7-1-1973

The Right to Light: Due Process and Public Utility Termination

John D. Schmelzer

balance between the rights of a secured party and a subsequent buyer in sections 9-306 and 9-307, and to engraft into either section, by judicial interpretation, requirements that are not there, upsets this balance. The proper result in *Swift* should not be accepted blindly. An understanding of the concepts underlying sections 9-306 and 9-307 is essential to their proper application.

ADAM K. LLEWELLYN

THE RIGHT TO LIGHT: DUE PROCESS AND PUBLIC UTILITY TERMINATION

Colorado gas and electric customers sought declaratory and injunctive relief, as well as money damages, against a privately owned Colorado public utility company. Their complaint in the federal district court charged that the company had violated the customers' rights to procedural due process by unlawfully terminating their gas and electric service without a hearing or without providing for one. Plaintiffs contended that the public utility's termination of service involved state action within the purview of the Civil Rights Acts,[1] and thus gave federal jurisdiction over the basic dispute. The company maintained that its policy of terminating service for failure to pay bills did not involve state action, and, therefore, that the customers did not have a claim for the taking of property without due process. The United States District Court for the District of Colorado, refusing to grant the motion to dismiss,[2] *held:* The actions of a privately owned public utility operating under close supervision of the state public utilities commission and supplying service under an exclusive franchise from the state are "state action" under the purview of 42 U.S.C. § 1983 (1970). *Hattell v. Public Service Co.*, 350 F. Supp. 240 (D. Colo. 1972).

---

1. The Civil Rights Acts are 42 U.S.C. § 1983 (1970) and 28 U.S.C. § 1343 (1970). Section 1983 provides a cause of action in the event a state contravenes the Constitution. The act states:

> 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 person within the jurisdiction 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.

28 U.S.C. § 1343(3) provides federal district courts with jurisdiction to redress deprivation under color of state law of any right secured by the Constitution. Section 1343(3) reads:

> 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, of 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. . . .

2. The claim for money damages, however, was dismissed. It was asserted under state

It is well settled that the operations of governmentally owned and operated public utility concerns, such as gas, electric and water companies, constitute state actions.[3] *Hattell*, however, is one of a growing number of federal court decisions[4] which have held that the practices of privately owned by publicly regulated utility companies may be "state action" under the Civil Rights Acts and, thus, subject to due process limitations. The basis for the decision in *Hattell* and similar cases lies in the interpretation of what constitutes "state action" under the Civil Rights Acts. In *Adickes v. S. H. Kress*,[5] the Supreme Court pointed out two elements that were necessary in order to establish a claim under 42 U.S.C. § 1983. First, the plaintiff must prove that the defendant has deprived him of a right secured by the "Constitution and laws" of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right under color of state law.

It is well settled that it is a violation of the fourteenth amendment for a state to "deprive any person of life, liberty, or property, without due process of law."[6] However, several lower federal courts had felt that the application of 28 U.S.C. § 1343(3) was limited to circumstances wherein deprivation of personal liberties was alleged.[7] Thus, "while property rights and rights of personal liberty are entitled to the procedural protections provided by due process, only the latter could be asserted in § 1983 civil rights actions."[8]

This personal liberty versus property right distinction can be attributed to Justice Stone's concurring opinion in *Hague v. C.I.O.*[9] In *Hague*, Justice Stone proposed that jurisdiction under 28 U.S.C. § 1343(3) be limited to deprivation of "personal liberty" and not include infringement of property rights. For thirty-three years the Supreme Court neither formally adopted nor rejected this distinction, and the full parameters of jurisdiction under section 1343(3) remained ambiguous.

Any question as to whether a civil rights action under section 1343 lay only for alleged deprivation of personal rights was finally put to rest by the Supreme Court in *Lynch v. Household Finance Corp.*[10] In *Lynch*,

law only. The district court, which would have had at most pendent jurisdiction, dismissed the claim in the interest of both avoiding needless decisions of state law, and fairness to litigants. 350 F. Supp. at 246.

3. *E.g.*, Davis v. Weir, 328 F. Supp. 317 (N.D. Ga. 1971).

4. Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir. 1972); Bronson v. Consolidated Edison Co., 350 F. Supp. 443 (S.D.N.Y. 1972); Stanford v. Gas Serv. Co., 346 F. Supp. 717 (D. Kan. 1972); Palmer v. Columbia Gas Co., 342 F. Supp. 241 (N.D. Ohio 1972).

5. 398 U.S. 144, 150 (1969).

