"State Action" in the Seventh Circuit

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"STATE ACTION" IN THE SEVENTH CIRCUIT

INTRODUCTION

In 1871 the United States Congress created a statutory cause of action for violation of the newly enacted fourteenth amendment.1 One element of such a cause of action is "state action"; a plaintiff must be able to prove that the wrongdoer acted "under color of any" state statute, ordinance or custom. The line between activities once viewed as private and those involving "state action" has become more blurred as the state has become more involved in a variety of activities that were once viewed as private.2 Where a private person is found to be acting "under color of" state law or custom3 the constitutional limitations which are placed on the government are placed on the private person.

In Shelley v. Kraemer5 the court stated:

Since the decision of this Court in the Civil Rights Cases,

1. 42 U.S.C. § 1983 reads as follows:

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.

It was enacted on Apr. 20, 1871, c. 22 § 1, 17 Stat. 13.

2. In discussing the meaning of "state action" and "under color of" state law the United States Supreme Court stated that "[i]n cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." United States v. Price, 383 U.S. 787, 794, n. 7 (1966). Accord, Murphy v. Society of Real Estate Appraisers, 388 F. Supp. 1046, 1049 (E.D. Wis. 1975); Bright v. Isenbarger, 314 F. Supp. 1382, 1389 (N.D. Ind. 1970).


4. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 167 (1970) where the Court stated that for a custom or usage of a state to constitute "state action" it must have the force of law by virtue of the persistent practices of state officials.

5. 334 U.S. 1 (1948).
109 U.S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.6

The United States Supreme Court has refused to establish an absolute test for determining whether a private person's actions have become so entwined with the state that they constitute "state action," and it has repeatedly 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."7 The Supreme Court may have missed the irony in its recent statement that "the question whether particular conduct is 'private,' on the one hand, or 'state action' on the other, frequently admits of no easy answer."8 Of course, when the state is obviously involved with the conduct there is little question that the "state action" requirement is met.9 But when the involvement has not been obvious, the attempts of courts to determine whether "state action" is present have appropriately been labeled a "magical mystery tour."10 The attorney who seeks some predictability11 in the "state action" area will not enjoy the mystery tour. The discussion below will examine Seventh Circuit cases which have considered the question of whether "state action" is present. The various arguments which plaintiffs have used in attempting to establish "state action" will also be examined. In some situations, cases from other circuits will assist in analyzing the Seventh Circuit cases. Finally the standards which Seventh Circuit courts used in determining whether "state action" was

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6. Id. at 13.
9. Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975) (prison guards); Spence v. Staras, 507 F.2d 554 (7th Cir. 1974) (agents and employees of state hospital); Roberts v. Acres, 495 F.2d 57 (7th Cir. 1974) (police officer); Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973) (state's attorney).
11. Oliver Wendell Holmes suggested that predictability is what the law is about. He stated that "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Holmes, The Path of the Law, reprinted in Jurisprudence in Action 279 (1953).
present will be set forth and analyzed. To assist in analysis, the cases have been categorized according to the central theme of the plaintiff's claim for "state action" as follows: State Regulation, State Financial Support, State Enforcement and Public Function.

State Regulation

In *Lucas v. Wisconsin Electric Power Company* the Seventh Circuit was faced with the question of whether the defendant power company's procedure for termination of plaintiff consumer's service was proscribed by section 1983. The plaintiff's complaint alleged that he had paid his $9.89 bill in cash without receiving a receipt. He paid subsequent charges but refused to pay the alleged arrearage. The power company then notified him that his service would be disconnected. Since the proposed termination was consistent with disconnect rules which had been approved by the Wisconsin Public Service Commission, the plaintiff argued that the defendants, the power company and the individual commissioners of the Public Service Commission, were acting "under color of" state law.

The court stated that in order to make its holding more precise, it would discuss "(a) the claim against the commissioners and then (b) the claim against the power company." The court acknowledged that when the commissioners acted in their official capacity they acted "under color of" state law within the meaning of section 1983 and then directed its attention to the constitutional issue of whether on behalf of the state the commissioners deprived the plaintiff of due process of law.

The circuit court affirmed the district court's dismissal of

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13. 466 F.2d at 646.

14. *Id.*
plaintiff's complaint on the ground that the power company's challenged action was not "under color of" state law within the meaning of section 1983. The court viewed the action of the power company as private even though the power company contributed state support through tax payments, had to comply with state regulatory controls, and was granted a limited monopoly status. The court said:

The "under color of" provision encompasses only such private conduct as is supported by state action. That support may take various forms, but it is quite clear that a private person does not act under color of state law unless he derives some "aid, comfort, or incentive," either real or apparent, from the state. Absent such affirmative support, the statute is inapplicable to private conduct. (footnotes omitted).

In addition to holding that the "under color of" provision requires affirmative state support by way of "aid, comfort or incentive, either real or apparent," the court stated that the support must be "significant, measured either by its contribution to the effectiveness of defendants' conduct, or perhaps by its defiance of conflicting national policy." 15

15. Id. at 654-55, quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 212 (1970) (Mr. Justice Brennan concurring and dissenting). For an unenlightening discussion of what constitutes "aid, comfort or incentive" see Phillips v. Money, 503 F.2d 990, 993-94 (7th Cir. 1974). The court in Doe v. Bellin Memorial Hospital, 479 F.2d 756 (7th Cir. 1973) reaffirmed its decision in Lucas that detailed regulation by the state of a private person does not constitute state action.

16. Id. at 656. In footnote 40 the court cited to Moose Lodge v. Irvis, 407 U.S. 163 (1972), wherein the Supreme Court stated "that where the impetus for the discrimination is private, the state must have significantly involved itself with invidious discrimination . . . in order for the discriminatory action to fall within the ambit of the constitutional prohibition." This reasoning was first articulated in Powe v. Miles, 407 F.2d 73 (2d Cir. 1968). In Powe, the plaintiff had argued that New York's regulation of educational standards in private schools constituted state action. Responding to this argument for the court, Judge Friendly wrote:

It overlooks the essential point—that 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. 407 F.2d at 81.

