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CONSTITUTIONAL LAW

DAVID W. ROBINSON, II*

I. EQUAL PROTECTION

Prior to the passage of the Civil Rights Act of 1964, the Supreme Court decided two cases arising from Columbia, both involving sit-in demonstrators. In Bouie v. Columbia, the demonstrators were convicted for violating a statute which forbids "entry upon the lands of another . . . after notice from the owner or tenant prohibiting such entry. . . ." The Supreme Court concluded that the statute, as written, did not give the demonstrators fair warning that their conduct, in remaining on the premises after being asked to leave, was prohibited, and, therefore deprived the demonstrators of rights guaranteed by the due process clause of the fourteenth amendment. In Barr v. Columbia the demonstrators were convicted for breach of the peace and trespass for refusing to leave the lunch counter of a drug store after being ordered to do so. The conviction for criminal trespass was reversed per curiam "for the reasons stated in Bouie v. City of Columbia." The court also concluded that the convictions for breach of the peace were unsupported by evidence, stating:

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5. "There was nothing in the statute to indicate that it also prohibited the different act of remaining on the premises after being asked to leave." Bouie v. Columbia, 378 U.S. 347, 355 (1964).
6. Id. at 367. In the dissenting opinion of Justices Black, Harlan and White it was stated that the dissenting justices could not believe that the demonstrators could have been "misled by the language of this statute (S.C. Code Ann. § 16-386 (1962)) into believing that it would permit them to stay on the property of another over the owner's protest without being guilty of trespass." The dissenters also felt that their dissenting opinion in Bell v. Maryland, 378 U.S. 226, 318 (1964), should govern this action, and the court should rule that the fourteenth amendment does not compel a restaurant owner to accept customers he does not desire to serve.
[T]he only evidence to which the city refers to justify the breach of peace convictions here, . . . is a suggestion that petitioners' mere presence seated at the counter might possibly have tended to move onlookers to commit acts of violence.9

Shortly after these cases were decided, Congress enacted the Civil Rights Act of 196410 and such discrimination in covered establishments was prohibited. In Heart of Atlanta Motel v. United States11 the Supreme Court decided that the Civil Rights Act was constitutional as a proper exercise of the commerce clause.

In Hamm v. Rock Hill12 the court enunciated a novel doctrine which disposed of the hundreds of prior convictions of sit-in demonstrators pending on appeal. In Hamm the demonstrators were convicted for violation of a statute which made it an offense to enter a place of business after having been warned not to do so or to refuse to leave immediately after having entered.13 The Supreme Court, in an opinion written by Mr. Justice Clark, ruled that the criminal prosecutions were prohibited by the Civil Rights Act because the proprietor was attempting to discriminate on racial grounds. Then the Court stated that, since the state prosecutions were not finalized when the statute was enacted, and because all federal prosecutions would be abated by the Civil Rights Act, the supremacy clause required a similar result in relation to state practices and state statutes contrary to the act. This, the Court stated, was not a retroactive intrusion into state criminal law, but merely an "application of a long-standing federal rule, namely, that since the Civil Rights Act substitutes a right for a crime any state statute . . . to the contrary must . . . give way under the normal abatement rule covering pending convictions arising out of a pre-enactment activity."14 The four dissenting justices 15 pointed out that there was

15. Mr. Justices Black, Harlan, Stewart, and White each wrote a separate opinion.
nothing in legislative history or language of the act to indicate any such congressional intention; the "common law" abatement rule applied only to one statute's succeeding another; and, Congress had no constitutional authority to abate prior lawful state convictions.

II. LEGISLATIVE APPORTIONMENT

There were no South Carolina cases involving apportionment during this survey period. However, no constitutional survey could omit what will undoubtedly be one of the most controversial decisions of this decade. In Reynolds v. Sims the Supreme Court extended the doctrines of Baker v. Carr, Gray v. Sanders, and Wesberry v. Sanders and ruled that, as a basic constitutional requirement, the equal protection clause requires that the seats in both houses of a bicameral state legislature be apportioned on a population basis, and that the Alabama senate and house should be apportioned on the basis of population so as to meet a "one-man, one-vote" rule. The Court did not undertake to formulate any single solution, stating:

We do not consider here the difficult question of the proper remedial devices which federal courts should utilize in state legislative apportionment cases. . . . It is enough to say now that once a State's legislative apportionment scheme has been found unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan.

The Court recognized that a variety of plans could meet the requirement, including multi- or single-member districts, or even overlapping districts.

