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Constitutional Law - Commerce Clause - Local Smoke Control Ordinance Not an Undue Burden on Interstate Commerce

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CONSTITUTIONAL LAW—COMMERCE CLAUSE—LOCAL SMOKE CONTROL ORDINANCE NOT AN UNDUE BURDEN ON INTERSTATE COMMERCE—In accordance with a scheme of federal ship inspection,¹ appellant possessed certificates which permitted its ships to operate on the Great Lakes² and which specified the type of boiler which might be used. While two of its ships were docked in Detroit, smoke was emitted from their boilers in violation of the minimum density and duration requirements of the Detroit Smoke Abatement Code.³

¹ REV. STAT. §§ 4399-462 (1875), as amended, 46 U.S.C. §§ 390-416, 435-36 (1953).

² REV. STAT. § 4321 (1875), as amended, 46 U.S.C. § 263 (1953).

³ DETROIT, MICH., MUNICIPAL CODE ch. 184 (1954).

The equipment which appellant was then using made compliance with the ordinance impossible. When criminal proceedings were instituted against appellant, it brought an action to enjoin the City of Detroit from enforcing the ordinance on the theory that the regulation placed an unconstitutional burden on interstate commerce.⁴ The lower court denied the injunction and was affirmed by the Supreme Court of Michigan.⁵ On appeal to the United States Supreme Court, *held*, affirmed, two Justices dissenting.⁶ A state police power regulation which neither discriminates against interstate commerce nor disrupts a national policy of uniform regulation is constitutional. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960).

The constitutionality of a state police power regulation affecting interstate commerce should be grounded on an assessment of the functional interests raised by the facts of the particular case. In the principal case, however, the Court disposed of the commerce clause question by reference to formal, conceptual statements of law⁷ and gave no indication that it had considered such functional factors as the effect of the ordinance upon the flow of commerce, the effectiveness of the regulation in eliminating the evil to be controlled, or the character of the business being regulated.⁸ In other cases the Court has adopted a more active role by expressly weighing state and national interests, by appearing to inquire into the wisdom and effectiveness of the legislation, and by otherwise discussing the functional aspects of the case in its written opinion.⁹ However, it is likely that in determining the constitutionality of a state regulation affecting interstate commerce the Court always considers the functional aspects of the case,¹⁰ but only in some cases does it do so expressly in its written opinion.¹¹

⁴ Appellant also argued that Congress had pre-empted the field through a scheme of federal ship inspection and that the possession of a federal license to operate precluded state regulation. Both the Michigan Supreme Court and the United States Supreme Court rejected these contentions. For a discussion of these aspects of the case, see *The Supreme Court, 1959 Term*, 74 HARV. L. REV. 132 (1960).

⁵ *Huron Portland Cement Co. v. City of Detroit*, 355 Mich. 227 (1959).

⁶ Justices Douglas and Frankfurter dissented. They based their dissent on the pre-emption issue and argued that the requirements of the Detroit smoke ordinance were in conflict with the federal statute.

⁷ In its most extended analysis of the commerce clause problem, the majority notes: "The claim that the Detroit ordinance . . . imposes . . . an undue burden on interstate commerce needs no extended discussion. State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity may constitutionally stand." Principal case at 448.

⁸ For other examples of this approach, see *Sproles v. Binford*, 286 U.S. 374, 388 (1932); *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 190 (1938).

⁹ See, e.g., *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 768 (1945).

¹⁰ "[W]hen judicial theory is cast in conceptual terms that seek to avoid the weighing of functional values, the result frequently is to obscure the judicial identification and appraisal of the functional interests that lead to the conceptual characterization." KAUPER, *FRONTIERS OF CONSTITUTIONAL LIBERTY* 94 (1956).

¹¹ If, on a preliminary consideration of the facts of a case, it is obvious to the Court that the underlying functional considerations clearly require them to sustain or to invalidate a state regulation, it seems likely that the Court would save time by framing its opinion in terse, conceptual language rather than writing a lengthy opinion containing an exhaustive consideration of the functional values raised.

Thus when attempting to predict the Court's position with respect to this type of regulation, it seems better to assess the functional interests which the Court has expressly or implicitly considered than to try to extract general rules of law from the conceptual language of the Court.

