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## Constitutional Law - State Action - Racial Discrimination - Taxation - Charitable Deduction - Foundation

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# Recent Decisions

CONSTITUTIONAL LAW—"STATE ACTION"—RACIAL DISCRIMINATION—TAXATION—CHARITABLE DEDUCTION—FOUNDATION—The United States Court of Appeals for the Second Circuit has held that a private foundation's practice of racial discrimination could be, because of its tax-exempt status and other government contracts, "state action" sufficient to invoke the prohibitions of the fourteenth amendment.

*Jackson v. Statler Foundation*, 496 F.2d 623 (2d Cir. 1974).

"O ye gods, how monstrous if I am not allowed to give or not to give my own to whom I will."

Plato

The Reverend Donald L. Jackson presented the federal court system with one of the more difficult constitutional questions facing American jurisprudence today. The status and relationship of tax exempt foundations<sup>1</sup> to the equal protection clause of the fourteenth amendment have long been discussed by both legal commentators and members of the philanthropic community.<sup>2</sup> In *Jackson v. Statler Foundation*,<sup>3</sup> the United States Court of Appeals for the Second Circuit was given the rather unique opportunity of speaking to the topic generally.<sup>4</sup> The court held that given certain specific circum-

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1. "Private foundation" is defined in the INT. REV. CODE OF 1954, § 509(a) to include all tax-exempt organizations under § 501(c)(3) except (1) churches, hospitals, educational institutions, and certain government agencies; (2) organizations which normally receive more than one-third of their annual support from grants, gifts, contributions, membership fees, and sales receipts, and less than one-third of their annual support from gross investment income; (3) organizations closely affiliated with the above, i.e., operated by a "parent" organization to carry out a given charitable purpose; and (4) organizations for public safety testing. A more general definition provided by a foundation analyst is "a charitable organization that receives its contributions from relatively few sources and spends its funds through grants or through operating programs." Parrish, *The Foundation: "A Special American Institution,"* in *THE FUTURE OF FOUNDATIONS* 10 (F. Heimann ed. 1973).

2. See Clark, *Charitable Trusts, The Fourteenth Amendment and the Will of Stephen Girard*, 66 *YALE L.J.* 979, 1004 n.96 (1957) [hereinafter cited as Clark] for a discussion concerning early theory of tax exemptions as indicia of "state action." See also *THE FUTURE OF FOUNDATIONS* 5 (F. Heimann ed. 1973).

3. 496 F.2d 623 (2d Cir. 1974).

4. The plaintiff-appellant appeared *pro se*, both in the district court and on appeal. Presumably due to a lack of counsel, the complaint is almost barren of factual material

stances, primarily tax-exempt status, a private foundation's practices could appropriately be "state action."<sup>5</sup> While the implications of such a decision to the edifice of American philanthropy are obvious, of no less importance is the impact of the case upon the evolution of the "state action" doctrine.

Reverend Jackson, a black man, brought suit in the United States District Court, Western District of New York, alleging a practice of racial discrimination by thirteen prominent charitable foundations located in the Buffalo, New York, area.<sup>6</sup> The relief requested was both injunctive and declaratory: the revocation of the foundations' federal<sup>7</sup> and state<sup>8</sup> tax-exempt status; damages; and a judicial decree ordering forfeiture of all the foundations' assets to the U.S. Treasury.<sup>9</sup> Chief Judge John T. Curtin dismissed the complaint on

necessary for a complete resolution of the case. Missing are essential facts concerning the particular structures, policies, and activities of the defendant foundations. Citing *Haines v. Kerner*, 404 U.S. 519 (1972) (dismissal of prisoner's *pro se* complaint reversed on ground that such complaints are held to less stringent standards), the court applied a "generous" construction to appellant's complaint and did not hold the inadequacies fatal. Thus, the court was in a position to address the issue of private foundations and "state action" generally, without the boundaries imposed by a specific set of facts: Do fourteenth amendment proscriptions apply to private foundations that practice invidious racial discrimination? The court assumed *arguendo* the existence of racially discriminatory policies of employment, investment, and disbursement of funds.

5. The court stated:

In sum, we believe that if on remand the district court finds that the defendant foundations are substantially dependent upon their exempt status, that the regulatory scheme is both detailed and intrusive, that the scheme carries connotations of government approval, that the foundations do not have a substantial claim of constitutional protection, and that they serve some public function, then a finding of "state action" would be appropriate.

496 F.2d at 634.

6. The crux of Jackson's complaint was that the named foundations had discriminated against him, his children, and his own foundation by refusing to hire him as a director of their foundations, refusing scholarship aid to his children, and refusing grants to his foundation, all for reasons of race. In addition, Jackson charged the foundations with general discriminatory practice in matters of employment and investment. *Id.* at 625.

7. The federal tax provisions include INT. REV. CODE OF 1954, § 501(c)(3) (exempts income of the organization from taxation); *id.* § 170(c)(2) (itemized deduction for contribution allowed); *id.* §§ 642(c), 2055, 2106(a)(2) (allowing various deductions for estate tax purposes); *id.* § 2522 (allows deduction for purposes of gift tax).

8. New York state's definition of exempt organizations is in substance the same as the federal definition provided by INT. REV. CODE OF 1954, § 501(c)(3). The applicable state tax provisions are NEW YORK TAX LAW § 1230 (McKinney 1966) (exemption from local taxation); *id.* §§ 208, 615 (allow "piggy-back" treatment of federal income and corporate tax deductions); *id.* § 249-c (exemption of bequests from estate tax). While plaintiff-appellant did not specify the particular state or federal provisions he was challenging, the court assumed he was referring to these provisions. 496 F.2d at 626 n.4.

9. Both the district court and the court of appeals agreed that forfeiture of assets via

the pleadings, ruling that Reverend Jackson had no standing to challenge the foundations' tax exemptions,<sup>10</sup> that there were insufficient facts stated in the complaint<sup>11</sup> to found an action based on 42 U.S.C. §§ 1981 and 1985,<sup>12</sup> and that any action based on 42 U.S.C. § 1983<sup>13</sup> was barred for lack of "state action."<sup>14</sup> Reverend Jackson

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judicial decree was inappropriate, and dismissal of that particular claim was affirmed. See *Wolkstein v. Port of New York Authority*, 178 F. Supp. 209 (D.N.J. 1959).

10. The *Jackson* court dissolved the lower court's objections to appellant's lack of standing by a single reference to *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972), where the standing issue was treated at length. The *McGlotten* court, citing *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150, 152-53 (1970), as authority, granted standing to a plaintiff in circumstances very similar to *Jackson*.

