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# Utility Terminations: Pay Now and Litigate Later (in the State Courts)

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congressional intent. If Congress believes that additional exemptions are needed, let Congress provide those exemptions.[54]

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## UTILITY TERMINATIONS: PAY NOW AND LITIGATE LATER (IN THE STATE COURTS)

*Jackson v. Metropolitan Edison Co.*, 95 S. Ct. 449 (1974)

On October 11, 1971, electrical service to petitioner's residence[1] was terminated by respondent utility because of alleged nonpayment. Since she received no notice or hearing before the termination,[2] petitioner brought suit seeking damages and injunctive relief under 42 U.S.C., section 1983.[3] Petitioner claimed that she was entitled[4] to reasonably continuous electrical service[5] and

54. Congressional intent may in fact already have been demonstrated by the rejection of H.R. 327 and H.R. 9738, 92d Cong., 1st Sess. (1971), both of which would have prohibited agency disclosures of names and addresses to mail order firms.

1. Until 1970 petitioner received electric service to her home under an account with respondent in her own name. Respondent terminated this account because of asserted delinquency in payments, and a new account was opened in the name of another occupant of the residence.

2. On two occasions prior to the termination, however, petitioner had been notified of irregularities in the account of a co-occupant who had moved from her residence in August 1971. From that time until the date of termination, petitioner allegedly received no bills from respondent. Petitioner believed that the co-occupant had paid all prior bills.

3. 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." *See generally* Black, *Foreword* to *The Supreme Court 1966 Term*, 81 HARV. L. REV. 69 (1967); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960).

4. See note 28 *infra* and accompanying text.

5. The basis for this claimed entitlement is 66 PA. STAT. §1171 (Purdon 1973), which provides: "Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities . . . . Such service also shall be reasonably continuous and without unreasonable interruptions or delay . . . ." This and similar statutes recognize that utility service is vital to the public interest. See note 76 *infra*. Nevertheless, it has been held that a utility's duty to render adequate service does not bar termination for nonpayment. *See* Note, *Fourteenth Amendment Due Process in Terminations of Utility Services for Nonpayment*, 86 HARV. L. REV. 1477, 1480 & n.13 (1973). But such termination has often been restricted to situations in which a close relationship exists between present services and the

that because respondent's termination was permitted by its general tariff on file with a state commission,[6] the termination was "state action" that deprived her of property without due process of law. Respondent answered that its actions were private conduct against which the fourteenth amendment offered no shield.[7] The trial court ruled that because respondent's termination practices did not constitute state action, such conduct need not comply with due process strictures.[8] The United States Court of Appeals for the Third Circuit affirmed.[9] On certiorari, the United States Supreme Court HELD,[10] Pennsylvania was not sufficiently connected with the challenged termination to attribute respondent's conduct to the state for purposes of the fourteenth amendment.

The due process clause of the fourteenth amendment has been the legal foundation from which recent attacks have been launched against utility

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source of the debt. Thus, termination has been held an improper sanction for failure to pay for other merchandise or different services purchased from the utility. Owens v. City of Beresford, S.D. , 201 N.W.2d 890 (1972) (termination of electrical and telephone service for failure to make payment for garbage collection service held unlawful). A few courts have held that if the customer is paying current bills, utility services may not be terminated for overdue statements. See Note, *Public Utilities and the Poor: The Requirement of Cash Deposits from Domestic Consumers,* 78 YALE L.J. 448, 454-55 (1969). But in the instant case petitioner continued to receive free electric services from the respondent, making no offer to pay current bills. Brief for Respondent at 8, Jackson v. Metropolitan Edison Co., 95 S. Ct. 449 (1974).

6. 66 PA. STAT. §1142 (Purdon 1973) provides that every public utility shall file tariffs with the public utility commission as provided by its regulations. The utilities are required to keep copies of such tariffs open for public inspection. Section VIII of the Commission Regulation on Tariffs stipulates: "Every public utility that imposes penalties upon its customers for failure to pay bills promptly shall provide in its filed tariffs a rule setting forth clearly the exact circumstances and conditions in which the penalties are imposed . . . ." Thus the purpose of Tariff Regulation VIII is to insure that public utilities inform their patrons of any possible penalty for failing to pay their bills. Pursuant to the regulation, the respondent filed its Tariff No. 41, which provided in rule 15 (issued April 30, 1971, effective June 30, 1971): "Company reserves the right to discontinue its service on *reasonable notice* and to remove its equipment in case of nonpayment of bills . . . ." (emphasis added). The Pennsylvania Public Utilities Commission approved respondent's tariff with the above provision, but in so doing only focused on the respondent's request for a rate increase. 95 S. Ct. at 455-56.

7. U.S. CONST. amend. XIV, §1 provides in pertinent part: "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." The "under color of" state law requirement of 42 U.S.C. §1983 and the "state action" requirement of the fourteenth amendment have been construed to be of the same breadth and scope. United States v. Price, 383 U.S. 787, 794 n.7 (1965). But at least one court has indicated that the "color of state law" test may be more demanding. Lavoie v. Bigwood, 457 F.2d 7 (1st Cir. 1972).

The fourteenth amendment does not afford protection against private discrimination, however "discriminatory or wrongful." Therefore, respondent must be an actor "under color of state law" before its termination practices are measured against due process standards.

8. Jackson v. Metropolitan Edison Co., 348 F. Supp. 954 (M.D. Pa. 1972).

9. 483 F.2d 754 (3d Cir. 1973).

10. 95 S. Ct. 449 (1974).

terminations for nonpayment.[11] Because the fourteenth amendment restricts only state governments,[12] a claim alleging deprivation of rights guaranteed by that amendment must demonstrate some kind of "state action."[13] In this manner, certain actions of private individuals or organizations significantly involved with the state may be considered state action and thus subjected to constitutional constraints.[14] Therefore, mere state involvement in,[15] aid to,[16]

11. Most decisions have held that the due process protections of the fourteenth amendment do apply to terminations of utility services for nonpayment. *See* Palmer v. Columbia Gas Co. of Ohio, Inc., 479 F.2d 153 (6th Cir. 1973); Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir. 1972), *vacated as moot,* 409 U.S. 815 (1972); Salisbury v. Southern New England Tel. Co., 365 F. Supp. 1023 (D. Conn. 1973); Bronson v. Consolidated Edison Co., 350 F. Supp. 443 (S.D.N.Y. 1972); Hattell v. Public Serv. Co., 350 F. Supp. 240 (D. Colo. 1972); Stanford v. Gas Serv. Co., 346 F. Supp. 717 (D. Kan. 1972). *Contra,* Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638 (7th Cir. 1972) (en banc), *cert. denied,* 409 U.S. 1114 (1973).

