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The Permissive Area of State Anti-Discrimination Acts

still exist? Unfortunately, the courts answer this question in the affirmative.

In conclusion, it should be pointed out that any person performing services for a municipality should take precautions to adhere to the prescribed statutory procedure lest he endanger his possibility of recovery.

THE PERMISSIVE AREA OF STATE ANTI-DISCRIMINATION ACTS

INTRODUCTION

Since the *"Civil Rights Cases"*[1] many states have passed legislation proscribing discrimination in various areas, including public accommodations, employment, and housing. The courts have coped with various arguments, both ingenious and ingenuous, attacking the validity of State "Fair Practices" Acts, but generally have sustained the legislation.

However, increasing concern is being voiced by the proponents of such state legislation in reaction to constitutional grounds raised in two recent cases to be discussed later in this comment. The arguments raised have been stated within the framework of the well-known and settled doctrines of "federal pre-emption," and the "negative implication doctrine," drawn from the plenary power of Congress in the area of interstate commerce. But in reality the *ratio decidendi* of these cases is the extent of permissible state action in areas where the federal government has previously acted.

Although on the surface it would seem that the relation of these doctrines to "Fair Practices" legislation of the states has been thoroughly delineated by the Supreme Court in *Bob-Lo Excursion Company v. Michigan*,[2] the recent decision of the Colorado Supreme Court, *Colorado Anti-Discrimination Commission and Marlon D. Green v. Continental Air Lines, Inc.*[3] has again brought the problem to the front.

The Civil Rights Act of 1875[4] generally declared that all persons were to be entitled to the full and equal enjoyment of the accommo-

1. 109 U.S. 3 (1883).

2. 333 U.S. 28 (1948).

3. (—Colo.—) 368 P.2d 970 (1962) *petition for cert granted,* No. 146 and No. 68, 10/8/62, Docket No. 146.

4. 18 Stat. 335.

dations and privileges of inns, public conveyances, theaters, and other places of public amusement, subject only to those legal limitations applicable alike to all citizens of every race and color, regardless of previous condition of servitude.

The above mentioned Civil Rights Act was attacked in the *Civil Rights Cases,* and the Supreme Court held that these acts were beyond the power Congress had derived from the implementing clause, Section 5 of the Fourteenth Amendment, since it was limited to arbitrary and discriminatory state action. However, the court decided that discriminatory action was not in a no man's land, free from regulation, but was in an area properly subject to state regulation.

Following the *Civil Rights Cases* considerable activity on the part of the states resulted in anti-discrimination legislation in twenty-eight states dealing with public accommodations,[5] in twenty-two states dealing with employment,[6] and in relatively recent years in seventeen states dealing with housing.[7] The housing area has shown a particular propensity for growth, evolving from public housing to urban renewal housing, to publicly assisted housing, and finally to private housing.[8]

In addition, the United States Commission on Civil Rights lists about fifty municipalities that have passed various housing anti-discrimination acts.[9]

CASES

Two recent cases have sharply pointed up the problems that are the crux of this article. One case is *Levitt & Sons, Inc. v. Division Against Discrimination in State Department of Education.*[10] The

5. *Public accommodations*: Alaska, California, Colorado, Connecticut, District of Columbia, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wyoming. Puerto Rico and the Virgin Islands also have such statutes.

6. *Employment*: Alaska, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Kansas, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Washington, and Wisconsin.

7. *Housing*: California, Colorado, Connecticut, Indiana, Illinois, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Washington, and Wisconsin.

8. NEW YORK CITY ADMINISTRATIVE CODE § x41.10 as amended in 1961; PITTSBURGH, PA. ORDINANCE NO. 523.

9. UNITED STATES COMMISSION ON CIVIL RIGHTS REPORT, 1959 pp. 411 - 412, REPORT, 1961, BOOK 4 ON HOUSING, pp. 200 - 201.

10. 31 N. J. 514, 158 A.2d 177 (1960), *appeal denied for lack of a substantial Federal question.* 363 U.S. 418 (1960).

other case is *Colorado Anti-Discrimination Commission and Marlon D. Green v. Continental Air Lines, Inc.*[11]

The *Levitt* case arose out of a complaint filed with the DAD[12] against corporate real estate developers, alleging racial discrimination in the failure to sell houses to the complainants. The developers instituted actions in a state superior court challenging the jurisdiction of DAD.[13] The State Superior Court dismissed the actions and the Appellate Division upheld the dismissal. The corporate developers appealed to the State Supreme Court, which affirmed the Appellate Division of the Superior Court. The particular issue raised and decided that is pertinent to this discussion was: whether Congress' refusal to incorporate a policy of nondiscrimination in national housing legislation indicated federal pre-emption, thereby precluding state action forbidding racial discrimination in federally assisted housing. The New Jersey Supreme Court decided there was no pre-emption.