11. Some of the factual deficiencies were as simple as establishing appellant's residency as Buffalo and expressing an intention to sue in a representative capacity. Others posed more serious problems, such as documenting the alleged discriminatory patterns of employment and investment and showing how appellant had been personally affected by such practices.

The court also stated that required joinder of the Secretary of the Treasury and the Tax Commissioner of New York as party defendants, would be necessary on remand. In a bit of judicial "coaching," the court suggested that joinder of these parties might completely eliminate the "state action" dispute on remand, on the basis of *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1971). There, the court revoked the tax-exempt status of private schools practicing racial discrimination in Mississippi, without ever reaching the constitutional question, and relying instead on a violation of "public policy" argument. See note 54 *infra*. Thus, it is not inconceivable that the *Jackson* court's emphasis will change on remand, from an equal protection argument to one founded in "public policy" considerations. Appellant's § 1983 claim, see note 13 *infra*, insures, however, that "state action" questions will still be of some importance on remand.

The dissent emphasized the fact that appellant Jackson was suing the foundations themselves, rather than the government agencies providing the tax benefits to those institutions. In *McGlotten* and the other cases dealing with problems similar to that in *Jackson*, the action was consistently brought against the responsible revenue official. This fact was not even mentioned in the majority opinion, perhaps because the proper defendant will be joined on remand when appellant is assisted by competent counsel.

12. 42 U.S.C. § 1981 (1970) provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1985 (1970) prohibits conspiracy among government officials to deny a person's civil rights.

13. 42 U.S.C. § 1983 (1970) provides:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

14. The "under color of the law" language found in the Civil Rights Acts has been inter-

subsequently appealed to the Second Circuit.<sup>15</sup>

### I. THE STATE ACTION REQUIREMENT

Since the prohibitions of the fourteenth amendment<sup>16</sup> do not reach purely private discriminatory conduct, a finding of some "state action" was essential before the court could consider appellant's contentions concerning either a § 1983 violation or a revocation of tax-exempt status.<sup>17</sup> The proclamation that private conduct is unaffected by fourteenth amendment proscriptions, first articulated by Justice Bradley in the historic *Civil Rights Cases*,<sup>18</sup> has echoed throughout courtrooms of this nation for more than a century.<sup>19</sup> Subsequent case law has established that racially discrimina-

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preted as being identical to the "state action" requirement necessary to invoke the fourteenth amendment. See *U.S. v. Price*, 383 U.S. 787, 794 n.7 (1965).

15. The opinion noted herein was written as a response to Judge Friendly's petition for consideration en banc, which was denied after a 4-4 vote. Judge Friendly's determined opposition to the result in *Jackson*, as evidenced by both his petitions for en banc consideration and his strong dissent, was to be expected. His often-quoted article, Friendly, *The Dartmouth College Case and the Public-Private Penumbra*, 12 *TEXAS L.Q.* 141 (1969), leaves no doubt of his strong opposition to judicial expansion of the fourteenth amendment, particularly into the area of private philanthropy.

16. U.S. Const. amend. XIV, § 1, provides in part that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

17. The state tax exemptions are subject to attack by the provisions of the fourteenth amendment. The federal income tax exemptions are reached by the due process clause of the fifth amendment, which prohibits the federal government from aiding private racial discrimination in any manner that would be prohibited to the states by the fourteenth amendment. See *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Green v. Kennedy*, 309 F. Supp. 1127, 1136 (D.D.C. 1970).

18. 109 U.S. 3 (1883). "Individual invasion of individual rights is not the subject-matter of the amendment." *Id.* at 11.

19. "The prohibitions of the Fourteenth Amendment have reference to 'state action' exclusively, and not to any action of private individuals." *Virginia v. Rives*, 100 U.S. 313, 318 (1880). "That amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). "[P]rivate conduct abridging individual rights does no violence to the Equal Protection Clause . . . ." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). See generally Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action*, 1965 *DUKE L. REV.* 219 [hereinafter cited as *Van Alstyne*]. For evidence that authors of the fourteenth amendment intended it to apply to purely private activity see Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 *YALE L.J.* 1353 (1964); St. Antoine, *Color Blindness But Not Myopia: A New Look at "State Action", Equal Protection, and "Private Racial Discrimination"*, 59 *MICH. L. REV.* 993, 995 n.9 (1961).

tory activity on the part of the state, whether it be by legislation,<sup>20</sup> judicial enforcement,<sup>21</sup> administrative decree,<sup>22</sup> or unauthorized acts of state agents,<sup>23</sup> will not be tolerated. Though clear at its inception, this public-private dichotomy has been rendered an anachronism by the vastly expanded activities of both state and federal governments. Hampered by complex state involvement in the lives of institutions and individuals,<sup>24</sup> the courts, using tools provided a century ago, are ill-equipped to separate public from private in a fashion that will give meaning to the fourteenth amendment and still retain sensitivity to both parties' constitutional claims.<sup>25</sup> According to the commentators, the "state action" doctrine is a hiding place for racism,<sup>26</sup> "a conceptual disaster area,"<sup>27</sup> "a map whose every country is marked incognito,"<sup>28</sup> and "a self-contradictory invention."<sup>29</sup> In short, it is a "doctrine in trouble."<sup>30</sup>

20. *Reitman v. Mulkey*, 387 U.S. 369 (1967) (provision in California constitution allowing owner's absolute discretion in sale of real property and forbidding subsequent legislation altering such right held invalid).

21. *Shelley v. Kraemer*, 334 U.S. 1 (1948) (judicial enforcement of racially restrictive covenants constitutes "state action").

22. *Robinson v. Florida*, 378 U.S. 153 (1964) (health department regulation requiring separate toilet facilities for blacks and whites is "state action" encouraging discrimination).

23. *Griffin v. Maryland*, 378 U.S. 130 (1964) (private amusement park contracted with deputy sheriff to enforce park's discriminatory policy).

24. In describing "state action" analysis, one commentator stated,

that the task is not that of testing a set of facts against a well-defined (or even ill-defined) "concept," but rather that of noting and clarifying yet another of the wonderfully variegated ways in which the Briarean state can put its hundred hands on life.

Black, *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 89 (1968) [hereinafter cited as Black].

25. The scholarly commentary critical of the current methods of handling "state action" questions is voluminous. Authors' opinions vary from suggesting minor adjustments in emphasis to advocating the elimination of the concept completely. The following works handle the issue most completely, and are among those sources most often cited: Black, *supra* note 24; Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 46 S. CAL. L. REV. 1003 (1973) [hereinafter cited as Burke & Reber]; Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966) [hereinafter cited as Silard].

26. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1383 (1964).

27. Black, *supra* note 24, at 95.

The field is a conceptual disaster area; most constructive suggestions come down, one way or another, to the suggestion that attention shift from the inquiry after 'state action' to some other inquiry altogether.

