South Carolina Law Review

Volume 42
Issue 1 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*

Article 4

Fall 1990

Constitutional Law

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CONSTITUTIONAL LAW

I. SUPREME COURT INTERPRETS STATE CONTRACT CLAUSE SIMILARLY TO THE FEDERAL CONTRACT CLAUSE IN UPHOLDING ACT CHANGING SANTEE COOPER'S FISCAL YEAR

In *South Carolina Public Service Authority v. Citizens & Southern National Bank*[1] the South Carolina Supreme Court held that a change in the fiscal year of the South Carolina Public Service Authority (Santee Cooper), instituted by Santee Cooper with the Legislature's approval, did not violate either the state[2] or federal[3] contract clauses.[4] Thus, the supreme court affirmed its previous interpretation[5] of the state contract clause as identical to the United States Supreme Court's interpretation of the federal contract clause.[6] Under the South Carolina Supreme Court's view, a substantial impairment of a contractual provision is constitutional if it is "reasonable and necessary to serve an important public purpose."[7] The court also held that Santee Cooper's change in the calendar year did not violate South Carolina's constitutional provisions relating to passage of special legislation, single subject matter of legislation, or state and federal provisions concerning equal protection and due process.[8]

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1. 300 S.C. 142, 386 S.E.2d 775 (1989).

2. S.C. CONST. art. I, § 4.

3. U.S. CONST. art. I, § 10, cl.1.

4. 300 S.C. at 169, 386 S.E.2d at 790.

5. *See* G-H Ins. Agency, Inc. v. Continental Ins. Co., 278 S.C. 241, 249, 294 S.E.2d 336, 340 (1982).

6. *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978); United States Trust Co. v. New Jersey, 431 U.S. 1 (1977).

7. *South Carolina Pub. Serv. Auth.*, 300 S.C. at 167, 386 S.E.2d at 789 (quoting *United States Trust Co.*, 431 U.S. at 26).

8. The state constitutional provision on special legislation, article III, section 34 of the South Carolina Constitution, prohibits passage of a special law when general law can be applied. The court held that Santee Cooper had a unique need for a different fiscal year from other state agencies. A general law, therefore, could not be applied and no constitutional violation occurred. *Id.* at 160, 386 S.E.2d at 785-86.

The state constitution provides that legislation must relate to a single subject matter. S.C. CONST. art. III, § 17. The court held that no constitutional violation occurred because the specific provision for fiscal year change, section 31 of Act 658 was related to the general subject of Act 658, the finances of the state government. *South Carolina Pub. Serv. Auth.*, 300 S.C. at 163, 386 S.E.2d at 787.

Furthermore, the court held that the fiscal year change did not violate the equal protection clause of the Fourteenth Amendment of the United States Constitution or

Santee Cooper previously operated on a July 1 to June 30 fiscal year as prescribed by its Bond Resolutions.[9] Santee Cooper's competitors operated on a calendar fiscal year from January 1 to December 31. Santee Cooper believed a change in fiscal year was necessary because of its inability to compare itself with competitors when trying to attract new clients. Different fiscal years made comparison difficult because electricity use differed greatly from year to year. An identical fiscal year allowed Santee Cooper a fair comparison, and made them more competitive.[10]

The supreme court found as a matter of fact that amending Santee Cooper's bond resolutions was impossible because of the large number of bonds held by unknown parties.[11] Because of the impossibility of a bondhold amendment, in 1988 the General Assembly passed Act 658.[12] Section 31 of the Act unilaterally authorized Santee Cooper to adopt the new fiscal year. On January 23, 1989, Santee Cooper adopted the new fiscal year effective January 1, 1990, and notified the bondholders' trustees of the change. The trustees informed Santee Cooper that the change violated the constitutional and contractual rights of the bondholders, and constituted a default by Santee Cooper on the bonds.[13]

Santee Cooper brought a declaratory judgment action and requested that the trial court certify the case as a class action. Santee Cooper also asked the court to establish the parties' rights, to declare that the legislation changing the fiscal year did not violate any constitutional or contractual rights of the bondholders, and to declare Santee Cooper's right to implement the change.[14]

The supreme court reasoned that the bond obligations were protected by the contract clauses of both the South Carolina Constitution and United States Constitution.[15] The court affirmed its view that the state contract clause is essentially identical to the federal clause, and, therefore, should be interpreted like the federal contract clause.[16] The

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article I, section 3 of the South Carolina Constitution. The court held that the unique classification of Santee Cooper was a rationally related classification because the authority played a unique role among state agencies. *Id.* at 161, 386 S.E.2d at 786.