The due process clause and the equal protection clause of the fourteenth amendment have also been used to challenge other practices of public utilities, but most of these attacks have been unsuccessful. *See, e.g.,* Particular Cleaners, Inc. v. Commonwealth Edison Co., 457 F.2d 189 (7th Cir.), *cert. denied,* 409 U.S. 890 (1972) (security deposit requirement); Martin v. Pacific N.W. Bell Tel. Co., 441 F.2d 1116 (9th Cir.), *cert. denied,* 404 U.S. 873 (1971) (hiring practices); Kadlec v. Illinois Bell Tel. Co., 407 F.2d 624 (7th Cir.), *cert. denied,* 396 U.S. 846 (1969) (termination for misuse of telephone service). *But see* Sokol v. Public Util. Comm'n, 65 Cal. 2d 247, 418 P.2d 265, 53 Cal. Rptr. 673 (1966) (termination for illegal use of telephone service).

12. The fourteenth amendment is designed to protect individuals from state action, whether overt or covert, which deprives them of fundamental rights. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972). See note 7 *supra.* The amendment's framers were wary of a too powerful and dominating government. They were also concerned with the values of pluralism, prerogatives of private property, and individual autonomy. *See generally* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity,* 74 COLUM. L. REV. 656 (1974).

13. The Supreme Court initially took the position that acts of private individuals or entities were beyond the reach of the fourteenth amendment (and thus of §1983) in the Civil Rights Cases, 109 U.S. 3, 17 (1883). In those cases the Court limited federal action by holding that Congress and the courts, in attacking oppresive racial prejudice, are restricted to assaults upon discrimination that is fostered by some action on the part of the states.

The most litigated clauses of the fourteenth amendment guarantee equal protection and due process of law. For a detailed analysis of theories that may be used to apply constitutional restrictions to private activity, see Note, *supra* note 12.

14. For instance, in Shelley v. Kraemer, 334 U.S. 1 (1948), the Supreme Court held that racially restrictive covenants in real estate deeds could not be enforced in state courts because such enforcement would constitute state action in support of the discrimination. Thus, direct state intervention was no longer necessary to constitute state action. *See generally* Black, *supra* note 3; Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment,* 30 S. CAL. L. REV. 208 (1957); Lewis, *supra* note 3; Van Alstyne & Karst, *State Action,* 14 STAN. L. REV. 3 (1961); Williams, *The Twilight of State Action,* 41 TEX L. REV. 347 (1963).

15. *See, e.g.,* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (restaurant leased parking facility from state); Male v. Crossroad Associates, 469 F.2d 616 (2d Cir. 1972) (privately owned apartment complex built pursuant to urban renewal project).

16. Where a state has granted a private party an unusual power that would not otherwise be available to it, the exercise of that power has been held to be state action. *See, e.g.,* Collins v. Viceroy Hotel Corp., 338 F. Supp. 390 (N.D. Ill. 1972); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970) (statutory innkeepers' liens authorizing landlords to seize belongings of tenants without a hearing).

or encouragement[17] of private discrimination or deprivation of property might constitute "state action," even without direct state participation.[18]

The Supreme Court has declined to set out a precise definition of state action.[19] It is settled, however, that the state action, and not the private action, must be the subject of the complaint.[20] Never before has the Supreme Court determined whether public utilities are state actors.[21] Prior to the instant case, lower courts were forced to adopt theories from state action analyses in other contexts to determine whether the pattern of particular state-conferred powers

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17. *See, e.g.,* Cooper v. Aaron, 358 U.S. 1 (1958) (state officials encouraged disobedience of court orders); Smith v. Allwright, 321 U.S. 649 (1944) (state support of all-white primary elections).

18. Note, *supra* note 12, at 677-80. In the 1960's it was argued that the legislative history of the fourteenth amendment showed that it was designed to reach racial discrimination in certain public accommodations irrespective of "state action," but this theory was apparently rejected. Bell v. Maryland, 378 U.S. 226, 303-04 (1964) (Goldberg, J., concurring). *See also* Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee,* 66 COLUM. L. REV. 855 (1966). For a history of judicial enforcement under the fourteenth amendment, see Comment, *Current Developments in State Action and Equal Protection of the Law,* 4 GONZAGA L. REV. 233, 235-39 (1969).

The requirement of "state action" recently has been held to include what are ostensibly private acts. *See, e.g.,* Reitman v. Mulkey, 387 U.S. 369 (1967) (racially motivated refusal to sell private home); Evans v. Newton, 382 U.S. 296 (1966) (exclusion of blacks from privately operated park); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (refusal to serve blacks at privately operated restaurant).

19. See Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972); Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961). Both Courts have expressed dissatisfaction with the elusiveness of the concept. *See, e.g., Burton* at 728 (Harlan, J., dissenting, stated that the majority found state action by "undiscriminatingly throwing together various factual bits and pieces"). Nevertheless, in Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968), a lower court stated: "[T]he state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury." See Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972), *noted in The Supreme Court, 1971 Term,* 86 HARV. L. REV. 50, 70 (1972); Reitman v. Mulkey, 387 U.S. 369, 380 (1967); Martin v. Pacific N.W. Bell Tel. Co., 441 F.2d 1116, 1118 (9th Cir.), *cert. denied,* 404 U.S. 873 (1971). See note 23 *infra.*

20. See note 7 *supra.*

21. More precisely, the United States Supreme Court has never found a utility to be a state actor for purposes of applying the fourteenth amendment's due process clause, although the Court did hold, in Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952), that a utility was a state actor for purposes of applying the first and fifth amendments. See Note, *Constitutional Law — Obtaining Due Process in Public Utility Pretermination Procedures,* 76 W. VA. L. REV. 492 n.16 (1974).

The Court probably granted certiorari in the present case in response to a mounting conflict in the lower federal courts on the issue. *See, e.g.,* Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638 (7th Cir. 1972) (en banc), *cert. denied,* 409 U.S. 1114 (1973) (utility termination held not state action); Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir.), *vacated as moot,* 409 U.S. 815 (1972) (utility termination held state action); Particular Cleaners, Inc. v. Commonwealth Edison Co., 457 F.2d 189 (7th Cir.), *cert. denied,* 409 U.S. 890 (1972) (requirement for security deposits held not in violation of due process); Martin v. Pacific N.W. Bell Tel. Co., 441 F.2d 1116 (9th Cir.), *cert. denied,* 404 U.S. 873 (1971) (utility employment practices not state action); Kadlec v. Illinois Bell Tel. Co., 407 F.2d 624 (7th Cir.), *cert. denied,* 396 U.S. 846 (1969) (utility termination for misuse of service not state action). *See also* Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), *cert.*

and controls provided a basis for state action.[22] This method, however, proved inadequate when applied to public utilities.[23]

Although utility companies have many of the attributes of private businesses,[24] they are subject to a unique scheme of state regulation[25] and are

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*denied,* 404 U.S. 1062 (1972) (holding that utilities constitute state action and are therefore not subject to antitrust legislation).

22. There is some difficulty in working by analogy in state action cases because all previous state action decisions rest squarely on their peculiar facts. See Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961). Consequently, it is difficult to analogize between a utility tariff and a lease *(Burton),* a liquor license *(Moose),* a restrictive covenant *(Shelley),* or a racially motivated deprivation of voting rights *(Newton).* The present case is salient, then, because future courts are provided a test to determine whether public utilities act "under color of state law." Due process is a flexible concept that allows judicial theories to expand or contract and thereby meet the needs of various factual situations.

