Louisiana Law Review

Volume 21 | Number 3
April 1961

Constitutional Law - Segreagation of Facilities Used By An Interstate Bus Line

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prosecution to be constitutional. In disposing of the instant case the Court could simply have said, as did the lower courts, that since the narcotics control act grants immunity from federal prosecution, this case is controlled by *United States v. Murdock*, and it would have been unnecessary to consider whether or not it was constitutional to grant immunity from state prosecution in this area. The instant case might be urged to support the position that the *Murdock* decision is open to question[28] but for the fact that since the *Ullmann* decision the Court has continually espoused the "two sovereignties" theory.[29] It may be that the Court by-passed the *Murdock* rationale and seized upon both *Ullmann* and *Reina* to set the limits of Congress' power to grant immunity from state prosecution.

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CONSTITUTIONAL LAW — SEGREGATION OF FACILITIES USED BY AN INTERSTATE BUS LINE

Petitioner, a Negro, was travelling by interstate bus through the South. During a stopover he entered a terminal restaurant and found that it was segregated into white and colored sections. Disregarding the division, petitioner sat down in the white section where he was refused service and was eventually arrested by an officer upon request of the proprietor. He was subsequently convicted and fined $10.00 in the Police Justice's Court of Richmond for violating a Virginia trespass law. The terminal restaurant which petitioner entered was leased by the Trailways Bus Terminal, Inc., a Virginia corporation, to the manager of the restaurant. The lease provided that the operation of the restaurant should be in keeping with the character of service of a modern bus terminal.[1] Petitioner appealed to the city court of

28. That the *Murdock* holding is open to question is especially true in light of the following extract taken from the majority opinion in the instant case (81 Sup. Ct. 260, 262): "Both courts below passed the question whether the statute grants state immunity because, assuming only federal immunity is granted, they held that United States v. Murdock, 284 U.S. 141, 52 S. Ct. 63, 76 L. Ed. 210, settled that the Fifth Amendment does not protect a federal witness from answering questions which might incriminate him under state law. D.C., 170 F. Supp. at page 595; 2 Cir., 273 F.2d at page 235. Petitioner contends that Murdock should be re-examined and overruled. *We have no occasion to consider this contention, since in our view § 1406 constitutionally grants immunity from both federal and state prosecutions.*" (Emphasis added.)

29. Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959); Knapp v. Schweitzer, 357 U.S. 371 (1958).

1. Actually, this was only one provision in the lease. The majority opinion summarized the lease provisions as follows: "Terminal covenanted to lease this

Richmond, claiming that discrimination based on color violated the Interstate Commerce Act, the equal protection, due process, and commerce clauses of the Constitution. His motion to dismiss on these grounds was overruled and he appealed to the Virginia Supreme Court, charging only discrimination in violation of the commerce clause and the fourteenth amendment. After the conviction was affirmed, the United States Supreme Court granted certiorari on the issue of whether the conviction violated the commerce, due process, and equal protection clauses of the Constitution, but decided that there were "persuasive"[2] reasons why the case should be decided on the Interstate Commerce Act rather than the constitutional grounds presented in the petition for certiorari,[3] and *held*, conviction reversed. The discrimina-

space to Restaurant for its use; to grant Restaurant the exclusive right to sell foods and other things usually sold in restaurants, news stands, soda fountains and lunch counters; to keep the terminal building in good repair and to furnish certain utilities. Restaurant on its part agreed to use its space for the sale of commodities agreed on at prices that are 'just and reasonable'; to sell no commodities not usually sold or installed in a bus terminal concession without Terminal's permission; to discontinue the sale of any commodity objectionable to Terminal; to buy, maintain, and replace equipment subject to Terminal's approval in writing as to its quality; to make alterations and additions only after Terminal's written consent and approval; to make no 'sales on buses operating in and out said bus station' but only 'through the windows of said buses'; to keep its employees neat and clean; to perform no terminal service other than that pertaining to the operations of its restaurant as agreed on; and that neither Restaurant nor its employees were to 'sell transportation of any kind or give information pertaining to schedules, rates or transportation matters, but shall refer all such inquiries to the proper agents of' Terminal." Boynton v. Virginia, 81 Sup. Ct. 182, 186-87 (1960).

2. *Id.* at 184.

3. Supreme Court Rule 23(1)(c) provides: "The petition for writ of certiorari shall contain in the order here indicated —

"The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. ***Only the questions set forth in the petition or fairly comprised therein will be considered by the court.***" (Emphasis added.)