In discussing the Lucas decision one commentator stated that the court's view underscored the need for something more than a perfunctory listing of contacts between the state and private persons in order to establish state action. Note, State Action: Theories for Applying Constitutional Restrictions to Private Activity, 74 Colum. L. Rev. 656, 690 (1974).

In Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974) the Court noted that "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." The Court went on to cite Burton v.
The court then applied the "significant" "affirmative state support" test to the power company's proposed termination of plaintiff's service. In two respects the state had supported the power company's action of termination. First, the state had authorized the power company to enter private property under certain circumstances. This state support, however, was not deemed "significant." Second, the state provided monopoly protection for the power company. In order to determine whether the monopoly protection was "significant" the court evaluated the state's support to determine whether it brought section 1983 into play. In other words, to meet the "significant" test, the state's monopoly protection must contribute to the effectiveness of the power company's conduct. The court found that the defendant's monopoly status would not significantly affect the plaintiff's dispute with the power company. "[T]he monopoly factor does not provide the necessary ingredient of added state support of private conduct—the termination of electric service—which will transform an issue of state regulatory policy into a federal civil rights case under section 1983."

Wilmington Parking Authority, 365 U.S. 715 (1961) for the proposition that the state's involvement may not be immediately obvious and that a detailed inquiry may be necessary to determine whether such a nexus is present. The court did not adopt the exact language of either Powe, supra, or Moose Lodge, supra that the state had to be involved in the activity that caused the injury. It would seem that the nexus could be satisfied even if the state were not directly involved in the challenged activity. For example, the state may be so involved in the actions of the private person that their activity is seen as "joint." See Burton, supra at 725. In such a case the nexus is satisfied even if the state is not directly involved in the challenged act. See also text accompanying notes 86 to 93 infra.


[The dispositive question in any state-action case is not whether any single fact or relationship presents a significant degree of state involvement, but rather whether the relevant factors compel a finding of state responsibility. Jackson, supra at 360.]

Justice Douglas would find the aggregate of the factors upon which a claimant relies controlling rather than have a court dismiss each factor individually as being insufficient to support a finding of state action.

18. The court concluded that if the electric company had entered private property to terminate power, as they were authorized to do by the state, a different question would have been presented. However, the court determined from the record that the power company could terminate plaintiff's service by throwing a switch or disconnecting wires.

19. See note 16, supra.

20. 466 F.2d at 658.
In separating the activities of the state and the power company, the court's analysis failed to answer the question of whether the state and the power company acted jointly. The state first promulgated rules with which utilities had to comply. In response to these rules the power company enacted their own rules and filed them with the state. In accepting these rules as conforming to the Administrative Code the state gave tacit approval to the rules. Isn’t this a "symbiotic" relationship which would lead to a conclusion of state action? According to Lucas, the answer is no, but it is unfortunate that the court did not explain why this joint activity did not constitute state action or why the actions of the state were not viewed as giving "apparent aid" to the power company.

The Lucas court affirmed Kadlec v. Illinois Bell Telephone Company where it held that the fact that the telephone company filed procedural rules with the state did not constitute "state action." Particular Cleaners, Inc. v. Commonwealth Edison Company was also reaffirmed by Lucas. The plaintiff in Particular Cleaners was complaining about Commonwealth's policy of requiring security deposits from select customers who could not show prior credit. The plaintiff attempted to distinguish Kadlec by arguing that the rules concerning security deposits were not those of the utility, as they had been in Kadlec, but that they were promulgated by the Illinois Commerce Commission. The court rejected this argument noting that "the state did not act on its own regulation. Edison executed its own policies, limited only by state regulation." The court also noted that the state did not benefit from, encourage, request or cooperate in the decision to collect security deposits. In both Kadlec and Particular Cleaners the

21. 466 F.2d at 669. Judge Sprecher in his dissent noted that the state by investing the utility with the power and authority to enter into the consumer's dwelling to terminate electricity had become a "joint party" with the utility in resorting to self-held procedures.


23. See 466 F.2d at 658 (Judge Sprecher dissenting).


25. 457 F.2d 189 (7th Cir. 1972).

26. Id. at 191.

27. Id.
court noted that "the nexus between the state and defendant's conduct was not sufficient to maintain an action under § 1983." Apparently, the court believed that there was nothing resembling the "jointness" or "symbiotic" relationship which had been present in Burton v. Wilmington Parking Authority.  

Driscoll v. Operating Engineers Local 139 did not arise in the same context as the utility cases but presented the question of whether extensive governmental regulation constitutes "state action."

The plaintiff sought to force Local No. 139 of the International Union of Operating Engineers to discontinue the requirement that all candidates for a union office swear that they were not Communists. In commenting on the argument that extensive governmental regulation was "state action" the court stated:

But governmental regulation or participation in some of the affairs of unions does not consequently make every union activity so imbued with governmental action that it can be subjected to constitutional restraints.

The court stated that only if the "governmental activity significantly encouraged" the promulgation and enforcement of the anti-Communist oath was state action present. This was essentially a restatement of the test enunciated in Lucas v. Wisconsin Electric Power Company, i.e., that since the state is not involved in the activity which actually caused the injury, state action is not present.

In Johnson v. Heinemann Candy Company the plaintiffs alleged that Heinemann had restaurant, cigarette and soft drink licenses sufficient to establish the requisite "state action." The court disagreed citing Jackson v. Metropolitan Edison Company:

But the 'mere fact that a business is subject to state regulation does not by itself convert its actions into that of

28. Id.
31. Id. at 690.
34. 402 F. Supp. 714 (E.D. Wis. 1975).
the State for purposes of the Fourteenth Amendment . . . .’
There must be ‘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.’36

In the Heinemann case the court found the plaintiffs were un-
able to identify a “sufficiently close nexus”37 between any state
regulation and Heinemann’s refusal to serve women in the
“Men’s Grill.”

Another application of the “significant” test requiring state
involvement in the activity causing the injury is found in
Cohen v. Illinois Institute of Technology.38 In that case the
plaintiff alleged that the defendant, a private university, dis-
criminated against faculty women in their appointment, reten-
tion and compensation. The plaintiff alleged, among other con-
tentions, that I.I.T. was regulated by the state.

