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The Commerce Clause and Interstate Carriers

J. Jennings

THE COMMERCE CLAUSE AND INTERSTATE CARRIERS

INTRODUCTION

Federal control over interstate commerce is based upon constitutional authority[1] and has never seriously been questioned. There are, however, many divergent views as to the method of exercising this power. This exercise of control has been defined as "complete and exclusive"[2] yet such a definition obviously offers no complete solution for the various problems which arise under this control of interstate commerce.

One vital problem is the extent to which the Commerce Clause should be considered as sufficient authorization for federal control without a specific enactment by Congress in this field. In consequence, laws enacted by Congress under the authority of the Commerce Clause shall be only incidentally discussed. This discussion shall be limited primarily to the extent of federal control authorized by the Commerce Clause upon interstate carriers and their passengers. It is in this field that two recent cases have held that private action is unconstitutional if it is found to be a burden upon interstate commerce.[3]

STATE LAWS

The demarcation between state and federal control over commerce has never been distinctly drawn. Yet it may be stated as a general rule that state legislation which attempts to levy a direct burden upon interstate commerce does encroach upon federal powers. Similarly the states do not have the power to restrain the free movement of such commerce.[4]

State statutes controlling separation of the races upon carriers involved in interstate commerce are void where such laws apply to interstate passengers. This is looked upon as a vain attempt by the states to control such commerce under the exercise of its police power.[5] The fundamental reason for holding these statutes void is the

1. U. S. Const. Art. I, § 8.
2. BROWN, THE COMMERCIAL POWER OF CONGRESS 291 (1910).
3. Chance v. Lambeth, 186 F. 2d 879 (4th Cir. 1951); Whiteside v. Southern Bus Lines, 177 F. 2d 949 (6th Cir. 1949).
4. Hall v. De Cuir, 95 U. S. 485 (1878); Cooley v. The Board of Wardens of the Port of Philadelphia, 12 How. 299, 319 (U. S. 1851). There the court said: "Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, ..."
5. Anderson v. Louisville & N. Ry. Co., 62 F. 46 (C. C. D. Ky. 1894).

need for uniformity. Disruption of such uniformity would necessarily result if state statutes concerning interstate passengers were permitted to stand. No state can bar transportation of passengers across its own boundaries nor can it reach beyond its boundaries to control the seating arrangement of passengers. Validating such state laws would, therefore, result in diverse seating in interstate journeys.[6]

It is interesting to note that the United States Supreme Court, in holding invalid a state statute requiring that there be no separation of the races on interstate carriers, said that congressional inaction left the carriers free to adopt such reasonable rules for the seating arrangement of their passengers as they saw fit.[7] The necessity for holding these state statutes void becomes apparent when inconsistent state laws concerning separation of races on carriers are noted. Ten states require separation of Negroes and whites on motor carriers while eighteen states prohibit such racial separation.[8] There is no federal act controlling the separation of the races in interstate commerce. Still the validity of such state statutes is denied upon the theory that the need for national uniformity supersedes the police power of the states. The Commerce Clause, even without action by Congress, establishes the essential immunity from state control of those subjects of interstate commerce requiring regulation prescribed by a single authority.[9]

PRIVATE ACTION

Until the past several years the federal courts held that the Commerce Clause, in absence of congressional action, did not limit the rules prescribed by interstate carriers.[10] These rules, however, are required to meet certain standards, some of which cover the separation of passengers by races upon interstate carriers. The case of *The Sue*,[11] decided before the passage of the Interstate Commerce Act, held that "[t]his discrimination on account of color is one which it must be conceded goes to the very limit of the right of the carrier to regulate the privileges of his passengers, and it can only be exercised when the carrier has it in his power to provide for the passenger, who is excluded from a place to which another person paying the same fare, is admitted, accommodations equally safe, con-

6. Morgan v. Virginia, 328 U. S. 373 (1946).
7. Hall v. De Cuir, 95 U. S. 485 (1878).
8. Morgan v. Virginia, 328 U. S. 373 (1946).
9. WATKINS, SHIPPERS AND CARRIERS 6 (4th ed. 1930).
10. Chiles v. Chesapeake & Ohio Ry. Co., 218 U. S. 72 (1910).
11. The Sue, 22 F. 843 (D. Md. 1885).