Finally, the court held that no substantive due process rights violations occurred. Because the fiscal year change would only bring about a neutral or positive effect, no due process violation occurred. *Id.* at 170, 386 S.E.2d at 791.

9. 300 S.C. at 150, 386 S.E.2d at 780.
10. *Id.* at 149, 386 S.E.2d at 779-80.
11. *Id.* at 157, 386 S.E.2d at 784.
12. 1988 S.C. Acts 658.
13. 300 S.C. at 147, 386 S.E.2d at 778-79.
14. *Id.* at 145, 386 S.E.2d at 777.
15. *Id.* at 164, 386 S.E.2d at 788.
16. *See id.* at 168-69, 386 S.E.2d at 790.

South Carolina Supreme Court adopted the federal standard established by the United States Supreme Court in *United States Trust Co. v. New Jersey*.[17] The standard is as follows:

> The finding of a technical impairment is simply the first step in determining whether there is an unconstitutional impairment of contract. . . . [T]he Contract Clause is not an absolute bar to subsequent modification of the State's own financial obligations. In this context, a law which impairs contractual obligations may be found constitutional if it is "reasonable and necessary to serve an important public purpose."[18]

The South Carolina Supreme Court viewed the Santee Cooper legislation as a mere technical impairment because it did not adversely affect the bondholders' contractual rights. Furthermore, the court reasoned that since the legislation was permissive, no breach of contract had occurred. As for Santee Cooper's implementation of the fiscal year change by its January 23 resolution, the court again held that because the bondholders experienced no adverse effects, only a technical impairment had occurred.[19]

Once the court established that the legislation created only a technical impairment under the *United States Trust* standard, the court held that the legislation was not unconstitutional.[20] Nevertheless, the court added that "were there an impairment, however, it is reasonable and necessary to serve an important public purpose."[21] The court here refers to the increased competitive ability the change provides Santee Cooper.

The court's last line of reasoning also favored constitutionality but is problematic. According to the court, because Santee Cooper never expressly promised to maintain the old fiscal year, but the fiscal year was simply defined within the bond resolutions, Santee Cooper could change the fiscal year without breaching the contract. Furthermore, the court reasoned that the sections of the bond resolution requiring Santee Cooper to operate in an efficient manner necessitated the change. Consequently, the court reasoned that no breach of contract occurred.[22] The court's reasoning would justify a unilateral modification of any contract term if the modification arguably was necessary to pro-

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17. 431 U.S. 1 (1977). The United States Supreme Court elaborated on this federal standard in Allied Structural Steel v. Spannaus, 438 U.S. 234 (1978).

18. *South Carolina Pub. Serv. Auth.*, 300 S.C. at 167, 386 S.E.2d at 789 (quoting United States Trust Co. v. New Jersey, 431 U.S. 1, 25 (1977)).

19. *Id.* at 168, 386 S.E.2d at 790.

20. *Id.*, 386 S.E.2d at 789-90.

21. *Id.*, 386 S.E.2d at 790.

22. *Id.* at 169, 386 S.E.2d at 790.

mote efficiency and no express promise existed to maintain the term's contractual definition. This precedent is troublesome. The court implies that any provision which a party does not want changed must be expressly noted. Contracts written using this method would thus be riddled with repetitive language expressly stating what may and may not be modified.

The court's holding on the South Carolina contract clause confirms its earlier view. In *G-H Insurance Agency, Inc. v. Continental Insurance Co.*[23] the South Carolina Supreme Court adopted the Fourth Circuit's view in *Garris v. Hanover Insurance Co.*,[24] that the state contract clause should be interpreted identically to the federal clause.[25] As the supreme court noted in *G-H Insurance*, "legislation [impairing contracts must be made] upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption."[26]

The Santee Cooper opinion follows other jurisdictions that interpret state contract clauses by the same standard which the United States Supreme Court has interpreted the federal contract clause.[27] Considering the precedent within the body of South Carolina law and the minimal impairment of the contract in this case, the decision is well reasoned.

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II. JUDICIAL INQUIRY INTO THE SUBJECTIVE MOTIVATION OF LEGISLATORS IS AN IMPERMISSIBLE INTRUSION INTO THE LEGISLATIVE FUNCTION

In *South Carolina Education Association v. Campbell*[28] the Fourth Circuit Court of Appeals declined to expand the number of exceptions to the principle that courts should not inquire into legislative motives to determine the constitutionality of facially neutral statutes. The court held that the district court judge erred when he relied on

23. 278 S.C. 241, 294 S.E.2d 336 (1982).

