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PRIVATE UNIVERSITIES: THE COURTS AND THE STATE ACTION THEORIES

Public educational institutions, as agencies of state and local government, are subject to the substantive and procedural limitations which delimit government conduct generally.¹ Private educational facilities, on the other hand, have not been required to meet such constitutional standards, as is indicated by cases arising out of the student protest movement of the past decade which involved due process challenges to the disciplinary procedures of private schools and universities.² Most of the recent³

¹*Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Esteban v. Central Mo. State College*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970); *Wright v. Texas So. Univ.*, 392 F.2d 728 (5th Cir. 1968); *Dixon v. State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); *Due v. Florida A. & M. Univ.*, 233 F. Supp. 396 (N.D. Fla. 1963); *Knight v. State Bd. of Educ.*, 200 F. Supp. 174 (M.D. Tenn. 1961).

²*Blackburn v. Fisk Univ.*, 443 F.2d 121 (6th Cir. 1971); *Palacios v. Foltz*, 441 F.2d 1196 (10th Cir. 1971); *Browns v. Mitchell*, 409 F.2d 593 (10th Cir. 1969); *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968); *Morgan v. St. Francis Prep. School*, 326 F. Supp. 1152 (M.D. Pa. 1971); *Bright v. Isenbarger*, 314 F. Supp. 1382 (N.D. Ind. 1970), *aff'd*, 439 F.2d 412 (7th Cir. 1971); *Counts v. Voorhees College*, 312 F. Supp. 598 (D.S.C. 1970), *aff'd*, 439 F.2d 723 (4th Cir. 1971); *McLeod v. College of Artesia*, 312 F. Supp. 498 (D.N.M. 1970); *Grossner v. Trustees of Columbia Univ.*, 287 F. Supp. 535 (S.D.N.Y. 1968); *Greene v. Howard Univ.*, 271 F. Supp. 609 (D.D.C. 1967), *rev'd in part on other grounds, dismissed in part as moot*, 412 F.2d 1128 (D.C. Cir. 1969).

Only two courts have stated that no distinction should be made between public and private universities; one court was reversed and the other offered its statement as a passing remark. In *Guillory v. Administrators of Tulane Univ.*, 203 F. Supp. 855 (E.D. La.), *judgment vacated and new trial ordered*, 207 F. Supp. 554 (E.D. La.), *aff'd per curiam*, 306 F.2d 489 (5th Cir.), *rev'd on retrial*, 212 F. Supp. 674 (E.D. La. 1962), Judge J. Skelly Wright wrote that "[n]o one any longer doubts that education is a matter affected with the greatest public interest. . . . this is true whether it is offered by a public or private institution." 203 F. Supp. at 858-59. In *Healy v. James*, 445 F.2d 1122 (2d Cir. 1971), *cert. granted*, 40 U.S. L.W. 3264 (U.S. Dec. 7, 1971) (No. 452), involving an action by state college students for declaratory relief to gain the college's approval of the local S.D.S. chapter as a recognized campus association, the court noted: "we yield to none in our profound belief that the full panoply of constitutional rights, duties, privileges and immunities should be fully implemented on every campus, whether of a public or private college . . ." 445 F.2d at 1130.

³Historically, the courts have utilized two doctrines to restrict the procedural protections provided by law to private university students. Some courts rely on the doctrine of *in loco parentis* which is based on the notion that the university could act in place of the parent. *See, e.g., John B. Stetson Univ. v. Hunt*, 88 Fla. 510, 102 So. 637 (1924). Other courts cite a contractual theory which states that the student has knowingly entered a contract with the university and the university is required to provide only so much protection as is enforceable under the contract. *See, e.g., Robinson v. University of Miami*, 100 So. 2d 442 (Fla. Dist. Ct. App. 1968); *Anthony v. Syracuse Univ.*, 224 App. Div. 487, 231 N.Y.S. 435

fourteenth amendment challenges to private conduct have been brought in federal courts as civil actions under section 1983 of Title 42.⁴ To be successful in an action under 1983, a plaintiff must establish not only that he has been deprived of a federally created right, but also that the defendant "acted under color of state law."⁵ It is this latter requirement, which is synonymous with "state action"⁶ as that concept has been developed under the language of the fourteenth amendment,⁷ that is the major obstacle to the application of due process to the disciplinary systems of private-

(1928). Heavy criticism has been dealt to both theories. See Holland, *The Student and the Law*, 22 CURRENT LEG. PROB. 61, 66 (1969); Note, *The College Student and Due Process in Disciplinary Proceedings*, 13 S.D.L. REV. 87, 88-90 (1968); Comment, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1362, 1367-77 (1963) [hereinafter *Judicial Review*]. Despite the criticism, the theories have retained some vitality even after public institutions were required to afford due process to their students. See, e.g., *Carr v. St. John's Univ.*, 17 App. Div. 2d 632, 231 N.Y.S.2d 410, *aff'd mem.*, 12 N.Y.2d 802, 187 N.E.2d 18, 235 N.Y.S.2d 834 (1962). For an interesting non-constitutional approach to the protection of students from the university's disciplinary power see Goldman, *The University and the Liberty of Its Students—A Fiduciary Theory*, 54 KY. L.J. 643 (1966).

