No. 7

In the Supreme Court of the United States

OCTOBER TERM, 1960

BRUCE BOYNTON, PETITIONER

v.

COMMONWEALTH OF VIRGINIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INDEX

	Page
Statement	1
Argument	4
Point I	5
Point II	9
Point III	16
Conclusion	28
Appendix	29

CITATIONS

Cases:

Air Terminal Services, Inc. v. *Rentzel*, 81 F. Supp. 611	20
American Federation of Labor v. *Swing*, 312 U.S. 321	18
Atchison, Topeka & Santa Fe Ry. Co., 135 I.C.C. 633	14
Atlantic Coast Line R. Co. v. *North Carolina Corp. Commission*, 206 U.S. 1	11
Augustus v. *City of Pensacola*, 1 R.R.L.R. 681	19
Barrows v. *Jackson*, 346 U.S. 249	17
Bob-Lo Excursion Co. v. *Michigan*, 333 U.S. 28	15
Boman v. *Birmingham Transit Co.*, decided July 12, 1960	26
Bridges v. *California*, 314 U.S. 252	18
Brown v. *Board of Education*, 347 U.S. 483	20
Cantwell v. *Connecticut*, 310 U.S. 296	18
Chance v. *Lambeth*, 186 F. 2d 879, certiorari denied, 341 U.S. 941	10, 11
City of Greensboro v. *Simkins*, 246 F. 2d 425	20

Cases—Continued

	Page
City of Petersburg v. *Alsup*, 238 F. 2d 830, certiorari denied, 353 U.S. 922	19
Civil Rights Cases, 109 U.S. 3	16, 17, 21
Coke v. *City of Atlanta*, (N.D. Ga.)	20
Dayton Union Ry. Co. Tariff for Redcap Service, 256 I.C.C. 289	12
Debs In re, 158 U.S. 564	11
Derrington v. *Plummer*, 240 F. 2d 922, certiorari denied, 353 U.S. 924	20
Draper v. *City of St. Louis*, 92 F. Supp. 546, appeal dismissed, 186 F. 2d 307	19
Fay v. *New York*, 332 U.S. 261	27
Flemming v. *South Carolina Electric & Gas Co.*, 224 F. 2d 752, appeal dismissed, 351 U.S. 901	21
Freeman v. *Retail Clerks Local 1207* (Kings County Super. Ct., Washington), decided December 9, 1959 (28 U.S.L. Week 2311)	25
Gayle v. *Browder*, 352 U.S. 903	20
Gibbons v. *Ogden*, 9 Wheat. 1	9
Hall v. *DeCuir*, 95 U.S. 485	9
Hayes v. *Crutcher*, 137 F. Supp. 853	19
Henderson v. *United States*, 339 U.S. 816	7, 10, 12, 13, 15
Henry v. *Greenville Airport Commission*, decided April 20, 1960	20
Holley v. *City of Portsmouth*, 150 F. Supp. 6	19
Holmes v. *City of Atlanta*, 350 U.S. 879, reversing 223 F. 2d 93	19
Hurd v. *Hodge*, 334 U.S. 24	27
Kansas City So. Ry. Co. v. *Kaw Valley Dist.*, 233 U.S. 75	10
Kerr v. *Enoch Pratt Free Library*, 149 F. 2d 212, certiorari denied, 326 U.S. 721	21

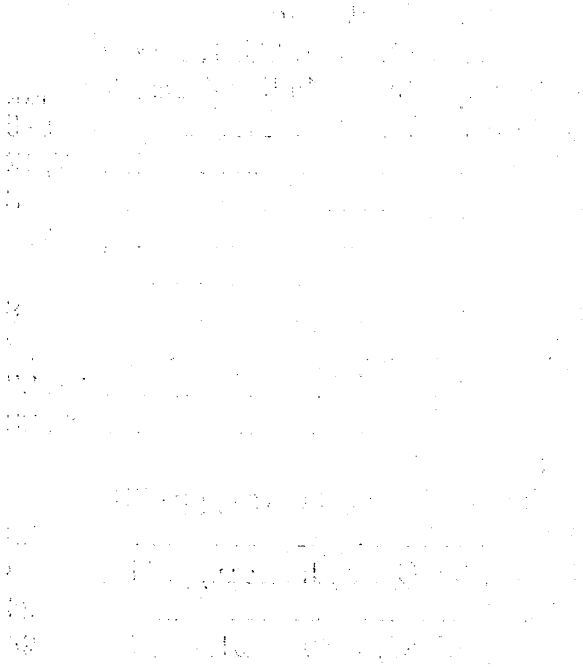
Cases—Continued

	Page
Keys v. *Carolina Coach Co.*, 64 M.C.C. 769	8
Korematsu v. *United States*, 323 U.S. 214	22
Kreshik v. *St. Nicholas Cathedral*, 363 U.S. 190	18
Lawrence v. *Hancock*, 76 F. Supp. 1004	19, 20
Lonesome v. *Maxwell*, 220 F. 2d 386	19
McCabe v. *Atchison .T. & S.F.R. Co.*, 235 U.S. 151	19
Marsh v. *Alabama*, 326 U.S. 501	5, 17, 24, 25, 26
Mayor and City Council of Baltimore v. *Dawson*, 350 U.S. 877, affirming 220 F. 2d 386	19
Mitchell v. *United States*, 313 U.S. 80	7, 10, 13, 15, 19, 21
Moorhead v. *City of Ft. Lauderdale*, 152 F. Supp. 131, affirmed, 248 F. 2d 544	19
Moorman v. *Morgan*, 285 S.W. 2d 146	19
Morgan v. *Virginia*, 328 U.S. 373	9, 10, 14, 15
Morris v. *Duby*, 274 U.S. 135	11
Muir v. *Louisville Park Theatrical Ass'n.*, 347 U.S. 971, reversing 202 F. 2d 275	19, 20
Munn v. *Illinois*, 94 U.S. 113	24
N.A.A.C.P. v. *Alabama*, 357 U.S. 449	18
N.A.A.C.P. v. *St. Louis-S.F. Ry. Co.*, 297 I.C.C. 335	12, 15
Nash v. *Air Terminal Services*, 85 F. Supp. 545	20
National Labor Relations Board v. *Babcock & Wilcox Co.*, 351 U.S. 105	24
New Orleans City Park Improvement Assoc. v. *Detiege*, 358 U.S. 54, affirming, 252 F. 2d 122	19
Philadelphia, B. & W.R. Co. v. *Smith*, 250 U.S. 101	11
Republic Aviation Corp. v. *National Labor Relations Board*, 324 U.S. 793, n. 8	24

