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Constitutional Law: Are Functions of a Labor Union State Action in Terms of the Fourteenth Amendment

T. C. Black

"Misleading declarations, not necessary for the decision of the issues involved, to the effect that a misrepresentation, as distinguished from a warranty, though material will not avoid an insurance contract unless made with fraudulent intent, are becoming unfortunately frequent in recent judicial opinions. . . . Reasons inducing the too frequent appearances of these misleading declarations are to be found in the well-known rule . . . that a statement of opinion or expectation will not avoid an insurance policy unless fraudulently made; in the statutes enacted in many states expressly stating that misrepresentations shall be harmless unless fraudulent as well as material; and in the confusion of concealment, which is harmless in most instances, when honest, with misrepresentation, which, if material, is fatal though honest."[32]

Public policy no doubt favors protecting the innocent insured. However, most false statements made in complete innocence in an insurance application are in answer to questions which should be construed as asking only for the insured's opinion or honest belief. Such could have been the finding in this case. In the rare situation where the false representation is made through inadvertance or mistake, the loss should rightly fall upon the one responsible for the mistake.

The broad rule laid down by the Louisiana Supreme Court in the *Gay* case, requiring proof of intent to deceive in all material misrepresentations in order to vitiate the policy, may result in forcing upon insurers risks they did not contract to accept. For this reason the better view would seem to be that of California and the majority of jurisdictions today, that a material misrepresentation by the insured will vitiate the policy regardless of the insured's intent.

Robert J. Westwick

CONSTITUTIONAL LAW: ARE FUNCTIONS OF A LABOR UNION STATE ACTION IN TERMS OF THE FOURTEENTH AMENDMENT?

Does a labor union have the right to deny membership to otherwise qualified workers solely on the grounds of race, color, or creed? The Supreme Court of Wisconsin has answered that question in the affirmative.

In the case of *Ross v. Ebert*,[1] two Negroes sought the assistance of the courts in gaining admittance to a union which had refused to accept them as members. It was alleged that they had been excluded for no other reason than their race. The facts being admitted on demurrer, the court held that it could not compel the union to admit the plaintiffs, for the reason that it would destroy the voluntary nature of the association. Further, it was held that the discrimination in question was not of the type contemplated by the fourteenth amendment to the Constitution of the United States since there was no state action presently involved. It was pointed out by the court that the Fair Employment Code of Wisconsin,[2] in at-

Soc'y of the U.S., 173 S.C. 120, 175 S.E. 209 (1934); Mutual Life Ins. Co. of N.Y. v. Muckler, 143 Ore. 327, 21 P.2d 804 (1933); Fidelity and Deposit Co. of Md. v. Guthrie Nat'l Bank, 17 Okla. 397, 87 Pac. 300 (1906).

[32] VANCE, *op. cit. supra* note 4 at 390. See also PATTERSON, *op. cit. supra* note 3 at 384.

[1] 275 Wis. 523, 82 N.W.2d 315 (1957).

[2] WIS. STAT. §§ 111.31–111.36 (1953). Section 111.32(5) defines discrimination: "The term 'discrimination' means discrimination because of race, color, or creed, national origin . . . by an employer individually . . . and by any labor organization against any member or applicant for membership . . ." Section 111.36(1) provided for the remedy: "The Industrial Commission may receive and investigate complaints charging discrimination or discriminatory practices in particular cases, and give publicity to its findings wth respect thereto." In the principle case, the Industrial Commission's board had made a recommendation that the union cease its discrimination. The plaintiffs sought enforcement of the board's findings in the courts.

tempting to forbid discrimination by unions, was no more than a statement of non-compulsory public policy. The code provided an exclusive remedy in the nature of an administrative reprimand for the deprivation of a right which the court contends the code itself had created, albeit an admittedly poor consolation for those affected. There seems to be little doubt that the code was not designed to be compulsory.[3] However, it is more questionable whether the code created this right to join a union free from discrimination, or whether the right already existed under the protection guaranteed by the fourteenth amendment.

The view that a labor union is strictly a voluntary association is far from a novel idea.[4] Neither is it an entirely realistic one. The concept originated at a time when unions had not the size, number, nor function that they possess in modern times.[5] It seems fair to say that today labor unions enjoy vast power and privilege accorded by modern policy and statute.[6] This being so, it follows that this power should be exercised in accord with these policies and that unions should function for the benefit of working men generally, and without unreasonable exclusion. In the absence of voluntary compliance, the question of legal compulsion is raised.

