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CONSTITUTIONAL LAW-FREEDOM OF SPEECH AND RELIGION-WHAT CONSTITUTES STATE ACTION

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CONSTITUTIONAL LAW—FREEDOM OF SPEECH AND RELIGION—WHAT CONSTITUTES STATE ACTION—Appellant, a Jehovah Witness, attempted to distribute religious literature in Chickasaw, a town in Alabama, owned by the Gulf Shipbuilding Corporation. Appellant was told by the corporate authorities that the town was private property and that she would not be permitted to distribute her literature.[1] She was also asked to leave and when she refused to do so was arrested and prosecuted under an Alabama trespass statute.[2] In her defense, appellant contended that to apply this statute to her activities in Chickasaw would abridge her right to freedom of press and religion as guaranteed by the Fourteenth Amendment.[3] She was convicted and the Alabama court of appeals upheld the conviction.[4] The state supreme court denied certiorari,[5] and

as well as lawyers like to use two or three words where one would do, since the balanced structure is thought to be artistic. The Bible and the works of Shakespeare, as well as deeds and wills, are full of tautological expressions." 58 HARV. L. REV. 548 at 553 (1945).

[10] Id. at 555.

[11] Cochran v. McLaughlin, 128 Conn. 638, 24 A. (2d) 836 (1942); In re Dulles' Estate, 218 Pa. 162, 67 A. 49 (1907).

[12] For examples of such statutes see Mich. Stat. Ann. (1937) § 26.1191; N.Y. Personal Prop. Law (McKinney, 1938) § 12, N.Y. Real Prop. Law (McKinney, 1945) § 113.

[13] Principal case at 69.

[1] The Court accepted the state court's determination that there had been no "dedication" of the streets of the town to the public and that Chickasaw was private property.

[2] Ala. Code (1940) t. 14, § 426, which makes it a crime to enter or remain on the premises of another after having been warned not to do so.

[3] The pertinent part of the Fourteenth Amendment relied on by the appellant provides that no state shall "deprive any person of life, liberty, or property, without due process of law."

[4] 21 S. (2d) 558 (1945).

[5] 246 Ala. 539, 21 S. (2d) 564 (1945).

the case came to the United States Supreme Court on appeal. *Held*, reversed.[6] The town of Chickasaw, in effect, is no different from any other municipality.[7] The mere difference in form should not serve as a basis for depriving persons of those rights guaranteed by the Fourteenth Amendment, and a state statute which punishes criminally such activities as were carried on by appellant is a violation of the Fourteenth Amendment. *Marsh v. Alabama*, (U.S. 1946) 66 S. Ct. 276.[8]

Once again the Jehovah Witnesses have been instrumental in widening the area of constitutional protection accorded civil liberties.[9] Traditionally, the

[6] The majority opinion of the Court was written by Justice Black. Justice Frankfurter wrote a concurring opinion, the essence of which is that "title to property as defined by state law controls property relations; it cannot control issues of civil liberty which arise precisely because a company town is a town as well as a congeries of property relations." Justice Reed wrote a dissenting opinion, concurred in by Chief Justice Stone and Justice Burton, upholding the conviction on the ground that Chickasaw was private property and therefore not subject to the constitutional prohibition.

[7] If Chickasaw were a municipality its action would undoubtedly be unconstitutional. Lovell v. Griffin, 303 U.S. 444, 58 S. Ct. 666 (1938). But this is not to say that the appellant's right under the Fourteenth Amendment is absolute. It is subject to reasonable regulation by the state. But the burden is on the state to prove its reasonableness.