⁴2 U.S.C. § 1983 (1970). Section 1983 was originally enacted as Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13. For a concise discussion of the legislative history of section 1983 see Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U.L. REV. 277, 279-82 (1965). See Note, *Damages Under § 1983: The School Context*, 46 IND. L.J. 521 (1971), stating:

In its present form, § 1983 has become increasingly used in the school context to coerce officials who have failed or refused to recognize that constitutional guarantees extend to teachers and students. In effect, § 1983 has begun a process of judicialization of schools, extending concepts of due process and equal protection into an area where arbitrary action by officials has been historically accepted.

Id.

⁵2 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.

Federal courts have jurisdiction in section 1983 actions under 28 U.S.C. § 1342 (3) & (4) (1970).

⁶*United States v. Price*, 383 U.S. 787, 794 n.7 (1966).

⁷U.S. CONST. amend. XIV, § 1 provides in 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.

universities.⁸ Courts are reluctant to find state action in the context of private education so as to afford students at private universities procedural safeguards similar to those afforded students at public institutions.

Robinson v. Davis

This judicial reluctance was recently exhibited by the Fourth Circuit Court of Appeals in *Robinson v. Davis*.⁹ In *Robinson*, an action under section 1983 was brought by a student at Montreat-Anderson College in Montreat, North Carolina, alleging constitutional violations in his expulsion following an investigatory hearing on drug usage at the college. The investigation was instigated by reports received by a town police officer from the State Bureau of Investigation and anonymous student informers. The college's administrative committee ordered town police officers, who were also employed as security guards by the college,¹⁰ to summon selected students to a closed hearing. Plaintiff's presence was preemptorily requested by one of the defendants dressed in a Montreat police uniform and carrying a side arm. The students were neither given notice of the charges nor an opportunity to know of the evidence against them or to present evidence on their own behalf.¹¹ A major portion of the interrogation was conducted by one of the police officer-security guards. Plaintiff alleged that he had been deprived of federally-created rights and presented two constitutional issues: whether the procedures used by the college to request his presence at the hearing amounted to a "seizure" proscribed by the fourth amendment and whether the conduct of the hearing failed to provide "due process" as guaranteed by the fourteenth amendment.¹²

⁸If no state action can be proven, federal jurisdiction will be lacking and the merits of the due process or equal protection claim will not be reached. *See, e.g.*, *Robinson v. Davis*, 447 F.2d 753, 759 (4th Cir. 1971).

⁹447 F.2d 753 (4th Cir. 1971).

¹⁰*Id.* at 754. Plaintiff's argument that the police-security guards' participation in the event constituted state action was based on the holding of *Griffin v. Maryland*, 378 U.S. 130 (1964), which proscribed a sheriff's conduct as being "under color of state law." Brief for appellant at 11. However, the Fourth Circuit concluded that the four policemen were acting within the ambit of their private employment as security guards. This conclusion disregards *Catlette v. United States*, 132 F.2d 902 (4th Cir. 1943), a case involving a sheriff who participated in the physical abuse of Jehovah's Witnesses. Although the sheriff claimed to have stated at that time that he was not acting under the name of the law (a position similar to that taken by the defendant policemen in *Robinson*), his conduct was nevertheless punishable under the fourteenth amendment. The Fourth Circuit stated that an officer of the law cannot so lightly "shuffle off" his official role. 132 F.2d at 906.

¹¹447 F.2d at 760-61 (Butzner, J., dissenting).

¹²*Id.* at 760. Judge Butzner, in dissent, concluded that the plaintiff was denied due process in the conduct of the administrative hearing.

State action, the other foundational requirement for an action under section 1983, was alleged by the plaintiff in *Robinson* to be found in the relationship between the college and the town of Montreat. The Presbyterian Church of the South owns and operates not only the college, but also the Mountain Retreat Association, which together occupy the major portion of the land which comprises the incorporated town of Montreat. Tax exempt status is given the property owned by the two organizations, with the consequence that the town has insufficient resources to finance any municipal services. However, the town has a contract with the Association pursuant to which the Association provides municipal services in exchange for ninety-five percent of the town's small tax levy as partial compensation. An interlocking directorate of sorts provides services for and has control over the college, the town, and the Association.¹³ Plaintiff alleged that state action was present due to the interdependence of the college and the town and that the action of town police officers in the investigation involved the town directly in the injurious conduct.¹⁴ Yet the Fourth Circuit, reaching a decision generally consistent with the position of other federal courts,¹⁵ concluded that no state action was present.

Robinson reinforces the long-standing distinction, initially stated by Chief Justice Marshall in *Trustees of Dartmouth College v. Woodward*,¹⁶ differentiating public from private educational corporations. Numerous writers have criticized this distinction as incorrectly reflecting the realities of modern education. For several years, they have predicted that as university education becomes more necessary and as private universities become more dependent upon government support for their survival, the courts will bring the actions of private universities and colleges within the scope of the due process guarantee of the fourteenth amendment.¹⁷

¹³*Id.* at 754.

¹⁴Brief for appellant at 11, 14.

¹⁵See cases cited in note 2 *supra*.

