

Possibility of “State Action” by Private Colleges in the USA

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Introduction

Civil liberties expressed in the first ten Amendments to the U.S. Constitution, including “due process of law” in the Fifth Amendment, apply only to acts by the U.S. federal government. The Fourteenth Amendment extends these civil liberties to acts by state or local governments. As a general statement of law, private corporations in the USA have *no* legal obligation to provide civil liberties, including due process.

My companion essay at <http://www.rbs2.com/eatty.pdf> discusses due process rights of college students who are accused of some disciplinary offense. As explained in that essay, state colleges have a constitutional requirement of due process, but the minimally acceptable process is much less than in criminal law. As a general rule explained in the previous paragraph, students at a private college have no due process rights, and the rules of a private college often forbid a student from bringing an attorney to a disciplinary hearing on campus.

Attorneys for students or professors at a private college (i.e., a college operated by a nonprofit corporation, *not* a government) sometimes argue that the college is a “state actor”, as that phrase is used in Fourteenth Amendment law. In some cases, the due process requirement of state actors would be important. In other cases, it would be easier to remedy gender or racial discrimination if a private college were a state actor. This essay discusses the technical criteria for state action in the context of private colleges in the USA.

The word *state* in this essay refers to *any* government in the USA, regardless of whether federal, state, county, or municipal.

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I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook*. Because part of the audience for this essay is nonlawyers, I have included longer quotations from court cases than typical writing for attorneys.

To make the scope of this essay manageable in my limited unpaid time, I have concentrated on cases in Massachusetts, New York State, and Pennsylvania (e.g., U.S. Courts of Appeals for First, Second, and Third Circuits), with the exception of my searches for cases involving accrediting associations.

Overview

There are at least seven arguments that can be made for declaring a private corporation a state actor. In the following paragraphs, I cite relevant U.S. Supreme Court cases, and sometimes also U.S. Court of Appeals cases.

1. public function

State action is found when a private corporation provides a “public function”, as in *Marsh v. Alabama*, 326 U.S. 501, 506 (1946) (company town). See also *Terry v. Adams*, 345 U.S. 461 (1953); *Evans v. Newton*, 382 U.S. 296, 299 (1966) (“That is to say, when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.”).

2. corporation uses government land

State action is found when a private corporation uses land or buildings that are owned by a government. See, e.g., *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Fortin v. Darlington Little League*, 514 F.2d 344 (1stCir. 1975); *Holodnak v. Avco Corp., Avco-Lycoming Division, Stratford*, 514 F.2d 285, 289 (2dCir. 1975), *cert. denied*, 423 U.S. 892 (1975).

3. acts under color of state law

State action is found when there are acts under color of state law, by using power “possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.” *United States v. Classic*, 313 U.S. 299, 326 (1941).

In *West v. Atkins*, 487 U.S. 42 (1988), the U.S. Supreme Court applied this doctrine to a private physician who had allegedly mistreated a prisoner in a state prison. A prisoner was found guilty and sentenced to prison by a court (i.e., state action) and the prison had custody of the prisoner. The prisoner was obviously not free to leave the prison and consult any physician. Instead, the prisoner was required by the state to accept the physician who was chosen by the prison. In *West*, the state of North Carolina contracted with a physician in private practice to provide part-time medical services to prisoners, making the physician an independent contractor. The U.S. Supreme Court held that the physician was a state actor. I note a significant fact that

distinguishes *West* from education cases: students at a private college voluntarily chose to attend that college, while the state chose the physician in *West*.

State action is found “when a private actor ‘is a willful participant in joint activity with the State of its agents.’ ” *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 296 (2001). See earlier cases, e.g., *Lugar v. Edmondson Oil*, 457 U.S. 922, 941 (1982) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970), which quotes *U.S. v. Price*, 383 U.S. 787, 794 (1966)).

4. state regulation/control

Plaintiffs’ lawyers often argue that there is state action when the private corporation is heavily regulated by the state, thereby giving the state some control of the corporation’s acts. But see *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350-351 (1974) (“Heavily regulated” electric utility that is a monopoly is *not* a state actor); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (no state action in private club that held a state liquor license, despite the state regulation that accompanied the liquor license).

This argument would be stronger if the state appointed some members of the board of directors of a private corporation. See, e.g., the Pennsylvania state-related colleges, where 1/3 of the trustees represent the state government, discussed in this essay beginning at page 41.

5. state funding not relevant

Plaintiff’s lawyers often argue there is state action when a private corporation receives substantial income from contracts or grants from a government. However, receiving money from a government does not convert a private corporation into a state actor.

- *Regents of University of California v. Bakke*, 438 U.S. 265, 384, n.3 (1978) (“This Court has never held that the mere receipt of federal or state funds is sufficient to make the recipient a federal or state actor.”);
- *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982) (“But in *Blum v. Yaretsky*, we held that the similar dependence of the nursing homes did not make the acts of the physicians and nursing home administrators acts of the State, and we conclude that the school’s receipt of public funds does not make the discharge decisions acts of the State.”);
- *Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982) (“That programs undertaken by the State result in substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business.” Even the state’s “payment of the medical expenses of more than 90% of the patients in the facilities” not enough for state action.);

- *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522, 544 (1987) (“The Government may subsidize private entities without assuming constitutional responsibility for their action.”);
- *Walker v. Pierce*, 560 F.2d 609, 613 (4thCir. 1977) (The receipt of Medicaid funds does not convert private medical care to state action.¹);
- *U.S. v. International Brotherhood of Teamsters*, 156 F.3d 354, 360 (2dCir. 1998);
- *Village of Bensenville v. Federal Aviation Admin.*, 457 F.3d 52, 64 (D.C.Cir. 2006) (“The receipt of public funds, even of ‘virtually all’ of an entity's funding, is not sufficient to fairly attribute the entity's actions to the government. See *Rendell-Baker*, 457 U.S. at 840-41, 102 S.Ct. 2764 (citing *Blum*, 457 U.S. at 1011, 102 S.Ct. 2777).”).

Perhaps plaintiff’s attorneys would have better success in arguing state action if they can show a state statute that obligates the state to continue funding for a college, instead of annual appropriations at the discretion of the legislature, or instead of discretionary renewal of a contract.

6. transferring public asset to evade civil liberties

State action is found when a public asset transferred to a private corporation for the purpose of evading civil liberties. See e.g., *Evans v. Newton*, 382 U.S. 296 (1966) (previously public park transferred to private trustees); *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974) (city’s recreational facilities transferred to all-white private schools). Note that an essential part of this reason is a nefarious conspiracy by government and the private group to evade civil liberties, a fact that is lacking in most education cases.

7. conduct “fairly attributable to state”

State action is found when an act or conduct or alleged infringement of U.S. Constitutional rights is “fairly attributable to the state”. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982); *West v. Atkins*, 487 U.S. 42, 49 (1988).

Lugar gives a two-part test:

Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State. These cases reflect a two-part approach to this question of “fair attribution.” First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible. In *Sniadach*, *Fuentes*, *W. T. Grant*, and *North Georgia*, for example, a state statute provided the right to garnish or to obtain prejudgment attachment, as well as the procedure by which the rights could be exercised. Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This

¹ See also *Hodge v. Paoli Memorial Hospital*, 576 F.2d 563, 564 (3dCir. 1978) (per curiam); *Trageser v. Libbie Rehabilitation Center*, 590 F.2d 87, 90 (4thCir. 1978) (same).

may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.

Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 937 (1982).

summary

An author of a law review article on finding state action by private colleges concluded that “victories [by plaintiffs] were rare. This was due in large part to the vagueness of what exactly constituted state action, and the reluctance of courts to intervene.”² The criteria for state action are not vague in the constitutional sense of the word, since the U.S. Supreme Court created the vagueness <*grin*>, but the criteria are difficult to apply. One U.S. Court of Appeals noted: “Commentators and judges have variously characterized the state action doctrine as ‘murky waters,’ a ‘protean concept,’ ‘obdurate,’ and ‘a conceptual disaster area.’ [citations omitted]”³ One reason for this problem is that the U.S. Supreme Court decides one case at a time, limited to the facts of each case, without *designing* general rules that would also apply to cases with different facts.

Most state action cases are argued in federal court. One major exception is *State v. Schmid*, 423 A.2d 615, 619-621 (N.J. 1980) (Reversing Schmid’s conviction for trespass — distributing political literature — on the campus of Princeton University, a private college without state action.).

With the U.S. Supreme Court’s decisions full of unhelpful words and phrases (e.g., “entwined with governmental policies”⁴), one can turn to a cogent summary of criteria for state action in a recent opinion of a U.S. Court of Appeals. For example, in August 2009, the Seventh Circuit summarized the U.S. Supreme Court’s state action criteria:

We recognize that these formulations are susceptible to semantic variations, conflation and significant overlap in practical application; we further recognize that they “lack rigid simplicity.” *Brentwood Acad.*, 531 U.S. at 294, 121 S.Ct. 924. Nevertheless, we believe that it is useful to describe these tests as the symbiotic relationship test,**FN8** the state command and encouragement test,**FN9** the joint participation doctrine **FN10** and the public function test.**FN11**

² Douglas R. Richmond, “Students’ Right to Counsel in University Disciplinary Proceedings,” 15 JOURNAL OF COLLEGE AND UNIVERSITY LAW 289, 306-307 (Winter 1989).

³ *Community Med. Ctr. v. Emergency Med. Servs.*, 712 F.2d 878, 879, n. 4 (3dCir. 1983). Quoted with approval in *Hack v. Yale College*, 237 F.3d 81, 83 (2dCir. 2000).

⁴ *Brentwood Academy*, 531 U.S. 288, 296 (2001) (quoting *Evans v. Newton*, 382 U.S. 296, 299(1966)).

FN8. See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). The Court did not use the term “symbiotic relationship” in *Burton*, but later referred to *Burton* as establishing such a test. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972).

FN9. See *Moose Lodge No. 107*, 407 U.S. at 176-77, 92 S.Ct. 1965 (holding that a private club, which had refused to admit African-American members, was not a state actor because, although the club was subject to a state's “detailed” regulation of liquor licenses, the state regulation did not “foster or encourage racial discrimination”).

FN10. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 931, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982) (noting that a “private party's joint participation with a state official in a conspiracy to discriminate would constitute both ‘state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights’ and action ‘under color of law for purposes of the statute’ ” (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970) (internal quotation marks omitted))).

FN11. See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974) (declining to hold that the supplying of utility service is a state action, because it “is not traditionally the exclusive prerogative of the State”). We noted in *Vickery v. Jones*, 100 F.3d 1334 (7thCir. 1996), that the court has rarely found this test met in modern times. See *id.* at 1345 (collecting cases).

Rodriguez v. Plymouth Ambulance Service, 577 F.3d 816, 823-824 (7thCir. 2009).

Note that “satisfaction of any one test is sufficient to find state action, so long as no countervailing factor exists.” *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9thCir. 2003) (citing *Lee v. Katz*, 276 F.3d 550, 554 (9thCir. 2002), which says: “See *Brentwood*, 531 U.S. at 304 (‘When ... the relevant facts show pervasive entwinement ..., the implication of state action is not affected by pointing out that the facts might not loom large under a different test.’)”).

U.S. Supreme Court

Barnette (1943)

In the landmark case of *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), the U.S. Supreme Court held unconstitutional a West Virginia regulation requiring children in state schools to salute the U.S. flag. An essential part of this case was the fact that the regulation was state action, which invoked the First Amendment protections of people via the Fourteenth Amendment. *Barnette*, 319 U.S. at 637.

Eighteen years later, the U.S. Supreme Court wrote:

Thus, in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628, this Court held that state action compelling school children to salute the flag, on pain of expulsion from public school, was contrary to the First and Fourteenth Amendments when applied to those students whose religious beliefs forbade saluting a flag. *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) (plurality).

And in 1977, the U.S. Supreme Court again wrote:

We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. See *Board of Education v. Barnette*, 319 U.S. 624, 633-634, 63 S.Ct. 1178, 1182-1183, 87 L.Ed. 1628 (1943); *id.*, at 645, 63 S.Ct., at 1188 (Murphy, J., concurring).

Wooley v. Maynard, 430 U.S. 705, 714 (1977) (Burger, C.J., for majority).

Quoted with approval in *Wallace v. Jaffree*, 472 U.S. 38, 51 (1985).

Barnette shows us one important example of finding state action. In *Barnette*, the facts were that a state government promulgated a regulation on every public school, which is obviously state action. But if a *private* school had voluntarily adopted the same flag-salute rule, then there would be no state action, and the rule would not be *unconstitutional*. Private colleges must obey statutes, tort law, and contracts with their students/professors, but *not* constitutional law.

Marsh v. Alabama (1946)

A suburb of Mobile Alabama was owned by Gulf Shipbuilding Corporation, which made it a company town. A Jehovah's Witness was arrested for distributing religious literature on "private property", which was a sidewalk near the Post Office in the business district of the company town. The U.S. Supreme Court ruled that company towns must give the same civil liberties as towns operated by a government.

Many people in the United States live in company-owned towns.[footnote omitted] These people, just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen. [footnote omitted]

Marsh v. State of Alabama, 326 U.S. 501, 508-509 (1946).

The U.S. Supreme Court later clarified the "public function" test to mean "exercise by a private entity of powers traditionally exclusively reserved to the State."

Petitioner next urges that state action is present because respondent provides an essential public service required to be supplied on a reasonably continuous basis by Pa.Stat.Ann., Tit. 66, § 1171 (1959), and hence performs a 'public function.' We have, of course, found state action present in the exercise by a private entity of powers traditionally exclusively reserved to

the State. See, e.g., *Nixon v. Condon*, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932) (election); *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953) (election); *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946) (company town); *Evans v. Newton*, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966) (municipal park). *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974).

Four years later, in 1978, the U.S. Supreme Court wrote:

Respondents' primary contention is that New York has delegated to Flagg Brothers a power "traditionally exclusively reserved to the State." *Jackson*, supra, 419 U.S. at 352, 95 S.Ct. at 454. They argue that the resolution of private disputes is a traditional function of civil government, and that the State in § 7-210 has delegated this function to Flagg Brothers. Respondents, however, have read too much into the language of our previous cases. While many functions have been traditionally performed by governments, very few have been "exclusively reserved to the State."

Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157-158 (1978) (recognizing company towns and elections as "exclusively reserved to the state").

And in 1982, the U.S. Supreme Court wrote:

Third, the required nexus may be present if the private entity has exercised powers that are "traditionally the exclusive prerogative of the State." *Jackson v. Metropolitan Edison Co.*, supra, at 353, 95 S.Ct., at 454; see *Flagg Bros., Inc. v. Brooks*, supra, 436 U.S. at 157-161, 98 S.Ct., at 1733-36.

Blum v. Yaretsky, 457 U.S. 991, 1005 (1982).

See also *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 309 (2001) (applying test from *Jackson*). Below, beginning at page 57, I criticize the test in *Jackson*.

Rendell-Baker v. Kohn (1982)

Several teachers whose employment was terminated sued their employer, a privately operated school for maladjusted high school students, for civil rights violations. The U.S. Court of Appeals dismissed the complaint for lack of "state action". *Rendell-Baker v. Kohn*, 641 F.2d 14, 23-24 (1st Cir. 1981). The Court of Appeals rejected the argument that there was state action because the financial support of the school was almost totally from taxpayer funds. 641 F.2d at 24-25 ("But the school's dependence on state funds, in itself, demonstrates only that the state has the potential to control the school's operations, not that it actually does so. Even near-complete governmental funding does not turn a private charitable and educational institution into a public entity so long as the private institution remains free, in fact, to control its own affairs.").

The U.S. Supreme Court affirmed. *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). The U.S. Supreme Court tersely rejected the funding argument:

First, the nursing homes, like the school, depended on the State for funds; the State subsidized the operating and capital costs of the nursing homes, and paid the medical expenses of more than 90% of the patients. 457 U.S., at 1011, 102 S.Ct., at 2789. Here the Court of Appeals concluded that the fact that virtually all of the school's income was derived from government funding was the strongest factor to support a claim of state action. 641 F.2d, at 24. But in *Blum v. Yaretsky* [457 U.S. 991 (1982)], we held that the similar dependence of the nursing homes did not make the acts of the physicians and nursing home administrators acts of the State, and we conclude that the school's receipt of public funds does not make the discharge decisions acts of the State.

The school, like the nursing homes, is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.

Rendell-Baker, 457 U.S. at 840-841.

The U.S. Supreme Court then rejected the regulation and “public function” arguments for state action:

A second factor considered in *Blum v. Yaretsky* [457 U.S. 991 (1982)] was the extensive regulation of the nursing homes by the State. There the State was indirectly involved in the transfer decisions challenged in that case because a primary goal of the State in regulating nursing homes was to keep costs down by transferring patients from intensive treatment centers to less expensive facilities when possible. Both state and federal regulations encouraged the nursing homes to transfer patients to less expensive facilities when appropriate. 457 U.S., at 1007-1008, 1009-1110, 102 S.Ct., at 2787-2789. The nursing homes were extensively regulated in many other ways as well. The Court relied on *Jackson*, where we held that state regulation, even if “extensive and detailed,” 419 U.S., at 350, 95 S.Ct., at 453, did not make a utility's actions state action.

Here the decisions to discharge the petitioners were not compelled or even influenced by any state regulation. Indeed, in contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school's personnel matters. The most intrusive personnel regulation promulgated by the various government agencies was the requirement that the Committee on Criminal Justice had the power to approve persons hired as vocational counselors. Such a regulation is not sufficient to make a decision to discharge, made by private management, state action. See n. 6, *supra*.

The third factor asserted to show that the school is a state actor is that it performs a “public function.” However, our holdings have made clear that the relevant question is not simply whether a private group is serving a “public function.” We have held that the question is whether the function performed has been “traditionally the exclusive prerogative of the State.” *Jackson*, *supra*, at 353, 95 S.Ct., at 454; quoted in *Blum v. Yaretsky*, 457 U.S., at 1011, 102 S.Ct., at 2789 (emphasis added). There can be no doubt that the education of maladjusted high school students is a public function, but that is only the beginning of the inquiry. Chapter 766 of the Massachusetts Acts of 1972 demonstrates that the State intends to provide services for such students at public expense. That legislative policy choice in no way makes these services the exclusive province of the State. Indeed, the Court of Appeals noted

that until recently the State had not undertaken to provide education for students who could not be served by traditional public schools. 641 F.2d, at 26. That a private entity performs a function which serves the public does not make its acts state action.[footnote omitted] *Rendell-Baker*, 457 U.S. at 841-842.

