AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 8: The New Deal/Great Society Era—Foundations/Scope/State Action

Burton v. Wilmington Parking Authority, **365 U.S. 715** (1961)

The Eagle Coffee Shoppe of Wilmington, Delaware refused to serve William Burton because Burton was a person of color. Burton sued the Wilmington Parking Authority, the state agency which owned leased space in a parking building to the Eagle Coffee Shoppe. He insisted that Delaware was responsible for the discriminatory actions of private businesses conducted on property owned by the state. The Wilmington Parking Authority responded that the Eagle Coffee Shoppe was a private business and that Delaware was not responsible for their discriminatory practices. The Chancery Court of Delaware agreed with Burton and issued an injunction ordering the Eagle Coffee Shoppe to serve patrons of all races. The Supreme Court of Delaware reversed that decree on the ground that the restaurant was not a state actor. Burton appealed to the Supreme Court of the United States. Burton's appeal was joined by the United States, which contributed an amicus brief urging the Supreme Court to find state action.

The Supreme Court by a 6-3 vote reversed the Supreme Court of Delaware. Justice Clark's majority opinion held that the close relationship between the Eagle Coffee Shop and the Wilmington Parking Authority provided sufficient grounds for forbidding both from engaging in racial discrimination. Burton *is frequently cited as the decision which established the "significant state involvement" test for state action. After reading Justice Clark's opinion, are you confident you could predict how the justices would apply that test to a slightly changed fact situation? If you are confident, do you base your prediction on intrinsic features of the test or beliefs about judicial preferences? Consider the following argument. Private businesses that discriminate in racist communities are likely to be more profitable than businesses that serve all persons. The more profitable the business, the more taxes for the state. Given that the state is profiting from racial discrimination,* Burton *provides grounds for declaring unconstitutional such ostensibly private discrimination. Is this a legitimate reading of* Burton*? Is this a correct interpretation of state action?*

JUSTICE CLARK delivered the opinion of the Court.

. . .. . . It is clear, as it always has been since the *Civil Rights Cases* (1883), . . . that "Individual invasion of individual rights is not the subject matter of the amendment" . . . and that private conduct abridging individual rights does no violence to the Equal Protection Clause unless, to some significant extent, the State, in any of its manifestations, has been found to have become involved in it. Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an "impossible task" which "This Court has never attempted." . . . Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.

. . .

The land and building were publicly owned. As an entity, the building was dedicated to "public uses" in performance of the Authority's "essential governmental functions." . . . The costs of land acquisition, construction, and maintenance are defrayed entirely from donations by the City of Wilmington, from loans and revenue bonds, and from the proceeds of rentals and parking services out of

which the loans and bonds were payable. . . . [T]he commercially leased areas were not surplus state property, but constituted a physically and financially integral and, indeed, indispensable part of the State's plan to operate its project as a self-sustaining unit. Upkeep and maintenance of the building, including necessary repairs, were responsibilities of the Authority, and were payable out of public funds. . . . Neither can it be ignored, especially in view of Eagle's affirmative allegation that for it to serve Negroes would injure its business, that profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a governmental agency.

Addition of all these activities, obligations and responsibilities of the Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn. It is irony amounting to grave injustice that, in one part of a single building, erected and maintained with public funds by an agency of the State to serve a public purpose, all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class citizen, offensive because of his race, without rights and unentitled to service, but at the same time fully enjoys equal access to nearby restaurants in wholly privately owned buildings. . . . 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. The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.

. . . Specifically defining the limits of our inquiry, what we hold today is that, when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself.

JUSTICE STEWART, concurring.

I agree that the judgment must be reversed, but I reach that conclusion by a route much more direct than the one traveled by the Court. In upholding Eagle's right to deny service to the appellant solely because of his race, the Supreme Court of Delaware relied upon a statute of that State which permits the proprietor of a restaurant to refuse to serve "persons whose reception or entertainment by him would be offensive to the major part of his customers. . . ." There is no suggestion in the record that the appellant as an individual was such a person. The highest court of Delaware has thus construed this legislative enactment as authorizing discriminatory classification based exclusively on color. Such a law seems to me clearly violative of the Fourteenth Amendment. . .

JUSTICE FRANKFURTER, dissenting.

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JUSTICE HARLAN, whom JUSTICE WHITTAKER joins, dissenting.

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If . . . the Delaware court construed this state statute "as authorizing discriminatory classification based exclusively on color," I would certainly agree, without more, that the enactment is offensive to the Fourteenth Amendment. It would then be quite unnecessary to reach the much broader questions dealt with in the Court's opinion. If, on the other hand, the state court meant no more than that under the statute, as at common law, Eagle was free to serve only those whom it pleased, then, and only then, would the question of "state action" be presented in full-blown form.

I think that sound principles of constitutional adjudication dictate that we should first ascertain the exact basis of this state judgment.