The *Green* case involved a complaint filed with the Colorado Anti-Discrimination Commission alleging that defendant airlines company had unlawfully discriminated by refusing to employ the complainant as a pilot because of his race. The commission found that the company had wrongfully discriminated and issued a cease and desist order.[14] The Colorado State District Court subsequently heard the case on the merits of the original order and dismissed the case. The ground for dismissal was federal pre-emption of the field through the Civil Aeronautics Act and the Railway Labor Act.[15] On appeal to the Colorado State Supreme Court the District Court decision was affirmed by a holding that state regulation of employment was a burden on interstate commerce.

EVALUATION

The particular portion of the *Levitt* opinion which is germane to this discussion was directed to the contention of the challenging party

11. *Supra* footnote 3.

12. Division Against Discrimination in State Department of Education.

13. The grounds upon which the developers based their objections were based upon a construction of the statute term "publicly assisted housing accommodations" and the constitutionality of the statute itself.

14. Subsequently the Colorado District Court in and for the City and County of Denver held the order defective on a formal ground. An attempt to substitute a new order was held invalid by the District Court and its decision affirmed by the Colorado Superior Court. The statute involved is COLO. REV. STAT. ANN. § 80-24 (1957).

15. District Court in and for the City and County of Denver, Colorado, January 7, 1961, Civil Action No. B - 29648 (—P.2d—), 6 Race Relations L. Rep. 805 (1961).

that "Congress as an integral part of its legislative program determined not to prohibit discrimination in the sale or lease of FHA insured housing."[16] Thus any state law having that effect would violate congressional policy and the rule of pre-emption. The New Jersey Court replied: "There is a considerable gap between Congress' refusing to adopt an express policy of nondiscrimination in regard to FHA insured housing to be applicable under all circumstances and in all sections of the country, and a congressional policy prohibiting states from enacting laws proscribing such discrimination."[17] It is of special interest to note the New Jersey Supreme Court's astute recognition of extrinsic but pertinent circumstances as evidenced by the statement: "Failure of Congress to incorporate into the National Housing Act[18] a positive imposition of a policy of nondiscrimination with its necessary national implications may be grounded in political expediency to secure its enactment and, in any event, such a provision would not account for local conditions and the effect of such a policy, on a local basis, on the National Housing Program."[19]

The particular portion of the *Green* decision that is pertinent to this article is found in this statement: "The Supreme Court of the United States has clearly indicated that with reference to interstate carriers the regulation of racial discrimination is a matter in which there is a 'need for national uniformity,' and that the states are without jurisdiction to act in that area."[20] The Colorado court relied heavily upon *Morgan v. Virginia,*[21] a case involving a Virginia statute *requiring* segregated waiting rooms for interstate travelers. In the *Morgan* case the statute was held unconstitutional as placing an unconstitutional burden on interstate commerce. The Colorado Supreme Court also depended upon *Hall v. DeCuir,*[22] an 1877 case, where a state statute *prohibiting* discrimination on a boat engaged in carrying passengers for hire between Louisiana and Mississippi was held invalid as imposing a direct burden on interstate commerce.

A close look at both cases reveals that the arguments of federal exclusion of state action rest largely upon implications to be drawn from congressional silence or failure to act. In the *Levitt* case the Fair Housing Act was involved; in the *Green* case it was the Interstate Commerce Act. Any attempt to imply from congressional silence a national policy favoring segregation is difficult to sustain

16. 31 N. J. 514, 158 A.2d 177, 188 (1960).

17. *Id.*

18. 48 Stat. 1246, as amended.

19. 31 N. J. 514, 158 A.2d 177, 188 (1960).

20. (—Colo.—) 368 P.2d 970, 974 (1962).

21. 328 U.S. 373 (1946).

