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**CONSTITUTIONAL LAW—Exclusion of Negroes From
Dental Society That Controls Selection of
State Dental Officials Violates the Equal
Protection Clause—*Hawkins v. North
Carolina Dental Society****

Plaintiff, a licensed Negro dentist, was refused admission to the North Carolina Dental Society,¹ a voluntary professional organization that plays a significant role both in the selecting of state dental officials and in the promotion of state dental programs.²

* 355 F.2d 718 (4th Cir.), cert. denied, 87 Sup. Ct. 322 (1966) [hereinafter cited as the principal case].

1. Plaintiff was also excluded from the Second District Dental Society which is a regional component of the North Carolina Dental Society. Membership in the former is a prerequisite to membership in the latter. There are no Negroes in either society, and the plaintiff was unable to obtain the necessary recommendations. Principal case at 719.

2. These programs include: (1) raising funds to create a scientific foundation for research and study in dentistry at the University of North Carolina School of Dentistry; (2) inspecting hospitals to determine whether their facilities are suitable for the teaching and training of dentistry; and (3) promulgation of fee schedules for use by the state's industrial commission. *Hawkins v. North Carolina Dental Soc'y*, 230 F. Supp. 805, 808 (W.D.N.C. 1964).

At the time the plaintiff sought admission to the Society, state statutes empowered the Society to elect the six members of the North Carolina Board of Dental Examiners³ and to designate the dental representatives to the Medical Care Commission⁴ and the Mental Health Council.⁵ After the plaintiff brought suit to compel his admission to the Society, the Society persuaded the state legislature to amend these statutes so that any licensed dentist can be nominated for election to the Board of Dental Examiners by a petition signed by at least ten dentists.⁶ The amendments further provided that the Governor, rather than the Society, shall appoint the dental representatives to the Medical Care Commission and the Mental Health Council, after requesting recommendations from the Society.⁷ In light of these changes in the statutes, the federal district court decided to dismiss the suit since the Society no longer had any legal control over the selection of the state's dental officials and the mere voluntary participation of a private organization in state programs is not sufficient to constitute state action.⁸ On appeal to the Court of Appeals for the Fourth Circuit, *held*, reversed. Since the amendments had not changed the Society's practical control over the selection of state dental officials⁹ and since the Negro dentist was still, for all practical purposes, without a voice in state dental programs, the Society's discriminatory exclusion of the plaintiff was deemed state action violative of the equal protection clause of the fourteenth amendment.

The principal case is one of the few instances where a court has used the fourteenth amendment to examine the conduct of professional organizations.¹⁰ Although the amendment states that no "State . . . [shall] deny to any person . . . the equal protection of the laws . . .," the courts have liberally construed the term "State" so as to afford greater protection to individual rights.¹¹ Consequently,

3. N.C. GEN. STAT. § 90-22 (1958).

4. N.C. GEN. STAT. § 131-117 (1958).

5. N.C. GEN. STAT. § 122-105 (1958).

6. N.C. Laws, 1961, ch. 213 (April 13, 1961).

7. N.C. Laws, 1963, chs. 325, 326 (May 1, 1963).

8. *Hawkins v. North Carolina Dental Soc'y*, 230 F. Supp. 805, 811 (W.D.N.C. 1964).

9. N.C. GEN. STAT. § 90-22 (1965) makes it theoretically possible for any licensed, nonmember dentist to become a member of the State Board of Dental Examiners. However, there have been three elections subsequent to the passage of this statute in which a total of seven nominees, all members of the Society, ran for six vacancies on the Board. Four of these were declared elected without the formality of an election. Principal case at 720.

10. In *Bell v. Georgia Dental Ass'n*, 231 F. Supp. 299 (N.D. Ga. 1964), the activities of defendant organization, which had been empowered by the state legislature to nominate members to state regulatory boards from which the Governor made appointments, were deemed to be state action and therefore within the fourteenth amendment.

