Case Notes

CONSTITUTIONAL LAW—GRANTING OF STATE TAX EXEMPTIONS TO PRIVATE CHARITABLE FOUNDATION HELD SUFFICIENT TO ESTABLISH STATE ACTION UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.—*Jackson v. Statler Foundation* (2d Cir. 1974).

Appellant Reverend Donald Jackson brought suit against thirteen charitable foundations alleging racial discrimination against himself, his children, and his own foundation. Appellant contended appellee foundations refused to hire him as a director of their foundations, refused to give scholarships to his children, and refused to grant money to his foundation, all because of appellant's race. Action was brought under section 1983 of title 42 of the *United States Code*[1] on the theory that the foundations had acted under "color of law" because they were granted a tax exempt status by the state.[2] On the authority of *Moose Lodge No. 107 v. Irvis*,[3] the trial court dismissed the complaint, ruling that the grant of a tax exemption did not significantly implicate the state with the foundations' activities to such a degree as to constitute state action. On appeal, *held*, reversed and remanded. "[I]f on remand the district court finds that the defendant foundations are substantially dependent on their exempt status, that the regulatory scheme [accompanying the tax exemption] is both detailed and intrusive, that that scheme carries connotations of governmental approval, that the foundations do not have a substantial claim of constitutional protection, and that they serve some public function, then a finding of 'state action' would be appropriate."[4] *Jackson v. Statler Foundation*, 496 F.2d 623 (2d Cir. 1974).

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1. 42 U.S.C. section 1983 (1970) is derived from section 1 of the Civil Rights Act of 1871. It reads:

> 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 of law, suit in equity, or other proper proceedings for redress.

2. The appellant nowhere specifies what specific tax exemption he is challenging. Among the major New York tax provisions in regard to charitable foundations are: N.Y. STATE TAX LAW §§ 208, 615 (which provide for state income and corporate tax deductions); N.Y. STATE TAX LAW § 1230(d) (which exempts these foundations from local taxation).

3. 407 U.S. 163 (1972).

4. Jackson v. Statler Foundation, 496 F.2d 623, 634 (2d Cir. 1974). Appellant also included federal tax exemptions in his claim. *See, e.g.*, 26 U.S.C. § 501(c)(3) (1970). However, the court noted that: "42 U.S.C. § 1983 proscribes only conduct '. . . under color of any statute . . . of any State . . .' and has been construed as not applying to the actions of the federal government, District of Columbia v. Carter, 409 U.S. 418, 424-25 (1973); Wheeldin v. Wheeler, 373 U.S. 647, 650, n.2 (1963), unless there is conspiracy between the state and federal officials, Kletschka v. Driver, 411 F.2d 436, 448-49 (2d Cir.

The protections of the equal protection clause are brought into play only when state action is involved.[5] Therefore, appellant's "tax exemption challenges require us to wade 'into the murky waters of the "state action" doctrine.' "[6]

In the *Civil Rights Cases*,[7] the Supreme Court set forth the fundamental distinction between discriminatory action by the state, which is prohibited by the fourteenth amendment, and private conduct which is not.[8] While this dichotomy is easily stated, "the question of whether particular discriminatory conduct is private, on the one hand, or amounts to 'state action' on the other frequently admits of no easy answer."[9] Where a governmental agency acts directly to deny a citizen equal treatment, state action is readily discernible.[10] More frequently, however, the discrimination does not find its impetus in the state but in the activities of private parties.[11] In *Shelley v. Kraemer*[12] the Supreme Court found state action in the judicial enforcement of private racial discrimination. In *Shelley*, a state court had enforced a restrictive covenant that prevented a white vendor from selling the restricted property to a black purchaser. The Supreme Court reversed, holding that, although private individuals have the right to enter into a racially restrictive covenant, under the fourteenth amendment a state cannot participate in the discrimination by allowing its courts to enforce the covenants.