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III. Death Penalty

In Moorer v. MacDougall\(^22\) a convicted rapist\(^23\) sought to have his conviction set aside in a habeas corpus proceeding on the ground that the imposition of the death penalty violated the equal protection clause of the fourteenth amendment. One of Moorer's arguments was that in South Carolina the death penalty had been almost exclusively reserved for Negroes in such cases, thus constituting a racially discriminatory application of the law. The South Carolina Supreme Court stated that the motives or circumstances which might have prompted the jury to impose the death penalty in a given case, "cannot be inquired into or proven because of the inviolability of the jury room . . . "\(^{24}\) The court also stated that statistics showing that the death sentence had been imposed in more cases involving Negroes than whites did not show racial discrimination, but only that the variation depended on the circumstances, aggravation, and enormity of the crime in each case.\(^25\)

IV. Elections

In the 1964 elections for the ten vacancies in Richland County's delegation to the state legislature, the Republican party nominated only four candidates and sought to avoid the necessity of voting for six democratic candidates or of writing in six names in order for their votes to be counted. In Boineau v. Thornton\(^26\) a three-judge federal court concluded that the requirement that an elector vote for as many candidates as there were vacancies in order for his vote to be counted\(^27\) does not violate the equal protection clause of the fourteenth amendment. The argument was raised that the practice of requiring a filled-in ballot would result in a dilution of the weight of the votes for the Republican nominees. The court stated that such dilution could be avoided if the Republican party either nominated a full slate of candidates or used the write-in device.\(^28\) The court recognized that

\(^{22}\) 245 S.C. 633, 142 S.E.2d 46 (1965).
\(^{25}\) Ibid. The issue has not ended. Recently, the United States Court of Appeals, Fourth Circuit, directed the district court to give Moorer a hearing on his federal habeas corpus appeal, Moorer v. South Carolina, 347 F.2d 502 (4th Cir. 1965).
the type of dilution prohibited by *Reynolds v. Sims*\(^29\) was based on disparity of population in different voting districts and that the statute requiring a fully filled-in ballot “avoids rather than fosters possibilities of dilution of the weight of votes...”\(^30\) if each party nominates a full slate of candidates.

### V. Self-Incrimination

The United States Supreme Court continued its disposition to broaden the scope of the fourteenth amendment. In what may be termed a “predictable” decision, the Court held that the fourteenth amendment incorporated the fifth amendment privilege against self-incrimination.\(^31\) Petitioner was called as a witness in a state crimes inquiry and, invoking the self-incrimination privilege, refused to answer a number of questions. The Supreme Court reversed his contempt conviction, stating that not only is the self-incrimination privilege applicable to the states, but also its application is governed by federal standards.\(^32\)

### VI. Due Process

#### A. Right to Counsel

*Pitt v. MacDougall*\(^33\) involved a retrospective application of the rule, announced in *Gideon v. Wainwright*,\(^34\) that an indigent defendant must be offered a court-appointed counsel. The South Carolina Supreme Court stated that a waiver of this right is effective only if intelligently and understandably given. The defendant's failure to specifically request counsel will not constitute such a waiver.

On the question of adequacy of representation, *Tillman v. State*\(^35\) held that due process was not denied when the defendant's paid counsel agreed to represent the defendant only in the event that he decided, of his own free will, to plead guilty.


\(^{32}\) This decision overruled Twining v. New Jersey, 211 U.S. 78 (1908) and Adamson v. California, 332 U.S. 46 (1947). For a summary of other recent Supreme Court decisions relating to the incorporation of the first eight amendments into the fourteenth amendment, see Malloy v. Hogan, 378 U.S. 1, 4 n.2 (1965).


\(^{34}\) 372 U.S. 335 (1963).

\(^{35}\) 244 S.C. 259, 136 S.E.2d 300 (1964).
The court stated that counsel had done nothing to coerce the defendant into pleading guilty. Rather, counsel told him that the decision was his to make and if he did not wish to plead guilty, he could retain other counsel or the court would appoint counsel for him.\footnote{36} The court found no condition imposed which either deprived the defendant of adequate representation, or in any way coerced him into pleading guilty. He was given full opportunity to select other counsel or have counsel appointed.

\textbf{B. Milk Regulation}

In \textit{Stone v. Salley}\footnote{37} the South Carolina Supreme Court was again faced with the issue of whether the legislature had the authority to regulate milk prices. The state dairy commission issued an order fixing the minimum price of milk and prohibiting producers, distributors and retailers from selling such milk below the cost of production. In its decision, the court affirmed and elaborated on its prior ruling in \textit{Gwynette v. Myers}.\footnote{38} On both occasions the court has stated that “the business of selling milk was not affected with the public interest;”\footnote{39} that “regulation of milk prices was beyond state’s police power;” and that the “statute which purports to give State Dairy Commission power to regulate retail price was to that extent unconstitutional.”\footnote{40} The court made its position emphatic:

The state may not dictate prices in a private industry merely because the industry is large and important or because the public may be concerned in respect of its maintenance, but such control is justifiable under the police power only when the industry is affected with a public interest in a sense that it may fairly be said that it has been devoted to the public use.\footnote{41}

Since the case at hand was almost identical to \textit{Gwynette}, the court again held that so much of the act as attempted to fix the retail price of milk, violated the due process and equal protection clauses of the constitution.