Justice Marshall wrote a dissenting opinion in *Rendell-Baker*, which dissent was joined by Justice Brennan.

In my view, this holding simply cannot be justified. The State has delegated to the New Perspectives School its statutory duty to educate children with special needs. The school receives almost all of its funds from the State, and is heavily regulated. This nexus between the school and the State is so substantial that the school's action must be considered state action. I therefore dissent.

Rendell-Baker v. Kohn, 457 U.S. 830, 844 (1982) (Marshall, J., dissenting).

Justice Marshall continues:

The fact that the school is providing a substitute for public education is also an important indicium of state action. The provision of education is one of the most important tasks performed by government: it ranks at the very apex of the function of a State. *Ambach v. Norwick*, 441 U.S. 68, 77, 99 S.Ct. 1589, 1594, 60 L.Ed.2d 49 (1979).**FN2** Of course, as the majority emphasizes, performance of a public function is by itself sufficient to justify treating a private entity as a state actor only where the function has been “traditionally the exclusive prerogative of the State.” *Jackson*, supra, at 353, 95 S.Ct., at 454. See *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946); *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944). But the fact that a private entity is performing a vital public function, when coupled with other factors demonstrating a close connection with the State, may justify a finding of state action. Cf. *Evans v. Newton*, supra.

FN2. This Court has repeatedly recognized the unique role that education plays in American society. See *Plyler v. Doe*, 457 U.S. 202, 221, 102 S.Ct. 2382, 2397, 72 L.Ed.2d 786 (1982) (public education is not “merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation”); *Wisconsin v. Yoder*, 406 U.S. 205, 221, 92 S.Ct. 1526, 1536, 32 L.Ed.2d 15 (1972) (education is necessary to “prepare citizens to participate effectively and intelligently in our open political system”); *Abington School District v. Schempp*, 374 U.S. 203, 230, 83 S.Ct. 1560, 1575, 10 L.Ed.2d 844 (1963) (BRENNAN, J., concurring) (public education is a “most vital civic institution for the preservation of a democratic system of government”); *Meyer v. Nebraska*, 262 U.S. 390, 400, 43 S.Ct. 625, 627, 67 L.Ed. 1042 (1923) (“The American people have always regarded education and acquisition of knowledge as matters of supreme importance”).

The school's provision of a substitute for public education deserves particular emphasis because of the role of Chapter 766. Under this statute, the State is required to provide a free education to all children, including those with special needs. Clearly, if the State had decided to provide the service itself, its conduct would be measured against constitutional standards. The State should not be permitted to avoid constitutional requirements simply by delegating its statutory duty to a private entity. **[FN3]** In my view, such a delegation does not convert the performance of the duty from public to private action when the duty is specific and the private institution's decisionmaking authority is significantly curtailed.

FN3. A State may not deliberately delegate a task to a private entity in order to avoid its constitutional obligations. *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953). But a State's decision to delegate a duty to a private entity should be carefully examined even when it has acted, not in bad faith, but for reasons of convenience. The doctrinal basis for the state action requirement is that exercises of state authority pose a special threat to constitutional values. A private entity vested with state authority poses that threat just as clearly as a state agency.

When an entity is not only heavily regulated and funded by the State, but also provides a service that the State is required to provide, there is a very close nexus with the State. Under these circumstances, it is entirely appropriate to treat the entity as an arm of the State. Cf. *Smith v. Allwright*, supra; *Terry v. Adams*, 345 U.S. 461, 469, 73 S.Ct. 809, 813, 97 L.Ed. 1152 (1953) (opinion of Black, J.). Here, since the New Perspectives School exists solely to fulfill the State's obligations under Chapter 766, I think it fully reasonable to conclude that the school is a state actor.

Rendell-Baker v. Kohn, 457 U.S. 830, 848-850 (1982) (Marshall, J., dissenting).

It seems that Justice Marshall would create a special rule for state action in education, because of education's "unique role" in American society. I think it is bad design to have one rule for private schools and another rule for private monopolies like electric utilities. In my view, the majority opinion reached the correct result.

Justice Marshall recited the fact "When [the pupils] graduate, they receive a diploma certified by the Town of Brookline School Committee." *Ibid.* at 846, see also majority opinion at 832. Neither the majority nor Justice Marshall used this fact in their reasoning. Let me argue that the diploma shows that the town is controlling the issuance of diplomas, even though a private company does the teaching and evaluation that qualifies each graduate who receives a diploma. Since the issuance of diplomas is state action (the diploma is certified by the town), the school's determination of who earned the diplomas might also be state action. It would be interesting to know whether the private school or the town (or both) is accredited to award diplomas. However, the issuance of diplomas is irrelevant to the central issue in this case: the allegation that a private school dismissed teachers in violation of their First Amendment rights of freedom of speech.

Tarkanian (1988)

Personally, I hate sports and athletics of all kinds and I regard them as a perversion of a school or college's true purpose — teaching students in intellectual subjects and scholarly research. That having been said, cases involving school and college athletic associations (e.g., National Collegiate Athletic Association (NCAA)) are relevant to determination of state action by academic accrediting associations in the USA, beginning at page 55, below.

In 1977, a report by the National Collegiate Athletic Association (NCAA) criticized Jerry Tarkanian, the basketball coach at the University of Nevada at Las Vegas (UNLV), for ten violations of NCAA rules. As required by NCAA rules, UNLV suspended Coach Tarkanian.

The coach sued in Nevada state court, which found that the NCAA was a state actor. *Tarkanian v. National Collegiate Athletic Association*, 741 P.2d 1345 (Nev. 1987). The NCAA appealed to the U.S. Supreme Court, which reversed the Nevada Supreme Court. *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179 (1988).

UNLV did *not* want to suspend the coach, who had produced winning basketball teams.

However, UNLV only had three options:

1. Reject the sanction requiring us to disassociate Coach Tarkanian from the athletic program and take the risk of still heavier sanctions, e.g., possible extra years of probation.
2. Recognize the University's delegation to the NCAA of the power to act as ultimate arbiter of these matters, thus reassigning Mr. Tarkanian from his present position — though tenured and without adequate notice — even while believing that the NCAA was wrong.
3. Pull out of the NCAA completely on the grounds that you will not execute what you hold to be their unjust judgments.

National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 187 (1988) (quoting counsel for UNLV advice to president of UNLV). The president of UNLV chose the second option, apparently to minimize damage to the athletic program at UNLV. Note it was UNLV that suspended the coach, although UNLV claims to be following the rules of NCAA.

The U.S. Supreme Court wrote:

We examine first the relationship between UNLV and the NCAA regarding the NCAA's rulemaking. UNLV is among the NCAA's members and participated in promulgating the Association's rules; it must be assumed, therefore, that Nevada had some impact on the NCAA's policy determinations. Yet the NCAA's several hundred other public and private member institutions each similarly affected those policies. Those institutions, the vast majority of which were located in States other than Nevada, did not act under color of Nevada law. It necessarily follows that the source of the legislation adopted by the NCAA is not Nevada but the collective membership, speaking through an organization that is independent of any particular State.[FN13] Cf. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501, 108 S.Ct. 1931, 1937, 100 L.Ed.2d 497 (1988) (“Whatever de facto authority the [private standard-setting] Association enjoys, no official authority has been conferred on it by any government....”).

FN13. The situation would, of course, be different if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign. See *Clark v. Arizona Interscholastic Association*, 695 F.2d 1126 (CA9 1982), *cert. denied*, 464 U.S. 818, 104 S.Ct. 79, 78 L.Ed.2d 90 (1983); *Louisiana High School Athletic Association v. St. Augustine High School*, 396 F.2d 224 (CA5 1968). The dissent apparently agrees that the NCAA was not acting under color of state law in its relationships with private universities, which constitute the bulk of its membership. See post, at 467, n. 2.

State action nonetheless might lie if UNLV, by embracing the NCAA's rules, transformed them into state rules and the NCAA into a state actor. See *Lugar*, 457 U.S., at 937, 102 S.Ct., at 2753. Neither UNLV's decision to adopt the NCAA's standards nor its minor role in their formulation is a sufficient reason for concluding that the NCAA was acting under color of Nevada law when it promulgated standards governing athlete recruitment, eligibility, and academic performance.

National Collegiate Athletic Association v. Tarkanian, 488 U.S. 179, 193-195 (1988).

The U.S. Supreme Court remarked:

Just as a state-compensated public defender acts in a private capacity when he or she represents a private client in a conflict against the State, *Polk County v. Dodson*, 454 U.S. 312, 320, 102 S.Ct. 445, 450, 70 L.Ed.2d 509 (1981), the NCAA is properly viewed as a private actor at odds with the State when it represents the interests of its entire membership in an investigation of one public university.

National Collegiate Athletic Association v. Tarkanian, 488 U.S. 179, 196 (1988).

The U.S. Supreme Court said:

Finally, Tarkanian argues that the power of the NCAA is so great that the UNLV had no practical alternative to compliance with its demands. We are not at all sure this is true, FN19 but even if we assume that a private monopolist can impose its will on a state agency by a threatened refusal to deal with it, it does not follow that such a private party is therefore acting under color of state law. Cf. *Jackson*, 419 U.S., at 351-352, 95 S.Ct., at 453-454 (State's conferral of monopoly status does not convert private party into state actor).

FN19. The university's desire to remain a powerhouse among the Nation's college basketball teams is understandable, and nonmembership in the NCAA obviously would thwart that goal. But that UNLV's options were unpalatable does not mean that they were nonexistent.

National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 198-199 (1988).

In the end, Coach Tarkanian won his civil rights claim against UNLV and was awarded \$150,725 in attorney's fees plus interest from UNLV. *University of Nevada v. Tarkanian*, 879 P.2d 1180 (Nev. 1994).

One way to interpret *NCAA v. Tarkanian* is to say that NCAA includes state universities nationwide, so no one state controls the NCAA. Since one can not identify any single state government that controls NCAA, then NCAA must not be a state actor. This interpretation ignores the theoretical possibility that state action could involve either a regional group of states or all fifty states. Notice that a statewide athletic association (e.g., an association of Tennessee high schools in *Brentwood*⁵) can be a state actor, while a nationwide athletic association (e.g. NCAA) is not a state actor. The U.S. Supreme Court in *Brentwood* specifically says:

⁵ *Brentwood* is discussed below, beginning at page 16.

Since it was difficult to see the NCAA, not as a collective membership, but as surrogate for the one State, we held the organization's connection with Nevada too insubstantial to ground a state-action claim. [*Tarkanian*, 488 U.S.] at 193, 196.

Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288, 297-298 (2001). Similarly, the First Circuit wrote:

Brentwood held that the activities of an athletic association within a single state could fairly be treated as those of the state itself, because “[t]he nominally private character of the Association [was] overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it.” 531 U.S. at 298, 121 S.Ct. 924. In contrast, in *Tarkanian*, the activities of a multistate athletic association were those of a collective membership, and the association was not the surrogate of any state. 488 U.S. at 193-94, 109 S.Ct. 454.

Tomaiolo v. Mallinoff, 281 F.3d 1, 9 (1stCir. 2002).

Notice that *Tarkanian* was decided by a 5 to 4 vote at the U.S. Supreme Court. Two liberal Justices (Brennan and Marshall) plus Justices White and O'Connor voted for state action by the Association, because the Association acted *jointly* with UNLV in suspending Coach Tarkanian. This narrow majority shows that the decision is controversial. I believe that the decision in *Tarkanian* is relevant to whether an accrediting association is a state actor, a topic discussed below, beginning at page 55.

For more interpretation of *NCAA v. Tarkanian*, see:

- *Brentwood Academy v. Tennessee Secondary Schools Athletic Ass'n*, 13 F.Supp.2d 670, 682-683 (M.D.Tenn. 1998) (distinguishing NCAA as *national* association from an association in only one state);
- *Cureton v. National Collegiate Athletic Ass'n*, 198 F.3d 107 (3dCir. 1999);
- *Smith v. National Collegiate Athletic Ass'n*, 266 F.3d 152 (3dCir. 2001).

Brentwood (2001)

Plaintiff is a private high school in Tennessee that was a member of Defendant athletic association. The Plaintiff challenged one of the Defendant's rules, and Plaintiff alleged violations of the First and Fourteenth Amendments. The U.S. District Court found Defendant had engaged in state action and granted summary judgment for Plaintiff. *Brentwood Academy v. Tennessee Secondary Schools Athletic Association*, 13 F.Supp.2d 670 (M.D.Tenn. 1998). The U.S. Court of Appeals reversed, and the U.S. Supreme Court reversed the Court of Appeals. *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001).

The following facts seem important to justify the U.S. Supreme Court's decision that the association was a state actor.

1. "No school is forced to join, but without any other authority actually regulating interscholastic athletics, it enjoys the memberships of almost all the State's public high schools (some 290 of them or 84% of the Association's voting membership), far outnumbering the 55 private schools that belong. A member school's team may play or scrimmage only against the team of another member, absent a dispensation." *Brentwood*, 531 U.S. at 291. In other words, the Association controls high school athletics in the state of Tennessee.
2. The U.S. District Court "relied on language in *National Collegiate Athletic Assn. v. Tarkanian*, 488 U.S. 179, 193, n. 13, 109 S.Ct. 454, 102 L.Ed.2d 469 (1988), suggesting that statewide interscholastic athletic associations are state actors, and on other federal cases in which such organizations had uniformly been held to be acting under color of state law." *Brentwood*, 531 U.S. at 293-294. See also *Brentwood*, 13 F.Supp.2d at 682. For a list of citations to nine U.S. Courts of Appeals or state supreme court cases holding statewide athletic associations to be state actors, see *Brentwood*, 531 U.S. at 294, n.1. See also cases in Tennessee cited at *Brentwood*, 13 F.Supp.2d at 679 ("The district courts in Tennessee have consistently held that the TSSAA acts under color of state law.").
3. "Although the Association's staff members are not paid by the State, they are eligible to join the State's public retirement system for its employees." *Brentwood*, 531 U.S. at 291. "State Board [of Education] members are assigned ex officio to serve as members of the board of control and legislative council, and the Association's ministerial employees are treated as state employees to the extent of being eligible for membership in the state retirement system." *Brentwood*, 531 U.S. at 300.

The U.S. Supreme Court admitted that a state action decision was a "normative judgment" in which no one fact was determinative.

What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity. From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government. See *Tarkanian*, 488 U.S., at 193, 196, 109 S.Ct. 454; *Polk County v. Dodson*, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981).

Our cases have identified a host of facts that can bear on the fairness of such an attribution. We have, for example, held that a challenged activity may be state action when it results from the State's exercise of "coercive power," *Blum*, 457 U.S., at 1004, 102 S.Ct. 2777, when the State provides "significant encouragement, either overt or covert," *ibid.*, or when a private actor operates as a "willful participant in joint activity with the State or its agents," *Lugar*, *supra*, at 941, 102 S.Ct. 2744 (internal quotation marks omitted). We have treated a nominally private entity as a state actor when it is controlled by an "agency of the State," *Pennsylvania v. Board of Directors of City Trusts of Philadelphia*, 353 U.S. 230, 231,

77 S.Ct. 806, 1 L.Ed.2d 792 (1957) (per curiam), when it has been delegated a public function by the State, cf., e.g., *West v. Atkins*, supra, at 56, 108 S.Ct. 2250; *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 627-628, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), when it is “entwined with governmental policies,” or when government is “entwined in [its] management or control,” *Evans v. Newton*, 382 U.S. 296, 299, 301, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966).

Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288, 295-296 (2001).

Notice that *Brentwood* was decided by a 5 to 4 vote at the U.S. Supreme Court, the three conservative Justices (Thomas, C.J. Rehnquist, Scalia) and swing-vote Kennedy voting for no state action by the Association. This narrow majority shows that the decision is controversial and does not clearly follow from precedents.

Massachusetts: No State Action Found

Because I am an attorney in Massachusetts, and because Massachusetts has some world-class universities (e.g., Massachusetts Institute of Technology, Harvard University, etc.), I looked at cases involving private educational institutions in Massachusetts and, more generally, in the U.S. Court of Appeals for the First Circuit, which includes Massachusetts. Beginning at page 28, below, I consider a group of cases from New York state. Beginning at page 41, below, I consider a group of cases from Pennsylvania.

Harvard University *Krohn* (1977)

Kenneth B. Krohn’s application for admission to Harvard Law School was denied. He sued Harvard in federal court, alleging deprivation of due process of law and violation of equal protection of the laws. The U.S. District Court dismissed the case in an unpublished opinion. The U.S. Court of Appeals affirmed the dismissal.

Plaintiff-appellant bases the presence of the requisite “state action” on two major theories: first, that Harvard University is a public institution by virtue of its historic connections with the Massachusetts Bay Colony and the supposed control exercised over it in the early days of the Commonwealth of Massachusetts; and, second, that there presently exists a sufficient nexus between the Commonwealth and Harvard Law School to imbue the law school’s activities with “color of state law.”

While appellant has written a fascinating historical review of the founding of Harvard University, we agree with the district court that he has failed to show a sufficient present day relationship between Harvard and the Commonwealth to treat the school as a public institution subject to federal jurisdiction in a 42 U.S.C. § 1983 suit. To hold otherwise would serve only to disrupt the less anciently established balance of rights and duties Harvard assumes as a private educational institution in Massachusetts. See, e. g., *Grueninger v. President and Fellows of Harvard College*, 343 Mass. 338, 178 N.E.2d 917 (1961) (Harvard is entitled to raise the limited defense of charitable immunities); *Attorney General v. President and Fellows of Harvard College*, 350 Mass. 125, 137, 213 N.E.2d 840, 847 (1966) (some gifts to

Harvard are “public charitable trusts in private educational hands”). This court will not enter into a historical debate with appellant; suffice it to say that Harvard has been for at least one hundred years and continues to be treated as a private educational institution in the whole range of its legal and educational relations and activities by both the private and public sectors in Massachusetts. It is considered by all reasonable persons to be a private educational institution and “(w)hile legitimate public belief is scarcely enough to determine that the acts of an avowedly private institution are state action, it is a factor to be weighed in the scales” *Grafton v. Brooklyn Law School*, 478 F.2d 1137, 1143 (2d Cir. 1973). As a private entity, Harvard Law School is not subject to suit brought under 42 U.S.C. § 1983. *Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883).