¹⁶17 U.S. (4 Wheat.) 518 (1819). In holding unconstitutional an act of the New Hampshire legislature which altered the Dartmouth charter, Marshall drew a distinction between "a civil institution to be employed in the administration of government" and "a private eleemosynary institution." *Id.* at 640-41. See O'Neil, *Private Universities and Public Law*, 19 BUFF. L. REV. 155, 156-61 (1970), for a criticism of Marshall's *Dartmouth College* opinion and the assumptions on which it rested. That such a public-private distinction may be unreasonable in the due process context is illustrated by the fact that a student's desire to attend a private college would require him to forfeit constitutional rights which he would possess were he to enter a state university. *But see* H. FRIENDLY, *THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA* 12 (1968) [hereinafter FRIENDLY], which suggests that a great contribution of the *Dartmouth College* case was "the impetus it gave to voluntary associations as a factor in American life."

¹⁷See, e.g., Note, *An Overview: The Private University and Due Process*, 1970 DUKE L.J. 795, 806; Note, *Judicial Intervention in Expulsions or Suspensions by Private Universities*, 5 WILLIAMETTE L.J. 277, 287-88 (1969); Note, *Reasonable Rules, Reasonably*

Suggested Theories for Finding State Action

The commentators argue that various Supreme Court discussions of the state action concept provide a foundation for the application of constitutional standards to the disciplinary proceedings of most, if not all, private universities.¹⁸ From these discussions emerge three applicable theories: (1) that state action may be discovered in the control exercised by the state over the private university through regulation and financial aid; (2) that state action may be deemed present by the very nature of education and of the university itself as a "public function;" and (3) that state action may be found by considering all the "indicia" of state involvement.¹⁹

A. The State Control Theory

The state control theory urges the courts to view such factors as state authorization to grant degrees, incorporation of or chartering of the university by the state, financial assistance in the form of grants and loans, and tax exemptions²⁰ as infusing the state with sufficient control over the private university so as to make the university's action state action.²¹ However, the courts have pointed out the invalidity of this approach. In

Enforced—Guidelines for University Disciplinary Proceedings, 53 MINN. L. REV. 301, 309 (1968); Johnson, *The Constitutional Rights of College Students*, 42 TEXAS L. REV. 344, 349 (1964); *Judicial Review*, *supra* note 3, at 1386; Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1102-03 (1960) [hereinafter cited as Lewis]. For example, it was suggested in 1968 that "very few colleges are today wholly 'private' in the sense of being altogether immune to the fourteenth amendment and the Bill of Rights." Van Alstyne, *The Judicial Trend Toward Student Academic Freedom*, 20 U. FLA. L. REV. 290, 291 (1968).

¹⁸Note, *An Overview: The Private University and Due Process*, 1970 DUKE L.J. 795, 797-803; *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1056-60 (1968); Kutner, *Habeas Scholastica: An Ombudsman for Academic Due Process—A Proposal*, 23 U. MIAMI L. REV. 107, 152 (1968).

¹⁹See note 18 *supra*. See also O'Neil, *Private Universities and Public Law*, 19 BUFF. L. REV. 155 (1970).

²⁰For a comprehensive discussion of the methods of government control over and financial aid to private universities see *Judicial Review*, *supra* note 3, at 1383-85.

²¹This approach uses as its rationale the language in *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir.), *cert. denied*, 326 U.S. 721 (1945), and *Griffin v. State Board of Educ.*, 239 F. Supp. 560 (E.D. Va. 1965). In *Kerr*, the library system had been established by private donation in 1882, but by 1944 ninety-nine percent of its budget was supplied by city taxation and a high degree of budgetary control was available to the city government. Because of this "state action," the Fourth Circuit compelled the library trustees to discontinue discrimination in admittance to library training courses. *But see Mitchell v. Boys Club of Metrop. Police*, 157 F. Supp. 101 (D.D.C. 1957). *Griffin* dealt with "white-only" private schools which received generous state monetary aid. The court held that "if the private school is the creature of, or is preponderantly maintained by, the grants, then the operation of the school is State action . . ." 239 F. Supp. at 565.

Powe v. Miles,²² the Second Circuit found unpersuasive the argument that New York State's general regulation of educational standards in private colleges makes the colleges' acts in disciplining students the acts of the state, for "the state must be involved not simply with some activity of the institution alleged to have inflicted injury . . . but with the activity that caused the injury."²³

Nor has the contention been deemed valid that a state, through incorporation or chartering, gives approval to a school whose policies violate the fourteenth amendment. This judicial rejection is bottomed on the distinction between public and private educational corporations²⁴ first asserted in *Trustees of Dartmouth College v. Woodward*.²⁵ In addition to falling within the debatable *Dartmouth College* distinction,²⁶ the incorporation argument is further weakened by the fact that no charter is actually needed to operate a school, for there is a constitutionally protected right to conduct an educational institution.²⁷ Finding state action in the act of incorporation seems to include too many private activities. For example, under such an approach, state action could be found in the licensing of private individuals, thus bringing their conduct within fourteenth amendment standards.

That financial aid in the form of state loans and grants is insufficient to establish state action was clearly pointed out in *Grossner v. Trustees of Columbia University*,²⁸ the court holding that "[the] receipt of money from the State is not, without a good deal more, enough to make the

²²407 F.2d 73 (2d Cir. 1968).

