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Constitutional Law--Application of the Fourteenth Amendment to Private Schools

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COMMENTS

CONSTITUTIONAL LAW—APPLICATION OF THE FOURTEENTH AMENDMENT TO PRIVATE SCHOOLS*

I. INTRODUCTION

Within the arena of constitutional law, courts have shown an increased concern for the protection of the rights of individuals. Recent decisions in welfare law,[1] criminal law,[2] administrative law,[3] and juvenile law[4] are but a few fields that are illustrative of this fact. The courts have been protecting the rights of individuals from governmental intrusions and not from interferences by private institution or private persons. It has been long recognized that the actions of private persons and private institutions are not subject to the limitations and duties imposed by the fourteenth amendment.[5] This long established precedent was recently affirmed by the United States Supreme Court in the case of *Burton v. Wilmington Parking Authority.*[6] Thus, some form of "state action" or government intrusion under the color of state law must be present before the fourteenth amendment will prohibit an activity for not complying with its mandates.

As our society becomes more and more specialized, the need for an education has become one of the primary concerns of all individuals. However, the courts have only recently begun to protect the rights of students.

Courts have traditionally been reluctant to intrude upon the do-

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* Bright v. Isenbarger, 314 F. Supp. 382 (N.D. Ind. 1970).

1. Sherbert v. Verner, 374 U.S. 398 (1963).

2. Miranda v. Arizona, 384 U.S. 436 (1966).

3. See v. City of Seattle, 387 U.S. 523 (1967); Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1967).

4. In re Gault, 387 U.S. 1 (1967).

5. Civil Rights Cases, 109 U.S. 3 (1883).

6. 365 U.S. 715 (1961). In this case, a portion of a public building was rented to a privately operated restaurant which discriminated against Blacks. The Court found "state action" from the public funds used to construct the building and the public image associated with the building.

> main of educational affairs, not only in recognition of their lack of institutional competence in such matters, but also out of respect for the autonomy of educational institutions. Furthermore, since courts must accomodate with the scholar's demand for freedom the competing demands of the institution and the State for restriction, they are unlikely to furnish the full range of protection sought by members of the academic community alone.[7]

The legal protection afforded academic freedom is almost exclusively applied to public education.

> Teachers and students at private institutions have been unable to secure the legal protections accorded to their counterparts at public schools and universities primarily because the provisions of the Fourteenth Amendment as yet have not been applied generally to private education.[8]

Suspensions, expulsions, and other disciplinary actions by private schools have rarely been attacked, and the challenges that have been made are consistently unsuccessful.[9] The logic behind the courts allowance of freedom of action to private secondary institutions is that the alternative of free public education insures that the student attends the private school by choice and also reduces the harm to the expelled student.[10]

The same rationale, however, cannot be applied to private colleges and universities as there is no alternative of a free public college education. The fact that there are not enough public colleges and universities to accommodate all college students has led many writers to believe that the constitutional rights afforded students of a public college may soon be extended to private institutions of higher education;[11] however, this extension has yet to occur.[12] Public schools are undoubtedly required to follow and provide due process standards and procedures as

7. *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1050 (1968), (hereinafter cited as *Academic Freedom*).

8. *Id.* at 1051.

9. *See* Hoadley v. Allen, 291 P. 601, 108 Cal. App. 468 (1930). *Contra* Miami Military Inst. v. Leff, 129 Misc. 481, 220 N.Y.S. 799 (City Court Buff. 1926).

10. *Academic Freedom*, at 1155.

11. *Id.* at 1045. *See also*, Comment, *Judicial Intervention in Expulsions or Suspensions by Private Universities*, 5 WILLIAMETTE L.J. 277 (Winter 1969).

12. *See* Powe v. Miles, 407 F.2d 73 (2d Cir. 1968); Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969); Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968).

set by the fourteenth amendment in disciplinary actions of their students.[13] However, the application of similar standards to private schools depends upon the finding of "state action"[14]—an issue of much contemporary judicial consideration and debate. Since public institutions are instruments of the state, students of these schools must be granted the guarantees of the fourteenth amendment.[15]

This comment will examine the concept of state action as related to disciplinary proceedings in private secondary schools. There will be some mention of the concept as related to private universities and colleges but only in analogy and aid to the discussion of private secondary schools.

