University of Richmond Law Review

Volume 9 | Issue 3 Article 7

1975

Constitutional Law-Termination of Utility Services for Nonpayment of Bill Without A Hearing Does Not Violate Due Process Clause of Fourteenth Amendment

Constitutional Law—TERMINATION OF UTILITY SERVICES FOR NON-PAYMENT OF BILL WITHOUT A HEARING DOES NOT VIOLATE DUE PROCESS CLAUSE OF FOURTEENTH AMENDMENT—*Jackson v. Metropolitan Edison Co.*, 95 S. Ct. 449 (1974).

Present governmental regulation of public utilities can be traced back to early English common law which imposed duties and obligations upon those who performed vital public services.[1] Two theories justified the imposition of these controls. The first focused on the monopoly status of the regulated business,[2] while the second relied on the "public calling" aspect of the enterprise.[3] Today under the judicial power[4] almost every state has a public utility commission which imposes a wide range of controls over the production and delivery of utility services. This can have far-reaching consequences because the due process clause of the fourteenth amendment[5] requires that states, or entities acting under color of state law, give reasonable notice and an impartial hearing prior to the termination of privileges, services, entitlements, benefits, or rights.[6]

Several federal cases have considered whether the fourteenth amendment requires that utility service customers be afforded the protection of procedural due process before a privately owned company may discontinue services for non-payment of bills.[7] In each case the plaintiffs brought suit

1. Barnes, *Government Regulation of Public Service Corporations*, 3 MARQ. L. REV. 65, 67 (1919). *See generally* M. GLAESER, PUBLIC UTILITIES IN AMERICAN CAPITALISM 196 (1957); B. WYMAN, PUBLIC SERVICE CORPORATIONS 3-16 (1911).

2. Out of medieval England and the de facto monopolies held by small groups of businessmen and professionals, evolved the notion of "natural monopolies." Natural monopolies were those businesses which, by their very nature, did not admit free competition and consequently under common law, would be subject to regulation and control. *See* authorities cited note 1 *supra*.

3. B. WYMAN, PUBLIC SERVICE CORPORATIONS 3-16 (1911). Businesses that controlled vital resources or supplied services and goods needed by all members of society were held to be engaged in "public callings."

4. Attorney Gen. v. Railroad Co., 35 Wis. 425, 530-33 (1874).

5. U.S. CONST. amend. XIV, § 1:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

6. 14 B.C. IND. & COM. L. REV. 317 (1972).

7. For cases holding that public utility termination procedures are subject to the due process clause of the fourteenth amendment, see Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir.), *vacated as moot*, 409 U.S. 815 (1972); Palmer v. Columbia Gas Co., 342 F. Supp. 241 (N.D. Ohio 1972); Bronson v. Consolidated Edison Co., 350 F. Supp. 443 (S.D.N.Y. 1972); Hattel v. Public Serv. Co., 350 F. Supp. 240 (D. Colo. 1972); Stanford v. Gas Serv. Co., 346 F. Supp. 717 (D. Kan. 1972). *Contra*, Lucas v. Wisconsin Elec. Power Co., 466 F.2d

under 42 U.S.C. § 1983,[8] which requires proof that: the defendant acted "under color of" state law;[9] and the plaintiff was deprived of a right guaranteed by the Constitution or the laws of the United States.[10] The pivotal issue in these cases has been the requirement that the deprivation be carried out "under color of" state law.[11]

---

638 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973); Martin v. Pacific Northwestern Bell Tel. Co., 441 F.2d 1116 (9th Cir.), *cert. denied*, 404 U.S. 873 (1971); Kadlec v. Illinois Bell Tel. Co., 407 F.2d 624 (7th Cir.), *cert. denied*, 396 U.S. 846 (1969).

8. 42 U.S.C. § 1983 (1970):

> 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.

For a general history of section 1983 see Poole, *Statutory Remedies for the Protection of Civil Rights*, 32 ORE. L. REV. 210 (1953).