11. See generally Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375 (1958); Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1961); Horowitz, *The Misleading*

in addition to the direct acts of the state itself,¹² state action now includes all acts of administrative agencies¹³ and officials¹⁴ and the operation of public facilities.¹⁵ The activity of private individuals¹⁶ which takes place on property leased¹⁷ or conveyed¹⁸ by the state or which is extensively financed or controlled¹⁹ by the state may also

Search for "State Action" Under the Fourteenth Amendment, 30 So. CAL. L. REV. 208 (1957); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); St. Antoine, *Color Blindness But Not Myopia: A New Look at State Action, Equal Protection, and "Private" Racial Discrimination*, 59 MICH. L. REV. 993 (1961); Comment, 50 CORNELL L.Q. 473 (1965); Comment, *Applicability of the Fourteenth Amendment to Private Organizations*, 61 HARV. L. REV. 344 (1948); Comment, 6 VILL. L. REV. 218 (1961).

12. Acts of the state which violate the fourteenth amendment include: (1) legislative enactment, see, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (statute provided for segregation of public schools); (2) executive action, see, e.g., *Screws v. United States*, 325 U.S. 91 (1945) (sheriff beating prisoner to death); (3) judicial action, see, e.g., *Barrows v. Jackson*, 346 U.S. 249 (1953); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (cases involving judicial enforcement of restrictive covenants based on race).

13. *Howe Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278 (1913).

14. *Ex parte Virginia*, 100 U.S. 339 (1880); *Flemming v. South Carolina Elec. & Gas Co.*, 224 F.2d 752 (4th Cir. 1955), *appeal dismissed*, 351 U.S. 901 (1956); *Crews v. United States*, 160 F.2d 746 (5th Cir. 1947).

15. *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam); *Mayor & City Council v. Dawson*, 350 U.S. 877 (1955) (per curiam). A state may, however, close or sell its facilities and such a sale may not necessarily constitute state action under the fourteenth amendment. *City of Montgomery v. Gilmore*, 277 F.2d 364 (5th Cir. 1960); *City of Greensboro v. Simkins*, 246 F.2d 425 (4th Cir. 1957).

16. See *Collins v. Hardyman*, 341 U.S. 651, 662 (1951) where the Court left open the possibility that the activities of very large private organizations might in some instances violate the fourteenth amendment despite the lack of state involvement.

17. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Derrington v. Plummer*, 240 F.2d 922 (5th Cir. 1956), *cert. denied*, 353 U.S. 924 (1957); *Smith v. City of Birmingham*, 226 F. Supp. 838 (N.D. Ala. 1963); *Nash v. Air Terminal Serv. Inc.*, 85 F. Supp. 545 (E.D. Va. 1949); *Kern v. City Comm'rs*, 151 Kan. 565, 100 P.2d 709 (1940). *But cf. Easterly v. Dempster*, 112 F. Supp. 214 (E.D. Tenn. 1953).

18. *Hampton v. City of Jacksonville*, 304 F.2d 320 (5th Cir. 1962) (conveyance of a fee by the city with a possibility of reverter); *Smith v. Holiday Inns of America, Inc.*, 336 F.2d 630 (6th Cir. 1964) (conveyance by the city of the total fee but control reserved over the grantee's operations by the insertion of restrictive covenants in the deed).

19. *Public Util. Comm'n v. Pollak*, 343 U.S. 451 (1952) (activity closely scrutinized and approved by a public utilities commission); *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963) (hospital received federal funds pursuant to the Hill Burton program and was subject to a comprehensive scheme of regulation); *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir.), *cert. denied*, 326 U.S. 721 (1945) (privately endowed library received 99% of its total operating funds from the city); see *Eaton v. Grubbs*, 329 F.2d 710 (4th Cir. 1964). It is difficult to determine exactly the amount of aid or control that are necessary to render the recipient's activities state action. The cases indicate, however, that even though the state grants a reasonable amount of aid in good faith, the recipient will not necessarily be subject to the sanctions of the fourteenth amendment. See *Norris v. Mayor & City Council*, 78 F. Supp. 451 (D. Md. 1948); *cf. Dorsey v. Styvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950) (state aid consisted of tax exemptions and the power of eminent domain). In *Mitchell v. Boys Club of Metropolitan Police*, 157 F. Supp. 101 (D.D.C. 1957), the court held that there was no state action although the defendant was permitted to use the city's playground facilities without cost and retain the services of city policemen for special duties. *Contra*, *Statom v. Board of Comm'rs*, 233 Md. 57, 195 A.2d 41 (1963). Builders who have homes insured by the FHA cannot be enjoined under the Constitution if they refuse to sell homes to Negroes solely on the