In analyzing the state’s comprehensive regulation of the
school the court relied on Moose Lodge No. 107 v. Irvis39 and
Jackson v. Metropolitan Edison40 in holding that “the mere
existence of detailed regulations of a private entity does not
make every act, or even every regulated act, of the private firm,
the action of the state.”41 In order for state regulation of a
private business or institution to be of decisive importance in
the “state action” analysis it must be alleged that the regula-
tory agency has “encouraged the practice in question, or at
least given its affirmative approval to the practice.”42 The
circuit court held that the facts alleged in the complaint failed
to support a conclusion that the defendant acted “under color
of” state law.43

Lucas and the other regulation cases discussed stand for the
proposition that “state action” is not present even when the
private person has a monopoly granted by the state, is heavily
regulated by the state, sets forth its own procedural regulations
as guided by the state’s rules and contributes tax dollars to the

36. Id. at 350.
37. See note 16, supra.
38. 524 F.2d 818 (7th Cir. 1975).
40. 419 U.S. 345.
41. 524 F.2d at 826.
42. Id. at 826.
43. Id. at 827.
state. These decisions only define real or apparent "aid, comfort or incentive" in negative terms. Rather than indicating what is "aid, comfort or incentive," the reader of these cases is only told what it is not.

Even where the state is involved with the private person in providing "aid, comfort, or incentive" the court looks to whether the state is "significantly" involved in the activity that caused the injury either in the state's contribution to the effectiveness of the defendant's conduct or the state's defiance of conflicting national policy. When such a requirement is present it becomes more difficult to establish state action. The state may be intricately involved in the activities of a private person but not with the particular act of which the plaintiff complains.

### State Financial Support

In Doe v. Bellin Memorial Hospital hospitals in Green Bay, Wisconsin had refused to allow the use of their facilities for an abortion for Jane Doe. The question presented was whether the hospital had acted "under color of" state law. If "state action" was present the hospital could not refuse the abortion, but if it was not present, the private hospital was free to adopt its own policy on abortions.

The plaintiffs argued that the receipt of Hill-Burton Act funds and the subsequent compliance with government regulations in order to retain the funds constituted "state action." This argument was rejected and the court stated that "[t]here is no evidence, however, that any condition related to the performance or non-performance of abortions was imposed upon the hospital" in order to receive or retain funds.

The court stated that "[t]he facts that defendants have

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44. See note 16, supra.
45. See text accompanying notes 88 to 93, infra.
46. 479 F.2d 756 (7th Cir. 1973).
48. 479 F.2d at 760.
49. 42 U.S.C. §§ 291-291Z. These same arguments were made and rejected in Doyle v. Unicare Health Serv., Inc., Aurora Center, 399 F. Supp. 69 (N.D. Ill. 1975) and Barrio v. McDonough District Hospital, 377 F. Supp. 317 (S.D. Ill. 1974). But see Suckle v. Madison General Hospital, 362 F. Supp. 1196 (W.D. Wis. 1973) where a finding of "state action" was based on the hospital's articles of incorporation, by-laws, customs and usages, contracts and sources of funds. See also Comment, State Action in the Health Field, 1975 Wis. L. Rev. 1188.
accepted financial support... from both the federal and state governments... do not justify the conclusion that its conduct, which is unaffected by such support or such regulation, is governed by section 1983.\textsuperscript{51} The court then went on to quote itself in the \textit{Lucas} case emphasizing that the private person must derive some "aid, comfort or incentive" from the state. The plaintiff must have wondered how the granting of funds to the hospital could not be seen as aid. Again the court applied the "state action" test which requires that the state be significantly involved in the activity that caused the injury.\textsuperscript{52}

The \textit{Doe} court stated that the facts were unlike those of \textit{Simkins v. Moses H. Cone Memorial Hospital}\textsuperscript{53} in that "this record does not reflect any governmental involvement in the very activity which is being challenged."\textsuperscript{54} But that was not the standard required by the \textit{Simkins} court. Nowhere was it stated in \textit{Simkins} that the government had to be involved in the activity that caused the injury, but rather the court stated the issue as "whether the state or the federal government, or both, have become so involved in the conduct of these otherwise private bodies that their activities are also the activities of these governments... ."

The \textit{Simkins} court then considered a number of factors which led to a conclusion of state action. These included "[t]he massive use of public funds and extensive state-federal sharing in the common plan\textsuperscript{55} which a state is required to submit to the surgeon general setting forth a hospital construction program. Another factor which the \textit{Simkins} court found significant was that the defendant hospitals operated as integral parts of comprehensive joint state and federal programs designed to properly allocate medical resources.\textsuperscript{56} It also held that participation in the Hill-Burton program constituted a "state function" and therefore equal protection guarantees applied.\textsuperscript{57} Finally, the court viewed as an important factor

\textsuperscript{51} Id.
\textsuperscript{52} Id. See note 16 supra.
\textsuperscript{53} 323 F.2d 959 (4th Cir. 1963).
\textsuperscript{54} 479 F.2d at 761.
\textsuperscript{56} Id. at 967.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 968. This is the equivalent of arguing that a public function is present. For a discussion of public function as "state action" see text accompanying notes 129 to 147 infra.
the fact that the challenged discrimination had been affirmatively sanctioned by the government. This last factor was the "governmental involvement in the very activity which is being challenged" that the Doe court had discussed. But in Simkins it was only one of a number of significant factors considered rather than the key or deciding factor as it was in Doe. The Doe court failed to address itself to the other factors.

The Doe court also relied on Bright v. Isenbarger, an action brought by two students who had been allegedly dismissed from a private parochial high school without due process. In affirming the district court's decision the circuit court adopted the district court's opinion. The plaintiff argued that indirect financial aid to the school through the grant of property tax exemptions coupled with the regulation of educational standards by the state constituted state action. The court stated that "[t]here can be no doubt that this supervision and tax exemption constitute action by the state, but the question is whether it constitutes the 'significant involvement' of the state in the challenged activity . . . ." The court rejected the plaintiff's argument. It noted that the tax exemption was given to a broad class of organizations and therefore was not significant aid. It further noted that if the regulation of educational standards constituted "state action" private education would be effectively eliminated.