²³*Id.* at 81. See also FRIENDLY, *supra* note 16, at 23. The court did note, however, that state action would be present if the state had undertaken to set policy for control of demonstrations in all universities. 407 F.2d at 81. Two years after *Powe*, the Second Circuit was presented with a case involving the expulsion of students under rules adopted by a college after the enactment of N.Y. EDUC. LAW § 6450 (McKinney Supp. 1971), which reads in part: "[E]very college chartered by the regents . . . shall adopt rules and regulations for the maintenance of public order on college campuses . . ." The case was remanded for the district court to determine if the statute was a legislative attempt to "coerce colleges" to adopt hard-line attitudes. *Coleman v. Wagner College*, 429 F.2d 1120 (2d Cir. 1970).

²⁴See, e.g., *Guillory v. Administrators of Tulane Univ.*, 212 F. Supp. 674, 679 (E.D. La. 1962). See also *Powe v. Miles*, 407 F.2d 73, 80 (2d Cir. 1968).

²⁵17 U.S. (4 Wheat.) 518 (1819). The fact that the state acted in chartering Dartmouth did not make it a public institution, for the trustees and professors were not "invested with any portion of political power, partaking in any degree in the administration of civil government, [or] performing duties which flow from the sovereign authority." *Id.* at 633.

²⁶See note 16 *supra*.

²⁷*Pierce v. Society of Sisters*, 268 U.S. 510 (1925). In *Pierce*, the Supreme Court held unconstitutional an Oregon law requiring children to be sent to public schools.

²⁸287 F. Supp. 535 (S.D.N.Y. 1968).

recipient an agency . . . of the Government."²⁹ In other words, something other than mere financial aid from the state must be the determinative factor. While financial aid may indicate state involvement with the university, it must be established that the involvement concerns not the general operation of the institution but rather the particular conduct that is allegedly unconstitutional.³⁰ Another facet of the state control argument is the availability of tax benefits to private universities, such benefits being viewed as an affirmative act on the part of the state legislature and thus state action. However, tax benefits are conferred on nearly all colleges³¹ and are consequently available on a neutral basis, making it unlikely that exemptions can be used by the state as a lever of influence.³² For this reason, the courts have rejected the exemption argument as an insufficient basis for a finding of state action.³³ Assertions of state control will continually fail to impress the courts unless a significant connection can be established between the state aid or regulation and the allegedly unconstitutional conduct of the private universities.

B. *The Public Function Theory*

The second approach, the "public function" theory, is predicated upon two distinct but related concepts,³⁴ either of which may support a finding of state action. One concept is that the private university has assumed an educational responsibility which in reality rests with the state,³⁵ while the related concept rests on the proposition that private universities possess quasi-governmental powers and should thus be sub-

²⁹*Id.* at 547-48.

³⁰*See* 287 F. Supp. at 548. *See also* Blackburn v. Fisk Univ., 443 F.2d 121, 123 (6th Cir. 1971); Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968).

³¹*See, e.g.*, INT. REV. CODE OF 1954, § 501(c)(3), which exempts from corporate taxation any corporation organized and operated exclusively for educational purposes.

³²Lewis, note 17 *supra*, at 1107-08.

³³*See, e.g.*, Browns v. Mitchell, 409 F.2d 593, 596 (10th Cir. 1969); McLeod v. College of Artesia, 312 F. Supp. 498, 501 (D.N.M. 1970). Tax exemptions have been held not to constitute state "participation" in the conduct of other enterprises as well. Amalgamated Clothing Workers, AFL-CIO v. Chicago Tribune Co., 435 F.2d 470, 477 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971); *cf.* Walz v. Tax Comm'n., 397 U.S. 664 (1970).

³⁴This distinction is recognized not only by the commentators but also by courts which have dealt with "public function" arguments. *See* United States v. Wiseman, 445 F.2d 792, 795-96 (2d Cir.), *cert. denied*, 92 S. Ct. 346 (1971); Powe v. Miles, 407 F.2d 73, 80 (2d Cir. 1968).

³⁵The theoretical basis for this facet of the "public function" theory is found in two of the Texas white-primary cases, Smith v. Allwright, 321 U.S. 649 (1944), and Terry v. Adams, 345 U.S. 461 (1953), and in Evans v. Newton, 382 U.S. 296 (1966), a case dealing with a city's transfer of a segregated park from public to private control.

jected to constitutional restraints.³⁶ Like the state aid and regulation argument, the public function theory has also been deemed an insufficient basis for the extension of the due process guarantee to private universities.

The branch of the theory grounded upon the reasoning that private universities are performing an educational function in place of the state is predicated on the assumption that, if the private institutions were to close, the government would have to fill the void.³⁷ Only Judge J. Skelly Wright, in an opinion which was reversed,³⁸ has accepted this argument. He wrote:

Clearly, the administrators of a private college are performing a public function. They do the work of the state, often in place of the state. Does it not follow that they stand in the state's shoes? And, if so, are they not then agents of the state, subject to the constitutional restraints on governmental action . . . ?³⁹

However, education has been traditionally regarded by the courts as an area of private as well as of public activity. The concept that private education serves a public function has been rejected in areas not involving fourteenth amendment issues⁴⁰ as well as in cases dealing with due process questions in the private university setting.⁴¹ Such rejection no doubt stems from the judiciary's realization that applying the "public function" concept to private education is an ad hoc approach and would have monumental repercussions in matters outside the private university situa-

³⁶This branch of the "public function" theory is based upon the notion that a private university performs public functions for its residents, and for the public at large, in much the same manner as a municipal corporation, and the mere fact that title rests in private persons does not preclude a finding of state action. See *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Marsh v. Alabama*, 326 U.S. 501 (1946).