Cases—Continued Page
Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218 12
St. Louis-S.F. Ry. v. *Public Service Commission*, 261 U.S. 369 11
Seaboard Air Line Ry. v. *Blackwell*, 244 U.S. 310 9
Shelley v. *Kraemer*, 334 U.S. 1 5, 17, 18, 25, 27
Smith v. *Allwright*, 321 U.S. 649 26
Solomon v. *Pennsylvania R.R.*, 96 F. Supp. 709 9
South Covington Ry. v. *Covington*, 235 U.S. 537 10
Southern Pacific Co. v. *Arizona*, 325 U.S. 761 9
Tate v. *Department of Conservation*, 133 F. Supp. 53, affirmed, 231 F. 2d 615, certiorari denied, 352 U.S. 838 20
Terry v. *Adams*, 345 U.S. 461 26
Virginia v. *Rives*, 100 U.S. 313 27
Ward v. *City of Miami*, 151 F. 593, affirmed, 252 F. 2d 787 19
Whiteside v. *Southern Bus Lines*, 177 F. 2d 949 10, 11
Williams v. *Carolina Coach Co.*, 111 F. Supp. 329, affirmed, 207 F. 2d 408 8
Williams v. *Howard Johnson's Restaurant*, 268 F. 2d 845 13, 14
Williams v. *Kansas City, Mo.*, 104 F. Supp. 848, affirmed, 205 F. 2d 47, certiorari denied, 346 U.S. 826 19

Constitution and statutes:
United States Constitution:
Fourteenth Amendment 15, 16, 17, 18, 19, 20, 27
Art. I, Sec. 8, Cl. 3 9, 11
Act of September 18, 1940, 54 Stat. 899 5
Civil Rights Act of 1866, 14 Stat. 27 23
Civil Rights Act of 1875, 18 Stat. 336 23

Constitution and statutes—Continued
Interstate Commerce Act, 49 U.S.C. 1, *et seq.*:
Page
National Transportation Policy (preceding 49 U.S.C. 1) 5–6
49 U.S.C. 3(1) 7, 12
49 U.S.C. 16(13) 8
49 U.S.C. 303(a)(19) 7, 9
49 U.S.C. 304(d) 8
49 U.S.C. 316(a) 6
49 U.S.C. 316(d) 6, 7
42 U.S.C. 1981 27, 28
42 U.S.C. 1982 27, 28
Miscellaneous:
Cong. Globe, 42d Cong., 2d Sess., pp. 381, 382–383 23
Cong. Record, 43d Cong., 1st Sess., p. 11 23
1 R.R.L.R. 681 24
N.Y. Times, April 23, 1960, p. 21, col. 1 25



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STATEMENT

At 8:00 p.m. on December 20, 1958, petitioner, a Negro student in his third year at the Howard University School of Law in Washington, D.C., boarded a Trailways bus in Washington to travel to his home in Selma, Alabama (R. 27). He had in his possession a ticket entitling him to travel to Montgomery, Alabama, on Trailways (R. 27). The bus arrived at the Trailways Bus Terminal in Richmond, Virginia, at about 10:40 p.m. When the driver pulled the bus up to the stop at the terminal, he notified the passengers, including petitioner, that there would be a forty-minute stopover (R. 28).

Because he was hungry, petitioner alighted from the bus and entered the terminal to get something to eat (R. 28). He had never stopped in Richmond before and did not know of any other place where he could get something to eat within such a short time (R. 29). There were two restaurants in the terminal. One, which was "customarily used for colored people" (R. 22), appeared to be crowded (R. 28). Petitioner proceeded to the other restaurant, "customarily used for * * * white" people (R. 22) which was not crowded, and sat down upon one of the vacant stools at the counter (R. 28).

One of the waitresses thereupon asked him to leave and go over to the other restaurant (R. 28). He informed her that the other restaurant was somewhat crowded and that he was an interstate passenger (R. 28). She insisted that, because of specific orders which she had been given and also because of the custom there, she could not serve him (R. 28). He reminded her that he was an interstate passenger and explained that, because his bus would be leaving within a short time, he would like to get something that would not take too long to prepare (R. 28). The waitress suggested that he purchase a prepared sandwich, whereupon he ordered one of the sandwiches with a beverage (R. 29).

The waitress departed, and then returned and informed petitioner that she had orders not to serve him (R. 29). He then asked her to find someone who could serve him (R. 29). She departed again and returned with the Assistant Manager of the restaurant (R. 20, 29). The Assistant Manager told petitioner

that he could not be served (R. 29), explained that there was a restaurant "on the other side for the colored" (R. 21), and suggested that he go to that restaurant (R. 21). Petitioner refused and continued to insist that his status as an interstate passenger entitled him to be served (R. 29). The Assistant Manager then called a police officer to enlist his aid in getting petitioner to leave (R. 21). The officer took petitioner outside and "tried to explain to him the situation" (R. 21), and then returned and asked the Assistant Manager if he wanted a warrant for petitioner's arrest (R. 21). After first replying in the negative (R. 21), the Assistant Manager, upon noticing that petitioner had returned, reconsidered and caused petitioner to be arrested for trespassing (R. 21, 29).

The bus terminal was owned and operated by Trailways Bus Terminal, Inc. (R. 9). The restaurants were built into the terminal upon its construction and leased by Trailways to Bus Terminal Restaurant of Richmond, Inc. (R. 9–17). The lease grants exclusive authority to the latter to operate restaurants in the terminal (R. 10) and requires that the restaurants be operated in keeping with the character of service maintained in an up-to-date, modern bus terminal (R. 14), that the lessee obtain the lessor's permission before selling any commodity not usually sold or installed in a "bus terminal concession" (R. 11), that the lessee refrain from selling on buses operating in or out of the terminal, and that, upon notice from the lessor, the lessee refrain

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from making sales through the windows of the buses (R. 16). At no facility in the terminal, with the exception of these restaurants, is racial segregation required or practiced (R. 8).

Trial on the trespassing charge was held on January 6, 1959, in the Police Court of the City of Richmond (R. 19). At the conclusion of the proceedings, petitioner was found guilty and fined $10 (R. 30). On February 20, 1959, the judgment was approved by the Hustings Court of the City of Richmond (R. 30–31). On June 19, 1959, the Supreme Court of Appeals of Virginia affirmed the judgment of the Hustings Court (R. 32).

ARGUMENT

During the course of his journey, petitioner, an American citizen traveling from one state to another on a federally-regulated carrier, was denied, solely because of his race or color, the right to equal treatment in the use of an essential transportation facility—in this instance, a restaurant in a bus terminal serving interstate passengers. This denial was compounded by the action of a state in prosecuting and punishing him as a criminal trespasser. The invocation of the state's trespass law against petitioner for acts constituting a peaceable and orderly attempt to exercise his federal rights to equal treatment in the use of transportation facilities while traveling on interstate carriers subject to federal regulation had the necessary and inevitable effect of thwarting and defeating these rights.

This case does not involve purely private or individual action which is in no respect enforced, implemented,

or supported by governmental authority. It does not present any question as to "the right of a homeowner" to choose or "to regulate the conduct of his guests" (*Marsh* v. *Alabama,* 326 U.S. 501, 506), for the facilities with which we are concerned here were "built and operated primarily to benefit the public" (*ibid.*). Nor is this a case in which the state "has merely abstained from action, leaving private individuals free to impose such discriminations as they see fit." *Shelley* v. *Kraemer,* 334 U.S. 1, 19. On the contrary, the judgment here under review represents an affirmative exertion of governmental authority to sanction and consummate racial discrimination, thereby making the state itself a party to the discrimination. In short, the significant aspects of this case are its *public, interstate,* and *governmental action* aspects.

