Supreme Court of the United States

October Term, 1960

No. 7

BRUCE BOYNTON,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

On Writ of Certiorari to the Supreme Court of Appeals of Virginia

BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA

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PRIOR PROCEEDINGS

On January 6, 1959, petitioner was convicted in the Police Court of the City of Richmond, Virginia, for violation of Section 18-225 of the Code of Virginia (1950) as amended, and a fine of ten dollars and costs was imposed. Upon appeal to the Hustings Court of the City of Richmond, petitioner was again convicted on February 20, 1959, and the same punishment imposed. A petition for a writ of error to the judgment of the Hustings Court was denied by the Supreme Court of Appeals of Virginia on June 19, 1959, and the cause is currently before this Court on a writ of certiorari to the Supreme Court of Appeals of Virginia, which was granted by this Court on February 23, 1960.

STATEMENT OF FACTS

On the night of December 20, 1958, the petitioner, a Negro student at the Howard University School of Law, was traveling via "Trailways" bus from Washington, D. C., to his home in Selma, Alabama. He boarded the bus in Washington, D. C., at 8:00 P. M., and arrived in Richmond, Virginia, about 10:40 P. M. Upon being informed by the driver of the bus that there would be a stopover of some forty minutes in Richmond, petitioner left the bus and entered the bus terminal building located at Ninth and Broad Streets in the City of Richmond (R. 27-28). Although noticing therein a separate restaurant for colored patrons which had seating capacity available (R. 28, 22), petitioner entered the restaurant for white patrons, seated himself at a counter and requested service. He was advised —first by a waitress and then by the assistant manager of the restaurant—that separate facilities were maintained for persons of the Negro race and that he could be served in the restaurant reserved for colored patrons. Petitioner stated that he was an interstate passenger and was entitled to be served where he was. The assistant manager requested him to leave the premises and repair to the other restaurant. When petitioner refused to comply with this request, he was arrested, upon a warrant issued at the instance of the assistant manager, for trespass in violation of Section 18-225 of the Virginia Code (R. 20, 21, 30).

The bus terminal building in Richmond, Virginia, is owned by Trailways Bus Terminal, Inc., which company leases space therein to Bus Terminal Restaurant of Richmond, Inc. The lease in question grants Bus Terminal Restaurant of Richmond, Inc., exclusive authority to operate restaurant facilities in the terminal (R. 9-18), and separate facilities for white and colored patrons are maintained by

the lessee company (R. 20). The Record discloses that Bus Terminal Restaurant of Richmond, Inc., is "not affiliated in any way with the bus company", and that the bus company has "no control over the operation of the restaurant" (R. 20). Moreover, the restaurant facilities are "not necessarily" operated for bus passengers and have "quite a bit of business . . . from local people" (R. 23).

Counsel for the Commonwealth find it necessary to comment upon the statement contained in the petitioner's brief and that contained in the brief *amicus curiae* filed by the Solicitor General on behalf of the United States. In the former, it is stated that petitioner first looked into a small restaurant and noticed "that it was crowded" (Brief, p. 3). In the brief of the Solicitor General, it is stated that the restaurant reserved for colored people "appeared to be crowded" (Brief, p. 2). While the petitioner testified that the restaurant reserved for colored patrons "appeared to be crowded" and that he informed the witness that it was "a bit" crowded, the witness Rush, assistant manager of the restaurant, testified that the facility in question was not crowded (R. 22). Neither the petitioner's brief nor that of the Solicitor General contains any reference to this positive testimony which, in the present posture of this litigation, must be accepted as establishing the fact of the case.

If the condition—whether crowded or uncrowded—of the restaurant reserved for colored people is immaterial, reference to such condition is unnecessary. If material, this Court should not be given the impression that the facts were favorable to the petitioner's view of the case in an attempt to show an alleged inconvenience to an interstate traveler which did not exist. On the contrary, an examination of his evidence establishes that the petitioner's complaint is not that he was denied an opportunity to secure food or was

inconvenienced in so doing, but that he was denied the opportunity to eat in a racially non-segregated facility in violation of his alleged constitutional right as an interstate traveler.

Moreover, while counsel for the petitioner and the Solicitor General have gone to great lengths to present to this Court evidence concerning the inter-corporate relationship between certain operating bus companies and Trailways Bus Terminal, Inc.—evidence which was not presented to nor considered by any judicial tribunal of the Commonwealth of Virginia—both have failed to mention, either in their factual statement or elsewhere in their briefs, evidence which is properly in the record (1) that there was no affiliation in any way between the bus company and the restaurant company here involved and (2) that the bus company had no control over the operation of the restaurant, which is maintained for local clientele as well as persons who may be passengers on buses using the terminal in which the restaurant facilities are located.

THE STATUTE

Under attack in the instant case is Section 18-225 of the Code of Virginia (1950) as amended, which in pertinent part provides:

> "If any person shall without authority of law go upon or remain upon the lands or premises of another, after having been forbidden to do so by the owner, lessee, custodian or other person lawfully in charge of such land, or after having been forbidden to do so by sign or signs posted on the premises at a place or places where they may be reasonably seen, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one hundred dollars or by confinement in jail not exceeding thirty days, or by both such fine and imprisonment."

