Kentucky Law Journal

Volume 50 | Issue 3 Article 3

1962

Constitutional Law--Fourteenth Amendment State Action--State Involvement in Private Discrimination

Robert G. Lawson
University of Kentucky

Recent Cases

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT STATE ACTION—STATE INVOLVEMENT IN PRIVATE DISCRIMINATION—Plaintiff, a Negro, instituted an action for declaratory and injunctive relief against the Eagle Coffee Shoppe, Inc., a restaurant located in an automobile parking facility which was owned and operated by the Wilmington Parking Authority, an agency of the State of Delaware. The restaurant was the Authority's lessee. Plaintiff alleged that Eagle's refusal to serve him food or drink solely because of his race abridged his rights under the Equal Protection Clause of the fourteenth amendment. The Supreme Court of Delaware held that Eagle was acting in a *purely private capacity*, and that its actions were not state action within the contemplation of the prohibitions of the fourteenth amendment.[1] *Held:* Reversed. The State of Delaware was involved to such degree as to constitute state action, and Eagle's discriminatory action denied the appellant's constitutional right to equal protection of the laws. *Burton v. Wilmington Parking Authority*, 81 Sup. Ct. 856 (1961).

The fourteenth amendment does not prohibit private action regardless of how wrongful or discriminatory it may be.[2] Therefore, in order for a party to obtain relief under this amendment it is necessary that he prove the presence of *state action.*

Realizing that the state action concept must be flexible in order to apply the fourteenth amendment effectively, the courts have apparently refrained from establishing a precise formula by which to determine exactly what degree or kind of state involvement will be deemed sufficient to fulfill the state action requirement. However, a close examination of past decisions delineates certain areas in which it is reasonably safe to say that state action is present. Action by any officer or agency of the state, whether it be within or without the scope of authority, even though contrary to state law, has been declared to be that of the state;[3] the use of state legal machinery by a private individual to enforce discrimination has been held to con-

---

[1] Wilmington Parking Authority v. Burton, 157 A.2d 894 (Del. 1960).

[2] Civil Rights Cases, 109 U.S. 3 (1883).

[3] Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239 (1931) (Discriminatory action of a state official in collecting taxes is state action even though the official has acted contrary to state law); Screws v. United States, 325 U.S. 91 (1945) (Assault of a Negro by state officers, while effecting an arrest, is state action); see also *Ex Parte* Virginia, 100 U.S. 339 (1880).

stitute state action;[4] and the exercise of a uniquely state function by a private person or institution has also been held to be sufficient.[5] Although generalizations such as these may be made, the formulation of an all-embracing rule by which to determine state responsibility under the fourteenth amendment would be an extremely difficult task; one which the courts have never undertaken.

The principal case presents a situation of state participation in private discrimination through a lease. In previous cases the courts have not held the state responsible for the private lessee's discriminatory actions unless there has been some state involvement other than the execution of a lease. The state courts and the lower federal courts have found this involvement in state control of the private lessee,[6] in discriminatory intent on the part of the state lessor,[7] or from the fact that the leased facility was intended by the state to provide a service which would be open to all or a substantial part of the general public.[8]

In the instant case there was no control whatsoever by the Authority over the operation of the private restaurant; nor was there discrimination contemplated by the Authority in making the lease. The Court found, however, that the restaurant was operated as an *integral part* of a state plan to provide a parking service for use by the general

---

[4] Shelley v. Kraemer, 334 U.S. 1 (1948) (State court's enforcement of a racially restrictive covenant violates the fourteenth amendment); Barrows v. Jackson, 346 U.S. 249 (1953) (Awarding damages for breach of a racially restrictive covenant violates the fourteenth amendment even though only Caucasians are before the court); *cf.*, Charlotte Park Commission v. Barringer, 242 N.C. 311, 88 S.E.2d 114 (1955), *cert. denied*, 350 U.S. 983 (1956) (An automatic reversion upon the breach of a restrictive covenant does not require the aid of a state court; therefore, it does not violate the fourteenth amendment).

[5] Marsh v. Alabama, 336 U.S. 501 (1946) (Operation of a privately owned town by its corporation-owner is the performance of a public function and sufficient to constitute state action); Rice v. Elmore, 165 F.2d 387 (5th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948) (Denial of Negroes' voting rights in a primary election by the Democratic Party is state action); Terry v. Adams, 345 U.S. 461 (1953) (Action by a county political organization in denying Negroes' voting rights in a primary election is state action).

[6] Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir. 1945), *cert. denied*, 326 U.S. 721 (1945). *Cf.*, Eaton v. Board of Managers of James Walker Memorial Hospital, 261 F.2d 521 (4th Cir. 1958).