I

The discrimination here against petitioner conflicts both with the general purposes and objects of the Interstate Commerce Act, 49 U.S.C. 1, *et seq.,* as embodied in the "National Transportation Policy,"[1]

[1] 49 U.S.C. preceding Section 1, added to the Interstate Commerce Act by the Act of September 18, 1940, 54 Stat. 899. Segregation of interstate bus passengers by race in a bus terminal restaurant is contrary to the "National Transportation Policy" in almost every one of its particulars. That policy is as follows: "It is hereby declared to be the national transportation policy of the Congress to provide for *fair and impartial regulation of all modes of transportation* subject to the provisions of this Act, * * * so administered as *to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation* and among the several carriers; *to encourage the establishment and maintenance of reasonable*

and with several of the specific provisions of the Act,[2] especially 49 U.S.C. 316(d).[3] That subsection states clearly that it "shall be unlawful * * * to subject any

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charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; all to the end of *developing, coordinating and preserving a national transportation system* by water, highway, and rail, as well as other means, *adequate to meet the needs of the commerce of the United States*, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy" (emphasis added).

[2] For example, 49 U.S.C. 316(a) provides in pertinent part that "[i]t shall be the duty of every common carrier of passengers by motor vehicle * * * to provide * * * adequate service * * * and facilities for the transportation of passengers in interstate or foreign commerce; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable regulations and practices relating thereto, and to * * * the facilities for transportation, and all other matters relating to or connected with the transportation of passengers in interstate or foreign commerce * * *." It seems clear that a segregated dining facility is foreign to the mandate, embodied in Section 316(a), that "adequate service and facilities" be maintained for all, including Negro passengers. Similarly, the duty of enforcing "just and reasonable regulations and practices" relating to transportation facilities "and all other matters relating to or connected with the transportation of passengers" clearly seems to be violated by the practice of racial discrimination in the terminal facilities which the passengers must use.

[3] 49 U.S.C. 316(d) provides in pertinent part that "[a]ll charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be

particular person * * * to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever * * *." This provision in Section 316(d), embodied in Part II of the Act dealing with "Motor Carriers," is identical to the provision in 49 U.S.C. 3(1), embodied in Part I of the Act dealing with "General Provisions and Railroad and Pipe Line Carriers," which was held in *Mitchell* v. *United States,* 313 U.S. 80, and *Henderson* v. *United States,* 339 U.S. 816, to proscribe racial discrimination in interstate railroad pullman and dining cars. Under the Act, "racial classification of passengers holding identical tickets" (*id.* at 825) is barred in relation to interstate transportation services of every kind.

To be sure, Section 316(d) speaks only of "any common carrier by motor vehicle," and not of terminals or terminal restaurant facilities as such. But 49 U.S.C. 303(a)(19) defines the "services" and "transportation" to which Part II of the Act applies as including "all facilities and property *operated or controlled by any * * * carrier* * * * used in the transportation of passengers or property in interstate or foreign commerce or *in the performance of any service in connection therewith*" (emphasis added).

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unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give or cause any undue or unreasonable preference or advantage to any particular person * * * in any respect whatsoever; or to subject any particular person * * * to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever * * *."

The facilities involved in the present case are so controlled. The Trailways Bus Terminal in Richmond, Virginia, is owned by Trailways Bus Terminal, Inc. (R. 18). According to an authenticated copy of the records of the Interstate Commerce Commission, reprinted in the Appendix, pp. 29–31, infra,[4] Virginia Stage Lines, Inc., a "common carrier by motor vehicle," owns fifty percent of the stock in Trailways Bus Terminal, Inc., and operates the terminal as a joint facility with the Carolina Coach Company, also a "common carrier by motor vehicle" (see *Williams* v. *Carolina Coach Co.*, 111 F. Supp. 329 (E.D. Va.), affirmed, 207 F. 2d 408 (C.A. 4); *Keys* v. *Carolina Coach Co.*, 64 M.C.C. 769).

The fact that the restaurant in the terminal is leased by Trailways Bus Terminal, Inc., to Bus Terminal Restaurant of Richmond, Inc., is thus immaterial here. Since a carrier is prohibited from enforcing racial segregation in facilities which it operates or controls, it may not evade its statutory responsibilities in this respect by leasing such facilities to another. The paramount federal duty of nondiscrimination is not delegable and cannot be discharged

[4] "[A]nnual or other reports of carriers made to the Commission * * * shall be preserved as public records * * *." 49 U.S.C. 16(13). These public records, including "copies of and extracts from" them, properly certified and sealed, "shall be received as prima facie evidence of what they purport to be * * * in all judicial proceedings * * *." *Ibid.*; see 49 U.S.C. 304(d). The extracts from the annual reports of the carrier which appear in the Appendix, pp. 29–32, *infra*, have been certified by the Secretary under the Commission's seal as required.

through lease of facilities.[5] It follows that maintenance of segregation in the Richmond terminal restaurant, and its enforcement by the state, violate the Interstate Commerce Act which thus provides a full defense against the trespass charge on which the judgment below was based. Cf. *Solomon* v. *Pennsylvania R.R.*, 96 F. Supp. 709, 712 (S.D.N.Y.).

II

Ever since *Gibbons* v. *Ogden*, 9 Wheat. 1, "the states have not been deemed to have the authority to impede substantially the free flow of commerce from state to state * * *." *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 767. This "long-recognized distribution of power between national and state governments" has been predicated in some cases upon the expressed or the presumed intention of Congress (*id.* at 768), and in others "upon the implications of the commerce clause itself" (*ibid.*). Thus, even in the absence of congressional action, the Commerce Clause, of its own force, requires invalidation of unreasonable state-imposed burdens on interstate commerce. See *Morgan* v. *Virginia*, 328 U.S. 373; *Hall* v. *DeCuir*, 95 U.S. 485. See also *Seaboard Air Line Ry.* v. *Blackwell*, 244 U.S.

[5] Moreover, the terms of the lease itself evidence sufficient control by the carrier for purposes of Section 303(a)(19): the terminal restaurants are required to be operated in keeping with the character of service maintained in an up-to-date, modern bus terminal (R. 14); the lessee must obtain the lessor's permission before selling any commodity not usually sold or installed in a "bus terminal concession" (R. 11); the lessee must refrain from selling on buses operating in or out of the terminal (R. 16); and, upon notice from the lessor, the lessee must also refrain from making sales through the windows of the buses (R. 16).

310; *South Covington Ry.* v. *Covington,* 235 U.S. 537.