II. BRIGHT V. ISENBARGER

A. Facts

Plaintiffs in this case were students at the Central Catholic High School, a private parochial secondary school owned by the Roman Catholic Diocese of Fort Wayne-South Bend, Indiana. They were expelled from school on March 6, 1970 for the second violation of leaving the schools grounds after 8:15 A.M. Both students were aware of the fact that the second violation of this strictly enforced regulation would mean expulsion. After an attempt to be reinstated, suit was filed on April 8, 1970 in the United States District Court for the Northern District of Indiana.[16] The complaint was filed in two counts: the first count alleges a cause of action under Title 42 United States Code, section 1983[17] and asserts jurisdiction under Title 28 United States

13. *See* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961).

14. *See* Wright v. Texas So. Univ., 392 F.2d 728 (5th Cir. 1968); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968).

15. Wright v. Texas So. Univ., 392 F.2d 728 (5th Cir. 1968). *See also* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961), which held that in a disciplinary action at a public institution a student is entitled to notice that he is charged with misconduct, a statement of and justification of the charges, a list of the names of witnesses against him and their proposed testimony, an opportunity to present his defense, and an opportunity to inspect the report of the findings of the disciplinary body.

16. 314 F. Supp. 382 (N.D. Ind. 1970).

17. 42 U.S.C. § 1983 (1871) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdic-

Code, section 1343;[18] the second count alleges that the plaintiffs were deprived by the defendants of a property right arising out of their payment of tuition without due process of law and asserts jurisdiction under Title 28 United States Code, section 1331.[19] The court denied plaintiffs' motion for a preliminary injunction and granted defendants' motion to dismiss for failure to state a cause of action. In so concluding, the court held that the fourteenth amendment does not apply to the internal operations of the defendants' parochial secondary school.[20]

Attendance at Central Catholic High School is conditional upon the payment of $200 per year tuition for each student. By law, every child in Indiana between seven and seventeen years of age must attend a public school "or other school taught in the English language."[21] If a child does not attend the public school, the private school which he does attend must be in session for at least the same period of time as the public schools.[22] The State of Indiana also provides indirect financial assistance to private schools. Private schools are exempt from property taxes.[23] Where children who attend any parochial school reside on a "regular route of a public school bus" free transportation is provided along the regular bus route for such children.[24] Central Catholic High School also participates in the federal school lunch program.[25]

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tion thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

18. 28 U.S.C. § 1343(3) (1964) provides:
The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
. . . .
(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, or any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

19. 28 U.S.C. § 1331(a) provides:
The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States.

20. Bright v. Isenbarger, 314 F. Supp. 1382 (N.D. Ind. 1970).

21. IND. STAT. ANN. § 28-505 (Burns' 1968 Cum. Supp.).

22. *Id.*

23. IND. STAT. ANN. § 64-201 (Burns' 1969 Supp.).

24. IND. STAT. ANN. § 28-3903 (Burns' 1968 Cum. Supp.).

25. *See* 42 U.S.C. §§ 1751-1761 (1964).

However, it is not clear from the evidence whether the parochial school receives any state funds as a result of its participation in this federal program.

The State of Indiana, through the State Board of Education, does not of its own initiative undertake to accredit or otherwise classify private schools within the state. However, the Board will inspect and issue the appropriate commission to the school if the school makes the proper request.[26] Central High School requested inspection and certification, and on March 13, 1969 was issued a "first class commission," which is the next to the highest classification issued by the Board. Even though the State of Indiana (through the State Board of Education) commissions and certifies private schools upon request and fulfillment of certain standards, there are no regulations or statutes governing a private school's disciplinary rules or the methods by which such rules are enforced.[27]

B. Introduction to the State Action Concept

The first count of the complaint alleges a cause of action under Title 42 United States Code, section 1983.[28] Two elements are required under Section 1983.[29] The plaintiffs must first prove that the defendants have deprived them of a right secured by the Constitution and the laws of the United States. Secondly, they must show that this constitutional right was deprived "under color of law,"[30] or by "state action."[31] The second count of the complaint alleges a deprivation of a property right in violation of the due process clause of the fourteenth amendment. A finding of "state action" is also necessary to establish this allegation.[32]

26. 2 Adm. Rules § Regs. § 28-3413(2) to (5) (Burns' 1967). Such accreditation is necessary for a student to get academic credit for work done at private school when he transfers to public schools and is also required for a school to be a member of the Indiana High School Athletic Association, of which Central Catholic High School is a member.

