Constitutional Law--Interstate Commerce

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principle which has gradually emerged as the correct standard for the "equal protection" guarantee.

Thus the court, in the principal case, quotes from *Patsone v. Pennsylvania.* "The question is a practical one, dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named."

Does the application of this principle help us in the present instance? The activities of the Ku Klux Klan are no closed book, in spite of the secret nature of the organization. Its long and shameful record of outlawry, crime, defiance of law, intolerance and biggotry constitute one of the darkest chapters in the history of American institutions. "The question is a practical one." The law need not be applied equally to all members of the designated class, for all members are not responsible for the evils which the statute aims to correct. In this way, persons or objects may be selected from a class to form what, in fact, constitutes another class, based upon the purpose and object of the legislation in question. The fact that all but a few or even one member of the larger designated class are excluded by the selection is no objection. As said by Mr. Justice Holmes, "it is the usual last resort of constitutional arguments to point out shortcomings of this sort." But so long as the statute is drafted upon experience which has a reasonable relation to a decent end and objective, there can be nothing in the Fourteenth Amendment to condemn it.

—Fowler V. Harper.

**CONSTITUTIONAL LAW—INTERSTATE COMMERCE**—The state of Louisiana, by legislative act, declared that the shrimp in the state were to be conserved for the use of the people of the state; that under certain regulations one might secure a license to take the shrimp, to be canned within the state; that after they were canned they might be shipped out of the state. Prior to the taking effect of the act X, a Louisiana corporation, had been taking shrimp and shipping them to Y, a Mississippi corporation, operating a canning factory in Mississippi. The enforcement of the act would destroy this arrangement, and make it impossible for Y to can Louisiana shrimp, except in Louisiana. X and Y, in the federal court in Louisiana, sought to enjoin the enforcement of parts of the act on the theory that they were invalid under the commerce clause. The Supreme Court of the United States reversed the decree of the lower courts which had refused a temporary injunction.

It seems to have been conceded that the plaintiffs could not have been successful had they relied on the 14th amendment. In fact, there is no dissent in the authorities on that score. The state owns the wild life of the state for the benefit of its people; one can only then deal with this wild life, (the property of the state) with the consent of the state. The state may grant a license to take the game upon such conditions as it sees fit, but the licensee acquires no property right protected by the "due process clause," for the

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property which the licensee gets is limited by the terms of the license. The result under the 14th amendment is exactly the same in the highway cases. The highways of the state are the property of the state, and any use other than a public use is subject to license by the proper authorities, upon such conditions as they care to impose. A proposed, and indeed an actual, user of the highways for private gain has no property or privilege protected by the 14th amendment. The so-called “certificate of public necessity” issued to bus companies is not a “property right.” Conversely under the 14th amendment one cannot be compelled to devote his property to any business or commerce, except that of his own choice. If the state does in fact devote its property to interstate commerce it is still entitled to compensation for its use.

In the present case the court seems to have specifically enforced an inchoate right to do interstate business. Where no present property right is involved, the difference in the result under the commerce clause, and that under the 14th amendment has never been explained by the court. The principal case adds a third situation to two others recently established. The commerce clause has heretofore been construed to affect the jurisdiction of state courts over a common carrier engaged in interstate commerce, although admittedly the jurisdiction of the state courts would not be affected by the 14th amendment.

Within the past few years, too, the Supreme Court has established the doctrine that a proposed use of a state highway for interstate commerce is

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2 State v. Kofines, 33 R. I. 221, 80 Atl. 432, Ann. Cas. 1913C, 1120 (1911); Geer v. Connecticut, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793 (1896); Alsos v. Kendall, 111 Or. 359, 227 Pac. 286 (1924); Booth Fisheries Co. v. Kendall, 111 Or. 377, 227 Pac. 291 (1924). The validity of these Oregon decisions is not involved in the principal case; but a different result might be reached were similar situations to arise, and the plaintiff were to rely on the commerce clause instead of the 14th amendment.


6 City of St. Louis v. Western Union Tel. Co., 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380 (1892). (City had granted license to use streets, but could collect rent for their use.)