A review of recent case law on state action reveals a great diversity of factual situations. For this reason, no clear tests have been developed to determine whether or not state action exists. In *Burton v. Wilmington Parking Authority*,[13] the Supreme Court held that a private restaurant owner who refused

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1969)." Jackson v. Statler Foundation, 496 F.2d 623, 635 (2d Cir. 1974). Since no colorable claim of such conspiracy had been made, the court directed that on remand the district court should look only to the state tax exemptions in determining whether appellant had a claim under 42 U.S.C. section 1983 (1970).

5. Section 1 of the fourteenth amendment reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. 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.

U.S. CONST. amend. XIV, § 1. This section has consistently been interpreted as applying only to state action. *See, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144, 150-52 (1970); United States v. Price, 383 U.S. 787, 793-94 (1966); Shelley v. Kraemer, 334 U.S. 1, 13 (1948); Civil Rights Cases, 109 U.S. 3, 10-18 (1883); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); Morris & Powe, *Constitutional and Statutory Rights to Open Housing*, 44 WASH. L. REV. 1, 13 (1968).

6. Jackson v. Statler Foundation, 496 F.2d 623, 626 (2d Cir. 1974).

7. 109 U.S. 3 (1883).

8. "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment." *Id.* at 11.

9. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972).

10. *See, e.g.*, Griffin v. Maryland, 378 U.S. 130 (1964).

11. *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Shelley v. Kraemer, 334 U.S. 1 (1948); Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

12. 334 U.S. 1 (1948).

13. 365 U.S. 715 (1961).

service to a customer because of his race violated the fourteenth amendment where the restaurant was located in a public building adjacent to a public garage, and leased from a state created agency. The Court observed that "private conduct abridging individual rights does no violence to the equal protection clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it."[14] After a comprehensive review of the relationship between the lessee and the parking authority, the Court concluded that "[t]he State has so far insinuated itself into a position of interdependence with [the private restaurant] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment."[15] But the Court refused to set forth a specific test, explaining that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance."[16]

While this is probably the only possible test, it is really no test at all. However, this approach has allowed the Court to extend the protections of the fourteenth amendment as they have attempted to adapt the law to fit modern social problems. In *Reitman v. Mulkey*,[17] the voters of California passed a referendum amending their state constitution to guarantee the right of private individuals to sell or decline to sell real property to whomever they chose for any reason. Although the proposition, in effect, repealed two fair housing acts, it was entirely neutral on its face and merely returned California to a posture of non-interference in private racial discrimination. The Court held that although the amendment was ostensibly neutral, it would have a tendency to authorize and encourage private discrimination and was thus in violation of the fourteenth amendment.

In *Moose Lodge No. 107 v. Irvis*,[18] the Court rejected the argument that the issuance of a license by a state agency fostered or encouraged discrimination. In *Moose Lodge*, a black guest of a white member was denied service in a private club solely because of his race. The lodge held a liquor license issued by the Pennsylvania Liquor Control Board and was accordingly subject to the extensive regulatory scheme imposed on all liquor licensees in Pennsylvania. The Court, however, refused to hold that because a state agency had issued the Moose Lodge a liquor license, the lodge's discriminatory conduct constituted state action.

Generally, tax incentives have seldom been singled out to be tested as a form of state action, although courts have examined tax benefits as one ele-

14. *Id.* at 722.
15. *Id.* at 725.
16. *Id.* at 722.
17. 387 U.S. 369 (1967). *See generally* Black, *Foreword: "State Action," Equal Protection and California's Proposition 14*, 81 HARV. L. REV. 69 (1967) [hereinafter cited as Black].
18. 407 U.S. 163 (1972).

ment in an overall pattern of governmental involvement with an otherwise private entity.[19] *Jackson v. Statler Foundation*[20] represents the latest decision in a recent trend of cases which have focused on tax exemptions and the issue of whether this form of governmental involvement constitutes state action.[21]

Browns v. Mitchell[22] was one of the earliest cases in this trend. It involved an action brought against a private university by students who were suspended for engaging in a sit-in demonstration. The students maintained that the university, which enjoyed a tax exempt status, violated their rights to due process under the fourteenth amendment. In dismissing the case, the United States Court of Appeals for the Tenth Circuit held that the granting of a tax exemption fell "far short of the requisite State involvement."[23]