³⁷*Judicial Review*, *supra* note 3, at 1385 n. 126.

³⁸*Guillory v. Administrators of Tulane Univ.*, 203 F. Supp. 855 (E.D. La.), *judgment vacated and new trial ordered*, 207 F. Supp. 554 (E.D. La.), *aff'd per curiam*, 306 F.2d 489 (5th Cir.), *rev'd on retrial*, 212 F. Supp. 674 (E.D. La. 1962).

³⁹203 F. Supp. at 859.

⁴⁰*Board of Educ. v. Pace College*, 27 App. Div. 2d 87, 276 N.Y.S.2d 162 (1966). The court stated that while a private university may perform services of critical public interest, such performance does not give it the character of a public function. *Id.* at 166. See *Application of Thomas S. Clarkson Mem. College of Tech.*, 274 App. Div. 732, 87 N.Y.S.2d 491 (1949) (holding that tax privileges are not *quid pro quo* for the performance of a public function). *Contra*, *Yale Univ. v. New Haven*, 71 Conn. 316, 42 A. 87 (1899).

⁴¹*Blackburn v. Fisk Univ.*, 443 F.2d 121, 124 (6th Cir. 1971); *Powe v. Miles*, 407 F.2d 73, 80 (2d Cir. 1968); *Counts v. Voorhees College*, 312 F. Supp. 598, 606 (D.S.C. 1970), *aff'd*, 439 F.2d 723 (4th Cir. 1971); *McLeod v. College of Artesia*, 312 F. Supp. 498, 501 (D.N.M. 1970); *Grossner v. Trustees of Columbia Univ.*, 287 F. Supp. 535, 549 (S.D.N.Y. 1968). In *Grossner*, the court flatly stated that "nothing supports the thesis that university (or private elementary) 'education' as such is 'state action.'" 287 F. Supp. at 549.

tion.⁴² Making all activities affected with public interest subject to the fourteenth amendment would entail a drastic change in existing law.

The second but distinct concept of the "public function" theory is grounded on the notion that a private university, because it performs public functions for its students in much the same manner as a municipal corporation provides for its residents, should be subjected to constitutional restraints. Proponents of the theory have drawn an analogy to the company town in *Marsh v. Alabama*⁴³ or the shopping center in *Food Employees Local 590 v. Logan Valley Plaza, Inc.*⁴⁴ However, the courts, when presented with this argument, have consistently maintained that it is the state itself and not the company town that is to be subjected to constitutional restraints.⁴⁵ What was found unconstitutional in *Marsh* was apparently the state's support of the town's action through the trespass conviction. However, it can be argued that a state which permits this kind of private action must couple the permission with certain restrictions which, if not supplied by the states, will be supplied under the fourteenth amendment by the courts.⁴⁶ Yet those restrictions which emerged in *Marsh* and *Logan Valley Plaza* have been narrowly interpreted by the courts as dealing only with the designation of public places for first amendment purposes rather than with violations of constitutional rights in the internal affairs of such enterprises.⁴⁷ The Fourth Circuit in *Robinson* summarily dismissed *Marsh* and *Logan Valley Plaza* as inapplicable by stating that "[t]he teaching of the cases in this area is clear, obviating the necessity for further discussion."⁴⁸

⁴²For example, if the "education as a public function" argument is applied to all private universities, a religious school would be performing the public task of education and consequently be in violation of the "establishment of religion" clause of the first amendment. See generally *Lefcourt v. Legal Aid Soc'y*, 445 F.2d 1150, 1157 n.10, (2d Cir. 1971); FRIENDLY, *supra* note 16, at 24.

⁴³326 U.S. 501 (1946). In *Marsh* the Supreme Court reversed a conviction under an Alabama criminal trespass statute of a Jehovah's Witness who had distributed literature on a street of a company-owned town, pointing out that a company-owned town did not function differently from any other town and, with the presence of state action, could not preclude the exercise of a pamphleteer's constitutional rights.

⁴⁴391 U.S. 308 (1968). *Logan Valley Plaza* enjoined a shopping center from using state trespass laws to preclude picketing on its property. The Court stated that after *Marsh* privately owned property may in some circumstances, at least for first amendment purposes, be treated as though it were publicly held.

⁴⁵*Grossner v. Trustees of Columbia Univ.*, 287 F. Supp. 535, 549 (S.D.N.Y. 1968).

⁴⁶Lewis, *supra* note 17, at 1097.

⁴⁷*Browns v. Mitchell*, 409 F.2d 593, 596 (10th Cir. 1969). See also *Lefcourt v. Legal Aid Soc'y*, 445 F.2d 1150, 1156 (2d Cir. 1971); *Powe v. Miles*, 407 F.2d 73, 80 (2d Cir. 1968).

⁴⁸447 F.2d 753, 757 (4th Cir. 1971).

C. The "Indicia" or *Burton*⁴⁹ Approach

The "indicia" concept of state action, as enunciated in *Burton v. Wilmington Parking Authority*,⁵⁰ urges courts to give a cumulative effect to all the "indicia" of state involvement in order to discover the presence of state action on the private campus.⁵¹ In comparison to the state control and "public function" arguments, the *Burton* approach seems to be the strongest theory on which to base a finding of state action in the private university context. Yet, use of *Burton* allows the courts, where a finding of state action is or may be unavoidable, to view such involvement, after weighing all the indicia, as not significant. That this escape valve exists is due to the confusion over the meaning of state action generally and the application of the *Burton* test in particular.