One of the important functional factors which the Court has expressly considered in its written opinions¹² is the existence or non-existence of conflicting state regulations on the same subject.¹³ It is questionable whether this should be a determinative factor in deciding the constitutionality of a state regulation. If the mere existence of a conflict between the laws of different states is a sufficient ground for invalidating a statute, healthy innovation would be stifled and the later of two conflicting state regulations would need to be invalidated.¹⁴ Furthermore, a court might interpret "conflicting state regulations" to mean "conflicting state policies." The regulations of two states would then be in conflict whenever one state passed a positive regulation dealing with an area which the other state chose to leave unregulated. Acceptance of this view would require that the ordinance in the principal case be invalidated, for the record would show conflicting state regulations although no other state was shown to have a smoke control ordinance. A second functional factor which has influenced the Court's decisions is the effect of the regulation on the free flow of commerce. If state regulations merely increase the cost of engaging in interstate commerce,¹⁵ the Court will be less likely to invalidate the regulation than if it actually restricts the physical flow of goods from one state to another.¹⁶ Compliance with the smoke regulation in the principal case would not restrict the free flow of goods across state lines but would merely increase the cost of engaging in commerce¹⁷ by requiring the appellant to install a different type of boiler if he is to comply with the ordinance. A third important functional factor which the Court has considered is the effectiveness of the regulation in achieving the goal which the state is attempting to attain through the use of its police power.¹⁸ When it is not clear that the regulation aids in achieving this goal, the Court is more inclined to invalidate the regulation. For example, in invalidating a

¹² See *Southern Pac. Co. v. Arizona*, *supra* note 9; *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); principal case at 448.

¹³ For a discussion of the problems the Court has had in defining "conflict" between a state and federal law, see *The Supreme Court, 1959 Term*, 74 HARV. L. REV. 132 (1960).

¹⁴ See *The Supreme Court, 1958 Term*, 73 HARV. L. REV. 168 (1959).

¹⁵ See *Sproles v. Binford*, *supra* note 8; *South Carolina State Highway Dep't v. Barnwell Bros.*, *supra* note 8.

¹⁶ *Bibb v. Navajo Freight Lines, Inc.*, *supra* note 12; *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

¹⁷ The Court noted in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 526 that "cost taken into consideration with other factors might be relevant in some cases to the issue of burden on commerce."

¹⁸ See *Southern Pac. Co. v. Arizona*, *supra* note 9; *Bibb v. Navajo Freight Lines*, *supra* note 12.

maximum train length regulation in *Southern Pac. Co. v. Arizona*¹⁹ the Court expressed doubt that the regulation would increase safety by reducing train accidents and employee injuries. Long trains are not, in themselves, a recognized danger; railroad safety might be improved by operating a small number of long trains rather than an increased number of short trains. However, in the principal case, smoke is itself a recognized evil; clearly limitations upon its density and duration help in attaining the city's objective of reducing smoke. A fourth functional factor which the Court has considered is the nature and extent of the interest which the state is trying to protect by enacting the police power regulation. If it appears that the state is regulating some legitimate local interest, the Court will be more inclined to uphold the enactment. For example, a state's proprietary interest in the maintenance of its highways weighs heavily in favor of laws regulating the use of those highways.²⁰ In the principal case it is clear that Detroit has a legitimate local interest in protecting its inhabitants and their property from air pollution.

Apart from the factors which the Court has expressly considered, there are other factors which courts should consider when passing upon the constitutionality of state regulation of interstate commerce. Where compliance with the regulation affects equipment use, courts should consider whether the ordinance makes a specific requirement concerning the type of equipment to be used²¹ or whether it merely sets an objective standard of performance. Where the type of equipment is specified a carrier engaged in interstate commerce may be forced to stop and change equipment if two states have differing specific requirements.²² On the other hand, if an objective standard of performance is defined, this standard may be met by the use of various types of equipment and would leave the affected carrier free to move between all states without equipment changeover so long as it met the most stringent standard. Such an objective standard existed in the principal case, for the ordinance set maximum limits on the density and duration of smoke. Thus, a carrier would be free to choose his equipment and operate in all states, without equipment changeover, simply by conforming to the most stringent smoke ordinance. Among other functional factors which the courts might consider are the extraterritorial effect of the state regulation, the economic effect on the industry most directly affected, and the likelihood of congressional action to alleviate burdens imposed by local laws. The importance of the latter factor can be seen in the principal case. Since Congress has expressly recognized air pollution

¹⁹ 325 U.S. 761, 776-79.

²⁰ See *South Carolina State Highway Dep't v. Barnwell Bros.*, *supra* note 8.

²¹ For example, the Illinois statute in *Bibb v. Navajo Freight Lines, Inc.*, *supra* note 12, specified the type of mudguard which was required to be used on trucks using the state's highways.

²² This was the situation in *Bibb v. Navajo Freight Lines, Inc.*, *supra* note 12, for Illinois and Arkansas each required a different type of mudguard to be used.

as a matter of local concern,²³ it is not likely to pass a uniform smoke control law. Thus an invalidation of this smoke ordinance would have meant that there could be no effective smoke regulation in Detroit. The Court properly avoided this result.

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²³ S. REP. No. 389, 84th Cong., 1st Sess. 3 (1955).