28. *Id.*

29. "[I]t is essentially a self-contradictory invention, the use of which is unredeemed by the myriad of *ad hoc* 'state action' roulettes establishing reviewability on a crazy-quilt basis." Van Alstyne, *supra* note 19, at 245.

30. Black, *supra* note 24, at 91.

But, however inept this doctrine may be, its underlying considerations are still a critical part of the political philosophies of this nation<sup>31</sup> and must be incorporated into decisions involving issues as presented in *Jackson*.

Early in its analysis, the *Jackson* court drew a critical distinction between "state action" cases involving alleged racial discrimination and those cases involving other constitutional claims.<sup>32</sup> Since the vast majority of "no state action" findings emerge from equal protection cases where race was not a factor,<sup>33</sup> it appears that courts use a different standard for "state action" where violations based on race are alleged.<sup>34</sup> Whatever mysterious degree of state involvement is required for a finding of "state action," clearly a lesser amount is needed if racial discrimination is alleged. This double standard undermines the precedential value of racial "state action" cases used to support non-race allegations and also casts doubt on the wisdom of dissenters who attack "state action" opinions with criteria and holdings from non-racial cases.

The analysis used by the *Jackson* court has been labeled the "incremental approach"<sup>35</sup> or the "multiple factor analysis"<sup>36</sup> and had its origin in *Burton v. Wilmington Parking Authority*.<sup>37</sup> Given

31. "Thus while the search for a merely formal connection—for 'state action'—is misleading, the search for the values which stand behind the state action limitation is indispensable." Van Alstyne & Karst, *State Action*, 14 *STAN. L. REV.* 3, 7 (1961). The notion of a pluralistic society is fundamental to American political philosophy. Equally important is the belief that certain aspects of private citizens' lives are just that—private, and beyond the scope of governmental scrutiny. Such values motivated the development of the "state action" limitation, and while the mechanics of applying the doctrine may have become distorted, the importance of the concept has not diminished with time.

32. 496 F.2d at 628.

33. *Id.* at 629. The *Jackson* court cites a multitude of recent non-race "state action" cases in which various courts made findings of "no state action." Most of them were due process or freedom of speech claims.

34. See *Loving v. Virginia*, 388 U.S. 1 (1967); *United States v. Wiseman*, 445 F.2d 792, 795 n.3 (2d Cir.), cert. denied, 404 U.S. 967 (1971); *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968); *Bright v. Isenbarger*, 314 F. Supp. 1382, 1392-93 (N.D. Ind. 1970), *aff'd*, 445 F.2d 412 (7th Cir. 1971). *Contra*, *Seidenberg v. McSorleys' Old Ale House, Inc.*, 317 F. Supp. 593, 598 n.7 (S.D.N.Y. 1970) (argues that the same standard should be used for determining existence of "state action" in cases involving sex as used in those concerned with race).

35. Note, *Academic Freedom*, 81 *HARV. L. REV.* 1045, 1057 (1968).

36. Basset, *The Reemergence of the "State Action" Requirement in Race Relations Cases*, 22 *CATHOLIC U.L. REV.* 39, 65 (1972).

37. 365 U.S. 715 (1961). In *Burton*, the state of Delaware had leased space in a public parking garage to a restaurant which subsequently practiced racial discrimination. In reversing the findings of the lower court, the Supreme Court totalled the various minute contacts

a complex fact situation with no direct or obvious control by the state, the court lists the various subtle connections between the actor and the state. Although no single connection would be sufficient, the cumulative effect of these numerous contacts is used to support a finding of "state action." The *Burton* approach is an acknowledgment that modern "state action" problems are difficult to analyze by facile formula.<sup>38</sup> Disconcerting as it might be to those who prefer their constitutional law in neat conceptual packages,<sup>39</sup> "[o]nly by sifting facts and weighing circumstances can the non-obvious involvement of the state in private conduct be attributed its true significance."<sup>40</sup>

## II. THE FIVE FACTOR ANALYSIS

The court began its "sifting and weighing" of specific facts by isolating the five factors considered germane to a determination of "state action": 1) the degree to which the private organization relies on governmental aid; 2) whether the assistance given connotes governmental approval of the organization's activities, or whether such

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between the restaurant and state to find sufficient "state action." For a critical commentary of the Court's analysis, see Lewis, *Burton v. Wilmington Parking Authority—A Case Without Precedent*, 61 COLUM. L. REV. 1458 (1961).

38. A recurring criticism of judicial handling of "state action" problems is the use of a mechanical, formula-type analysis. Some commentators stress the extreme importance of factual distinctions in "state action" cases, and warn that transfer of word-formulas from one factual setting to another causes grossly distorted results. See Burke & Reber, *supra* note 25, at 1012. Others suggest that such formulas are mere verbiage, hiding the real basis of the decision—the courts' analysis of the competing interests involved. See 25 VAND. L. REV. 1237 (1972).

39. The extreme difficulty of "fitting" the illusive body of "state action" theory, already deformed by a century of judicial torturing, to today's complex private-state relationships has caused more than one commentator to cry aloud in anguish. The remark of the distinguished commentator, Herbert Wechsler, is typical: "[they are] decisions that for me provide the hardest test of my belief in principled adjudication . . ." Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 26 (1959).

40. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). The Supreme Court's open-ended "sifting and weighing" language enabled considerable expansion of the doctrine to include many relationships that traditionally would not have constituted significant "state action." While the *Jackson* court pays lip-service to the *Burton* approach, 496 F.2d at 627, its actual analysis closely follows the traditional formula style, using criteria developed in somewhat similar factual contexts. See note 68 *infra*, and accompanying text. The court's adherence to a more structured, precedential-based analysis, despite the almost unanimous criticism of such an approach both by commentators and courts, might be explained as a response to the challenge by fellow judges of the soundness of the result reached. See note 15 *supra*, and accompanying text.



aid is given to all without such connotation; 3) the extent to which the private organization serves a public function; 4) the extent and intrusiveness of government regulation of the activity; 5) the extent to which the organization can claim recognition as a "private" organization based on associational or other constitutional grounds.<sup>41</sup>

### A. *Reliance on Governmental Aid*

An inspection of the history and evolution of the American foundation quickly reveals the symbiotic relationship such organizations have with the system of taxation.<sup>42</sup> While it is difficult to ascertain the motivations of contributors to private foundations, the court suggested that the available empirical data indicated that tax benefits were a prime consideration.<sup>43</sup> Unlike public charities, foundations are financially dependent upon endowments or upon a very small number of wealthy contributors (often corporations),<sup>44</sup> and tax considerations are likely to be far more important to those who give to foundations.<sup>45</sup>

Despite the absence of conclusive data, it seems that the court was on firm ground in concluding that many private foundations depend heavily on governmental aid. That conclusion assumes that

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41. 496 F.2d at 629.