7 One cannot sue upon a cause of action arising in another state, where both parties are non-residents, and the carrier is in fact inconvenienced. Davis v. Farmers Co-operative Equity Co., 282 U. S. 312, 43 Sup. Ct. 556, 67 L. Ed. 906 (1923); Iron City Produce Co. v. American Ry. Express Co., (Ohio State, App. Ct., 1927), 151 N. E. 316, 3 Ind. L. J. 130; Sioux Remedy Co. v. Cope, 235 U. S. 197, 35 Sup. Ct. 57, 59 L. Ed. 193 (1914). (State compelled to provide reasonable court facilities for the enforcement against one of its citizens of a cause of action arising out of interstate commerce). Cf. Conneley v. Central R. R. Co., 238 Fed. 932 (1916); Murman v. Wabash Ry. Co., 221 N. Y. Supp. 332 (1927). (In the last two cases the cause of action arose under the Federal Employee’s Liability Act, and the result is different, due to the fact that the act provides that suit “may be brought in any district where the defendant shall be doing business.”)
protected by the commerce clause. It was assumed in the first case decided that the 14th amendment was no protection. The theory was that to refuse an applicant a license for the use of the state highways after others had been granted licenses was a prohibition of competition in interstate commerce, and consequently not a regulation of the use of the highways, but a regulation of interstate commerce. The result is that prohibition of competition in intrastate commerce is a regulation of the use of the highways and not a regulation of business, (and valid under the 14th amendment), while prohibition of the use of highways in interstate commerce, is not a prohibition of the use, but of competition under the commerce clause. Thus, an inchoate right to engage in interstate commerce is protected by the commerce clause of the Constitution; an inchoate right to engage in intrastate commerce is not protected by the 14th amendment.

The principal case does not discuss the bus cases, but the principle involved and the result reached are the same.

The court in the shrimp case relied upon the following propositions:

1. The recited reasons for, and purposes of, the act were false, i. e., there was no purpose to conserve any part of the shrimp for domestic use, but to compel the establishment of canning factories in the state (and it decides that this latter purpose was invalid). 2. Conditions in Louisiana were not as favorable as were conditions in Mississippi for canning shrimp. 3. The offer to allow the shrimp to be caught for the ultimate purpose of interstate commerce placed the shrimp in interstate commerce when in fact caught, and other regulations were therefore invalid. 4. The taking of shrimp under the act would create a private ownership; the plaintiffs could accept the offer without being bound by the remaining regulations which were invalid, because in conflict with the commerce clause.

The opinion is not clear as to which propositions really form the basis of the decision. If the third is the decisive one, then the first and second are immaterial, i. e., if the shrimp were in fact put into interstate commerce then clearly all state control ceased, and any state prohibition of interstate commerce would be invalid if it were supported by the best of reasons, and the purest of motives or purposes. That they were not yet put in interstate commerce appears plain. There was only an offer to put them in interstate commerce under certain conditions. The plaintiffs were not complaining that they already had taken shrimp which they were prohibited from using in inter-


10 Cf. Utah-Idaho Sugar Co. v. Federal Trade Comm., 22 Fed. (2) 122 (1927). (Federal Trade Commission has no jurisdiction over the sugar industry so long as the acts complained of have to do solely with production and manufacture.)
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state commerce; they were complaining that they could not take shrimp to be subsequently used in interstate commerce.

In this connection the court seems to lay some emphasis on the fact that the plaintiffs heretofore had been engaged in interstate commerce. This, it is submitted, is immaterial. Clearly the mere withdrawal of the state's property from interstate commerce, or the refusal to grant or renew a license to take the shrimp for purposes of interstate commerce would not be regulation of interstate commerce. It would be clearly going too far to hold that the inchoate right to engage in interstate commerce created a corresponding duty on the part of anyone the plaintiff might wish to contract with, which would be specifically enforced. If the defendant in fact wished to devote its property to intrastate commerce, would not forcing it to devote it to interstate commerce be unconstitutional, as a federal interference with a state power? And why, after all, is not that a complete answer to the court's decision!

If the plaintiff in fact wished to devote its property exclusively to intrastate commerce, is not that within its admitted powers? Can there be any regulation of interstate commerce until interstate commerce is in fact lawfully established? How can the mere making of an offer be an interference with interstate commerce?

The fourth proposition is the one upon which the court must rest its decision, and the first and second are then material in determining the validity of the conditions. The result is that if the state in truth makes an offer to use its shrimp in interstate commerce, upon a condition that the shrimp must first be canned in the state, one may accept the offer without the condition, the latter being invalid as a regulation of interstate commerce. The surprising result is that the right or privilege to do interstate business is not such a right or privilege as is protected by the 14th amendment, but it is, nevertheless, a property right when measured by the commerce clause. If the condition against use in interstate commerce is invalid, then the property the taker gets ought clearly to be such a property as is protected by the 14th amendment. It seems plain, does it not, that after all the federal courts ought not to, and in fact cannot specifically enforce the inchoate right to do interstate business? The right to do interstate business can be no better than the right to do intrastate business: the first is governed by the commerce clause, but to no greater extent than is the latter by the reserved power of the state.