37. 244 S.C. 531, 137 S.E.2d 788 (1964).
41. Id. at 539, 137 S.E.2d at 791-92.}
O. Taxation

The constitutionality of the mileage formula[^42] was questioned in *Mercury Motor Express, Inc. v. South Carolina Tax Comm'n.*[^43] The appellant trucking company derived only one percent of its net income from freight pick-ups and deliveries in South Carolina but it was taxed on seventeen percent of its income because that was the proportion of its mileage travelled in South Carolina. Appellant contended that a tax so based, in light of the result which placed its tax well above its income in this state, produced arbitrary, discriminatory and unconstitutional results in violation of the federal and state constitutions.[^44] In upholding the validity of the mileage formula, the court stated the seventeen percent of the appellant's total mileage, travelled in this state, was contributing to the appellant's income. The court pointed out that the burden is on the taxpayer to prove that the tax, when applied to it, produces an arbitrary or unconstitutional result. In this case the appellant did not meet this burden.[^45]

VII. Freedom of Religion

In 1962 the legislature revised the Sunday closing law so as to specifically prohibit the sale of certain articles on Sunday and exempt other business operations.[^46] In *State v. Solomon*[^47] the defendant appealed his conviction under this law, contending that it violated provisions of the first amendment to the federal constitution and the state constitution, concerning the free exercise of religion. Since the statute set aside Sunday for the furtherance of religious beliefs, it discriminated against members of non-Christian sects, who did not hold Sunday as a day of worship. The court sustained the validity of the statute on the ground that its aim was to provide a uniform day of rest, and thus, it served a secular, not religious, purpose. The court noted that the legislature had found that changing social and economic

[^42]: S.C. Code Ann. § 65-256 (1962). By this formula, the income tax on appellants' foreign corporation is based on the proportionate mileage travelled by its trucks in South Carolina, to that travelled totally by it.


factors created a need for a more equitable and uniform method of observing a day of rest in this state and that such legislation was in the interest of moral, physical and mental health of the public.

VIII. FIFTH AMENDMENT

In Leavell v. United States48 the United States District Court for the Eastern District of South Carolina held that the noise and vibration of jet airplanes on federal property was not an actual invasion of the plaintiff’s property, and thus, did not constitute a taking without just compensation in violation of the fifth amendment. The court relied on the principles enunciated in Batten v. United States49 and similar cases. In construing this constitutional provision the federal courts have consistently distinguished between a taking and consequential damages. “Governmental activities which do not directly encroach on private property are not a taking within the meaning of the Fifth Amendment even though the consequences of such acts may impair the use of the property.”50 In other words the plaintiff must show an actual invasion of his property in order to recover;51 a showing of damages alone is not sufficient to require compensation. In Leavell recovery was sought solely for damages from noise, shock and vibration. Thus, the court denied recovery because no actual invasion took place. Further, the court observed that while there was some interference with the plaintiff’s enjoyment of the property, the government’s actions were not so complete as to deprive the owner of all her interest in the subject matter and thus was not a “taking” in the constitutional sense.

IX. COUNTY GOVERNMENT

In 1964, legislation was enacted which authorized Anderson County to borrow 225,000 dollars from the state sinking fund for the construction of a water line. In order to secure repayment of that sum the full faith, credit and taxing power of Anderson County was pledged.52 This act further provided that

49. 306 F.2d 580 (10th Cir. 1962).
51. An example of actual invasion is the case where the plaintiff’s property is damaged by government airplanes crossing over his land. See Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946).
the county was directed to levy and collect an annual tax on all the taxable property in the county; this tax was to be sufficient to retire the loan and interest due thereon. The validity of this act was attacked in Bratcher v. Ashley53 where the plaintiffs contended that the act violated the state constitution, which provides:

The General Assembly shall not have the power to authorize any county or township to levy a tax or issue bonds for any purpose except for educational purposes, to build and repair roads, buildings and bridges, to maintain and support prisoners, pay jurors, county officers, and for litigation, quarantine and court expense and for ordinary county purposes, to support paupers, and pay past indebtedness.54

County taxes may not be levied or county bonds issued for an undertaking which does not come within this provision no matter how public the purpose.55 In holding the act unconstitutional, the court stated that the construction and maintenance of a water line was not an "ordinary county purpose", and thus, was not authorized by the state constitution.