The Supreme Court expanded the state action concept in the nineteen-forties, moving from its earlier and rather rigid characterization⁵² to a position proscribing conduct which under the earlier characterization was arguably private.⁵³ While the results in those cases were clear, the extent to which other ostensibly private conduct would be proscribed was relatively obscure. By 1960, the only certainty in this area of constitutional law was provided by the fact that the concept could be said to have grown in four directions⁵⁴ covering: the individual acting under color of law,⁵⁵ the non-official individual or group acting under governmental authority,⁵⁶ governmental refusal or failure to act,⁵⁷ and judicial enforcement

⁴⁹365 U.S. 715 (1961).

⁵⁰*Id.*

⁵¹Support for the "indicia" approach is found in the "sifting facts and weighing circumstances" language of *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). The Court in *Burton* acknowledged that there is no set state action test for cases dealing with non-obvious state involvement.

⁵²The character of state action was first determined by the *Civil Rights Cases*, 109 U.S. 3 (1883), in which the Supreme Court held that the states rather than the federal government were responsible for the protection of individual rights against infringement by private individuals. *Id.* at 11. From the language of the *Civil Rights Cases* evolved a rigid characterization of state action which "postulated an active, direct role by the state." Note, *The Emasculation of Reitman v. Mulkey*, 3 RUTGERS CAMDEN L.J. 155, 156 (1971).

⁵³*Shelley v. Kraemer*, 334 U.S. 1 (1948) (extending the concept to judicial enforcement of racially restrictive covenants); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Screws v. United States*, 325 U.S. 91 (1945) (equating "under pretense of law" with "under color of law"); *Smith v. Allwright*, 321 U.S. 649 (1944) (extending the concept to include Democratic primaries in Texas).

⁵⁴*Williams, The Twilight of State Action*, 41 TEXAS L. REV. 347, 351-52 (1963).

⁵⁵*See, e.g., United States v. Price*, 383 U.S. 787 (1966); *United States v. Guest*, 383 U.S. 745 (1966); *Monroe v. Pape*, 365 U.S. 167 (1961); *Screws v. United States*, 325 U.S. 91 (1945).

⁵⁶*See, e.g., Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Evans v. Newton*, 382 U.S. 296 (1966); *Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 326 U.S. 501 (1946).

and supervision of private relationships.⁵⁸ But these classifications, which arose in situations of rather conspicuous state involvement, were of little aid to courts saddled with the responsibility of adjudicating cases of nonobvious involvement on the basis of the Court's concept of the distinction between state and private action.

The distinction between state and private action would have been virtually eliminated had the Court in later cases broadly interpreted the implications of *Shelley v. Kraemer*,⁵⁹ a case in which the Court found state action in the judicial enforcement of racially restrictive real estate covenants. A broad reading of *Shelley* would result in the conversion of nearly all private decisions into state action.⁶⁰ However, the Court seemingly rejected such an interpretation of *Shelley* out of a desire, perhaps, to retain the state-private distinction. In *Burton*⁶¹ the Court placed a limitation on a literal interpretation of *Shelley* by intimating that the discovery of some nexus of the state with the private conduct is not sufficient to bring such conduct within the concept of state action;⁶² rather the state must be involved to some "significant extent."⁶³ *Burton* involved a restaurant, leased to a private individual by the state parking authority, which refused to serve blacks. The Court initially observed that the fourteenth amendment erects no shield against merely private conduct, however discriminatory or wrongful, "unless to some significant extent the State in any of its manifestations has been found to have become involved in it."⁶⁴ Recognizing that the delineation of state from private conduct through the application of a precise formula was impossible, the Court stated that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."⁶⁵ The Court proceeded to look at the

⁵⁷See, e.g., *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

⁵⁸See, e.g., *Lombard v. Louisiana*, 373 U.S. 267 (1963); *Barrows v. Jackson*, 346 U.S. 249 (1953); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

⁵⁹334 U.S. 1 (1948).

⁶⁰It has been argued that *Shelley* stands for the proposition that state action occurs whenever a state gives effect to, or fails to provide a remedy against, a private restriction of a fourteenth amendment right. See Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962). The author recognizes the confusion created by *Shelley* and observes that the case was "rightly decided" but that "a more satisfactory opinion can be written." *Id.* at 474.

⁶¹365 U.S. 715 (1961).

⁶²*Id.* at 722.

⁶³*Id.* The court's "significant extent" language in *Burton* has been criticized for failing to provide proper guidance to the bar and the public. Lewis, *Burton v. Wilmington Parking Authority—A Case Without Precedent*, 61 COLUM. L. REV. 1458 (1961).

⁶⁴365 U.S. at 722.

⁶⁵*Id.*

leasing and financial arrangements between the state agency and its discriminatory lessee and, from those indicia, concluded that the state was involved to such a significant extent that action by the lessee was action by the state.