Plaintiff further alleges that the defendant's refusal to admit him to the law school was, by virtue of the existence of the State Supreme Judicial Court's rule requiring all bar applicants to establish their successful completion of a course of study at a law school, an activity “so intertwined with the state as to be subject to the standards of lawful activity imposed upon public institutions.” *Berrios v. Inter Am. University*, 535 F.2d 1330, 1332 (1st Cir. 1976). See *Burton v. Wilmington Pkg. Auth.*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). We reject plaintiff's contention. *Grafton*, supra, 478 F.2d 1137.

In order to determine whether or not “private action” is “so intertwined with the state” we must look to

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. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974).

Accord, *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972).

This court has held, in another context, that the receipt by a private university of state financial assistance through tax exemptions and a student aid program, regulation of the university by a public accreditation council and the authority of that council to oversee university disciplinary procedures, either individually or together, were insufficient attributes of governmental involvement to render the university's disciplinary proceedings “state action” for section 1983 purposes. *Berrios*, supra, 535 F.2d at 1332. Here, plaintiff has alleged no more than the Supreme Judicial Court rule, and

the mere fact that a school is giving instruction the successful completion of which affords one, and the more generally desired, path to the taking of a state bar examination, does not make its functions any more governmental than the imparting of the pre-legal instruction which is also required,

Grafton, supra, 478 F.2d at 1141. (Footnote omitted.)

There is not, in this case, an intertwining of state and private action sufficient for a section 1983 cause of action.

Further, it is clear that the mere offering of an education, regulated by the State, does not imbue defendant's activities with sufficient “public interest” to render defendant's activities governmental in nature. See *Evans v. Newton*, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966). The Supreme Court has said:

It is difficult to imagine a regulated activity more essential or more “clothed with the public interest” than the maintenance of schools, yet we stated in *Evans v. Newton*, 382 U.S. 296, 300, 86 S.Ct. 486, 489, 15 L.Ed.2d 373 (1966):

“The range of governmental activities is broad and varied, and the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions. While a State may not segregate public schools so as to exclude one or more religious groups, those sects may maintain their own

parochial educational systems.” *Jackson*, supra, 419 U.S. at 354 n. 9, 95 S.Ct. at 455 n. 9.

Finally, plaintiff has failed to allege any connection whatsoever between defendant's allegedly discriminatory admissions policy and any activity on the part of the Commonwealth. In order to subject the activities of private entities to a section 1983 claim, a plaintiff must allege that the acts of the state are in some way involved in the private discriminatory conduct in that they were “intended either overtly or covertly to encourage discrimination,” *Moose Lodge*, supra, 407 U.S. at 173, 92 S.Ct. at 1972, or that they affirmatively promoted the discriminatory conduct. See *id.* at 175 n. 3, 92 S.Ct. 1965. Here, plaintiff alleges no nexus whatsoever between the Supreme Judicial Court rule or any other rule, regulation or conduct on the part of the Commonwealth of Massachusetts and defendant's admissions policy. Therefore, plaintiff has not stated a cause of action against the defendant under 42 U.S.C. § 1983.

Krohn v. Harvard Law School, 552 F.2d 21, 23-24 (1stCir. 1977) (Bownes, J.). Judge Bownes wrote the decision in April 1977 while he was a judge in the U.S. District Court in New Hampshire, in Oct 1977 he became a judge on the First Circuit.

Rice (1981)

A female student at Harvard Law School argued pro se that federal funding of work-study program at Harvard Law School made the private school a state actor for purposes of alleged gender discrimination in grades. The U.S. District Court dismissed her complaint in an unpublished opinion. After tersely declining to revisit its prior opinion in *Krohn*, the U.S. Court of Appeals affirmed. *Rice v. President and Fellows of Harvard College*, 663 F.2d 336 (1stCir. 1981), *cert. den.*, 456 U.S. 928 (1982).

Cohen (1983)

Harvard chose not to renew the employment contract of Phin Cohen, an assistant professor of nutrition at the Harvard School of Public Health. Dr. Cohen sued in federal court, alleging violation of his First and Fifth Amendment rights. He lost, because he could not show state action by Harvard. *Cohen v. Harvard Univ.*, 568 F.Supp. 658 (D.Mass. 1983), *aff'd*, 729 F.2d 59 (1stCir. 1984) (rejecting new arguments raised for first time on appeal), *cert. den.*, 469 U.S. 874 (1984).

The U.S. District Court wrote:

Cohen's contention that Harvard's action should be attributed to the government because Harvard “exercises powers traditionally exclusively reserved to the [government],” *Jackson*, supra, 419 U.S. at 352, 95 S.Ct. at 454, is equally without merit. While it is true that the federal government has engaged in substantial funding of scientific research, such research is by no means within the exclusive domain of government. Further, the mere fact that Cohen worked at Harvard on research in which the public might be interested does not transmute Harvard's employment decision into federal government action.

Because Harvard's action cannot be attributed to the federal government, Cohen has no cause of action under the First and Fifth Amendments. Counts I and II of his amended complaint must, therefore, be dismissed.

Cohen v. Harvard Univ., 568 F.Supp. 658, 661 (D.Mass. 1983).

Cohen argued that his research was funded by the federal government, but it is well established that receipt of government money does not make a corporation a state actor. See cases cited at page 5, above. Furthermore, "There is no evidence that Cohen's employment termination was influenced by the government." *Cohen*, 568 F.Supp. at 660.

Lamb v. Rantoul (1977)

Myrna B. Lamb, a professor at Rhode Island School of Design (RISD), was denied tenure there. She sued in federal court, alleging gender discrimination. The U.S. District Court dismissed her case, because there was no state action by RISD, and the First Circuit affirmed. *Melanson v. Rantoul*, 421 F.Supp. 492 (D.R.I. 1976), *aff'd sub nom. Lamb v. Rantoul*, 561 F.2d 409, 410-411 (1st Cir. 1977).

The U.S. District Court wrote:

Plaintiffs first argue that the relationship between the state and RISD evinces "a governmental design for private execution of public functions", *Berrios v. Inter American University*, 409 F.Supp. 769 (D.P.R. 1975), thereby establishing the presence of state action under the principles of *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946). They seek to distinguish the holding of the Court of Appeals in *Berrios*, *supra*, that higher education is not a public function by pointing to "a plethora of situations and activities where RISD was actually performing specific functions for and on behalf of the state" (emphasis added). These include, *inter alia*, tours of its museum for public school children, assistance in land-use planning for various towns in the state, and participation in artistic programs on behalf of the Rhode Island Department of Social and Rehabilitative Services.

With due respect, plaintiffs have completely misconstrued the public function theory, which treats as state action only the private exercise of a state-delegated power "which is traditionally associated with sovereignty". *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353, 95 S.Ct. 449, 454, 42 L.Ed.2d 477 (1974); see *Evans v. Newton*, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966). The question is not whether RISD is performing various services for the state, but whether it has been entrusted with state power for use in traditional governmental functions, such as elections, *Nixon v. Condon*, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932), or the operation of municipal parks, *Evans v. Newton*, *supra*.

Framed this way, the Court has little trouble deciding that higher education in Rhode Island is not a public function such that its delegation to RISD transforms RISD's actions into the actions of the state. The Supreme Court has already rejected (albeit in dicta) the public function theory as applied to higher education. *Jackson*, *supra*, 419 U.S. at 353, 354 n. 9, 95 S.Ct. 449; *Evans v. Newton*, *supra*, 382 U.S. at 300, 86 S.Ct. 486. The First Circuit seems conclusively to have rejected it in *Berrios*, *supra*, 535 F.2d at 1333. To the extent that the First Circuit's holding was limited to the facts before it, this Court sees no evidence before it to distinguish the factual situation in the case at bar from *Berrios*, *supra*.

Melanson v. Rantoul, 421 F.Supp. 492, 495 (D.R.I. 1976).

The amount of state funding to RISD was minuscule. “Rhode Island’s direct aid to RISD has not, at least as far back as 1965, totalled more than 2% of RISD’s operating income.” *Melanson v. Rantoul*, 421 F.Supp. 492, 497 (D.R.I. 1976). Furthermore, the District Court noted: “It is well-settled that funds derived from federal sources are not relevant in determining whether there is sufficient state funding for 14th amendment prohibitions to attach. *Berrios v. Inter American University*, 535 F.2d 1330, 1332 n. 5 (1st Cir. 1976).” *Melanson v. Rantoul*, 421 F.Supp. 492, 496, n.6 (D.R.I. 1976).

The U.S. Court of Appeals for the First Circuit affirmed:

In brief, the state of Rhode Island and RISD have the following relationships. A modest amount of direct financial assistance, generally approximating one percent of RISD’s annual operating budget, is received from the state. In 1974-75, RISD received the largest amount of direct assistance, \$90,090, its total income being \$7,700,089. Of this a small amount (\$15,681) was given for state scholarships; a similar amount was allocated to museum tours for schools, which RISD gives under contract with the state; and the largest amount (\$50,000) was given for the museum. The most substantial financial advantage lies in RISD’s exemption from property and sales taxes, which all educational and charitable institutions enjoy. The extent of formal structural connections between RISD and the state is the requirement that five of RISD’s 43 directors be state and Providence officials, designated ex officio, and the obligation to file annual reports and to allow inspections by the state. Finally, there is considerable cooperation between state officials and RISD personnel in preparing grant applications and projects serving various sectors of the Rhode Island citizenry. [footnote omitted]

This case seems to us largely controlled by *Berrios v. Inter American University*, 535 F.2d 1330 (1st Cir. 1976). Our holding there that higher education was not a public function in the sense relevant to state action analysis applies even more forcibly to the combined art-related missions of RISD. In *Berrios*, although the University received not only tax exemptions but a much larger proportion of its budget from the state than does RISD, and was subject to accreditation regulation and oversight of disciplinary procedures by a public body, we held, citing prevailing authority, that the university was not a state actor. See also *Krohn v. Harvard Law School*, 552 F.2d 21 (1st Cir. 1977).

The additional factors present here are of two types: those arguably pointing to the “symbiotic” relationship mentioned in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961), and the fact that this is a sex discrimination case. The former include the 1948 conveyance by the city of Providence of a building to RISD and RISD’s granting the state an easement in other property for historical purposes; the by-law provision we have noted requiring ex officio board members; the statutory requirement of an annual report and visitation rights in the state department of education; the assistance of the Rhode Island Historical Preservation Commission in including some of RISD’s buildings on the National Register of Historic Places and in obtaining a federal grant for developing some of its property; the receipt of federal funds channeled through the Rhode Island State Council on the Arts, which has its offices in one of RISD’s buildings.

Our inquiry must be, as the Court put it in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974), “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.” In *Jackson* an electricity customer sought damages for the utility’s termination of service. As the Court summarized the case,

“All of petitioner's arguments taken together show no more than that Metropolitan was a heavily regulated, privately owned utility, enjoying at least a partial monopoly . . . and that it elected to terminate service to petitioner in a manner which the Pennsylvania Public Utility Commission found permissible under state law.” *Id.* at 358, 95 S.Ct. at 457.

The Court held that this did not make the utility's conduct attributable to the state. There is even less basis in the present case for finding any connection between the state and the action of RISD in refusing tenure to appellant. *Lamb v. Rantoul*, 561 F.2d 409, 410-411 (1st Cir. 1977).

other private colleges in Massachusetts

Lorentzen v. Boston College, 440 F.Supp. 464, 465 (D.Mass. 1977) (charter from the State of Massachusetts, and state/local tax exemption because of College's nonprofit status, was *not* adequate reason to declare Boston College a state actor). This case was brought by a pro se plaintiff. It would be strange if Boston College were a state actor, because Boston College is operated by the Jesuits, part of the Catholic Church. State action by Boston College would likely infringe the no establishment clause of the First Amendment.

Anderson v. Massachusetts Institute of Technology, Not Reported in N.E.2d, 3 Mass.L.Rptr. 293, 1995 WL 813188 at *3 (Mass.Super. 1995) (“Constitutional protection is unavailing to Anderson, a student at a private university.”). I am surprised that there are not more cases involving alleged state action by Massachusetts Institute of Technology, given the huge amount of federal government contracts and grants to MIT.

Boston University (BU) expelled a dentist from a graduate program at the BU School of Graduate Dentistry. The dentist sued, alleging state action and deprivation of his rights to due process and equal protection. BU “moved to dismiss on the ground that BU's academic decision to terminate plaintiff is not a state action subject to constitutional scrutiny because BU is a private university.” 73 F.Supp2d at 69. The U.S. District Court dismissed the litigation.

In order to determine whether a private actor may be found to be a state actor, courts must examine: (1) whether there was a sufficient nexus between the state and the private actor which compelled the private actor to act as it did; (2) whether the private actor has assumed a traditionally public function; or (3) whether there is a sufficient “symbiotic relationship” between the state and the private actor so that the state might be recognized as a joint participant in the challenged activity. See *Ponce v. Basketball Fed'n*, 760 F.2d 375, 377 (1st Cir. 1985); *Tynecki v. Tufts Univ. School of Dental Med.*, 875 F.Supp. 26, 31 (D.Mass. 1994). Under any of these tests, BU's decision to terminate does not qualify as governmental action.

Missert v. Trustees of Boston University, 73 F.Supp.2d 68, 71 (D.Mass. 1999), *aff'd*, 2000 WL 1618436 (1stCir. 2000) (per curiam). The U.S. District Court discussed the traditional governmental function test:

With respect to the second test, a plaintiff must show that a private actor assumed powers that are “traditionally exclusively reserved to the state” in order for the private actor to be deemed a state actor. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352, 95 S.Ct. 449,

42 L.Ed.2d 477 (1974). A private party becomes a state actor when it has been delegated a traditional government function. See, e.g., *West v. Atkins*, 487 U.S. 42, 57, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988) (holding that a physician under contract with North Carolina to provide medical services to prison inmates was a state actor for purposes of § 1983); *Terry v. Adams*, 345 U.S. 461, 470, 73 S.Ct. 809, 97 L.Ed. 1152 (1953) (finding state action where a private organization conducted elections to select candidates for a primary election); *Marsh v. Alabama*, 326 U.S. 501, 508, 66 S.Ct. 276, 90 L.Ed. 265 (1946) (holding that company-owned town is a state actor). The First Circuit has held that education is not a traditionally exclusive public function. *Johnson v. Pinkerton Academy*, 861 F.2d 335, 338 (1st Cir. 1988). Academic decision-making within a private graduate institution does not constitute state action. See *Tynecki*, 875 F.Supp. at 32. While an [Institutional Review Board]'s decision may well constitute state action under this traditional government function test, its decisions are not at issue here.

Missert, 73 F.Supp.2d at 72. The U.S. Court of Appeals affirmed in an unpublished opinion. 2000 WL 1618436 (1stCir. 2000) (per curiam).

Logiodice (2002)

Three towns in Maine did not operate a public high school, but, since 1983, contracted with a private high school, Maine Central Institute (MCI). Zachariah Logiodice, an 11th grade pupil, was suspended for ten days for cursing at a teacher and the dean at MCI and disobeying a teacher. Zachariah's parents filed litigation against MCI and school district, alleging defendants had denied Zachariah due process required under see *Goss v. Lopez*, 419 U.S. 565 (1975). The U.S. District Court found that MCI was not a state actor and granted summary judgment to all defendants. *Logiodice v. Trustees of MCI*, 170 F.Supp.2d 16 (D.Me. 2001). The U.S. Court of Appeals affirmed:

We start with the claims against MCI. The district court did not reach the merits of plaintiff's procedural due process claim because it found at the threshold that MCI was not acting "under color of state law." 42 U.S.C. § 1983. In most contexts, section 1983's "under color of state law" requisite is construed in harmony with the state action requirement of the Fourteenth Amendment. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 931-35, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). Broadly speaking, the Fourteenth Amendment protects individuals only against government (leaving private conduct to regulation by statutes and common law). E.g., *The Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883).

Yet under several doctrines, acts by a nominally private entity may comprise state action—e.g., if, with respect to the activity at issue, the private entity is engaged in a traditionally exclusive public function; is "entwined" with the government; is subject to governmental coercion or encouragement; or is willingly engaged in joint action with the government. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295-96, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001). The doctrines are too generally phrased to be self-executing: the cases are sensitive to fact situations and lack neat consistency. See *id.*

Nevertheless, existing doctrine provides the starting point and framework for analysis. Plaintiff's first claim on appeal is that MCI is a state actor because (in plaintiff's words) "it was performing the traditional public function of providing public educational services" to the school district's high school students. Under the "public function" doctrine, the Supreme Court has identified certain functions which it regards as the sole province of government, and it has treated ostensibly private parties performing such functions as state actors. The classic

cases are the conduct of elections, e.g., *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953), and the governance of a “company” town, *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946).

So far as the public function test is based on historical practice (as opposed to a normative judgment), see, e.g., *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 545, 107 S.Ct. 2971, 97 L.Ed.2d 427 (1987), plaintiff cannot meet it. This is because under Supreme Court precedent, it is not enough that the function be one sometimes performed by government—an approach that would exclude little, given the diversity of activities performed by modern governments. Rather, where the party complained of is otherwise private, the function must be one “exclusively reserved to the State.” *Flagg Bros. v. Brooks*, 436 U.S. 149, 158, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978) (emphasis added).

Obviously, education is not and never has been a function reserved to the state. See, e.g., *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). In Maine, as elsewhere, schooling, including high school education, is regularly and widely performed by private entities; this has been so from the outset of this country’s history. See Chadbourne, *A HISTORY OF EDUCATION IN MAINE* 111 (1936); Bowen, *THE HISTORY OF SECONDARY EDUCATION IN SOMERSET COUNTY IN MAINE* 16-22 (1935). MCI itself was founded in 1866. Chadbourne, *supra*, at 283. Accordingly, the Supreme Court, in *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-43, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982), *aff’g* 641 F.2d 14 (1st Cir. 1981), and lower courts, including this one, see *Robert S. v. Stetson Sch., Inc.*, 256 F.3d 159, 165-66 (3d Cir. 2001); *Johnson v. Pinkerton Acad.*, 861 F.2d 335, 338 (1st Cir. 1988), have declined to describe private schools as performing an exclusive public function. See also *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 354 n. 9, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974).

