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Constitutional Law - Freedom of Association - State Regulation of Legal Profession

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body of water as a river or stream in these situations? These questions are truly confusing if we simply rely on the test set forth in *Amerada* and *Esso*.

The geological characteristics which the court considered in *Cockrell* could be the answer to these complex problems. Instead of the flat statement that a body of water is a river or stream if it has the power to carry and deposit alluvion, this decision makes possible the use of expert testimony and physical evidence. It is submitted that the law regarding alluvion and the difficulty of characterizing a body of water as a river or stream will be greatly simplified should the Supreme Court accept the geological characteristics dealt with in *Cockrell*.

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CONSTITUTIONAL LAW — FREEDOM OF ASSOCIATION — STATE REGULATION OF LEGAL PROFESSION

The Virginia State Bar sued under state legislation to enjoin the Brotherhood of Railroad Trainmen and others from engaging in a legal aid program alleged to constitute unauthorized practice of law and solicitation of legal business.[1] Under the program, the United States was divided into sixteen regions and a local lawyer or firm was selected by the Brotherhood in each region as the most competent counsel to settle personal injury suits of union members. When a worker was injured or killed, the secretary of his local lodge would visit him or his family and urge that the claim not be settled without prior legal advice, and that in the Brotherhood's judgment the best lawyer to consult was the regional counsel recommended by it.[2] The result of the plan was to channel substantially all of the personal injury cases

1. Suit was instituted pursuant to 2 VA. CODE 619 (1950); 171 Va. xviii (1938), wherein the Virginia Supreme Court of Appeals virtually promulgated the American Bar Association's Canons of Ethics into official Rules of Court in accordance with the authority granted by statute. See VA. CODE §§ 54-42—54.83.1 (1950).

2. A great deal of uncertainty surrounds the actual relationships of attorney, client, and union in the principal case. In the past, the union official who contacted the injured had received a substantial gratuity from the lawyer involved; it also appears that the attorney paid for free trips offered to the injured, that he might consult with the attorney in question before signing a contract. Often the injured was shown a photostatic copy of checks previously recovered. See *In re* Brotherhood of Railroad Trainmen, 13 Ill. 2d 391, 150 N.E.2d 163 (1958).

of the Brotherhood members to counsel recommended by the union. The Virginia State Bar sued in the Chancery Court of Richmond, an injunction was issued as prayed for,[3] and the Virginia Supreme Court of Appeals affirmed summarily. On certiorari, two Justices dissenting, the United States Supreme Court reversed. *Held*, a state's prohibition of a union's recommendation of particular attorneys to its members as the most competent counsel to litigate their personal injury claims guaranteed by federal statute constitutes an infringement of the union members' right to freedom of association, and cannot be justified as a legitimate exercise of the state's power to regulate the legal profession. *Brotherhood of Railroad Trainmen v. Virginia*, 84 Sup. Ct. 1113 (1964).

The right of association is a new and rapidly developing concept in constitutional law. On its face, the first amendment creates no protected right of association *per se*; the Supreme Court, beginning with *Thornhill v. Alabama*[4] and *De Jonge v. Oregon*,[5] has developed the present freedom of association by implication from the explicit freedoms of assembly and speech. In the former case, union picketing was held an aspect of freedom of speech; in the latter, it was held that assembly for political discussion could not be deemed unlawful *per se* without some further showing of illegality. Although the protection extended in *De Jonge* was apparently based on freedom of assembly, the Court indicated that it was unwilling to separate the idea of freedom of assembly from that of speech.[6] Subsequent cases in-

The majority in the principal case does not elaborate on the circumstances surrounding the present action, but the dissent indicated that the president of the union exerted considerable influence on the case and on the fees of participating attorneys. 84 Sup. Ct. at 1118. Moreover, there seems to be some conflict as to the facts of the principal case as viewed by the majority and the dissent. The majority state that the union now provides a staff at its own expense to investigate the accidents, whereas the dissenting opinion clearly intimates that there is some sort of reimbursement for these services paid for by the regional counsel. See 84 Sup. Ct. at 1115, n.8, and *id.* at 1118. Nevertheless, it is to be noted that the question of "fee-splitting" is explicitly held to be an issue unnecessary to a decision in the case. *Id.* at 1116, n.9. Therefore, presumably the portion of the injunction against fee-splitting still stands. See note 3 *infra*.