QUESTIONS PRESENTED

1. Does Section 18-225 of the Virginia Code, as applied to petitioner in the case at bar, contravene Article I, Section 8, Clause 3, of the Constitution of the United States?

2. Does Section 18-225 of the Virginia Code, as applied to the petitioner in the case at bar, contravene the Fourteenth Amendment to the Constitution of the United States?

ARGUMENT

I.

The Virginia Statute and the Interstate Commerce Clause

Section 18-225 of the Virginia Code first appeared as Chapter 165 of the Acts of the General Assembly of 1934. Acts of Assembly (1934), Chapter 165, p. 248. With minor amendments not here material, the language of the existing statute is substantially identical to that contained in the original enactment. As is manifest from its terms, the statute does no more than impose criminal sanctions for continued trespass by an individual upon the lands or premises of another after proper warning and is entirely devoid of any racial connotation whatever. The statute does not purport to be, and is not, a racial segregation law.* It forbids trespass by anyone—whether he be a member of a racial minority or not—in going upon or remaining upon the private property of another when he is not welcome. Such con-

*Indeed, those familiar with the legislative history of the statute are aware that the provision concerning signs was inserted to combat the problems presented by unauthorized use of unattended, private parking lots. In this connection, petitioner's discussion of the early statutes and common law of Virginia relating to trespass upon private property, and his compilation of the statutes of other States, England, the Commonwealth countries and South Africa (to show where the petitioner would and would not have been convicted of an offense under the circumstances of this case) are of no assistance in resolving the issues presented in the instant litigation.

duct in violation of individual property rights is a proper subject of State legislation.

Counsel for the Commonwealth respectfully submit that invocation of this statute by an agent of Bus Terminal Restaurant of Richmond, Inc., in the case at bar, entails no conflict with the Interstate Commerce Act or the Commerce Clause of the United States Constitution. With respect to the Interstate Commerce Act, 49 U. S. C. A. 1 et seq., the provisions of Sections 3(1) and 316(d) thereof make it unlawful for any common carrier by railroad or motor vehicle to make or give any undue or unreasonable preference or advantage to any person, or to subject any particular person to any undue or unreasonable prejudice or disadvantage in any respect.* However, the maintenance of racially separate restaurant facilities in a terminal building by a lessee non-carrier concern is not antagonistic to these provisions of the Interstate Commerce Act. The validity of this proposition was definitely established in *N.A.A.C.P.* v. *St. Louis—San Francisco Railway Co.*, 297 I. C. C. 335, in which case the Interstate Commerce Commission ruled that the maintenance of segregated lunch rooms located in a railroad passenger station in Richmond, Virginia, by a lessee of the Richmond Terminal Railway Company was not violative of Section 3(1) of the Act. Subsequently, in *Keys* v. *Carolina Coach Co.*, 64 M. C. C. 769, the Commission ruled that Section 316(d) of the Interstate Commerce Act imposed upon common carriers by motor vehicle restrictions similar to those imposed by Section 3(1) upon railroad carriers.

The decision of the Interstate Commerce Commission in *N.A.A.C.P.* v. *St. Louis—San Francisco Railway Company,*

*49 U.S.C.A. 3(1); 49 U.S.C.A. 316(d); post, Appendix A.

supra, is utterly at variance with the contention of the petitioner in the case at bar that the operation of racially separate restaurant facilities by Bus Terminal Restaurant of Richmond, Inc., is repugnant to the Interstate Commerce Act. Indeed, in that case it was established—in contrast to the want of similar proof in the case at bar—that the defendant corporation, Richmond Terminal Railway Company, which operated the terminal and leased the lunch room facilities to the Union News Company, was jointly controlled by the Richmond, Fredericksburg and Potomac and the Atlantic Coast Line railroad companies and was a carrier subject to the jurisdiction of the Commission.

In an effort to avoid the conclusive effect of that decision, counsel for the petitioner and the Solicitor General seek to introduce new evidence in the instant case, at the ultimate level of judicial review, to establish that Trailways Bus Terminal, Inc.—the company which owned the terminal building in question and leased space therein to Bus Terminal Restaurant of Richmond, Inc.—is jointly owned by two operating bus companies, Carolina Coach Company and Virginia Stage Lines, whose names do not even appear in the record. In this manner they seek to invoke the provisions of Section 303(a)(19) of the Interstate Commerce Act, which prescribes:

> "The 'services' and 'transportation' to which this chapter applies include all vehicles operated by, for, or in the interest of any motor carrier irrespective of ownership or of contract, express or implied, together with all facilities and property operated or controlled by any such carrier or carriers, and used in the transportation of passengers or property in interstate or foreign commerce or in the performance of any service in connection therewith."

The evidence offered by counsel for the petitioner is set forth in documents of which the Supreme Court of Appeals of Virginia may not take judicial notice. The evidence of the Solicitor General is offered to this Court, for the first time in this case, by one who is not even a party to the litigation. *Counsel for the Commonwealth insist that such evidence is not properly before this Court and may not properly be considered by this Court.*

Even if it were appropriate for this Court to consider it, the challenged evidence would not establish that the restaurant facilities under consideration in this case were "operated or controlled" by a motor vehicle carrier. At most, such evidence would only establish that the terminal itself was so operated or controlled, and the record discloses that there was no enforced racial segregation—by law or otherwise—in any of the facilities of the terminal, as distinguished from the restaurant located in the same building.