[7] Lawrence v. Hancock, 76 F. Supp. 1004 (S.D. W.Va. 1948); Culver v. City of Warren, 84 Ohio App. 373, 83 N.E.2d 82 (1948). This *discriminatory intent* on the part of the state results from using the lease as a subterfuge to avoid the requirements of the fourteenth amendment. The court's rationalization in holding this to be state action was that a lease cannot be used to implement a policy of discrimination which would be unconstitutional if pursued by the state directly.

[8] Coke v. City of Atlanta, 184 F. Supp. 579 (N.D.Ga. 1960); see also Jones v. Marva Theatres, Inc., 180 F. Supp. 49 (D.Md. 1960). The most significant factor in this class of cases is that the leased facility is to be used by a substantial part of the general public. The lessee is regarded as an instrumentality of the state, and his action is state action despite the defenses of good faith in making the lease and lack of state control.

public, and held that the state was involved to such degree as to come within the scope of the fourteenth amendment. The payment of rent, which was essential if the parking service was to be self-sustaining, and the presence of the restaurant in the public-owned building, were the only connections between the Authority and the private lessee.[9] By finding this sufficient to constitute state action, the Supreme Court has made a very liberal application of the state action concept. Certain language of the opinion indicates that the Court, by way of implication, may have extended the limits of state action even further. Justice Clark, speaking for the Court, stated:

> [T]he Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. . . . By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property, and prestige behind the admitted discrimination.[10]

Is the Court not suggesting an affirmative duty on the lessor to see that the lessee of state-owned property does not discriminate? Obviously the Court did not have to rely on such a duty to find state action. Nevertheless, the language of the Court in this case, and in other recent decisions,[11] contains strong dicta which indicate this extension of the state action concept. The imposition of this duty, although not supported by the holdings of prior decisions, is certainly indicative of trends in constitutional jurisprudence involving the rights of Negroes under the fourteenth amendment. Since the principal purpose of the amendment was to raise the colored race from a condition of inferiority into "perfect equality"[12] of civil rights with all other citizens, it seems that the achievement of this purpose imposes an

---

[9] Had there been any intent on the part of the Authority to provide a restaurant for the parking customer, the Court would have had an additional basis upon which to find state action. The absence of this factor distinguishes the *Burton* case from Boynton v. Virginia, 364 U.S. 454 (1960), in which the Supreme Court held that a bus terminal restaurant, although operated by a lessee, was an *integral part* of the interstate carrier, and was subject to the same obligations and prohibitions imposed upon the carrier. In the *Boynton* case the restaurant had been constructed in the terminal specifically for the purpose of serving travelers, where as in the *Burton* case, the type of business occupying the leased premises was immaterial to the Authority.

[10] Burton v. Wilmington Parking Authority, 81 Sup. Ct. 856, 861-62 (1961).

[11] In Lawrence v. Hancock, 76 F.Supp. 1004, 1009 (S.D. W.Va. 1948), the court stated that "it is not conceivable that a city can provide the ways and means for a private individual or corporation to discriminate against its own citizens." In City of Greensboro v. Simkins, 246 F.2d 425, 426 (4th Cir. 1957), the court stated that "the rights of citizens to use public property without discrimination on the ground of race may not be abridged by the mere leasing of the property." In each of these cases the lease was used as a subterfuge to evade the fourteenth amendment, but the courts' rulings were much broader than were necessary for the determination of these actions.

[12] See *Ex Parte* Virginia, 100 U.S. 339 (1880).

absolute duty upon a state-lessor to see that the equal use and enjoyment of property whose ownership is retained by the state is denied to no citizen because of race.[13]

Obviously, this rule need not be applied mechanically in every case. An exclusive club which is leasing space for a meeting place should not be required to open its doors to all persons simply because the meetings are being held in a state-owned building. In such cases equal use and enjoyment can come from giving all persons equal opportunity to lease the property. On the other hand, in those cases in which the property is to be used by the general public, rather than a private group, as in the case of a restaurant, library, or theatre, equal use and enjoyment can be achieved only by guaranteeing admission or use to all citizens, irrespective of race.

Although the involvement by the state may have been sufficient to justify the result of the *Burton* case, a more direct route to a finding of state action may have been available to the Court, which would have avoided the controversial issues involved in the lessor-lessee relationship. In reaching its decision the Supreme Court of Delaware relied upon a state statute exempting innkeepers and restaurateurs from any duty to serve persons who would injure their business or be offensive to their customers. Admittedly, the extent of this reliance is left in considerable doubt by both the Delaware Supreme Court and the United States Supreme Court. In applying this statute the Delaware court merely stated that Eagle was "subject to the provisions of 24 Del. C. Sec. 1501, which does not compel the operator of a restaurant to give service to all persons seeking such."[14]

Justice Stewart, in a concurring opinion, and Justices Frankfurter and Harlan, in dissenting opinions presented different views as to the construction attributed to this statute by the Delaware court.