23. Privately-owned public utilities rest on the borderline between state and private action. The distinction between "state" and "private" action involves a balancing of the constitutional interests of *private* persons against the interests of other *private* persons in freedom of choice and use of property. For example, the interest of patrons may be balanced against the right of a restaurant owner to serve whom he chooses.

Two steps are involved in a state action analysis of government involvement. It must first be determined whether the involvement is constitutionally meaningful. Then, it must be determined whether the involvement is significant enough to invoke the fourteenth amendment. For example, if the involvement does not concern a constitutionally protected interest, it makes no difference that the government is significantly involved because it extensively regulates the private party being challenged. But an analysis also must consider the particular context in which a constitutionally protected right is asserted. A claim that one should have the right to an education or freedom of religion certainly will bear greater weight than a claim of a right to drink beer in a bar. See Note, *supra* note 12, at 656-62. The Supreme Court has stated: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

24. Utility companies are not managed or subsidized by the state except in the case of a municipally-owned utility. Privately-owned utilities have profitmaking goals as any private business and depend upon income from receipts from the sale of their services. *Cf.* Ihrke v. Northern States Power Co., 459 F.2d 566, 569 (8th Cir.), *vacated as moot,* 409 U.S. 815 (1972). Like other private companies, public utilities issue securities and declare dividends, although both of these rights are usually subject to state control.

25. State commissions exercised jurisdiction over electric companies in 46 states in 1964, while 49 regulated telephone companies and 47 supervised gas companies. Note, *Public Utilities and the Poor: The Requirement of Cash Deposits from Domestic Consumers,* 78 YALE L.J. 448, 452 n.21 (1969). One author has suggested that the rationale behind modern-day utility regulation is the need to bolster the consumer's poor bargaining position. C. WILCOX, PUBLIC POLICIES TOWARD BUSINESS 286-87 (1966). See note 29 *infra.* Because public utilities supply essential services directly to individual consumers, a "natural" inequality of bargaining power is created that may easily be abused by the utility. See Reshenthaler, *The Legal Background of Electric Utility Regulation in Texas—an Economist's View,* 21 BAYLOR L. REV. 295 (1969), which suggested that Texas adopt statewide utility regulation. But another commentator has argued that regulatory agencies have become regulated by the industries they "control." *See* J. GOULDEN, THE SUPERLAWYERS (1972).

In Pennsylvania the state utility commission can dictate the rates that the utility charges its customers. 66 PA. STAT. §§1141, 1142, 1149 (Purdon 1973). It is also empowered to issue regulations necessary for supervision of the utilities, including provisions for inspection and access to facilities and records of the utility. 66 PA. STAT. §§1142, 1144, 1148, 1149, 1171, 1172, 1183, 1342 (Purdon 1973). State regulatory commissions also reserve the power to prevent a

granted many powers ordinarily reserved to the state.[26] Accordingly, special duties have been imposed upon public utilities to counterbalance these unusual rights.[27] The most important and yet the most elusive of these duties is the obligation to render reasonably continuous service on a nondiscriminatory basis.[28] It is well settled that regulation of public utilities is a proper exercise

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utility from discontinuing service and to revoke the company's franchise. *See* D. PEGRUM, PUBLIC REGULATION OF BUSINESS 599 (1959); Note, *Constitutional Safeguards for Public Utility Customers: Power to the People,* 48 N.Y.U.L. REV. 493, 498 (1973).

26. Many state statutes grant public utilities the right to enter upon private property to cut trees or to lay pipes and lines. Utility companies may also enter private dwellings to read meters, to shut off service, or to retrieve utility property. Public utilities almost universally enjoy eminent domain powers to condemn property in the same manner as the state. See Note, *Constitutional Safeguards for Public Utility Customers: Power to the People,* 48 N.Y.U.L. REV. 493, 499 (1973). Utilities are also granted a franchise that gives them a virtual monopoly within an exclusive territory of service. 66 PA. STAT. §§1121-23 (Purdon 1973). Of course, retention of the franchise is conditioned upon adherence to the rules and regulations of the state and its regulatory bodies.

27. Note, *The Duty of a Public Utility To Render Adequate Service: Its Scope and Enforcement,* 62 COLUM. L. REV. 312, 312-27 (1962). *But see* Note, *supra* note 26, at 495-97, where it is argued that present governmental regulation of public utilities is a deviation from the early common law duties imposed upon those who performed public services. At common law anyone who sold scarce goods and services vital to the general public was subject to price controls. See Barnes, *Government Regulation of Public Service Corporations,* 3 MARQ L. REV. 65, 68 (1919). Later, those persons performing any "public" business or service were compelled to serve all who tendered payment in a fair manner. *See generally* Burdick, *The Origin of the Peculiar Duties of Public Service Companies,* 11 COLUM. L. REV. 514, 514-31, 616-38, 743-64 (1911); Wyman, *The Law of the Public Callings as a Solution to the Trust Problem,* 17 HARV. L. REV. 156, 156-73, 217-47 (1904). Such obligations were aimed at preventing those in control of necessary goods and services from using their powers oppressively. See Barnes, *supra,* at 69-71.

28. *See e.g.,* 66 Pa. Stat. §1171 (Purdon 1973). *See generally* Note, *supra* note 27; Note, *supra* note 26, at 498. This "duty" is at the very heart of the entitlement theory used by petitioner in the principal case. Under this approach the consumer is entitled to receive utility services until it has been shown that he has failed to pay for them. Until recently, however, the Supreme Court viewed due process rights as owing only to individuals with possessory or statutorily granted interests in property. Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969). Those with tangible property "rights" were entitled to protection; those who were the recipients of privileges conferred by the state were not. But in Goldberg v. Kelly, 397 U.S. 254, 266 (1970), the Court made it clear that "the interest of the eligible [welfare] recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens." The Court accordingly held that the due process clause requires a hearing before termination of welfare benefits. Thus, *Goldberg* expanded the "property" protected by the fourteenth amendment to include "important interests" to which a person is "entitled," regardless of their technical or common law status. *See generally* Note, *The Emerging Constitutional Issues in Public Utility Consumer Law,* 24 U. FLA. L. REV. 744, 745-47 (1972).