In numerous cases the Supreme Court has indicated that it will not decide the constitutional issues in a case where such a decision is unnecessary. *E.g.*, Light v. United States, 220 U.S. 523 (1911). However, it would appear in view of Supreme Court Rule 23(1)(c) that when a case is before the Court on certiorari, it is proper for the Court to leave the constitutional issue undecided only if other questions on which the case may be decided have been presented in the petition for certiorari, or if the other questions can be found to be fairly comprised in the constitutional issue actually presented. Apparently the majority of the Court in the instant case felt that the question of whether the conviction was in violation of the Interstate Commerce Act was fairly comprised in the problem of whether the conviction was in violation of the commerce clause, and the due process and equal protection clauses of the fourteenth amendment. The Court pointed out that "discrimination because of color is the core of the two broad constitutional questions presented to us by petitioner, just as it is the core of the Interstate Commerce Act question presented to the Virginia Courts." Boynton v. Virginia, 81 Sup. Ct. 182, 184 (1960). The dissenting Justices disagreed, being of the opinion that no question under the Interstate Commerce Act was properly before the Court for consideration. *Id.* at 188. Thus, assuming that the issue

tion violated the Interstate Commerce Act since the terminal and restaurant operated as an "integral"[4] part of the bus carrier's transportation service for interstate passengers, the act prohibiting discrimination by such terminals and restaurants. *Boynton v. Virginia*, 81 Sup. Ct. 182 (1960).

The commerce clause of the United States Constitution confers upon Congress the power to regulate interstate commerce.[5] As a corollary when Congress acts in a particular area of interstate commerce the states are no longer free to legislate in the same area.[6] However, where Congress has refrained from acting, and thus not pre-empted the field, residual power is said to rest in the states to legislate on local matters, even though interstate commerce may be affected.[7] Yet, even where Congress has not acted, state legislation is prohibited which substantially impedes the free flow of interstate commerce or which acts in an area which demands a single uniform authority.[8] Thus the states have been prohibited from enacting segregation laws concerning passenger use of an interstate carrier's facilities on the ground that this is a subject which requires a single uniform rule which only Congress can provide.[9]

In enacting the Interstate Commerce Act Congress prohibited an interstate carrier from discriminating in the use of facilities which it furnished. Section 3(1) of that act, which applies to railroad carriers, prohibits giving any undue or unreasonable preference or advantage to any particular person.[10] Common

under the Interstate Commerce Act was fairly comprised in the constitutional questions presented in the petition for certiorari, one persuasive reason that the Court refused to base the decision on constitutional grounds may have been the accepted proposition that the court will avoid a decision on a constitutional issue when the case can be decided on other grounds. However, due to the seemingly strained interpretation given the Interstate Commerce Act by the Court, discussed hereafter, it does not appear to this writer that justification for not deciding the constitutional questions can be explained merely in terms of the fact that the Court will not decide constitutional issues where it is unnecessary to do so.

4. Boynton v. Virginia, 81 Sup. Ct. 182, 184 (1960).

5. U.S. CONST. art. I, § 8, provides in part: "The Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."

6. See, *e.g.*, Chicago v. Atchison, Topeka & Santa Fe Ry., 357 U.S. 77 (1958). However, the states may be free to act in an area where Congress has acted if the federal and state law may be reconciled so that they can stand together. DOWLING, CONSTITUTIONAL LAW 562 (6th ed. 1959).

7. Cooley v. Board of Wardens, Port of Philadelphia, 53 U.S. (12 How.) 299 (1851); Willson v. Blackbird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829).

8. Wabash, St. L. & P. Ry. v. Illinois, 118 U.S. 557 (1886).

9. Morgan v. Virginia, 328 U.S. 373 (1946); Hall v. DeCuir, 95 U.S. 485 (1878).

10. 24 STAT. 380 (1887), 49 U.S.C. § 3(1) (1958) provides: "It shall be unlawful for any common carrier subject to the provisions of this chapter to

carriers by motor vehicle engaged in interstate commerce are subject to a similar provision in Section 216(d).[11] The act further provides that facilities furnished by a carrier are those which are *operated* or *controlled* by it.[12] Under the section of the act dealing with railroads, it has been held that discrimination by a carrier between Negroes and whites in the furnishing of dining facilities is unlawful,[13] the United States Supreme Court indicating that a railroad might not be required to furnish facilities; but if they did there could be no discrimination in the use by interstate passengers.[14] The Interstate Commerce Commission classified a railroad-owned hotel and restaurant facility necessary for the convenience of passengers as a carrier itself,[15] but refused to find that a restaurant leased by a carrier to a private company was such a "carrier" since the lessor's power of supervision was so limited that the restaurant could not be considered an "integral part" of its passenger service.[16]

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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 . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

11. 49 STAT. 558 (1935), 49 U.S.C. § 316(d) (1958), provides: "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."