The following year, the Supreme Court examined this issue in *Walz v. Tax Commission.*[24] Petitioner claimed that a provision in the New York Constitution[25] authorizing the exemption of religious organizations from property tax constituted excessive government entanglement in violation of the establishment clause.[26] The Court noted that in terms of strictest logic, a tax exemption does constitute a kind of state involvement, but that this involvement can only be characterized as "minimal and remote."[27] The rationale in *Walz* was later followed by two lower federal court decisions—*Chicago Joint Board, Amalgamated Clothing Workers v. Chicago Tribune Co.*,[28] an action by a union against a newspaper which enjoyed various tax benefits, and *Bright v. Isenbarger*,[29] an action by students against a private parochial school with a tax exempt status.

The first major breakthrough in this area of tax exemptions and state action was made in a trilogy of cases involving suits by individual taxpayers against state and federal revenue officials. In *Green v. Connally*,[30] a class action was brought by parents of Negro school children attending public schools in Mississippi to enjoin United States Treasury officials from according a tax exempt status to private schools which discriminated against Negro students. Al-

19. *See* Evans v. Newton, 382 U.S. 296 (1966); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Blackburn v. Fisk University, 443 F.2d 121 (6th Cir. 1971); Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964); Braden v. University of Pittsburgh, 343 F. Supp. 836 (W.D. Pa. 1972); Holmes v. Silver Cross Hospital, 340 F. Supp. 125 (N.D. Ill. 1972).

20. 496 F.2d 623 (2d Cir. 1974).

21. *See also* Bittker & Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 YALE L.J. 51 (1972); Comment, *Tax Incentives as State Action*, 122 U. PA. L. REV. 414 (1973).

22. 409 F.2d 593 (10th Cir. 1969).

23. *Id.* at 596.

24. 397 U.S. 664 (1970).

25. N.Y. CONST. art. 16, § 1.

26. U.S. CONST. amend. I.

27. 397 U.S. 664, 676 (1970).

28. 435 F.2d 470 (7th Cir. 1970).

29. 314 F. Supp. 1382 (N.D. Ind. 1970), *aff'd*, 445 F.2d 412 (7th Cir. 1971).

30. 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971).

though the case actually turned on statutory grounds, the court noted that it would be very difficult to establish the constitutionality of tax exemptions provided to private schools with racially discriminatory policies.[31]

In *Pitts v. Department of Revenue*,[32] an individual taxpayer brought suit against the Wisconsin department of revenue seeking to enjoin state officials from granting tax exemptions to fraternal organizations which discriminated on the basis of race. Citing the decision in *Green*, the federal district court held that the fourteenth amendment prohibited the state from granting the exemption, characterizing the state involvement as fostering and encouraging racial discrimination.[33]

Finally, in *McGlotten v. Connally*,[34] a three judge federal court held that the Secretary of the Treasury could not grant federal income tax exemptions to fraternal orders that excluded non-whites from membership. In the court's view, these tax benefits constituted federal subsidies, the grant of which demonstrated governmental approval of the organization and hence approval of their discriminatory practices.[35] The rationale of these decisions was used to strike down tax exemptions granted to fraternal orders in *Falkenstein v. Department of Revenue*,[36] but distinguished as applied to labor unions in *Marker v. Schultz*.[37]

Jackson v. Statler Foundation[38] represents the most recent and potentially most significant decision in this trend. It is significant not only because it is the first case to hold that the granting of tax exemptions to private charitable foundations may be sufficient state action so as to bring the foundations' activities within the ambit of the fourteenth amendment, but also because of the analysis which the court uses to reach its result.