Petitioner in the instant case argued that state statutory law required utilities to provide "reasonably continuous" service on a nondiscriminatory basis. 66 PA. STAT. §§1144, 1171, 1172 (Purdon 1973). It was then contended that the state conferred a benefit upon the petitioner to which she was entitled. Consequently, it was suggested that denial of such a state-conferred benefit required due process safeguards. Brief for Petitioner at 28-29. *Accord,* Fuentes v. Shevin, 407 U.S. 67, 86 (1972).

of administrative power.[29] But if such a pattern of regulation delegates state power to ostensibly private persons who then act with the force of law, "state action" is present if significant government interests are thereby promoted.[30]

Federal cases dealing with the state action issue fall into four major categories. The first group of cases has found state action when pervasive governmental regulation has the effect of fostering or encouraging the alleged denial of due process.[31] The rationale behind these decisions is that the state becomes implicated in the actions of a private party when the private party receives assistance from the state's "thumb on the scales"[32] or when the state is "entwined in the management or control"[33] of the private entity.[34] Never-

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Petitioner's argument was not passed upon by the Supreme Court, however, because it had no occasion to consider the issue. 42 U.S.C. §1983 first requires a showing of state action, and second, that the complainant was deprived of a constitutionally protected interest. Because no "state action" existed, the Court did not speculate as to whether petitioner had a property interest protected by the fourteenth amendment. Nor did the Court indicate what procedural guarantees the fourteenth amendment would require if a property interest were found to exist. 95 S. Ct. at 452 n.2. Nevertheless, even though *Goldberg* applied only to entitlements granted by statute, several lower courts have thought that the principles of the entitlement theory should be applicable even in cases where there was no statute. See Bronson v. Consolidated Edison Co., 350 F. Supp. 443, 447 (S.D.N.Y. 1972); Stanford v. Gas Serv. Co., 346 F. Supp. 717, 719-21 (D. Kan. 1972); Palmer v. Columbia Gas Co., 342 F. Supp. 241, 244 (N.D. Ohio 1972), *aff'd*, 479 F.2d 153 (6th Cir. 1973). *Cf.* Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638, 646 n.13 (7th Cir. 1972) (en banc), *cert. denied*, 409 U.S. 1114 (1973). *See generally* Reich, *The New Property*, 73 YALE L.J. 733 (1964).

29. Attorney Gen. v. Railroad Cos., 35 Wis. 425, 530-33 (1874). Two theories have been advanced to explain how businesses were classified as "public" and therefore subjected to regulatory controls. The first theory is the monopoly theory. Barnes, *supra* note 27, at 68. In early England professionals and craftsmen were required to serve all who were willing to pay whatever price the state allowed. Wyman, *supra* note 27, at 157-66. As technical skills became more common, these artificial monopolies disappeared, leaving only "natural" monopolies (businesses that by their nature do not admit of free competition). These businesses remained subject to the controls imposed upon their historical predecessors in return for being allowed to function as monopolies. Barnes, *supra* note 27, at 68-72.

The second theory is the "common calling" theory. Burdick, *supra* note 27, at 514-19. Occupations that controlled goods or services that all members of the public might need were "common callings." People in these occupations performed a public service. Therefore, they assumed the obligation to serve all who applied in a workmanlike manner. *Id.* Present governmental regulation of public utilities, then, is derived from the early common law duties imposed upon those who performed public services.

30. See Brief for the Legal Aid Foundation of Long Beach, the Legal Aid Society of Alameda County, and the Legal Aid Society of San Diego as Amicus Curiae at 9, Jackson v. Metropolitan Edison Co., 95 S. Ct. 449 (1974).

31. *See, e.g.*, Palmer v. Columbia Gas Co. of Ohio, Inc., 479 F.2d 153 (6th Cir. 1973); Note, *Light a Candle and Call an Attorney—The Utility Shutoff Cases*, 58 IOWA L. REV. 1161, 1171-80 (1973). *But see* Kadlec v. Illinois Bell Tel. Co., 407 F.2d 624 (7th Cir.), *cert. denied*, 396 U.S. 846 (1969).

32. American Communications Ass'n v. Douds, 339 U.S. 382, 401 (1950); see Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970).

33. Evans v. Newton, 382 U.S. 296 (1966).

34. Some courts have concentrated on the nature of the alleged due process violation rather than the rationale behind the regulation theory. These decisions predicate a finding of state action on the grossness of the utility's abuse of procedural minimum fairness. See Palmer v. Columbia Gas Co., 342 F. Supp. 241, 243 (N.D. Ohio 1972), *aff'd*, 479 F.2d 153 (6th

theless, the state's right to regulate utilities does not confer the power to manage or control them.[35] Clearly, everyone is subject to some degree of state regulation, but labeling every person's activity as "state action" violates the intent of section 1983.[36] To do so would emasculate the distinctions between private and state acts established by the *Civil Rights Cases*.[37]

A second group of federal cases[38] emphasizes the exclusive franchise granted to a utility by the state.[39] These courts recognize that a monopoly eliminates the consumer's ability to obtain alternative utility services.[40] Other courts note that a utility is a natural monopoly[41] and argue that a monopoly grant does not affect the relationship between the utility and its customers.[42] Moreover, a majority of courts have considered monopoly status alone an inadequate basis for state action.[43]

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Cir. 1973), where the court noted that the utility's employees were hostile, arrogant, and "shockingly callous" toward consumers. *Compare* Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973) (finding no state action), *with* Bronson v. Consolidated Edison Co., 350 F. Supp. 443 (S.D.N.Y. 1972), where state action was found in a situation described as "an Orwellian nightmare of computer control."

35. Shelton, *The Shutoff of Utility Services for Nonpayment: A Plight of the Poor*, 46 WASH. L. REV. 745, 762 & n.78 (1971).

36. See 95 S. Ct. at 453 & n.7. *See also* Comment, *The Right to Light: Due Process and Public Utility Termination*, 27 U. MIAMI L. REV. 529, 531 (1973).

37. 109 U.S. 3 (1883); see note 13 *supra*.

38. *See, e.g.*, Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir.), *vacated as moot*, 409 U.S. 815 (1972) (utility termination held state action).

39. Note, *supra* note 21, at 496. *See also* Comment, *Liability of a Privately Owned Utility Under 42 U.S.C.* §1983, 34 OHIO ST. L.J. 222 (1973).

40. Palmer v. Columbia Gas Co. of Ohio, Inc., 479 F.2d 153, 163-64 (6th Cir. 1973) (utility found to be state actor).

41. Public utilities are characterized by high fixed costs and significant economies of scale. Thus, in an inelastic market, competition among utilities is inefficient and unstable. Competitive investment is discouraged by high threshold capital requirements and in the absence of restrictions, utilities naturally absorb competitiors into a monopoly. See C. KAYSEN & D. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 191 (1965); H. TRACHAEL, PUBLIC UTILITY REGULATION 7-8, 52 (1947). *See generally* C. WILCOX, *supra* note 25.

42. Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638, 657 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973) (utility termination not state action). Such courts fail to realize that state protection of a utility's monopoly does remove legal barriers to the acquisition of monopoly power. Utilities would not be "natural monopolies" if it were not for their protection from the antitrust laws, which do not apply to companies enjoying a state grant of monopoly status. See note 72 *infra*. Furthermore, several writers have challenged the widely held belief that utilities are natural monopolies. *See* 95 S. Ct. at 462 (Marshall, J., dissenting); A. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 2-3 & n.3 (1971) and authorities cited therein. Nevertheless, utility regulation and the antitrust laws both developed from the need to protect consumers from monopoly power. Thus, utility supervision and the antitrust laws are complementary means to the same end. *See generally* Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548 (1969); Note, *Fourteenth Amendment Due Process in Terminations of Utility Services for Nonpayment*, 86 HARV. L. REV. 1477, 1489 & n.70 (1973).