venient and pleasant."[12] But the courts in requiring equal facilities decided that this is a duty owed to the public by all common carriers, and did not base their decision on the Commerce Clause.[13] Since the passage of the Interstate Commerce Act[14] in 1887, such unequal accommodations are definitely prohibited on interstate carriers. The decision in *Henderson v. The United States*[15] was based on the Interstate Commerce Act. There the court held unlawful a carrier regulation which required separate dining tables for Negroes and whites. This decision was based upon the fact that Negroes were sometimes required to wait for dining facilities even though there was ample space in the white section of the dining car. This, the Court said, resulted in discrimination against individuals and was unlawful under the Interstate Commerce Act. Thus the requirement that public carriers, intrastate and interstate, provide equal accommodations has long protected the rights of passengers from unjust carrier regulations. As an added note, the Interstate Commerce Act could be the instrumentality through which separation of the races is abolished on interstate carriers. This might be reached by a decision which holds that segregation of the races in itself is a denial of equal facilities.

Another restriction placed upon the regulations issued by common carriers is the rule of reasonableness. Carriers are free to make such rules and regulations for the promotion of their business as they chose. These regulations, however, must not result in discrimination and must be reasonable.[16] This right of the carrier to make reasonable rules is based upon public policy and the right of private property.[17] Whether a carrier regulation is reasonable is essentially a mixed question of law and fact[18] and cannot depend upon the status of the passenger being either intrastate or interstate.[19] One of the crucial factors in determining whether a carrier regulation is reasonable is the public opinion in the area served which is a unique problem depending upon the particular environment.[20] It is the primary

12. *Id.* at 843, 22 F. at 846.
13. Gray v. Cincinnati Southern Ry. Co., 11 F. 683 (C. C. S. D. Ohio 1882).
14. 24 Stat. 379 (1887), 49 U. S. C. § 3 (1). "It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, or unreasonable prejudice or disadvantage whatsoever."
15. Henderson v. The United States, 339 U. S. 816 (1950).
16. WATKINS, SHIPPERS AND CARRIERS 63 (4th ed. 1930).
17. The W. C. and P. Ry. Co., 55 Pa. 209 (1867).
18. The Sue, 22 F. 843 (D. Md. 1885).
19. Chiles v. Chesapeake & Ohio Ry. Co., 218 U. S. 72 (1910).
20. Simmons v. Atlantic Greyhound Corporation, 75 F. Supp. 166 (W. D. Va. 1947).

duty of the carrier to operate as efficiently as possible. Thus where public sentiment is such that certain regulations are necessary for the efficient operation of the carrier, such rules are not unreasonable. While it has been held that separation of the races upon common carriers is not unreasonable per se,[21] the disappearance of public bias may some day alter this rule. For if there were no reason for the separation of the races such separation might become unreasonable per se. At present, however, so long as equal accommodations do not mean identical accommodations, races and nationalities, under circumstances to be determined on the facts of each case, may be reasonably separated.

DISTINCTION BETWEEN STATE ACTION AND PRIVATE ACTION

With regard to interstate commerce, our courts have long recognized a distinction between private and state regulation. State laws which attempt to control separation of passengers on interstate carriers are void under the Commerce Clause without congressional action.[22] Regulations made by interstate carriers controlling separation of races are valid unless they deny equal accommodations to passengers or are unreasonable.[23] The case of *Hall v. De Cuir*[24] points out this distinction most clearly. There the Court held invalid a state statute controlling the separation of passengers on interstate carriers, but pointed out that carrier regulations of this type were not necessarily unlawful. In holding a carrier regulation concerning passengers lawful, the Court in the *Chiles v. Chesapeake and Ohio Railway Company*[25] case pointed out that they were not dealing with a state statute. One of the more recent cases which illustrates this distinction is the case of *Simmons v. The Atlantic Greyhound Corporation.*[26] In that decision a Negro sued the Atlantic Greyhound Corporation for damages resulting from its segregation policy. The court held that lack of congressional action concerning the regulation of passengers in interstate service was tantamount to an implied ap-