Whether any particular state legislation is invalid depends upon whether "it unduly burdens * * * commerce in matters where uniformity is necessary * * *." *Morgan* v. *Virginia, supra,* at 377. And whether "the statute in question is a burden on commerce" depends upon the "situation created by the attempted enforcement of * * * [the] statute * * *." *Id.* at 377–378. Thus, in *Morgan* v. *Virginia, supra,* a Virginia statute required racial segregation in interstate buses. Stating that the issue of the statute's validity must be decided "as a matter of balance between the exercise of the local police power and the need for national uniformity in the regulations for interstate travel," the Court concluded "* * * that seating arrangements for the different races in interstate motor travel require a single, uniform rule to promote and protect national travel." 328 U.S. at 386. See also *Henderson* v. *United States,* 339 U.S. 816; *Mitchell* v. *United States,* 313 U.S. 80; *Chance* v. *Lambeth,* 186 F. 2d 879 (C.A. 4), certiorari denied, 341 U.S. 941; *Whiteside* v. *Southern Bus Lines, Inc.,* 177 F. 2d 949 (C.A. 6).

The application of a state statute is not the only official act of a state which has been found by the Court to be invalid as a burden on interstate commerce. In *Morgan* v. *Virginia, supra,* at 379, the Court also observed that "* * * a final court order is invalid which materially affects interstate commerce." Accord, *Kansas City So. Ry. Co.* v. *Kaw Valley Dist.,* 233 U.S. 75. An order of an administrative commission may also constitute a burden on interstate com-

merce. *Morris* v. *Duby,* 274 U.S. 135; *St. Louis-S.F. Ry.* v. *Public Service Commission,* 261 U.S. 369; *Atlantic Coast Line R. Co.* v. *North Carolina Corp. Commission,* 206 U.S. 1. Similarly, the federal courts have ruled that a burden may be created by the state enforcement of a private regulation. *Chance* v. *Lambeth, supra; Whiteside* v. *Southern Bus Lines, Inc., supra.*

In the present case, petitioner was ejected from the restaurant and arrested by a state police officer, prosecuted by the state for violation of a law enacted by the state legislature, and convicted by a state judge in a state court. Thus, whether the trespass conviction be isolated as an unconstitutional application of the state trespass law or whether it be regarded as a combination of state legislative, executive, and judicial action, it nevertheless is clearly the type of activity which is embraced within the scope of the Commerce Clause.[6]

It is not material that the present case involves racial segregation in dining facilities at bus terminals rather than on the bus itself. The furnishing of food to interstate passengers is as much a part of interstate commerce in the one place as the other. See *Philadelphia, B. & W. R. Co.* v. *Smith,* 250 U.S. 101; *Henderson* v. *United States,* 339 U.S. 816. Facilities are, of course, not removed from inter-

[6] Some courts have indicated—correctly, we believe—that racial segregation imposed by a private carrier alone, unsupported by state authority, would also constitute an unlawful burden on interstate commerce. *Chance* v. *Lambeth, supra,* at 882–883; *Whiteside* v. *Southern Bus Lines, Inc., supra,* at 953; cf. *In re Debs,* 158 U.S. 564, 581, 582.

state commerce simply because they are stationary. See, *e.g., Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218, 229. The Interstate Commerce Commission, by asserting jurisdiction over terminal facilities such as red-cap service, *Dayton Union Ry. Co. Tariff for Redcap Service,* 256 I.C.C. 289, 299, and station waiting rooms and rest rooms, *N.A.A.C.P.* v. *St. Louis–S.F. Ry. Co.,* 297 I.C.C. 335, has demonstrated its recognition that a facility may be in interstate commerce although it is located in a terminal rather than on a moving carrier.[7] This Court, in *Henderson* v. *United States,* 339 U.S. 816, 824, characterized regulations of a railroad carrier which required segregation of the races in dining cars as "unreasonable discriminations" in violation of Section 3(1) of the Interstate Commerce Act, 49 U.S.C. 3(1).[8] Segregation in terminal dining

[7] By striking down racial segregation in station waiting rooms and rest rooms as violative of the Interstate Commerce Act, the Commission has recognized that segregation within the confines of a terminal prejudices and disadvantages a Negro traveler as unreasonably as segregation on the carrier itself. *N.A.A.C.P.* v. *St. Louis–S.F. Ry. Co., supra.*

[8] In *N.A.A.C.P.* v. *St. Louis–S.F. Ry. Co., supra,* the Interstate Commerce Commerce Commission refused to assert jurisdiction, under Section 3(1), over lunchrooms in the Richmond railway terminal. However, the Commission's sole basis for declining to assert jurisdiction over the lunchroom was that there had been a nineteen-year lapse in its operation, which, according to the Commission, indicated that this lunchroom had not constituted an integral part of the terminal's common-carrier functions and therefore was not within its jurisdiction. But, as the record shows in the present case, the restaurants were built as an integral part of the interstate terminal facility (R. 9), and there is no indication that they have not been in continuous operation since then. Access to the restaurant was intended to, and did, facilitate interstate travel.

facilities, no less than segregation on a moving diner, constitutes, in the words of *Henderson,* "unreasonable discrimination," "unreasonable prejudice," and "unreasonable disadvantage" to the passenger denied equality of treatment.[9]

Bus passengers are far more dependent upon terminal dining facilities than are railroad passengers. Unlike bus companies, railroads do not schedule regular stops which are long enough to permit their passengers to eat in terminals. Once a journey by rail has commenced, railroad passengers normally satisfy their food requirements during the course of the trip either by buying sandwiches and eating them while occupying seats in coaches, or by eating regular meals in the dining car of the train itself. As a practical matter, interstate bus passengers ordinarily must obtain their meals from the facilities offered at the bus terminal or go hungry. Thus, bus terminal restaurant facilities are a precise equivalent of dining cars on railroad trains.

The decision of the court of appeals in *Williams* v. *Howard Johnson's Restaurant,* 268 F. 2d 845, 848 (C.A. 4), assuming that it was correctly decided, does not compel an opposite conclusion. In that case the court decided that a restaurant located on an interstate highway in the city of Alexandria is not engaged in interstate commerce "merely because in the course of its business of furnishing accommodations to the

[9] This Court has similarly characterized, and has held repugnant to the Interstate Commerce Act regulations segregating Negroes from whites in Pullman cars. *Mitchell* v. *United States, supra.*

general public it serves persons who are traveling from state to state," and it concluded that the restaurant was "an instrument of local commerce."[10] The Trailways bus restaurant in Richmond, on the other hand, is located in an interstate bus terminal, was constructed at the same time that the terminal was constructed (R. 9), and was leased upon conditions requiring that the lessee obtain the lessor's permission before selling any commodity not usually sold or installed in a "bus terminal concession" (R. 11), and that the restaurant be operated "in keeping with the character of service maintained in an up-to-date, modern bus terminal" (R. 14). There is therefore no warrant for designating the restaurant in this case as "an instrument of local commerce." Even though it may incidentally serve local traffic (R. 23), it clearly is primarily an instrument of interstate travel, and in this case it was in fact sought to be used by petitioner in connection with his interstate journey. Cf. *Atchison, Topeka & Santa Fe Ry. Co.*, 135 I.C.C. 633, 634–635.