43. *See, e.g.*, Kadlec v. Illinois Bell Tel. Co., 407 F.2d 624 (7th Cir.), *cert. denied*, 396 U.S. 846 (1969) (utility termination held private action). These courts stress the amount and type of state regulation involved in the utilities activities. In so doing, they concentrate on the fact that utilities, railroads, and airlines are subject to the same degree of governmental

The third and most liberal line of reasoning is that privately-owned public utilities perform a public function with several courts finding that where a private organization exercises significant control over the operation, management, or supply of a governmental or public service, there is state action for purposes of section 1983.[44] This doctrine, then, focuses on the nature of the challenged activity, rather than on the actual role of the state.[45] Courts in this group generally hold that the relationship, which exists between the general public and the private organization controlling a public function, must be precisely the same as the relationship that would have existed between the public and the state if the state had provided that service.[46] The Supreme Court has never attempted a comprehensive definition of "public function," but other federal courts have indicated that all public functions furnish important services for the benefit of the public and are considered appropriate functions for the state to perform.[47]

The agent or joint participant theory is exemplified by a fourth group of cases involving individuals acting as agents or instrumentalities of the state. Unlike the public function theory, the agency doctrine focuses on the interrelationship between the state and the private actor.[48] The basic premise is that the state has so insinuated itself into a position of interdependence with a private party that it must be recognized as a joint participant in the challenged activity.[49] In such cases the challenged activity cannot be considered "purely private."[50] Consequently, a public utility is a joint participant if it implements state policy in cooperation with the state.[51]

The majority opinion in the instant case analyzed each of these theories separately, without finding state action. The court ruled that the fourteenth amendment is not applicable to a utility simply because it is extensively

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regulation, but they essentially ignore the distinction that only utilities enjoy monopoly status. See Note, *supra* note 26, at 505-06.

44. Local 590, Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (privately owned shopping center performed government function); Marsh v. Alabama, 326 U.S. 501 (1946) (privately incorporated town held state actor).

45. *See* Hattell v. Public Serv. Co., 350 F. Supp. 240 (D. Colo. 1972); Comment, *supra* note 36.

46. *See* Marsh v. Alabama, 326 U.S. 501 (1946).

47. Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638, 665 (7th Cir. 1972), *cert. denied,* 409 U.S. 1114 (1973); Bronson v. Consolidated Edison Co., 350 F. Supp. 443, 446 (S.D.N.Y. 1972); Stanford v. Gas Serv. Co., 346 F. Supp. 717, 721-22 (D. Kan. 1972).

48. *See* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

49. *Id.*

50. Evans v. Newton, 382 U.S. 296 (1966).

51. By empowering the companies to meet private needs, the state is able to circumvent its responsibility to the public. Similarly, without monopoly and franchise rights and the power of eminent domain, utilities would find it difficult to provide service to their consumers. Some courts indicate that this interdependence marks utility companies as state actors. *Cf.* Male v. Crossroads Associates, 469 F.2d 616 (2d Cir. 1972) (privately owned apartment complex built pursuant to urban renewal project); McQueen v. Druker, 438 F.2d 781 (1st Cir. 1971) (urban renewal); Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963) (en banc), *cert. denied,* 376 U.S. 938 (1964) (private hospital receiving federal funds under Hill-Burton program).

regulated by the state[52] or because it provides "arguably essential goods and services."[53]

The majority declined to find state action under the regulation theory[54] merely because respondent's termination procedures were contained in a tariff approved by the state regulatory agency.[55] Because respondent was a privately owned company and the state had not prescribed termination procedures for the utilities, respondent had no duty to observe the due process clause.

The Court observed that if it were dealing with the exercise by respondent of a power delegated to it by the state, its case "would be quite a different one."[56] Essential to the instant holding, then, is the fact that respondent

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52. 95 S. Ct. at 453.

53. *Id.* at 455. Many commentators, prior to the instant decision, had concluded that termination of service by a public utility constituted state action. They viewed the regulation and monopoly privileges of utilities as having significant impact upon the distribution of an essential service. Some authors even suggested that under certain circumstances the government has a duty to act and its inaction amounted to state action. See Williams, *The Twilight of State Action,* 41 TEXAS L. REV. 347, 378 (1963). The instant case appears to prematurely outdate articles attempting such an academic forecast. *See* Henkin, *Shelly v. Kraemer: Notes for a Revised Opinion,* 110 U. PA. L. REV. 473, 483-85 (1962); Lewis, *supra* note 3, at 1093. *See also* Note, *Constitutional Law — Public Utilities — The State Action and Due Process Doctrines,* 14 B.C. IND. & COM. L. REV. 317, 343 (1973); Note, *supra* note 42, at 1486, 1493-94; Note, *supra* note 31, at 1180-81; Note, *supra* note 21, at 507. *See generally* Baker, *Utility and Rights: Two Justifications for State Action Increasing Equality,* 84 YALE L.J. 39 (1974); Note, *The Right To a Hearing Prior To Termination of Utility Services,* 22 BUFFALO L. REV. 1057 (1973); Comment, *Constitutional Law — Procedural Due Process — Notice and Hearing Required Prior to Utility Termination,* 6 CREIGHTON L. REV. 417 (1973); Comment, *Constitutional Law — Due Process — Mailed Notice and Informal Hearing Do Not Satisfy Due Process Requirements When Utilities Are Terminated by State Action,* 4 MEMPHIS ST. L. REV. 153 (1973); Comment, *Constitutional Law — Utility Shutoffs — A Violation of Due Process Under Color of State Law?,* 7 U. RICH. L. REV. 377 (1972).

54. The majority stated that regulation alone does not convert every act of a business into that of the state. 95 S. Ct. at 455. By relying only upon its previous decisions, the Supreme Court has severely restricted lower court case law that emphasized state regulation as a basis for state action. See text accompanying notes 31-37 *supra.* In Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952), the Supreme Court was presented with the question of whether a privately owned bus company had violated the first amendment rights of its riders by installing a piped music system in its buses. The Court merely assumed that there was sufficient state action to decide the issue. It emphasized that the regulatory agency had ordered an investigation and, after formal hearings, had affirmatively determined that public safety, comfort, and convenience were not impaired. *Id.* at 462. *Pollak* is therefore not authority for holding that the activities conducted under the auspices of a utility regulatory body satisfy the "color of state law" test. Nevertheless, after *Pollak* lower courts generally considered that governmental regulation would provide an adequate basis for state action. See Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir.), *vacated as moot,* 409 U.S. 815 (1972). However, in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), the Court reiterated that "pervasive government regulation" such as licensing, without direct state involvement, does not result in state action. With the instant decision, it should now be quite clear that lower courts have misread *Pollak.*

55. 95 S. Ct. at 455. Because the tariff provided for pretermination notice, it could also be argued that the state did not approve respondent's termination practices.