The right or privilege to engage in interstate commerce is no different from the right or privilege to engage in any other business, except that the source of its control is federal. That suggests a question not discussed in the principal case: was there a "case" presented within Section 2, Article III, U. S. Constitution? The suit was to enjoin the enforcement of the parts of the act which the plaintiffs claimed were in conflict with the commerce clause. There was no allegation that they had accepted or attempted to accept the offer, the state had made. The result sought, and in truth, the relief obtained is a declaration that the conditions in restraint of interstate commerce were

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11 As far as the 14th amendment is concerned, the result is the direct opposite: the offer is an offer to grant a qualified interest in the shrimp, and the limited restraint as to its use is valid; i. e., the state has a right to grant or not, as it sees fit, and it may therefore grant upon such terms and conditions as it desires, and it may grant only a qualified interest.
invalid, and that the plaintiffs might accept the offer of the state without accepting the invalid conditions. It looks as if the decree were a declaratory one, and that no "property right" was involved.\footnote{284}

On that theory the suit was prematurely brought. Had the plaintiffs accepted the offer of the state, applied for a license, and started to take shrimp the questions involved could have been properly raised, and it is submitted that the same result would be reached, but it ought to be reached under a combination of both the commerce clause and the 14th amendment. The Constitution gives a right or privilege to do interstate business: this right or privilege if it exists and is recognized ought to be property protected by the 14th amendment. The result of that is of course (if the existence of the right or privilege be decreed) that the Supreme Court merely erroneously assumed that the 14th amendment was not involved. The result of the cases would be the same. The question would then be, is this a reasonable regulation under all of the circumstances? \textit{Geer v. Connecticut}, and the principal case could then be reconciled.

The court's fourth proposition above involves two questions: 1. Is the condition attached to the offer in truth illegal? and, 2. If illegal, is it separable from the balance of the offer? The decision on the first is in conflict with the prior case of \textit{Geer v. State of Connecticut}.\footnote{285} In that case the state had prohibited the taking of certain game birds except for domestic use. In a criminal prosecution under the act the defendant urged that the act was in conflict with the commerce clause. The court in that case decided that the offer of the state to the defendant to take the game upon certain conditions could not be split up, i.e., he took his hunting license with those conditions attached; that the condition against transportation out of the state was valid, because the defendant had no rights until he took the game, and he got thereby only a qualified ownership.\footnote{286} (The result was that the defendant had no right to do interstate business which was not co-extensive with his rights under the 14th amendment. On this point the cases are clearly in

\footnote{285} \textit{Muskurat v. U. S.}, 219 U. S. 346, 31 Sup. Ct. 250, 55 L. Ed. 246 (1910); \textit{Penn. v. W. Va.}, 262 U. S. 553, 43 Sup. Ct. 658, 67 L. Ed. 1117, 32 A. L. R. 300 (1922). It is true that courts recognize the privilege of engaging in business as a property right and restrain an interference with the privilege; but no court has yet reformed an offer to sell to conform to the desire of the offeree. The net result of this case is that the court makes an offer for the defendant. It may be suggested that the explanation, however, is that the state was acting in two capacities; in making the offer of a grant of a license it was acting in its proprietary capacity as trustee of the shrimp, while in making the restrictions as to its use it was acting in its governmental capacity and in the exercise of its "police powers." The proposed business then between the plaintiffs and the state, as trustee, was protected as against the threatened interference by the state, as state. The answer to that would seem to be that in truth the statute in question was not an offer plus a regulation, but it was only a conditional offer. This argument has been repudiated in the cases under the 14th amendment. See, \textit{Geer v. Connecticut}, supra, note 2.

\footnote{286} \textit{Supra}, note 2.