24. 630 F.2d 1001, 1011 (4th Cir. 1980).

25. G-H Ins. Agency, Inc. v. Continental Ins. Co., 278 S.C. 241, 248-49, 294 S.E.2d 336, 340 (1982); *see also* South Carolina Pub. Serv. Auth. v. Summers, 282 S.C. 148, 154-55, 318 S.E.2d 113, 116 (1984) (measuring the state contract clause by the federal standard of *United States Trust*).

26. 278 S.C. at 246, 294 S.E.2d at 339.

27. *See, e.g.*, Board of Comm'rs v. Department of Natural Resources, 496 So. 2d 281 (La. 1986); Van Slooten v. Larsen, 410 Mich. 21, 299 N.W.2d 704 (1980); Neel v. First Fed. Sav. and Loan Ass'n, 207 Mont. 376, 675 P.2d 96 (1984); Minnesota Trust Co. v. Hatch, 368 N.W.2d 372 (Minn. Ct. App. 1985).

28. 883 F.2d 1251 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 1129 (1990).

evidence of the subjective motives of individual members of the South Carolina legislature. Based on the testimony of individual legislators, the district court ruled that a facially neutral statute actually was intended to impair the First Amendment freedom of speech and freedom of association rights of the South Carolina Education Association (SCEA).[29]

The SCEA sued the Secretary of State, the Governor, and the Comptroller General of South Carolina to regain its ability to collect membership dues through voluntary payroll deductions. The organization did not dispute the state's authority to regulate payroll deductions of public employees.[30] The group claimed that the challenged legislation violated its members First Amendment rights of free speech and freedom of association. The SCEA's premise was that the legislation would impair the group's freedom of association by limiting the number of members it otherwise might attract and that the loss of revenue from membership dues would impair its ability to represent its members.[31] The association also claimed that the state had denied it equal protection of the law because the statute authorized a "similarly situated" group, the State Employees Association, to collect membership dues through payroll deductions.[32]

In 1979 the Attorney General of South Carolina issued a nonbinding opinion that public bodies could not provide payroll deductions without specific statutory authority.[33] At that time the SCEA was one of many professional and charitable organizations allowed to use payroll deductions for the collection of dues and contributions without statutory authority. Because the attorney general's opinion was nonbinding, many South Carolina school districts continued to allow payroll deduction of SCEA dues.[34]

In response to the attorney general's opinion the SCEA proposed legislation to authorize its payroll deductions. In 1981 the General Assembly passed legislation that authorizes payroll deductions only for charities, credit unions, and other financial institutions.[35] In fact the statutory scheme specifically excludes participation by labor organizations.[36] The SCEA claimed that the legislation targeted it for exclusion

29. *Id.* at 1253.
30. *Id.* at 1256.
31. *Id.* at 1256-57.
32. *Id.* at 1262-63.
33. *Id.* at 1252-53.
34. *Id.* at 1254.
35. S.C. CODE ANN. § 8-11-92 (Law. Co-op. 1986).
36. *Id.* § 8-11-92(A)(4) (excluding groups that qualify as labor organizations under 26 U.S.C. § 501(c)(5) (1988)).

because of the SCEA's speech-related activities.[37]

The State Employees Association, which also was denied the use of payroll deductions under the 1981 statute,[38] lobbied the General Assembly for three years and obtained specific statutory authority to collect membership dues through payroll deductions.[39] The legislative grant to the State Employees Association prompted the SCEA suit and gave rise to the SCEA's equal protection claim that it was entitled to the same benefits as the similarly situated State Employees Association.[40]

The district court determined that the General Assembly's desire to target the SCEA motivated the adoption of the 1981 legislation.[41] Sitting without a jury, the court heard testimony from individual legislators about their personal motives.[42] Without an inquiry into legislative motive the district court could not have found any constitutional violations.[43] The statute itself is facially neutral. The statute does not regulate the rights of labor organizations to solicit members or to express their views. The law simply excludes labor organizations from participation in the payroll deduction plan.[44]

The district court applied a strict scrutiny analysis to the SCEA's equal protection claim because it found that the state's action was con-

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37. *Campbell*, 883 F.2d at 1255.

38. *Id.* at 1263.