9. Although the language of § 1983, "under color of" law, appears to be broader than the language of the fourteenth amendment, which refers only to state action, the Supreme Court has held that it is the same as state action under the fourteenth amendment. *See* United States v. Price, 383 U.S. 787, 794 n.7 (1966). *See also* Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).

10. While utility service might not be considered property in the conventional sense, the Supreme Court in Goldberg v. Kelly, 397 U.S. 254, 262 (1970), recognized a new form of property called "entitlements." An entitlement is a judicially determined property right arising from the relationship of the state and an individual which is created when a state confers a particular status on an individual. Comment, *The Emerging Constitutional Issues in Public Utility Consumer Law*, 24 U. FLA. L. REV. 744, 747 (1972). For a discussion of status as a property right see Reich, *The New Property*, 73 YALE L.J. 733 (1964).

The *Goldberg* rationale holds that once the state has undertaken to provide a service or extend a benefit to an individual, it must comply with the due process requirements of the fourteenth amendment before such service or benefit can be terminated. The states require utility companies to obtain licenses before they can furnish services to the public; state statutes require utilities to serve all who apply for such services, and evince a strong interest in assuring that utility services are fairly provided. Therefore, it can be strongly argued that the state has conferred a benefit upon the public, the denial of which requires due process of law.

Things that have been held to be entitlements include: Bell v. Burson, 402 U.S. 535 (1971) (driver's license); California Dept. of Human Resources v. Java, 402 U.S. 121 (1971) (unemployment compensation); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits); Thorpe v. Housing Authority, 386 U.S. 670 (1967) (public housing).

11. The Supreme Court has persistently refused to formulate a precise definition of state action. Instead, it has said: "[o]nly 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). The plaintiffs in the utility cases (*see* note 8 *supra*) have argued the presence of state action under the following four theories:

> 1. Utilities are subject to state regulation. Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952); American Communication Ass'n v. Douds, 339 U.S. 382 (1950); Steele v. Louisville & N. R.R., 323 U.S. 192 (1944).

In the recent case of *Jackson v. Metropolitan Edison Co.*,[12] the United States Supreme Court dealt squarely with this issue.[13] Mrs. Catherine Jackson brought suit under 42 U.S.C. § 1983 against Metropolitan Edison Company,[14] a privately owned and operated Pennsylvania corporation, when they terminated her electric service for non-payment of an overdue bill without giving her a hearing and an opportunity to pay any amounts found due. Mrs. Jackson argued that Metropolitan Edison was acting under color of state law[15] and that its termination process deprived her of her property without due process of law.[16] The District Court for the Middle District of Pennsylvania dismissed the complaint upon the grounds

---

2. Utilities perform a "public function." Amalgamated Food Employees Union 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Evans v. Newton, 382 U.S. 296 (1966); Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946).

3. Utility companies are agents of or joint participants with the state. Burton v. Wilmington Parking Auth., 365 U.S. 715, 723-25 (1961); Cooper v. Aaron, 358 U.S. 1, 15-16 (1958); Smith v. Allwright, 321 U.S. 649, 663 (1944); Nixon v. Condon, 286 U.S. 73, 88-89 (1932).

4. The three previous theories are not distinct, but are meant to be applied together. Examining each theory individually might not support a finding of state action, but when applied cumulatively to public utilities there emerges a distinct pattern of state involvement. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722-26 (1961).

For a more detailed discussion of these theories, see Comment, *Constitutional Safeguards for Public Utility Customers: Power To The People*, 48 N.Y.U.L. REV. 493, 500-11 (1973).

12. 95 S. Ct. 449 (1974) [hereinafter cited as *Jackson*].