3. The pertinent part of the injunction sought by Virginia reads as follows: "[F]rom holding out lawyers selected by it [union] as the only approved lawyers to aid the members or their families; . . . or in any other manner soliciting or encouraging such legal employment of the selected lawyers; . . . or from doing any act or combination of acts, and from formulating and putting into practice any plan, pattern or design, the result of which is to channel legal employment to any particular lawyer or group of lawyers . . . ." 84 Sup. Ct. at 1115-16.

4. 310 U.S. 88 (1940).

5. 299 U.S. 353 (1937).

6. *Id.* at 365: "The question, if the rights of free speech and peaceable as-

dicate the Court's growing concern with the relationship between the two freedoms. Thus, in *Wieman v. Updegraff*,[7] a state act requiring a loyalty oath of state employees was held to violate the first amendment because, under the act, *association* with an organization alone determined disloyalty and consequently there was a stifling of "democratic expression and controversy."[8] By the time of *Sweezy v. New Hampshire*[9] in 1957, freedom of association as an independent right was becoming more explicit, though still related to freedom of speech: "every citizen shall have the right to engage in *political expression and association.* This right was enshrined in the First Amendment."[10] (Emphasis added.) Finally, in *NAACP v. Alabama*,[11] Justice Harlan, speaking for the majority, announced: "It is beyond debate that freedom to engage in associations for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the due process clause."[12]

Harlan's expression in *NAACP v. Alabama* left uncertainty whether the activities protected by freedom of association were limited to those intimately related to the expression of political ideas, as implied in *Wieman* and *Sweezy*.[13] The subsequent reasoning in *NAACP v. Button*[14] indicated an affirmative answer. This case sustained the NAACP practice of hiring lawyers to

sembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects."

7. 344 U.S. 183 (1952).

8. *Id.* at 191.

9. 354 U.S. 234 (1957).

10. *Id.* at 250.

11. 357 U.S. 449 (1958).

12. *Id.* at 460.

13. This implication is drawn from the *Wieman* and *Sweezy* quotations appearing in the text. Whether the expressions appearing in the *Wieman* and *Sweezy* cases are indicative of an intention on the court's part to protect only *political* expressions is admittedly debatable. Nevertheless, it is clear that the court did intend to protect association for the advancement of *beliefs*, political or otherwise. In *Alabama*, Justice Harlan indicated in dictum that it was immaterial whether the beliefs sought to be advanced by association pertain to political, economic, or cultural matters, that the state action must, in any case, be subject to the closest scrutiny. *Id.* at 460-61. This dictum must be read in the light of Harlan's subsequent dissent in both the *Button* and *Brotherhood* cases, particularly the latter, wherein he places great emphasis on the presence or absence of political motives within the organizations involved. Furthermore, whether Harlan's dictum in *Alabama* was good law is largely a moot question with regard to the instant case, since his statement was clearly limited to the protection of the expression of *beliefs* (whether political or otherwise), whereas the instant case is concerned with the protection and effective enforcement of private property rights. See text accompanying notes 32-36 *infra*.

14. 371 U.S. 415 (1963).

handle its members' civil rights suits as an activity protected by the freedom of association. The Court emphasized that the litigation involved was not a method of resolving private differences,[15] but was rather a form of political expression. The state's regulation of these political expressions was held too broad, the state failing to show an interest sufficient to outweigh the political interests of the NAACP.