21. Logwood v. Memphis & C. Ry. Co., 23 F. 318 (C. C. Tenn. 1885).
22. Hall v. De Cuir, 95 U. S. 485 (1878).
23. Chiles v. Chesapeake & Ohio Ry. Co., 218 U. S. 72, 77 (1910). The court said: "The interstate commerce clause of the Constitution does not constrain the action of carriers, but, on the contrary, leaves them to adopt rules and regulations for the government of their business, free from any interference except by Congress. Such rules and regulations, of course, must be reasonable, but whether they be such cannot depend upon a passenger being state or interstate."
24. Hall v. De Cuir, 95 U. S. 485 (1878).
25. Chiles v. Chesapeake & Ohio Ry. Co., 218 U. S. 72 (1910).
26. Simmons v. Atlantic Greyhound Corporation, 75 F. Supp. 166 (W. D. Va. 1947).

proval of the rules made by the carriers, and that so long as it was reasonable and afforded equal facilities, racial segregation had been approved by the inactivity of Congress. This case further held that decisions dealing with state statutes were inapplicable in the instant decision. The *Morgan v. Virginia*[27] case held that a state statute requiring motor carriers to allocate seats to white and colored passengers was a burden upon interstate commerce. This case, however, pointed with approval to the *Chiles v. Chesapeake* case which distinguishes between state and private regulations. Thus the courts in dealing with interstate carriers have always recognized a difference between state laws and carrier regulations. The basic reasoning behind these cases, even though some were decided before the Interstate Commerce Act, is not changed by the Act. The purpose of section 3 (1) of the Interstate Commerce Act was not to eliminate separation of the races, but was to eliminate discrimination because of color. From the beginning it has been recognized that the application of section 3 (1) of the Interstate Commerce Act was to be directed against discrimination between Negro and white passengers.[28] Until, therefore, it is decided that segregation alone results in discrimination, the Interstate Commerce Act does not forbid it. The question, whether there was a discrimination forbidden by the Interstate Commerce Act, does not rest upon the issue of segregation but is determined by the test of equality of treatment.[29]

Two recent cases, *Whiteside v. Southern Bus Lines* and *Chance v. Lambeth*, held that segregation requirements by interstate carriers resulting in a shifting of seating arrangements throughout a journey constituted a burden on interstate commerce and were void. In the case of *Chance v. Lambeth*[30] the court said:

> It is true that the regulation of the carrier was not enacted by state authority, although the power of the state is customarily invoked to enforce it; but we know of no principle of law which requires the courts to strike down a state statute which interferes with interstate commerce but to uphold a railroad regulation invested with the same vice.

The *Whiteside v. Southern Bus Lines*[31] case recognized that older cases have stated that there must be state action before such regulations would be considered a burden upon interstate commerce. But

27. Morgan v. Virginia, 328 U. S. 373 (1946).
28. Henderson v. The United States, 339 U. S. 816 (1950).
29. Mitchell v. The United States, 313 U. S. 80 (1941).
30. Chance v. Lambeth, 186 F. 2d 879 (4th Cir. 1951).
31. Whiteside v. Southern Bus Lines, 177 F. 2d 949 (6th Cir. 1949).

it does away with this previous rule by stating that, "It must be observed that acts burdening interstate commerce are not, like those inhibited in the Fourteenth Amendment, limited to state action. Burdens may result from activities of private persons . . . ."[32] It would seem that these cases need not have been decided on such broad grounds: The shifting of seating arrangements could have been held to be in violation of the Interstate Commerce Act. There is no doubt that a regulation by the carrier which necessitates a repeated shifting of seats by passengers because of segregation would in itself be a deprivation of their just rights.[33] The decision in neither of these cases, however, is based upon the Interstate Commerce Act, nor did they mention the rule of reasonableness nor the equal accommodation requirement. These two cases, then, have questioned the need of the above two tests in determining whether an interstate carrier regulation is valid.

To better understand the effect of the *Whiteside* and *Chance* cases, a brief look at the purpose of the Commerce Clause at its inception as compared to its present status is necessary.