13. It must be remembered that interpretation of the state action requirement has been chiefly at issue in cases concerned with acts of racial discrimination, where the Court will look closely before dismissing a complaint alleging racial discrimination for lack of state action. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Reitman v. Mulkey, 387 U.S. 369 (1967); Evans v. Newton, 382 U.S. 296 (1966); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

14. Metropolitan Edison Company holds a certificate of public convenience issued by the Pennsylvania Public Utilities Commission. As a condition of holding its certificate it is subject to extensive regulation by the State Utilities Commission which has broad power over utility rates, PA. STAT. ANN., tit. 66, § 1141 *et seq.* (1959), over the character and quality of utility services and facilities, *id.* §§ 1171, 1182-83, and broad power to regulate and investigate complaints about utilities, *id.* §§ 1391, 1398.

15. Mrs. Jackson based her allegation of state action on the fact that Metropolitan Edison was subject to extensive regulation by the Pennsylvania Utilities Commission, the idea that Metropolitan Edison performed a "public function," and the theory that the state has so insinuated itself into a position of interdependence with Metropolitan Edison that it was a joint participant in the termination procedures. She also claimed that the state had approved and authorized the termination procedures because the Pennsylvania Utilities Commission approved the general tariff Metropolitan Edison had filed which included the right to terminate services for non-payment. 95 S. Ct. at 451.

16. Mrs. Jackson claimed her right to electric service was property under the "entitlement theory." *See* note 10 *supra*. 95 S. Ct. at 451.

that she had failed to show the necessary state action.[17] The Third Circuit Court of Appeals affirmed the district court's dismissal, and the Supreme Court affirmed. Justice Rehnquist, writing for the majority, found that the state was not sufficiently connected with the termination to make Metropolitan Edison's conduct attributable to the state for purposes of the fourteenth amendment.[18]

In the early fifties,[19] the Supreme Court developed the theory that extensive governmental regulation could convert the actions of a private entity into state action; a theory later reinforced in the sixties.[20] However, the correlation between state regulation and state action became questionable after *Moose Lodge No. 107 v. Irvis*,[21] in which the Court indicated that the mere existence of state regulation by itself would no longer justify a finding of state action.[22]

In *Jackson* the Court adopted a restrictive theory of state action, holding that the mere fact that a business is subject to extensive and detailed state regulation does not by itself convert the acts of the business into those of the state for purposes of the fourteenth amendment.[23] This new, more rigid standard of state action requires that the state directly encourage or foster the challenged action by ordering it, rather than merely approving or authorizing it.[24]

---

17. The Court concluded that Mrs. Jackson did nothing more than show that Metropolitan Edison was a heavily regulated private utility with a partial monopoly in furnishing electric service within its territory, and that it elected to terminate its services in a manner permitted under Pennsylvania law. *Id.* at 457.

18. The Court side-stepped the issue of whether electric services qualify as entitlements, holding that since the requirement of state action had not been met, it had no occasion to decide the entitlement issue. *Id.*

19. Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952). A privately owned and operated bus company, Capital Transit, was subject to close regulatory supervision by the Public Utilities Commission of the District of Columbia. The Court found that such regulation and supervision converted the bus company's interests into state action. *Id.* at 462.

20. Evans. v. Newton, 382 U.S. 296, 301 (1966) (extensive governmental surveillance of a private utility could provide the basis for a finding of state action).

21. 407 U.S. 163 (1972) [hereinafter cited as *Moose Lodge*]. A black guest at a private club was refused service because of his race. The guest claimed such discriminatory action violated his constitutional rights under § 1983, and that state action existed because the club had been granted a liquor license by the state. The Court held that the general regulatory requirements imposed by the state did not sufficiently involve the state in the club's activities to justify a finding of state action.

While it is possible to distinguish *Pollak* from *Moose Lodge* on the facts because the regulation in *Moose Lodge* was not as pervasive as that in *Pollak*, the Court's language in *Moose Lodge* seemed to place severe limitations on *Pollak*.

22. *Id.* at 175-76.

23. 95 S. Ct. at 453.