Racial discrimination or segregation interferes with a "single, uniform rule to promote and protect national travel" (*Morgan* v. *Virginia, supra,* at 386), and thereby imposes a burden on interstate commerce. In instances in which rules have varied from state to state with respect to racial discrimination or nondiscrimination in interstate transportation facilities, the Court has held invalid statutes requiring racial

[10] The plaintiff in the *Williams* case contended that the private segregation itself constituted a burden on interstate commerce. Cf. footnote 6, *supra.*

discrimination (see, *e.g., Morgan* v. *Virginia, supra*) because of their tendency to undermine any "single, uniform rule to promote and protect national travel." See *Bob-Lo Excursion Co.* v. *Michigan,* 333 U.S. 28, 40. If diversity of racial rules from state to state is to be avoided, and uniformity with respect to interstate travel achieved, racial discrimination and segregation, be it by state statute no matter how enforced, must be deemed invalid. Interstate commerce would flow more smoothly if states did not use their criminal process to support racially discriminatory policies of the proprietors of such restaurants, and if the latter were thereby encouraged to serve all interstate passengers indiscriminately instead of refusing to serve some of them on grounds irrelevant to the interstate travel.

Moreover, enforcement of racial discrimination, such as that involved in the present case, supports and accentuates an unreasonable disadvantage and prejudice to a class of interstate travelers. Cf. *Henderson* v. *United States,* 339 U.S. 816, 824; *Mitchell* v. *United States,* 313 U.S. 80. Since interstate bus travel cannot be conducted without regularly scheduled bus stops, and since dining facilities at such stops are an integral and essential part of interstate bus service, the disadvantage and prejudice cannot be avoided by the interstate Negro bus traveler. In *N.A.A.C.P.* v. *St. Louis–S.F. Ry. Co.,* 297 I.C.C. 335, 347, the Interstate Commerce Commission, in ordering the end of segregation in interstate rail travel, declared:

> * * * The disadvantage to a traveler who is assigned accommodations or facilities so desig-

> nated as to imply his inherent inferiority solely because of his race must be regarded under present conditions as unreasonable. Also, he is entitled to be free of annoyances, some petty and some substantial, which almost inevitably accompany segregation even though the rail carriers, as most of the defendants have done here, sincerely try to provide both races with equally convenient and comfortable cars and waiting rooms.

Racial segregation works a serious and unwarranted burden and hardship upon those against whom it operates, and the prospect of encountering it in bus terminals surely operates as a deterrent to a Negro contemplating an interstate bus journey. National travel is hindered by the enforcement of such arbitrary discriminations in service. Persons holding the same tickets, whatever their race, color, religion or other irrelevant personal characteristic, are entitled to the same service and treatment when they travel in interstate commerce. Under the controlling provisions of federal law, a Negro passenger is free to travel the length and breadth of this country without hindrance or humiliation, and to receive precisely the same service, no more and no less, as any other passenger.

III

In the *Civil Rights Cases,* 109 U.S. 3, 11, this Court declared that "positive rights and privileges are undoubtedly secured by the Fourteenth Amendment," which "nullifies and makes void all State legislation, and *State action of every kind,* which impairs the

privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws." *Ibid.* (emphasis added). Racially discriminatory acts of individuals, moreover, are insulated from the proscription of the Fourteenth Amendment only insofar as they are "unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings," or are "not sanctioned in some way by the State." *Id.* at 17.

That the discrimination in the present case was of private origin is irrelevant. The application of a general, nondiscriminatory, and otherwise valid law to effectuate a racially discriminatory policy of a private agency, and the enforcement of such a discriminatory policy by state governmental organs, has been held repeatedly to be a denial by state action of rights secured by the Fourteenth Amendment. Thus, in *Shelley* v. *Kraemer,* 334 U.S. 1, the judicial enforcement of private racially restrictive covenants by injunction was held violative of the Fourteenth Amendment; similarly, in *Barrows* v. *Jackson,* 346 U.S. 249, this Court decided that such covenants could not be enforced, consistently with the Fourteenth Amendment, by the assessment of damages for their breach; and in *Marsh* v. *Alabama,* 326 U.S. 501, this Court ruled that the criminal courts could not be used to convict of trespass persons exercising their rights of free speech in a privately-owned company

town.[11] See also *Kreshik* v. *St. Nicholas Cathedral,* 363 U.S. 190, 191; *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 463.

If, in *Shelley,* the action of a state judiciary alone was in question, in the present case each branch of state government contributed directly and substantially to the support and enforcement of the terminal restaurant's discriminatory policy. By the active intervention of the executive and judicial branches of that government, applying a law passed by its legislature, "the full panoply of state power" (*Shelley* v. *Kraemer, supra,* at 19) was exerted to deny to petitioner, on the ground of race or color, the enjoyment of the right to equal treatment in the use of accommodations open to the public generally—here interstate travel facilities—a right clearly secured by

[11] It is immaterial that the state judicial action which enforces the denial of rights guaranteed by the Fourteenth Amendment may be procedurally fair. Such action is constitutionally proscribed "even though the judicial proceedings * * * may have been in complete accord with the most rigorous conceptions of procedural due process." *Shelley* v. *Kraemer*, *supra* at 17. See also *Bridges* v. *California*, 314 U.S. 252; *American Federation of Labor* v. *Swing*, 312 U.S. 321; *Cantwell* v. *Connecticut*, 310 U.S. 296. Similarly, it is no answer to say that the state courts stand ready to convict white persons of trespass should they refuse to leave bus terminal restaurants from which they have been excluded because of race or color. "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. * * * Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley* v. *Kraemer*, *supra* at 22.

the Fourteenth Amendment. See *Mitchell* v. *United States,* 313 U.S. 80, 94.[12]

The right not to be excluded solely on account of race from facilities open to the public has been held to extend to such accommodations as public beaches and bathhouses (*Mayor and City Council of Baltimore* v. *Dawson,* 350 U.S. 877, affirming 220 F. 2d 386 (C.A. 4)),[13] golf courses (*Holmes* v. *City of Atlanta,* 350 U.S. 879, reversing 223 F. 2d 93 (C.A. 5)),[14] park and recreational facilities (*New Orleans City Park Improvement Assoc.* v. *Detiege,* 358 U.S. 54, affirming, 252 F. 2d 122 (C.A. 5)),[15] and theatres (*Muir* v. *Louisville Park Theatrical Ass'n.,* 347 U.S. 971, reversing 202 F. 2d 275 (C.A. 6), and remanding for consideration in

[12] There, the Court stated that "[t]he denial to appellant of equality of accommodations because of his race would be an invasion of a fundamental individual right which is guaranteed against state action by the Fourteenth Amendment." See also *McCabe* v. *Atchison, T. & S.F. Ry.*, 235 U.S. 151, 160–162.

[13] See also *City of Petersburg* v. *Alsup*, 238 F. 2d 830 (C.A. 5), certiorari denied, 353 U.S. 922; *Williams* v. *Kansas City, Mo.*, 104 F. Supp. 848 (W.D. Mo.), affirmed, 205 F. 2d 47 (C.A. 8), certiorari denied, 346 U.S. 826; *Draper* v. *City of St. Louis*, 92 F. Supp. 546 (E.D. Mo.), appeal dismissed, 186 F. 2d 307 (C.A. 8); *Lawrence* v. *Hancock*, 76 F. Supp. 1004 (S.D. W. Va.).