Admittedly, both *Rendell-Baker* and *Johnson* involved claims to due process protection made by teachers and not students; our own decisions in both cases held out the possibility that students might have a better claim. *Johnson*, 861 F.2d at 338; *Rendell-Baker*, 641 F.2d at 26. Whether state actor status should depend on who is suing is debatable, see, e.g., *Sherlock v. Montefiore Med. Ctr.*, 84 F.3d 522, 527 (2d Cir. 1996), and the Supreme Court’s decision in *Rendell-Baker* did not encourage such a distinction. In any event, any stronger claim by students would be based not on historical practice but on normative judgments (more is to be said about this below).

Plaintiff essentially concedes that education, as a category, is not from a historical standpoint the exclusive province of government; but his brief seeks to narrow and refine the category as that of providing a publicly funded education available to all students generally. MCI, he says, is different from other private schools; although it admits some non-district students selectively, it admits all district students and so serves as the school of last resort for students in the district. There is no indication that the Supreme Court had this kind of tailoring by adjectives in mind when it spoke of functions “exclusively” provided by government. However this may be, even publicly funded education of last resort was not provided exclusively by government in Maine.

Before public high schools became widespread, private grammar schools and academies received public funds and were the only secondary education available. See Chadbourne, *supra*, at 104-35, 273-87. And even as towns increasingly built their own public schools beginning in the mid-1800s, some municipalities continued to rely on publicly funded private schools to provide free secondary education. In fact, the first statewide high school law providing money to municipalities for the establishment of local public schools also contained the original version of 20-A M.R.S.A. § 2701 — the current provision allowing school districts to provide education through contracts with private high schools. See *id.* at 378-79, 515-16 (citing 1873 Me. Laws ch. 124, § 7). Other states had similar laws early on. E.g., 1904 Vt. Acts & Resolves No. 37, § 2; 1874 N.H. Laws ch. 69, § 1.

Plaintiff also invokes the “entwinement” doctrine, to which we now turn. According to *Brentwood*, a private entity may be classed as a state actor “when it is ‘entwined with governmental policies’ or when government is ‘entwined in [its] management or control.’ ” 531 U.S. at 296, 121 S.Ct. 924 (quoting *Evans v. Newton*, 382 U.S. 296, 299, 301, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966)). In *Brentwood*, the defendant was a non-profit association that set and enforced standards for athletic competition among schools both private and public. At issue was the association's enforcement of recruitment rules alleged by a member school to violate the First and Fourteenth Amendments. *Brentwood*, 531 U.S. at 291-93.

A closely divided Supreme Court applied the state action label to the association. The opinion stressed two points: that the membership of the association was comprised overwhelmingly (84 percent) of “public schools represented by their officials acting in their official capacity to provide an integral element of secondary public schooling,” *Brentwood*, 531 U.S. at 299-300, 121 S.Ct. 924, and that in substance the association (replacing previous state school board regulation) set binding athletic standards for state schools, including the recruiting standards at issue in the case, *id.* at 300-01, 121 S.Ct. 924.

In our own case, there are certainly connections between the state, the school district and MCI. The state regulates contract schools in various respects, see 20-A M.R.S.A. §§ 2702, 2901, 2902, 2951; most (about 80 percent) of MCI's students are sponsored by the school district; the school district contributes about half of MCI's budget; and in certain respects (public busing to extracurricular events, transfer of lower-school records, assistance with registration), MCI students are treated as if they were regular public school students.

But unlike the association in *Brentwood*, MCI is run by private trustees and not public officials; two officials of the school district (a school principal and a teacher) are trustees but serve as private citizens. And looking to the particular activity sought to be classed as state action, see *Blum v. Yaretsky*, 457 U.S. 991, 1004-05, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) — namely, the imposition of discipline on students — there is no entwinement: The MCI contract provides, with minor variations in language among the three versions, that “the Trustees shall have the sole right to promulgate, administer and enforce all rules and regulations pertaining to student behavior, discipline, and use of the buildings and grounds.” *Logiodice v. Trustees of Maine Central Institute*, 296 F.3d 22, 26-28 (1stCir. 2002), *cert. den.*, 537 U.S. 1107 (2003).

The U.S. Court of Appeals recognized the lack of a clear test for state action, and also recognized that plaintiff was not required to attend MCI and there was no *constitutional* requirement that a state provide a free education.

Thus, MCI does not fit within the two state-action exceptions invoked by plaintiff on appeal, nor other arguable exceptions that were discussed by the district court but are no longer relied upon by plaintiff. *Logiodice*, 170 F.Supp.2d at 28-29. Yet this does not exhaust the analysis: the reality is that some of the cases applying the state action label do not fit well into any established exception but are closer to ad hoc normative judgments. FN1 See *Brentwood*, 531 U.S. at 295-96, 121 S.Ct. 924. The difference is that the ad hoc cases have not yet congealed into formal categories.

FN1. E.g., *Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991); *West v. Atkins*, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988); *Polk County v. Dodson*, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981); *Evans v. Newton*, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961).

Exemplifying this point, plaintiff's best case may be *West v. Atkins*, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988). There a state prisoner, claiming serious mistreatment by a doctor, brought a section 1983 suit against the doctor, asserting a claim of cruel and unusual punishment. Assuming deliberate indifference, the doctor would clearly have been liable to suit if he had been a full-time state employee. See *Estelle v. Gamble*, 429 U.S. 97, 104-05, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). The Supreme Court in *West* said that the result was the same even though the doctor furnished the medical services to prisoners on a part-time basis and was technically an independent contractor with the state rather than a state employee. 487 U.S. at 55-57, 108 S.Ct. 2250.

The Supreme Court's analysis did not rely directly on the public function doctrine or any other organized body of precedent. Cf. *Brentwood*, 531 U.S. at 295-96, 121 S.Ct. 924. The decision emphasized both that the plaintiff was literally a prisoner of the state (and therefore a captive to whatever doctor the state provided) and that the state had an affirmative constitutional obligation to provide adequate medical care to its prisoners, a duty the doctor was fulfilling. *West*, 487 U.S. at 54-55, 108 S.Ct. 2250 (citing *Estelle*, 429 U.S. at 103-04, 97 S.Ct. 285). By contrast the plaintiff in our case is not required to attend MCI; and the Supreme Court has rejected any federal constitutional obligation on the state to provide education, see *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973).

Logiodice, 296 F.3d 22, 28-29 (1stCir. 2002).

A Maine state statute obligated the state to provide a free education, 296 F.3d at 30, but that was not a constitutional obligation.

The reality is that we are all dependent on private entities for crucial services and, in certain key areas, competition may not furnish protection. Consider, for example, towns in which electric, gas, or bus service is privately provided under franchise. Thus far, the Supreme Court has declined to impose due process requirements on such institutions. E.g., *Jackson*, 419 U.S. at 353-54 & n. 9, 95 S.Ct. 449. It perceives, as we do here, that state statutory and administrative remedies are normally available to deal with such abuses and that "constitutionalizing" regulation of private entities is a last resort.

Logiodice, 296 F.3d 22, 30-31 (1stCir. 2002).

I do not understand the significance of the fact that free education is a statutory, not constitutional, requirement. State statutes are state action. There is no constitutional requirement that cities have parks, but if a city transfers its parks to a private organization that discriminates against black people, courts have no difficulty in finding state action in the transfer and then finding unconstitutional racial discrimination. Nevertheless, the First Circuit makes a good point that private corporations (e.g., utilities) provide essential services, but are not state action.

I think *Logiodice* may be distinguished from *Rendell-Baker v. Kohn* on the fact that the private school in Maine was the only local high school available to Logiodice, so travel expenses or boarding expenses and private tuition expenses may have coerced him to attend that local private school. In other words, the government contracted with the private school in Maine to be a substitute for a local public high school, which may be state action. However, in *Rendell-Baker v. Kohn* there were local public high schools available to pupils, although the public high schools did not have the special needs programs that were offered by the private school.

New York: No State Action Found

During 1968-1988, there were a series of six landmark cases in the U.S. Court of Appeals for the Second Circuit regarding alleged state action by private colleges in New York State. Because some of these cases involve particular New York State statutes that might indicate an unusual degree of control of private colleges by the state,⁶ it makes sense to consider these cases in one group.

early cases in trial courts

- *Grossner v. Columbia Univ.*, 287 F.Supp. 535, 548 (S.D.N.Y. 1968) (Government funding alone (“without a good deal more”) does not cause state action.);
- *Ryan v. Hofstra Univ.*, 324 N.Y.S.2d 964, 968 (N.Y.Sup. 1971) (found state action by Hofstra University). I discuss this case in detail, beginning on page 49, below, and then explain why it is *not* good law.

Second Circuit

Powe v. Miles (1968)

Powe is a landmark opinion by Judge Henry Jacob Friendly, in a case involving seven students who obstructed an ROTC ceremony at the annual Parents Day on campus at Alfred University. The disruption occurred on 11 May 1968, the students sued for alleged civil rights violations in August 1968, the U.S. District Court dismissed the case⁷ for absence of federal jurisdiction on 25 Sep 1968, and Judge Friendly affirmed on 23 Dec 1968 — a very rapid judicial schedule.

There are two parts of this case, because Alfred University is composed of four colleges, of which three are private colleges, and one — the New York State College of Ceramics — was created by the State of New York in 1900, but operated by Alfred University under contract with the state. Four of the student protesters were enrolled in the private Liberal Arts College at Alfred University and three were enrolled in the New York State College of Ceramics.

The attorneys for the students argued that Alfred University was a state actor, because it performed a "public function" of education. Judge Friendly ably extinguished this argument:

Appellants' 'public function' argument seeks to fuse a number of lines of authority, none of which is applicable here. One is typified by *Marsh v. Alabama*, 326 U.S. 501, 502, 508, 66 S.Ct. 276, 277, 90 L.Ed. 265 (1946), where a private company owned and operated an

⁶ See, e.g., O'Neil, *Private Universities and Public Law*, 19 BUFFALO LAW REVIEW 155 (1970).

⁷ *Powe v. Mills*, 294 F.Supp. 1269 (W.D.N.Y. 1968).

aggregation having 'all the characteristics of any other American town,' with its streets and public places generally open to all comers, and the private ownership was disregarded. While the principle of that decision has recently been held to cover the public walkways and parking areas of a privately owned shopping center, *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603 (1968), in the context of union picketing of one of the enterprises located there, this rested on findings that the premises resembled 'the business area of a municipality' and, in light of the tremendous development of suburban shopping centers, were 'the functional equivalent of a 'business block,' and hence 'the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.' 391 U.S. at 315, 319, 88 S.Ct. at 1607, 1609. Alfred's football field does not fit the rubric of either *Marsh* or *Logan Valley Plaza*; it was open only to persons connected with the University or licensed by it to participate in or attend athletic contests or other events. In another variant the 'public function' cases concern particular activities or facilities so clearly governmental in nature that the state cannot be permitted to escape responsibility by allowing them to be managed by a supposedly private agency. The party primaries in *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944), and *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953), come within this category; so also does the once public park still 'swept, manicured, watered, patrolled, and maintained by the city as a public facility for whites only' in *Evans v. Newton*, 382 U.S. 296, 301, 86 S.Ct. 486, 489, 15 L.Ed.2d 373 (1966). Mr. Justice Douglas' opinion in the *Evans* case sharply distinguished, even in the context of racial discrimination, between a park, which 'is more like a fire department or police department that traditionally serves the community' and an educational institution, 382 U.S. at 302, 86 S.Ct. at 490. As to this, 'If a testator wanted to leave a school or center for the use of one race only and in no way implicated the State in the supervision, control, or management of that facility, we assume arguendo that no constitutional difficulty would be encountered,' 382 U.S. at 300, 86 S.Ct. at 489. Education has never been a state monopoly in this country, even at the primary or secondary levels, and New York's entry into higher education on a significant scale came more than a century after Alfred's establishment.FN5

FN5. In light of all this we scarcely need mention that the case presents no problem of a state encouraging the formation and functioning of 'private' schools in order to evade constitutional requirements with respect to public ones. See *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964); *Louisiana Education Comm'n v. Poindexter*, 393 U.S. 17, 89 S.Ct. 48, 21 L.Ed.2d 16 (1968), 37 L.W. 3131; *South Carolina State Board of Education v. Brown*, 393 U.S. 222, 89 S.Ct. 449, 21 L.Ed.2d 391 (1968).

Powe v. Miles, 407 F.2d 73, 80 (2dCir. 1968).

In March 2011, this holding is still valid law in the Second Circuit. *Weise v. Syracuse University*, 522 F.2d 397, 404, n.6 (2dCir. 1975); *New York City Jaycees, Inc. v. United States Jaycees, Inc.*, 512 F.2d 856, 860 (2dCir. 1975) (recognizing U.S. Supreme Court decision in *Jackson*); *Grafton v. Brooklyn Law School*, 478 F.2d 1137, 1140 and n.6 (2dCir. 1973). See also *Berrios v. Inter Am. University*, 535 F.2d 1330, 1333 (1stCir. 1976); *Cohen v. Illinois Institute of Technology*, 524 F.2d 818, 826, n.24 (7thCir. 1975) (Stevens, J.).

The attorney for the students argued that New York State's regulation of education made a private college a state actor. Judge Friendly rejected this argument.

The contention that New York's regulation of educational standards in private schools, colleges and universities, e.g., Education Law §§ 207, 215, 305(2), makes their acts in curtailing protest and disciplining students the acts of the State is equally unpersuasive. 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.** Putting the point another way, the state action, not the private action, must be the subject of complaint. See *Burton v. Wilmington Parking Authority*, supra, 365 U.S. at 725, 81 S.Ct. 856, 6 L.Ed.2d 45; *Grossner v. Trustees of Columbia University*, 287 F.Supp. 535, 548 (S.D.N.Y. 1968). When the state bans a subject from the curriculum of a private school, as in *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), its responsibility needs no elucidation. State action would be similarly present here with respect to all the students if New York had undertaken to set policy for the control of demonstrations in all private universities or in universities containing contract colleges. Cf. *Public Utilities Comm'n of District of Columbia v. Pollak*, 343 U.S. 451, 461-463, 72 S.Ct. 96 L.Ed. 1068 (1952).FN6 But the fact that New York has exercised some regulatory powers over the standard of education offered by Alfred University does not implicate it generally in Alfred's policies toward demonstrations and discipline.

FN6. The *Pollak* case may rest also on the nearly exclusive character of the transit company's franchise. See 343 U.S. at 454 n. 1, 72 S.Ct. 96. Cf. *Boman v. Birmingham Transit Co.*, 280 F.2d 531 (5 Cir. 1960).

Powe v. Miles, 407 F.2d 73, 81 (2dCir. 1968).

In March 2011, this is still valid law in the Second Circuit, see *Albert v. Carovano*, 851 F.2d 561, 569 (2dCir. 1988) (en banc). The sentence that I boldfaced has been quoted in many subsequent decisions, e.g.,

- *U.S. v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO*, 941 F.2d 1292, 1296 (2dCir. 1991);
- *Albert v. Carovano*, 851 F.2d 561, 569 (2dCir. 1988);
- *Schlein v. Milford Hospital, Inc.*, 561 F.2d 427, 428 (2dCir. 1977);
- *Jackson v. American Bar Ass'n*, 538 F.2d 829, 832-833 (9thCir. 1976);
- *Hamlin ex rel. Hamlin v. City of Peekskill Bd. of Education*, 377 F.Supp.2d 379, 388 (S.D.N.Y. 2005).

The attorney for the students argued that state financial support for the Liberal Arts College at Alfred University made the University a state actor. Judge Friendly rejected this argument, noting that the state contributed less than \$200,000 of a \$6.8 million budget at Alfred University, a mere 3%. Judge Friendly concluded:

This is a long way from being so dominant as to afford basis for a contention that the state is merely utilizing private trustees to administer a state activity, as in *Kerr v. Enoch Pratt Free Library of Baltimore City*, 149 F.2d 212 (4 Cir. 1945). We perceive no basis for holding that the grant of scholarships and the financing of CC imposes on the State a duty to see that Alfred's overall policies with respect to demonstrations and discipline conform to First and

Fourteenth Amendment standards so that state inaction might constitute an object of attack. Whether this would be true if Alfred were to adopt discriminatory admission policies, see *Cooper v. Aaron*, 358 U.S. 1, 19, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958), is a different question we need not here decide.

Powe v. Miles, 407 F.2d 73, 81 (2dCir. 1968).

So, the Liberal Arts College at Alfred University was not a state actor. However, the New York State College of Ceramics was a state actor, for reasons explained by Judge Friendly:

We hold that regulation of demonstrations by and discipline of the students in the New York State College of Ceramics at Alfred University by the President and the Dean of Students constitutes state action, for the seemingly simple but entirely sufficient reason that the State has willed it that way. The very name of the college identifies it as a state institution. In part I of this opinion we have extensively reviewed the statutes making the college an integral part of the State University;FN7 it suffices here to cite Education Law § 6102, whereby Alfred University maintains discipline and determines educational policies with respect to the State College 'as the representative of the state university trustees.' We see no reason why the State should not be taken at its word. The statutory provisions are not mere verbiage; they reflect the Legislature's belief that the citizens of New York would demand retention of State control over an educational institution wholly supported by State money. If the discipline had been administered by the Dean of CC, all of whose salary is paid by the State, because of Acts of CC students in the State-owned buildings, the existence of state action would hardly be doubted. We do not think a different result is justified because here the CC students were demonstrating on another part of the campus, which the State's payments on their behalf entitled them to enter for proper purposes, and the authority was exercised by delegates of the State who also have other roles. While even as to the CC students the President and the Dean of Students may lack the symbolic tie with the state furnished by the deputy sheriff's badge in *Griffin v. Maryland*, supra, or the public building in *Burton v. Wilmington Parking Authority*, supra, the students of the New York State College of Ceramics can properly regard themselves as receiving a public education FN8 and entitled to be treated by those in charge in the same way as their counterparts in other portions of the State University. If the State wanted Alfred's policy on demonstrations changed for the CC students, mere order of the State University trustees would suffice, Education Law § 355(1)(a), and(2)(b); no general legislation would be needed, as it would be if the State desired to control the policy for other students. However one characterizes Alfred's relationship to the State with respect to the New York State College of Ceramics, it is much closer than that of an independent contractor. The State furnishes the land, buildings and equipment; it meets and evidently expects to continue to meet the entire budget; it requires that all receipts be credited against that budget, Education Law § 6102; and in the last analysis it can tell Alfred not simply what to do but how to do it. The confiding of certain duties to private individuals no more insulates the State under these circumstances than in *Kerr v. Enoch Pratt Free Library*, supra. While it may well be that the principle of *Burton v. Wilmington Parking Authority* would not require a finding of state action or, in any event, of unconstitutional state action if the coffee shop involved in that case dismissed a waitress without notice and hearing or refused to rent a private dining room to the local branch of the Communist Party, the State's relation to the New York State College of Ceramics goes far beyond that of landlord and tenant. The control of these student protests by the President and the Dean of Students on behalf of the State is an instance of positive state involvement, whether obvious or not.