42. At the turn of the century, the five general foundations then in existence were much the creation of classic philanthropists such as Andrew Carnegie. By 1930, despite growing concern with social problems, there were fewer than 200 foundations. The next three decades saw a skyrocketing tax rate, due primarily to World War II; in response there was a phenomenal growth in the number of tax-exempt foundations, until in 1964 they totaled 15,000. Of the 26,000-plus foundations in existence today, 92% were formed in the last three decades. B. WHITAKER, *THE PHILANTHROPOIDS: FOUNDATIONS AND SOCIETY* 13 (1974).

43. 496 F.2d at 629-30 n.8.

44. Gifts by corporations are sometimes vulnerable to attack as being *ultra vires*. The primary justifications that a corporate officer can give courts and disgruntled stockholders is that these gifts both enhance the image of the corporation in the general community and provide attractive tax advantages. If deductibility of these gifts were removed, corporate gifts to foundations would likely cease.

45. The average citizen who gives a few dollars per year to the Heart Fund, muscular dystrophy telethon, or other similar public charity, is probably not motivated by tax considerations. There is substantial evidence that as the amounts given increase, and as one moves into the realm of the "professional givers" who endow foundations and universities, the reliance on tax benefits increases as well. See *Bob Jones Univ. v. Connally*, 341 F. Supp. 277 (D.S.C. 1971), *rev'd on other grounds*, 472 F.2d 903 (4th Cir.), *cert. granted*, 414 U.S. 817 (1973) (tax-exempt status revoked by Internal Revenue Service because of racially discriminatory admissions policy of university). There, the university submitted numerous affidavits from financial supporters stating that their giving would cease if contributions would no longer be deductible.

a tax exemption can be classified as a "governmental aid" or subsidy. This concept has only recently found favor in some lower courts,<sup>46</sup> and has never been addressed directly by the Supreme Court in a context similar to *Jackson*. All courts agree that direct aid by the government, be it in the form of appropriations,<sup>47</sup> private use of the eminent domain power,<sup>48</sup> or judicial enforcement of discriminatory activity,<sup>49</sup> is governmental aid sufficient to bring its beneficiaries within fourteenth amendment restrictions. But these same courts have consistently found tax exemptions standing alone to be insufficient for "state action."<sup>50</sup> While the courts recognize that a tax exemption is a contact between state and private party, they deny that it is the kind or quality of involvement that constitutes the "significant"<sup>51</sup> state action needed to trigger fourteenth amendment proscriptions.<sup>52</sup> Tax deductions and exemptions are "indirect" aid and have avoided constitutional objections because of their blanket applicability and neutral application.

### B. Connotes Government Approval

Various courts in a number of recent cases, however, have revoked

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46. The following cases contain dicta that tax-exempt status is an affirmative form of government aid: *Falkenstein v. Department of Revenue*, 350 F. Supp. 887 (D. Ore. 1972); *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972); *Bob Jones Univ. v. Connally*, 341 F. Supp. 277 (D.S.C. 1971), *rev'd on other grounds*, 472 F.2d 903 (4th Cir.), *cert. granted*, 414 U.S. 817 (1973); *Pitts v. Department of Revenue*, 333 F. Supp. 662 (E.D. Wis. 1971).

47. *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir. 1945) (private library aided by substantial public funds must comply with fourteenth amendment in employment practices).

48. *Smith v. Holiday Inns of America, Inc.*, 336 F.2d 630 (6th Cir. 1964) (motel's acquisition of building site via eminent domain power conferred through its participation in redevelopment project was "state action").

49. See note 21 *supra*.

50. *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (tax-exempt status of property owned by religious organizations was not "state action"); *Marker v. Shultz*, 485 F.2d 1003 (D.C. Cir. 1973) (tax-exempt status of labor unions held not to constitute "state action"); *Eaton v. Grubbs*, 329 F.2d 710, 713 (4th Cir. 1964) ("While a tax exemption, by itself, may not impose upon the recipient the restrictions of the Fourteenth Amendment . . . [a tax exemption may attain significance when viewed with other attendant state involvements"); *Guillory v. Administrators of Tulane Univ.*, 212 F. Supp. 674, 685 (E.D. La. 1962) ("a simple tax benefit [does not evoke] state action. [Otherwise] every legal creature would be within the proscription of the Fourteenth Amendment").

51. "There is no point in doing the usual dance about that word, 'significant,'" says one commentator. Black, *supra* note 24, at 84. Only significant "state action" will trigger fourteenth amendment proscriptions. However, the failure of the courts to provide even vague clues as to what is and what is not significant has left the term devoid of meaning.

52. For an excellent discussion of this issue see Note, *The Internal Revenue Code and Racial Discrimination*, 72 COLUM. L. REV. 1215 (1972).

the tax privileges of private organizations that practice racial discrimination.<sup>53</sup> Using one of several theories,<sup>54</sup> these courts managed to provide the missing nexus and dissolve the neutral aura of tax exemptions. A very sophisticated analysis of this type was put forth by *McGlotten v. Connally*,<sup>55</sup> an opinion heavily relied upon by *Jackson*. The *McGlotten* court stated that a plaintiff, in order to establish "state action," must show that the questioned revenue provision did in fact aid, encourage, or perpetuate racial discrimination. To meet this burden, a plaintiff must first show that the defendant organization had a tax-exempt status, benefitted financially from that status, and practiced racial discrimination. Plaintiff can use the theory, espoused by courts and commentators alike, that tax exemption, at least in economic effect, is very similar to a government subsidy.<sup>56</sup> Plaintiff's second burden is to show that the revenue

53. See cases cited note 46 *supra*.

54. In *Green v. Connally*, 330 F. Supp. 1150, 1157-61 (D.D.C.), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1971), the court used statutory construction to remove tax-exempt status from private schools that discriminate racially. The court stated that the "charitable" sections of the Internal Revenue Code are subject to the definitional mandates of the common law of charitable trusts. Thus, just as racially discriminatory trusts have been found to be by definition noncharitable, private schools that practice similar discrimination cannot qualify as "charitable" for INT. REV. CODE OF 1954, § 170.

A second theory is that granting federal tax benefits violates federal public policy, as expressed in the United States Constitution and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(d)-(4) (1970). In *Tank Truck Rentals, Inc. v. Commissioner*, 356 U.S. 30 (1958), the Court held that fines imposed on owners of overweight trucks were not deductible as "ordinary and necessary" business expenses under INT. REV. CODE OF 1954, § 23(a)(1)(A), because such an allowance would frustrate defined "public policies." This public policy argument has become known as the "Tank Truck Doctrine." See *Green v. Connally*, *supra* at 1161-64.