fall within its purview. Further extensions of the concept of state action have brought within the scope of the amendment private organizations when such organizations exercise practical control over activities which are normally performed by the state. These organizations are said to be performing state or public functions,²⁰ so that, pursuant to the public function doctrine, their private identity is lost and they are considered an arm of the state.

In its statement of the facts, the court in the principal case indicated that there were two closely related factors which brought the Society's action under the fourteenth amendment. First, even under the statutes as amended, the Governor must request recommendations from the Society before he makes his appointments to the Medical Care and Mental Health Commissions. While these recommendations are not binding on the Governor, nevertheless, the state has officially delegated to the Society the responsibility of making them. Although it could be argued that this fact alone is sufficient to justify regarding the Society as an organization which performs a state function, such a position would pose difficult problems if the statutory requirement for recommendations were removed but the Governor voluntarily requested advice or recommendations from the Society. Since the court was aware of the possibility of the removal of the requirement for recommendations^{20a} and since it was apparently unwilling to say that the mere fact that an individual influenced state action was sufficient to subject the indi-

basis of race. *Johnson v. Levitt & Sons*, 131 F. Supp. 114 (E.D. Pa. 1955). *Contra*, *Ming v. Horgan*, 3 RACE REL. L. REP. 693 (Cal. Super. Ct. 1958).

20. *Evans v. Newton*, 382 U.S. 296 (1966); *Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Baskin v. Brown*, 174 F.2d 391 (4th Cir. 1949); *Rice v. Elmore*, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948). There is presently a conflict in the lower courts as to how far the public function concept should be extended in order to limit private activities under the fourteenth amendment. See *Baldwin v. Morgan*, 287 F.2d 750 (5th Cir. 1961); *Boman v. Birmingham Transit Co.*, 280 F.2d 531 (5th Cir. 1960). *But cf.* *Dorsey v. Styvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950) (a private developer was not bound by the fourteenth amendment to follow a nondiscriminatory rental policy despite the fact that its development was the equivalent of a normal city).

One problem that has troubled the courts is the granting of powers or privileges by the state to a private party. In *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944), the Supreme Court held that a labor union which serves as the exclusive bargaining agent for a class of railroad employees under the Railway Labor Act has a statutory duty to represent fairly union and non-union employees at the collective bargaining table without discrimination because of race. See also *Conley v. Gibson*, 355 U.S. 41 (1957); *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952); *Betts v. Easley*, 161 Kan. 459, 169 P.2d 831 (1946). However, the granting of a license by the state to operate a restaurant has not been regarded as sufficient to constitute state action. *Williams v. Howard Johnson's Restaurant*, 268 F.2d 845 (4th Cir. 1959); see *Bell v. Georgia Dental Ass'n*, 231 F. Supp. 299 (N.D. Ga. 1964).

20a. The court's fears were in fact borne out, for at the next session of the legislature, the statutes were amended so as to provide that the Governor is not required to request recommendations from the Society.

vidual to the fourteenth amendment, the court was not content to rest its decision solely on the statutory authorization to make recommendations.

