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Recent Decision: State Anti-Discrimination Act Not a Burden on Interstate Commerce

Constitution are warrants for the here and now."[37]

[37] Watson v. City of Memphis, *supra* note 29, at 4500.

Recent Decision: State Anti-Discrimination Act Not A Burden On Interstate Commerce

The principal legal arguments levelled against segregation, and those which have received the most notoriety, concern violations of the due process and equal protection clauses of the fourteenth amendment.[1] But it is another section of the Constitution, the commerce clause,[2] which is becoming increasingly important among the constitutional questions to be answered in the present civil rights conflict.[3]

Ironically, the commerce clause has been utilized as an argument to justify discrimination. An example is the principal case wherein Marlon Green, a Negro, applied for the position of pilot with an interstate air carrier. Although he was ostensibly qualified to fill the position, his application for the carrier's training school was rejected. Green informed Colorado's Anti-Discrimination Commission of this action and the Commission found that Green was rejected because of his race which amounted to a violation of the state's Anti-Discrimination Act.[4] The air carrier was ordered to cease the discrimination and to give Green another opportunity to enroll. The Supreme Court of Colorado, contrary to the Commission's order, declared that this statute, through which the Commission received its power, placed an undue burden on interstate commerce and occupied an area pre-empted by federal legislation. The United States Supreme Court, in reversing, unanimously *held* that the Colorado statute to prevent discrimination in hiring on account of race does not impose a constitutionally prohibited burden upon interstate commerce. *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963).

An early interpretation of the commerce clause attempted to repose all authority affecting interstate commerce in Congress thereby impliedly prohibiting any state regulation.[5] Within thirty years this interpretation was succeeded by a theory of concurrent powers which allowed, and presently allows, a state to regulate an area of interstate commerce that does not require uniform rules.[6] The states, however,

[1] See, *e.g.*, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Brown v. Board of Educ., 347 U.S. 483 (1954).

[2] U.S. CONST. art. 1, §8, cl.3.

[3] See N.Y. Times, June 20, 1963, p. 1, col. 8.

[4] COLO. REV. STAT. ANN. §80-24-6 (Supp. 1960) declares that "It shall be discriminatory or unfair employment practice: (2) For an employer to refuse to hire . . . any person otherwise qualified, because of race, creed, color, national origin or ancestry."
For a collection and analysis of similar Fair Employment Practice Acts see 36 NOTRE DAME LAW. 189 (1961).

[5] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). "[T]hat a state may regulate commerce . . . cannot be admitted." *Id.* at 199; Dowling, *Interstate Commerce And State Power*, 27 VA. L. REV. 1 (1940).

[6] Cooley v. Board of Wardens, 53 U.S. (12 How.) 298 (1851).

were not given unbridled power to regulate this non-uniform area. For instance, a state could not regulate an area which was exclusively subject to federal legislation.[7] Furthermore, state regulation could not be economically discriminatory[8]; nor could it impose an undue burden on commerce.[9]

The question of whether a state regulation creates an undue burden on commerce must be determined on an *ad hoc* basis. A court, in making such a determination, will weigh the regulation's promotion of local interests against the extent to which it restricts the free flow of interstate commerce or, stated differently, the extent to which it interferes in an area where national uniformity is necessary. For example, in *Southern Pac. Co. v. Arizona* ex rel. *Sullivan,*[10] the State of Arizona, intending to increase railroad safety, enacted laws which limited the length of railroad trains passing within its jurisdiction. The Supreme Court weighed the effect of the statute on transportation efficiency and economy against the safety value of the regulation. It concluded that the regulation exceeded what was essential for safety "since it does not appear that it will lessen . . . the danger of accident."[11] This process of weighing the effect of local interests against interstate commerce has also been employed with respect to laws that protect the health, safety and welfare of the community; and in many instances, these laws have been upheld.[12]

