivalent remedy to the majority would ignore all of the policy considerations which went into the formation of the modern state action doctrine and misinterpret the historical thrust of the civil rights amendments. More importantly, perhaps, it would provide an even more expansive opportunity to overturn the private decision-making processes of traditionally self-regulating private universities. These processes, where "reverse discrimination" is alleged, involve something more than an asserted right to discriminate. They also involve an attempt to conform institutional procedures to the historical imperatives of the civil rights movement, as displayed in constitutional amendments, case law, legislation, and detailed administrative directives.

Although the conforming process involves choices which have the effect of excluding certain majority applicants, such exclusion is not prompted by a discriminatory motive. Nor does it have the effect of denying all members of a certain racial or ethnic category of a particular educational benefit. Instead, it results from a balancing of interests traditionally within the institution's prerogative. Qualifications for any educational benefit have never been generally

248 According to R. O'Neil, *all* of the racial discrimination cases heard prior to *DeFunis* dealt with the claims of individuals clearly members of minority groups. *See* R. O'NEIL, *supra* note 2, at 72.

249 Justice Powell wrote the following in his concurring opinion in *Runyon:*

> In certain personal contractual relationships . . . such as those where the offeror selects those with whom he desires to bargain on an individualized basis, or where the contract is the foundation of a close association . . . there is reason to assume that, although the choice made by the offeror is selective, it reflects "a purpose of exclusiveness" other than the desire to bar members of the Negro race.

viewed as being absolute. Arguably "qualified" individuals have always been excluded where demand for benefits has exceeded supply.

Civil rights law, when dealing with instances of racially-based exclusion, can at least identify a process which is not a good faith response to all minority demands lodged against an institution. Yet even where lack of good faith is implicit, the courts have been leery of elevating minority demands into actionable claims against colleges. To make *every* admissions rejection letter a political *thirteenth* amendment question would be a preposterous result.[250] It would not be justified by the need to overcome the continuing manifestations of past systematic racial oppression. It would threaten a practically unlimited scrutiny into the policy choices of private institutions of higher education.

VI. Conclusion

Bakke threatens to restrict the right of public institutions of higher education to establish preferential admissions of scholarship programs for minority students. A curtailment of that right is certain to send shock waves through private institutions maintaining or contemplating similar programs. An understandable fear exists that any restriction on the right of state institutions to practice "reverse discrimination" will ultimately lead to a similar restriction in the private sector.

Majority plaintiffs who seek to challenge "reverse discrimination" in the colleges, universities and professional schools have at their disposal several statutes under which they can seek to establish jurisdiction and the validity of their claim. The fears of those administering racially-preferential programs will not be completely assuaged until each of these statutory alternatives, including possible remedies under § 1981 and Title VI of the Civil Rights Act of 1968, fails. Yet a review of the substantial number of cases involving claims brought either by victims of racial discrimination or against private educational institutions under § 1983 gives considerable reason to believe that broad judicial policies presently exist which should immunize private colleges from a negative ruling in *Bakke*.

Section 1983, as judicially interpreted, makes a distinction between parties acting under "color of any statute, ordinance, regulation, custom, or usage of any state," and parties acting in a purely private capacity. Under the statute, only those parties who are held to be state actors are subject to the jurisdiction of the federal courts. Cases interpreting the statute have seldom found private colleges to be state actors, even when they have been accused of racially discriminatory practices.

If these decisions reflected a mechanistic analysis of the points of contact between the schools and the states in which they are situated, their general tendency would have little relevance outside the state action doctrine. It is clear

250 96 S. Ct. at 2602 (Powell, J., concurring). In *Newton,* Justice Harlan expressed the fear that "every college entrance rejection letter [might become] a potential fourteenth amendment question." 382 U.S. at 322. Professor Bickel feared that the same result might occur in every area of private education dependent on public funds:

> Private schools that draw on public funds might be considered public to the extent of being required, as the state is, to admit students without regard to race or religion . . . That, of course, is preposterous.

A. BICKEL, POLITICS AND THE WARREN COURT 204 (1965).

that neither § 1981 nor Title VI require any contact at all between private parties and a state to establish federal jurisdiction. An action failing under § 1983 would stand a real chance of being considered on its own merits under either of the other statutory alternatives.

Historically, however, it is § 1983 cases involving racial discrimination or involving institutions of higher education have not reached their results through any mechanistic analysis, or indeed, through any application of unitary and principled jurisdictional standards. Instead, the cases have employed differential standards in analyzing the extent of contact between various defendants and the states. These differential standards have served to promote certain policy objectives.

Since World War II, one of the chief objectives promoted has been the protection of minority members from racial injustice. As a result, most parties seeking to exclude minority members from their premises, or from the benefits of a contract, have had a particularly difficult time proving insufficient relationships with the state to justify a finding of no jurisdiction. In a practical, if not a formal sense, they have borne the burden of rebutting a presumption of state action because of the status of the plaintiffs and the nature of the offense charged.

Even before the passage of the fourteenth amendment, however, a policy was well entrenched in the law affording considerable judicial deference to the decisions of *private,* as distinguished from *public,* educational institutions. This attitude of deference has manifested itself most completely in cases involving institutions of higher learning. It has been transferred nearly intact into state action decision-making. As a consequence, parties seeking to sue private colleges under § 1983 have had a particularly difficult time demonstrating sufficient relationships between the college and the state to justify a finding of federal jurisdiction. The underlying although rebuttable presumption where private colleges have been concerned has traditionally been that they are not state actors. Otherwise, the argument goes, they would lose their right of independent decision-making which is their chief definitional characteristic, and is arguably their chief institutional end.

The weight of the state action regard for minority plaintiffs has seldom been judicially balanced with the obviously heavy regard afforded the privacy of private colleges. Significantly, however, in the few instances where the balance has been struck, institutional prerogatives have usually been respected. This result is not in keeping with the ordinary holdings in cases involving the claims of members of racial minorities against discriminating private parties. It suggests that the courts have continued to place a high value on institutional independence.

Such a value is not likely to be undercut by any decision in *Bakke.* Even assuming that the *Bakke* Court finds the preferential admissions policy employed by the University of California at Davis an unconstitutional exercise of state power, the history of the state action doctrine suggests that such a holding will not be extended to private colleges. Their discretion has traditionally been respected. Despite the recent decision in *Runyon,* it may still weigh more heavily with the courts than the demands of minority members seeking racial equality. Similar demands made by majority members are deserving of judicial consider-

ation. But no reason exists to believe that such consideration should be stronger than that afforded minority claimants.

Substantial arguments exist for asserting the contrary. It is clear that an institution seeking to justify racially preferential practices with obvious remedial purposes has a stronger justification for its policies than one offering the argument that it is acting only for reasons of its own privacy, without regard for any broader social objective. Various administrative regulations currently in effect tend to confirm the remedial motivation and "good faith" of the private colleges practicing reverse discrimination. It is also clear that the history of the post-civil war amendments and the judicial interpretations of remedies promulgated in their name supports a theory that minority members seeking to assert their right to equality under the law are entitled to more consideration than majority members of society who, by their very definition, are not similarly situated.

Summing up, it thus appears that the state action doctrine provides a method of analyzing current judicial attitudes toward racial discrimination on the one hand, and the institutional privacy of private colleges on the other. Balancing these attitudes within the specific context of "reverse discrimination," institutional privacy still appears to be the predominant value.

John A. Scanlan, Jr.