While it is far easier to "fault 'state action' than to suggest a flawless alternative standard,"⁶⁶ the theory can nevertheless be described as "a conceptual disaster area."⁶⁷ It is clear in *Burton* that the Court realized the vagueness of the doctrine;⁶⁸ perhaps *Burton* laid a foundation for relinquishment of the concept. In any case, *Burton* can be said to have taken the middle course between choosing a formula "in the hope of achieving uniform and predictable results" and abandoning courts "to a continual struggle with unruly legislative facts,"⁶⁹ for the *Burton* Court announced its decision by way of a "significant extent" formula, although it reached its conclusion through the struggle of "sifting facts and weighing circumstances."⁷⁰ Such a middle-ground policy has been criticized as being "easy only in the short run."⁷¹ *Robinson*, by utilizing the *Burton* approach to negate a finding of state action, gives validity to that criticism.⁷² While *Burton* directed itself to situations in which state involvement was so unobvious from the outset that examination must proceed by sifting and weighing facts and circumstances, the case has been misinterpreted as supplying the sole state action formula to the exclusion of the other directions in which the concept has moved.

In *Robinson* the Fourth Circuit utilized the *Burton* test⁷³ in a situation which arguably presented a higher degree of state involvement than was discernible from the facts of *Burton* itself. Rather than applying *Burton* in the one private university case to which the quasi-governmental branch of the "public function" theory seems applicable, the court might have extended the rationale of *Marsh v. Alabama*⁷⁴ in order to reach the merits of the student's claim. *Marsh* can be said to imply that private organizations should be subject to constitutional restraints when they have the power to infringe constitutional rights in a manner similar to that of the state. Clearly the administrators of Montreat-Anderson Col-

⁶⁶Silard, *A Constitutional Forecast: Demise of the State Action Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855, 870 (1966).

⁶⁷Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967).

⁶⁸365 U.S. at 722.

⁶⁹Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3, 58 (1961).

⁷⁰365 U.S. at 722.

⁷¹Van Alstyne & Karst, *supra* note 69.

⁷²See, e.g., *Robinson v. Davis*, 447 F.2d 753 (4th Cir. 1971); *Guillory v. Administrators of Tulane Univ.*, 212 F. Supp. 674 (E.D. La. 1962).

⁷³447 F.2d at 754.

⁷⁴326 U.S. 501 (1945). See note 48 and text accompanying note 53 *supra*.

lege vested themselves "with the cloak of municipal authority," in which case "they act not only as private citizens, but also as agents of the state."⁷⁵ Alternatively, it can be argued that the branch of the state action concept which covers the individual acting "under color of law"⁷⁶ could have been utilized by the Fourth Circuit to find the policemen's acts in violation of plaintiff's constitutional rights. That the *Burton* test, which by its own admission is to be used for cases of nonobvious state involvement,⁷⁷ was applied in *Robinson*, a case presenting questions of obvious involvement, to the exclusion of the other directions in which the concept has moved is indicative of the confusion surrounding *Burton*.

Judicial Reluctance and Due Process in the Private University

Assuming *arguendo* that the *Burton* test is applicable to *Robinson*, the fact that the Fourth Circuit did not find significant indicia of state involvement⁷⁸ indicates the extremes to which courts will go to avoid the subjection of private university disciplinary processes to the due process clause. Cases involving racial discrimination by private hospitals, which have found state action from "indicia" similar to that present in most private universities, seem surprisingly to indicate that the *Burton* test is not likely to be used to guarantee due process to private university students. Additionally, these cases offer a rationale for the judicial reluctance to establish such a guarantee. For example, in *Eaton v. Grubbs*,⁷⁹ an action to enjoin a private hospital from denying admission to treatment facilities on a racially discriminatory basis, the Fourth Circuit held that the record showed that state and federal involvement in the conduct of the hospital was such to justify a finding of state action.⁸⁰ The court, following the dictates of *Burton*, weighed such facts as financial aid, a tax exemption, capital construction subsidies, donations of property, and the grant of the power of eminent domain to the hospital by the city and county, before concluding that these facts taken together were sufficient to invoke the equal protection clause of the fourteenth amendment.⁸¹

In *Simkins v. Moses H. Cone Memorial Hospital*,⁸² the court held that the discriminatory conduct of a hospital which received state-

⁷⁵447 F.2d at 760 (Butzner, J., dissenting).

⁷⁶See note 55 *supra*.

⁷⁷365 U.S. at 722.

⁷⁸See 447 F.2d at 760 (Butzner, J., dissenting). Judge Butzner in his dissent in *Robinson* argued that the *Burton* test could be applied and would result in a finding of state action.

⁷⁹329 F.2d 710 (4th Cir. 1964).

⁸⁰*Id.* at 715.

⁸¹*Id.*; *accord*, *Smith v. Hampton Training School for Nurses*, 360 F.2d 577 (4th Cir. 1966).