Initially, it should be noted that the court did not hold that the granting of state tax exemptions to private charitable foundations in and of itself automatically constitutes state action. The decision in *Jackson* was reached only after sifting and weighing the facts and circumstances of the case. As a form of analysis, the court set forth five factors to be considered in a determination of state action:

1) [T]he degree to which the "private" organization is dependent on government aid;
2) [T]he extent and intrusiveness of the governmental regulatory scheme;

31. 330 F. Supp. 1150, 1165 (D.D.C. 1971). Under the *Internal Revenue Code*, racially discriminatory private schools are not entitled to the federal tax exemption provided to charitable and educational institutions, nor are persons making gifts to such schools entitled to deductions provided in cases of gifts to charitable and educational institutions. INT. REV. CODE of 1954, §§ 170, 501.
32. 333 F. Supp. 662 (E.D. Wis. 1971).
33. *Id.* at 669.
34. 338 F. Supp. 448 (D.D.C. 1972).
35. *Id.* at 459.
36. 350 F. Supp. 887 (D. Ore. 1972).
37. 485 F.2d 1003 (D.C. Cir. 1973).
38. 496 F.2d 623 (2d Cir. 1974).

3) [W]hether the scheme connotes government approval of the activity . . . ;
4) [T]he extent to which the organization serves a public function . . . ;
5) [W]hether the organization has legitimate claims to recognition as a "private" organization . . . .[39]

According to the court, each of these factors was material though no one element conclusive. Furthermore, the court indicated that even if all factors were not present, a finding of state action might still be appropriate.[40] The tax advantages granted to the foundation were then analyzed within this framework, as the appellate court attempted to demonstrate how the necessary inferences could be drawn from the facts of the case on remand.[41]

The importance of the decision becomes apparent when it is compared to the rulings of previous cases in this area. The *Green, Pitts* and *McGlotten* decisions involved suits by claimants against state or federal revenue officials.[42] The challenged action was the governmental action itself—the granting of tax exemptions—while the relief sought was to enjoin those officials from continuing to grant tax benefits to offending organizations.[43] These cases held that the government could no longer grant income tax exemptions to organizations with discriminatory policies. The governmental action was impermissible state action in violation of the equal protection clause.

In contrast, *Jackson* represents an action against a private foundation. The challenged action in this case is the alleged discriminatory action of the foundation, not the actions of revenue officials who have granted the foundations their tax exempt status.[44] This case applies a much broader concept of the state action doctrine than previous decisions. Appellant did not contend that the government had violated the equal protection clause by according a tax exempt status to the foundations. Rather, he asserted that the granting of tax exemptions to the foundations was sufficient state involvement so as to transform the otherwise private activities of the foundations into state action.[45] Once this theory of state action was accepted, the foundations could be sued for damages under section 1983 if they failed to direct their activities in accordance with the restrictions imposed upon the state by the fourteenth amendment.

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39. *Id.* at 629.
40. *Id.* at 634.
41. *Id.* at 629-34.
42. McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972); Pitts v. Department of Revenue, 333 F. Supp. 662 (E.D. Wis. 1971); Green v. Connally, 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971).
43. The *Pitts* decision is very careful to note this distinction. 333 F. Supp. at 665-66.
44. It appears from the record that appellant did attempt to force revocation of the appellees' tax exempt status. However, the court noted that the appellant had failed to join the government or any revenue department officials and therefore that part of the complaint was dismissed on its face. Jackson v. Statler Foundation, 496 F.2d 623, 626 (2d Cir. 1974).
45. *Id.* at 636 (dissenting opinion).

This decision is also significant in view of the analysis used to reach the result. Noting the apparent discord between the prior cases which had considered this issue, the court structured their analysis by dividing the cases into two groups.[46] The court pointed out that where racial discrimination was involved, courts have generally found state action to exist;[47] where other constitutional rights are at issue, such as due process and the establishment clause, the decisions have concluded that the state involvement, if any, is not sufficient.[48] The opinion goes on to suggest that this dichotomy can be explained by what the court perceives to be a double state action standard.[49] In other words, prior cases seem to have applied a less onerous test in finding state action in cases involving racial discrimination and a more rigorous standard in determining its existence in cases involving other claims.[50]