Powe v. Miles, 407 F.2d 73, 82-83 (2dCir. 1968).

Coleman v. Wagner College (1970)

The two dozen plaintiffs occupied a dean's office at Wagner College, a private college in New York City that was affiliated with the Lutheran Church. A different dean, the Dean of Students, informed the students they would be expelled if they did not promptly leave the office. The students remained and they were expelled without a hearing. The students sued in federal court, alleging deprivation of due process. In an unreported opinion, the U.S. District Court, sua sponte, dismissed the case, before the Complaint was served on the College.⁸ The students' attorney attempted to establish state action by arguing that the private college was subject to New York State's Henderson Act:

[New York State Education Law, McKinney's Consol. Laws, c. 16,] § 6450. **Regulation by colleges of conduct on campuses and other college property used for educational purposes.**

1. The trustees or other governing board of every college chartered by the regents or incorporated by special act of the legislature shall adopt rules and regulations for the maintenance of public order on college campuses and other college property used for educational purposes and provide a program for the enforcement thereof. Such rules and regulations shall govern the conduct of students, faculty and other staff as well as visitors and other licensees and invitees on such campuses and property. The penalties for violations of such rules and regulations shall be clearly set forth therein and shall include provisions for the ejection of a violator from such campus and property, and in case of a student or faculty violator his suspension, expulsion or other appropriate disciplinary action. Such rules and regulations shall be filed with the regents and the commissioner of education not later than ninety days after the effective date of this act. All amendments to such rules and regulations shall be filed with the regents and the commissioner of education not later than ten days after their adoption.

2. If the trustees or other governing board of a college fails to file the rules and regulations within the time required by this section such college shall not be eligible to receive any state aid or assistance until such rules and regulations are duly filed.

3. Nothing contained in this section is intended nor shall it be construed to limit or restrict the freedom of speech nor peaceful assembly.

Coleman v. Wagner College, 429 F.2d 1120, 1122, n.1 (2dCir. 1970).

The U.S. Court of Appeal characterized the state statute:

Moreover, it appears to us that the 'regulation' of college discipline embodied in section 6450 appears almost devoid of meaningful content. Colleges are not required to secure approval of rules and regulations drafted pursuant to the section but merely to file them with the designated officials. The statute does not proscribe specific activities or types of conduct as violations of the public order of the campus. No penalty is designated; although college officials are required to have the sanction of ejection (and, in the case of students and faculty members, an 'appropriate disciplinary action') at their disposal, they are not required to use it. One wonders whether rules and regulations consisting solely of the statement that any individual guilty of a transgression against the public order of the campus shall be required to give the Dean of the College a rose and a peppercorn on Midsummer's Day would satisfy the

⁸ *Coleman*, 429 F.2d at 1123, n.2.

literal command of the statute in all respects. Read in this manner, the statute does little more than call upon the college administrators to reconsider the problem of student discipline and to place the results of this reconsideration on record with certain officials of the State of New York. If the statute is applied in accordance with its literal meaning, regulations filed pursuant to its provisions and disciplinary proceedings instituted pursuant to these regulations are the product and responsibility of private individuals and not of the state.

We are, however, cognizant of the possibility that the statute may have been intended, or may be applied, to mean more than it purports to say. More specifically, section 6450 may be intended or applied as a command to the colleges of the state to adopt a new, more severe attitude toward campus disruption and to impose harsh sanctions on unruly students. The Governor's Memorandum approving section 6450 referred to an 'intolerable situation on the Cornell University Campus' and spoke of 'the urgent need for adequate plans for student-university relations.' 2 McKinney's 1969 Session Law, p. 2546. Several other bills pending in the New York legislature while section 6450 was under consideration suggest that the statute was enacted in an atmosphere of hostility toward unruly student demonstrators and of resolve to make disruption costly for the participants. [footnote omitted] If these considerations have merit and section 6450 was intended to coerce colleges to adopt disciplinary codes embodying a 'hard-line' attitude toward student protesters, it would appear that New York has indeed 'undertaken to set policy for the control of demonstrations in all private universities' and should be held responsible for the implementation of this policy. *Powe v. Miles*, 407 F.2d 73, 81 (1968). Since we cannot resolve this question on the record before us, we conclude that the district court acted too hastily in dismissing the complaint and, consequently, remand for a further hearing at which the plaintiffs may introduce evidence to establish that section 6450 represents a meaningful state intrusion into the disciplinary policies of private colleges and universities.

Coleman v. Wagner College, 429 F.2d 1120, 1124-1125 (2dCir. 1970).

The final disposition of *Coleman v. Wagner College* is not in Westlaw. In 1988, the application of the Henderson Act to private colleges arose again, and the U.S. Court of Appeals again held that there was no state action. (see page 37, below).

Grafton v. Brooklyn Law School (1973)

Plaintiffs were two activists opposed to the wars in Vietnam and Cambodia who had been expelled from Brooklyn Law School in 1971 for too many D and F grades in classes. Plaintiffs alleged that faculty retaliated against them because of their views on the wars. Brooklyn Law School is a private school. Plaintiffs sued in federal court, alleging violation of the First Amendment rights and due process rights. The U.S. District Court, in an unpublished opinion, dismissed the case, because there was no state action by Brooklyn Law School. The U.S. Court of Appeals affirmed. *Grafton v. Brooklyn Law School*, 478 F.2d 1137 (2dCir. 1973).

Judge Friendly followed *Powe v. Miles* in rejecting the argument "the furnishing of higher education necessarily constitutes state action because it is a 'public function' " *Grafton v. Brooklyn Law School*, 478 F.2d at 1140-1141.

Judge Friendly rejected the argument that regulation of Brooklyn Law School by state statutes somehow made Brooklyn Law School a state actor. *Grafton v. Brooklyn Law School*, 478 F.2d at 1141 (2dCir. 1973). He followed *Powe v. Miles* and distinguished a more intrusive state statute considered in *Coleman v. Wagner College*.

Judge Friendly rejected the argument that two kinds of financial support from the state made Brooklyn Law School a state actor.

One is that the present building of Brooklyn Law School is on a site acquired from the City of New York at a public sale in 1965 where bidding was restricted to “a non-profit corporation . . . for the construction of educational facilities” and the Law School, as the only bidder, bought the land for the upset price of \$750,000, allegedly far below its real value. We need not decide what the result would be if New York City had not only given the land, see note 10 supra, but constructed the buildings and leased them to the Law School, a situation that would demand consideration of how far *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961), applies beyond the area of racial discrimination. *Grafton* at 1141-42.

The other form of state aid is that under § 6401 of the Education Law, added by Laws 1968, c. 677, a private institution meeting “standards of educational quality applicable to comparable public institutions” is entitled to \$400 for each bachelor's or master's degree which it awards, except for degrees earned by students with respect to whom other state aid has been granted to the institution. It could well be that such grants by the state, even though they represent only a small part of the cost of affording three years of legal training, would afford a ground for constitutional complaint if the charge here were an admission policy discriminating against racial or religious groups. See *Cooper v. Aaron*, 358 U.S. 1, 19, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958); *Louisiana Education Comm'n v. Poindexter*, 393 U.S. 17, 89 S.Ct. 48, 21 L.Ed.2d 16, *aff'g* 296 F.Supp. 686 (E.D.La. 1968).[footnote omitted] But while a grant or other index of state involvement may be impermissible when it “fosters or encourages” discrimination on the basis of race, the same limited involvement may not rise to the level of “state action” when the action in question is alleged to affront other constitutional rights. We do not regard the \$400 payment as sufficient to carry on its back the particular constitutional rights that plaintiffs here advance. See *Grossner v. Trustees of Columbia University*, 287 F.Supp. 535, 548 (S.D.N.Y. 1968). Moreover, while we held as to the College of Ceramics students in *Powe v. Miles*, supra, that conduct performed by otherwise “private” institutions on contract with the state to provide education would itself be state action, the mere making of an outright grant amounting to a fraction of the actual cost of conferring a degree does not suffice to make the school the agent of the state. *Grafton* at 1142.

Finally, Judge Friendly rejected the argument that state requirements for admission to practice law (e.g., written examinations in law classes) somehow made Brooklyn Law School a state actor. *Grafton* at 1142-43.

Wahba v. New York University (1974)

Plaintiff was a non-tenure-track research associate professor in the Biochemistry Department of the New York University (NYU) School of Medicine, who worked on a research project funded by National Institute of Health, an agency of the U.S. Government. Plaintiff was originally hired as an instructor in January 1963, promoted twice, and terminated in August 1970.⁹ After a dispute with the department chairman (who was also principal investigator on the government grant) over submission of a manuscript for publication without the permission of the department chairman (and without including the name of the department chairman as a co-author), the department chairman refused to renew Plaintiff's annual employment contract. Plaintiff sued in federal court, alleging deprivation of constitutional rights. The U.S. District Court granted summary judgement motion by the University, because there was no state action by the University. *Wahba v. New York University*, 371 F.Supp. 567 (S.D.N.Y. 1973) (following *Powe v. Miles* and *Grafton v. Brooklyn Law School*). The U.S. Court of Appeals affirmed. *Wahba v. New York University*, 492 F.2d 96 (2dCir. 1974). The U.S. Supreme Court refused to hear the case. 419 U.S. 874 (1974).

I am personally sympathetic to the Plaintiff in this case. Plaintiff was essentially a second-class professor, without any expectation of earning tenure, who worked as a mere employee on a series of one-year contracts. Apparently Plaintiff was a competent scientist, because NYU promoted him twice in seven years, and he was able quickly to find employment at the Sherbrooke University School of Medicine in Jan 1970. But this is not the place to discuss the merits of this interesting case, because Plaintiff could not meet the jurisdictional requirements for his constitutional claims, because there was no state action by NYU.

Judge Friendly wrote a six-page opinion that, in my view, misses some of the key arguments that could be made for why NYU is a state actor in the limited context of an employee who is working full-time on a government research grant. Judge Friendly does say "The venture was to be that of New York University and Dr. Ochoa [the principal investigator on the government grant and department chairman], undertaken with government support. What NIH wanted least was to share responsibility for its administration." *Wahba*, 492 F.2d at 100. "The form and manner of publication of results are left entirely in private hands." *Wahba*, 492 F.2d at 102. Then Judge Friendly says:

⁹ *Wahba*, 371 F.Supp. at 568 (hiring date) and *Wahba*, 492 F.2d at 97.

This kind of arrangement, whereby federal funds are used to prime the pump of research effort in private scientific institutions which the Government could not perform as well, has social values too obvious to require elaboration.¹⁰ Only rarely are professors of Dr. Ochoa's [the principal investigator on the government grant and department chairman] eminence willing to enter government service in peacetime. It is equally clear that scientists of his reputation on the staffs of private institutions, with a wealth of choices before them, are not likely to be willing to undertake projects under public grants if they are deprived of the freedom of management which they consider necessary and would have in projects not governmentally financed. It is hardly an attractive prospect for a research scientist to be forced to divert time from scientific inquiry to appear before a court or even a university board to justify such decisions as his refusal to allow a participant in his research project to make what he considers a premature and ill-advised publication; FN6 even less inviting is the prospect that the hearing board, in construing what it deems to be its constitutional mandate, may require him to allow such publication. Congress has specified one constitutional command, a prohibition of racial discrimination, which those engaging in federally financed projects must respect. This very specification affords some indication that the Government did not mean to require compliance with other constitutional guarantees; we do not think the Constitution imposes them *proprio vigore*.

FN6. We recognize that many private universities have established boards to pass on the discipline of students and to make employment decisions regarding untenured faculty. *Developments in the Law — Academic Freedom*, 81 HARVARD LAW REV. 1045, 1101-04, 1157-59 (1968). But these are flexible measures voluntarily adopted by the schools themselves. Furthermore, plaintiff's position would necessarily entail that decision of such a board with respect to a project financed by a federal grant would be subject to at least some judicial review.

Wahba, 482 F.2d at 102.

If Plaintiff had worked on the same project at the National Institute of Health campus in Bethesda, Maryland, then Plaintiff would be an employee of the U.S. Government — not only state action, but Plaintiff would have additional protections of civil service statutes and regulations. But, because Plaintiff worked on the project as an employee of NYU, there was no state action, and no legal protection for Plaintiff. NYU is *not* a state actor in the context of a student in classes or an instructor who teaches classes. Instead, I would argue that NYU is a state actor in the narrow context of an employee who is working full-time on a government research grant. The protections of First Amendment rights and due process of law are not just a benefit to the employee, but also a benefit to the government who sponsors the research grant, in that the government gets the results of a more robust inquiry that is legally protected. However, my view is *not* the law in the USA. One can easily imagine hypothetical cases in which the research is funded by the U.S. military and

¹⁰ Footnote by Standler: This first sentence is irrelevant to the *Wahba* case. While some research grants or contracts do provide initial funding that incubates new technologies, that is *not* what happened here. Dr. Ochoa, the principal investigator, won a Nobel Prize in the year 1959. The grant at issue in *Wahba* began in the year 1957 and had been renewed every year since then (at least up to the 1974 opinion). 492 F.2d at 97. The grant in *Wahba* provided long-term funding to an eminent scientist, to continue his basic research.

the workers on the research contract are required to have a security clearance from the government, where the security clearance is additional evidence of state action.

Weise v. Syracuse Univ. (1975)

Weise v. Syracuse University, 522 F.2d 397, 408 (2d Cir. 1975) (case alleges gender discrimination by Syracuse University, record not sufficient to determine whether Syracuse University, a private school receiving some public funds, was a state actor). The Second Circuit in *Weise* also considered a weaker test for state action than in cases involved with discipline of students or the First Amendment, because freedom from discrimination was a more important right.¹¹ The Second Circuit followed its previous decisions in *Powe v. Miles* and *Grafton v. Brooklyn Law School*, and again rejected the argument that because education is a “public function”, there is state action.¹²

On remand, the U.S. District Court found no state action by Syracuse University. *Weise*, 553 F.Supp. 675, 677-682 (N.D.N.Y. 1982). The District Court simply followed the then recent U.S. Supreme Court decision in *Rendell-Baker*, which found no state action by a high school, despite more evidence of state action by that high school than could be attributed to Syracuse University. *Weise*, 553 F.Supp. at 682.

Albert v. Carovano (1988)

The plaintiffs were students at Hamilton College, a private college. The College suspended the plaintiffs after they had a three-day occupation of the main administration building. The purpose of the occupation was to protest against apartheid in South Africa. The plaintiffs sued in federal court, alleging that Hamilton College was a state actor and that they were denied due process of law. The U.S. District Court, in an unpublished decision in Dec 1986, found that Hamilton College was not a state actor. The en banc U.S. Court of Appeals stated some of the facts about the College’s disciplinary code and the Henderson Act:

Chartered in 1812, Hamilton College is a privately-endowed institution of higher learning located in Clinton, New York. Until 1969, it prescribed a concise code of conduct for its students. The College stated only that “Conduct becoming a gentleman is expected of Hamilton men at all times,” and that “It is assumed that undergraduates will understand what constitutes gentlemanly conduct without expressed rules to cover every occasion.” The College’s Judiciary Board limited suspensions to “extremely serious misconduct.”

¹¹ *Weise*, 522 F.2d at 405-407.

¹² *Weise*, 522 F.2d at 404, n.6.

The College altered its code of conduct in 1969, however, after New York enacted the Henderson Act. That Act was a response to campus unrest in the 1960's, and as noted, requires colleges both to adopt rules concerning the maintenance of public order on campus and to file those rules with the state. [FN1] Colleges that fail to comply are not eligible to receive state aid.

[FN1] Section 6450 provides, in pertinent part:

1. The trustees or other governing board of every college chartered by the regents or incorporated by special act of the legislature shall adopt rules and regulations for the maintenance of public order on college campuses and other college property used for educational purposes and provide a program for the enforcement thereof.... Such rules and regulations shall govern the conduct of students, faculty and other staff as well as visitors and other licensees and invitees on such campuses and property. The penalties for violations of such rules and regulations shall be clearly set forth therein and shall include provisions for the ejection of a violator from such campus and property, in the case of a student or faculty violator his suspension, expulsion or other appropriate disciplinary action.... Such penalties shall be in addition to any penalty pursuant to the penal law or any other chapter to which a violator or organization may be subject. Such rules and regulations shall be filed with the regents and the commissioner of education not later than ninety days after the effective date of this act.... All amendments to such rules and regulations shall be filed with the regents and the commissioner of education not later than ten days after their adoption.

2. If the trustees or other governing board of a college fails to file the rules and regulations within the time required by this section such college shall not be eligible to receive any state aid or assistance until such rules and regulations are duly filed.

3. Nothing contained in this section is intended nor shall it be construed to limit or restrict the freedom of speech nor [sic] peaceful assembly.

[New York State Education Law, chapt. 16, § 6450.]

Albert v. Carovano, 851 F.2d 561, 563 (2dCir. 1988) (en banc).

This case is unusual in that it had three appellate opinions, without any remands in between:

1. *Albert v. Carovano*, 824 F.2d 1333, 1341 (2dCir. 1987) (“... there is a genuine dispute over the material issues of whether the decision to suspend the students is ‘fairly attributable’ to the State under *Coleman* and whether the State ‘substantially encouraged’ the disciplinary action taken by Carovano.”),
2. *modified on rehearing*, 839 F.2d 871 (2dCir. 1987) (state action not mentioned),
3. *on rehearing en banc*, 851 F.2d 561 (2dCir. 1988) (en banc) (Hamilton College not a state actor).

Warning! I have seen some citations to the first reported opinion, 824 F.2d 1333, that assert a holding of state action by Hamilton College, without mentioning that the first appellate opinion was vacated (or less kindly: reversed) by the en banc opinion. I concentrate on the en banc opinion, since it is the only valid statement of law for this case.