[8] On the same day the Court in Tucker v. State of Texas, (U.S. 1946) 66 S. Ct. 274, reversed the conviction of an ordained minister of Jehovah's Witnesses by the Justice Court of Medina County, Texas for violating article 479, chapter 3 of the Texas Penal Code (Vernon, 1938) which makes it an offense for any "peddler or hawker of goods or merchandise" wilfully to refuse to leave premises after having been notified by the owner to do so. The minister had been distributing religious literature in the Hondo Navigation Village located in Medina County, Texas. The village was set up and is owned by the United States. The Court, with the same three justices dissenting as in principal case, reversed the conviction. Although the majority opinion written by Justice Black stresses the constitutional argument, it should be noted that the Court found "that neither the Housing Act passed by Congress nor the Housing Authority Regulations contain language indicating a purpose to bar freedom of press and religion within villages such as the one here involved." On the constitutional issue, Justice Black's opinion reveals the same ambiguity noted in the text above with respect to the Marsh case. Reference is made to the First Amendment which should serve as a limitation on federal agencies such as housing authorities. Yet it is the Texas statute which is held unconstitutional and not under the Fourteenth Amendment but under the First Amendment.

The position of the dissenting justices in the principal case is understandable, but their position in the Tucker case creates difficulties, since it leads to the result that the federal government, by the simple expedient of setting up a corporate entity, may do indirectly what it may not do directly.

[9] Schneider v. State, 308 U.S. 147, 60 S. Ct. 146 (1939); Cantwell v. Connecticut, 310 U.S. 296, 60 S. Ct. 900 (1940); 128 A.L.R. 1361 (1940); Jones v. Opelika, 319 U.S. 103, 63 S. Ct. 890 (1943); Largent v. Texas, 318 U.S. 418, 63 S. Ct. 667 (1943); Jamison v. Texas, 318 U.S. 413, 63 S. Ct. 669 (1943); Murdock v. Pennsylvania, 319 U.S. 105, 63 S. Ct. 870 (1943); Follett v. McCormick, 321 U.S. 573, 64 S. Ct. 717 (1944); 152 A.L.R. 322 (1944).

Fourteenth Amendment has been a protection solely against state action.[10] Private invasions of rights guaranteed by the Fourteenth Amendment have been outside the pale of constitutional security.[11] Within the framework of this limitation it may be worthwhile to trace briefly the expansion of the substantive content of the amendment and the interpretative development of the meaning of state action. In *Ex Parte Virginia*,[12] the court decided that the guaranties of the Fourteenth Amendment were effective against the conduct of state officials acting under the authority of their office even if such conduct was also violative of state law. Security has also been provided against infringement by state inaction in those situations where a duty to take affirmative action can be spelled out.[13] And protection against curtailment by private action is also within the constitutional scope when such action is integrated with the legislative processes of the state.[14] The substantive phase of the development of the Fourteenth Amendment has taken shape largely in terms of the individual social and economic philosophy of the court. Once construed as an instrument to prevent state intrusion against individual freedom of action in the sphere of economic activity,[15] today it is most frequently employed to prevent the curtailment of civil

[10] Civil Rights Cases, 109 U.S. 3, 3 S. Ct. 18 (1883). In Powe v. United States, (C.C.A. 5th, 1940) 109 F. (2d) 147, the Department of Justice attempted to persuade the Court to enlarge the concept of constitutional right of free speech to sustain federal legislation [18 U.S.C. (1940) § 51, commonly referred to as § 19 of the Criminal Code] to penalize infringement of Fourteenth Amendment rights by individuals. Relying on precedent, the Court refused to go along with the government in this attempt. Certiorari was denied by the Supreme Court, 308 U.S. 670, 60 S. Ct. 717 (1940). It is significant that this case was prosecuted shortly after the publication of an article by O. John Rogge, Assistant Attorney General of the United States, in "Justice and Civil Liberties," 25 A.B.A.J. 1030 (1939), indicated that the criminal division of the *civil liberties* unit was re-examining the position taken by the Supreme Court in order to find ways to reach individual action.

For a discussion of this case see 40 COL. L. REV. 902 (1940). The author discusses the possibility of enlarging the freedom of speech concept by resort to Article IV, Section 4 of the Constitution guaranteeing a republican form of government. This was relied on in part by the government in the case.

[11] For an instructive analysis of the relationship between the power of the state and individual action, see Hale, "Force and the State: A Comparison of 'Political' and 'Economic' Compulsion," 35 COL. L. REV. 149 (1935). Miller, "Individual Invasions of Individual Rights," 3 NAT. B. J. 126 (1945).