The space utilized for the restaurant facilities was leased to an independent corporation which was in no way under the control of, or affiliated with, the bus company. The written lease between Trailways Bus Terminal, Inc. and Bus Terminal Restaurant of Richmond, Inc. is a part of the record in this case and, as was said of a comparable document in *N.A.A.C.P.* v. *St. Louis—San Francisco Railway Co., supra* at 343:

> "The lease is silent as to racial segregation. The Terminal has certain powers of supervision for a purpose which may be described as policing. The lessee is obligated to 'comply with the requirements of the Department of Public Health, City of Richmond, and with all other lawful governmental rules and regulations.' The context, however, indicates that this requirement is for the purpose of keeping the premises in a neat, clean, and orderly condition, and does not

render the lessee liable for violations of the Interstate Commerce Act."

Significantly, counsel for the petitioner did not assert—either in their petition for writ of certiorari or in their brief—that the validity of the Virginia statute under the Interstate Commerce Act was one of the questions presented by this appeal, and they concede that Congress has expressed no specific intent concerning an arrest and conviction like that of the petitioner in the case at bar (Brief, p. 19). Moreover, counsel for the petitioner have devoted less than two pages to this point in their argument on brief. In so doing, it would appear that they have accorded this contention a consideration proportioned to its merit.

Southern Pacific Co. v. *Arizona*, 325 U. S. 761, provides an appropriate point of departure for consideration of petitioner's principal contention, *i.e.*, that invocation of the Virginia statute under the circumstances of the case at bar is repugnant to the Commerce Clause of the United States Constitution. The dominant question presented in that case was whether or not the Arizona Train Limit Law, which limited the length of railroad trains operating in Arizona to fourteen passenger and seventy freight cars, contravened the Commerce Clause. With respect to the principles governing the resolution of that question and the proper application of those principles to the case before it, this Court observed (325 U. S. at 766-771):

> "Although the commerce clause conferred on the national government power to regulate commerce, its possession of the power does not exclude all state power of regulation. Ever since Wilson v. Black Bird Creek Marsh Co. 2 Pet (US) 245, 7 L ed 412, and Cooley v. Port Wardens, 12 How (US) 299, 13 L ed 996, it has been recognized that, in the absence of conflicting legis-

lation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interestate commerce or even, to some extent, regulate it.

* * *

"But ever since Gibbons v. Ogden, 9 Wheat. (US) 1, 6 L ed 23, the states have not been deemed to have authority *to impede substantially the free flow of commerce from state to state,* or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.

* * *

"In the application of these principles some enactments may be found to be plainly within and others plainly without state power. But between these extremes lies the infinite variety of cases, in which regulation of local matters may also operate as a regulation of commerce, in which reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved.

* * *

"Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a matter which would otherwise not be permissible . . . or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce.

* * *

"But in general Congress has left it to the courts to formulate the rules thus interpreting the commerce clause in its application, doubtless because it has . . . been aware that *in their application state laws will not be invalidated without the support of relevant factual material which will 'afford a sure basis' for an informed*

judgment. Terminal R. Asso. v. Brotherhood of R. Trainmen, supra (318 US 8, 87 L ed 578, 63 S Ct 420); Southern R. Co. v. King, 217 US 524, 54 L ed 868, 30 S Ct 594. Meanwhile, Congress has accomodated its legislation as have the states, to these rules as an established feature of our constitutional system. There has thus been left to the states wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, *provided it does not materially restrict the free flow of commerce across state lines, or intefere with it in matters with respect to which uniformity of regulation is of predominant national concern.*

"*Hence the matters for ultimate determination here are the nature and extent of the burden which the state regulation* of interstate trains, adopted as a safety measure, *imposes on interstate commerce,* and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, such as to make inapplicable the rule generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference." (Italics supplied)

Consistent with the principles thus enunciated, this Court proceeded to consider and evaluate the "relevant factual material" which afforded "a sure basis" for its "informed judgment" that the Arizona statute *in fact* imposed an undue burden upon interstate commerce. This material consumed some 3000 pages of the printed record before the Court in that case, and in its opinion, this Court repeatedly referred to the "evidence", the "statistics introduced into the record" and the "detailed findings" which the record amply supported. Id. at 775-778. Only after a full analysis of the

record evidence did this Court conclude that the statute under consideration infringed the Commerce Clause.

In *Morgan* v. *Virginia,* 328 U. S. 373, the question presented was whether or not a statute of Virginia requiring racial separation of passengers on buses operated by intrastate and interstate motor vehicle carriers was antagonistic to the Commerce Clause. Invalidating the statute there under consideration, this Court stated (328 U. S. at 377-381):

> "There is a recognized abstract principle, however, that may be taken as a postulate for testing whether particular state legislation in the absence of action by Congress is beyond state power. This is that the state legislation is invalid if it *unduly burdens* that commerce in matters where uniformity is necessary—necessary in the constitutional sense of useful in accomplishing a permitted purpose. Where uniformity is essential for the functioning of commerce, a state may not interpose its local regulation. Too true it is that the principle lacks in precision. Although the quality of such a principle is abstract, its application *to the facts of a situation created by the attempted enforcement of a statute* brings about *a specific determination,* as to whether or not the statute in question is a burden on commerce. Within the broad limits of the principle, *the cases turn on their own facts.*
>
> * * *
>
> "On appellant's journey, this statute required that she sit in designated seats in Virginia. Changes in seat designation might be made 'at any time' during the journey when 'necessary or proper for the comfort and convenience of passengers.' This occurred in this instance. Upon such change of designation, the statute authorizes the operator of the vehicle to require, as he did here, 'any passenger to change his or her seat as it may be necessary or proper.' An interstate passenger must if necessary repeatedly shift seats while moving

in Virginia to meet the seating requirements of the changing passenger group. On arrival at the District of Columbia line, the appellant would have had freedom to occupy any available seat and so to the end of her journey.