6. U.S. CONST. amend. XIV, § 1.

7. *See, e.g.*, Weddle v. Director, Patuxent Inst'n., 436 F.2d 342 (4th Cir. 1970), *vacated and remanded* 405 U.S. 1036 (1972).

8. Ihrke v. Northern States Power Co., 459 F.2d 566, 568 (8th Cir. 1972), *citing* Ihrke v. Northern States Power Co., 328 F. Supp. 404, 407 (D. Minn. 1971) [hereinafter referred to as *Ihrke*].

9. 307 U.S. 496, 518 (1939) [hereinafter referred to as *Hague*].

10. 405 U.S. 538 (1972) [hereinafter referred to as *Lynch*].

the court rejected the distinction between personal liberties and proprietary rights as a limitation on the scope of jurisdiction under section 1343. "Neither the words of § 1343(3) nor the legislative history of that provision distinguishes between personal and property rights."[11] The *Lynch* opinion suggested an additional reason for rejecting the property rights limitation: specifically, that personal liberties and proprietary rights were interdependent and indistinguishable.

Decisions rendered in *Stanford v. Gas Service Co.*,[12] *Palmer v. Columbia Gas Co.*,[13] and *Bronson v. Consolidated Edison*[14] are in accord with the *Hattell* reasoning that public utility termination practices constitute "state action" within the purview of the Civil Rights Acts. However, unlike *Hattell*, these cases did not rely upon *Lynch* and simply avoided or loosely construed any distinction between proprietary interests and personal rights. The decisions in these cases evolved from the respective courts' recognition of the changing concept of property.[15]

It has been suggested that not all "rights" or "entitlements" requiring due process protection have been stated.[16] The entitlement doctrine had been developed by the court to protect interests variously denominated as "statutory entitlements" or "important interests."[17] Welfare benefits,[18] drivers licenses,[19] and unemployment compensation,[20] by no means common law property forms, are among those areas that have been characterized as entitlements and thus fall within the broad definition of property to be protected by the due process clause of the fourteenth amendment. The *Stanford*, *Palmer*, and *Bronson* courts recognized that public utility services—specifically heat, water, gas, and electricity —were necessities of life and that termination of these utility services also constituted a taking of a "right" or an "entitlement."

The critical issue in *Hattell* and related cases, however, was whether termination policies of privately owned public utility firms was "state action" within the meaning of section 1983. Clearly, all persons are subject to some degree of state regulation, but it is contrary to the intent of section 1983 to label all such entities and activities as "state action." The Supreme Court has applied the term only on a case by case basis and

---

11. *Id.* at 543.
12. 346 F. Supp. 717 (D. Kan. 1972) [hereinafter referred to as *Stanford*].
13. 342 F. Supp. 241 (N.D. Ohio 1972) [hereinafter referred to as *Palmer*].
14. 350 F. Supp. 443 (S.D.N.Y. 1972) [hereinafter referred to as *Bronson*].
15. *See* Reich, *The New Property*, 73 YALE L.J. 733 (1964). Distinctions between conventional property interests, traditionally protected by due process, and governmental "privileges" are being abolished. The latter group, if classified as an entitlement, may also have to be afforded due process protection.
16. Stanford v. Gas Serv. Co., 346 F. Supp. 717, 719 (D. Kan. 1972), *citing* McGautha v. California, 402 U.S. 183, 255 (1971) (Justice Brennan dissenting).
17. Fuentes v. Shevin, 407 U.S. 67 (1972).
18. Goldberg v. Kelly, 397 U.S. 254, 262 (1970).
19. *See* Bell v. Burson, 402 U.S. 535, 539 (1971).
20. *See* California Human Resources Dept. v. Java, 402 U.S. 121 (1971).

has never formulated an exact definition.[21] Consequently, "state action" is a factual determination in each case.

Federal courts have generally held that when a private concern performs a public function and is subject to public regulation, the conduct may generally be characterized as "under color of law or state action." In *Evans v. Newton*,[22] state park facilities were deeded to private trustees who, in turn, denied entrance to the park to Blacks. The Supreme Court ruled that the state was a party to the discrimination and held that "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations."[23]

The Supreme Court's most recent statement on the parameters of "state action" under section 1983 was in a discrimination case, *Moose Lodge No. 107 v. Irvis*.[24] In *Moose Lodge*, the petitioner, a Black, was invited as a guest to a fraternal organization. He was refused service on the grounds that the club's by-laws forbid service to non-whites. Irvis argued that the state's granting of a liquor license and the regulation exercised over the grantee was sufficient to make a private club's action in discriminating on the basis of race "state action." The Supreme Court disagreed, noting that the Liquor Control Board's regulations did not encourage or play a significant part in enforcing racially discriminatory guest policies.