A third theory finds that federal tax benefits to discriminatory organizations violate 42 U.S.C. § 2000(d) (1970). The important language of that section reads:

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.

Federal tax benefits have been found to be the type of "assistance" prohibited by this section. See *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972).

While such theories are generally outside the scope of this note, they should be recognized as means by which the withdrawal of tax benefits are being used to fight racial discrimination. Given the unwieldiness of the "state action" doctrine, it would not be surprising to see the appellant in *Jackson* take one of the above tactics on remand.

55. 338 F. Supp. 448 (D.D.C. 1972).

56. Tax exemptions operate as a subsidy which must be offset by higher taxes on non-exempt persons and organizations. These privileges cannot be excused as insignificant, for many charitable institutions could not survive if they were withheld. Clark, *supra* note 2, at 1004 n.96. See also Wolfman, *Federal Tax Policy and the Support of*

provisions in question were included in that group of exemptions/deductions passed by Congress for the sole purpose of encouraging a particular activity or behavior. *McGlotten* recognized that while some benefits may be given in an effort to reach an equitable measure of net income,<sup>57</sup> and some reflect an administrative decision that net income is so minimal as to make collection economically infeasible, there are also those exemptions and deductions which exist solely to encourage a certain form of behavior.<sup>58</sup> Finally, a plaintiff must show that tax regulations required an organization, in order to acquire exempt status, to be certified or approved by the Internal Revenue Service.<sup>59</sup> If these three burdens are met, a plaintiff has bridged the gap between the "neutral" tax exemption and the institution's racial policy. By specifically listing the organization as exempt, the government has in effect stamped it "Government Approved," a stamp that must surely be interpreted as an endorsement of the organization's activities.<sup>60</sup> The question in very general terms becomes: Is this the type of value-free, across-the-board exemption provided to anyone who happens to fall into the category, or is this a privilege granted to encourage the activities of specific groups with approved policies?

The circumstances of *Jackson* fit nicely into the analytical framework established in *McGlotten*, and the court uses this approach in finding governmental aid and approval embodied in the tax benefits. There is very little doubt concerning Congressional motives for exempting foundation income and providing deductions for do-

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*Science*, 114 U. PA. L. REV. 171, 172 (1965). In his concurring opinion in *Walz v. Tax Comm'n*, 397 U.S. 664, 690 (1970), Justice Brennan noted that while tax exemptions and subsidies were similar in terms of economic impact, they were qualitatively different. Subsidies, he argued, give more power to the grantor to direct the uses of the money, while exemptions are "passive assistance."

57. Examples would be INT. REV. CODE OF 1954, § 162 (deduction of business expenses); *id.* § 172 (provision for net operating loss carryovers); *id.* §§ 1301-05 (income averaging).

58. Examples of such provisions are INT. REV. CODE OF 1954, § 163 (deduction for mortgage interest); *id.* § 167(k) (accelerated depreciation for rehabilitation of low income rental housing); *id.* § 169 (amortization of air pollution control facilities).

59. In *McGlotten*, the court pointed to INT. REV. CODE OF 1954, § 170(c)(4) as specifying fraternal orders as eligible to carry on the prescribed activities. In addition, each fraternal order had to acquire a letter of determination from the Internal Revenue Service before contributions could be deducted.

60. There is the additional element that tax "aid" to an institution must be seen as aiding the purpose for which that institution exists. While an individual may use "freed assets" from a tax benefit for any number of purposes, an institution is limited to the purpose for which it was created. Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1103 (1960).

nors.<sup>61</sup> And, like fraternal orders, private foundations must apply to the Internal Revenue Service for tax-exempt status, specifically stating the "benefits, services, or products"<sup>62</sup> provided.

The connotation of governmental approval will serve to distinguish *Jackson* from its most formidable obstacle, *Moose Lodge No. 107 v. Irvis*.<sup>63</sup> In *Moose Lodge*, the Supreme Court, for the first time in seventy years,<sup>64</sup> handed down a "no state action" decision in a racial context. Irvis was refused service as a guest in the restaurant of the Moose Lodge, a private club. With the plaintiff arguing that Pennsylvania's grant of a state liquor license to the club supplied the needed contact for "state action," the Court, after addressing the narrower issue of standing,<sup>65</sup> held that Irvis had failed to demonstrate sufficient state involvement. The Court pointed to the apparent neutrality surrounding the issuance of such a license and the lack of any benefit to the state which would make the state a joint venturer with the Lodge. It is precisely these elements of mutual benefit and government approval that distinguish *Jackson* from *Moose Lodge*.

### C. Public Function

That a private organization performs a public function or acts as a surrogate for the state is an established basis for finding "state action."<sup>66</sup> The *Jackson* court seemed somewhat reticent to pursue a

61. The original congressional motive in passing the general charitable deduction provisions of § 170 was to provide an incentive for the citizen-taxpayer to donate to organizations promoting the general welfare, thus relieving the government's burden. See 55 CONG. REC. 6728 (1917) (remarks of Senator Hollis on passage of the original provision, Revenue Act of 1917, § 1201(2), 40 Stat. 330). A comment made by Mortimer Caplin, while Commissioner of the Internal Revenue Service, supports this view: "The promotion of private philanthropy through tax forgiveness is a basic tenet of the United States tax system." FOUNDATIONS: TWENTY VIEWPOINTS 18 (F. Andrews ed. 1965).

62. See "Application for Recognition of Exemption," Form 1023, Form 872-C, and Instructions 1023, Department of the Treasury, Internal Revenue Service.

63. 407 U.S. 163 (1972).

64. *Hodges v. United States*, 203 U.S. 1 (1906) (no "state action" in slavery-type labor contracts of private corporation). See Black, note 24 *supra*, at 84-85. *But cf.* Palmer v. Thompson, 403 U.S. 217 (1971) (blanket closings of city pools found to be "state action," but not discriminatory "state action" since all citizens were affected equally).

65. Since appellant Irvis had never applied for membership in the Lodge, he was denied standing to question its discriminatory membership policy. That Irvis brought the action as an individual and refused to broaden it into a class action also contributed to the Court's narrow scope of inspection. 407 U.S. at 166. See 8 NEW ENG. L. REV. 251 (1973).