In a vigorous dissent in *Jackson*, Judge Friendly criticizes what he views as the majority's "loose characterization of the 'state action' doctrine."[51] Judge Friendly contends that the majority erred in its reliance upon the *Green, Pitts* and *McGlotten* decisions, all of which involved actions against the government. In those cases, the challenged action was clearly governmental action, while in the case at bar, the appellant challenges the activities of the foundation itself. Judge Friendly warns that: "holding that an otherwise private institution has become an arm of the state is much broader and can have far more serious consequences than a determination that the state [by granting tax benefits] has impermissibly fostered private discrimination."[52] When an otherwise private entity is viewed as an arm of the state, it may be directly exposed "to damage claims for prior discriminatory conduct and could be required by a court to make decisions not only as to the disposition of its charitable donations but in the selection of its employees in accordance with the restrictions properly imposed on governmental agencies."[53] Furthermore, only one of the cases relied upon for this proposition was approved by the Supreme Court.[54]

Secondly, Judge Friendly attacks the double state action standard which

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46. *Id.* at 628.

47. Falkenstein v. Department of Revenue, 350 F. Supp. 887 (D. Ore. 1972); McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972); Pitts v. Department of Revenue, 333 F. Supp. 662 (E.D. Wis. 1971); Smith v. YMCA of Montgomery, 316 F. Supp. 899 (M.D. Ala. 1970), *modified*, 462 F.2d 634 (5th Cir. 1972).

48. Marker v. Schultz, 485 F.2d 1003 (D.C. Cir. 1973); Chicago Joint Board, Amalgamated Clothing Workers v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971); Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968); Bright v. Isenbarger, 314 F. Supp. 1382 (N.D. Ind. 1970), *aff'd*, 445 F.2d 412 (7th Cir. 1971).

49. Jackson v. Statler Foundation, 496 F.2d 623, 629 (2d Cir. 1974).

50. *See* Lefcourt v. Legal Aid Society, 445 F.2d 1150, 1155 n.6 (2d Cir. 1971); Wolin v. Port Authority, 392 F.2d 83, 89 (2d Cir. 1968); Howe v. United Parcel Service, Inc., 379 F. Supp. 667, 674-75 (S.D. Iowa 1974); Bright v. Isenbarger, 314 F. Supp. 1382, 1394 (N.D. Ind. 1970), *aff'd*, 445 F.2d 412 (7th Cir. 1971).

51. Jackson v. Statler Foundation, 496 F.2d 623, 637 (2d Cir. 1974).

52. *Id.*

53. *Id.*

54. Green v. Connally, 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971).

the court employs.[55] Judge Friendly contends that the cases which the majority relied upon were all decided prior to the Supreme Court's decision in *Moose Lodge No. 107 v. Irvis*.[56] In that case, the Court did not utilize any less demanding standard nor did they refer to any of the cases which had suggested it. In reaching their decision that the mere issuance of a license by the state to an otherwise private entity was not sufficient state involvement to constitute state action, the Court pointed out that:

> the court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct set forth in *The Civil Rights Cases* . . . . Our holdings indicate that where the impetus for the discrimination is private, the State must have "significantly involved itself with invidious discriminations . . . ."[57]

Finally, Judge Friendly criticizes the decision because there is no suggestion that the claimed involvement by the state is in any way associated with the discriminatory action itself. Several recent federal court decisions have stressed the essential point that in order for state action to exist, "the 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."[58] There

55. Although the Supreme Court has never held that a different, less demanding, standard of what constitutes state action is applicable where there are allegations of racial discrimination, "the fact that only a handful of the successful 'state action' cases have not involved challenges to racial discrimination and the considerations of diversity and pluralism suggest this possibility." Bright v. Isenbarger, 314 F. Supp. 1382, 1394 (N.D. Ind. 1970), *aff'd*, 445 F.2d 412 (7th Cir. 1971). Moreover, this theory would seem to be justified in light of the fact that the Supreme Court has stated that the clear and central purpose of the fourteenth amendment is to eliminate all official sources of invidious discrimination by the states. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964); Slaughter-House Cases, 83 U.S. 36, 71-72 (1873); Black, *supra* note 17.

56. 407 U.S. 163 (1972).