27. 314 F. Supp. at 1387.

28. *Supra*, note 17.

29. *E.g.*, Adickes v. S. H. Kress & Co., 90 S. Ct. 1598 (1970).

30. *Id.* at 1604.

31. In cases under section 1983, the Supreme Court has consistently treated the requirement of "under color of law" as the same as "state action" required by the Fourteenth Amendment. *E.g.*, United States v. Pierce, 383 U.S. 787, 794 n.7 (1966) (and cases cited therein).

32. It is well established that only "state action," and not private action, is subject to the limitations of the fourteenth amendment. Civil Rights Cases, 109 U.S. 3 (1883). Also, the federal courts are without jurisdiction of the subject matter if state action is not present. 28 U.S.C. § 1343(3), *supra* note 18.

Almost all applications of the fourteenth amendment to private conduct based on a finding of "state action" have involved racial discrimination.[33] The Supreme Court has stated, "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the states."[34] No court has yet held that a less demanding standard of "state action" is applicable where there is an allegation of racial discrimination; however the fact that only a few non-racial "state action" cases have been successful, strongly implies this possibility.[35] The plaintiffs in *Bright* cited only two "state action" cases which did not involve racial discrimination, and these were distinguishable and inapplicable.[36] This trend to limit the finding of "state action" to cases where racial discrimination is present is illustrated by three recent decisions which have denied the application of the due process clause of the fourteenth amendment to the disciplinary procedures of private colleges and universities.[37] These cases proved damaging to the plaintiffs' cause.[38]

C. *No State Involvement in Challenged Action of Defendants*

The plaintiffs in *Bright* alleged that their expulsion from school constituted "state action" because the State of Indiana regulates the

33. *See* Evans v. Newton, 382 U.S. 296 (1966); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Reitman v. Mulkey, 387 U.S. 369 (1967).

34. Loving v. Virginia, 388 U.S. 1, 10 (1967).

35. *See* Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961); Black, *"State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1962).

36. The first case the plaintiffs cite is Public Util. Comm. v. Pollak, 343 U.S. 451 (1952) which held that the first and fifth amendments applied to a transit company's decision to broadcast radio programs on its vehicles because a governmental agency had approved the activity (and thus state action was present). The other case, Marsh v. Alabama, 326 U.S. 501 (1946) is not properly a "state action" case. In this case, the State of Alabama (not a private person) was prohibited from enforcing a trespass law against a person for distributing religious material on the sidewalks of a town. This town was indistinguishable from any other municipality except that it was owned by a private company.

37. *See* Powe v. Miles, 407 F.2d 73 (2d Cir. 1968); Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969); Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968).

38. The fact that the fourteenth amendment was not applicable to the disciplinary activities of private colleges and universities implies that there will be no application of the fourteenth amendment to the disciplinary practices of private secondary schools where there is an alternative of a free public education.

educational standards in private secondary schools, grants private schools tax exemption, allows private schools to participate in federal school lunch programs, and provides transportation to parochial school students who reside on a regular route of a public school bus.[39] However, the plaintiffs do not contend that the State of Indiana was in any way involved with the challenged disciplinary proceedings of the defendants. The cases of *Powe v. Miles*,[40] *Browns v. Mitchell*,[41] and *Grossner v. Trustees of Columbia University*[42] proved harmful to the plaintiffs' cause because each case rejected similar arguments due to the fact that there was no state involvement in the challenged activity (that is, disciplinary procedures of private colleges and universities).[43] In *Powe*, the students contended that because the State of New York regulated educational standards in private schools and universities, the disciplinary proceedings of such private schools were "state action." Judge Friendly noted that this contention

> overlooks the essential point—that the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury. . . . But the fact that New York has exercised some regulatory powers over the standard of education offered by Alfred

39. *Supra* notes 21 thru 25.