[14] See also *Moorhead* v. *City of Ft. Lauderdale*, 152 F. Supp. 131 (S.D. Fla.), affirmed, 248 F. 2d 544 (C.A. 5); *Holley* v. *City of Portsmouth*, 150 F. Supp. 6 (E.D. Va.); *Ward* v. *City of Miami*, 151 F. Supp. 593 (S.D. Fla.), affirmed, 252 F. 2d 787 (C.A. 5); *Hayes* v. *Crutcher*, 137 F. Supp. 853 (M.D. Tenn.); *Augustus* v. *City of Pensacola*, 1 R.R.L.R. 681.

[15] See also *Lonesome* v. *Maxwell*, 220 F. 2d 386 (C.A. 4); *Augustus* v. *City of Pensacola*, *supra; Moorman* v. *Morgan*, 285 S.W. 2d 146 (Ky.).

light of *Brown* v. *Board of Education,* 347 U.S. 483, and "conditions that now prevail").[16]

A restaurant, like a theatre, a common carrier, a school, a beach, a pool, a park, or a golf course, is a place of public accommodation. The federal courts have held, therefore, that rights guaranteed by the equal protection clause are contravened when a private lessee of a state-owned restaurant engages in racially discriminatory practices. *Derrington* v. *Plummer,* 240 F. 2d 922 (C.A. 5), certiorari denied, 353 U.S. 924; *Coke* v. *City of Atlanta* (N.D. Ga.).[17] These holdings illustrate, moreover, that where the state enforces or supports racial discrimination in a place open for the use of the general public—as, in this case, interstate transportation facilities—it infringes Fourteenth Amendment rights notwithstanding the private origin of the discriminatory conduct.[18]

Nor is it relevant that the property upon which the discrimination occurs is privately owned. State laws which require or permit segregation of the races on privately owned interstate motor buses are invalid under the Fourteenth Amendment. *Gayle* v. *Brow-*

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[16] See also *Henry* v. *Greenville Airport Commission* (C.A. 4), decided April 20, 1960 (waiting room in a municipal airport).

[17] Cf. *Nash* v. *Air Terminal Services*, 85 F. Supp. 545 (E.D. Va.); *Air Terminal Services, Inc.* v. *Rentzel*, 81 F. Supp. 611 (E.D. Va.).

[18] Accord, *Muir* v. *Louisville Park Theatrical Ass'n.*, *supra; City of Greensboro* v. *Simkins*, 246 F. 2d 425 (C.A. 4); *Derrington* v. *Plummer*, *supra; Tate* v. *Department of Conservation*, 133 F. Supp. 53 (E.D. Va.), affirmed, 231 F. 2d 615 (C.A. 4), certiorari denied, 352 U.S. 838; *Nash* v. *Air Terminal Services*, *supra; Lawrence* v. *Hancock*, 76 F. Supp. 1004 (S.D. W. Va.).

der, 352 U.S. 903; *Flemming* v. *South Carolina Electric & Gas Co.,* 224 F. 2d 752, appeal dismissed, 351 U.S. 901; see *Mitchell* v. *United States,* 313 U.S. 80, 94. Racial discrimination by a privately-owned place of public accommodation may also violate Fourteenth Amendment rights if such place is financially supported or regulated by the state. *Kerr* v. *Enoch Pratt Free Library,* 149 F. 2d 212 (C.A. 4), certiorari denied, 326 U.S. 721. That the right to equal treatment in places of public accommodation is protected by the Fourteenth Amendment against deprivation by state action is not impaired by the decision in the *Civil Rights Cases,* 109 U.S. 3, for there the Court carefully reserved the question whether the Amendment secured the right to be free from *state*-sanctioned discrimination in places of public accommodations.[19]

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[19] The Court emphasized that it was reserving this question (109 U.S. at 19, 21, 24):

> We have discussed the question presented by the law on the assumption that a right to enjoy equal accommodation and privileges in all inns, public conveyances, and places of public amusement, is one of the essential rights of the citizen which no State can abridge or interfere with. Whether it is such a right, or not, is a different question which, in the view we have taken of the validity of the law on the ground already stated, it is not necessary to examine.
>
> * * * * *
>
> But is there any similarity between such servitudes [the burdens and disabilities incident to feudal vassalage] and a denial by the owner of an inn, a public conveyance, or a theatre, of its accommodations and privileges to an in-

Because an asserted justification for invasion of the right to be free from state enforcement of racially discriminatory practices warrants the most searching judicial scrutiny, such enforcement can withstand attack, if at all, only where the constitutional right is subordinated to a countervailing right or interest so weighty as to occupy a preferred constitutional status. *Cf. Korematsu* v. *United States,* 323 U.S. 214, 216. The narrow issue in the present case is not whether the right, for example, of a homeowner to choose his guests should prevail over petitioner's constitutional right to be free from the state enforcement of a policy of racial discrimination, but rather whether the interest of a proprietor who has opened up his business property for use by the general public—in particular, by passengers travelling in interstate com-

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dividual, even though the denial be founded on the race or color of that individual? Where does any slavery or servitude, or badge of either, arise from such an act of denial? *Whether it might not be a denial of a right which, if sanctioned by state law, would be obnoxious to the prohibitions of the Fourteenth Amendment, is another question.*

* * * * *

Now, conceding, for the sake of the argument, that the admission to an inn, a public conveyance, or a place of public amusement, on equal terms with all other citizens, is the right of every man and all classes of men, is it any more than one of those rights which the states by the Fourteenth Amendment are forbidden to deny to any person? And is the Constitution violated until the denial of the right has some State sanction or authority? [Emphasis added.]

merce on a federally-regulated carrier—should so prevail.[20]

[20] During the debate on the bill introduced in the Senate by Charles Sumner of Massachusetts on December 20, 1871, to amend the Civil Rights Act of 1866, 14 Stat. 27, which served as the precursor to the Civil Rights Act of 1875, 18 Stat. 336, Senator Sumner distinguished between a man's home and places and facilities of public accommodation licensed by law: "Each person, whether Senator or citizen, is always free to choose who shall be his friend, his associate, his guest. And does not the ancient proverb declare that a man is known by the company he keeps? But this assumes that he may choose for himself. His house is his 'castle'; and this very designation, borrowed from the common law, shows his absolute independence within its walls; * * * but when he leaves his 'castle' and goes abroad, this independence is at an end. He walks the streets; but he is subject to the prevailing law of Equality; nor can he appropriate the sidewalk to his own exclusive use, driving into the gutter all whose skin is less white than his own. But nobody pretends that Equality on the highway, whether on pavement or sidewalk, is a question of society. And, permit me to say, that *Equality in all institutions created or regulated by law* is as little a question of society" (emphasis added). After quoting Holingshead, Story, Kent and Parsons on the common law duties of innkeepers and common carriers to treat all alike, Sumner then said: "As the inn cannot close its doors, or the public conveyance refuse a seat to any paying traveler, decent in condition, so it must be with the theater and other places of public amusement. Here are institutions whose peculiar object is the 'pursuit of happiness,' which has been placed among the equal rights of all." Cong. Globe, 42d Cong., 2d Sess., 382–383. See also Cong. Rec., 43d Cong., 1st Sess., 11: "Our colored fellow-citizens must be admitted to complete equality before the law. In other words, everywhere *in everything regulated by law*, they must be equal with all their fellow citizens. There is the simple principle on which this bill stands" (emphasis added); Cong. Globe, 42d Cong., 2d Sess., 381: "The precise rule is Equality before the Law; * * * that is, that condition before the Law in which all are alike—being entitled, *without any discrimination to the equal enjoyment of all institutions, privileges, advantages and conveniences created or regulated by law* * * *" (emphasis added).