57. *Id.* at 173. This basic principle was emphasized even more explicitly in *Jackson v. Metropolitan Edison Co.*, the most recent state action case handed down by the Supreme Court. 43 U.S.L.W. 4110 (U.S. Dec. 23, 1974). Petitioner brought suit against Metropolitan Edison, a privately owned utility company, seeking damages and injunctive relief under 42 U.S.C. section 1983 (1970) for termination of her electrical service before she had been afforded notice and an opportunity to be heard. Although Metropolitan Edison was found to be a "heavily regulated private utility," the Court held "that the State . . . is not sufficiently connected with respondent's action in terminating petitioner's service so as to make respondent's conduct in so doing attributable to the State for purposes of the Fourteenth Amendment." *Id.* at 4114. According to the Court, "[d]octors, optometrists, lawyers, Metropolitan, and *Nebbia's* upstate New York grocery selling a quart of milk are all in regulated businesses, providing arguably essential goods and services, 'affected with a public interest.' We do not believe that such a status converts their every action, absent more, into that of the State." *Id.* at 4113.

58. Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968); *accord*, Marker v. Schultz, 485 F.2d 1003, 1007 (D.C. Cir. 1973); Browns v. Mitchell, 409 F.2d 593, 596 (10th Cir. 1969); Bright v. Isenbarger, 314 F. Supp. 1382, 1394 (N.D. Ind. 1970), *aff'd*, 445 F.2d 412 (7th Cir. 1971); Counts v. Voorhees College, 312 F. Supp. 598, 607 (D.S.C. 1970); McLeod v. College of Artesia, 312 F. Supp. 498, 501 (D.N.M. 1970); Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535, 548 (S.D.N.Y. 1968).

can be no doubt that the granting of tax exemptions constitutes state involvement with the foundation in a limited sense. "But 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."[59] There is nothing in the case to indicate that the tax exemption is or can be utilized in any way to dictate the administration of the foundations' donations. "The benefits conferred, however characterized, have no bearing on the challenged actions beyond the perpetuation of the institution itself."[60]

If the appellees take Judge Friendly's suggestion[61] and appeal this decision to the Supreme Court, one can only speculate as to the final result. To be sure, the government has an important interest in preserving private philanthropy, and a decision of this nature may discourage private donors by subjecting them to the necessity of justifying their decisions in court. On the other hand, one must remember that "[t]he state-action doctrine reflects the profound judgment that denials of equal treatment, and particularly denials on account of race or color, are singularly grave when government has or shares responsibility for them."[62] One may well wonder, however, if the court lost sight of the essential dichotomy between state action, which is prohibited under the fourteenth amendment, and private conduct which is not. The implications of this decision are staggering for this concept of state action can undoubtedly be used to reach sources of private action that heretofore had been considered so purely private as to fall without the ambit of the equal protection clause.

> Simply because of tax exemptions, private social agencies, community centers, institutions of higher education, homes for the young and the aged, endowed by private donors for the sole or preferential benefit of particular creeds or races, must open their doors equally to all, with every decision subject to judicial reexamination, even though this may impair or destroy the very purpose which led the donor to endow them.[63]

Moreover, this decision may have even more far reaching consequences. If tax exemptions granted to private charitable foundations are sufficient to transform their activities into state action, this same rationale may also be applied to reach the activities of corporations and even private individuals who are recipients of tax benefits. It is ironic that the Constitution, supposedly the protector of individual rights and liberties, thus becomes an instrument which frustrates efforts of private individuals who wish to exercise their freedom of choice

59. Jackson v. Metropolitan Edison Co., 43 U.S.L.W. 4110, 4112 (U.S. Dec. 23, 1974).
60. Browns v. Mitchell, 409 F.2d 593, 596 (10th Cir. 1969).
61. Jackson v. Statler Foundation, 496 F.2d 623, 640 (2d Cir. 1974) (dissenting opinion).
62. Adickes v. S.H. Kress & Co., 398 U.S. 144, 190 (1970).
63. Jackson v. Statler Foundation, 496 F.2d 623, 638 (2d Cir. 1974) (dissenting opinion).

in making charitable contributions. *Jackson v. Statler Foundation* may very well spell the demise of the state action doctrine as it has traditionally been viewed, for there may be few, if any, private entities that fall without its broad scope.

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