[12] 100 U.S. 339 (1879). For a discussion of this entire problem see Isseks, "Jurisdiction of the Lower Federal Courts to Enjoin Unauthorized Action of State Officials," 40 HARV. L. REV. 969 (1927).

[13] L. C. Dyer and George C. Dyer, "Constitutionality of a Federal Anti-Lynching Bill," 13 ST. LOUIS L. REV. 186 (1928); Cattlette v. United States, (C.C.A. 4th, 1943) 132 F. (2d) 902; Screws v. United States, 325 U.S. 91, 65 S. Ct. 1031 (1945). Although the Screws case involved affirmative action of state officials, the Court said that the problem "is not whether state law has been violated but whether an inhabitant of a state has been deprived of a federal right."

[14] 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).

[15] Indicative of this trend are Coppage v. Kansas, 236 U.S. 1, 35 S.Ct. 240 (1915); Adkins v. Children's Hospital, 261 U.S. 525, 43 S. Ct. 394 (1923); 24 A.L.R. 1259 (1923).

liberties.[16] This transition stems from the belief of the court that full effect, wherever possible, should be given to the will of the people expressed through their duly chosen representatives.[17] Thus regulatory control by legislatures of private property and contract rights in the interest of the state has been upheld wherever a plausible reason for such legislation existed.[18] And to insure that such legislation would be representative of the popular will, those channels through which the will of the community can best be expressed have been accorded the utmost protection.[19] Company owned towns comprise a sizeable segment of our population.[20] The substantive content of the life of such a community can be controlled by this corporate form against the wishes of its populace if it is not subject to constitutional restraint.[21] In view of the court's underlying approach to the question of civil liberties, the decision in the principal case is understandable, however difficult it is to reconcile it with prior interpretations of the amendment. This difficulty is evident from the paucity and inapplicability of authority relied upon by the court. In part, Justice Black, writing the court's

[16] It is commonly said that where civil liberties are concerned there is no presumption of constitutionality accompanying a statute curtailing them. This approach is useful only if we keep in mind that it merely expresses the court's attitude toward such problems and that language in terms of "presumptions" only rationalizes a desired result. See 40 COL. L. REV. 531 (1940). For a survey of the history of the Fourteenth Amendment, see: Warren, "The New 'Liberty' Under the Fourteenth Amendment," 39 HARV. L. REV. 431 (1926); Green "Liberty Under the Fourteenth Amendment," 27 WASH. UNIV. L. Q. 497 (1942); Green, "Liberty under the Fourteenth Amendment; 1942-1943," 28 WASH. UNIV. L. Q. 251 (1943); Green, "Liberty Under the Fourteenth Amendment, 1943-44," 43 MICH. L. REV. 437 (1944). Stockman, "Summary of Civil Liberties Cases in the 1944 Term of the United States Supreme Court," 3 NAT. B. J. 189 (1945).

[17] United States v. Carolene Products, 304 U.S. 144 (the often quoted note 4 at 152), 58 S. Ct. 778 (1938); Schneider v. State, 308 U.S. 147 at 161, 60 S. Ct. 146 (1939); Lovell v. City of Griffin, 303 U.S. 444, 58 S. Ct. 666 (1938); and note 16, supra.

[18] Nebbia v. New York, 291 U.S. 502, 54 S. Ct. 505 (1934); West Coast Hotel v. Parrish, 300 U.S. 379, 57 S. Ct. 578 (1937); and see note 16, supra.

[19] It was not until recently that the freedoms of the First Amendment were deemed to be within the protection of the Fourteenth Amendment. Freedom of speech, Gitlow v. New York, 268 U.S. 652, 45 S. Ct. 625 (1925). Here such protection was assumed rather than expressly stated. The first decision actually extending this protection was Fiske v. Kansas, 274 U.S. 380, 47 S. Ct. 655 (1927). Freedom of press, Near v. Minnesota, 283 U.S. 697, 51 S. Ct. 625 (1931). Freedom of religion, Cantwell v. Connecticut, 310 U.S. 296, 60 S. Ct. 900 (1940). Right to peaceable assembly, DeJonge v. Oregon, 299 U.S. 353, 57 S. Ct. 255 (1937). Right to petition for redress of grievances, Bridges v. California, 314 U.S. 252, 62 S. Ct. 190 (1941); and see note 16, supra.