Courts have long placed restrictions upon proprietors whose operations are of a public nature, affecting the community at large. As early as *Munn* v. *Illinois,* 94 U.S. 113, 126, this Court said:

> Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. * * *

This Court in *Marsh* v. *Alabama,* 326 U.S. 501, 506, similarly rejected the contention that the rights of a proprietor of property open to the public were coextensive with those of a homeowner:

> Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it * * *.[21]

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[21] *Cf. Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U.S. 793, 798, 802, n. 8; *National Labor Relations Board* v. *Babcock & Wilcox Co.,* 351 U.S. 105, 112. Although *Marsh* v. *Alabama* involved the rights of free speech and religion, its principle is equally applicable to other Fourteenth Amendment rights, and this Court, in *Shelley* v. *Kraemer, supra,* at 22, has specifically applied it to the right to equal protection of the laws, stating that "the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment. *Cf. Marsh* v. *Alabama,* 326 U.S. 501 (1946)."

Only recently, a Washington court applied the *Marsh* principle in rejecting the right of an owner of a shopping center to obtain an injunction from a state court restraining peaceful picketing on the privately-owned sidewalks of the shopping center. *Freeman* v. *Retail Clerks Local 1207* (Kings County Super. Ct., Washington), decided December 9, 1959 (28 U.S. Law Week 2311). The court noted that the owner had contracted away his right to private and personal use and occupancy, and emphasized that interference with the owner's fundamental right of privacy was not involved because he had devoted his property for use by the general public. In April of this year, the Superior Court of Raleigh, North Carolina, relying on the *Marsh* decision, dismissed trespass charges against forty-three Negroes who had been arrested for demonstrating on the privately-owned sidewalks of a shopping center against segregated lunch counters in the stores of the shopping center. See New York Times, April 23, 1960, p. 21, col. 1.

The concepts of "private property" and "state action," as *Marsh* illustrates, do not fall into neat, precise categories. In the last analysis, the determination whether private conduct has been so "panoplied" by governmental action, power, or support that it may fairly be judged by the standards of the Fourteenth Amendment is, like so many questions of constitutional law, one of proximity and degree. As already noted, this case concerns, not an individual home owner, but an essential public transportation facility in the direct stream of interstate commerce

and subject to effective federal regulation under the Interstate Commerce Act. While the facility here may be distinguished from a company town, such as was involved in *Marsh* v. *Alabama,* or from the primary voting machinery involved in *Terry* v. *Adams,* 345 U.S. 461, 473, and *Smith* v. *Allwright,* 321 U.S. 649, we think the underlying rationale of those cases is equally applicable here. The Trailways Bus Terminal in Richmond, Virginia, is not comparable to a home or even to a corner grocery store. Though privately owned, it is an interstate facility operated for the benefit of the general public, in relation to which the broad constitutional principle of *Marsh* v. *Alabama* may properly be applied. Cf. *Boman* v. *Birmingham Transit Co.,* decided July 12, 1960, in which the Fifth Circuit held that because of "the peculiar function" performed by a bus transit company as a public utility "and its relation to the City and State of Alabama through its holding of a special franchise to operate on the public streets of Birmingham," the acts of the bus company in requiring racially segregated seating were "state acts," and thus violated the constitutional rights of Negro passengers.

To be sure, local trespass laws are directed towards the avoidance of breaches of the peace. But petitioner's conduct was peaceable and orderly; if any threat to the peace was involved, it arose solely from the racial discrimination against him. Accordingly, if the state's legitimate interest in preventing breaches of the peace is made the basis of governmental intervention in such a situation, its intervention could be constitutionally

justified only if directed at the source of the threat to the peace, rather than at the person who is being discriminated against.

The federal statutory and constitutional rights here invoked are derived from not only the Interstate Commerce Act and the Fourteenth Amendment, but the Civil Rights Acts as well. 42 U.S.C. 1981 provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, * * * and to full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens * * *." 42 U.S.C. 1982 provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to * * * purchase * * * real and personal property." Referring to similar statutory provisions involving jury service, this Court has declared: "For us the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of alleged discrimination." *Fay* v. *New York,* 332 U.S. 261, 282–283. See also *Shelley* v. *Kraemer,* 334 U.S. 1, 10–12; *Hurd* v. *Hodge,* 334 U.S. 24, 30–34. In *Virginia* v. *Rives,* 100 U.S. 313, 318, the Court, speaking of these statutes, said:

> The plain object of these statutes, as of the Constitution which authorized them, was to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same.

When a state abets or sanctions discrimination against a colored citizen who seeks to patronize a business establishment open to the general public, the colored citizen is thereby denied the right "to make and enforce contracts" and "to purchase personal property" guaranteed by 42 U.S.C. 1981 and 1982 against deprivation on racial grounds.

CONCLUSION

It is respectfully submitted that the judgment below should be reversed with directions to vacate the conviction and dismiss the criminal proceedings brought against petitioner.

J. LEE RANKIN,
Solicitor General.
HAROLD R. TYLER, JR.,
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SEPTEMBER 1960.

U.S. GOVERNMENT PRINTING OFFICE: 1960

APPENDIX

I. C. C. Docket No. MC 59238

ANNUAL REPORT

ORGANIZATION AND CONTROL

1. State full and exact name of respondent making this report:
Virginia Stage Lines, Inc.

doing business as Virginia Trailways

2. Name, title, and address of officer, owner or partner to whom correspondence concerning this report should be addressed.

(Name)	(Title)	
D. S. Marshall	Office Manager	
114-4th St., S. E. (Number) (Street)	Charlottesville (City)	Virginia (State)

3. Address of office where accounting records are maintained:

114-4th St., S. E. (Number) (Street)	Charlottesville (City)	Virginia (State)

4. Carrier is Corporation
(Individual, partnership, corporation, association, etc.)

5. If a partnership, state the names and addresses of each partner, including silent or limited, and their interests:

Name	Address	Proportion of interest

6. If a corporation, association, or other similar form of enterprise:

A. Incorporation or organization was—
In the State of Virginia on March 20, 1925

B. The directors' names, addresses, and terms of office are:

Name	Address	Term expires
S. A. Jessup	Charlottesville, Va.	One year or until
P. S. Jessup	Washington, D. C.	successors are
C. A. Jessup	Charlottesville, Va.	duly elected.
J. L. Jessup	Charlottesville, Va.	
W. G. Muncy	Charlottesville, Va.	