The *Hattell* court noted that there was sharp disagreement between jurisdictions as to whether public utility termination policies constituted state action. In *Kadlec v. Illinois Bell Telephone Co.*[25] and *Lucas v. Wisconsin Electric Power Co.*,[26] the Seventh Circuit held that a utility's relationship with its respective public service commission did not involve the state to a sufficient extent as to fall within the purview of "state action" under section 1983. The Eighth Circuit in *Ihrke*,[27] followed by *Stanford* and *Bronson* in other jurisdictions made contrary findings. *Hattell* chose to characterize the utility's termination policies as "under color of law" rather than follow the more restrictive approach of the Seventh Circuit in *Kadlec* and *Lucas*.

In *Kadlec*, the court rejected the contention that the filing of regulations by the defendant phone company and subsequent approval of them by state administrators clothed the utility with any state authority. The

21. [T]o fashion and apply a precise formula for recognition of state responsibility . . . is an "impossible task" which "This Court has never attempted." . . . Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.
Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

22. 382 U.S. 296 (1966).

23. *Id.* at 299.

24. 407 U.S. 163 (1972) [hereinafter referred to as *Moose Lodge*].

25. 407 F.2d 624 (7th Cir. 1969) [hereinafter referred to as *Kadlec*].

26. 466 F.2d 638 (7th Cir. 1972) [hereinafter referred to as *Lucas*].

27. Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir. 1972).

filing and approval of such regulations were deemed incidents of state regulatory power and were designed merely to inform citizens of their rights. The opinion added that conduct "under color of law" could rarely be satisfied by anyone other than a state official.[28] Judge Kerner, however, in his concurring opinion, hinted that there might be situations in which a privately owned utility company was so entwined with the state as to characterize its conduct "under color of law." He suggested seven factors[29] in determining whether a private utility was engaging in state action.

In *Lucas*, all Wisconsin utilities were required to file detailed rules regarding their operation with the state utilities commission. The commissioners adopted the defendant power company's regulations. These rules provided for termination of service five days after notice was first given if the amount owed was not promptly paid. The court indicated that the utility was not acting under "color of law" in threatening to terminate service because the state's acceptance of the utility regulations had in no way diminished the rights of the plaintiff customer, nor significantly expanded the rights of the defendant power company.[30] The plaintiff argued that the defendant power company had a state-granted monopoly, and thus, the defendant's rights had been substantially enlarged. In dismissing this argument, the Seventh Circuit held that state involvement with the entity inflicting injury upon the plaintiff was insufficient to invoke fourteenth amendment protections. What was needed was state involvement with the specific activity causing the injury. The state's laxness in failing to require a formal hearing prior to termination of service was state inaction and not equivalent to "state action" for fourteenth amendment purposes.[31]

The *Hattell* opinion distinguished *Lucas*, as well as cases that were favorable to the plaintiff. In *Lucas*, termination of service was effected automatically by turning off a switch. In the instant case, the power company's agents entered upon private property to terminate service. The utility company's powers had been enhanced because the state had authorized trespass by the utility under certain circumstances. The utility's assumption of a police power clearly established "state action."

Ihrke, which was favorable to the plaintiff, was also subject to

28. Kadlec v. Illinois Bell Tel. Co., 407 F.2d 624, 626 (7th Cir. 1969), *citing* Jobson v. Henne, 355 F.2d 129, 133 (2d Cir. 1966).

29. The factors which should be considered are whether 1) the entity is subject to close regulation by a statutorily-created body . . . , 2) the regulations filed with the regulatory body are required to be filed as a condition of the entity's operation, 3) the regulations must be approved by the regulatory body to be effective, 4) the entity is given a total or partial monopoly by the regulatory body, 5) the regulatory body controls the rates charged and/or specific services offered by the entity, 6) the actions of the entity are subject to review by the regulatory body, and 7) the regulation permits the entity to perform acts which it may not otherwise perform without violating state law.
Kadlec v. Illinois Bell Tel. Co., 407 F.2d 624, 628 (7th Cir. 1969) (concurring opinion).

30. Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638 (7th Cir. 1972).

