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Constitutional Law - State Action - Trade Union's Authority is Not Derived from the State

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CONSTITUTIONAL LAW—STATE ACTION—TRADE UNION'S AUTHORITY IS NOT DERIVED FROM THE STATE—Plaintiffs claimed that defendant union and defendant company conspired to discriminate against Negro cab driver employees by means of a working regulation intended to compel plaintiffs to pick up passengers only in wards inhabited primarily by Negroes.[1] Two bases for original jurisdiction in federal court were advanced. First, it was contended that the cause of action involved more than $3,000 and arose under the laws of the United States[2] because the bargaining power of the union was conferred upon it by the National Labor Relations Act.[3] Second, it was maintained that the Civil Rights Act[4] vested jurisdiction, on the ground that the discrimination was practiced under color of state law since the union acted by authority conferred upon it by the Pennsylvania Labor Relations Act.[5] *Held*, original jurisdiction was not vested in the district court. The right of the union to engage in collective bargaining was recognized long prior to the NLRA and hence its power was not derived from the act. Also, since the power of the union was conferred upon it by the consent of its members, it could not be said that it acted under authority bestowed upon it by either the federal or Pennsylvania acts. *Williams v. Yellow Cab Co.*, (3d Cir. 1952) 200 F. (2d) 302.

Despite substantial evidence that the Fourteenth Amendment was intended to reach invasions of civil rights by individuals as well as states,[6] the principal case offers further proof of the tenacity with which the courts have adhered to the requirement of some state action, as laid down by the majority in the *Civil Rights Cases*.[7] However, the deterrent effect of this requirement has been mitigated by the Supreme Court's recognition that there is no sharp line between individual and state action, and thus the desire to protect civil rights has resulted in a continuous expansion of the concept of state action.[8] This expansion has proceeded along three somewhat overlapping lines. The first development has been a willingness to accept a less obvious showing of official action as satisfying the requirement of state action. This is typified by the *Screws* case,[9] which held that there may be state action even though an official is not acting within the scope of his prescribed authority. The second expansion has been the equating of state sanctions with state action. Thus the Court

[1] Even were jurisdiction to have been granted, it is quite unlikely that any actionable discrimination was involved. See Williams v. Yellow Cab Co., (D.C. Pa. 1952) 103 F. Supp. 847, esp. at 852 et seq.

[2] 28 U.S.C. (Supp. V, 1952) §1331.

[3] 61 Stat. L. 143, amending §9(a) (1947), 29 U.S.C. (Supp. V, 1952) §159(a).

[4] 28 U.S.C. (Supp. V, 1952) §1343(3).

[5] 43 Pa. Stat. Ann. (Purdon, 1952) §211.1 et seq.

[6] FLACK, ADOPTION OF THE FOURTEENTH AMENDMENT (1908).

[7] 109 U.S. 3, 3 S.Ct. 18 (1883).

[8] Barnett, "What is State Action?" 24 ORE. L. REV. 227 (1945); Gressman, "Unhappy History of Civil Rights Legislation," 50 MICH. L. REV. 1323 (1952).

[9] Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031 (1945). This put to rest uncertainty which had been created by Barney v. New York, 193 U.S. 430, 24 S.Ct. 502 (1904).

found that it would be state action if a state court was to enforce a private contract containing restrictive covenants.[10] The third avenue for enlargement of the state action concept has been where a private organization is exercising a state function. Thus in the *Allwright* case[11] the Court found state action was involved when a private organization was able to prevent Negroes from voting in a primary election. A fourth possibility for future expansion of the scope of state action is suggested by *Marsh v. Alabama.*[12] There a state court was prevented from enforcing a statute which enabled the owners of a company town to have an individual arrested when she refused to desist from distributing religious literature on the streets of the town. Language in the opinion suggests the possibility that when a private organization becomes imbued with a public function it may then be subject to the same constitutional limitations as a state.[13]

In the principal case, the court concluded that the union was not within the rule of the *Allwright* case since it was not exercising "a basic state function."[14] However, there are grounds for doubting whether "basic state function" should have been so used to limit the concept of state action. Since the right to work has been judicially recognized as a natural right,[15] it seems reasonable to conclude that organizations legally capable[16] of substantially affecting that right might well be held to have satisfied the test promulgated in the *Marsh* case, i.e., they are imbued with public functions and hence come within the concept of state action. In a recent case a privately endowed library operated by a privately elected board of trustees was held to the standards of state action because it received substantial financial aid from the city.[17] Such a decision adds credence to the suggestion that state action need not be political.[18] Further doubts concerning the requirements of a basic function as apparently construed

[10] Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836 (1948). Such contracts had been held valid in Corrigan v. Buckley, 271 U.S. 323, 46 S.Ct. 521 (1926).