It is fundamental that the first and fourteenth amendment freedoms are not absolute. Their exercise may be subject to reasonable state regulation pursuant to a legitimate legislative goal.[16] The current test of such a regulation's validity is whether the interest of the state in avoiding a substantive evil is sufficient to overbalance the limitation sought to be placed on the exercise of the freedom in question. Further, such a regulation should be drawn as narrowly as possible.[17]

A state's power to regulate professional conduct in general has long been recognized by the United States Supreme Court, and exercised freely by the states.[18] Pursuant to this authority, twenty-six states have incorporated the American Bar Association's Canons of Ethics into state law.[19] Of prime significance are the canons aimed at curbing solicitation of legal business and protecting the attorney-client relationship. It is thus provided that no lawyer should, directly or indirectly, seek out those with personal injury claims, or remunerate those who bring or

15. *Id.* at 429: "In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression."

16. See, *e.g.*, Nelson v. County of Los Angeles, 362 U.S. 1 (1960); Uphaus v. Wyman, 360 U.S. 72 (1959); Whitney v. California, 274 U.S. 357 (1927).

17. *E.g.*, Louisiana v. NAACP, 366 U.S. 293 (1961); Shelton v. Tucker, 364 U.S. 479 (1960); NAACP v. Alabama, 357 U.S. 449 (1958); Dennis v. United States, 341 U.S. 494 (1951). The now classic "weighing and balancing test" had its origin in the *Dennis* case, 341 U.S. at 510: "Chief Judge Learned Hand, writing for the majority below, [said:] 'In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion [of rights] as is necessary to avoid the danger.' We adopt this statement of the rule." The requirement for the statute to be drawn as narrowly as possible is exemplified by the *Shelton* case, 364 U.S. at 488: "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end may be more narrowly achieved."

18. *E.g.*, Williamson v. Lee Optical, 348 U.S. 483 (1955); Semler v. Oregon, 294 U.S. 608 (1935); State v. Kievman, 116 Conn. 458, 165 Atl. 601 (1933); People v. Witte, 315 Ill. 282, 146 N.E. 178 (1924); State v. DeVerges, 153 La. 349, 95 So. 805 (1923).

19. RICE, FREEDOM OF ASSOCIATION 96, n.155 (1962).

influence the bringing of such cases to his office;[20] that no lay intermediary should be permitted to intervene between lawyer and client, and that employment by an organization "should not include the rendering of legal services to members of such an organization in respect to their individual affairs";[21] and, that no lawyer should permit his name or services to be used by a lay agency for the purpose of aiding or making possible the unauthorized practice of law.[22] In addition to the canons, state case law leaves little doubt that the states believed their legitimate power included the power to restrain solicitation,[23] even if the defendant raised a constitutional objection, such as denial of due process,[24] or of equal protection of the law.[25]

In federal courts, similar conclusions were reached. Thus, the Supreme Court has sustained a state's prohibition of solicitation over a claimed denial of due process of law, stating that "a regulation which aims to bring the conduct of the business into harmony with ethical practice is obviously reasonable."[26] Similarly, the Supreme Court on two other occasions has upheld a state's power to regulate solicitation and advertisement in other professions over constitutional objections.[27] Within this context, the Brotherhood of Railroad Trainmen had been enjoined from fee-splitting practices accompanying recommendation of attorneys by at least one lower federal court[28] and three separate state courts.[29] None of these cases, however, indicate that the Brotherhood raised a constitutional issue.