In Pitts v. Department of Revenue of the State of Wisconsin the plaintiffs sought to enjoin the state's grant of tax exemptions to organizations which discriminated in their membership on the basis of race on the ground that the tax exemptions constituted "state action" which fostered discrimination. In analyzing the Pitts decision careful note should be taken that this action was brought against the Department of Revenue of the State of Wisconsin rather than against a private person. The plaintiffs in Pitts did not claim "that state action

59. Id.
60. 445 F.2d 412 (7th Cir. 1971).
62. Id. at 1396.
63. Id. at 1396 and 1397.
64. 333 F. Supp. 662 (E.D. Wis. 1971).
fostering discrimination exists in this case because activities of ostensibly private organizations have become impregnated with a governmental character.”

The Pitts court presented the issue in the alternative as whether the defendant’s granting of tax exemptions to organizations which discriminate is “state action” fostering discrimination or “whether the grant of tax exemptions without inquiry into the policies of the organizations benefited is merely an expression of neutrality with respect to those policies.” In finding that “state action” was present the court distinguished three cases dealing with the grant of tax exemptions which found that “state action” was not present. It distinguished those cases on the ground that they had not involved an equal protection claim. The district court was aware that the Seventh Circuit court of appeals had an opportunity to establish a less demanding standard of what constitutes “state action” when racial discrimination was present, but had refused to meet this issue. In spite of this, the court stated that “[i]nherent in our decision . . . is a determination that a different standard must be applied to ascertain state action in cases involving equal protection than in cases involving other rights.”

The “different standard” requires an examination of the challenged conduct “both in light of the right it allegedly violates and in the light of the right under which it is asserted to be proper.” “In making this examination it is crucial . . . that

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66. 333 F. Supp. at 664.
67. Id. at 669. Specifically, the court found that the grant of a tax exemption to private organizations which discriminate is “significant” state action “encouraging” discrimination in violation of the plaintiff’s rights under the equal protection clause of the Fourteenth Amendment and must be enjoined.
70. Bright v. Isenbarger, 445 F.2d 412, 413 (7th Cir. 1971). The district court had stated “that only a handful of successful ‘state action cases’ had not involved challenges to racial discrimination” and thought this might suggest that a less demanding standard ought to be applied when allegations of racial discrimination were present. 314 F. Supp. at 1394.
71. 333 F. Supp. at 668.
72. Id. at 669.
the prevention of racial discrimination is dominant in any bal-
ancing of constitutional interests."

The *Pitts* court is not the only court that has applied a
different standard when equal protection questions are present.
Other courts have held that there is a dual state action stan-
dard: a less onerous test when discrimination is present and a
more rigorous standard for other claims. For example, in
*Weise v. Syracuse University* the court explained the ration-
ale for applying a different state action standard as "the pecu-
liar offensiveness of the state's taxing all citizens for objectives
from the benefits of which a particular category is arbitrarily
excluded or disadvantaged." The *Weise* court continued:

Class-based discrimination is perhaps the practice most
fundamentally opposed to the stuff of which our national
heritage is composed, and by far the most evil form of dis-
crimination has been that based on race . . . . [I]n race
discrimination cases courts have been particularly vigilant in
requiring the states to avoid support of otherwise private dis-
crimination, and that where the conduct has been less offen-
sive a greater degree of tolerance has been shown.

In *Barrett, M.D. v. United Hospital* the court explained

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73. Id.

74. See, e.g., *Golden v. Biscayne Bay Yacht Club*, 521 F.2d 344 (5th Cir. 1975) *rev'd
en banc*, 44 LW 2493 (1976); *Jackson v. Statlor Foundation*, 496 F.2d 623 (2d Cir.
1974); *James v. Pinnix*, 495 F.2d 206 (5th Cir. 1974); *Lefcourt v. Legal Aid Society,
445 F.2d 1150 (2d Cir. 1971) and *Bright v. Isenbarger*, 314 F. Supp. 1382 (N.D. Ind.
1970). *See also* *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 190-91 (1970) (Mr. Justice
Brennan dissenting on other grounds) which stated:

The state action doctrine reflects the profound judgment that denials of
equal treatment, and *particularly* denials on account of race or color, are singu-
larly grave when government has or shares responsibility for them . . . .
*Something is uniquely amiss in a society where the government, the authori-
tative oracle of community values, involves itself in racial discrimination. Ac-
cordingly, in the cases that have come before us this Court has condemned
significant state involvement in racial discrimination . . . however subtle and
*indirect* it may have been and whatever form it may have taken. (emphasis
added).

In commenting on this quote the court in *Lucas v. Wisconsin Electric Power Company,
466 F.2d 638, 656, n. 41 (1972), cert. denied, 409 U.S. 1114 (1973)* stated:

Mr. Justice Brennan would agree that the state involvement must be 'signifi-
cant.' It may well be that he would find that a lesser degree of state involvement
would satisfy the significance test when racial discrimination is involved.

75. 522 F.2d 397 (2d Cir. 1975).

76. Id. at 405.

77. Id. at 406.

the application of the "double standard" test for state action. The court stated that the Second Circuit applies a three-pronged test to determine the existence of "state action." It must be shown (1) that the state's involvement with the private institution is significant, (2) that the state must be involved not simply with some activity of the institution but with the activity that caused the injury (the nexus requirement and (3) that the state's involvement must aid, encourage or connote approval of the complained of activity. However, the court pointed out that two situations represent significant departures from this test—in the situations where race discrimination is alleged and in the "public function" cases. Where neither of these exceptions are found applicable to the allegations in plaintiff's complaint, the court will proceed to apply the three-pronged test "keeping in mind . . . that it is the 'totality of the circumstances' which must be considered in testing for the presence of 'state action'. Burton v. Wilmington Parking Authority. . . ." The Barrett court noted that the rationale behind the exception to the application of the three-pronged test in cases involving race discrimination may make the "less onerous test" applicable to cases involving sex or age discrimination.

Subsequently, in Girard v. 94th Street and Fifth Avenue Corp., the court applied the "less onerous test" in a case involving alleged sex discrimination. The court departed from the three-pronged test and more closely scrutinized whether the alleged discrimination by the defendants was "impregnated" with governmental approval. "Under the stricter standard, indirect governmental participation in the management of an organization is persuasive evidence of the existence of 'state action' where the participation is both substantial and other than neutral."