66. The "public function" criterion originated in *Marsh v. Alabama*, 326 U.S. 501 (1946), where a privately owned "company town" was held to perform a "public function," making

public function argument because the foundations' specific activities were not set out in full in the complaint. Assuming the defendant foundations are not part of that small clique of eccentric-purposed organizations not designed to benefit the general public,<sup>67</sup> the court may have overlooked a very strong argument. Despite criticism,<sup>68</sup> the "public function" test is solidly engrained as a valid criterion in "state action" litigation and is especially relevant to the private foundation: Even though foundations are privately controlled, their primary purposes and functions are self-avowedly public.<sup>69</sup> In addition, foundation activities are often coterminous with government participation in particular projects and, indeed, often reach similar dimensions.<sup>70</sup> It is regrettable that the court gave the

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the fourteenth amendment applicable to its officials' actions. In *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968), the test was broadened considerably. A shopping mall was found to be the "functional equivalent to the business district in *Marsh*," thus limiting the Plaza's right to curtail first amendment rights. *Id.* at 318. *Contra*, *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). The test has also been used, as in *Jackson*, in cases using a "cumulative contacts" analysis. For a thorough look at the "public function" test from two perspectives see *Bell v. Maryland*, 378 U.S. 226 (1964), particularly the dissent by Justice Black, *id.* at 318, who authored the opinion in *Marsh*.

67. Of the 26,000-plus foundations in the United States, most provide grants for such traditional efforts as education, welfare work, and scientific research. Some foundations deal in less traditional areas, for example, the foundation which provided funds for French peasants to dress as matadors or hula maidens. The donor's intent was to prove that there was no degradation to which the French would not stoop for money. Another example is the fund to provide one baked potato at each meal for every girl at Bryn Mawr. Parrish, *The Foundation: "A Special American Institution,"* in *THE FUTURE OF FOUNDATIONS* 17 (F. Heimann ed. 1973).

68. The inability to draw the line between what is and what is not a "public function" serves as the basis for most of the criticism directed at the test. Commentators state that once activities other than those performed exclusively by the government are included in "state action," one cannot consistently exclude any other "function" as nonpublic. The great problems experienced by the courts in applying the "business affected with the public interest" test to a legislature's power to regulate business are indicative of the problems of the "public function" criterion. See *Nebbia v. New York*, 291 U.S. 502, 531-36 (1934). See also Note, *Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 1069 (1963). While commentators recognize the vitality of the "public function" test in a limited number of situations, see note 66 *supra*, many recommend limiting it to those instances where, in a conscious effort to circumvent the fourteenth amendment, states place a public facility in private hands. See *Burke & Reber*, *supra* note 25, at 1067. While there is much merit in the commentators' remarks concerning the "public function" test, most of their criticism is inapplicable when applied to the "private" foundation. See note 69 *infra*.

69. The literature dealing with the subject of foundations, much of it financed and/or published by foundations themselves, talks in terms of the "public trust" under which these organizations operate. The following comment is typical: "Tax-exemption is conferred for the purpose of facilitating the performance of a public task by a private agency." Parrish, *The Foundation: "A Special American Institution,"* in *THE FUTURE OF FOUNDATIONS* 27 (F. Heimann ed. 1973). See also comments by the noted foundation spokesman, Andrews Emerson, in *THE FOUNDATION DIRECTORY* 45 (2d ed. Walton Lewis ed. 1964).

70. In the words of one commentator, "It would be incongruous if philanthropy, while

“public function” test so little attention. As an established “state action” indicator, a showing of public function should have been used in support of the court’s tax-benefit analysis, making the court’s holding more palatable to those who may oppose expansion of the “state action” concept.

#### D. Governmental Regulation

The *Jackson* court then examined the extent and intrusiveness of the governmental regulatory scheme affecting foundations, a scheme established primarily by the Tax Reform Act of 1969.<sup>71</sup> To illustrate the pervasiveness of the government’s regulation of foundation affairs, the court cited rules of mandatory public disclosure of foundation assets<sup>72</sup> and prohibitions against self-dealing and nepotism,<sup>73</sup> and pointed to the extensive surveillance over foundation activities by special I.R.S. agencies.<sup>74</sup> One wonders, however, if the court’s efforts are not misdirected, since the “regulatory scheme” criterion of “state action” developed from litigation in which state regulations forced or strongly encouraged a private citizen to practice discrimination. For instance, the state regulation in *Robinson v. Florida*<sup>75</sup> required restaurants to maintain separate washroom facilities for blacks and whites. While agreeing that the state regulation did not prescribe segregated eating facilities, the Court, finding

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operating with the helping hand of government and performing the same essential functions, was to be held to a lesser standard.” Clark, note 2 *supra*, at 1010.

71. Act of Dec. 30, 1969, Pub. L. No. 91-172, 83 Stat. 487, amending INT. REV. CODE OF 1954. For a detailed discussion of the substance and effect of the 1969 Tax Reform Act, which was directed primarily at private foundations see *Private Foundations and the 1969 Tax Reform Act*, 7 COLUM. J. LAW & SOC. PROB. 240 (1971) [hereinafter cited as *Private Foundations*]. The effects of this Act are generally beyond the scope of this note.

72. INT. REV. CODE OF 1954, § 6104. The court also quoted at length *id.* § 6056, which requires a foundation to file annually a detailed financial report with the Internal Revenue Service.

73. INT. REV. CODE OF 1954, §§ 4945(a)-(d), (g), prohibit grants for activities not contemplated by the tax exemption. These provisions, designed to prevent frivolous grants as a form of reward, are a response to the notorious Ford Foundation grants to Senator Kennedy’s staff, following his assassination. McGeorge Bundy, then president of the foundation, said the grants were generally available to men “talented, dedicated, devoted, and concerned,” but was hard pressed to explain why, out of the whole nation, all eight recipients were chosen from one small Kennedy headquarters office in Washington. *Private Foundations, supra* note 71, at 251.

74. See CCH PRIV. FOUND. REP. ¶ 6502. INT. REV. CODE OF 1954, § 4940 provides for a 4% excise tax on the net investment income of private foundations to finance the “watch-dog” activities mandated by the 1969 Tax Reform Act.

75. 378 U.S. 153 (1964).

“state action,” said that requiring restaurant proprietors to keep separate sanitary facilities was so burdensome as to encourage discrimination. As in other “state action through regulation” cases, the scheme was one that strongly encouraged private discrimination. In the *Jackson* case, the public disclosure, self-dealing, and nepotism regulations simply had very little relevance to the encouragement of discrimination and thus to the “state action” issue,<sup>76</sup> except perhaps to show additional foundation-government involvements.

### E. Constitutional Privilege

The final factor analyzed by the court was the private foundations’ right to assert a particular privilege of privacy in associational or other similar constitutional terms. The *Jackson* court here appeared to recognize the numerous commentators who have strongly advocated the adoption of a “balancing of respective constitutional interests” test as the most appropriate form of analysis in “state action” questions.<sup>77</sup> Some commentators have even suggested that judges often do employ a “balancing of interests” technique in the actual decision-making process of a particular case.<sup>78</sup> When two parties with competing constitutional claims stand before the court, it is clear that the rights of one must be made subordinate to the other. Thus, courts have been forced to establish priorities among constitutional rights. The *Jackson* court, pointing to strong authority in the area, concluded that the freedom to dispose of one’s property as desired is indeed a protected right,<sup>79</sup> but this right cannot be exercised in a racially discriminatory manner if the exercise in any way involves the state.<sup>80</sup> The court’s analysis presumes the ulti-

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76. Judge Friendly noted that the court ignored this essential distinction between a regulatory scheme in which a private institution plays a part in an offensive government policy and one which is designed to prevent the institution’s acting in an abusive way . . . .