31. *Id.* at 647.

factual distinctions. In that case, the city of St. Paul benefited from the payment of bills resulting from the utility's threatening to terminate service. The city received five percent of the utility's gross earnings for the right of the franchise. Though the connection between private conduct and state authority was not as blatant in *Hattell*, the plaintiff alleged that the Colorado Power Company paid the state a flat fee for its franchise. The *Hattell* opinion stressed that any distinction between a profit sharing agreement and a flat fee for a franchise was meaningless, and as the utility company was performing a public function, both were indicators of "state action."[32]

Other cases on the issue of whether privately owned public utility practices constitute "state action" have been resolved by similar, if not identical, reasoning to that in *Hattell*. In *Stanford*, the court found that the defendant utility company's operations had become so entwined with governmental control as to be state action. The court reasoned that since a public utility performed a public function under public regulation, it must be subject to constitutional restraints.[33] In *Palmer*, the court emphasized that the defendant utility company was acting in a governmental capacity when it exercised police power ordinarily reserved to the state. In *Palmer*, as in the instant case, a statute permitted the defendant power company to enter upon private property to terminate service. The court reasoned that the statute evidenced that the defendant's relationship with the government was far greater and more prevalent than that of an ordinary business enterprise.[34] The defendant's intrusion upon private property to suspend service was an exercise of police power. It was analogized to a state police officer executing a writ of replevin, entering upon private land, and depriving a person of possession of goods.[35] There was little question that this was state action.

The *Hattell* opinion suggests a further reason for finding that utility suspension policies are "under color of law." Recently, privately owned public utilities have successfully argued that they are exempt from Sherman Anti-Trust legislation.[36] Their defense was not based upon the ground that they were not monopolies, but rather that their activity is exempt as "state action." The utilities claimed that they were monopolies because of state policy and that their rates and practices were subjected to meaningful state regulation. The *Hattell* opinion merely adopts the utilities' defense to Sherman Anti-Trust prosecutions, thus bringing them within the "state action" requirement of section 1983.[37]

In summary, *Hattell* and similar recent cases stand for the proposi-

32. 350 F. Supp. at 245.
33. Stanford v. Gas Serv. Co., 346 F. Supp. 717, 722 (D. Kan. 1972).
34. Palmer v. Columbia Gas Co., 342 F. Supp. 241, 245 (N.D. Ohio 1972).
35. *Id.* at 246.
36. *See, e.g.*, Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 405 U.S. 969 (1972).
37. 350 F. Supp. at 245.

tion that municipal regulation of rates, collection practices, and termination practices may cause the utility to be so entwined with government as to lose its private status. However, courts will not hold that merely because a utility is pervasively regulated, any action taken by it is under "color of law." Only those activities which are subject to state regulation will be deemed "state action." *Hattell*, of necessity, was limited to the issue of what constituted state action and did not address the question of what was needed to conform to due process. Due process, when taken from principle to practice, demands only that what is available to the individual be fundamentally fair in light of the circumstances. No doubt, implementation of due process requirements will be a fertile source of future litigation.

JOHN D. SCHMELZER

WIRETAP EVIDENCE INADMISSIBLE IN CIVIL CASES WITHOUT CONSENT OF ONE COMMUNICANT

A wife brought an action for the dissolution of her marriage. During the presentation of testimony on the issue of temporary child custody, her husband offered in evidence recordings of intercepted telephone conversations he had obtained by tapping two telephone lines coming into the home of the parties.[1] The wife filed a motion to suppress the intercepted wire communications,[2] but the trial court denied the motion.[3] On appeal, the District Court of Appeal, First District, reversing the trial court, held that the statutory and constitutional law of the State of Florida precludes the admissibility of intercepted wire communications unless the interception be by consent of one of the parties to the conversation, or by authorization of a court of competent jurisdiction.[4] The Florida Supreme Court *held*, affirmed: The decision of the district court is adopted with the addition that the statute in question[5] makes no exception which allows the admission of wiretap evidence in domestic relation cases in which neither party to the communication has consented to the interception. *Markham v. Markham*, 272 So.2d 813 (Fla. 1973).

1. The husband and wife owned, as tenants by the entireties, the marital home. One of the telephones tapped was listed in the husband's name. The second telephone in the home is an extension of a phone installed in the "Nancy Markham School of Dance."

2. The wife relied on the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2518 (1970), and FLA. STAT. § 934.06 (1971).

3. The trial judge preserved to the wife the right to object to portions of the recordings only on grounds of relevancy or materiality.

4. Markham v. Markham, 265 So.2d 59 (Fla. 1st Dist. 1972). In light of the supreme court's adoption by reference of the district court of appeal's decision, citation to portions of the case herein will be to the district court's opinion.

5. FLA. STAT. § 934.01 (1971).