One of the arguments that the plaintiff made in Cohen v. Illinois Institute of Technology was that the financial and

79. Id. at 797.
80. Id. at 797-98.
81. Id. at 800.
82. Id. at 797, n. 26.
84. Id. at 454-55, quoting Jackson v. Statler Foundation, 496 F.2d 623, 635 (2d Cir. 1974).
85. 524 F.2d 818 (7th Cir. 1975).
other support which the defendant received from the state was a factor leading to a conclusion of state action. The state supported I.I.T. through benefits from the state's eminent domain powers; students were allowed to use state facilities in certain study programs; students received loan guarantees and scholarships from the state and under the state grant program, funds were provided directly to the school.

The court found that the school was "not so heavily dependent on the state as to be considered the equivalent of a public university for all purposes and in all its activities." The court did find, however, that the state's support would have been sufficiently significant to find "state action" had it been alleged that that support furthered the specific policies or conduct under attack.

The above tests of Cohen suggest that the Seventh Circuit may be developing a twofold approach to the question of whether "state action" is present. It first examines whether the private person was "so heavily dependent on the state as to be considered the equivalent of a public institution for all purposes and in all its activities." For example, the court intimates that if a "private university" were so heavily dependent upon the state for support that it could not exist without such support it might be considered a "public university for all purposes." Second, even if the private person was not so heavily dependent on the state as to be considered a "public university for all purposes and in all its activities," the court will conduct a further examination to determine if state support has furthered the specific policies or conduct under attack. If that is the case, "state action" is present. However in Cohen there was nothing in the complaint alleging that the state's assistance lent any support to any act of discrimination.

86. Id. at 825. (footnote omitted).
87. Id.
88. Id.
89. Id.
90. Id. Weise v. Syracuse University, 522 F.2d 397, 405 (2d Cir. 1975) presented a fact situation remarkably similar to Cohen. The Weise court stated:

"[T]he essential point [is] that the state must be involved not simply with some activity of the institution alleged to have influenced injury upon a plaintiff but with the activity that caused the injury.” (citations omitted).

However, the Second Circuit notes that this is only half of the inquiry. The court must "look to the nature of the right infringed as well as the extent of the state's involvement."
The *Cohen* court suggested that if I.I.T. had been empowered by the state to exercise the power of eminent domain rather than merely receiving the benefits of the state's use of that power a finding of "state action" might have been proper.91

In discussing the funds contributed by the state the court stated that they "represent[ed] only a small fraction of the cost of educating the students for whom the grants are paid."92 The implication of such a statement is that the amount of funds that the state contributes as compared to an institution's total operating budget is important in determining whether there is "state action."93

*Bucha v. Illinois High School Association*94 and *Leffel v. Wisconsin Interscholastic Athletic Association*95 are two dis-

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92. 524 F.2d at 825.
93. The court stated in footnote 18 that in contrast to the present case: [T]he financial contributions by the state to the University of Louisville ("substantial financial support"), *Brown v. Strickler*, 422 F.2d 1000, 1001 (6th Cir. 1970); Temple University (up to 54.2% of the school's operating income), *Isaacs v. Board of Trustees of Temple University*, 385 F. Supp. 473, 479 (E.D. Pa. 1974); and the University of Pennsylvania (25% of the University's "hard core" budget), *Racklin v. University of Pennsylvania*, supra n. 15, at 996-998, where sufficient state involvement was found, were significantly greater than that which could possibly be proven here. Nor is the extent of the state contributions sufficiently in doubt so as to require a reversal of the dismissal of the complaint, as was the case in *Weise v. Syracuse University*, 522 F.2d 397, at 407 (2d Cir. 1975), and *Braden v. University of Pittsburgh*, 477 F.2d 1, 6 (3rd Cir. 1973). 584 F.2d at 825, n. 18.

Thus the *Cohen* court distinguished itself from *Weise*. Since the extent of state contributions was in doubt in *Weise*, the case had to be remanded. If that were the case in *Cohen*, the above quote indicates a remand would be required. Again, the conclusion that the amount of funds contributed by the state is important in determining state action is emphasized. This seems to be a proper analysis for if a "private university" derived 90% of its support from the state there would be no question that "state action" was present. Likewise, if it only received 5%, "state action" would not be present. The proper question then is what percentage equals "state action." See also *Norwood v. Harrison*, 413 U.S. 455 (1973). The Court stated:

[Decisions on the constitutionality of state involvement in private discrimination do not turn on whether the state aid adds up to 51 percent or adds up to only 49 percent of the support of the segregated institution.


95. 398 F. Supp. 749 (E.D. Wis. 1975). *Accord*, *Fortin v. Darlington Little League*, Inc., 514 F.2d 344 (1st Cir. 1975). *Kelly v. Wisconsin Interscholastic Athletic Ass'n*, 367 F. Supp. 1388 (E.D. Wis. 1974) was a similar case which was dismissed as to the athletic association because of a failure to allege any facts which would lead to a
strict court cases where the courts were faced with the issue of whether the rules of a private voluntary athletic association which prohibited participation by women constituted "state action." In Bucha the court held that since many members of the athletic association were tax supported public institutions, and since many of the association's sporting events were conducted in facilities constructed and maintained at taxpayer expense, "state action" was present. In Leffel the court distinguished Doe v. Bellin Memorial Hospital noting that there was "a far more direct influence upon the school's athletic programs by the [athletic association] than there was over the hospital's policies by reason of the hospital's receipt of Hill-Burton funds." Relying upon Lucas v. Wisconsin Electric Power Co. the court found that "state action" was present.

C. State Enforcement

1. State Acting in Concert with Private Persons

The Supreme Court in United States v. Price held:

Private persons jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents.

96. 479 F.2d 756 (7th Cir. 1973). See text accompanying notes 46 to 59 supra.
97. 398 F. Supp. at 750.
98. 466 F.2d 638 (7th Cir. 1972), cert. denied, 409 U.S. 1114 (1973).
100. Id. at 794. Also, the "under color of" provision in § 242 means the same thing that it does in the civil counterpart of 42 U.S.C. § 1983. 18 U.S.C. § 242.