[20] United States Coal Comm. Rep. Part III, pp. 1467, 1469 (1925), summarized in MORRIS, THE PLIGHT OF THE COAL MINER, c. 6, p. 86 (1934). See also, Magnussen, "Housing by Employers in United States," Bureau of Labor Statistics Bul. No. 263 (Misc. Serv.) p. 11; RHYNE, SOME SOUTHERN COTTON MILL WORKERS AND THEIR VILLAGES (1930).

[21] Bowden, "Freedom for Wage Earners," 200 AM. ACAD. OF POLI. AND SOC. SCI. ANNALS 185 (1938); CHAFFEE, THE INQUIRING MIND 173-74 (1928); COMPANY TOWN (Pamphlet by Bituminous Operator's Special Committee, 1923).

opinion, attempts to support his position by developing the inroads made upon absolute property rights by regulatory power of the state, statutory enactments [22] and the commerce clause of the United States Constitution.[23] It does not seem that these offer any help in interpreting the limitations imposed by the Fourteenth Amendment. Coupled with this reliance is the thought that the action of the town of Chickasaw is state action but it is not too clear whether Justice Black means to say that the corporate action of itself is equivalent to state action or whether the state action consists of criminal sanctions imposed by the state.[24] It seems doubtful that the Court would say that the mere use of the judicial processes of the state to enforce private rights is state action, for that would mean that all individual conduct invading rights protected by the Fourteenth Amendment would be within the prohibition of the Amendment. If it means only that certain kinds of private conduct for the purposes of the Fourteenth Amendment will be considered to be the equivalent of state action, there still remains a problem of application. Will the Court confine the approach to the facts of the case as Justice Reed, in his dissent, concedes the Court may well do? Or is to be an entering wedge, as Justice Reed fears, to reach varied private action? [25] Will it reach the activities of trade unions? [26] Will it reach the conduct of charitable, educational and other institutions receiving state subsidies in the form of tax exemption? [27] Also, if the decision is that the action of the town of Chickasaw is equivalent to state action though it must be recognized as a departure from the traditional concept of state action, it can be sustained on the ground that at most it is a difference in form and not substance. But any attempt to broaden its application would seem to involve a complete overhauling of our entire approach to the meaning of the Fourteenth Amendment.

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[22] Citing: Republican Aviation Corp. v. N.L.R.B., 324 U.S. 793, 65 S. Ct. 982 (1945); 157 A.L.R. 1088 (1945).

[23] Justice Black does admit that the issue under the commerce clause is not "directly analogous." Principal case at 279. This reliance on the commerce clause is the one part of the Court's opinion to which Justice Frankfurter takes exception. He says, "It does not seem to me to further constitutional analysis to seek help for the solution of the delicate problems arising under the First Amendment from the very different order or problems which the Commerce Clause presents." Principal case at 281.

[24] In principal case at 280, Justice Black states, "Insofar as the State has attempted to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town, its action cannot stand."

[25] Principal case at 282.

[26] For an enlightening and discerning analysis of this problem see, Witmer, "Civil Liberties and the Trade Union," 50 YALE L. J. 621 (1941).

[27] Aside from the possibility of proceeding against such organizations on constitutional grounds, it is possible that tax exemptions given by the state may be attacked on the ground that they are a diversion of public funds for a private purpose. For a discussion of some state decisions in this field, see 27 MINN. L. REV. 311 (1943).

For a recent study of discrimination in colleges and professional schools in New York City, see "Report on Discrimination in Institutions of Higher Learning," prepared by the Mayor's Committee on Unity referred to in NEW YORK TIMES, Jan. 23, 1946, § 1, 1:1.