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Constitutional Law - Civil Rights - Leased Public Property and State Action

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Notes

CONSTITUTIONAL LAW — CIVIL RIGHTS — LEASED PUBLIC PROPERTY AND STATE ACTION

Plaintiff, a Negro, was refused service solely on the basis of his race by a privately operated restaurant located in a parking building owned and operated by the Wilmington Parking Authority, an agency of the State of Delaware. The parking building project was financed by public funds or funds provided by public bond issues or loans.[1] The building was constructed for the sole purpose of providing a parking facility for the convenience of the public. Revenue from the rental of space in the building to private businesses and proceeds from the parking service were necessary to maintain the parking facility on a self-sustaining basis. Upkeep and maintenance of the parking building were the responsibility of the Authority at no expense to the restaurant. Plaintiff sued for declaratory and injunctive relief, contending that denial of service to him violated the equal protection clause of the fourteenth amendment. The Supreme Court of Delaware[2] held that the plaintiff was not entitled to relief because the Authority was connected with the restaurant only to the extent of receiving rent which was not deemed a sufficient connection with the state to make the restaurant's operation state action. On certiorari to the United States Supreme Court,[3] *held,* reversed, three Justices dissenting.[4] Under

1. The Authority was authorized to borrow money and to issue its own tax exempt bonds. The city of Wilmington donated to the Authority a total of $2,756,827.69, part of which was used to redeem bonds and pay off loans made by the Authority. Burton v. Wilmington Parking Authority, 365 U.S. 715, 717, 718 (1961).

2. Wilmington Parking Authority v. Burton, 157 A.2d 894 (Del. 1960).

3. Plaintiff appealed on the ground that the state statute had been construed unconstitutionally by a state court of last resort. The United States Supreme Court denied the appeal but granted certiorari.

4. The Delaware Supreme Court had cited 24 DEL. CODE § 1501 (1953) and stated: "We . . . hold that the operation of its restaurant by Eagle does not fall within the scope of the prohibitions of the Fourteenth Amendment." Burton v. Wilmington Parking Authority, 157 A.2d 894, 902 (Del. 1960). The statute provides: "No keeper of an inn, tavern, hotel, or restaurant, or other place of public entertainment or refreshment of travelers, guests, or customers shall be obliged, by law, to furnish entertainment or refreshment to persons whose reception or entertainment by him would be offensive to the major part of his customers, and would injure his business." Justices Harlan, Whittaker, and Frankfurter were of the view that the case should be sent back to the state court for clarification of the basis of its decision before going into the question of state action. Burton v. Wilmington Parking authority, 365 U.S. 715, 728 (1961).

the circumstances the degree of connexity between the state and the private lessee was such that discrimination on the basis of race by the lessee constituted state action violative of the fourteenth amendment. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

Since the decision rendered in the *Civil Rights Cases*[5] in 1883, it has been consistently held that the prohibitions of the fourteenth amendment are directed to the discriminatory acts of the states and not to the discriminatory acts of private persons. However the degree of connexity between a private person and a state sufficient to constitute the acts of the former state action, thus subject to the prohibitions of the fourteenth amendment, has remained a difficult problem since the decision of the *Civil Rights Cases*.[6] The case of *Shelley v. Kramer*[7] set the stage for a very broad concept of state action.

Justice Harlan stated: "If . . . the state court meant no more than that under the statute, as at common law, Eagle was free to serve only those whom it pleased, then, and only then, would the question of state action be presented in full-blown form." *Id.* at 730.

5. 109 U.S. 3 (1883). The Court held a federal statute prohibiting discrimination on the basis of race in inns, public conveyances and places of public amusement unconstitutional because the right not to be discriminated against was secured only against aggression by the states under the fourteenth amendment. Mr. Justice Bradley, speaking for the majority, stated: "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment." *Id.* at 11. The basis for the Court's decision seems to be that the prohibitions of the fourteenth amendment are directed to the states. The fourteenth amendment reads in part: "No *state* shall make or enforce any law which shall abridge the privileges or immunities of citizens . . .; nor shall any *state* deprive any person of life, liberty, or property . . .; nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis added.)