40. 407 F.2d 73 (2d Cir. 1968). In this case Alfred University, a private university, operated on its campus the New York State College of Ceramics pursuant to a contract with the State of New York. Four liberal arts students from Alfred and three ceramic college students were suspended following student demonstrations. The court held that regulation of demonstrations and the discipline of students at the ceramics college constituted "state action" and the three students affected thereby should have been afforded their rights under the fourteenth amendment. The four liberal arts students, who attended the private portion of Alfred, were not afforded the same rights.

41. 409 F.2d 593 (10th Cir. 1969). In this case, students of a private university in Colorado (Denver University) were suspended for participating in a sit-in in a nonpublic area of a university building. The university received no state funds but enjoyed a tax exemption status. The court held that this status did not amount to the "state action" that is required by the fourteenth amendment.

42. 287 F. Supp. 535 (S.D.N.Y. 1968). This was an action by students of Columbia University, a private university, to restrain disciplinary proceedings against them as a result of their sit-ins in four of the school's buildings and the President's (of the university) office. The court found that there was no "state action" present as the State of New York was not involved in the disciplinary proceedings. The court further noted that a performance of a public function (education) by a private college does not render its conduct to be "state action" so as to subject the college to federal constitutional requirements.

43. *See* 407 F.2d at 81; 409 F.2d at 596; 287 F. Supp. at 548.

44. 407 F.2d at 81.

> University does not implicate it generally in Alfred's policies toward demonstrations and discipline.

Therefore, under the reasoning of the *Powe, Browns*, and *Grossner* decisions, the federal court in *Bright* held that the expulsion of the plaintiffs by the parochial school authorities was not "state action" because the State of Indiana was in no way involved in the challenged activities.[45]

D. Not Sufficient State Involvement with Private School in Ways Other Than Challenged Activity

The court in *Bright*, as an alternative ground for holding that the defendants' actions were not "state action," held that the other relationships between the State of Indiana and Central Catholic High School were insufficient to make the expulsions of the student-plaintiffs "state actions."[46] A two-fold inquiry is necessary in finding "state action" as shown by *Evans v. Newton*:[47] first, what was the nature of the state involvement and, secondly, what was the nature of the institution involved. In the recent case of *Pennsylvania v. Brown* (The Girard College Case),[48] Judge Lord noted for "state action" to be present in the educational context there must be "significant" state involvement.[49] In discussing the purpose of the "state action" doctrine, Judge Lord stated:

> The quest is not for a scintilla of State action, for State action is ubiquitous and persuasive. The inquiry is properly directed to the type of state action involved, the extent to which the State thereby associates itself or is in the public view associated with invidious discriminatory purposes and policies, and, accordingly, the extent to which the responsibility for the perpetuation of those invidious designs may be justifiably ascribed to the States itself.[50]

In discussing the nature of the state involvement, the *Bright* Court felt that there could be no doubt that the supervision by the State of Indiana of educational standards for private schools and the tax exemption granted to these schools constituted action by the state. How-

45. 314 F. Supp. at 1395.
46. *Id.*
47. 382 U.S. 296 (1966).
48. 270 F. Supp. 782 (E.D. Pa. 1967).
49. *Id.* at 788. *E.g.*, Reitman v. Mulkey, 387 U.S. 369, 380 (1967).
50. 270 F. Supp. at 789.

ever, there was not "significant" involvement by the state so that the challenged actions could be justifiably ascribed to the state itself.[51] The court thus concluded that the relationship between the State of Indiana and Central Catholic High School did not so insinuate the state "[i]nto a position of interdependence with . . . [the school] that it must be recognized as a joint participant in the challenged activity. . . ."[52] Thus, there was not "significant involvement" by the State of Indiana required to impute "state action."