22. 95 U.S. 547 (1877).

in the light of the expressions of the XIII and XIV Amendments. In a recent California decision dealing with an anti-discrimination statute, Chief Justice Gibson said: "Discrimination on the basis of race or color is contrary to the public policy of the United States and of this State. Although the anti-discrimination provisions of the Federal Constitution relate to state rather than private action, they nevertheless evidence a definite national policy against discrimination."[23]

It is clear that states may not act inconsistently with valid federal enactments. However, the area in which states may implement or otherwise act consistently with federal legislation is not clearly defined, as evidenced by the *Levitt* and *Green* decisions. It is submitted that state action that is not inconsistent with federal action is always permissable unless a "need for national uniformity" exists.

The argument of pre-emption was dismissed rather summarily by the *Levitt* court which found that other reasons may have dictated Congress' refusal to accept statutory changes that would have expressly prohibited the discrimination charged. In the absence of supporting decisions to sustain the "need for uniformity" the implication of pre-emption was not upheld. In contradistinction to the situation of the *Levitt* case, the objection voiced in the *Green* case was grounded in a strong line of supporting cases stemming from *Hall v. DeCuir,* supra.

It is submitted that the decision of the Colorado Supreme Court demonstrated a rigid and doctrinaire approach that did not consider such important factors as valid and pertinent United States Supreme Court decisions, the historical context of the cases relied upon, or the strong and rapidly growing policy against discrimination.[24]

The primary case relied upon in the *Green* case was *Hall v. DeCuir,* supra., in which the United States Supreme Court invalidated a Louisiana anti-segregation statute[25] as applied to interstate carriers. As a secondary reference the Colorado Court presented a reiteration of the *Hall v. DeCuir* rationale in the *Morgan* case as standing for the proposition that a state may neither forbid nor require segregation in reference to interstate carriers.

The cases cited in both the Colorado District Court and the Colorado Supreme Court proceed to show that the question of racial discrimination by interstate carriers is, in and of itself, of such a nature that national, uniform regulation by a single authority is

23. *Burks v. Poppy Construction Company,* 20 Cal. Rptr. 609, 370 P.2d 313, 317 (1962).

24. *Ibid.*

25. LA. REV. STAT. 1870 p. 93.

required. But every case cited deals with exclusion or regulation of *passengers* on interstate carriers and the various courts stress the inconvenience of changing seats, practical obstructions, and burdens that result from diverse state regulations. Therefore, these cases only stand for the proposition that racial discrimination by carriers, as related to passengers, requires uniform legislation and do not lay down a broad rule that state anti-discrimination action *per se* is an unreasonable burden as applied to interstate commerce. However, at no point does the Colorado court attempt to evaluate two Supreme Court decisions, antecedent to the *Hall v. DeCuir* and *Morgan* cases but very pertinent to any analysis of them, the *Civil Rights Cases* and the *Bob-Lo Excursion* case.

The *Civil Rights Cases* were decided in 1883, approximately six years after the *Hall v. DeCuir* case. It is axiomatic that any reliance upon the *Hall v. DeCuir* case must take into account the *Civil Rights Cases* wherein Mr. Justice Bradley speaking for the Court said: "The wrongful act of any individual, unsupported by any such authority (state), is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the state, or not done under state authority, his rights remain in full force and may presumably be vindicated *by resort to the laws of the state for redress.*"[26] (Emphasis added.) Thus, it is established that this is a proper area for state action. The *Morgan* case was decided in 1946, and its holding, superficially, is tantamount to a decision that *any* legislation in this area is forbidden insofar as it applies to interstate transportation. But since the area has previously been marked off as proper for state action the *Morgan* case cannot be taken literally and must be interpreted as proscribing only state regulation placing an *unreasonable burden on interstate commerce.* Congressional action precludes state action only where the repugnance is considered to be so direct and positive that the two acts cannot be reconciled.[27] This analysis of the cases indicates that the basic policy determination underlying judicial interpretation of state anti-discrimination legislation is whether there is a "need for national uniformity" that precludes any state action, consistent or inconsistent. In 1948, Mr. Justice Rutledge, in the *Bob-Lo* case, an appeal from an action pursuant to the *Michigan Civil Rights Act,*[28] referring to the appropriateness of state action in the face of admit-

26. 109 U.S. 3, 17 (1883).