6. It appears that where such fundamental rights as freedom of speech or the right to vote are involved, only very slight connection between the state and the private party is required in order to find state action. In Terry v. Adams, 345 U.S. 461 (1953) the only connection between the state and the private discriminatory acts was that the state permitted a private political organization to hold private elections from which all non-members were excluded. The winner of the private primary had subsequently won the general election in every election year since the 1930's. In Marsh v. Alabama, 326 U.S. 501, 507 (1946), where a Jehovah's Witness was forced to discontinue distributing handbills on the company town sidewalk, the court stated: "We do not think it makes any significant constitutional difference as to the relationship between the rights of the owner and those of the public that here the State, instead of permitting the corporation to operate a highway, permitted it to use its property as a town, operate a 'business block' in the town and a street and sidewalk on that business block." In Dorsey v. Stuyvesant Town Corp., 299 N.Y. 519, 87 N.E.2d 541 (1949), cert. denied, 339 U.S. 981 (1950), financial assistance given a private party by the state was held not to be state action. For discussions of the state action concept see Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375 (1958); Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 So. CAL. L. REV. 208 (1957); Comment, 21 LOUISIANA LAW REVIEW 435 (1961).

7. 334 U.S. 1 (1948).

In that case the Supreme Court held that state court enforcement of a restrictive covenant in a deed of private property barring sale to Negroes constituted state action violative of the fourteenth amendment. *Shelley* raised a question as to whether any degree of state aid to private persons who discriminate in a manner offensive to the fourteenth amendment would be considered sufficient to characterize the discrimination as state action.[8] It appears, however, that the courts have found no state action in the absence of either a reasonable degree of control,[9] or responsibility by the state,[10] or a purpose to provide a facility to the public.[11]

Prior to the instant case, there had been no delineation by the Supreme Court of what constituted state action in the leasing of public property. An analysis of other court decisions reveals three factors which seem to have been of primary importance

8. Barrows v. Jackson, 346 U.S. 249 (1953) held that a racially restrictive covenant is unenforceable at law for damages against a co-covenantor who sold to a Negro. It appears that the application of the *Shelley* rule has been restricted to situations in which a *racially* restrictive covenant is involved. See Williams v. Howard Johnson's Restaurant, 268 F.2d 845 (4th Cir. 1959); State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958). For a discussion of the implications of the *Shelley* case see 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).

9. In Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir. 1945), cert. denied, 326 U.S. 721 (1945), the court implied that state control attached to subsidies given to a privately operated library, presumably because substantially all of the revenues of the library were derived from the city. In Eaton v. Board of Managers, 261 F.2d 521, 527 (4th Cir. 1958) the court distinguished the *Kerr* case on the ground that little financial support was derived from the state, stating: "The hospital is neither owned nor controlled by the municipalities and the revenues derived from them on a contract basis amount to less than 4½ per cent of its total income." In Norris v. Mayor and City Council of Baltimore, 78 F. Supp. 451 (D. Md. 1948), it was held that there was no state action because there was no governmental control. In Dorsey v. Stuyvesant Town Corp., 299 N.Y. 519, 87 N.E.2d 541 (1949), cert. denied, 339 U.S. 981 (1950) it was held that there was no state action although the state had used power of eminent domain to obtain property to convey to Stuyvesant and had granted the corporation a twenty-five year tax exemption. The cases seem to indicate that state financial aid without some form of accompanying control is not state action.

10. *E.g.*, Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946); Smith v. Allwright, 321 U.S. 649 (1944). It appears that the state has responsibility in the sense that it has a duty not to permit discrimination where the right invaded is fundamental. See note 6 *supra*.