Magill v. Avonworth Baseball Conference, 516 F.2d 1328 (3rd Cir. 1975) held that the mere use of public parks by a private organization does not satisfy the "state action" nexus test. See Gilmore v. City of Montgomery, 417 U.S. 556, 573-74 (1974). Quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), the Magill court stated that "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action . . . ." The court stated that this nexus would be present if the state's involvement was "significant." Magill, supra at 1332, citing Reitman v. Mulkey, 387 U.S. 369, 380 (1967). The court examined the financial support given the defendant by the state and held that since it was de minimis this support was not sufficiently significant to meet the nexus standard set out in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).
In *Johnson v. Heinemann Candy Company*, the court applied the *Price* rationale to find "state action" where private persons were "jointly engaged with state officials in the prohibited practice."

The plaintiffs in *Johnson* sought declaratory and injunctive relief. The defendant, a restaurant, had set aside a portion of the restaurant for men only. The defendant sought and obtained agreement with the city attorney and the police department to establish procedures for handling complaints from the defendant regarding disruption of its business by women attempting to be served in the "men's grill."

On several occasions the plaintiffs seated themselves in the "men's grill" and were refused service. On one of these occasions the police were called. The plaintiffs gave their names to the officers and were told to appear at the city attorney’s office.

The court found sufficient "state action" in the fact that defendant sought and obtained an agreement with the police for the enforcement of its discriminatory policy coupled with the actual implementation of that policy. The effect of this agreement was to encourage Heinemann's to continue discriminating since the power of the state was available for enforcement. Thus, there was established sufficient involvement by the state with the discriminatory policy.

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102. Id. at 718.
103. If someone from Heinemann's contacted the police to inform them of a disturbance or that people were seating themselves contrary to Heinemann's policy, the employees would ask those persons to leave. If they refused, a police officer would take their names so Heinemann's would take legal action. The prosecution of any complaint would be undertaken by Heinemann's as the city refused to do so on its own initiative.
104. The court found the holding of the Supreme Court in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), squarely applicable to the *Heinemann* case. In that case the Supreme Court said that the plaintiff would be entitled to relief under § 1983 if she could prove that a Kress employee and a policeman somehow reached an understanding to deny plaintiff service in the Kress store, or to cause her subsequent arrest because she was a white person in the company of Negroes. The involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized, or lawful . . . . Moreover, a private party involved in such a conspiracy even though not an official of the State, can be liable under § 1983. (citations omitted). 398 U.S. at 152.
105. Accord, *Smith v. Brookshire Bros. Inc.*, 519 F.2d 93 (5th Cir. 1975), wherein a private store and the police acted in concert pursuant to a customary plan to detain persons suspected of shoplifting. The Fifth Circuit found sufficient state involvement to support an action under § 1983.
In *Hansen v. Ahlgrimm*[^108] the plaintiff alleged that a private attorney acted "in concert" with a state court judge in seeking an order to show cause and the issuance of an arrest warrant for failure to comply. The court said that in view of "the ordinary contacts of counsel and court incident to litigation, it may be questioned whether these allegations are sufficiently specific to constitute a claim of actionable conspiracy for the purpose of 42 U.S.C. section 1983."[^107] The court further said that the plaintiff failed to show any overt acts by the defendant "reasonably related to the promotion of the claimed conspiracy!"[^108]

The court also stated:

> [A]llegations of conspiracy between private persons and public officials who are themselves immune from liability[^109] under the facts alleged are insufficient to establish liability of the private persons under color of state law for purposes of the Civil Rights Act.[^10]

Generally, a private attorney, while participating in the trial of a private state court action, is not considered to act "under color of" state law,[^111] and is immune from civil liability

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[^108]: 520 F.2d 768 (7th Cir. 1975).
[^107]: Id. at 770.
[^109]: Id. at 770, quoting *Dieu v. Norton*, 411 F.2d 761, 763 (7th Cir. 1969).
[^10]: The court initially determined that Judge Ahlgrimm was immune from liability under the Civil Rights Act.
[^110]: 520 F.2d at 770.
[^111]: 410 F.2d 365, 366 (7th Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970), wherein the court said:

Lawyers who are not also parties in interest and are engaged in private litigation on behalf of clients do not act under color of state law within the meaning of 42 USC § 1983. Every litigant is entitled to a zealous advocate in the presentation of his matters before the court. The state merely provides a
under section 1983. This principle is grounded on social considerations. The remedies guaranteed by the Civil Rights Act generally are not invoked against a private attorney in order to avoid creating "a conflict between the attorney's duties to protect himself and to zealously represent his client." It is also generally true that state court litigants are not amenable to suit under section 1983 since the state merely provides a forum and the actions of the litigants are not attributable to the state.

The Wisconsin Eastern District court found exceptions to these rules in United States General, Inc. v. Schroeder. The plaintiff in Schroeder sought injunctive relief and monetary damages as compensation for losses sustained as a result of an illegal garnishment action instituted in the county court. The defendants were the plaintiff in the garnishment action and the attorney who prosecuted the action in his behalf.

The issue, as stated by the court, was "whether under the charges set out in this complaint, an attorney for a private individual may be found to be acting under color of state law by virtue of his institutions of prosecution of, and failure to withdraw a patently unconstitutional garnishment proceeding." In answering this question in the affirmative, the court recognized that attorneys usually are immune from civil liability under section 1983 but nevertheless held that if the plaintiff was able to prove bad faith or malice on the part of the defen-

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forum for the litigants and although lawyers are considered 'officers of the court', they are not officers of the state within the meaning of the Civil Rights Act (citations omitted).

Accord, Skolnick v. Martin, 317 F.2d 855 (7th Cir. 1963); Hansen v. Ahlgrimm, 520 F.2d 768 (7th Cir. 1975); Ehn v. Price, 372 F. Supp. 151 (N.D. Ill. 1974) (private attorney appointed as counsel for the accused plaintiff by a state court for an appeal did not make attorney an officer of the court for the purposes of 42 U.S.C. § 1983).


113. In Firnhaber v. Sensenbrenner, 385 F. Supp. 406 (E.D. Wis. 1974), the plaintiff alleged that the defendant caused his attorney to file a motion resulting in the court's issuance of a temporary restraining order that restricted the distribution of the plaintiff's political material for a brief period of time resulting in damages to the plaintiff. The court noted that it was unclear whether such limited activity on the part of the state could ever constitute "state action" for purposes of the fourteenth amendment and 42 U.S.C. § 1983. "This is hardly more than a provision of the machinery and forum for the hearing of private disputes, which is generally thought to be insufficient to constitute state action." 385 F. Supp. at 410.