"Interstate passengers traveling via motors between the north and south or the east and west may pass through Virginia on through lines in the day or in the night. The large buses approach the comfort of pullmans and have seats covenient for rest. On such interstate journeys the enforcement of the requirements for reseating would be disturbing.

* * *

"*As our previous discussion demonstrates,* the transportation difficulties arising from a statute that requires commingling of the races, as in the De Cuir Case, are increased by one that requires separation, as here." (Italics supplied)

The doctrine enunciated in these cases is not ancient history, nor are the decisions themselves judicial relics of some lost civilization. The opinion of this Court in *Bibb* v. *Navajo Freight Lines,* 359 U. S. 520, decided May 25, 1959, convincingly demonstrates that the principles under consideration have not been enervated by the passage of time and that they apply with undiminished vitality to present day litigation. Indeed, counsel for the petitioner concede that "the vigor of the *Morgan* and *Southern Pacific* cases was reaffirmed" by this Court's decision in the *Bibb* case.

Under consideration in that case was the question of whether or not an Illinois statute requiring a certain type of rear fender mudguard on trucks and trailers operating on the highways of that State conflicted with the Commerce Clause. Sustaining the decision of a specially con-

stituted three-judge District Court declaring the Illinois statute violative of the Commerce Clause, this Court declared (359 U. S. at 524):

> "Unless we can *conclude on the whole record* that 'the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it' (Southern P Co. v. Arizona, supra (325 US pp 775, 776)) we must uphold the statute." (Italics supplied)

The Court then proceeded to a consideration of the exhaustive findings of the trial court relating to the cost, safety, time loss and interference with the "interline" operations of motor carriers occasioned by an interstate carrier's compliance with the challenged statute. At the conclusion of its review, the Court pointed out (359 U. S. at 528):

> *"This in summary is the rather massive showing of burden on interstate commerce which appellees made at the hearing."* (Italics supplied)

Mr. Justice Harlan, with whom Mr. Justice Stewart joined, authored a separate concurring opinion which is sufficiently brief and sufficiently significant to merit full reproduction in the body of this brief (359 U. S. at 530).

> "The opinion of the Court *clearly demonstrates the heavy burden* in terms of cost and interference with 'interlining,' which the Illinois statute here involved imposes on interstate commerce. *In view of the findings of the District Court, summarized on page 5 of the Court's opinion and fully justified by the record,* to the effect that the contour mudflap 'possesses no advantages' in terms of safety over the conventional flap

> permitted in all other States, and indeed creates certain safety hazards, this heavy burden cannot be justified on the theory that the Illinois statute is a necessary, appropriate, or helpful local safety measure. Accordingly, I concure in the judgment of the Court." (Italics supplied)

The opinions of this Court in the *Southern Pacific, Morgan* and *Bibb* cases bring into bold relief the patent inadequacy of the instant record to present to this Court any substantial question of conflict between the Virginia statute and the Commerce Clause. The entire appellate record in the case at bar is less than thirty-five pages in length, and the transcribed evidence relates exclusively to the circumstances under which the petitioner was charged with violating the Virginia statute forbidding trespass to private property. Not a single item of evidence has been presented by the petitioner which even purports to establish that the regulation of the lessee non-carrier restaurant company and the Virginia statute under consideration in the instant case "materially restrict the free flow of commerce" across state lines; nor has any evidence been presented which even remotely tends to demonstrate "the nature and extent of the burden", if any, which the regulation and statute impose on interstate commerce. *Southern Pacific Co.* v. *Arizona, supra* at 770. In light of the decisions discussed above, it is manifest that a claim of repugnance to the Commerce Clause of the United States Constitution cannot be supported by mere speculation and conjecture and that the regulation of the restaurant company and the State statute challenged here cannot be held invalid in the absence of a clear showing that they constitute an interference with interstate commerce. In this situation, it is essential that there be record evidence upon which this Court may ground

a conclusion that the regulation and statute unduly burden interstate commerce. Since the record in this case is devoid of any evidence tending to establish this proposition, the critical issue in this case is highlighted by an eventuary vacuum, and an appropriate case for judicial intervention has not been made out.

It is obvious that this Court cannot "find" or "conclude" or "demonstrate" *on the basis of the record* in the instant case that the statute and regulation here under attack have even the remotest peripheral effect upon interstate commerce, much less that they impermissibly burden such commerce. Moreover, it is no part of the judicial function for courts to be ingenious in searching out grounds upon which state or federal legislation may be invalidated. On the contrary, as this Court recently iterated in a similar context, to indulge such a view "would be to ignore the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists." *Huron Cement Co.* v. *City of Detroit,* ..... U. S. ....., 80 S. Ct. 813, decided April 25, 1960.