C. The names and titles of principal general officers are:

Name	Title
S. A. Jessup	Chairman of Board
C. A. Jessup	President & General Manager
P. S. Jessup	Vice President
W. G. Muncy	Secretary & Assistant Treasurer
J. L. Jessup	Treasurer
B. A. Reynolds	Assistant Secretary
R. A. Trice	Assistant Secretary
J. E. Craft	Vice President

13. List of companies under common control with respondent

Line No.			
1	Charlottesville & Albemarle Bus Co.	Charlottesville Va.	Joint Management
2	Trailways Service, Inc.	Washington D. C.	Joint Management
3	Safeway Transit Co.	Wilmington N. C.	Joint Management
4	Lynchburg Transit Co.	Lynchburg Va.	Joint Management
5	Safety Motor Transit Co.	Roanoke Va.	Joint Management
6	Safeway Trails, Inc.	Washington D. C.	Joint Management
7	Allentown & Reading Transit Co.	Allentown Pa.	Joint Management
8	Trailways Bus Terminal Inc.	Richmond Va.	Joint Facility
9	Va. Pepsi Cola Bottling Co., Inc.	Charlottesville Va.	Joint Management
10	Trailways Terminal of Washington Inc.	Washington D. C.	Joint Facility
11	Trailways of New England	Washington D. C.	Joint Management
12			

14. Furnish complete list showing all companies controlled by respondent, either directly or indirectly. List under each directly controlled company the companies controlled by it and under each such company any others of more remote control. Each step of control should be appropriately indented from the left margin. After each company state the percentage, if any, of the voting power represented by securities owned by the immediately controlling company.

Line No.		
21	Allentown & Reading Transit Co. Allentown Pa.	100% Stock Ownership
22		
23	Trailways Service Inc., Washington D. C.	50% Stock Ownership
24	Joint Garage Facility-Respondent & Safeway Trails, Inc., Washington, D. C.	
25		
26	Trailways Bus Terminal, Inc., Richmond Va.	50% Stock Ownership
27	Joint Terminal Facility-Respondent & Carolina Coach Co. Raleigh N. C.	
28		
29	Safeway Trails, Inc., Washington, D. C.	Ownership of 355 shares of total of
30		1500 shares outstanding
31	Trailways Terminal of Washington, D. C.	50% Stock Ownership
32	Joint Terminal Facility Respondent & Safeway Trails, Inc., Washington, D. C.	
33		
34	Safeway Transit Co., Wilmington N. C.	100% Stock Ownership
35	Trailways of New England	50% Stock Ownership
36	Safety Motor Transit Co., Roanoke, Va.	100% Stock Ownership
37	Valley Trailways, Inc.	50% Stock Ownership
38	Lynchburg Transit Co., Lynchburg, Va.	100% Stock Ownership
39	Service Coach Lines, Inc., Tampa, Florida (ICC Docket M MCF 6168)	33 1/3% Stock Ownership
40	Blue Ribbon Lines, Corp., Ashland, Kentucky	100% Stock Ownership
41		
42		

15. Furnish complete list showing companies controlling the respondent. Commence with the company which is most remote and list under each such company the company immediately controlled by it. Each step of control should be appropriately indented from the left margin. After each company state the percentage, if any, of the voting power represented by securities owned by the immediately controlling company. Where any company listed is immediately controlled by or through two or more companies jointly, list all such companies and list the controlled company under each of them, indicating its status by appropriate cross references.

Line No.	
51	None
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Schedule 9009.—CONTRACTS AND AGREEMENTS—ASSOCIATED COMPANIES

1. Furnish the information called for in item 9 concerning each contract agreement or arrangement (written or unwritten) in effect at any time during the year between the respondent and companies or persons associated with the respondent, including officers, directors, stockholders, owners, partners or their wives and other close relatives, or their agents, whereby the respondent received management, construction, engineering, financial, legal, accounting, purchasing or other type of service including the furnishing of materials and supplies, purchase of equipment and the leasing of structures, land, and vehicles.

2. The basis for computing payments such as rental charges, commissions, taxes, maintenance costs, charges for improvements, etc., should be fully stated in the case of each such contract, agreement or arrangement.

3. The total amount paid by the respondent during the year under the terms of each contract, agreement, etc., should be stated.

4. If motor fuel is furnished the respondent, the price per gallon should be shown.

5. In connection with the repairing and servicing of the respondent's equipment, and the furnishing of other materials and supplies, the mark-up of labor and materials should be stated.

6. Information to be reported in this schedule shall be furnished for each company or individual to whom the respondent paid $2,500 or more during the year covered by the report.

7. Do not include information shown in schedule 9002–A.

8. If the respondent did not participate in any such contract or arrangement, that fact should be stated.

9. (a) Name of company or person rendering service.
   (b) If associate is other than a principally-owned subsidiary of respondent such as a company controlled by persons associated with respondent, furnish names of partners, owners, or stockholders of associate and their proportionate interest in associate.
   (c) Character of service.
   (d) Basis of charges.
   (e) Date and term of contract.
   (f) Date of Commission authorization, if contract has received Commission approval.
   (g) Total charges for year, classified as to purchases, compensation for service, and reimbursement for expenses.

Line No.	
1	(a) Trailways Service, Inc., Washington, D. C.
2	(c) Maintenance & Service to Revenue Equipment
3	(d) Cost of actual work done plus fixed percentage overside on labor, materials and
4	supplies furnished to cover overhead.
5	(e) September 1947 with cancellation by either party
6	(f) None
7	(g) Not available
8	
9	Safeway Trails, Inc. has leased space in New York Port of Authority Bus Terminal
10	in connection with Virginia Stage Lines, Inc. and others have a working agreement
11	for cooperative advertising and Sales Promotion in the New York area.
12	
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15	Respondent owns 50% Stock of Trailways Bus Terminal, Inc. which is operated as a
16	joint Terminal facility in Richmond, Virginia with Carolina Coach Company.
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20	Respondent owns 50% of Stock of Trailways Terminal of Washington, Inc.
21	Washington, D. C. which is operated as a joint facility with Safeway Trails, Inc.
22	
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25	Respondent also has working arrangements with various other carriers for
26	"Pooled Equipment" between various points on an exchange equipment basis. The
27	contract contemplates balancing out mileage by even mileage on exchange of
28	equipment.
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Interstate Commerce Commission
Washington 25, D. C.

I, HAROLD D. McCOY, Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached is a true copy of the Title page and pages 3 and 50 taken from the annual report of Virginia Stage Lines, Inc., for the year ended December 31, 1959, the original of which now on file in this Commission, in my custody as Secretary of said Commission.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Commission this 8th day of August, A. D. 1960.

SECRETARY OF THE INTERSTATE COMMERCE COMMISSION

31 O - 60 (Face p. 28) No. 4