115. Id. at 716.
dant attorney in the commencement of "a frivolous garnishment action without substantial hope of success or other legitimate purpose" relief may be granted under section 1983. The immunity protection was unavailable to an attorney in this situation because it would not serve to implement the goal for which it was established.

2. Actions Under State Statutes

In actions brought pursuant to state statute the courts have usually found sufficient "state action" present to meet the requisites of section 1983.

Judge Warren imputed "state action" to the plaintiff in the garnishment action on the theory that it was only by statute that the defendants in Schroeder had the authority to institute the prejudgment garnishment. "This is not just action against a backdrop of an amorphous state policy, but is instead action encouraged, indeed only made possible by explicit state authorization." Further, the court held that where an attorney brings and presses a suit which attributes "state action" to the client the attorney is also engaging in "state action."

As a result of the defendant hotel proprietor's seizure of the plaintiff's personal property for non-payment of rent pursuant to the Illinois innkeeper's lien law, the plaintiff in Collins v. Viceroy Hotel Corp. sought a declaratory judgment, injunctive relief and damages. In finding the requisite "state action" the court applied the rationale espoused by the Supreme Court in Reitman v. Mulkey finding "state action" "where the state by its affirmative action has made deprivations of due process legally possible."

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116. Id. at 717.
117. Id.
[A] private citizen is acting under color of state law when his action is encouraged by state law and especially when it is possible only by virtue of state law. In the instant case defendants were able to obtain a garnishment only because of state law, therefore they were acting under color of state law.
119. See also discussion of an attorney's immunity from liability under § 1983, at notes 106 to 113 supra.
120. ILL. REV. STAT., 1969, Ch. 71, § 2, and Ch. 82, § 57. This statute authorized a hotel proprietor to seize property of a hotel guest without any notice and without any hearing, either before or after the seizure.
123. 338 F. Supp. at 394. See, e.g., Burke & Reber, State Action Congressional
In a section 1983 action to enjoin the defendant from proceeding in a state public nuisance action against the plaintiff, the court in *Larkin v. Bruce*\(^2\) found that the defendant was acting "under color of" state law. The defendant had acted pursuant to section 280.02 of the Wisconsin Statutes,\(^3\) which authorized "a private person to institute an action by the state in the public interest."\(^4\)

**D. Public Function**

The plaintiffs in *Murphy v. Society of Real Estate Appraisers*\(^5\) were attempting to enjoin a disciplinary proceeding which had been instituted by the defendants. The plaintiffs argued that since Wisconsin had statutorily recognized the defendants as a licensing authority for real estate appraisers, "state action" existed. The State of Wisconsin, the plaintiffs argued, delegated to the real estate society the task of determining who would be approved as an appraiser for purposes of section 215.21(9) of the Wisconsin Statutes,\(^6\) and that such a delegation transformed the action of the private society into that of the state.\(^7\) In determining whether the defendant performed a public function the court noted that it must be guided by the principles set forth in *Jackson v. Metropolitan Edison Co.*\(^8\)

The *Jackson* Court defined public function as "the exercise by a private entity of powers traditionally exclusively reserved

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\(^3\) Section 280.02, Wis. Stats., provides:

"[A]n action to enjoin a public nuisance may be commenced and prosecuted in the name of the state, either by the attorney general . . . or upon the relation of a private individual, or a county, having first obtained leave therefor from the court" (emphasis added).

\(^4\) 352 F. Supp. at 1077.

\(^5\) 388 F. Supp. 1046 (E.D. Wis. 1975).

\(^6\) Wis. Stat. § 215.21(9) reads in pertinent part as follows: "APPRAISALS BY APPROVED APPRAISERS: WHEN REQUIRED."

(a) Appraisals of the real estate security shall be made by appraisers, approved by the commissioner . . . ."

Real estate appraisers may be deemed approved in a number of ways. Approval may be obtained by membership in "a recognized professional appraisal group, organization or society . . . .” See Wis. Ad. Code § S-L 18.06(1)(a).

\(^7\) 388 F. Supp. at 1050.

\(^8\) 419 U.S. 345 (1974).
to the State" or as the exercise of a power traditionally associated with sovereignty.131 The Jackson Court then went on to hold that a public function was not present because the State of Pennsylvania did not traditionally supply utility service.132

Relying on Jackson, the Murphy court held the defendants were not performing an activity which is "traditionally associated with sovereignty" and therefore "state action" could not be found under a public function theory.133 The appropriate question as set forth in Jackson, which was given no more than a pro forma answer in Murphy, was whether the approval of appraisers by the real estate society was the exercise of a power "traditionally exclusively reserved to the state." The court answered no but did not explain why. Appraisals of real estate security are made by appraisers approved by the state.134 Appraisers are approved by the state if they are members of the real estate appraisers society. Thus, the society has the actual power of deciding who will or will not be approved by the state and this seems to be a power "traditionally associated with sovereignty." A reading of Murphy does not explain what is wrong with the above reasoning.135

*United States v. Hoffman*136 did not specifically discuss whether the private person performed a public function but the principles which apply in the public function area were applied by the court. The court held that privately employed railroad policemen who were vested with the powers of city policemen

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131. 419 U.S. at 352-53.
132. Id. at 353. In his dissent in Jackson, Justice Marshall had no difficulty in finding that a public function was being performed and therefore that "state action" was present.

The Court concedes that state action might be present if the activity in question were 'traditionally associated with sovereignty,' but it then undercut that point by suggesting that a particular service is not a public function if the State in question has not required that it be governmentally operated. This reads the 'public function' argument too narrowly. The whole point of the 'public function' cases is to look behind the State's decision to provide public services through private parties (citations omitted). In my view, utility service is traditionally identified with the State through universal public regulation or ownership to a degree sufficient to render it a public function. 419 U.S. at 371.

133. 388 F. Supp. at 1050-51.