The en banc U.S. Court of Appeals noted the New York statute actually exerted little control over a private college.

The language of the Henderson Act requires only that rules adopted and filed pursuant to the Act provide “suspension, expulsion or other appropriate disciplinary action” as penalties for violation of those rules. Beyond this the Act is silent. Colleges are free to define breaches of public order however they wish, and they need not resort to a particular penalty in any particular case. Finally, nothing in the language of Section 6450 requires colleges to enforce the regulations filed pursuant to that Section at all. As we have previously observed, the terms of the Act leave “[o]ne wonder [ing] whether rules and regulations consisting solely of the statement that any individual guilty of a transgression against the public order of the campus shall be required to give the Dean of the College a rose and a peppercorn on Midsummer’s Day would satisfy the literal command of the statute in all respects.” *Coleman v. Wagner College*, 429 F.2d 1120, 1124 (2d Cir. 1970).

Albert v. Carovano, 851 F.2d 561, 564 (2d Cir. 1988) (en banc).

The court later says:

As we explain more fully below, however, appellants' theory of state action suffers from a fatal flaw. That theory assumes that either Section 6450 or the rules Hamilton filed pursuant to that statute constitute “a rule of conduct imposed by the state.” [*Lugar v. Edmondson Oil*, 457 U.S.] at 937, 102 S.Ct. at 2753. Yet nothing in either the legislation or those rules required that these appellants be suspended for occupying Buttrick Hall. Moreover, it is undisputed that the state's role under the Henderson Act has been merely to keep on file rules submitted by colleges and universities. The state has never sought to compel schools to enforce these rules and has never even inquired about such enforcement. In these circumstances, our decisions and those of the Supreme Court preclude a finding of state action.

Albert v. Carovano, 851 F.2d 561, 568 (2d Cir. 1988) (en banc).

The court later says:

Appellants argue that evidence that in 1969 Hamilton adopted the present code in response to Section 6450 suffices under *Coleman* [*v. Wagner College*, 429 F.2d 1120 (2d Cir. 1970) (“... our only previous encounter with the Henderson Act.”)] to defeat summary judgment. We disagree. Because *Coleman* held that the language of Section 6450 does not compel college administrators to take particular disciplinary actions, the court directed inquiry on remand into the views of state officials on their role under the Henderson Act and the views of private educational administrators as to their obligations under the Act. The issue in a *Coleman*-type case *today* is whether the particular sanction under challenge was imposed as a result of the acts of state officials responsible for enforcement of the Henderson Act or as a result of “a reasonable and widespread belief” by college or university administrators that imposition of the sanction was required by Section 6450. See [*Coleman*] at 1125.

The answer to this inquiry is undisputed. Since the passage of the Henderson Act, no state official has ever regarded his or her responsibilities under the Act as more than ministerial, has ever sought to affect disciplinary measures taken by private college administrators, or has ever even inquired into such a matter. The only arguable departure by state officials from a literal reading of the Act is Stone's interpretation that a code must explicitly include expulsion and suspension as possible but not mandatory sanctions. Nor is there any evidence whatsoever that any private college administrators anywhere in the State of New York believe, reasonably or not, that the Henderson Act requires that particular sanctions be imposed for disruption, much less that such a belief was held by Dean Jervis or President

Carovano. Indeed, in light of the clarification provided in the intervening years since Coleman, even Judge Friendly's looser test of whether "citizens may reasonably believe [the disciplinary action in 1986] to have been taken at the state's instance," [*Coleman*] at 1127 (Friendly, J., concurring), would not be satisfied. Appellants' submission regarding Hamilton's adoption of a new code of conduct in 1969 is, therefore, of no relevance and does not fulfill the test preferred by either the majority or minority in *Coleman*.

Albert v. Carovano, 851 F.2d 561, 570 (2dCir. 1988) (en banc).

Judge Oakes wrote the only separate opinion, to express his view that the Henderson Act "compel[ed] private colleges to promulgate rules for maintaining public order." *Ibid.* at 574 (Oakes, J., dissenting).

The statute requires that penalties for violation of the rules include "suspension, expulsion or other appropriate disciplinary action." While the words "other appropriate" may be weasel words, the statutory injunction forbidding "state aid or assistance" to colleges that failed to conform to section 6450(1), N.Y.Educ.Law § 6450(2), provided an irresistible incentive for colleges to establish the strictest penalties possible for student misconduct. Numerous colleges took this threat seriously and registered their opposition to the new statute. For the majority to say that there is no "evidence whatsoever that any private college administrators anywhere in the State of New York believe, reasonably or not, that the Henderson Act requires that particular sanctions be imposed for disruption," majority op. at 570, seems to me plain wrong.

Albert v. Carovano, 851 F.2d 561, 574-575 (2dCir. 1988) (Oakes, J., dissenting).

Neither the majority opinion nor Judge Oakes asks the hypothetical question of what would Hamilton College do to plaintiffs under the old rule, before the Henderson Act. The judicial opinion mentions no evidence on this issue. The pre-Henderson standard at Hamilton College was "ungentlemanly conduct". Suppose, pre-Henderson, Hamilton College would have suspended or expelled the plaintiffs, because the plaintiffs significantly disrupted operations of the College in a most ungentlemanly way. Then one can conclude that the Henderson Act increased the complexity of the written rules, but did not make the result more severe than before the Henderson Act. And, for that reason, I suggest the Henderson Act does not cause Hamilton College to be a state actor. The test I suggest here considers whether the Henderson Act changed the *result* of the private college's disciplinary process.

Pennsylvania

Pennsylvania state-related colleges are state actors

Pennsylvania has an unusual situation, because its state statute creates three “state-related” Universities that were formerly private nonprofit corporations, and one land-grant University that is also “state-related”. As explained below, courts have found that these state-related colleges are state actors. The reasons for state action (e.g., the state appoints 1/3 of the board of directors of each of these state-related colleges, the state provides continuing financial support to operate the college) should be of interest to attorneys who are want to argue that a private college is a state actor.

Historically, Pennsylvania had one state university: The Pennsylvania State University with its main campus at State College, Pennsylvania. That changed in 1965-72, when three private universities — Temple Univ. in Philadelphia, the Univ. of Pittsburgh, and Lincoln Univ. (formerly a college for black people) — became “state-related” by act of the Pennsylvania legislature:

1. The Pennsylvania State University (PSU) was originally incorporated in 1855 as a private corporation, but members of the board of trustees included the governor and representatives of the state government. 24 Pennsylvania Statute § 2531, et seq. (enacted 1855). In 1863, PSU became the only¹³ land-grant College in Pennsylvania. See, e.g., 24 Pennsylvania Statutes §§ 2571, 2584. PSU is required by statute to make an annual report of its “receipts and expenditures” each year to the legislature. 24 P.S. § 2549 (enacted 1863). PSU administers a network of branch campuses across the state, most of which are essentially community colleges. Currently, PSU has 32 people on its board of trustees, of which 10 members represent the state (i.e., the governor, three state secretaries, six people appointed by the governor) and 21 members are elected by alumni, Pennsylvania agricultural societies, and a board representing industry.
2. Temple University was established in 1874 and became "state-related" in the year 1965. 24 Penn.Statutes § 2510-1 and -2. Temple University has 36 voting trustees, of which 4 are appointed by the governor and 8 are appointed by the Pennsylvania legislature. 24 Penn.Statutes § 2510-4.
3. The University of Pittsburgh was established in 1787 and became "state-related" in the year 1966. 24 Penn.Statutes § 2510-201 and -202. One-third of the board of trustees of the University of Pittsburgh are appointed by the governor and state legislature. 24 Penn.Statutes § 2510-204.

¹³ That there is only one land-grant University is made clear in 24 Penn. Statutes § 2510-505, and 71 Penn. Statutes § 547.

4. Lincoln University was established in 1854 and became "state-related" in the year 1972. 24 P.S. § 2510-401 and -402.

The four state-related Universities are mentioned in several Pennsylvania Statutes, including:

- 10 Pennsylvania Statutes § 374(d) (enacted 1997) (no real estate tax for their land);
- 24 P.S. § 20-2001-D (enacted 1949) (definition of "State-related institution" in Public School Code of 1949);
- 24 P.S. § 5009(a) (enacted 1961) (no discrimination statute).

PSU is state actor

Even the Pennsylvania State Supreme Court admits that The Pennsylvania State University is a state actor. *Brush v. Pennsylvania State University*, 414 A.2d 48, 52 (Pa. 1980) (operation of dormitories). See also *Nicholas v. Pennsylvania State University*, 227 F.3d 133 (3dCir. 2000) (Alito, J.) (state action not issue on appeal); *Benner v. Oswald*, 444 F.Supp. 545, 556 (M.D.Pa. 1978) ("... all of Penn State's actions are state actions within the meaning of 42 U.S.C. § 1983."), *aff'd*, 592 F.2d 174, 178-180 (3dCir. 1979).

In the following paragraphs, I discuss court cases finding state action by the other three state-related universities in Pennsylvania.

Isaacs (1974)

In 1974, Judge Higginbotham¹⁴ found state action by Temple University in termination of employment of two faculty members. *Isaacs v. Board of Trustees of Temple University of Commonwealth System of Higher Education*, 385 F.Supp. 473 (E.D.Pa. 1974). There were three major reasons for the finding of state action:

1. Pennsylvania state statutes made Temple Univ. part of the state-related colleges, *Isaacs*, 385 F.Supp. at 477-478;
2. the state appointed 1/3 of the board of trustees, *Isaacs*, 385 F.Supp. at 478; and
3. the state provided at least 54% of Temple's operating income (excluding revenue from Temple's Hospital) during 1966-76, *Isaacs*, 385 F.Supp. at 479.

The judge noted that "Sometimes, it seems, Temple itself does not know whether it is public or private." *Isaacs*, 385 F.Supp. at 487.

¹⁴ In 1977, Judge Higginbotham began serving on the U.S. Court of Appeals for the Third Circuit.

Braden (1977)

In a gender discrimination case with a female professor as the plaintiff, the Univ. of Pittsburgh moved for summary judgment because there was no state action. The District Court denied the summary judgment and the en banc Third Circuit affirmed, holding that there was state action by the University of Pittsburgh.

With respect to the overall relationship between the University and the Commonwealth, a most telling factor is the University of Pittsburgh-Commonwealth Act [footnote to 24 Penn. Statute § 2510-201 et seq.] and the manner in which that legislation has been implemented. Such evidence would appear to indicate that the state is deeply enmeshed in operations of the University, including but not limited to its financing and its basic decision-making processes. Indeed, in light of the Act and the history of its effectuation, it is highly questionable whether the University may be described as a “purely private” institution, a characterization that would substantially immunize it from the dictates of the Constitution and the statutory progeny of that document.

Prior to the passage of the Act, Pitt was a private educational institution in dire financial straits.[footnote to *Braden*, 392 F.Supp. 118 at 122.] At the initiative of the University, overtures were made to the State Board of Education in an effort to ameliorate Pitt's monetary troubles. While agreeing to afford the requested aid, the Commonwealth was not content merely to inject public funds into the ailing institution. Instead, as will become evident, it conditioned a massive infusion of moneys on a comprehensive restructuring of the University to reflect the needs of the Commonwealth.

....

That the University of Pittsburgh-Commonwealth Act is especially damaging to the appellants' contention that state action is lacking becomes immediately clear. The Pennsylvania legislature in its statutory program boldly announces:

(I)t is hereby declared to be the purpose of this act to extend Commonwealth opportunities for higher education by establishing University of Pittsburgh as an instrumentality of the Commonwealth to serve as a State-related institution in the Commonwealth system of higher education.[FN53]

FN53. Pa.Stat.Ann. tit. 24, § 2510-202 (Purdon Supp.1976). (emphasis added) Both parties have stipulated that, for purposes of 11th Amendment state immunity, the University of Pittsburgh is not to be deemed a state agency. See 392 F.Supp. at 123. However, at oral argument, the Court was advised that such stipulation was not intended to bear on the state action issue.

And the body of the Act discloses that the proclamation of legislative policy, making the University a state “instrumentality” as well as a “state-related institution,” is not empty verbiage. We are inclined to take the Commonwealth at its word, and, indeed, may well be obligated to do so at this point in the proceedings.

Examination of the Act, as adopted and implemented, suggests that the line of demarcation between the University and the Commonwealth was blurred, if not obliterated. Significantly, the legislation changed the name of the University to the “University of Pittsburgh Of the Commonwealth System of Higher Education.” [28 P.S. § 2510-203.] Pitt's

charter also was amended so that trustees appointed by the Governor of Pennsylvania, by the President Pro Tempore of the Senate and by the Speaker of the House constitute one-third of the voting members of the Board of Trustees.[28 P.S. § 2510-203.] In addition, the Act names several state officials as ex officio trustees, including the Governor, the State Secretary of Education, and the Mayor of Pittsburgh, thus seeming to ensure that governmental representation on the Board is rather substantial. [FN56]

FN56. Although the hearing revealed no evidence that the Commonwealth trustees had voted as a bloc, see 392 F.Supp. at 121, it still might be possible to infer that the Commonwealth is capable of influencing Board decisions. Some trustees who are not selected by the Commonwealth nonetheless have positions with the state government. For example, the Chairman of Pitt's Board of Trustees is a member of the State Board of Education and also serves as Chairman of the State Council of Higher Education. Members of both of these state educational bodies are appointed by the Governor. It also is worth noting that the Pennsylvania Manual, a publication of the Commonwealth which lists state departments, agencies and boards, categorizes Pitt's Board of Trustees as a subspecies of the Department of Education. Commonwealth of Pennsylvania, Pennsylvania Manual (1974-75) at 331.

The statutory program is not limited to a modification of the University's name or the composition of its Board of Trustees. It promises that there will be annual appropriations for Pitt.[footnote omitted] And since the passage of the legislation, public funds have poured into the coffers of the University, averaging more than one-third of its total operating budget.[footnote omitted] In fiscal year 1973-74, for example, the state appropriated roughly \$48 million for Pitt, an amount representing over thirty-five per cent of the school's budget.

And the generosity of the Commonwealth has increased with each passing year.

Braden v. University of Pittsburgh, 552 F.2d 948, 958-960 (3dCir. 1977) (en banc).

The U.S. Court of Appeals noted:

If anything, there would appear to be adequate grounds for believing that Pitt is vested with a status more closely akin to that of a state college rather than that of a private institution of higher education.

Braden, 552 F.2d at 961.

Trotman (1980)

In a First Amendment decision, Judge Sloviter held that:

[These letters by Dr. Branson, President of Lincoln University,] were written by a state official in a position of authority with the power to impose discipline. They are therefore state action which must be exercised in compliance with the mandate of the First Amendment and cannot be dismissed as merely part of an academic debate.

Trotman v. Board of Trustees of Lincoln University, 635 F.2d 216, 228 (3dCir. 1980).

Krynicky & Schier (1984)

In two employment cases — one a denial of tenure, the other gender discrimination — in Federal Court, state action was found at both the University of Pittsburgh and Temple University. *Krynicky v. University of Pittsburgh and Schier v. Temple University*, 742 F.2d 94, 103 (3dCir. 1984) (holding *Braden* was still valid), *cert. denied*, 471 U.S. 1015, 105 S.Ct. 2018 (1985). The Third Circuit discussed the recent U.S. Supreme Court cases on state action:

The logic of *Rendell-Baker* and *Blum* is that state contributions to otherwise private entities, no matter how great those contributions may be, will not of themselves transform a private actor into a state actor. In the cases of Pitt and Temple, to the contrary, the issue is not whether the level of state contributions has reached a magic figure necessary to effect this transformation, but rather the affirmative state act of statutorily accepting responsibility for these institutions. This fact, above all, marks the difference between these two institutions and those discussed by the Supreme Court in *Rendell-Baker* and *Blum*.

In addition, unlike the school in *Rendell-Baker* and the nursing home in *Blum*, Temple and Pitt are not merely private contractors with the state. Not only do they receive present financial support, but also the state has committed itself to future financial aid and sets an annual appropriation policy and tuition rate. There is nothing to indicate that the state could not discontinue its support of the New Perspectives School or the American Nursing Home at any time by the simple means of not renewing their contracts. By contrast, it would require a legislative enactment to disentangle Temple and Pitt from the Commonwealth, and the idea that legislative appropriations to these institutions might be severely curtailed is unrealistic. Cf. Pa.Stat.Ann. tit. 24, § 2510(b). Furthermore, neither of the institutions in *Rendell-Baker* or *Blum* had to submit to state-sponsored audits or make yearly reports to the State Assembly. Finally, unlike the institutions in *Blum* and *Rendell-Baker*, one-third of the Trustees of Pitt and Temple are now appointed by the state. Temple and Pitt are not merely “private contractors performing services for the government,” *Rendell-Baker*, 457 U.S. at 843, 102 S.Ct. at 2772; they not only receive funding and are subject to routine state regulations, but are instrumentalities of the state, both in name and in fact.

In sum, we see nothing in either *Blum* or *Rendell-Baker* that conflicts with *Braden* or its rationale, and, therefore, we conclude that the Supreme Court did not overrule our decision in *Braden*. [footnote omitted]

Krynicky v. University of Pittsburgh, 742 F.2d 94, 102-103 (3dCir. 1984).

The U.S. District Court in *Schier* also found state action by Temple Univ. *Schier*, 576 F.Supp. 1569, 1572-1579 (E.D.Pa. 1984), *aff’d sub nom. Krynicky*, 742 F.2d 94 (3dCir. 1984). The holding that Temple Univ. was a state actor was reiterated a year later in *Molthan v. Temple University of Com. System of Higher Education*, 778 F.2d 955, 961 (3dCir. 1985).

“state-aided” colleges in Pennsylvania are not state actors

There is a second group of colleges in Pennsylvania, called “state-aided” in the Pennsylvania Statutes:

... the term “State-aided” institution means the Delaware Valley College of Science and Agriculture, Drexel University, Hahnemann University, Thomas Jefferson University, the Medical College of Pennsylvania, University of Pennsylvania, Pennsylvania College of Podiatric Medicine, Pennsylvania College of Optometry, Philadelphia College of Osteopathic Medicine, Philadelphia College of Textiles and Science, and University of the Arts. 24 Pennsylvania Statutes § 5009(a) (enacted 1961, current March 2011) (no discrimination statute).