The plaintiffs in *Bright* also failed to establish the second inquiry of *Evans* which is, the nature of the institution in terms of services it performs in the community. In *Evans*, the Court concluded that a privately owned park which had been open to every white person had the appearance of a public facility as it rendered a service "municipal in nature."[53] However, the court specifically excluded schools from its examples of institutions which traditionally serve the community.[54] Thus, Central Catholic High School does not give the appearance of being a public facility as did the park in *Evans*. Also, there is nothing in the public image of the parochial school that would suggest that its disciplinary proceedings were approved by the State of Indiana, much less that the state was a "joint participant" in them.[55]

E. Constitutional Right to a Private Education

Almost a half century ago, the United States Supreme Court in *Pierce v. Society of Sisters*[56] invalidated a state statute which would have effectively prohibited private primary schools because the statute unreasonably interfered with the right of the parent to educate its child in a school of its choice.[57] *Pierce* relied on an earlier Supreme Court decision that held that a state's desire to foster homogeneous people by prohibiting the teaching of German in private primary schools un-

51. *See* Evans v. Newton, 382 U.S. 296, 299 (1966); Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961); Reitman v. Mulkey, 387 U.S. 369, 380 (1967).

52. Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961).

53. Evans v. Newton, 382 U.S. 296, 301 (1966).

54. *Id.* at 302.

55. *See* Evans v. Newton, 382 U.S. 296, 301, 302 (1966); Burton v. Wilmington Parking Auth., 365 U.S. 715, 723-25 (1961); Pennsylvania v. Brown, 270 F. Supp. 782, 791, 792 (E.D. Pa. 1967).

56. 45 S. Ct. 571 (1924).

57. *Id.*

reasonably interfered with the right of parents to control the education of their children.[58] The *Pierce* decision stands for the proposition that the right of parents to establish, and send their children to, private and parochial secondary schools is a constitutionally protected right.[59] "With respect to ideology, religion, wealth, and intelligence, but not with respect to race, our society has adjudged that there is value in the richness of disparate traditions."[60] Private schools provide a diversity that the public schools may not and should not provide. Because private education is not supported by the government, it is not restricted to secular and nonpartisan goals.[61] Thus, private schools may emphasize moral development and strict discipline in a manner that public schools are not allowed to do.[62] In a previously mentioned case of *Grossner v. Trustees of Columbia University*,[63] Judge Frankel rejected the argument that because Columbia University performs a public function it was subject to the fourteenth amendment. In so doing, he stated that:

> If the law were what plaintiffs declare it to be, the difficult problem of aid to "private schools"—specifically, parochial schools —would not exist. Indeed, the very idea of a parochial school would be unthinkable.[64]

Therefore, it is obvious that if the fourteenth amendment is to be extended to private schools' disciplinary practices, the constitutionally protected rights of parents to send their children to schools of their choice will be violated. This, the federal court in *Bright* found to be intolerable.

III. CONCLUSION

In examining the disciplinary proceeding of a student, the courts have granted the students the guarantees of the fourteenth amendment if the student is attending a public institution.[65] The courts have yet to

58. Meyer v. Nebraska, 43 S. Ct. 625 (1923).

59. 45 S. Ct. 571 (1924).

60. *Academic Freedom*, 81 HARV. L. REV. 1045, 1064 (1968).

61. *Id.* at 1062-1064. In the case of West Virginia State Board of Educ. v. Burnette, 319 U.S. 624 (1943) the Supreme Court noted that the goal of public education is "secular education and political neutrality." *Id.* at 637.

62. *See* Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969); Richards v. Thurston, 304 F. Supp. 449 (D. Mass. 1969).

63. 287 F. Supp. 535 (S.D.N.Y. 1968).

64. *Id.* at 549 n.19.

65. *Supra*, note 14.

extend the same rights and guarantees to students at private schools because of the lack of "state action" as required by the fourteenth amendment. There has been some speculation by legal scholars that the courts will strain in the future to find "state action" where the students are attending a private college or university; because there is no alternative present here as there is at the secondary level; and because there are not enough public colleges and universities to educate the large numbers that are now attending college. If these private colleges did not exist, the states would have to provide for more colleges. Therefore, writers argue that the students at private colleges and universities should be given the same rights as those at public institutions. However, it is not likely that the courts will extend these same rights to students at private secondary schools as it is obviously their choice to attend, and there is an alternative of free public education where all guarantees of the fourteenth amendment are granted in disciplinary proceedings.

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