Invalidation of the legislation under attack in the instant case upon the ground that, in its operation, it unduly burdens interstate commerce, would manifestly subvert the judicial principles enunciated by Mr. Justice Frankfurter in his concurring opinion in *American Fed. of Labor* v. *American Sash & Door Co.,* 335 U. S. 538, 555-557:

> "In the day-to-day working of our democracy it is vital that the power of the non-democratic organ of our Government be exercised with rigorous self-restraint. Because the powers exercised by this Court are inherently oligarchic, Jefferson all of his life thought of the Court as 'an irresponsible body' and 'independent of the nation itself'. The Court is not saved from being oligarchic because it professes to act in the service of

humane ends. As history amply proves, the judiciary is prone to misconceive the public good by confounding private notions with constitutional requirements, and such misconceptions are not subject to legitimate displacement by the will of the people except at too slow a pace. * * *

"Our right to pass on the validity of legislation is now too much a part of our constitutional system to be brought into question. But the implications of that right and the conditions for its exercise must constantly be kept in mind and vigorously observed. Because the Court is without power to shape measures for dealing with the problems of society but has merely the power of negation over measures shaped by others, the indispensable judicial requisite is intellectual humility, and such humility presupposes complete disinterestedness. And so, in the end, it is right that the Court, should be indifferent to public temper and popular wishes. * * * A court which yields to the popular will thereby licenses itself to practice despotism, for there can be no assurance that it will not on another occasion indulge its own will. Courts can fulfill their responsibility in a democratic society only to the extent that they succeed in shaping their judgments by rational standards, and rational standards are both impersonal and communicable. Matters of policy, however, are by definition matters which demand the resolution of conflicts of value, and the elements of conflicting values are largely imponderable. Assessment of their competing worth involves differences of feeling; it is also an exercise in prophecy. Obviously the proper forum for mediating a clash of feelings and rendering a prophetic judgment is the body chosen for those purposes by the people. Its functions can be assumed by this Court only in disregard of the historic limits of the Constitution."

Finally, counsel for respondent submit that none of the decisions cited by petitioner is applicable to the situation which obtains in the instant case. These decisions were also relied upon in *Williams* v. *Howard Johnson's Restaurant,*

4 Cir., 268 F. 2d 845, in which case the petitioner contended that his exclusion from the Howard Johnson's Restaurant in the City of Alexandria, Virginia, on racial grounds amounted to discrimination against a person moving in interstate commerce and also interference with the free flow of commerce in violation of the Constitution of the United States. With respect to these decisions, the United States Court of Appeals for the Fourth Circuit declared (268 F. 2d at 848):

> "The cases upon which the plaintiff relies in each instance disclosed discriminatory action against persons of the colored race *by carriers engaged in the transportation of passengers in interstate commerce.* In some instances the carrier's action was taken in accordance with its own regulations, which were declared illegal as a violation of paragraph 1, section 3 of the Interstate Commerce Act, 49 U.S.C.A. Sec. 3(1), which forbids a carrier to subject any person to undue or unreasonable prejudice or disadvantage in any respect, as in Mitchell v. United States, 313 U.S. 80, 61 S. Ct. 873, 85 L. Ed. 1201, and Henderson v. United States, 339 U. S. 816, 70 S. Ct. 843, 94 L. Ed. 1302. In other instances, the carrier's action was taken in accordance with a state statute or state custom requiring the segregation of the races by public carriers and was declared unlawful as creating an undue burden on interstate commerce in violation of the commerce clause of the Constitution, as in Morgan v. Com. of Virginia, 328 U. S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317; Williams v. Carolina Coach Co., D. C. Va., 111 F. Supp. 329, affirmed 4 Cir., 207 F. 2d 408; Flemming v. S. C. Elec. & Gas Co., 4 Cir., 224 F. 2d 752; and Chance v. Lambeth, 4 Cir., 186 F. 2d 879.
>
> *"In every instance the conduct condemned was that of an organization directly engaged in interstate* commerce and the line of authority would be persuasive in

the determination of the present controversy *if it could be said that the defendant restaurant was so engaged.* We think, however, that the cases cited are not applicable because we do not find that a restaurant is engaged in interstate commerce *merely because in the course of its business of furnishing accommodations to the general public it serves persons who are traveling from state to state.* As an instrument of local commerce, the restaurant is not subject to the constitutional and statutory provisions discussed above and, thus, is at liberty to deal with such persons as it may select." (Italics supplied)

II.

The Virginia Statute and the Fourteenth Amendment

The petitioner's contention that his arrest and conviction for trespass violates Fourteenth Amendment rights is worthy of little consideration.

Shelley v. *Kraemer,* 334 U. S. 1, expressly held that the Fourteenth Amendment erects no shield against merely private conduct, however discriminatory or wrongful. The Court pointed out that since the decision of this Court in the *Civil Rights Cases,* 109 U. S. 3, the principle has become firmly imbedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may be fairly said to be that of the States.