Rackin v. University of Pennsylvania, 386 F.Supp. 992 (E.D.Pa. 1974) found state action by the University of Pennsylvania, a private school that receives funding from the Pennsylvania state government in the “state-aided” group of colleges. However, this is an early case and does not reflect modern U.S. Supreme Court jurisprudence on state action, as explained at page 54, below.

The state-aided colleges in Pennsylvania are *not* state actors. See, e.g.,

- *Sament v. Hahnemann Medical College and Hospital of Philadelphia*, 413 F.Supp. 434 (E.D.Pa. 1976) (Hahnemann College not a state actor);
- *Imperiale v. Hahnemann University*, 776 F.Supp. 189 (E.D.Pa. 1991), *aff’d*, 966 F.2d 125 (3dCir. 1992) (per curiam) (no state action by Hahnemann);
- *Altschuler v. University of Pennsylvania School of Law*, 1999 WL 1314734 (2dCir. 1999) (“... we affirm on the ground that the Law School, a private entity, is not a state actor subject to Section 1983 liability for failing to comply with FERPA [Family Educational Records and Privacy Act, 20 U.S.C. § 1232g].”).

Pennsylvania State System of Higher-Education is state actor

Adding to the complexity of higher-education in Pennsylvania (e.g., “state-related”, “state-aided”, and totally private colleges), there is a fourth group of 14 colleges called the “Pennsylvania State System of Higher-Education”. These 14 colleges include the Indiana University of Pennsylvania (IUP) and 13 formerly known by “[name of town] State College” and now known as “[name of town] University of Pennsylvania”. 24 Pennsylvania Statutes § 20-2002-A (enacted 1949, as amended in 1983). The IUP was formerly the Indiana State College, which was separately redesignated as a University. 24 Penn. Statutes § 2510-101 (enacted 1965). The IUP is the only institution in this group that can grant doctoral degrees. 24 Penn. Statutes § 20-2003-A(a) (current Mar 2011).

The 14 colleges in the Pennsylvania State System of Higher-Education appear to be analogous to state colleges and state universities in other states — there is no doubt that they are state actors. The state attorney general’s office supplies the attorney(s) who represent the state colleges, which is an admission that the state colleges are part of the state government. In many cases, the issue of state-action does not appear in litigation involving these colleges, because it is an uncontroverted fact.

- *Skehan v. Bloomsburg State College*, 501 F.2d 31, 41 (3dCir. 1974) (“The Attorney General of the Commonwealth appeared for it and all other defendants, filing a common answer for all. The status of the College in the governmental structure of the Commonwealth is somewhat ambiguous. But unlike the University of Pittsburgh, Bloomsburg State College apparently has no separate corporate existence.”), *vacated and remanded for further consideration*, 421 U.S. 983 (1975), *on remand*, 538 F.2d 53 (3dCir. 1976) (state action *not* an issue), *cert. den.*, 429 U.S. 979 (1976), *on appeal*, 590 F.2d 470 (3rd Cir. 1978) (state-action *not* an issue), *cert. denied*, 444 U.S. 832 (1979).
- *Roseman v. Hassler*, 382 F.Supp. 1328, 1329 (W.D.Pa. 1974) (“Indiana University of Pennsylvania is an educational institution owned and operated by the Commonwealth of Pennsylvania.”), *aff’d*, 520 F.2d 1364 (3rdCir. 1975), *cert. den.*, 424 U.S. 921 (1976).
- *Shawer v. Indiana University of Pennsylvania*, 602 F.2d 1161 (3dCir. 1979) (Defendant represented by Pennsylvania Deputy Attorney General).
- *Indorato v. Patton*, 994 F.Supp. 300, 305-306 (E.D.Pa. 1998) (Football umpire injured by player from Cheyney University of Pennsylvania. Cheyney University was a state-actor.).
- *O’Hara v. Indiana University of Pennsylvania*, 171 F.Supp.2d 490, 497-498 (W.D.Pa. 2001) (IUP, as part of Pennsylvania state government, enjoys immunity under the Eleventh Amendment.).

State Action Erroneously Found

This section considers several historic cases during the years 1970-74, in which a private school or private college was held to be a state actor. These early case did not have the benefit of tests enunciated by U.S. Supreme Court cases in *Jackson* (1974); *Rendell-Baker* (1982); *Lugar* (1982); *Blum v. Yaretsky* (1982); and *West v. Atkins* (1988). Since *Rendell-Baker* (1982), the cases in this section are bad law, and should not be cited as examples of current law.

Doe v. Hacker (1970)

Doe was a pupil from Derry, NH. Derry had no public high school, but contracted with Pinkerton Academy, a private school, to provide an education for pupils from Derry. Judge Bownes in the trial court found that Pinkerton Academy was engaged in state action:

The Court is of the opinion that the action of the defendant principal is ‘state action’ under these facts and that the plaintiff has stated a good cause of action under 42 U.S.C. § 1983. Since Pinkerton Academy is directly accepting state money as tuition payments in return for educating all of the young men and women from the Town of Derry who wish to attend it as

a secondary school, since the State Board of Education has continuing authority to see to it that its facilities and equipment are such that it will be approved as a comprehensive high school, and since it is, by state statute (N.H. R.S.A. 194:22), a high school maintained by the school district of Derry, its students have the same constitutional rights as do the students of any public high school. For constitutional purposes, therefore, the faculty and trustees of Pinkerton Academy, the school board of the school district of Derry, and the State Board of Education are together maintaining and operating the Academy as a public high school in the school district of Derry.

Doe v. Hacker, 316 F.Supp. 1144, 1147 (D.N.H. 1970).

Judge Bownes wrote a good rebuke to the Academy's argument that plaintiff voluntarily attended Pinkerton Academy and had alternative choices:

Counsel for the defendant has suggested that the plaintiff can go to Memorial High School in Manchester, which has no dress code, if he does not wish to abide by the dress code at Pinkerton Academy. This approach begs the issue. The plaintiff has a right to go to Pinkerton Academy. Pinkerton Academy has a contractual obligation to accept him as a student. He has been attending this school for three years and was supposed to start his senior year this September. The taxpayers of the Town of Derry are paying for his education at Pinkerton Academy.

Hacker, at 1147.

In 1977, Judge Bownes wrote an opinion, *Krohn*, 552 F.2d 21 (1stCir. 1977), that denied state action by Harvard University, but Judge Bownes did *not* cite his own earlier opinion in *Hacker*. Similarly, the First Circuit's opinion in *Rendell-Baker*, 641 F.2d 14 (1stCir. 1981) does not cite *Hacker*, although both the law and facts are similar in these cases. These may be examples of overruling of *Hacker* by neglect.

Hacker was effectively overruled by the U.S. Supreme Court decision in *Rendell-Baker*, and definitely overruled by the First Circuit, as recognized by a later First Circuit case that also involved Pinkerton Academy:

It so happened that Pinkerton Academy had already been declared a state actor. *Doe v. Hackler*, 316 F.Supp. 1144 (D.N.H. 1970) (Bownes, J.). In *Hackler* the court relied on three factors: (1) "directly accepting state money as tuition;" (2) the power of the State Board of Education to approve facilities and equipment; and (3) the provisions of New Hampshire Rev.Stat. Ann. 194:22. *Hackler*, 316 F.Supp. at 1147. The present district court correctly recognized that the first two factors were too broad and had been rejected by *Rendell-Baker* as applicable to every private contractor who does public work. The court held *Rendell-Baker* distinguishable, however, on two grounds: that the Court indicated it would reach a different result if the private contractor was performing a function "traditionally the exclusive prerogative of the State," 457 U.S. at 842 (emphasis in original), and the terms of the New Hampshire statute relied on in *Hackler*.

Johnson v. Pinkerton Academy, 861 F.2d 335, 337 (1stCir. 1988) (holding Pinkerton Academy is *not* a state actor).

Hacker was also effectively overruled by the First Circuit in *Logiodice*, 296 F.3d 22 (1stCir. 2002) (also not citing *Hacker*), a case with similar facts to *Hacker*.

It is important to note that *Hacker* was not necessarily erroneously decided by Judge Bownes in 1970. *Hacker* is now rejected because the U.S. Supreme Court changed the criteria for state action subsequent to *Hacker*, especially in the 1982 cases of *Rendell-Baker*; *Lugar*; and *Blum v. Yaretsky*. Judge Bownes was well known for his strong opinions upholding civil liberties when the government was overreaching its authority. We might have more Justice and Fairness if Judge Bownes' opinion in *Hacker* were now the prevailing law. But the U.S. Supreme Court in *Rendell-Baker* enunciated rules that make it very difficult for a private educational institution to be found to be a state actor, and those rules relegate *Hacker* to only of historical interest.

Ryan v. Hofstra University (1971)

“Robert Ryan, Jr., was accused of throwing rocks through the bookstore window at Hofstra” University, a private university in New York City. *Ryan v. Hofstra Univ.*, 324 N.Y.S.2d 964, 968 (N.Y.Sup. 1971). Ryan appeared before a disciplinary committee the following day and admitted throwing rocks, and he was permanently expelled two days after he was arrested by campus police. Ryan sued in state court, alleging that the “University’s action was improper and arbitrary and that the proceedings deprived him of due process of law.” *Ryan* at 972. The trial judge found that “Accordingly, in the absence of a foundation for his conduct, the Dean acted arbitrarily and in abuse of discretion in not giving Robert the choice of appearing before a Student Judiciary Board as required by the Hofstra Rules.” *Ryan* at 975. Instead of stopping at finding Hofstra violated their own rules, the trial judge continued and put Hofstra’s wrong on a constitutional level.

The trial judge discussed state action:

The federal provisions expressly require that the offending action be state action. The New York Constitution, it is to be noted, differs in formulation. The State Constitutional provisions merely require that no person be denied equal protection or be deprived of rights without due process of law, and makes no provision in terms that ‘state action’ be the negating force. However, by virtue of *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541, some state action is prerequisite in New York as well, since the constitutional provisions are ‘coordinate commands’. 299 N.Y. at 531, 87 N.E.2d at 548.

The law is plain that while state action is the subject of ‘equal protection’ and ‘due process’ constitutional limitation, the state itself need not be the direct moving force. The offending action may be taken by a ‘private’ organization, and need not be taken by the state directly or by its elected or appointed officials.

Ryan v. Hofstra Univ., 324 N.Y.S.2d 964, 977-978 (N.Y.Sup. 1971). The judge cited only two U.S. Supreme Court cases on state action. *Burton v. Wilmington Parking Authority*, a case that is distinguishable from *Ryan* in that the city of Wilmington owned the land and building in that case, while *Hofstra* owned its land. *Evans v. Newton* involved control of a public park and racial discrimination, issues not present in *Ryan*. The judge in *Ryan* bizarrely found state action by Hofstra, because “Hofstra has the major state governmental presence of the New York Dormitory Authority.” *Ryan* at 979. Note that the plaintiff was accused of throwing a rock through the

bookstore window, *not* a dormitory window. The trial court's opinion does *not* mention whether plaintiff lived in the dormitory at Hofstra.

The trial court then lists other financial criteria that allegedly justified state action by Hofstra:

Consider the following additional governmental financial aspects:

- (a) Over \$1,000,000 of the Hofstra \$25,000,000 operating budget comes directly from governmental grants.
- (b) The large majority of Hofstra students are New York State residents receiving State scholarship awards and incentives of various amounts under the New York State Education Law. No computation was offered of the exact amount of the Hofstra receipts from State scholarships and incentives.
- (c) During the past five years, Hofstra has received over \$3,000,000 in direct federal construction grants.
- (d) Hofstra received a donation, conditioned upon educational use, from the federal government of 125 acres of land which forms over half its campus.
- (e) The total book value of Hofstra is estimated to be \$61,000,000, of which \$31,500,000 is supplied by the Dormitory Authority. \$4,000,000 comes from government grants and \$3,500,000 from private gifts, which are largely facilitated by income tax deductions. Only about one-third of the Hofstra plant comes from funds generated by Hofstra over the years, presumably through operations. However, it is unknown just how much of this operational surplus stems from prior availability of governmental funding or contract money for governmental services.
- (f) The total acreage of Hofstra is 225 acres in the heart of Nassau County, with 1,600,000 square feet of building space. Being a tax-exempt organization, it pays no real estate taxes on its education use properties. Taking judicial notice of the tax rates and assessments in the surrounding area of land and buildings, it is necessary to conclude that a substantial percent-age of its total revenues would have to be paid in public real estate taxes if Hofstra were fairly and currently assessed and tax paying.
- (g) An Internal Revenue Service Training Center is operated by the Government prominently on campus in a separate leased building. Hofstra also operates a Police Training program for Nassau County.

Ryan v. Hofstra Univ., 324 N.Y.S.2d 964, 980 (N.Y.Sup. 1971). Subsequent to *Ryan*, there have been a long string of cases in the U.S. Supreme Court and U.S. Courts of Appeals that hold that government funding does not constitute state action. See above, beginning at page 5.

The trial judge then noted the state regulation and found more justification for state action by Hofstra:

Yet, 'private' connotes ownership or possession by somebody. No private person owns Hofstra University or its property directly, nor even indirectly in the form of shares of stock. The University is replete with public interest, requirement and supervision. The University is

in the most real comparable sense a public trust for the rendition of education. It is only for this reason that so much public wealth and effort has been supplied to it.

A private university like Hofstra is an oligarchal form tending to be self-perpetuating. Its fundamental legal responsibilities are to the public. Its existence and favored position can be justified only as a public stewardship.

Hofstra operates under a franchise from the New York State Board of Regents. Under Education Law § 219, the Board of Regents can move to dissolve the university corporation if it ceases its educational functions. There would then follow a distribution of its net assets to such educational, religious, benevolent, charitable or similar purposes as the courts might approve. Education Law § 220.

Hofstra's degree requirements are controlled by the State Board of Regents, Education Law § 218, and there is State visitation by the Board of Regents. Education Law § 215.

New York State, as a matter of public policy in fulfillment of the governmental function of providing education, has elected to fund both 'public' and 'private' schools. Through its Board of Regents, it integrates its degree requirements. Its funding is its method of allocating state resources for education, and accordingly publicly implicit in character. Cf. *Simkins v. Moses H. Cove Memorial Hospital*, 2 Cir., 323 F.2d 959, cert. den. 376 U.S. 938, 84 S.Ct. 793, 11 L.Ed.2d 659; Cf. *Pennsylvania v. Brown*, D.C., 270 F.Supp. 782.

In modern practice, there is a diminishing difference between the actual operation of universities, whether they be 'public' or 'private' in format. While the State university system is under the control of the governor and the legislature, it is financing which forms the dominant relationship of the state politic to its own schools. Substantial autonomy is afforded boards and faculties, which abound with private citizens in board positions. To a greater degree, state universities are operating internally free of public political control. *Greene v. Howard University*, Supra. On the other hand, 'private' universities like Hofstra which are basically financed through state action also have important regulation by the State Board of Regents. And so the two types continually approach a similar reality. The State makes the University fiscally possible. The University's Board of Trustees, the faculty, and school administration make the place.

Ryan v. Hofstra Univ., 324 N.Y.S.2d 964, 981 (N.Y.Sup. 1971). Three years later, the U.S. Supreme Court in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) rejected this reasoning as grounds for state action.

Finally, the trial judge found state action by Hofstra. *Ibid.* at 983-984. I think this case can best be classified as an early case, before there were many published judicial opinions about state action by private colleges, and its reasoning and result is *not* consistent with the vast majority of subsequent cases. I think the judge was distressed at the way Hofstra treated the plaintiff, so the judge fashioned a remedy. Hofstra University elected not to appeal, but submitted proposed disciplinary procedures to the trial judge, which the judge approved with a few modifications. *Ryan v. Hofstra University*, 328 N.Y.S.2d 339 (N.Y.Sup. 1972).

Ryan is a trial court opinion that is not precedent anywhere. The reasoning and result in *Ryan* has been generally ignored by judges in similar cases, which shows disapproval by neglect. The following opinions, amongst others, have mentioned *Ryan*:

- *Oefelein v. Monsignor Farrell High School*, 353 N.Y.S.2d 674, 675 (N.Y.Sup. 1974) ("The *Ryan* Case, however, can be distinguished. The massive State contacts present in that case are

not found here. Furthermore, it dealt with the rights of a college student not the rights of a high school freshman.”);

- *Mary M. v. Clark*, 473 N.Y.S.2d 843, 845 (N.Y.A.D. 3 Dept. 1984) (Defendant was a state university. “We note, too, that *Matter of Ryan v. Hofstra Univ.*, 67 Misc.2d 651, 324 N.Y.S.2d 964 is distinguishable on its facts from the instant matter.” The opinion does not say which facts are distinguishable.);
- *Hernandez v. Don Bosco Preparatory High*, 730 A.2d 365, 371 (N.J.Super.A.D. 1999) (rejecting Plaintiff’s reliance on *Ryan*).

My search of Westlaw on 17 March 2011 for all cases in state or federal courts has found no other judicial opinions on the issue of whether Hofstra University is a state actor. In conclusion, the finding of state action in *Ryan* is bad law and should not be cited, except as an example of bad law.

Buckton v. NCAA (1973)

Buckton held that Boston University (BU) is a state actor, a conclusion that diverges from a more recent case, *Missert v. Trustees of Boston University*, 73 F.Supp.2d 68 (D.Mass. 1999), *aff’d*, 2000 WL 1618436 (1st Cir. 2000) (per curiam). The conclusion that BU is a state actor also diverges from mainstream jurisprudence involving many similar private colleges and universities. I ignore the part of *Buckton* regarding the NCAA, because *Buckton* is wrong after the U.S. Supreme Court decision in *Tarkanian*. *Buckton* is a difficult case to discuss, because the opinion contains little discussion of its reasoning and because it has been ignored (instead of criticized) by subsequent cases. Even cases in Massachusetts ignore *Buckton*, as if this case is a pariah.

The U.S. District Court wrote in *Buckton*:

On the basis of the existing record, the court finds a substantial likelihood that the requisite state action is present in the conduct of B.U. and the N.C.A.A. towards plaintiffs.

B.U., though a private institution, clearly performs functions governmental in nature, such as providing higher education to and exercising substantial dominion over its students. It may be constrained, therefore, by the requirements of the Constitution. See *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603 (1968) (private shopping center); *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946) (company town); *Hawkins v. North Carolina Dental Society*, 355 F.2d 718 (4th Cir. 1966); *Simkins v. Moses H. Cone Memorial Hosp’l*, 323 F.2d 959, 968 (4th Cir. 1963), *cert. den.*, 376 U.S. 938, 84 S.Ct. 793, 11 L.Ed.2d 659.