\footnote{284} The power of the state to control the killing of and ownership in game being admitted, the commerce in game, which the state law permitted, was necessarily only internal commerce, since the restriction that it should not become the subject of external commerce, went along with the grant and was a part of it." 161 U. S. at p. 532.
conflict.) The court, in the Geer case, however, decided also that admitting that the conditions attached to the license did affect interstate commerce the regulation was a valid state exercise of the police power. Upon that point there would seem to be much force to the observation of Mr. Justice McReynolds in the dissenting opinion in the principal case: "How wild life may be utilized in order to advantage her own citizens is for the producing state to determine. To enlarge opportunity for employment is one way, and often the most effective way to promote this welfare." 15

On the proposition that the illegal condition in restraint is separable from the balance of the offer the court cites three cases, 16 each of which involved the right of a foreign corporation to object to laws in force at the time of its admission to a state on the ground that their enforcement violated the "equal protection" clause. The reason must be that the 14th amendment is a limitation upon the power of the state to act; the corporation does not accept the supposed conditions on its entry into the state because the state has no power to make that kind of an offer. 17 The commerce clause is likewise a limitation on the power of a state to act, and the result is (if it be decided that the condition is in fact a restraint on interstate commerce) that the condition is invalid, being beyond the power of the state to offer, and therefore of the offeree to accept.

The result in the instant case would be, then—(if the plaintiffs had accepted the offer and started to take the shrimp)—that by accepting the offer the plaintiffs acquired a property right in the shrimp when taken. The interference by the state in an effort to take the shrimp out of the state would be invalid under the 14th amendment, and the supposed excuse for the interference would be a condition, invalid under the commerce clause. The present decision could well be justified under such a situation, whereas upon the record the decision seems to be a declaratory decree, and in effect the specific enforcement of an inchoate right to do interstate business.

Would the result be any different if the offer were made by an individual rather than the state? The prohibition of the 14th amendment is solely against state action, so clearly it could not apply. 18 It is difficult to see how the result would be any different under the commerce clause. It granted to Congress, and thereby took from the states, power to regulate interstate commerce. An individual might interfere with interstate commerce, and his act might be unlawful under appropriate legislation, but it would not be uncon-

15 49 Sup. Ct. at p. 5. See also, Union Fisheries Co. v. Shoemaker, 98 Or. 658, 193 Pac. 476, 194 Pac. 854 (1921) and New York ex rel Silz v. Hesterburg, 211 U. S. 31 (1908).


stitutional. Congress might pass an act making all conditions in restraint of interstate commerce invalid; the result would be that the offeree might accept the offer and disregard the conditions. A state could not refuse to enforce his rights under the contract, not because it must enforce his inchoate right to do interstate business, but because his contract rights are property within the 14th amendment, and the supposed conditions do not limit them, being invalid under the federal legislation. If the state makes the offer with conditions attached in restraint of interstate commerce the conditions are void, being beyond its power to make; if an individual is the offeror, the conditions might be void under appropriate federal legislation, not because of a lack of power to make that kind of an offer, but because the conditions would be illegal.

—Bernard C. Gavit.

Constitutional Law—Reasonable Exercise of the Police Power—In any application of the constitutional requirement that a taking of private property by the state be a reasonable taking we are necessarily dealing in mental concepts. As to whether or not given action is reasonable depends ultimately upon the judges' ideas of reasonableness which in turn depend upon the experience, learning and philosophy of the judges themselves. In the recent case of Louis K. Liggett Co. v. Baldrige, the majority of the Supreme Court of the United States say: "Mere stock ownership in a corporation, owning and operating a drug store, can have no real or substantial relation to the public health,—the act creates an unreasonable and unnecessary restriction upon private business." The minority say: "A standing criticism of the use of corporations in business is that it causes such business to be owned by people who do not know anything about it.—The divorce between the power of control and knowledge is an evil.—It is enough if the questioned act has a manifest tendency to cure or at least to make the evil less."

Other language of the opinions would indicate that perhaps the difference in result may be that the majority requires reasonable evidence to support the reasonableness of the regulation: the minority requires only a scintilla of evidence. This would be a departure from the accepted rules that one who attacks an act as unconstitutional has the burden of proof, and that all reasonable presumptions are in favor of the action of the state. But if the point were specifically raised both sides would undoubtedly pay lip-service to these rules. The majority opinion is really upon the theory that acting upon judicial knowledge and the evidence in the case there was no evidence to sustain the reasonableness of the legislation.

A regulation of private property must have in truth a reasonable foundation. The rights of private property are protected by the Constitution against every unreasonable taking even although the taking be under the guise of social welfare. Where a private right leaves off and social welfare begins depend in truth on the length and breadth of the so-called private right.


2 73 L. Ed. 45, 49 Sup. Ct. 57 (1928). The facts are stated, post, p. 295.