24. In *Jackson* the Court declared that approval by a state utility commission of the actions

Until the *Jackson* decision the Supreme Court had consistently indicated that the presence of a governmentally conferred monopoly was a weighty factor in determining whether constitutional obligations could be imposed on private entities.[25] In assessing the role a state granted or protected monopoly plays, the Court now found it not to be a determining factor in considering whether Metropolitan Edison's termination procedure was state action.[26] Instead it relied upon *Public Utility Commission v. Pollak*, in which it expressly disclaimed reliance on the monopoly factor for finding state action.[27] It is submitted that *Pollak*, upon a careful reading, will not hold up as precedent for this decision. The *Pollak* decision on its face simply states that the monopoly factor was not used as an element in finding state action in that case, not that the presence of a monopoly is never relevant in determining state action.[28]

Traditionally when the Court has based a finding of state action on the "public function"[29] theory, it has used a narrow definition of what consti-

---

of a public utility "where the Commission has not put its own weight on the side of the proposed action by ordering it, does not transmute a practice initiated by the utility and approved by the Commission into 'state action'." 95 S. Ct. at 456-57.

25. Railway Employees v. Hanson, 351 U.S. 225 (1956) (government conferral of monopoly status and the right to be the exclusive bargaining agent for certain classes of railroad employees); Steele v. Louisville & N. R.R., 322 U.S. 722 (1944) (government-conferred monopoly status to be the exclusive bargaining agent for certain classes of railroad employees).

The Court in *Moose Lodge* emphasized that the state's liquor licensing scheme did not confer a monopoly on the private club, thus implying that if a monopoly had been present, a finding of state action would have been justified. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176-77 (1972).

26. 95 S. Ct. at 454. As a factual matter the Court felt that it was doubtful that the state ever granted or guaranteed Metropolitan Edison Company a monopoly. The Court pointed out that there was nothing in Metropolitan Edison's certificate of public convenience or the Pennsylvania statutes under which the certificate was granted, PA. STAT. ANN. tit. 66, §§ 1121-23, that indicated that the state granted or guaranteed monopoly status to Metropolitan. The Court concluded, however, that the existence or non-existence of the monopoly would not have made any difference in their decision. 95 S. Ct. at 454.

27. Public Utilities Comm'n v. Pollak, 343 U.S. 451, 462 (1952).

28. 95 S. Ct. at 458 n.4 (Justice Douglas dissenting). *See also id.* at 461 (Justice Marshall dissenting). Justice Marshall suggests that the majority distinguishes the prior decisions from the decision in *Jackson* on the assertion that utility companies are "natural monopolies" rather than "artificial monopolies." *Id.* at 461 n.8. The majority theory seems to be that the state's purpose in regulating a natural monopoly is to prevent the charging of monopoly prices, not to prevent competition, thus making the state's involvement less significant. This seems to be a rather narrow distinction, especially in view of the fact that state grants of the monopoly status to public utilities have enabled them to successfully defend antitrust suits by arguing that their acts are state actions, and therefore, exempt from antitrust laws. *See, e.g.*, Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971). It seems illogical to allow utilities to plead state action as a defense in some situations and to deny it in others.

29. *See* note 11 *supra*.

tutes a "public function," finding the presence of state action only when a private entity exercises power usually reserved exclusively to the state.[30] In *Jackson* the Court held the "public function" did not justify a finding of state action, because Pennsylvania law never required the state to furnish utility services to its citizens.[31] Therefore Metropolitan Edison was exercising a power not traditionally associated with the state.[32]

The Court rejected the idea that the state was a "joint participant"[33] in Metropolitan Edison's termination procedures. In *Burton v. Wilmington Parking Authority*,[34] the Court found joint participation, and consequently state action, in the fact that the state had insinuated itself into a position of interdependence with a lessee of state property. The Court found that *Jackson* lacked this symbiotic relationship since Metropolitan Edison was a privately owned and operated utility that did not lease its facilities from the state.[35] The only relationship the Court found between Metropolitan Edison and the state was the extensive state regulation.[36]

While the Court pays lip service to the theory that consideration of the totality of the circumstances surrounding a state's involvement is necessary to determine the existence of state action,[37] the majority seem to take

30. *See, e.g.*, Evans v. Newton, 382 U.S. 296 (1966); Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946); Nixon v. Condon, 286 U.S. 73 (1931).