496 F.2d at 639.

77. See note 25 *supra*.

78. See note 38 *supra*.

79. See *Gordon v. Gordon*, 332 Mass. 197, 124 N.E.2d 228, cert. denied, 349 U.S. 947 (1955) (court enforced a will provision passing property to daughter on the condition that she marry a member of the Jewish faith); *United States Nat’l Bank v. Snodgrass*, 202 Ore. 530, 275 P.2d 860 (1954) (court, in giving effect to testator’s intent, enforced a will with “anti-Catholic” provisions but did not find “state action”).

80. *Evans v. Newton*, 382 U.S. 296 (1966) (land grant by testator for “white only” park to be administered by city held invalid); *Pennsylvania v. Board of Directors*, 353 U.S. 230 (1957) (part of lengthy litigation concerning the will of Stephen Girard and the provisions



mate issue in the case—that private foundations and the government are sufficiently entangled to trigger the fourteenth amendment. The real significance of the discussion by the court is that the court gives formal recognition to the weighing of constitutional interests as a critical factor in “state action” analysis. Clearly the court correctly isolated the appropriate interests involved, and the great weight of authority supports its choice of equal protection as the prevailing interest.<sup>81</sup>

### III. *Jackson's* IMPACT

When the various aspects of the court's “state action” analysis are pieced together, a logic emerges that amply supports the rather limited holding of *Jackson*.<sup>82</sup> The opinion is, as the dissent points out, somewhat open-ended. But that is the nature of the beast, for “state action” analysis is typically directed at distinguishing other cases rather than relying on precedent. In *Jackson*, once the theory of tax exemption as a subsidy is accepted, the result is inevitable. The court's argument is supported by ample precedent, and the major cases seemingly inconsistent are easily distinguished,<sup>83</sup>

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endowing a private school for white males only); *Shelley v. Kraemer*, 334 U.S. 1 (1948). As stated in *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1971):

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

*Id.* at 1163.

81. See cases cited note 80 *supra*.

82. The court made a finding of “state action” only as to the Buffalo Foundation, whose directors were appointed by various government officials, a situation clearly controlled by *Pennsylvania v. Board of Directors*, 353 U.S. 230 (1957) (that an official agency of the Commonwealth of Pennsylvania was a trustee of Girard College was sufficient in itself to invoke “state action”). The dissent agreed with the panel's opinion concerning the Buffalo Foundation. As to the other defendant foundations, the court remanded the case to the district court for additional fact-finding, holding only that the actions of a foundation could, given certain circumstances, constitute “state action.”

83. The dissent, relying on *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), disagreed with the *Jackson* court's tax-benefit analysis. *Walz* concerned a taxpayer's challenge to New York and federal tax exemptions to religious organizations; plaintiff argued that such exemptions violated the establishment clause. Denying plaintiff relief, the court analyzed government relationships with private organizations via the tax system, but did so from an altogether different perspective than the *Jackson* court. The *Walz* holding that a tax exemption to a religious

yet one is left with the feeling that something is amiss. This uneasy feeling is compounded by Judge Friendly's heated attacks on the panel's opinion<sup>84</sup> and his utilization of the dissenter's old standby—"staggering implications" extending far beyond the facts of the case. Other factors, such as the sensitive nature of "state action" questions generally and the status of American philanthropy as a "sacred cow," more concretely explain the feeling that "something is surely wrong here."<sup>85</sup> A moment's reflection, however, reveals that the effect of the *Jackson* decision on the great majority of American foundations will be minute at best.

First, foundations will be insulated from spurious suits both by the cost of litigation and by the heavy burden of proof imposed upon a plaintiff. The difficulty of showing a discriminatory pattern of investment will probably be formidable: The mere allegation that a grant was denied due to race, without evidence that the foundation's policy was and continues to be one of racial discrimination, will go nowhere. Assume, for instance, that a plaintiff can show that a particular foundation has never awarded a grant to a member of a minority group, does not employ members of minority races, and has not invested in any minority controlled businesses. The foundation could defend itself by stating that the alleged pattern was not the result of any definite policy of the foundation, but was simply *de facto*. The burden would be on the plaintiff, according to *Snowden v. Hughes*,<sup>86</sup> to show that the discrimination was purposeful. Thus, foundations with no official policy of discrimination would be protected, regardless of the nature of their past activities.

Second, the claim is unfounded that foundations, in order to be

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organization is not excessive entanglement or support in first amendment terms has very little relevance to the *Jackson* equal protection decision that the tax-exempt status of private foundations may be "state action." See also notes 61-64 *supra* and accompanying text.

84. Judge Friendly goes as far as to liken the panel to a spider, and the defendant foundations to its helpless prey. "Although the defendants . . . may somehow manage to escape from the net the panel has woven . . ." 496 F.2d at 637 (footnote omitted).

85. One commentator stated that the paradox in "state action" decisions is that even though courts are not overruling any precedents or radically departing from previous styles of "state action" analysis, ". . . somehow a feeling persists, and is passionately expressed that massive Doric columns are falling." Black, *supra* note 24, at 88-89.

86. 321 U.S. 1 (1944).

But a discriminatory purpose is not presumed . . . there must be a showing of clear and intentional discrimination . . . Thus the denial of equal protection by the exclusion of negroes from a jury may be shown by extrinsic evidence of a purposeful discriminatory administration of a statute fair on its face.

*Id.* 8-9 (citations omitted).

capable of defending against such actions, will be required to spend precious dollars on additional record-keeping. The Tax Reform Act of 1969 already requires that foundations keep extremely detailed records concerning the issuance of each grant and the acceptance of every contribution.<sup>87</sup> In the unlikely event that a civil rights suit should be filed against a foundation, the data needed to defend against such an action would already have been compiled, eliminating extensive administrative cost.

Third, there is the oft-expressed warning that the "constitution-izing" of private philanthropy will destroy much of the pluralistic value of these institutions.<sup>88</sup> While the value of private foundations to a pluralistic society cannot be underestimated, one must wonder how much of this value would be lost by curtailing foundations that practice malicious racial discrimination. The ability of a foundation to support innovative or highly controversial research will not be hindered by the *Jackson* decision. Nor will support of extremely eccentric, highly unpopular, or anti-establishment activities in any way be suppressed.<sup>89</sup> Such freedom of activity provides the real merit of foundations in a pluralistic society, and it will continue unfettered.