State laws either requiring or prohibiting segregation have also been tested against commerce clause objections.[13] In *Hall v. DeCuir,*[14] a Louisiana statute requiring integration on riverboats was held to violate the commerce clause. The Court reasoned that the riverboats could not efficiently operate if each state bordering the Mississippi enacted different legislation pertaining to accommodations. Inconvenience would occur, the Court stated, through the relocation of passengers. This inconvenience was held to be a direct burden on interstate commerce in an area which needed uniformity of regulation. Approximately seventy years later, in *Morgan v. Virginia,*[15] the Court utilized the *Hall* rationale in invalidating a state statute requiring segregation on interstate buses while passing through Virginia.

A state statute that conflicts with federal

[7] See Union Brokerage Co. v. Jensen, 322 U.S. 202 (1944); South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938).

[8] Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (a state statute cannot discriminate against interstate commerce if reasonable nondiscriminatory alternatives adequate to conserve legitimate local interests are available).

[9] Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959).

[10] 325 U.S. 761, 770-71 (1945).

[11] *Id.* at 781-82.

[12] *E.g.*, Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) (control of dense black smoke from docked ships); H.P. Welch Co. v. New Hampshire, 306 U.S. 79 (1939) (regulation on the number of consecutive driving hours).

[13] The regulation need not be the product of a state legislature to be constitutionally objectionable. Railroad and bus regulations have also been held to violate the commerce clause. Chance v. Lambeth, 186 F.2d 879 (4th Cir. 1951); Whiteside v. Southern Bus Lines, Inc., 177 F.2d 949 (6th Cir. 1949).

[14] 95 U.S. (5 Otto) 485 (1877).

[15] 328 U.S. 373 (1946). As to why the *Morgan* case was not decided under the Interstate Commerce Act see Pollak, *The Supreme Court and the States: Reflections on* Boynton v. Virginia, 49 CALIF. L. REV. 15, 38-39 (1961). Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948) is the third of three cases decided by the Supreme Court concerning commerce clause objections to anti-discrimination statutes.

legislation[16] or intrudes in a field Congress intended to occupy exclusively is invalid.[17] If Congress does not clearly manifest an intent to exclude all state legislation,[18] or if the statute is not in conflict with federal law,[19] the Court will be reluctant to strike down the state law.[20] State statutes that are identical to federal legislation and which cover subjects omitted by federal legislation have been upheld so long as no conflict appears possible[21] and pre-emption was not intended.

Federal legislation is non-existent within the area of discrimination and employment practices. Executive orders, however, have required government contractors to refrain from discriminatory hiring practices.[22] Many states, in contrast, have enacted legislation prohibiting discrimination in this area.[23] These acts apply to all firms within the states' jurisdiction, including those that are active in interstate commerce. No challenge on commerce clause grounds had been brought before the Supreme Court prior to the principal case.[24]

The Court, in the case under discussion, unanimously held that the Colorado statute did not unduly burden interstate commerce and that federal legislation had not pre-empted the field of fair employment practices in air transportation. In discussing the first point, the Court remarked that the facts of each case determine whether a state regulation is unduly burdensome. With this in mind, the Court felt that the circumstances before it did not amount to those present both in *Hall* and *Morgan*. Furthermore, the Court regarded the fair employment statute as localized matter and, more significantly, stated that the "threat of diverse and conflicting regulation of hiring practices is virtually nonexistent."[25]

An analysis of this quotation is warranted. When *Hall* and *Morgan* were decided, statutes authorizing segregation were

[16] U.S. CONST. art. VI, cl. 2 (supremacy clause); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942). "But where the United States exercises its power of legislation as to conflict with the state . . . the state legislation becomes inoperative. . . ." *Id.* at 155-56.

[17] See, *e.g.*, Guss v. Utah Labor Relations Bd., 353 U.S. 1, 10 (1957); Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Wisconsin Employment Relations Bd., 340 U.S. 383, 390 (1951).

[18] Reid v. Colorado, 187 U.S. 137, 148 (1902).