56. *Id.* at 454.

terminated its services from a utility pole[57] and did not employ facilities or authority of the commonwealth to effect the termination of service.[58]

Receding from a line of decisions established by the lower courts,[59] the majority was unwilling to find that utilities are state actors solely because of their monopoly status.[60] The Court, reasoning that monopoly status is independent of termination power,[61] concluded that it is no longer determinative of the state action issue.[62] It follows, therefore, that previous court findings of state action based upon the monopoly theory were really findings of "state inaction," the failure to regulate utility termination practices. Consequently, by rejecting the monopoly rationale, the Court indicated that it will predicate a finding of state action only upon a showing of affirmative state activity.

The instant case presented the court with a clear opportunity to extend the public function theory to businesses "affected with a public interest."[63] Instead, the majority relied upon Pennsylvania decisions[64] holding that the state had no obligation to provide electrical services; thus, no public function existed. Additionally, no agency relationship was found between the state and respondent that would constitute state action.[65] The majority deemed it in-

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57. Jackson v. Metropolitan Edison Co., 483 F.2d 754, 758 (3d Cir. 1973).

58. Under Pennsylvania law, respondent had authority to enter upon private property to effectuate termination of service as provided in its tariff. Since it did not do so, the state cannot be said to have aided the respondent.

59. See text accompanying notes 38-43 *supra*.

60. 95 S. Ct. at 454.

61. *Id.* The majority, however, failed to note that monopoly power increases the effect of the termination power because the consumer cannot seek service from a competitor. See note 42 *supra*.

62. *Id.*

63. *Id.*

64. *See, e.g.*, Girard Life Ins. Co. v. City of Philadelphia, 88 Pa. 393 (1879).

65. 95 S. Ct. at 457. Three additional unexpressed reasons underlying the present decision are apparent from an examination of the history and procedures of public utilities. First, it was undisputed at common law that a utility could cut off service for nonpayment. Thus, it can be argued that even if a state should grant utilities the right to terminate service for nonpayment, the utilities are not given the benefit of any additional privilege that they did not previously enjoy. Consequently, they are not state actors under the regulation theory.

Second, in the instant case, the regulatory agency only approved the respondent's termination procedures insofar as they provided for reasonable notice. The respondent violated its own tariff and proper remedy under Pennsylvania law lies with the regulatory agency or in the state courts, not in the federal courts. *See* Philadelphia Elec. Co. v. Pennsylvania Human Relations Comm'n, 5 Pa. Commonwealth 329, 290 A.2d 699 (1972).

The third reason underlying the Court's decision is that respondent's activities are subject to extensive regulation under the Federal Power Act and the Public Utility Holding Company Act of 1935. Brief for Respondent at 16, 95 S. Ct. 449. These federal statutes are not applicable to states or state agencies. It would therefore be inconsistent to hold that respondent utility is a state actor when states are specifically excluded from the scope of these statutes. The Supreme Court resolved this inconsistency by placing the burden upon state legislatures to decide whether practices of public utilities should be more extensively regulated.

consequential that respondent paid a special tax to the state[66] and remarked that all corporations pay taxes.[67]

The principal decision has significantly limited several leading cases[68] by deemphasizing the monopoly and public function tests. Although these theories will remain a factor in determining whether state action exists, the Court has indicated that it will require the more rigid standard of *affirmative* state action.[69] State inaction, then, cannot be intertwined with the actions of a private entity to create state action.

In a dissenting opinion, Justice Marshall viewed the ruling as "a major step in repudiating" a line of past decisions granting constitutional protections to persons dealing with state regulated monopolies.[70] In his opinion, rather

66. 72 PA. STAT. §8101 (Purdon 1973) provides that Pennsylvania utilities must pay a tax computed as a certain percentage of their gross receipts. In Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir.), *vacated as moot,* 409 U.S. 815 (1972), it was held that such a tax makes the state a "direct beneficiary" of the utility's business, resulting in a joint venture for state action purposes.

67. 95 S. Ct. at 457.

68. *Id.* The Court limited Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), to a lessor-lessee situation for state action purposes.

69. At first glance, the affirmative action-inaction test appears fallacious because it can be said that if a particular result is known to follow from particular acts, the failure of the states to regulate those acts is really "affirmative" state action. But states must have a duty to act before a failure to act becomes significant. Such a duty can only exist from prior affirmative state action, which attempted to regulate those particular acts or to guard against that particular result. For example, if a state enacted a statute and then failed to enforce it, it would be affirmatively aiding the challenged activity. If the statute is breached by a public utility, the state has a duty to enforce it. Some commentators have argued that, at this point, state inaction constitutes state action. But they are really concerned with the prior affirmative state acts that imposed a duty upon the state to continue to act affirmatively. Nevertheless, the inaction of the state must still maintain the causal connection between the utility's breach and the consumer's damage. Thus, if a state provides for utility termination upon only 5 days' notice, and the utility terminated without notice, the state's failure to act is affirmative. If the consumer is damaged, the causal connection was the state's inaction and the utility is accordingly responsible as a state actor.

The inaction of the state must also be significant. For example, in Shelley v. Kraemer, 334 U.S. 1 (1948), state courts were not allowed to enforce restrictive covenants. Although state discrimination was held to be prohibited by the fourteenth amendment, private discrimination was not. Consequently, the *inaction* of the state was not significant. Similarly, in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), there was no *duty* upon the state to act, since the state had not previously sought to protect the private discrimination involved therein. Thus, in the instant case, because the state had never attempted to regulate utility terminations, it had no duty to act affirmatively to require the respondent to comply with due process. Additionally, because the Federal Constitution protects only "civil" rights, and not "social" rights, the state's inaction was insignificant. *See* Bell v. Maryland, 378 U.S. 226, 313 (1963).

70. 95 S. Ct. at 461. Justice Marshall's dissent is no surprise. As counsel for the NAACP he led the assault upon the "separate but equal" doctrine set forth in Plessy v. Ferguson, 163 U.S. 537 (1896). He successfully contended in Sweatt v. Painter, 339 U.S. 629 (1950), that it was virtually impossible for a state to comply with this doctrine in the area of graduate education. Next, he challenged seventeen states and the District of Columbia in an effort to outlaw segregation in all public schools. Brown v. Board of Education, 347 U.S. 483 (1954). Mr. Justice Marshall prevailed over John W. Davis (Democratic candidate for President in 1924) by arguing that the fourteenth amendment had been adopted to strike down dis-

than considering each factor separately, the Court should have considered the extensive interaction between the state and the respondent in its totality.[71] He warned that the majority opinion "is bound to lead to mischief when applied to problems beyond the narrow sphere of due process objections to utility terminations."[72] Although full-scale due process hearings would be expensive, he concluded that abbreviated pretermination procedures were preferable to allowing utilities to behave as they please.[73]

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criminatory legislation passed by many southern states after the Civil War. *See generally* R. TRESOLINI & M. SHAPIRO, AMERICAN CONSTITUTIONAL LAW 585-654 (3d ed. 1970); Kizer, *The Impact of* Brown v. Board of Education, 2 GONZAGA L. REV. 1 (1967).