28. MICH. PENAL CODE §§ 146 - 148. MICH. CORP. LAW: §§ 17115 - 146 to 17115 - 148 (Supp. 1940), MICH. STAT. ANN. §§ 28.343 - 28.346 (Cum. Supp. 1946).

27. *Sinnot v. Davenport,* 22 How. 227, 243 (U.S. 1859).

ted foreign commerce, said: "It is far too late to maintain that the states possess no regulatory powers over such commerce. From the first meeting of Congress they have regulated important phases of both foreign and interstate commerce, particularly in relation to transportation by water, with Congress' express consent. And without such consent for nearly a hundred years they have exercised like power under the local diversity branch of the formula announced in *Cooley v. Board of Wardens,* 12 How. 299."[29] "Certainly there is no national interest which overrides the interest of Michigan to forbid the type of discrimination practiced here. And, in view of these facts, the ruling would be strange indeed to come from this Court, that Michigan could not apply her long settled policy against racial and creedal discrimination to this segment of foreign commerce, so peculiarly and almost exclusively affecting her people and institutions."[30] Mr. Justice Douglas in a concurring opinion said: "This regulation would not place a burden on interstate commerce within the meaning of our cases. It does not impose a regulation which discriminates against interstate commerce or which, by specifying the mode in which it shall be conducted, disturbs the uniformity essential to its proper functioning, see *Southern Pacific Co. v. Arizona,* 325 U.S. 761; *Morgan v. Virginia,* supra."[31]

The majority opinion of Mr. Justice Rutledge clearly affirms the *Civil Rights Cases* and just as clearly refuses to recognize the rationale drawn from the *Morgan* decision by the Colorado Court. Mr. Justice Douglas in his concurring opinion comments decisively on the question most pertinent to our analysis and decides that such regulation would not place a burden on interstate commerce within the meaning of the cases, and cites *Morgan* as authority for this proposition.

The United States Supreme Court in *Railway Mail Ass'n. v. Corsi*[32] said, ". . . Congress must clearly manifest an intention to regulate for itself activities of its employees, which are apart from their governmental duties, before the police power of the state is powerless."[33] Obviously where the employees are not federal employees, but merely employees of a private organization subject to Congress' regulation, the pre-emptive intent must be doubly clear.

29. 333 U.S. 28, at 37 (1948).
30. *Id.* at 40.
31. *Id.* at 41.
32. 326 U.S. 88 (1945).
33. *Id.* at 97.

CONCLUSION

In summary, I believe that the Colorado Supreme Court's narrow view of the *Morgan* case and reliance upon *Hall v. DeCuir* was unjustified in view of the clear delegation of actions for redress of discrimination by individuals to state authorities in the *Civil Rights Cases* decision. In the *Minnesota Rate Cases,* the U. S. Supreme Court said: "It has repeatedly been declared by this Court that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation."[34] Since state regulation has generally been permitted in matters of interstate commerce which are local in nature, certainly the regulation of hiring of individuals who merely operate in interstate commerce would impose no greater burden. In the light of the existing case law a determination that a state anti-discrimination act is invalid on the basis of federal pre-emption or as a burden on interstate commerce must be grounded in a subsidiary finding of a need for national uniformity. The Colorado Supreme Court's finding that the area of racial discrimination with reference to interstate air transportation has been withdrawn from state regulation is too broad and cannot be sustained. The recent decisions stemming from *Brown v. the Board of Education;*[35] the 1961 ICC ruling banning discrimination in waiting rooms;[36] the Presidential Executive Orders 10925[37] and 11063;[38] and the widespread prevalence of state anti-discrimination statutes are sufficient to indicate that the statutes in question actually aid an already existing national policy.

It should be noted that the Supreme Court has denied an appeal of the *Levitt* decision for lack of a substantial federal question, but has granted a petition for certiorari by the complainants in the *Green* case.

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34. 230 U.S. 352, 399 (1913).

35. 349 U.S. 294 (1955).

36. 26 Fed. Reg. 9166 (1961) (Regulations governing discrimination in operations of interstate motor common carriers of passengers).

37. Exec. Order No. 10925, 26 Fed. Reg. 1977 (1961) (Established President's Committee on Equal Employment Opportunity).

38. Exec. Order No. 11063, November 20, 1962, 31 U.S.L. WEEK 2259 (1962) (Banning racial and religious discrimination in sale or rental of federally owned, operated, or financed housing).