In *United States* v. *Harris,* 106 U. S. 629, this Court, quoting from *United States* v. *Cruickshank,* 92 U. S. 542, said:

> " 'The fourteenth amendment prohibits a state from depriving any person of life, liberty or property without due process of law, or from denying to any person the equal protection of the laws; but this provision does not add anything to the rights of one citizen as against

> another. It simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society. The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the states, and it remains there. The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guarantees, and no more. The power of the national government is limited to this guaranty.' "

If the restaurant involved in this case is not subject to regulation by Congress under its power to regulate interstate commerce, the company operating it is free to select its patrons upon any basis it sees fit, and, in the case at bar, was within its rights in directing the petitioner to leave the section of the restaurant reserved for white patrons.

In the last two years, five decisions—one by the Supreme Court of North Carolina, one by the Supreme Court of Delaware, one by the United States Court of Appeals for the Fourth circuit, one by the United States District Court for the Eastern District of Maryland, and the other, this case, from the Supreme Court of Appeals of Virginia, have all sustained the right of the operator of a private restaurant to discriminate on the basis of race as against the contention that such action was proscribed by the Fourteenth Amendment. There has been no decision to the contrary, State or Federal, so far as we are aware, and none has been cited here.

In *State* v. *Clyburn,* 247 N. C. 455, 101 S. E. 2d 295, decided in 1958, a trespass conviction similar to that involved in this case, was upheld. The Court, after citing and quoting from the *Civil Rights Cases, supra,* and *U. S.* v. *Harris, supra,* said:

"More than half a century after these cases were decided the Supreme Court of the United States said in *Shelley* v. *Kraemer,* 334 U. S. 1, 68 S. Ct. 836, 842, 92 L. Ed. 1161, 3 A.L.R. 2d 441: 'Since the decision of this Court in the Civil Rights Cases, 1883, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.' This interpretation has not been modified: *Collins* v. *Hardyman,* 341 U. S. 651, 71 S. Ct. 937, 95 L. Ed. 1253; *District of Columbia* v. *Thompson Co.,* 346 U. S. 100, 73 S. Ct. 1007, 97 L. Ed. 1480; *Williams* v. *Yellow Cab Co.,* 3 Cir., 200 F. 2d 302, certiorari denied *Dargan* v. *Yellow Cab Co.,* 346 U. S. 840, 74 S. Ct. 52, 98 L. Ed. 361.

"*Dorsey* v. *Stuyvesant Town Corp.,* 299 N. Y. 512, 87 N. E. 2d 541, 14 A.L.R. 2d 133, presented the right of a corporation, organized under the New York law to provide low cost housing, to select its tenants, with the right to reject on account of race, color, or religion. The New York Court of Appeals affirmed the right of the corporation to select its tenants. The Supreme Court of the United States denied certiorari, 339 U. S. 981, 70 S. Ct. 1019, 94 L. Ed. 1385.

"The right of an operator of a private enterprise to select the clientele he will serve and to make such selection based on color, if he so desires, has been repeatedly recognized by the appellate courts of this nation [Citing cases]. The owner-operator's refusal to serve defendants, except in the portion of the building designated by him, impaired no rights of defendants." 101 S. E. 2d 295, 299.

In *Williams* v. *Howard Johnson's Restaurant,* 268 F. 2d 845, decided in 1959, Judge Soper, in speaking for the

Fourth Circuit Court of Appeals, held that a restaurant, as an instrument of local commerce is not subject to the provisions of the Fourteenth Amendment, notwithstanding the substantial inconvenience and embarrassment to which persons of the Negro race may be subject in the denial to them of the right to be served in public restaurants. Judge Soper observed in his opinion:

> "The plaintiff concedes that no statute of Virginia requires the exclusion of Negroes from public restaurants and hence it would seem that he does not rely upon the provisions of the Fourteenth Amendment which prohibit the States from making or enforcing any *law* abridging the privileges and immunities of citizens of the United States or denying to any person the equal protection of the law. He points, however, to statutes of the State which require the segregation of the races in the facilities furnished by carriers and by persons engaged in the operation of places of public assemblage; he emphasises the long established local custom of excluding Negroes from public restaurants and he contends that the acquiescence of the State in these practices amounts to discriminatory State action which falls within the condemnation of the Constitution. The essence of the argument is that the State licenses restaurants to serve the public and thereby is burdened with the positive duty to prohibit unjust discrimination in the use and enjoyment of the facilities.
>
> "This argument fails to observe the *important distinction between activities that are required by the State and those which are carried out by voluntary choice and without compulsion by the people of the State in accordance with their own desires and social practices. Unlike these actions are performed in obedience to some positive provision of State law they do not furnish a basis for the pending complaint.* The license laws of Virginia do not fill the void Section 35-26 of the Code of Virginia, 1950, makes it

unlawful for any person to operate a restaurant in the State without an unrevoked permit from the Commissioner, who is the chief executive officer of the State Board of Health. The statute is obviously designed to protect the health of the community but it does not authorize State officials to control the management of the business or to dictate what persons shall be served. The customs of the people of a State do not constitute State action within the prohibition of the Fourteenth Amendment. As stated by the Supreme Court of the United States in *Shelley* v. *Kraemer,* 334 U. S. 1; 68 S. Ct. 836, 842:

> 'Since the decision of this Court in the Civil Rights Cases, 1883, 109 U. S. 3, * * * the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment *is only such action as may fairly be said to be that of the States.* That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.' " (Italics supplied)

See, also, *Wilmington Parking Authority* v. *Burton,* 157 A. 2d 894, decided in January, 1960, and *Slack* v. *Atlantic White Tower System,* 181 F. Supp. 124, decided in February, 1960.