In the instant case, the majority opinion held that the activi-

20. ABA CANONS OF ETHICS Canon 28.
21. *Id.* Canon 35.
22. *Id.* Canon 47.
23. See Higgins v. State Bar, 46 Cal. 2d 241, 293 P.2d 455 (1956); Hildebrand v. State Bar, 36 Cal. 2d 504, 255 P.2d 508 (1950); People v. Motorist's Ass'n, 354 Ill. 595, 188 N.E. 827 (1943); People v. Chicago Motor Club, 362 Ill. 50, 199 N.E. 1 (1935); Ryan v. Penn R.R., 268 Ill. App. 364 (1932); Kelley v. Boyne, 239 Mich. 204, 214 N.W. 316 (1927); *In re* Fisch, 269 App. Div. 74, 54 N.Y.S.2d 126 (1945); *In re* Shiffman, 269 App. Div. 76, 54 N.Y.S.2d 128 (1945); Petition of Bar Ass'n, 15 Ohio L. Abs. 106 (Ct. App. 1933); Goodman v. Motorist's Alliance, 29 Ohio N.P.(N.S.) 31 (1931); State *ex rel.* McIntosh v. Rossman, 53 Wash. 1, 21 L.R.A.(N.S.) 821 (1909).
24. *Ex parte* McCloskey, 82 Tex. Crim. 531, 199 S.W. 1101 (1918).
25. Kelley v. Boyne, 239 Mich. 204, 214 N.W. 316 (1927).
26. McCloskey v. Tobin, 252 U.S. 107, 108 (1920).
27. Williamson v. Lee Optical, 348 U.S. 483 (1955); Semler v. Oregon, 294 U.S. 608 (1935).
28. *In re* O'Neill, 5 F. Supp. 465 (E.D.N.Y. 1933).
29. Hildebrand v. State Bar, 36 Cal. 2d 504, 225 P.2d 508 (1950); *In re* Brotherhood, 13 Ill. 2d 391, 150 N.E.2d 163 (1959); Petition of Bar Ass'n, 15 Ohio L. Abs. 106 (Ct. App. 1935).

ties of the Brotherhood, which were designed to aid its members in asserting their rights guaranteed by federal statutes, were protected by freedom of association, the state having failed to show interest sufficient to justify enjoining the plan of recommendation of attorneys to the members.[30] In effect, the decision extended the ambit of the right of association, while evidently discounting to some extent the state's traditional interest in regulation of the legal profession. In reaching its conclusion, the majority relies heavily on *NAACP v. Button*,[31] but evidently broadens the scope of freedom of association as there defined. As has been indicated, *Button* unquestionably extended the scope of the protection of freedom of association to political organizations propounding political ideas;[32] but it is equally clear that the majority opinion in that case is not authority for extending freedom of association to all organizations indiscriminately.[33] In the instant case, it appears that the Brotherhood could not be deemed to have a political interest in its members' personal liability claims, even though these claims were guaranteed by the Federal Employer's Liability Act[34] and the Safety Appliance Act.[35] The claims asserted in the instant case rest on the individual property interests of the members rather than on any collective political interest of the group.[36] Thus it is perhaps significant that the majority does not argue that the Brotherhood is protected in its actions because of its political nature. Indeed, the scope of the freedom announced in *Brotherhood* may go beyond protecting organizations advancing claims guaranteed by federal statute, although the decision indicates, with some uncertainty, that the Federal Employer's Liability Act and the Safety Appliance Act may be determinative.[37]

The majority opinion in the principal case does not include

30. 84 Sup. Ct. at 1117-18.
31. 84 Sup. Ct. at 1117.
32. See note 14 *supra*.
33. See note 14 *supra*.
34. 34 Stat. 232 (1906), as amended, 45 U.S.C. §§ 51-60 (1952).
35. 27 Stat. 531 (1893), as amended, 45 U.S.C. §§ 1-43 (1952).
36. 84 Sup. Ct. at 1115.
37. *Id.* at 1117: "A state could not . . . infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress." In a long series of state cases, it had been repeatedly held that automobile associations would not be permitted to engage attorneys and hold them out as the approved and recommended lawyers for handling the accident cases of the association's members. See note 23 *supra*. Since no federal statute is there involved, it would have been extremely helpful to an interpretation of the instant case if the court had mentioned what bearing, if any, the instant decision might have on the automobile cases.