The second factor relied on by the court in the principal case is that, despite the statutory revisions, the Society, as a practical matter, continued to control the appointment of state dental officials. That the existence of practical control had led courts to find state action in activity which is not otherwise within the fourteenth amendment is illustrated by several recent cases. First, consider the white primary cases where, as in the principal case, post-litigation statutory changes were made in an attempt to insulate the discriminatory activity from the limitations imposed upon state action. The voting controversy began when Texas statutes which prohibited Negroes from voting in the Democratic Primary were declared unconstitutional in that they violated the fourteenth amendment.²¹ Subsequently, the Democratic Party, attempting to achieve the same result, utilized its own discriminatory rules to keep Negroes from voting in its primary. However, the Supreme Court, in *Smith v. Allwright*,²² found that the Party's activity constituted state action since the primary was an integral part of the elective process conducted under state statutory authority.²³ Finally, in *Terry v. Adams*,²⁴ the Court found that private elections which were conducted by a county-wide organization known as the Jaybird Association also constituted state action, for despite the fact that the Association was not in any way regulated by the state and had no formal relationship with the Democratic Party, the winner of the Jaybird election as a practical matter almost always became the Democratic nominee.²⁵ It is arguable that *Terry* might be distinguished from the principal case since the former was decided under the fifteenth amendment, in which the state action concept is arguably subject to a broader construction,²⁶ but the following two cases, both of which were decided on the basis of the fourteenth amendment, also indicate the importance of the private entity's practical control of

21. *Nixon v. Herndon*, 273 U.S. 536 (1927). Texas then enacted a statute that empowered the State Executive Committee of the Democratic Party to prescribe qualifications for the party members. The Supreme Court held in *Nixon v. Condon*, 286 U.S. 73 (1932), that since this committee derived its powers from the state and not the party, its actions were subject to the sanctions of the fourteenth and fifteenth amendments.

22. 321 U.S. 649 (1944).

23. The *Allwright* decision overruled *Grovey v. Townsend*, 295 U.S. 45 (1935), in which it was held that the Democratic Party's exclusion of Negroes, absent any participation by the state, did not constitute state action.

24. 345 U.S. 461 (1953).

25. *Id.* at 484, 493 (Minton, J., dissenting).

26. For an analysis of state action under the fifteenth amendment, see Note, 74 *YALE L.J.* 1448 (1965).

state activities. In *Marsh v. Alabama*,²⁷ the Supreme Court held that a Jehovah's Witness who distributed religious literature on the streets of a *privately* owned town could not be prosecuted for trespass. The Court emphasized that the services and functions performed by any town are the same, whether the town be publicly or privately controlled. Finally, *Evans v. Newton*²⁸ is also relevant, for in *Evans*, the Court held that a privately owned park, devised to a town and subsequently transferred to a private trustee, could not be operated on a segregated basis. While the Court's reasoning was based in part on the fact that the park remained under municipal control and continued to receive tax exemptions, the underlying rationale was that the inherently public nature generally associated with all parks required a policy of non-discrimination even by a privately owned park. Although *Terry*, *Marsh* and *Evans* support the decision in the principal case, in that they rely on practical control, it is noteworthy that in each of these cases, the sole purpose of the private organization was the performance of a public function whereas in the principal case, the professional organization did engage in many private as well as public activities. It may be argued that the principal case goes beyond prior authority, but, given the fact that an organization performs a public function, its non-public activities are irrelevant so long as exclusion from the organization excludes one from participating in the public activity.

Unless a cause of action is based on a violation of a constitutional right, the courts have been reluctant to interfere with the membership policies of professional organizations.²⁹ While this approach originally received wide support, the increasing amount of economic and political power wielded by these organizations has caused the courts to respond favorably to the argument that judicial intervention in the affairs of professional organizations may be necessary in order to protect an individual, despite the fact that the organizational activities are free from constitutional attack.³⁰ At the present

27. 326 U.S. 501 (1946).

28. 382 U.S. 296 (1966).

29. The Pluralists, headed by J. N. Figgis and Harold Laski, were the chief proponents of the idea that all private organizations should enjoy freedom from interference by the State. See Laski, *The Personality of Associations*, 29 HARV. L. REV. 404, 418-19 (1916). Regardless of the effect of arbitrary *exclusion* on one's economic and social interests, there is no legally enforceable right to become a member of a professional organization. *Medical Soc'y v. Walker*, 245 Ala. 135, 16 So. 2d 321 (1944); *Harris v. Thomas*, 217 S.W. 1068 (Tex. Civ. App. 1920). When a member has been wrongfully *expelled*, however, the courts may intervene on the theory that the expelled member has suffered a loss of property rights, *Dawkins v. Antrobus*, 17 Ch. D. 615 (1881), or on the theory that the organization has breached a contract between itself and the expelled member, *Polin v. Kaplan*, 257 N.Y. 277, 177 N.E. 833 (1931).