Counsel for the petitioner nowhere asserts that there exists any independent "right" to equal treatment in the use of a privately owned place of public accommodation which cannot be denied by the owner on the ground of race or color. The Solicitor General in several instances uses passages in his brief referring to such a "right," though in most instances he is careful to add qualifying phrases, such as, "as in this case, interstate transportation facilities."

We have shown above that the restaurant here involved

is not such a facility that has been subject to regulation by Congress under the commerce clause.

In the absence of a state law forbidding discrimination, such as has been enacted in a number of states, whence comes such "right" to equal treatment in the use of places of public accommodation? If it be a "right," it is something that the petitioner could assert against any who would deny it to him. If it is not something that he can assert against anyone, or any entity—public or private—then it is not a "right"; that is to say, it is not something to which he is entitled.

While it may be that the state itself could not deny to the petitioner the equal opportunity to use a place of public accommodation, or deny him equal protection in the exercise of such an opportunity if it be afforded to him by the private owner, we have yet to be informed from whence the petitioner has secured any "right" to use such accommodation as against the wishes of the owner of the establishment.

The cases cited by the petitioner, and *Mitchell* v. *United States,* 313 U. S. 80 and *McCabe* v. *Atchison T. & S. F. Ry.,* 235 U. S. 151, cited by the Solicitor General, were, as Judge Soper said of the cases cited by the plaintiff in *Williams* v. *Howard Johnson's Restaurant,* all cases dealing with facilities of carriers actually engaged in interstate commerce.

The Solicitor General has, in the brief *amicus curiae,* so intertwined cases dealing with interstate commerce, cases dealing with state-owned or operated facilities, and cases dealing with state statutes which in themselves impose discriminations, and by quotations out of context has so distorted former decisions of this Court, that we think a few comments concerning that brief are necessary.

First, after accurately paraphrasing with partial quotations two statements which this Court did make in the *Civil Rights Cases,* 109 U. S. 3, which statements were not essential to the Court's decision, the Solicitor General then improperly and incorrectly paraphrases a third statement made by this Court in those cases.

While the Court did say that "positive rights and privileges" are secured by the Fourteenth Amendment, and that that provision does nullify State action of every kind which impairs the "privileges and immunities" of citizens of the United States (but without defining such rights, privileges or immunities), it nowhere stated that, "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.'" Brief *amicus curiae,* page 17.

Yet the Solicitor General so implies.

The language used in the partial quotations comes from the following satement of the Court:

> "In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort

> to the laws of the State for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and to sell, to sue in the courts or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow-citizen; but, unless protected in these wrongful acts by some shield of state law or state authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefore to the laws of the state where the wrongful acts are committed. Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminatory and unjust laws of the state by prohibiting such laws, it is not individual offenses, but abrogation and denial of rights, which it denounces, and for which it clothes the Congress with power to provide a remedy. This abrogation and denial of rights, for which the states alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, the evil or wrong actually committed rest upon some state law or state authority for its excuse and perpetration." 109 U. S. 3, 17.

That paragraph must, of course, be read in connection with the added statement of the Court, reading as follows:

> "We have discussed the question presented by the law, on the assumption that a right to enjoy equal accommodations 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." 109 U. S. 3, 19.

What the court is there saying, and all that it is saying, is that a private wrong (if any there be) in no way denies a person his constitutional rights under the Fourteenth Amendment, for it remains a private wrong, subject to redress under the law, civil or criminal, of the State where the wrong was committed. The court nowhere said, or implied, that private racially discriminatory acts were violative of or proscribed by the Fourteenth Amendment; it merely assumed for purposes of argument that the right to enjoy equal accommodations is one of the essential rights of a citizen, and held that, even if that be so, Congress had no power to legislate in that field as against the acts of private citizens. "It is State action of a particular character that is prohibited. *Individual invasion of individual rights is not the subject matter of the Amendment.*" 109 U. S. 3, 11. (Italics supplied.)

The Solicitor General, in assuming the role of friend of the court, should have been careful not to represent former language of this court as holding something it did not hold (when in fact the actual holding was to the contrary) and particularly when much of what the court was saying was based upon assumptions made *arguendo*.

Again, at page 19 of the brief *amicus curiae*, the Solicitor General says that "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 [and other enumerated facilities]," citing cases. This statement, in its implications, is a complete and absolute misrepresentation—no less. In each of the situations and cases enumerated there was involved not simply a "public" but a governmentally *owned* facility. The discriminatory

action was, in truth, state action operating directly upon the individuals affected—no less.

The cases dealing with state owned facilities do *not* "illustrate" the principle so broadly stated by the Solicitor General at page 20 of his brief.