> The journals of the Convention and public discussion of the period offer no conclusive answer to the question [the purpose of the Commerce Clause]; but it appears that under a form of expression sufficiently general to give Congress power at all times to prevent burdensome, conflicting or discriminatory State legislation, the Convention had prominently in mind the regulation of foreign commerce by the passage of a navigation act and the imposition of a tariff; while so far as concerned interstate commerce, nothing more was intended than to enable Congress to prevent the imposition of duties by particular States upon articles imported from or through other States.[34]

This, of course, is not to say that Congress does not have the power to legislate upon private action in connection with interstate commerce, for it is axiomatic that the construction of the Commerce Clause cannot be limited solely to the particular status of interstate commerce at the time of its creation. But rather it must broaden as interstate commerce becomes a more important and complex field

32. *Id.* at 953.
33. Day v. The Atlantic Greyhound, 171 F. 2d 59 (4th Cir. 1948).
34. PRENTICE AND EGAN, THE COMMERCE CLAUSE OF THE FEDERAL GOVERNMENT 2 (1898); Kidd v. Pearson, 128 U. S. 1, 5 (1888). The court said: "It is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign Nations and among the several States was to insure uniformity of regulation against conflicting and discriminatory state legislation."

and thus accomplish wider purposes as the need arises.[35] Indeed, it would be a strange construction of any constitution to say that a general legislative power gave Congress the right to prohibit or invalidate state laws and yet as to private action left Congress powerless. Especially is this so in the field of interstate commerce where the changing times more and more call for a free and untrammeled commerce among the several states of the union.[36] But it is generally the rule that the failure of Congress to legislate should be considered as an expression of its intention not to disturb that which already exists.[37] Under this view a long line of cases have held that interstate carriers may make their own rules without regard to the Commerce Clause of the Constitution. Thus as the Commerce Clause of itself does not appear to limit private action concerning interstate carriers, and as there has been no legislation forbidding separation of the races by public carriers, it is difficult to see upon what authority the *Chance* and *Whiteside* cases are based. These two cases have extended the heretofore recognized interpretation placed upon the Commerce Clause to limits previously considered beyond the courts' interference. There are matters which involve public rights which may be presented in such a manner as to be susceptible of judicial determination, but which should not be brought within the cognizance of the courts.[38] Permeating the previous cases dealing with regulation of private action in interstate commerce has been the idea that Congress must be the agency to determine whether private action constitutes an obstruction of interstate commerce. A power which confers authority to control by legislation should not itself be construed as the power to control. The power to regulate commerce has been defined as the power to prescribe the rules by which it should be governed;[39] further, the determination of the rules to be adopted rests in the discretion of Congress.[40]

CONCLUSION

The cases of *Chance v. Lambeth* and *Whiteside v. Southern Bus Lines* held, in effect, a private action to be unconstitutional. These are unique holdings in the history of judicial decisions in the field

35. PRENTICE AND EGAN, THE COMMERCE CLAUSE OF THE FEDERAL GOVERNMENT 35 (1898).
36. Addyston Pipe and Steel Co. v. The United States, 175 U. S. 136 (1899).
37. PRENTICE AND EGAN, THE COMMERCE CLAUSE OF THE FEDERAL GOVERNMENT 166 (1898).
38. Den v. The Hoboken Land and Improvement Co., 18 How. 272 (U. S. 1856).
39. COOKE, THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION 66 (1908).
40. *Ibid.*

of interstate commerce. If the application of these decisions were to be limited to the regulation of carriers requiring separation of races alone, no great impression would be made upon the field of constitutional law. But there does not seem to be any intention of such limitation; rather the very fact that these cases could have been decided on narrower grounds shows that the courts do not intend to limit them. Under the ruling in these cases the Interstate Commerce Act, the Anti-Trust Act and any other act dealing with the control of interstate commerce need not have been passed as the action prohibited by such acts could be found to constitute a burden on interstate commerce. Thus, while the results reached in the *Chance* and *Whiteside* cases are sound, the grounds upon which these decisions rest are unsteady and doubtful. Congress has passed many laws restricting private action in connection with interstate commerce. Such restrictions placed upon private action under the Commerce Clause should rest within the discretion of Congress, but now "judicial legislation" seems to be in the process of superseding the discretion of Congress. The result seems to be that the age-old distinction between state laws and carrier regulations concerning interstate commerce is now under serious attack.

J. JENNINGS.