11. Derrington v. Plummer, 240 F.2d 922, 925 (5th Cir. 1956), cert. denied, 353 U.S. 924 (1957) ("[T]he express purpose of the lease was to furnish cafeteria service for the benefit of persons having occasion to be in the County Courthouse. . . . [I]n rendering such service the lessee stands in the place of the County."). See Jones v. Marva Theatre, Inc., 180 F. Supp. 49 (D. Md. 1960); Simkins v. City of Greensboro, 149 F. Supp. 562 (M.D. N.C. 1957), aff'd per curiam, 246 F.2d 425 (4th Cir. 1957); Tate v. Department of Conservation & Dev., 133 F. Supp. 53 (E.D. Va. 1955), aff'd per curiam, 231 F.2d 615 (4th Cir. 1956), cert. denied, 352 U.S. 838 (1956); Lawrence v. Hancock, 76 F. Supp. 1004 (S.D. W. Va. 1948); Culver v. City of Warren, 84 Ohio App. 373, 83 N.E.2d 82 (1948).

in determining whether or not discrimination by a lessee of public property constitutes discrimination by the state and thus violates the fourteenth amendment. The first and most obvious factor has been public ownership; the second, whether the property was open to the public; and, finally, whether, in leasing the property, the state's purpose was to provide a service to the public.[12]

It is not entirely clear from the instant decision whether the "state action" was considered to be the state's failure to prohibit discrimination in the lease agreement itself,[13] or whether the lessee's discrimination was considered state action merely because of his connection with the state. The Court noted that the Authority could have required the restaurant operator to refrain from discrimination in its operation of the restaurant, stating that: "[B]y its inaction the Authority, and through it the state, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination."[14] If existence of the lease agreement itself constituted state action, then the effect of the decision is to consider this factor alone as determinative of the state action concept.[15] However, from a close reading of the

12. The three factors seem to have been determinative in finding state action in the following cases: Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956), cert. denied, 353 U.S. 924 (1957); St. Petersburg v. Alsup, 238 F.2d 830, cert. denied, 353 U.S. 922 (1957); Jones v. Marva Theatre, Inc., 180 F. Supp. 49 (D. Md. 1960); Simkins v. City of Greensboro, 149 F. Supp. 562 (M.D. N.C. 1957), aff'd per curiam, 246 F.2d 425 (4th Cir. 1957); Tate v. Department of Conservation & Dev., 133 F. Supp. 53 (E.D. Va. 1955), aff'd per curiam, 231 F.2d 615 (4th Cir. 1956), cert. denied, 352 U.S. 838 (1956); Nash v. Air Terminal Services, Inc., 85 F. Supp. 545 (E.D. Va. 1949); Lawrence v. Hancock, 76 F. Supp. 1004 (S.D. W. Va. 1948); Culver v. City of Warren, 84 Ohio App. 373, 83 N.E.2d 82 (1948).

13. Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961): "[T]he Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be."

14. *Id.* at 725.

15. This could be the basis for future decision of cases involving leases of public property. In his concurring opinion in Garner v. Louisiana, 82 Sup. Ct. 248, 262 (1961), Mr. Justice Douglas reasons: "Race is an impermissible classification when it comes to parks or other municipal facilities by reason of the Equal Protection Clause of the Fourteenth Amendment. By the same token, I do not see how a State can constitutionally exercise its licensing power over business either in terms or in effect to segregate the races in the licensed premises. The authority to license a business for public use is derived from the public. Negroes are as much a part of that public as are whites. A municipality granting a license to operate a business for the public represents Negroes as well as all other races who live there." If the proscriptions of the fourteenth amendment require a state to insure that a business on private property licensed by the state does not

opinion it appears that the Court did not base its finding of state action upon failure of the state to prohibit discrimination.[16]

The Court listed several factors which established the connection between the Authority and the private lessee. Among those mentioned were: the land and building were publicly owned; the building was dedicated to "public uses"; the restaurant was an integral part of the parking building; mutual benefits were conferred on the Authority and the restaurant since the restaurant was an integral part of the parking building; plaintiff was refused service in a public building although he would have been served on private property nearby; and receipt of rent from the restaurant was necessary for financial support of the Authority. The Court then stated: "Addition of all these activities, obligations and responsibilities of the Authority . . . indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn."[17] The Court specifically limited its decision to the facts and circumstances of the case and warned against using the case as a test for every state leasing agreement.[18] Consequently, a rule of general future applicability cannot be derived.[19]

It is submitted that there are two factors which should be essential to a determination of whether there is sufficient connection between a private lessee and the state to constitute the

discriminate then a fortiori the same rule should apply when the state leases its public property to a private party.

16. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961): "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." The Court also pointed out a variety of "activities, obligations and responsibilities of the Authority" in connection with the lessee combined with the "obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service." *Id.* at 724.

17. *Id.* at 724.

18. *Id.* at 723. A factor which seems now to be of little importance is the purpose to provide a specific facility to the public. "[T]he Authority had no original intent to place a restaurant in the building, it being only a happenstance resulting from the bidding." Purpose to provide a facility to the public allowed the courts to treat the private lessee as standing in the place of the state or its subdivision. See, *e.g.*, Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956), cert. denied, 353 U.S. 924 (1957); Tate v. Department of Conservation & Dev., 133 F. Supp. 53 (E.D. Va. 1955), aff'd per curiam, 231 F.2d 615 (4th Cir. 1956), cert. denied, 352 U.S. 838 (1956).

19. Burton v. Wilmington Parking Authority, 305 U.S. 715, 725-26 (1961): "Because readily applicable formulae may not be fashioned, the conclusions drawn from the facts and circumstances of this record are by no means declared as universal truths on the basis of which every state leasing agreement is to be tested. Owing to the very 'largeness' of government, a multitude of relationships might appear to some to fall within the Amendment's embrace, but that . . . can be determined only in the framework of the peculiar facts or circumstances present."

acts of the lessee as state action. These are public ownership of the leased premises and the lessee's holding the premises open to the public.[20] The right which is protected appears to be that of a member of the public to enjoy public property in the same manner as other members of the public. There would appear to be no right of access during the term of the lease where the premises are not held open to the public. For example, where a religious or fraternal organization leases public property for its own use, exclusion from the property is made on the reasonable and constitutional basis of non-membership in the organization. But where the lessee, holding the premises open to the general public, excludes a portion of the public on the basis of race, creed, or color, the exclusion is made on the basis of an unreasonable and unconstitutional classification.[21]

Because the conclusion reached by the Court seems to represent only a slight departure from that which would seem indicated by prior decisions of other courts dealing with lease of public property,[22] it would seem that the Court exercised undue caution in not attempting to enunciate a rule capable of more general application. It is submitted that the state action concept is capable of definition within more specific limits than those announced by the Court.

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20. See Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375, 401 (1958), where the author suggests that: "if the lessee chooses not to open the meeting to the public generally, then there is no right, state or federal, of access in the public to the meeting. The lessee can then discriminate on the basis of religion or non-membership in the specific organization, whatever it may be." In *all* of the cases dealing with the question of leases of public property to private parties the suit has resulted from the fact that a member of the public has been denied access to property which is held open to the public. See, *e.g.*, Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956), cert. denied, 353 U.S. 924 (1957), where a Negro was denied service in a cafeteria of a courthouse building; Jones v. Marva Theatre, Inc., 180 F. Supp. 49 (D. Md. 1960), where Negroes were required to sit in a separate section and use separate toilet facilities in an auditorium of the town hall; Tate v. Department of Conservation & Dev., 133 F. Supp. 53 (E.D. Va. 1955), aff'd per curiam, 231 F.2d 615 (4th Cir. 1956), cert. denied, 352 U.S. 838 (1956), where Negroes were denied access to state parks; Holley v. City of Portsmouth, 150 F. Supp. 6 (E.D. Va. 1957), where access to a swimming pool was denied Negroes.

21. It should be noted that whether the lessee holds the premises open to the public or not, the "state action" is the same, *e.g.*, lease of public property. The determination of "state action" would not seem to turn on the degree of connection but whether or not the lessee restricts public access to the property unconstitutionally. See Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 SO. CAL. L. REV. 208 (1957).

22. The only factor not present in the instant case was the purpose to provide a service to the public. See note 12 *supra*.