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

distributed funds for construction and modernization constituted state action pursuant to a state policy of racial discrimination.⁸³ Another circuit found that a private hospital, which received fourteen percent of its budget from government funds and whose board had five members who were responsible to the public, was infused with state action and consequently subject to the fourteenth amendment.⁸⁴

At first glance, the results in the hospital cases, when compared to *Robinson* and others, should indicate that the courts are applying the *Burton* state action concept to one constitutional right and not to another. The courts are clearly not as hesitant to apply the equal protection clause to a racially discriminatory college admissions policy as they are to apply the due process clause of the fourteenth amendment to private university disciplinary proceedings.⁸⁵ In his concurring opinion in *Powe v. Miles*, which dealt with an alleged denial of due process by a private college, Judge Friendly admitted that the result might have been different had the case involved a racially discriminatory admissions policy.⁸⁶ Carrying Judge Friendly's statement further, the Second Circuit later pointed out in a due process case that, with respect to racial discrimination, the scope of state action is somewhat broader.⁸⁷ And while state action may be found in racial discrimination, "where the issue involves the exercise of First Amendment rights . . . the inquiry must go further."⁸⁸ Other courts have accordingly felt that there is a less demanding standard of what constitutes sufficient state action where there are allegations of racial

⁸³*Id.* at 967. For a broader application of *Simkins* see *Sams v. Ohio Valley Gen. Hosp. Ass'n*, 413 F.2d 826 (4th Cir. 1969). However, in a due process challenge to a hospital's firing procedures, one court, after applying *Burton*, refused to find state action despite the fact that the hospital received federal construction funds and was subject to state regulation. *Mulvihill v. Julia L. Butterfield Mem. Hosp.*, 329 F. Supp. 1020 (S.D.N.Y. 1971).

⁸⁴*Chiaffitelli v. Dettmer Hosp., Inc.*, 437 F.2d 429 (6th Cir. 1971).

⁸⁵Two courts have found state action in equal protection cases involving racially discriminatory admissions policies. *Hammond v. University of Tampa*, 344 F.2d 951 (5th Cir. 1965), dealt with the discriminatory admissions policy of a college whose establishment had been made possible by use of surplus city buildings. In *Pennsylvania v. Brown*, 392 F.2d 120 (3d Cir.), *cert. denied*, 391 U.S. 921 (1968), one of a long line of cases attacking the racially discriminatory admissions policy of Girard College, the court held that the action of a city court in removing the city as trustee and naming private individuals in the city's place was action sufficient to allow a finding of state action.

⁸⁶407 F.2d at 81.

⁸⁷*Lefcourt v. Legal Aid Soc'y*, 445 F.2d 1150, 1155 n.6 (2d Cir. 1971). The court noted that the reason for further inquiry in first amendment cases than in the area of race discrimination is that in the latter state inaction or neutrality has often been found to constitute affirmative encouragement. See FRIENDLY, *supra* note 16, at 22. See generally *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Cooper v. Aaron*, 358 U.S. 1 (1958).

⁸⁸*Wolin v. Port Authority*, 392 F.2d 83, 89 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968).

discrimination.⁸⁹ The rationale that supports this distinction is drawn from several sources, including the concept that the state action doctrine was developed in response to efforts to eliminate private racial discrimination;⁹⁰ the racially based origins of the fourteenth amendment and section 1983;⁹¹ congressional action on the race question in the form of the various civil rights acts;⁹² and the history of state participation in racism.⁹³ However, *Sams v. Ohio Valley General Hospital Association*,⁹⁴ which found state action in a case involving non-racial discrimination, detracts from the contention that the state action concept is applied to purely racial situations.⁹⁵

If courts have a special interest in a particular area, such as racial discrimination, state action will seemingly be more readily found; the Supreme Court does not appear to consider the due process problem in the private university context as one of its special interests. On the other hand, the Court may be reluctant to confront the problem because of the sensitive nature of the tenuous public-private university distinction. The courts recognize that the freedom of choice guaranteed by a dual system of higher education is "deeply rooted in American tradition"⁹⁶ and "the benefits of diversity of educational institutions argue against fitting all private schools into the same procrustean bed."⁹⁷

Whether relying upon a racial discrimination distinction or upon the self-imposed judicial policy of reluctance in meeting unwelcome issues or upon the weakness of the state control and public function arguments, the

⁸⁹Bright v. Isenbarger, 314 F. Supp. 1382, 1392 (N.D. Ind. 1970), *aff'd*, 445 F.2d 412 (7th Cir. 1971); see *Male v. Crossroads Associates*, 320 F. Supp. 141, 148-49 (S.D.N.Y. 1970), in which the district court admitted that the facts before it were very similar to those in *Smith v. Holiday Inns*, 336 F.2d 630 (6th Cir. 1964), but with the significant difference that, in *Smith*, there was admitted racial discrimination.

⁹⁰*Id.*

⁹¹See Frank & Munro, *The Original Understanding of "Equal Protection of the Laws"*, 50 COLUM. L. REV. 131 (1950). For a discussion of the abuses which fostered passage of the Act of 1871 see Justice Douglas' opinion in *Monroe v. Pape*, 365 U.S. 167 (1961).

⁹²See Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 94 (1966), suggesting that the Court is reluctant to act in certain areas without prior Congressional action.

⁹³See *Mulvihill v. Julia L. Butterfield Mem. Hosp.*, 329 F. Supp. 1020, 1024 (S.D.N.Y. 1971).

⁹⁴413 F.2d 826 (4th Cir. 1969). In *Sams* the Court found that the restriction of staff privileges to doctors from one county was geographic discrimination and consequently that doctors from the surrounding counties were denied equal protection.

⁹⁵Perhaps the distinction is made in these cases on the basis of any violation of the equal protection clause and not solely on the basis of racial discrimination.

⁹⁶O'Neil, *Private Universities and Public Law*, 19 BUFF. L. REV. 155, 167 (1970).

⁹⁷*Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1063 (1968). See also FRIENDLY, *supra* note 16, at 30.