12. 49 STAT. 544 (1935), 49 U.S.C. § 303(a)(19) (1958) provides: "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." (Emphasis added.)

13. Henderson v. United States, 339 U.S. 816 (1950); Mitchell v. United States, 313 U.S. 80 (1941).

14. Mitchell v. United States, 313 U.S. 80, 97 (1941).

15. Atchison, Topeka & Santa Fe Ry., 135 I.C.C. 633 (1928).

16. NAACP v. St. Louis-Santa Fe Ry., 297 I.C.C. 335, 343 (1955). The Commission stated: "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.

"In our decisions dealing with redcap service performed at railway terminals in large cities for which a definite charge is imposed, we have distinguished that service from the lunch-counter service, bootblack stand, newspaper and periodicals sales service, checkroom and parcel lockers services, and taxicab concessions, offered by carriers as matters of convenience and comfort to all persons who care to become patrons of the carriers for the purpose. . . . Here, the lunchroom concession does not constitute an *integral* part of the passenger service performed by

In the instant case the Court avoided a decision on the constitutional issues presented in the petition for certiorari, and decided the case under the Interstate Commerce Act. The Court held that facilities regulated by the act are those which are an integral part of the interstate carrier's transportation service. In so doing the Court apparently substituted "integral" for the word "control," which is used in the section of the act specifying the facilities that are to be considered services of the carrier.[17] It was apparently on this point that the dissenting Justices took issue, indicating that they disagreed that "a motor carrier's regular 'use' of a restaurant, though it be 'neither own[ed], control[led] nor operated by the motor carrier, makes the restaurant a facility' operated or controlled by [the motor] carrier or carriers within the meaning of section 203(a)(19) of the Interstate Commerce Act."[18]

In the final analysis, the question must arise as to why the Court would resort to a seemingly extended interpretation of the Interstate Commerce Act to encompass the facts of the instant case, instead of deciding the constitutional questions presented in the petition for certiorari. Since the commerce clause delineates the powers of Congress and the states, and expressly provides that Congress shall have the power to regulate interstate commerce, it appears that a decision under that clause would be directed to the question of whether certain state

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the defendants." (Emphasis added.)

Although the Commission used the term "integral" in describing what would be necessary to make the restaurant service that of the carrier, it was apparently not used in the same context as employed by the Court in the instant case. According to the instant decision the Interstate Commerce Act covers all facilities that are an integral part of the carrier service, and it can become an integral part without the necessity of control. As used by the Interstate Commerce Commission it would be necesary to find that the carrier had some control over the facility before it could be considered an integral part of the carrier's service. It appears that the dissent in the *Boynton* case recognized this distinction when, in citing the *NAACP v. St. Louis & Santa Fe Ry.* case, they stated that mere use does not make the restaurant a facility operated or controlled by the carrier and that they were of the opinion that the Interstate Commerce Commission recognized and correctly applied this principle. Boyton v. Virginia, 81 Sup. Ct. 182, 190 (1960).

17. Boynton v. Virginia, 81 Sup. Ct. 182, 186 (1960). The Court stated: "Respondent correctly points out, however, that, whatever may be the facts, the evidence in this record does not show that the bus company owns or actively controls the bus terminal or the restaurant in it. But the fact that Section 203(a)(19) says that the protections of the motor carrier provisions of the Act extend to 'include' facilities so operated or controlled by no means should be interpreted to exempt motor carriers from their statutory duty under section 216(d) not to discriminate should they choose to provide their interstate passengers with services that are an *integral* part of transportation through the use of facilities they neither own, *control* nor operate." (Emphasis added.)