Justice Marshall's dissent is even more appropriate in light of the fact that he argued Shelley v. Kraemer, 334 U.S. 1 (1948), which is the "touchstone" between the Civil Rights Cases, 109 U.S. 3 (1883), and modern state action controversies. In the *Civil Rights Cases* the Supreme Court stated that private acts of discrimination were beyond the reach of the fourteenth amendment. The state action battlefield remained dormant for 70 years until *Shelley* signaled the resumption of hostilities. Mr. Justice Marshall argued that the enforcement of restrictive covenants by state courts constituted state action. The Supreme Court agreed and, since *Shelley*, the boundaries of state action have been continually expanding.

As a Supreme Court Justice, Mr. Marshall has emphasized that the purpose of the fourteenth amendment is to secure personal freedom and opportunity. Board of Regents v. Roth, 408 U.S. 564, 588 (1972) (dissenting opinion). *See also* the dissenting opinions of Justices Douglas and Brennan in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), in which Justice Marshall concurred. In the instant case he warned that the majority opinion might deprive minority groups of a constitutional remedy for utility discrimination. 95 S. Ct. at 465. Such a result is doubtful, but it is apparent that the boundaries of state action have been forced to their outer limits.

71. 95 S. Ct. at 461.

72. *Id.* Justice Marshall probably was referring to the fact that since Washington Gas Light Co. v. Virginia Elec. Power Co., 438 F.2d 248 (4th Cir. 1971), utilities have been able to exempt themselves from antitrust laws because their monopolies constituted "state action." Of special significance is the fact that *Washington Gas Light* found state action from state inaction, declaring that the utilities need only have the disputed item in their tariff filed with the state regulatory agency. The present decision, then, leaves in doubt whether utilities will be able to defend antitrust suits on this basis. As a practical matter, however, *Washington Gas Light* was an overly broad decision and probably would not have been followed anyway. *See* Gas Light Co. of Columbus v. Georgia Power Co., 404 F.2d 1062 (5th Cir. 1972), *cert. denied*, 405 U.S. 969 (1972); Comment, *Antitrust Law — State-Regulated Industries*, 13 WM. & MARY L. REV. 229 (1971); 85 HARV. L. REV. 670 (1972).

73. 95 S. Ct. at 464. The introduction of procedural safeguards into the marketplace may in practice significantly increase the cost and decrease the availability of goods and services sold on credit. Adams v. Egley, 338 F. Supp. 614, 622 (S.D. Cal. 1972), *rev'd on other grounds sub nom.* Adams v. Southern Cal. First Nat'l Bank (9th Cir. 1973). Prior to the instant decision there was speculation that pretermination hearings would increase pressure for state ownership of public utilities. Because utilities are plagued with already high operating costs, a "pay now and litigate later" collection policy is particularly beneficial. *See* Flora v. United States, 362 U.S. 145 (1960) (discusses history and procedures of tax revenue collection that involves payment before filing for a refund). Thus, utilities have traditionally justified unrestricted termination on the ground that it minimizes collection costs. If the instant decision had required pretermination hearings for utility consumers, utilities would have been faced with additional expense and ultimately a rate increase. Because utilities are guaranteed a "fair rate of return" by the states (usually around 6%), the consuming public would in effect "internally subsidize" the due process hearings. As the cost of utility services to the public is increased, a greater number of people will be unable to afford these services.

Justice Douglas also criticized the Court's analysis as sequential rather than cumulative.[74] In his opinion, the Court should have considered all relevant theories in the aggregate rather than making a significant departure from previous treatment of state action issues.[75] Considering electrical service a necessity of life,[76] he believed that it should not be taken without the safeguards afforded by procedural due process.

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Public service commissions generally recognize an allowance for uncollectable bills in ratemaking; consequently there exists a reciprocal relationship between utility rates and the number of disconnected consumers unable to pay for these services. Government owned utilities would pay no taxes, make no profits, and would enjoy greater economies of scale. It is apparent, therefore, that pressure for state ownership of utilities is directly proportional to the percentage of the population unable to afford these services.

It is not clear, however, that notice and hearings before termination will always result in additional expense to the utilities or to the public. Quite the contrary, notice of termination could actually benefit the utilities. In Palmer v. Columbia Gas Co., 342 F. Supp. 241, 242-43 (N.D. Ohio 1972), *aff'd*, 479 F.2d 153 (6th Cir. 1973), the defendant utility served 140,000 customers and each year mailed 120,000-140,000 notices threatening termination. But only 6,000 disconnections actually took place. These figures imply that termination notices usually produce payment within a short period. There are a number of states that do in fact require a five-day pretermination notice and provide for informal hearings on disputed bills. See Shelton, *supra* note 35, at 753 n.36. Such informal procedures have been used in New York for several years with a great deal of success. Brief for the Public Service Commission of the State of New York as Amicus Curiae at 5-8, 95 S. Ct. 449 (1974) (filed to dissuade the Supreme Court from determining specific hearing procedures without considering special problems pertinent to utility terminations).

74. 95 S. Ct. at 459.

75. *Id.*

76. This belief and how it is viewed by future members of the Court will very probably be determinative of the utility termination issue in later cases. When deciding the principal case, the United States District Court of Appeals for the Third Circuit stated that to characterize electrical service as being "indispensable to life and health" and to insinuate that termination of such service would deprive one of the very "means and necessities of life" only served to "becloud the real issues." 483 F.2d at 759. That opinion also questioned whether failure to provide this service "is a threat to life itself." *Id.* at 760. That opinion is mistaken. On Christmas Eve, 1973, an elderly New York couple were found in their home frozen to death as a result of having their heat disconnected. Ironically, more than enough money was in the house to pay the utility bill, but the company had made no effort to contact the couple or to determine their reasons for nonpayment. Because of their advanced age (92 and 91 years), they probably were unable to leave their home. N.Y. Times, Dec. 28, 1973, at 25, col. 1. In Wisconsin, a 71-year-old man was found frozen, lying helpless in his home and dressed in five shirts and blankets. It was one degree above zero outside and 20 degrees inside. Boston Globe, Feb. 9, 1974, at 17, col. 1. It is even more disturbing that as a general rule, abnormally cold weather at the time of the shutoff does not impose an additional burden of care upon a utility. Cullinane v. Potomac Elec. Power Co., 147 A.2d 768 (D.C. Mun. Ct. App. 1959). A few more enlightened courts, however, have stated that the lack of heat in the winter has "very serious effects upon the physical health of human beings, and can easily be fatal." Palmer v. Columbia Gas Co. of Ohio, Inc., 342 F. Supp. 241 (N.D. Ohio 1972). In the instant case, petitioner's two minor children required medical attention because of serious colds contracted when they lived for eight days without light, heat, or hot water for cooking and hygienic purposes. Brief for Petitioner at 30, 95 S. Ct. 449 (1974).