31. The Court found that the furnishing of utility service had never been, under Pennsylvania law, either a state function or a municipal duty. 95 S. Ct. at 454. *See* Baily v. Philadelphia, 184 Pa. 594, 39 A. 494 (1898); Girard Life Ins. Co. v. City of Philadelphia, 80 Pa. 393 (1879). Pennsylvania law, PA. STAT. ANN., tit. 66, § 1171 (1959), requires state regulated utilities to supply continuous utility services, but imposes no such obligation on the state. 95 S. Ct. at 454.

32. The Court refused to expand the "public function" theory into the broad premise that all businesses providing essential goods and services "are state actors in all their activities." 95 S. Ct. at 455.

The Court followed its decision in Nebbia v. New York, 291 U.S. 502 (1934) where it refused to accept "affected with a public interest" as a valid test in defining state action. *Id.* at 536.

33. 95 S. Ct. at 457.

34. 365 U.S. 715 (1961). A private individual operated a restaurant in space leased from a state parking authority in a publicly owned building. This individual refused to let blacks eat in his restaurant. The Court found that his landlord-tenant relationship with the state caused his otherwise private activity to become state action. In its decision, the Court made it clear that while "a multitude of relationships might appear to some to fall within the Amendment's embrace . . ." the actual holding was limited to lessees of public property. *Id.* at 726.

35. 95 S. Ct. at 457.

36. In *Moose Lodge* the Court stated that "however detailed this type of regulation may be in some particulars, it cannot be said . . . to make the State in any realistic sense a partner or even a joint venturer . . . ." Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176-77 (1972).

37. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722-26 (1961).

a sequential rather than a cumulative approach.[38] It is submitted that it is not enough to examine each of the factors upon which a claimant relies,[39] and dismiss each one individually as insufficient by itself to support a finding of state action. To determine a state's true involvement with a private entity, the aggregate of the facts must control.

Though state action may now be more clearly defined, the *Jackson* decision tends to leave utility customers without recourse against high-handed utility practices. The Court seems to pass over the facts that utility services are vital to the public, that competition between utilities is usually non-existent, and that states endow utilities with rights and powers greater than those enjoyed by other private companies. Because utility consumers have no other source from which to obtain these essential services, utility companies have little incentive to deal fairly with their customers.[40]

However, the consequences of this decision extend far beyond an unwillingness to expand fourteenth amendment procedural due process to privately owned utilities. The new, more restrictive standard of state action, and the refusal to expand the public function or joint participant theories, place a seemingly insurmountable burden upon plaintiffs seeking to prove state action under § 1983. Moreover, the failure to follow a cumulative approach in its analysis of state action permits the Court to pass over the true extent of a state's involvement with a private entity. If a majority of the Supreme Court continues to adhere to these guidelines, rarely will a plaintiff be able to satisfy the "state action" requirement of § 1983.

W. C. E. III

38. *See* 95 S. Ct. at 453-54.

39. Such an approach does not seem to focus on the true extent of the state's relationship with Metropolitan Edison. When the aggregate of all the facts is considered, it shows a monopolistic utility which provides essential public services as a licensee of the state, and this is done within a framework of extensive state supervision and control. The challenged procedures of Metropolitan Edison were approved by the state and were made enforceable by the weight and authority of the state. The state also has the power to review and amend Metropolitan Edison's regulation if the public interest so requires. The totality of the circumstances seems to show that the state is extremely intertwined with Metropolitan Edison's actions and has sufficiently authorized and supported its termination procedures to justify a finding of state action. *See* Mr. Justice Douglas's dissenting opinion, 95 S. Ct. at 459.

40. Comment, *Constitutional Safeguards for Public Utility Customers: Power To The People*, 48 N.Y.U.L. REV. 493 (1973).