The existence of an absolute right to join a union has not, so far, been directly recognized. The courts have usually held, as the Wisconsin court mentions, that trade unions, like other voluntary associations, may prescribe qualifications for membership and may restrict and exclude as they see fit and proper.[7] Allowing that a union may restrict its membership, it has been suggested that by its acceptance of the rights and privileges conjunctive with the bargaining power the union should be required to limit the basis of its exclusionary policies.[8] A requirement that a member should have the same interests, be employed in the same type of work, or have the same employer, would be reasonable.[9] Specifying eligible races would not appear to be reasonable. It is a far different thing to say that a union may deny membership to an obstructionist or to a worker in a competing trade than to allow the rejection of an otherwise acceptable person on the single standard of his color. It is to abolish this type of discrimination that is the aim of the fourteenth amendment.

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[3] Effective July 4, 1957, two months after the principle case was decided, the code was amended. Section 111.36, which was added, provides in effect that the examining board of the Industrial Commission shall issue an order to cease discrimination, if such is found to exist. It further declares: ". . . any person aggrieved by non-compliance with the order shall be entitled to have the same specifically enforced in equity . . ." Section 111.37, also added, provides that the findings and orders of the board shall be subject to judicial review.

See Wisconsin Attorney General's Opinion, May 20, 1957, which asserts that the code, as amended, provides for constitutional due process. For a holding that the enforcement of such statutes is constitutional, see: Railway Mail Carriers' Ass'n v. Corsi, 326 U.S. 88 (1945).

[4] Mayer v. Journeyman Stone Cutters' Ass'n, 47 N.J. Eq. 519, 20 Atl. 492 (1890); Greenwood v. Building Trades Council, 71 Cal. App. 159, 233 Pac. 823 (1925); Murphy v. Higgins, 12 N.Y.S.2d 913 (1939).

[5] Chaffee, *The Internal Affairs of an Association Not for Profit*, 43 HARV. L. REV. 903 (1930).

[6] For a general discussion, see: Summers, *The Right to Join a Union*, 47 COL. L. REV. 33 (1947).

[7] Colson v. Delber, 80 N.Y.S.2d 448 (1948); Cameron v. International Alliance, 118 N.J. Eq. 11, 176 Atl. 692 (1935).

[8] *Supra* note 6.

[9] "An organization has the natural right of self-preservation, and may, with propriety, expel members who show their disloyalty by joining a rival organization." Davis v. International Alliance, 60 Cal. App. 2d 713, 141 P.2d 488 (1943).

It would seem that the most obvious and difficult barrier to the recognition of a constitutional right to join a union free from discrimination is the limitation that the fourteenth amendment is aimed at state and not individual action.[10] It seems axiomatic that state and individual action are opposed and readily distinguishable. However, when one considers that the state, as an impersonal political body, must manifest its actions through individuals, the line of division may not appear quite so precise. It does not seem realistic to consider the legislative process alone as constituting state action. Necessarily, the executive branch must administer the legislation and the judicial as well must exercise its controlling function. In line with these observations, the view of state action taken by the courts has not confined itself to direct acts of the state in its sovereign capacity. Instead the scope has been extended to a consideration of the *function of the actor* and the *authority behind the action* rather than merely the *identity of the actor*. As a result, the limitation of the fourteenth amendment does not necessarily exclude the possibility that certain action by a labor union may be regarded as state action. It remains to determine whether the functions of a labor union are sufficiently governmental and whether the authority is derived from the state in such a degree that its action might be considered state action.

There has been considerable authority for applying the constitutional prohibitions on the states to cases not involving the state as an entity. For example, the Supreme Court of the United States has found that the acts of a state official not within the scope of his authority are state action.[11] In *Shelley v. Kraemer*,[12] the enforcement of a contract by the courts was termed state action, and in a later case,[13] judicial sanction of such a contract was held to be its equivalent.

Nor are private organizations beyond the reach of the amendment merely because of their private nature. The Democratic Party in Texas was enjoined from discriminating against negroes on the grounds that membership in the party was a necessary adjunct to the right to vote in that state and that this activity approached action by the state itself to such a degree that it was included in the proscriptions of the Constitution.[14] A more recent case[15] went somewhat further in holding that the fact that an organization received its substantial financial support from the state and municipal governments rendered its operations state action. Thus, a private organization with a public function and a private organization under state support have been incorporated into the scope of the sanctions of the amendment.[16]

Where the denial of membership threatens the right to work directly, courts have given equitable relief.[17] In *James v. Marinship Corp.*,[18] there was both a

[10] "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment." Civil Rights Cases, 109 U.S. 3 (1883); see also, United States v. Classic, 313 U.S. 299 (1941); Shelley v. Kraemer, 334 U.S. 1 (1948); Mooney v. Holohan, 294 U.S. 91 (1945).