Buckton v. NCAA, 366 F.Supp. 1152, 1156 (D.Mass. 1973).

Buckton gives weak authority here. First, *Logan Valley Plaza* was later explicitly overruled in *Hudgens v. N. L. R. B.*, 424 U.S. 507, 518 (1976) (“... we make clear now, if it was not clear before, that the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case. [*Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972)]”), see also *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980). Second, *Marsh v. Alabama* is a company town case that is easily

factually distinguishable from Boston University. Third, the two Fourth Circuit cases do not involve colleges and are not precedent in the First Circuit.

The U.S. District Court wrote in *Buckton*:

Moreover, state support to these defendants “through any arrangement, management, funds, or property” would inject state action into their conduct. [citing cases not involving a college] The Fifth Circuit has held that where the establishment of a private university was largely made possible by the use of a surplus city building and other city land leased for university purposes, the city's involvement constituted sufficient state action to bring the 14th Amendment into play. *Hammond v. University of Tampa*, 344 F.2d 951 (5th Cir. 1965). See also *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961), *cert. den.* 368 U.S. 930, 82 S.Ct. 368, 7 L.Ed.2d 193 (tax-supported college); *Ryan v. Hofstra University*, 67 Misc.2d 651, 324 N.Y.S.2d 964 (1971) (private university).

Buckton v. NCAA, 366 F.Supp. 1152, 1156 (D.Mass. 1973).

Again *Buckton* cites weak authority. First, we consider *Hammond*. My search on Westlaw on 20 Mar 2011 showed that *Hammond* is cited in only eight cases, was not cited after the year 1987, and cited only twice in the 1980s, which suggests it was never significant and now has lost any validity. In 1977, the Third Circuit cited *Hammond* as a departure from the general rule:

For the most part, those cases in which state action has been present concerned state-owned colleges. [citations deleted] But see *Hammond v. University of Tampa*, 344 F.2d 951 (5th Cir. 1965); [citations to two other cases deleted]. Understandably, most courts have been reluctant to impose constitutional and statutory mandates on private universities which receive limited state benefits. [citations deleted]

Braden v. University of Pittsburgh, 552 F.2d 948, 964, n.79 (3d Cir. 1977).

Second, *Dixon* was correct to find state action by an agency of the state of Alabama, but *Dixon* is factually distinguishable from the University of Tampa, which is a private college. Third, I have argued that state action in *Ryan* was wrongly decided, see page 49, above.

Later in *Buckton*, the U.S. District Court says:

B.U. is an academic institution incorporated by the Commonwealth of Massachusetts. During the 1973 fiscal year B.U. received \$55,290.00 from the Commonwealth and \$18,133,688.00 from the federal government. Such funding continues during the current fiscal year. As stated, B.U. is a member of both the E.C.A.C. and the N.C.A.A. and sponsors a hockey team in intercollegiate competition. B.U. utilizes state-owned facilities on occasion for its athletic events.

On the basis of the existing record, the court finds a substantial likelihood that the requisite state action is present in the conduct of B.U. and the N.C.A.A. towards plaintiffs.

Buckton v. NCAA, 366 F.Supp. 1152, 1157 (D.Mass. 1973).

The incorporation of BU is surely irrelevant to state action, else all private corporations would be state actors. The funding by the state and federal governments is also irrelevant to state action, as explained above, beginning at page 5. Using state-owned facilities for athletic events is not a good reason to find state action, particularly when the choice of facilities is not relevant to plaintiffs alleged injuries in *Buckton*.

In conclusion, the finding of state action by Boston University in *Buckton* is bad law and should not be cited, except as an example of bad law. Like the other cases in this section, *Buckton* is an early case that did not have the benefit of tests enunciated by U.S. Supreme Court cases in *Jackson* (1974); *Rendell-Baker* (1982); *Lugar* (1982); *Blum v. Yaretsky* (1982); and *West v. Atkins* (1988). Furthermore, *Buckton* is not a final judgment on the merits. The issue in *Buckton* is plaintiffs' request for a preliminary injunction. So *Buckton* was not intended to permanently decide the question of whether BU is a state actor.

Strangely, the NCAA did not appeal the finding of state action. *Buckton v. National Collegiate Athletic Assn.*, 436 F.Supp. 1258, 1263 (D.Mass. 1977) (“[quoting] 366 F.Supp. at 1157. NCAA did not appeal from this ruling.”). The District Order ordered NCAA to pay plaintiffs' attorneys fees.

Rackin v. University of Pennsylvania (1974)

Rackin v. University of Pennsylvania, 386 F.Supp. 992 (E.D.Pa. 1974) found state action by the University of Pennsylvania, a private school that receives funding from the Pennsylvania state government in the “state-aided” group of colleges. However, *Rackin* is probably no longer valid law, as explained in:

- *Imperiale v. Hahnemann University*, 776 F.Supp. 189, 198, n.4 (E.D.Pa. 1991) (“It is this court’s view that *Rackin* does not retain vitality in light of the subsequent *Lugar* trilogy.”), *aff’d*, 966 F.2d 125 (3dCir. 1992);
- *Altschuler v. University of Pennsylvania Law School*, Not Reported in F.Supp., 1997 WL 129394 at *16 (S.D.N.Y. 1997) (“However, *Rackin* is not controlling because, in making that determination, it used a broader test than the one the Supreme Court later set forth in *Blum*. Accordingly, ‘*Rackin* does not retain vitality’ in light of later Supreme Court caselaw. *Imperiale v. Hahnemann Univ.*, 776 F.Supp. 189, 198 n. 4 (E.D.Pa. 1991), *aff’d*, 966 F.2d 125 (3dCir. 1992).”), *Altschuler* was *affirmed*, 1999 WL 1314734 (2dCir. 1999);
- *Brogan v. La Salle University*, 70 F.Supp.2d 556, 569, n.38 (E.D.Pa. 1999), *aff’d*, not reported in Federal Reporter, 148 Ed. Law Reporter 604 (3dCir. 2000).

Like *Hacker* and *Ryan*, *Rackin* is an early case that did not have the benefit of tests enunciated by U.S. Supreme Court cases in *Jackson* (1974); *Rendell-Baker* (1982); *Lugar* (1982); *Blum v. Yaretsky* (1982); and *West v. Atkins* (1988). I conclude that *Rackin* reached the wrong result.

Accreditation Organizations are not state actors

The governments of each of the fifty states pour an immense amount of money into public schools (grades K-12) and into at least one system of state colleges. Despite all of this expenditure, the minimum quality standards are set by *private* accrediting organizations, which are nonprofit corporations. I have posted a terse webpage at <http://www.rbs2.com/accred.htm> that tersely summarizes the accrediting organizations and provides links to their websites.

The following is a list of the reported cases nationwide in the U.S. Courts of Appeal involving state action by an accrediting organization, with a few cases from the U.S. District Courts. **None of the following cases found state action by the accrediting association.** However, some of these cases found that a college did have a “common-law due process” right of fair treatment by the accrediting association.

- *Parsons College v. North Central Ass'n of Colleges and Secondary Schools*, 271 F.Supp. 65, 71 (N.D.Ill. 1967) (“Relying upon recent decisions of the Illinois Appellate Courts, the College argues that the action must be set aside if it is ‘contrary to rudimentary due process or grounded in arbitrariness.’ *Virgin v. American College of Surgeons*, 42 Ill.App.2d 352, 192 N.E.2d 414 (1st Dist., 2d Div. 1963),”);
- *Marlboro Corp. v. Association of Independent Colleges & Schools, Inc.*, 416 F.Supp. 958, 959 (D.Mass. 1976) (“Private associations like defendant are ‘quasi-public’ and must follow fair procedures reasonably related to their legitimate purposes. *Falcone v. Middlesex County Medical Society*, 1961, 34 N.J. 582, 170 A.2d 791, *Blende v. Maricopa County Medical Ass'n*, 1964, 96 Ariz. 240, 393 P.2d 926.”), *aff'd*, 556 F.2d 78 (1stCir. 1977);
- *Medical Institute of Minnesota v. National Ass'n of Trade and Technical Schools*, 817 F.2d 1310, 1314 (8thCir. 1987) (“Although not governed by constitutional guidelines, NATTS nevertheless must conform its actions to fundamental principles of fairness. These principles are flexible and involve weighing the ‘nature of the controversy and the competing interests of the parties’ on a case by case basis. *Marlboro Corp. v. Association of Indep. Colleges*, 556 F.2d 78, 81 (1stCir. 1977).”);
- *McKeesport Hosp. v. Accreditation Council for Graduate Medical Education*, 24 F.3d 519, 524-525 (3dCir. 1994);
- *Chicago School of Automatic Transmissions, Inc. v. Accreditation Alliance of Career Schools and Colleges*, 44 F.3d 447, 449, n.1 (7thCir. 1994) (Easterbrook, J.) (“A governmental body may rely on the decisions of a private association without turning that association into ‘the government’ itself. See *Sanjuan v. American Board of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 250 (7thCir. 1994).”);
- *Shoemaker v. Accreditation Council for Graduate Medical Education*, 1996 WL 341935 at *1 (9thCir. 1996) (“Generally, a state’s response to a private party’s actions does not convert the private party’s conduct into state action. *Blum v. Yaretsky*, 457 U.S. 991 (1982); *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988). *Tarkanian* is closely on point, and controls.”);

- *Massachusetts School of Law at Andover, Inc. v. American Bar Association*, 107 F.3d 1026, 1036 (3dCir. 1997) (States required candidates for the state bar to graduate from an ABA-accredited law school. The law school at Andover was not ABA accredited, and so the law school sued the ABA on antitrust grounds. “To the extent that MSL's alleged injury arises from the inability of its graduates to take the bar examination in most states, the injury is the result of state action and thus is immune from antitrust action under the doctrine of *Parker v. Brown*, 317 U.S. at 352, 63 S.Ct. at 314. In short, this case does not involve a delegation of state authority. To the contrary, the states use the ABA to assist them in their decision-making processes. Thus, we have here a government action case.”);
- *Foundation for Interior Design Education Research v. Savannah College of Art & Design*, 244 F.3d 521, 527 (6thCir. 2001) (Tracing origin of common-law due process to state cases on licensing of physicians in the early 1960s. “These cases reasoned that, because the medical societies in question exercised a monopolistic power in areas of public concern, they were required to base their decisions on substantial evidence and were not allowed to act arbitrarily or unreasonably. See *Falcone*, 170 A.2d [791] at 795-800 [(N.J. 1961)]; *Blende*, 393 P.2d [926] at 930 [(Ariz. 1964)].”);
- *Auburn University v. Southern Association of Colleges and Schools*, 489 F.Supp. 2d 1362, 1369-1371 (N.D.Ga. 2002) (Held that a nonprofit accreditation organization was *not* a state actor, however the accreditation organization must provide “common-law due process”. Mentions U.S. Supreme Court decision in *Brentwood*.);
- *Western State University of Southern California v. American Bar Ass'n*, 301 F.Supp.2d 1129 (C.D.Cal. 2004) (no state action by ABA);
- *Thomas M. Cooley Law School v. American Bar Association*, 459 F.3d 705, 711 (6thCir. 2006) (“Many courts, including this one, recognize that ‘quasi-public’ professional organizations and accrediting agencies such as the ABA have a common law duty to employ fair procedures when making decisions affecting their members.”);
- *Hiwassee College, Inc. v. Southern Association Of Colleges And Schools*, 531 F.3d 1333, 1335 (11thCir. 2008) (“... the overwhelming majority of courts who have considered the issue have found that accrediting agencies are not state actors. See e.g., *McKeesport Hosp. v. Accreditation Council for Graduate Med. Educ.*, 24 F.3d 519, 524-25 (3dCir. 1994); *Chicago Sch. of Automatic Transmissions, Inc. v. Accreditation Alliance of Career Schs. & Colls.*, 44 F.3d 447, 449 n. 1 (7th Cir. 1994).” Mentions U.S. Supreme Court decision in *Brentwood*.);
- *Hu v. American Bar Association*, 568 F.Supp.2d 959 (N.D.Ill. 2008) (Neither Chicago Kent School of Law, a division of the Illinois Institute of Technology, nor ABA was a state actor. Mentions U.S. Supreme Court decision in *Brentwood*.), *aff'd*, 334 Fed.Appx. 17 (7thCir. 2009).

In the above list, I specifically searched Westlaw on 20 Mar 2011 for cases involving alleged state action by accrediting associations *and* which cited the U.S. Supreme Court decision in *Brentwood*. The most intelligent comment about *Brentwood* in these accrediting cases is:

It may be that the Court's "pervasive entwinement" theory articulated in *Brentwood Academy* will supercede the legal fiction of courts denying that accrediting agencies are state actors, but declaring them to be "quasi public" organizations bound by "common law due process." *Auburn University v. Southern Association of Colleges and Schools*, 489 F.Supp. 2d 1362, 1373 (N.D.Ga. 2002). I am not sure what the judge in *Auburn Univ.* means by "legal fiction", because the accrediting associations really are private organizations. *Auburn Univ.* uses the phrase "legal fiction" only one time in the opinion and other accrediting cases seem to avoid the phrase. It seems that *Brentwood* did not change the rule that accrediting associations are not state actors, despite similarities between the NCAA and accrediting associations.

I agree that accrediting associations in the USA are *not* state actors. First, the association has no government officials on its board of directors, so there is no direct state control. Second, the association receives no government money. And, third, accrediting educational institutions is not a "traditional" function of government in the USA, under the test in *Jackson*. Even if one advocates a more liberal standard for state action than the current U.S. Supreme Court jurisprudence, it is difficult to argue with the first two reasons above.

There is an analogy here to testing of consumer and industrial products for safety. Obviously, personal safety of people in homes and employees — and avoiding fires — is a legitimate concern of government. However, testing of products for safety in the USA is accomplished by private, nonprofit organizations, of which Underwriters Laboratories is the most famous. Government agencies, such as OSHA, use the results of Underwriters Laboratories tests.

my criticism of "traditional" function test

To clarify the rule in *Jackson* (page 9, above), suppose a state transfers its state prisons to a private corporation. The private corporation hires and manages prison guards. An inmate at the privately operated prison sues in federal court, alleging mistreatment by prison guards. Is the privately operated prison state action? The answer is "yes", because operation of prisons is a "traditionally the exclusive prerogative of the state", satisfying the test in *Jackson*.¹⁵

But suppose a local government contracts with a private high school to provide educational services for local pupils, with all tuition paid by the government. There is no state action, because operation of schools is *not* "traditionally the exclusive prerogative of the state." *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982); *Logiodice v. Trustees of Maine Central Institute*, 296 F.3d 22, 26-27 (1stCir. 2002) ("Obviously, education is not and never has been a function reserved to the state."). In fact, private high schools are common in the USA.

¹⁵ See, e.g., *Skelton v. Pri-Cor., Inc.*, 963 F.2d 100, 102 (6thCir. 1991) (private prison acts under color of state law); *Street v. Corrections Corp. of America*, 102 F.3d 810, 814 (6thCir. 1996) (color of state law); *Pollard v. Geo Group, Inc.*, 629 F.3d 843, 855 (9thCir. 2010) (state action found).

With the exception of the U.S. Military Academy and Naval Academy, nearly all of the early colleges in the USA were private corporations. State governments began to establish state colleges in the late 1800s. Therefore, the “public function” test in *Marsh v. Alabama*, as clarified in *Jackson*, will generally result in no state action for private colleges.

Consider another example. Suppose a state creates a welfare program, then contracts with a private corporation to administer the program (e.g., determining eligibility). The private corporation obviously should be a state actor, in that it has sole responsibility for administering a benefit conferred by the state. However, one could argue that the private corporation fails the “traditionally the exclusive prerogative of the state” test in *Jackson*, because before the 1930s charity was traditionally provided in the USA by private organizations, especially churches.

The above-mentioned examples of high schools and private administration of state benefits hint that there is a problem with the “traditionally the exclusive prerogative of the state” test in *Jackson*. If the state has a duty — either a constitutional duty or a statutory duty — to provide some service or benefit, and the state contracts with a private corporation to provide that service or benefit, then I think there should be state action. The finding of state action is even stronger when the private corporation is the *sole* provider of the service or benefit, because then citizens have no choice. Additionally, the finding of state action is even stronger when the private corporation receives *all* of its income from government(s).

In my opinion, the amount of control actually exercised by the state should not be a major factor in determining state action. A state might exert weak management over a private contractor, or zealous state employees might intervene in day-to-day operations, but that is the choice by the state. The state *could* closely control the private contractor. Indeed, if the private contractor is mistreating people, the state should exercise more control or find a different contractor.

Conclusion

Since the 1970s, many attorneys representing professors or students at private colleges attempted to argue in court that the private college was a state actor, so that civil liberties (especially due process) would apply to their clients. With a few exceptions¹⁶ in the early 1970s that are now recognized as wrongfully decided, and the state-related colleges in Pennsylvania, such arguments have been spectacularly unsuccessful.

In cases involving dismissal for academic reasons (e.g., poor research or teaching by a professor, inadequate thesis or dissertation by a graduate student, failing an examination), the legal doctrine of academic abstention prevents courts from reviewing the dismissal. Academic abstention applies to *both* state colleges *and* private colleges, but for different reasons, as explained in my essay at <http://www.rbs2.com/AcadAbst.pdf> (2007).

¹⁶ See cases discussed above, beginning at page 47.

In cases involving dismissal of a student for disciplinary reasons (e.g., cheating on an examination, plagiarism, disrupting a class, etc.), state colleges are required to provide very little due process when compared to criminal trials. So if a student at a private college were to obtain the minimal due process required at a state college, the student would have little advantage, as shown in my essay on due process for students at <http://www.rbs2.com/eatty.pdf> (2011). There are numerous cases in which students at state colleges won more due process, and then were expelled again after receiving the additional process — teaching us that winning more process does *not* change the result.

In the cases in the two previous paragraphs, there is little advantage in having a private college declared a state actor. However, a finding of state action could be helpful in litigation involving racial or gender discrimination.

An attorney writing contracts between a government and a private corporation should be careful to avoid *unintended* state action.

This document is at **www.rbs2.com/esa.pdf**

My most recent search for court cases on this topic was in March 2011.

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return to my homepage at <http://www.rbs2.com/>