Ever since it was positively stated in the *Civil Rights Cases, supra,* it has been universally accepted by all of the courts, federal and state alike, and by this court itself that the Fourteenth Amendment created no right to be free of private discrimination in the use of privately owned and operated facilities. In fact, in that case, the court held that Congress itself, even under its power to enact legislation under Section 5 of the Fourteenth Amendment, could not enter into such a field of "municipal law regulative of all private rights between man and man in society" and enact positive legislation forbidding such discrimination. This court said that to have Congress establish such a code of municipal law "would be to make Congress take the place of the state legislatures and to supersede them."

When it is conceded that a private individual may make distinctions, that is to say may discriminate, on purely racial grounds in selecting his customers, guests, employees, etc.—and, in the absence of valid applicable federal or state statutes to the contrary, it must be so conceded—then, when he does so discriminate or make distinctions, it is made by him as an individual and is complete and over.

When the person affected by the action of another individual insists upon a contrary "right" which he does not have and then proceeds to violate the property rights admittedly possessed by such other party and insists upon remaining upon the property of the other, the discrimination complained of does not become that of the state when its simple law of trespass is applied.

Indeed, in the recent case of *Griffin* v. *Collins* (U. S. D.

C. Md.), ... F. Supp. ....., 29 Law Week 2109, decided August 25, 1960, the Court held that the arrest of Negro trespassers by Maryland police, in response to the request of an amusement park proprietor for police assistance in enforcing such park's policy of excluding Negroes, did not constitute state action in violation of the Due Process and Equal Protection clause of the Fourteenth Amendment or of the Civil Rights Act. In the course of its opinion, the Court stated:

> "Plaintiffs concede the right of the corporate defendants, as owners and operators of [amusement] park, to serve or refuse to serve whomever they please, and concede that said defendants like other property owners or operators of a private business may use 'self-help' to eject a Negro who insists on remaining on the premises after being told to leave. Counsel argue, however, that if the proprietor of a business calls a police officer, deputy sheriff, or other state official to remove or arrest the Negro, such action or arrest would (1) violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment, which forbid state-imposed racial discrimination in the field of recreational activity, and (2) deprive the Negro of his rights under 42 U.S.C.A. 1981 and 1983.
>
> "Plaintiffs have cited no authority holding that in the ordinary case, where the proprietor of a store, restaurant, or amusement park, himself or through his own employees, notifies the Negro of the policy and orders him to leave the premises, the calling in of a peace officer to enforce the proprietor's admitted right would amount to deprivation by the state of any rights, privileges or immunities secured to the Negro by the Constitution or laws. Granted the right of the proprietor to choose his customers and to eject trespassers, it can hardly be the law, as plaintiffs contend, that the proprietor may use such force as he and his employees possess but may not call on a peace officer to enforce his rights."

Please note that the Virginia statute is color blind. It is concerned with only three questions:

Was the defendant on the property of another?

Was the defendant directed to leave?

Did he refuse to do so?

The legislation is not concerned with whether the defendant or the other individual was white, green, purple or black, or with whether the two parties were of the same or of different races, religions, creeds or whatever.

Nor should the policeman who makes the arrest, or the court which tries the defendant, be concerned with such facts. In truth, if justice is to be color blind, evidence of such facts would be inadmissible.

The case we have here is not such a case as *Marsh* v. *Alabama,* 326 U. S. 501, which involved what was in fact a town, a whole community. The town, a suburb of Mobile, Alabama, was owned by a corporation. Except for that, it had all the characteristics of any other American town. The property consisted of residential buildings, streets, a system of sewers, a sewage disposal plant, a business block. A deputy of the Mobile county sheriff, paid by the company, served as the town's policeman. The United States had a post office there. The town and the surrounding neighborhood were thickly populated. The surrounding neighborhood could not be distinguished from the company's property by any one not familiar with the property lines. This court there held that a person could not be punished for distributing religious literature upon the sidewalks of the town.

Nor do we have here such a case as *Shelley* v. *Kraemer, supra,* or *Barrows* v. *Jackson,* 346 U. S. 249, which involved the efforts of one person to control the action of a second party in his relations with still a third party, and the use by the state of its powers to compel one person who did

not wish to discriminate to carry out actual discrimination against another. Note that in those two cases this court was dealing with cases in which justice was not color blind. The state judicial proceeding complained of was predicated upon race, required evidence as to the race of the individuals involved and the orders of the court were entered solely on the grounds of the race of the individuals involved.

That this court has not applied *Marsh* v. *Alabama* and *Shelley* v. *Kraemer, supra,* to prohibit state judicial action not in itself concerned with racial issues, or religious issues, or issues of freedom of the press, but only with property rights (which possibly may have arisen after there has been some private discrimination by an individual) is shown by *Hall* v. *Virginia,* 188 Va. 72, App. dism. 335 U. S. 875, Rehearing denied 335 U. S. 912, and *Breard* v. *Alexandria,* 341 U. S. 622.

It is submitted that the petitioner presents no case of the violation of his rights under the Fourteenth Amendment.

CONCLUSION

For the reasons heretofore stated, counsel for the Commonwealth respectfully submit that the judgment of the Supreme Court of Appeals of Virginia should be affirmed.

Respectfully submitted,

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APPENDIX A

49 U.S.C.A. 3(1)

It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsover: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

49 U.S.C.A. 316(d)

All 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 unreasonsable charge for such service or any part thereof, is prohibited and declared to be 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, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region,

district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

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