One author suggests that electrical services are so essential that poor groups will begin to demand rate (and service) concessions based upon nothing but the customer's need for the service and his inability to pay established rates. See Smartt, *Are Welfare Rates in the Utilities' Future?*, ABA PUB. UTIL. §62 (1968). The poor's resentment of utility practices is

The impact of the principal case centers on whether utility consumers have a constitutional remedy in the federal courts for a wrongful disconnection.[77] Dissenting, Justice Brennan suggested that because no controversy existed between petitioner and respondent, petitioner lacked standing in the federal courts.[78] He reasoned that because the electrical account was not in her name, it was not her constitutional rights that were allegedly violated.[79] But the majority assumed jurisdiction and determined that only state courts have jurisdiction to hear a disconnection case unless there is direct and affirmative state involvement in the challenged procedures. Accordingly, "the 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."[80]

Thus, the principal case has clarified the test for state action and has designated a forum in which cases not meeting this test must be litigated. Unfortunately, if the news media are any reflection of general understanding, the instant case is prone to be misconstrued.[81] This decision has no effect upon requirements that states may choose to place upon utility termination procedures. Consequently, a reluctance to enlarge the authority of the federal courts should be viewed as an indication of concern for the most appropriate method of maintaining the proper balance between governmental power and individual liberties.

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reflected in two cartoons in a National Welfare Rights Organization publication. One cartoon showed a mother and her child with the caption "Pay or Freeze"; a second depicted the familiar Reddi Kilowatt character with the spelling changed to "Killowatt" and the word "kill" underlined. PUB. UTIL. FORT. March 14, 1968, at 10. *But see* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (importance of state-performed public school service irrelevant).

77. Because most termination disputes involve only a small amount of money, the practical effect of the decision is that most utility consumers will be forced to seek remedies in state courts. If the consumer can assert a civil rights violation under §1983, then no minimum amount of money need be in controversy to invoke the jurisdiction of federal courts. But without a finding of "state action," the consumer must show that "federal question" or "diversity" jurisdiction exists and that the amount in cointroversy is more than $10,000.

78. 95 S. Ct. at 460.

79. *Id.* Because the account was not in petitioner's own name, Justice Brennan believed she had no standing. However, older Pennsylvania decisions hold that a tenant who is the nonbilling party has standing to challenge the termination of utility service to his residence when the landlord billing party refuses or fails to pay the bill. Tyrone Gas & Water Co. v. Public Serv. Comm'n, 77 Pa. Super. 292 (1921). *Accord,* Jackson v. Northern States Power Co., 343 F. Supp. 265 (D. Minn. 1972). *See also* Caro v. Northern Pa. Power Co., 24 P.U.C. 581 (complaint docket 13936 (1935)), where the Pennsylvania Public Utilities Commission ruled that if one contracts with another face to face, the contract is valid even if it is made in the name of another person. Arguably, if petitioner had respondent's service placed in the other occupant's name after service under her own name was disconnected, she could have standing to sue on the contract.

80. 95 S. Ct. at 453.

81. "Pay Up or Shut Up" was the headline TIME used in an article characterizing the case as "lethal." TIME, Jan. 8, 1975, at 75. Similarly, the New York Times interpreted the case to hold that all utility service may be cut off without warning. N.Y. Times, Dec. 24, 1974, at 1, cols. 2-3. See The Christian Science Monitor, Dec. 24, 1974, at 1, cols. 2-3.

The instant case is especially significant because it comes at a time when utility terminations for nonpayment have doubled[82] due to rising unemployment, inflation, and skyrocketing fuel prices. Economically, the decision means that consumers will not suffer increased rates necessary to finance pretermination hearings.[83] But the social value of the decision is questionable. On one hand, for the very poor, due process recognition would have meant only that the utility would disconnect after, instead of before, a hearing.[84] On the other hand, unjust terminations may exact a high personal and societal cost, as measured in terms of demoralization and frustration.

The present case should not be construed to require a showing that a state has ordered the activity in question before it can be deemed "state action."[85] Such an interpretation would significantly and inappropriately restrict the application of section 1983.[86] Although the instant decision does propose a more rigid standard, that standard depends upon peculiar facts and does not represent a decline in consumerism. It is unfortunate that the Constitution does not provide judicial remedies for every social and economic ill. But that document does not guarantee every American the right to sanitary housing, food, or utility services without payment.[87] Perhaps the best solution is for the

82. In January 1975, according to one Florida newspaper, utility terminations increased by more than 100% for Florida Power Corporation, which was disconnecting 4,000 customers per month. Orlando (Fla.) Sentinel Star, Jan. 19, 1975, at 1, cols. 1-4.

83. See note 73 *supra*.

84. Most jurisdictions recognize that public utilities cannot furnish free service to any person or class customers without unlawfully discriminating against other customers. See Nunemaker v. Pacific Tel. & Tel. Co., 80 P.U.R.3d 129 (Cal. Pub. Util. Comm'n (1969)).

85. The majority opinion stated: "Approval by a state utility commission of . . . a request from a regulated utility, where the Commission has not put its own weight on the side of the proposed practice by *ordering* it, does not transmute a practice initiated by the utility and approved by the Commission into 'state action.'" 95 S. Ct. at 456-57 (emphasis added).

86. The purpose of §1983 is to provide a federal forum for citizens with civil rights complaints whenever a state directly or indirectly allows a private group to perpetrate an injury. 95 S. Ct. at 460 (Douglas, J., dissenting); Poole, *Statutory Remedies for the Protection of Civil Rights*, 32 ORE. L. REV. 210, 213-27 (1953). This section is to be broadly construed in the context of racial discrimination. Green v. Dumke, 480 F.2d 624, 628 (9th Cir. 1973). It is normally not interpreted as broadly in other contexts. See Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968). But if the present decision is read to require a state order for finding of state action, it will loom as a landmark on the constitutional horizon, casting a shadow on almost every major state action case decided over the past quarter century. See Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) (police conspiracy was state action regardless of whether officer's acts were officially authorized); Local 590, Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (shopping center is state actor providing public service); United States v. Guest, 383 U.S. 745 (1966) (involvement of state need not be direct); Evans v. Newton, 382 U.S. 296 (1966) (exclusion of blacks from privately operated park); Baker v. Carr, 369 U.S. 186 (1962) (state action from state inaction); Terry v. Adams, 345 U.S. 461 (1953) (conducting elections). Cases finding state action from a statute, however, would not be affected. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972); Hernandez v. European Auto Collision, Inc., 487 F.2d 378 (2d Cir. 1973) (detention of auto by garageman); Hill v. Toll, 320 F. Supp. 185 (E.D. Pa. 1970) (bail bondsman is state actor).

87. See Lindsey v. Normet, 405 U.S. 56 (1972) (summary form of payment by a tenant to remain in possession held valid even though he had to reserve all other defenses for a later action — tenants were not allowed possession without payment).