Mr. Justice Stewart concluded that this statute was construed as "authorizing discriminatory classification based exclusively on color."[15] Under this view the statute on its face was not a violation of the fourteenth amendment, but the state court, by failing to find the plaintiff Burton individually offensive to the defendant's customers or harmful to the defendant's business, must have held that the defendant

[13] The imposition of this duty upon the state will doubtlessly be somewhat detrimental to the policy of leasing unprofitable facilities neither used nor needed by the state. Nevertheless, the denial of individual constitutional rights would be difficult to justify upon this basis, especially in light of the fact that the state could conduct a bona fide sale of its surplus property, and rid itself of any responsibility for the possessor's action. See Tonkins v. City of Greensboro, 276 F.2d 890 (4th Cir. 1960).

[14] Wilmington Parking Authority v. Burton, 157 A.2d 894, 902 (Del. 1960).

[15] Burton v. Wilmington Parking Authority, 81 Sup. Ct. 856, 862 (1961).

could refuse service to the plaintiff under this statute solely because he was a Negro. In effect the state court has classified all Negroes as offensive. Could there be any doubt as to the presence of state action under this construction of the statute?

A second view of the construction given this statute by the Delaware court was presented by Mr. Justice Harlan in a dissenting opinion. He found the state court's application of the statute so ambiguous that the exact basis of its decision should have been ascertained before deciding the "far-reaching constitutional question"[16] involved in this case.

Mr. Justice Frankfurter, agreeing with Justice Harlan, also found ambiguity in the Delaware court's view, and stated that clarification of the state court's actions would be the appropriate solution. However, he still saw fit to give his own view of the state court's construction of its statute, which he found to be merely declaratory of the common law and not state sanction of the defendant's discriminatory actions. Justice Frankfurter implied that there was a pre-existing common law rule that allowed restaurant owners to refuse service to anyone they so pleased, and the mere fact that this rule has been restated in a statute and applied by the state court to this case does not place state sanction behind the common law authorized action.

There may be still another view of the construction of this statute implicit in the opinions of these three justices. At common law, the restaurateur was free to refuse service to anyone, whereas the innkeeper was obligated to serve all persons who were inoffensive to his customers. It may be that Justice Stewart was convinced that the inclusion of inns and restaurants in the same statute imposed duties upon the restaurateur that he did not have at common law, namely, the duty to serve all inoffensive persons. Under this construction of the statute the holding by the state court that the defendant could exclude the plaintiff solely because he was a Negro is, in effect, a finding that all Negroes may be treated as offensive as a class. The Delaware restaurateur has a statutory duty to serve whites unless they are individually offensive; he may refuse Negroes as a class. This is what Justice Stewart attacks as "discriminatory classification based exclusively on color." Thus, under this view, when Justices Frankfurter and Harlan said that they would agree with Justice Stewart if his interpretation of the state's action were correct, they might have been implying that they think that the Delaware court's construction of the statute does not impose this new duty on the restaurateur, but

[16] *Id.* at 863.

instead leaves him as free as at common law to refuse service to any person at his own whim.

The majority opinion of the Court accepted neither of these views, ignored the Delaware statute, and proceeded to decide the broader questions of constitutional law set forth in the first part of this comment. It is a policy of the Supreme Court that when a case can be decided on either of two grounds, one involving a constitutional question and the other a question of statutory interpretation, the Court will decide only the latter.[17] In view of the possibility that Justice Stewart may have been correct in the interpretation of the state court's actions, the appropriate procedure would seem to have been to require the Delaware Supreme Court to state more clearly its construction of the Delaware statute. This could possibly have resulted in avoidance of the broader issues determined by the majority opinion in the *Burton* case.

Robert Lawson

DIVORCE—FINANCIAL INABILITY TO MEET MAINTENANCE ORDER—HUSBAND'S DEFAULT AS AFFECTING RIGHT TO A HEARING TO MODIFY FUTURE INSTALLMENTS—The trial court granted the wife an absolute divorce, custody of a minor child and maintenance money. The husband filed for a modification of that part of the judgment relating to maintenance, alleging financial inability. The order over-ruling the motion provided that the husband, who subsequently defaulted, purge himself of contempt by paying arrearages. On appeal, the contention was that the trial court erred in summarily dismissing the husband's petition to modify the judgment without first hearing proof of changed financial conditions. *Held:* Reversed. Where the husband was not in contempt of court at the time of filing an amended petition to modify a maintenance order, although he might have become delinquent before the hearing was held, he should have been afforded a hearing with the opportunity to adduce evidence on the question of financial ability. *Knight v. Knight,* 341 S.W.2d 59 (Ky. 1960).

The Court in this case recognized the not infrequent need for revision of decrees and orders issued in divorce proceedings. This comment, in accordance with the principal case, advocates a rule allowing a hearing to modify maintenance orders as to future install-

[17] See Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936).