[19] Savage v. Jones, 225 U.S. 501, 533 (1912) wherein the state of Indiana required producers of medicine for domestic animals to label the ingredients on each package. The purpose of the statute was to prevent a fraud on the people of the state. The federal government also had legislation forbidding the introduction of adulterated or misbranded food into commerce. The federal legislation did not require a recital of the ingredients, except in specific areas like morphine, opium, etc. The Court found that Congress did not pre-empt the field since it limited the scope of its statutory prohibitions and consequently did not include those safeguards at which the Indiana statute was aimed.

[20] See Huron Portland Cement Co. v. City of Detroit, *supra* note 12, at 446.

[21] California v. Zook, 336 U.S. 725 (1949). A state law identical with federal legislation will be struck down when national uniformity is the policy of the federal law.

[22] The most recent executive order in this area is Exec. Order No. 10925, 26 Fed. Reg. 1977 (1961). As the principal case points out, 372 U.S. 714, 723-24, various federal laws have been passed forbidding discrimination in air transportation. These enactments, however, are not directed toward fair employment practices.

[23] See 36 NOTRE DAME LAW. 189 n.3 (1961).

[24] In Railway Mail Ass'n. v. Corsi, 326 U.S. 88 (1945), the Supreme Court held that Section 43 of the New York Civil Rights Law was not an interference with the association's right of selection of membership or with its liberty to contract. The decision rested solely on the fourteenth amendment.

[25] Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714, 721 (1963).

not unconstitutional and hence, different states could pass conflicting legislation concerning segregation. With the advent of the *Brown v. Board of Educ.* interpretation of the fourteenth amendment,[26] it was settled that any legislation requiring segregation is invalid. Consequently, the rationale of both *Hall* and *Morgan* are no longer applicable and respondent air carrier could not reasonably argue that a state other than Colorado could pass contrary legislation regarding discrimination in employment practices. The Court's conclusion is that Colorado's Anti-Discrimination Act will not conflict with any other state's fair employment statute to such an extent as to result in an undue burden.

The Court, in discussing the second issue of whether the Federal Aviation Act[27] had pre-empted the discrimination field, noted that the act was directed at price discrimination. However, the Court assumed the act's applicability to unfair hiring practices and, after indulging in that assumption, determined that Congress did not intend to bar state legislation.

The Court appears to have given blanket approval to other state statutes similar in purpose. Since state legislation cannot require discrimination, other states can only imitate Colorado's legislation or, perhaps, exceed it, *i.e.*, provide greater protection against discrimination. This latter possibility raises one of the interesting problems which arise in discussing the effect of fourteenth amendment legislation on the commerce clause[28] since it can be argued that a statute affording greater protection against discrimination will constitute an undue burden. To illustrate, let us assume that a state's policy against discrimination is so strong that it considers it in the best interests of the general moral welfare of its citizens to enact rather strong anti-discrimination legislation. Let us further assume that such a state passes a law which forbids the marketing of any goods within its jurisdiction if the goods are manufactured in an industry which practices segregation. It would appear that in this hypothetical the fourteenth amendment and the commerce clause are somewhat in conflict. A court would have to decide whether the free interplay of commerce is a consideration paramount to the designs of a statute which is effectuating the mandates of the fourteenth amendment. If the unimpeded flow of commerce is deemed a superior national interest then, ironically, the commerce clause may well emerge as a constitutional barrier to some forms of civil rights legislation.

[26] 347 U.S. 483 (1954).

[27] 72 Stat. 737, 49 U.S.C. §§1301-1542 (1958), as amended, 49 U.S.C. §§1301-1542 (Supp. III, 1961).

[28] For a profitable discussion of some of the constitutional problems involved in enacting an anti-discrimination statute, see Waite, *Constitutionality Of The Proposed Minnesota Fair Employment Practices Act*, 32 MINN. L. REV. 349 (1948).