30. See MILLER, *PRIVATE GOVERNMENTS AND THE CONSTITUTION* (1959). See generally *Developments in the Law—Judicial Control of Private Associations*, 76 HARV. L. REV. 983 (1963).

time, there are two situations which may prompt the courts to intervene: when membership is required by state law³¹ and when membership is a prerequisite to an individual's livelihood.³² For example, in *Falcone v. Middlesex County Medical Society*,³³ a licensed osteopath was denied admission to the county medical society³⁴ and consequently was unable to serve on the staffs of private hospitals which were required by the American Hospital Association to employ only licensed doctors who were in good standing in their local medical societies. Since the osteopath's exclusion from the society prevented him, for all practical purposes, from practicing medicine and substantially impaired his livelihood, the New Jersey Supreme Court required the county society to admit him. The *Falcone* decision represented a significant departure from the traditional treatment of private and professional organizations, but it was not totally without precedent³⁵ and its rationale has been adopted in other states.³⁶ Although the facts of *Falcone* are far more compelling than those of the principal case,³⁷ the concern with the power of professional organizations which provoked the *Falcone* decision may have influenced the court in the principal case and prompted it to extend the concept of state action so as to be able to require the admission of the plaintiff to the North Carolina Dental Society.

31. *People ex rel. Bartlett v. Medical Soc'y*, 32 N.Y.* 187 (1865).

32. *Falcone v. Middlesex County Medical Soc'y*, 34 N.J. 582, 170 A.2d 791 (1961); see Note, 75 HARV. L. REV. 1186 (1962); Note, 15 RUTGERS L. REV. 327 (1961); Note, 74 YALE L.J. 1313 (1965); Annot., 89 A.L.R.2d 964 (1963).

33. 34 N.J. 582, 170 A.2d 791 (1961).

34. It should be noted that New Jersey is one of the very few states where the Board of Medical Examiners licenses both medical doctors and osteopathic physicians. Plaintiff received his degree from a school that was not approved by the A.M.A. because it did not grant a medical degree, but rather it granted a degree of osteopathy. The local society would not admit plaintiff since it followed the A.M.A. practice of limiting its membership to doctors of medicine. The hospitals could not accept plaintiff's services, since they would have lost accreditation from the A.M.A.

35. First, it appears that other organizations similar to the one in *Falcone* do not have a constitutional right to discriminate on the basis of race with regard to membership policies. *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945). Second, a labor union that has a closed shop agreement with an employer may not arbitrarily exclude Negroes from its membership in order to prevent them from obtaining employment. *James v. Marinship Corp.*, 25 Cal. 2d 721, 155 P.2d 329 (1944). *Contra*, *Ross v. Ebert*, 275 Wis. 523, 82 N.W.2d 315 (1957). See also *Williams v. Yellow Cab Co.*, 200 F.2d 302 (3d Cir. 1952), *cert. denied*, 346 U.S. 840 (1953).

36. See *Blende v. Maricopa County Medical Soc'y*, 96 Ariz. 240, 393 P.2d 926 (1964); *Kronen v. Pacific Coast Soc'y of Orthodontists*, 46 Cal. Rptr. 808 (Dist. Ct. App. 1965); *Kurk v. Queen's County Medical Soc'y*, 260 N.Y.S.2d 520 (Sup. Ct. 1965). Where substantial harm other than economic injury is shown, admission will not be compelled. *Salter v. New York State Psychological Ass'n*, 14 N.Y.2d 100, 248 N.Y.S.2d 864, 198 N.E.2d 250 (1964).

37. The district court in the principal case rejected evidence that membership in the society was a prerequisite to practice in the Charlotte Memorial Hospital. Brief for Appellant, p. 10. Had this evidence been admitted, the Court of Appeals for the Fourth Circuit might have based its result on the rationale of *Falcone*.