135. In relying on Jackson, the court may have been unaware of the following language from Justice Marshall's dissent in that case. "Today the court . . . adopts a stance that is bound to lead to mischief when applied to problems beyond the narrow sphere of due process objections to utility terminations." 419 U.S. at 366.

136. 498 F.2d 879 (7th Cir. 1974).
acted "under color of" state law. In so holding the court viewed as important the fact that "a continuing delegation of the law enforcement power of the state" was present. This delegation of the law enforcement power of the state was the delegation of a power traditionally associated with sovereignty.

In *Cohen v. Illinois Institute of Technology* the plaintiffs had argued that I.I.T., in providing higher educational services, was engaged in a traditionally public function. The court noted that this argument had been routinely rejected in private college and university cases. The plaintiff had added a new twist to the usual contention that education is a public function by arguing that Illinois had declared higher education to be a public function in the preamble of the Educational Facilities Authority Act of 1969. This argument fared no better than previous education-is-a-public-function arguments. The court stated: "Illinois' recent declaration of the importance of higher education can scarcely convert I.I.T.'s activities into 'powers traditionally exclusively reserved to the state.'"

When the Illinois Migrant Council, the plaintiff in *Illinois Migrant Council v. Campbell Soup Co.*, attempted to speak to the defendant's employees who resided at the company's residential community of Prince Crossing, Illinois, the defendant refused them access to the town. The plaintiff brought an action to compel the defendant to permit them access to the farmworkers and for damages. The plaintiff alleged federal jurisdiction based on section 1983. The Seventh Circuit found the requisite "state action," relying on the theory of *Marsh v. Alabama* in that the complaint alleged sufficient facts.

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137. Id. at 881.
138. See Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974), and text accompanying notes 130 to 135 supra.
139. 524 F.2d 818 (7th Cir. 1975).
141. 524 F.2d at 826-27, n. 24, quoting Jackson v. Metropolitan Edison Co., 419 U.S. at 352.
142. 519 F.2d 391 (7th Cir. 1975).
143. 326 U.S. 501 (1946). The Supreme Court in *Marsh* found that the company
upon which it could be concluded that the defendant's town of Prince Crossing was a company town. The circuit court concluded that size alone is not determinative of whether a town has sufficient public residential characteristics as to constitute state action but rather the question is whether the town "serves as a functional equivalent of a municipality for its residents." The court said:

"[P]roperty otherwise private, upon which the public is invited for certain limited and designated purposes do not come under the rule of Marsh v. Alabama, for such property cannot be thought of as being a "company town." Private commercial property, such as a shopping center, is not a residential community; there is thus no resemblance to a "company town.""

However, the court found that Prince Crossing had the characteristics of a municipality and served as a functional equivalent of a normal town to its inhabitants, thus a "company town" within the meaning of Marsh. Accordingly, when the defendant acted it did so "under color of" state law.

CONCLUSION

The Seventh Circuit has not looked favorably on claims of "state action." One explanation of this may be the fact that in expanding the "state action" concept the United States Supreme Court was faced with a series of cases which presented the "state action" question in the context of a "private person's" discrimination based on race. The Seventh Circuit, in establishing "state action" boundaries has not been faced with the racial discrimination cases. The Seventh Circuit has not possessed "all the characteristics of any other American town."

144. The complaint alleged:

[T]hat the company operated a residential community for 150 persons providing them with the basic facilities needed, including a work place, residence, a store, a cafeteria and a recreational building . . . . [T]he company enforced a no-trespass policy, from which it would be quite reasonable to infer that the company had some means of enforcing its no-trespass rules. It would further seem reasonable to infer that a community of 150 persons, located some miles from any other town, must have some means of protecting itself from crime and fire, and must have some means of disposing of its sewage. Illinois Migrant Council v. Campbell Soup Co., 519 F.2d 319, 395 (7th Cir. 1975).


146. 519 F.2d at 395.

147. Id.
formally adopted the dual standard approach to "state action," i.e., that a less onerous test for establishing "state action" is used when racial discrimination is alleged. But the rigorous standard it has applied may implicitly recognize the existence of a dual standard.

Another explanation is that the Seventh Circuit has repeatedly applied a "state action" test requiring that the state be involved in the activity that caused the injury. While other courts have used such a test, it has usually been one of a number of factors considered in determining whether "state action" was present rather than the sole or primary test. In relying on the "activity that caused the injury" test, the Seventh Circuit has often failed to answer the fundamental question of whether the "private person" was sufficiently entwined with the state or performing a function such that the activity had to be viewed as that of the state. Also, when considering a number of different factors which have been alleged to constitute "state action" Seventh Circuit courts have considered the allegations sequentially and have failed to analyze whether cumulatively the relevant factors constitute "state action."

Only recently in *Cohen v. Illinois Institute of Technology* has the Seventh Circuit suggested that it may consider as determinative of the presence of "state action" the test of whether a private person is so heavily dependent on the state as to be considered the equivalent of the state. *Cohen* suggests that if this test is met, "state action" is present and the court need not consider whether the state's support of the private person has furthered the specific policies or conduct under at-

149. See Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638, 656 (1972), where the court used as one measurement of "significant" state support, a state's "defiance of conflicting national policy." Note 41 states:

For example, the fundamental value "of erasing racial discrimination in all its forms seems to underlie Mr. Justice Brennan's dissenting opinion in Moose Lodge . . . ."

Mr. Justice Brennan would agree that the state involvement must be 'significant.' It may well be that he would find that a lesser degree of state involvement would satisfy the significance test when racial discrimination is involved.

152. See note 17 supra.
153. 524 F.2d 818 (7th Cir. 1975).
If this analysis reflects the approach taken by the Seventh Circuit, a more realistic view of state action may evolve. For if a "private person" cannot exist independent of state support (monopoly support, financial, eminent domain, etc.), then the state is implicitly involved in the activity that caused the injury and "state action" should be found.

In certain instances the Seventh Circuit examines only the single contact of the state with the private person in order to find "state action" as where state officials act in concert with "private persons" to implement actions in violation of the fourteenth amendment; and where a state statute has authorized a cause of action which would not otherwise exist.

In cases where the "private person" exercises "powers" traditionally exclusively reserved to the state, the Seventh Circuit has found "state action" without analysis of the degree or nature of the state contact with the "private person."

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154. Id. at 825.