[11] Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757 (1944), overruling Grovey v. Townsend, 295 U.S. 45, 55 S.Ct. 622 (1935).

[12] 326 U.S. 501, 66 S.Ct. 276 (1946).

[13] It is not clear whether the basis of the Court's opinion was that judicial enforcement of a private right is state action, or whether the private conduct here was to be treated as state action for the purpose at hand. The former is suggested by language in Shelley v. Kraemer, note 10 supra, at 22, and also by Breard v. Alexandria, 341 U.S. 622 at 643, 71 S.Ct. 920 (1951); the latter by Frankfurter, J., concurring in Niemotko v. Maryland, 340 U.S. 268 at 277, 71 S.Ct. 325 (1951). See also 44 MICH. L. REV. 848 (1946).

[14] Principal case at 307.

[15] See, e.g., concurring opinion in Butchers' Union Co. v. Crescent City Co., 111 U.S. 746 at 762, 4 S.Ct. 652 (1884).

[16] See, e.g., Witmer, "Civil Liberties And The Trade Union," 50 YALE L.J. 621 (1941); Murray, "The Right To Equal Opportunity in Employment," 33 CALIF. L. REV. 388 (1945).

[17] Kerr v. Enoch Pratt Library, (4th Cir. 1945) 149 F. (2d) 212, cert. den. 326 U.S. 721, 66 S.Ct. 26 (1945).

[18] In regard to this contention it is difficult to appraise the significance of the denial of certiorari in Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E. (2d) 541 (1949), cert. den. 339 U.S. 981, 70 S.Ct. 1019 (1950), Black and Douglas, JJ., disagreeing. In this case the New York Court of Appeals found, in a four to three decision, that no state action was involved although powers of eminent domain and certain tax exemptions were granted to defendant, a private company. See 15 UNIV. CHI. L. REV. 745 (1948).

by the court in the principal case are suggested by decisions where the actions of a political subdivision are held to be state action.[19] Clearly, many of the actions of a municipality or administrative agency[20] would not be basic to the continued political existence of the state. These considerations suggest that a union may well meet the requirements of exercising a basic state function even if its activities are not essentially political. Actually, in the principal case the chief ground for the court's conclusion that no state action was involved was that the union acted pursuant to the consent of its members and not by virtue of power derived from the state statute. This distinction is based upon dictum in the *Steele* case,[21] where the Supreme Court indicated that a union deriving its authority wholly from a federal statute would be subject to the constitutional limitations on federal action so far as civil rights are concerned. But in the principal case, since the plaintiffs were union members and the union contract with the employer predated the state statute permitting exclusive bargaining agents, the union authority was derived from the consent of the employees. Although such a conclusion appears warranted under the existing federal decisions, one may wonder whether it is warranted in light of the situation which actually obtains. Since the union rules and the contract between the union and the employer required union membership as a condition of employment,[22] and since the plaintiffs had no part in selecting the particular union with which the employer contracted, may it not be as unrealistic to say the union's authority was derived from consent as to say that there is freedom of contract between a hotel and a prospective female employee?[23]

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[19] E.g., Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666 (1938).

[20] As to finding state action in administrative agencies, see Home Telephone and Telegraph Co. v. Los Angeles, 227 U.S. 278, 33 S.Ct. 312 (1913); Hale, "Unconstitutional Acts As Federal Crimes," 60 HARV. L. REV. 65 at 80 et seq. (1946).

[21] Steele v. Louisville & N.R. Co., 323 U.S. 192 at 199, 65 S.Ct. 226 (1944).

[22] Williams v. Yellow Cab Co., note 1 supra, at 850.

[23] West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578 (1937), overruling Adkins v. Children's Hospital, 261 U.S. 525, 43 S.Ct. 394 (1923).