Fourth, there is the very legitimate concern that the holding in *Jackson* will frustrate those discriminatory foundations that serve socially beneficial causes.<sup>90</sup> For instance, it would be difficult for a

87. See notes 71-74 *supra* and accompanying text.

88. One of the virtues of the private foundation, in pluralistic terms, is its ability to work effectively in areas prohibited to the government. As Judge Friendly said,

[I]t is the very possibility of doing something different than government can do, of creating an institution free to make choices government cannot—even seemingly arbitrary ones— . . . which stimulates much private giving and interest.

Friendly, *The Dartmouth College Case and the Public-Private Penumbra*, 12 TEXAS L.Q. 141 (1969). Some commentators call the charitable contribution "the older generation's substitute for civil disobedience," thus recognizing the foundation's role as a viable alternative for donors frustrated by the incompetency or inefficiency of modern government. Bittker, *Charitable Contributions: Tax Deductions or Matching Grants?*, 28 TAX L. REV. 37, 61 (1972). There are those scholars, however, who warn that generalizations concerning the pluralistic benefit of foundations will not sustain the institution against the type of attacks currently being made against it. "Clichés about the virtues of pluralism are no substitute for real thinking." THE FUTURE OF FOUNDATIONS 5 (F. Heimann ed. 1973).

89. See *Private Foundations*, *supra* note 71, at 241. For an argument that the private foundation is necessary to the continuation of democratic society see L. STONE, FEDERAL TAX SUPPORT OF CHARITIES AND OTHER EXEMPT ORGANIZATIONS: THE NEED FOR A NATIONAL POLICY, *Hearings on H.R. 13,270 Before the Committee on Ways and Means on the Subject of Tax Reform*, 91st Cong., 1st Sess., pt. 1, at 155, 167 (1969).

90. In reference to charitable trusts that benefit minority groups, Clark has stated: "The

foundation providing grants exclusively to black college students or chicano children to circumvent the holding of *Jackson*. Although a purely mechanical application of the court's holding might remove tax benefits from such organizations, it is more likely that, by sifting and weighing circumstances, a court might reach a more just result.<sup>91</sup> Thus, the only foundations definitely vulnerable to *Jackson* are those with *maliciously* discriminating racial policies. It is critical to note that *Jackson* does not invalidate such foundations or interfere with the rights of a donor to dispose of his property in a discriminating fashion—it merely denies the helping hand of a tax exemption or deduction in the process.

Many of the potential problems raised by *Jackson* could be eliminated by more affirmative action on the part of the Internal Revenue Service. While some commentators predict that application of equal protection standards to any portion of the Internal Revenue Code will produce a "parade of horrors,"<sup>92</sup> such fears may be more imagined than real. In the case of foundations, the Internal Revenue Service has been provided with all the tools necessary to effectively screen foundations before granting tax-exempt status.<sup>93</sup> Repeated involvement as a party defendant in litigation similar to *Jackson* should inform the Internal Revenue Service that granting exempt status should involve more than ritualistic filing followed by an almost automatic approval.<sup>94</sup> A sincere effort by the Internal Revenue Service to enforce the federal public policy against racial discrimination would solve many potential problems. The Internal Revenue Service has been able to inspect other institutions before

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argument, so cynically made in other areas of race conflict, that segregation benefits both races, has a ring of truth in this context." Clark, note 2 *supra*, at 983.

91. A court, using the "sifting and weighing" technique espoused in *Burton*, could consider such factors as the specificity of the class which the fourteenth amendment was particularly designed to protect, the enormous amount of foundation wealth available to members of majority races, and the foundations' "charitable" nature in the common law sense.

92. Most of these criticisms fail to take into account the critical distinctions drawn by *McGlotten* concerning different "types" of tax exemptions and deductions. For example, a business that practices racial discrimination would not lose its "ordinary and necessary" business expense deduction, for such a deduction is not of the "government approved" character singled out in *McGlotten*. See Note, 50 N. CAR. L. REV. 1132, 1146 n.61 (1972).

93. The information which foundations are required to file with the Internal Revenue Service would be sufficient to allow at least a preliminary judgment concerning exempt status. The 4% excise "surveillance" tax paid by foundations could be used to help finance such investigations. See note 74 *supra*.

94. See 45 TEMP. L.Q. 657, 660 (1972).

granting exempt status<sup>95</sup> and there is no reason why it cannot be done with foundations.

### CONCLUSION

While the thunder produced by racial conflicts of past decades has died down, and the more glaring and disabling forms of racial discrimination are being eliminated, the job for which the fourteenth amendment was fashioned is far from done. Officially supported racial discrimination must be completely removed from the body politic of the United States, and methods and attitudes such as those developed by the *Jackson* court go far toward effecting a cure. The importance of *Jackson* is not to be found in its effect on American philanthropy as a whole, for such influences are likely to be minimal. The real significance of the case is that it demonstrates the courts' continual willingness to adopt new methods, however unique, for combatting racial discrimination. The *Jackson* court is the most prestigious body to recognize the "tax-benefit" analysis of *McGlotten*; such recognition continues the trend toward using the Internal Revenue Code as a powerful new weapon to combat racial discrimination.

Permeating the court's opinion is the attitude that racial discrimination, even when only indirectly supported by governmental activity, is an abomination that cannot and will not be tolerated. Thus, the court reveals a strong sensitivity to the real spirit and purpose of the fourteenth amendment.<sup>96</sup> Some commentators have shown concern that recent cases such as *Moose Lodge* indicate the judiciary's change of attitude toward the issue of racial discrimination.<sup>97</sup> These same commentators foresee a softening of judicial attitudes toward minor racial discrimination, along with a reluctance to further expand the "state action" concept to cope with more subtle forms of officially supported racial discrimination. The attitude of the *Jackson* court may help to ease such fears.

David Whitney

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95. In response to litigation, the Internal Revenue Service issued press releases and subsequent revenue rulings stating that exemptions to private segregated schools would cease, and that an inspection of a school's racial policy would be made in the future before exempt status would be granted. I.R.S. News Release, July 10, 1970, 7 CCH 1970 STAND. FED. TAX REP. ¶ 6790; I.R.S. News Release, July 19, 1970, *id.* ¶ 6814.

96. See Note, *The Decline and Fall of the New Equal Protection: A Polemical Approach*, 58 VA. L. REV. 1489, 1510 (1972). See also Black, *supra* note 24, at 97-98.

97. See 8 N. ENG. L. REV. 251 (1973); 26 RUTGERS L. REV. 888 (1973).