18. *Id.* at 190.

legislation is an unlawful regulation of interstate commerce. In the instant case the state legislation involved would be the trespass law as applied to the facts. If the Court had decided that this was an unlawful regulation of interstate commerce, the effect would have been to deny the state power to invoke laws to aid an individual in his racial discrimination when that individual was involved in interstate commerce. However, the individual himself could still discriminate since a decision under the commerce clause would enjoin only the state. Thus it seems that the ultimate effect would be to allow private discrimination without state aid, which would mean that the individual involved could carry out his discrimination through private means, whatever they might be, with no law on which to rely to effectuate his right.[19]

If the instant decision had been rendered under the fourteenth amendment, the recent group of cases involving the so-called "sit-in" demonstrations, in effect, would have been decided. Those cases raise the question of whether state aid of private discrimination is unlawful state action under the fourteenth amendment. They commonly arise when an individual refuses service on the basis of color and the state aids the individual in his discrimination by enforcing a trespass law or similar statute.[20] As yet, it is not clear whether such aid is unlawful and the Court appears reluctant to settle the issue. If state enforcement of private discrimination is held to be unlawful state action, then again the somewhat anomalous situation could arise where the individual is allowed to discriminate

19. Self-help might be encouraged even more by the fact that thus far the Supreme Court has refused to find state action where a private person effectuates his own desire to discriminate and then is sued by the person who is discriminated against and is upheld in his discrimination by the state court. See Rice v. Sioux City Memorial Cemetery, 348 U.S. 880 (1954). "Suppose, in the typical 'sit-in' situation, that the owner of the property, instead of seeking the assistance of the state to vindicate his right to discriminate, chooses to utilize self-help for that purpose, that is, to use reasonable force to remove the Negro from his premises. If the Negro subsequently sues him for assault and battery or causes a criminal proceeding to be initiated, and the defendant pleads a privilege to use reasonable force to remove a trespasser, the court's action in sustaining the defense would not violate the Fourteenth Amendment.

"If private implementation of the right to discriminate is permissible in a trespass-to-real-property situation arising out of a 'sit-in', but the Court holds that affirmative state vindication of that right by imposing a criminal sanction is not, it will thereby encourage the use of a self-help, a situation hardly calculated to improve either race relations or the maintenance of law and order." *Louisiana Legislative Symposium — Race Relations*, 21 LOUISIANA LAW REVIEW 85, 97 (1960).

20. For a thorough discussion of the problem of state action under the fourteenth amendment, see Comment, 21 LOUISIANA LAW REVIEW 433 (1961).

if he can effectuate such discrimination himself. It appears that such position would put a premium on self-help. Thus, perhaps it may be concluded that the "persuasive reasons" why the Court did not consider the constitutional questions in the instant case stemmed from the fact that it did not approve of the discrimination here involved, but yet was reluctant to condemn it as unconstitutional because of the complications inherent in such a decision.

Hillary J. Crain

INCOME TAXATION — DEPRECIATION OF AN ASSET NOT USED FOR ITS FULL ECONOMIC LIFE

The United States Supreme Court in three cases decided during the last term has defined the concepts of "useful life" and "salvage value" as applied to depreciable property that is sold prior to exhaustion of its full economic life. A hypothetical case will serve to illustrate the situation presented in two of these cases.[1] During the taxable years in question, 1950 and 1951, taxpayer sold cars which he had previously purchased for use in his business. The cars had an original cost of $1,600 each, and taxpayer depreciated them by the straight line method, taking a useful life of four years and a salvage value of zero.[2] After using the cars for less than two years, he sold them for $1,400 each. During this period $500 per car was deducted as depreciation, leaving a net profit of $300 per car.[3] A total of 290 cars were sold in the two years, at a profit of $87,000, which was treated as a capital gain. The Commissioner of Internal Revenue contended that for depreciation purposes, useful life was the period over which the taxpayer actually used the cars in his trade or business, and salvage value was their actual resale value. Therefore, the taxpayer could have deducted only

1. The figures in the hypothetical case approximate those as set out in Evans v. Commissioner, 264 F.2d 502 (9th Cir. 1959).

2. This is the most common method of depreciation. The annual allowance is computed by this formula:

$$\frac{\text{original cost} - \text{salvage value (if any)}}{\text{useful life}}$$

In the hypothetical case: $\frac{\$1600-0}{4 \text{ years}} = \$400$ per year per car

See Treas. Reg. § 1.167(b)-1 (1956).

3. Net profit=Resale Price−Adjusted Basis [Cost-Depreciation Taken]. In the hypothetical case Net Profit=$1400−($1600−$500)=$300.