[11] Screws v. United States, 325 U.S. 91 (1945).

[12] 334 U.S. 1 (1948).

[13] Barrows v. Jackson, 324 U.S. 249 (1953).

[14] Smith v. Allwright, 321 U.S. 649 (1944).

[15] Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir., 1945).

[16] See also: Marsh v. Alabama, 326 U.S. 501 (1946); Rice v. Elmore, 165 F.2d 387 (4th Cir., 1947).

[17] Newman, *The Closed Union and the Right to Work*, 43 COL. L. REV. 42 (1943); Wallace Corp. v. N.L.R.B., 323 U.S. 248 (1944), *rehearing denied*, 324 U.S. 885 (1945); Lucke v. Clothing Cutters' and Trimmers' Ass'n, 77 Md. 396, 26 Atl. 505 (1893); Schwab v. Moving Picture Machine Operators, 165 Ore. 602, 109 P.2d 600 (1941); Wilson v. Newspaper and Mail Deliverers' Union, 123 N.J. Eq. 347, 197 Atl. 720 (Ch. 1938).

[18] 25 Cal. 2d 721, 155 P.2d 329 (1944).

closed union and a closed shop, so exclusion from the union meant effectively the plaintiffs would be unable to get work where the union controlled. The California court held that a reasonable interpretation of the National Labor Relations Act,[19] under which the plant operated, would require the union to have a reasonable basis for the determination of eligibility of membership and that racial discrimination was no such reasonable standard. The court therefore granted an injunction and the union was required to allow the plaintiffs equal status as members with all the inherent rights. The decision in the *James* case was reached partly on the basis of a showing that there was a union labor monopoly in the area, but in a later California case, *Williams v. International Brotherhood*,[20] it was held unnecessary to show a monopoly to get injunctive relief, and sufficient that denial of membership in the particular union would prevent a person from becoming employed where the union was the bargaining agent. In these cases, however, it must be stressed that there was a closed shop as well as a closed union. In the principle case,[21] there was only a closed union. Therefore, the plaintiff's continued employment did not necessarily depend on their membership in the offending union.

This is not to say that, apart from the right to work, union membership does not accord very substantial advantages and rights. The Employment Peace Act[22] of Wisconsin recognizes the fact that a fair income and adequate working conditions are of vital interest to the employee. These, in turn, are contingent upon adequate machinery for the adjustment of labor disputes and the arbitration of individual grievances. The power and importance of collective bargaining having been conceded, it might be submitted that this authority to bargain for higher wages and benefits is closely connected with the right to work itself. It certainly is responsible in a large degree for prescribing the conditions under which the work must be performed. Collective bargaining has been likened to a governmental process in that it sets the patterns between employer and employee for an orderly relationship.[23] The injustice of refusing a worker some voice in this process of arbitration seems obvious. It is this bargaining power, then, that takes on the aspect and attributes of state action, deriving its force and authority from state and federal sanction. For it is by labor legislation such as the Wisconsin Employment Peace Act and the National Labor Relations Act that the power to bargain collectively is enforced. In *Betts v. Easley*,[24] a Kansas case, the union had assumed the role of bargaining agent under the provisions of the Railway Labor Act.[25] Where the union had discriminated, the court noted:

> ". . . the view that the acts complained of are those of a 'private association of individuals' is untenable. The acts complained of are those of an organization created as an agency and functioning under the provisions of federal law."

The actions of a labor union as such an agency, created and functioning under law, should be considered state action.

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[19] 49 STAT. 453 (1935), 29 U.S.C. § 159 (1952); note that the Taft-Hartley Act § 1, 81 STAT. 136 (1947), 29 U.S.C. § 141 (1952), has since prevented closed shop agreements in firms affecting interstate commerce. The union shop is still allowed which would propose a similar problem in the event of discrimination.

[20] 27 Cal. 2d 586, 165 P.2d 903 (1946).

[21] *Supra* note 1.

[22] WIS. STAT. § 111.01 (1953).

[23] For a discussion of the nature of collective bargaining see: N.L.R.B. v. Highland Park Mfg. Co., 110 F.2d 632, 638 (4th Cir. 1948).

[24] 161 Kan. 459, 169 P.2d 831 (1946).

[25] 54 STAT. 785 (1948), 45 U.S.C. § 151 (1952).