any serious evaluation of the interest which the state has conventionally urged in defending statutes designed to curb solicitation.[38] In the past, the state's interest in controlling the solicitation of legal business was felt to have several aspects. The relationship of attorney and client was to be free of intermediaries whose interests might vary from those of the client; there was fear that third parties who obtained a financial interest in a case might exert pressures contrary to the best interest of the client; no relationship should be struck between an attorney and a third party which might lessen the degree of confidence placed in him by his client and by the public generally; no third party should be permitted to institute or encourage litigation which might, otherwise, find settlement out of court; and finally, there was the general fear that the legal profession might be reduced to a commercial enterprise.[39] Under the narrowest construction possible, the majority in the instant case holds that the state has no interest sufficient to justify an injunction which would, by its terms, prohibit the recommendation of particular attorneys to its members even though its effect is to channel personal injury cases to recommended counsel.[40] The court seems to dismiss the possibility that such a state interest might prevail with the proposition that a state cannot foreclose the exercise of constitutional rights by mere labels,[41] and that mere recommendation does not constitute solicitation.[42] The Court further concludes that the state was not trying to prevent commercialization of the legal profession.[43] The opinion does not consider the interest which the state might have in preventing a recommended attorney or firm from monopolizing this particular type of FELA litigation, especially when there is no guarantee that the counsel involved is more competent than one who might be selected, without union encouragement, by the injured himself. Moreover, the history of the Brotherhood's plan seems to indicate that where the plan was in operation, the attorneys were often obliged to split their fees with the union;[44]

38. See 84 Sup. Ct. at 1117, and text accompanying notes 41-42 *infra*.

39. See Comment, 25 U. CHI. L. REV. 674 (1958) (many cases cited); Note, 7 VAND. L. REV. 677 (1954); *but see* Note, 107 U. PA. L. REV. 389 (1958).

40. 84 Sup. Ct. at 1117-18.

41. *Id.* at 1117.

42. *Ibid.*

43. *Ibid.*

44. See, *e.g.*, *In re* Brotherhood of Railroad Trainmen, 13 Ill. 2d 391, 394, 150 N.E.2d 163, 166 (1958). Apparently, there was evidence of fee splitting in the union's Virginia operations out of which the present litigation arose, since the state court injunction was directed against fee splitting as well as recom-

and, it further appears that the union exerted control over the attorney-client relationship and the conduct of the litigation which affected the disposition of the cases.[45] Thus, the state might well have been attempting to curb what it thought was the basic problem: a program in which the incentive to split fees and the likelihood of interference with the attorney-client relationship were great, and the practical possibility of checking these evils without attacking the entire program was severely limited.[46] In the light of these considerations, the Court's denial of any substantial state interest seems at least questionable.

The majority's ambiguous extension of the scope of freedom of association, coupled with its lack of consideration of the state's interest in prohibiting solicitation of legal business by an organization, poses a serious threat to the dignity of the legal profession and the sanctity of the attorney-client relationship. Even if the court's holding is limited to situations where the object of litigation is enforcement of a cause of action provided by federal law, its ramifications could be extensive. Numerous other federal statutes[47] beside the FELA and Safety Appliance Act provide causes of action for personal and property damages to various classes of prospective litigants, who under some form of organization might enable a favored attorney or firm to escape the restrictions against solicitation in the legal profession. If, on the other hand, the instant case forecasts extension of freedom of association to an extent which would materially hamper the state's ability to prevent solicitation of legal business whenever it is carried on by an organization for the benefit of its members, the traditional protection of the legal profession and the attorney-client relationship from commercial interests and pressures might become largely a thing of the past.

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mendation. See 84 Sup. Ct. at 1115, n.9, 1118. However, as the majority viewed the case this aspect of the injunction was not at issue. See note 2 *supra*.

45. See 84 Sup. Ct. at 1118; *In re* Brotherhood of Railroad Trainmen, 13 Ill. 2d 391, 394, 150 N.E.2d 163, 166 (1958).

46. See Dennis v. United States, 341 U.S. 494, 510 (1951): "Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: 'In each case [courts] must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' We adopt this statement of the rule."

47. *E.g.*, Jones Act, 41 Stat. 988 (1920), 46 U.S.C. § 688 (1952); Longshoremen and Harbor Workers Act, 44 Stat. 1424 (1927), 33 U.S.C. § 901 (1952); Harter Act, 27 Stat. 445 (1893), 46 U.S.C. §§ 190-195 (1953); Carriage of Goods by Sea Act, 49 Stat. 1207 (1936); 46 U.S.C. § 1300 (1953); Federal Torts Claims Act, 60 Stat. 843, 28 U.S.C. § 1346 (1946).