39. S.C. CODE ANN. § 8-11-83 (Law. Co-op. Supp. 1989).

40. Although the free speech and equal protection claims discussed in this case are important, they will not be dealt with at length here. The court of appeals' analysis of these issues does not indicate a significant departure from existing South Carolina law. Furthermore, because the court primarily focused on the permissibility of judicial inquiry into legislative motive, this survey will do the same.

41. South Carolina Educ. Ass'n v. Campbell, 697 F. Supp. 908, 918-20 (D.S.C. 1988), *rev'd*, 883 F.2d 1251 (4th Cir. 1989).

42. *See id.*

43. Even if it had been permissible to inquire into the legislature's motive to find that the General Assembly had targeted the SCEA, the district court may have erred in finding that the alleged targeting violated the First Amendment. In Arkansas State Highway Employees Local 1315 v. Kell, 628 F.2d 1099 (8th Cir. 1980) the court of appeals affirmed a district court holding that "even a retaliatory termination of the [payroll] deduction of union dues would not infringe appellees' First Amendment rights, nor would it constitute an unpermitted discrimination in violation of the equal protection clause . . . ." *Id.* at 1102. The Eighth Circuit relied on Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463 (1979) in which the Supreme Court held that the First Amendment does not "impose any affirmative obligation on the government to listen, to respond, or . . . to recognize the association." *Id.* at 465. From the language in *Smith* the Eighth Circuit concluded that "the First Amendment does not impose any duty on a public employer to affirmatively assist, or even to recognize a union." *Kell*, 628 F.2d at 1102.

44. *See* S.C. CODE ANN. § 8-11-92 (Law. Co-op. 1986).

tent-based.[45] Use of strict scrutiny led the court to find that the statute violated the equal protection clause.[46]

On appeal the Fourth Circuit held that the lower court's "extensive reliance on the testimony of individual members of the General Assembly as to legislative motive [was] an improper intrusion into the legislative function . . . ."[47] Furthermore, because "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny,"[48] the statute did not implicate a fundamental right. The court of appeals, therefore, applied rational scrutiny and found the statute to be rationally related to a legitimate state interest and, thus, constitutional.[49]

An established principle of constitutional jurisprudence precludes inquiry into legislative motives to strike down a statute that is clearly constitutional in the absence of such inquiry.[50] In *McCray v. United States*[51] the United States Supreme Court made it clear that "[t]he decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted."[52]

The primary reason for this policy is that it is difficult for courts to determine reliably the actual motives of a legislative body. Chief Justice Earl Warren summarized this difficulty in *United States v. O'Brien*:[53]

> What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it. . . . We decline to void essentially on the ground that it is unwise legislation which

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45. *See South Carolina Educ. Ass'n*, 697 F. Supp. at 917.

46. *See* South Carolina Educ. Ass'n v. Campbell, 883 F.2d 1251, 1262-63 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 1129 (1990).

47. *Id.* at 1253.

48. *Id.* at 1256 (citation omitted) (quoting Regan v. Taxation with Representation of Washington, 461 U.S. 540, 549-50 (1983)).

49. *Id.* at 1263-64. The Fourth Circuit also noted that the district court had failed to apply the South Carolina rule that "testimony of legislators is not evidence of legislative intent . . . ." *Id.* at 1260. The court of appeals quoted from Tallevast v. Kaminski, 146 S.C. 225, 143 S.E. 796 (1928) in which the South Carolina Supreme Court said, "It is a settled principle in the interpretation of statutes that . . . resort cannot be had to the opinions of legislators . . . for the purpose of ascertaining the intent of the Legislature." *Id.* at 236, 143 S.E. at 799.

50. As early as 1810 the United States Supreme Court recognized the difficulties inherent in determining legislative motives and refused to consider such evidence. *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

51. 195 U.S. 27 (1904).

52. *Id.* at 56.

53. 391 U.S. 367 (1968).

> [the legislature] had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.[54]

In addition to the consideration of Supreme Court precedent the Fourth Circuit determined that an inquiry into legislative motivation "is inimical to the independence of the legislative branch and inconsistent with the constitutional concept of separation of powers."[55]

Although the rule that precludes inquiry into legislative motive is firmly established, the Supreme Court has recognized that certain exceptions exist "in a very limited and well-defined class of cases where the very nature of the constitutional question requires an inquiry into legislative purpose."[56] The Fourth Circuit acknowledged these exceptions in *South Carolina Education Association v. Campbell* when it stated that "[m]otive is thus relevant in these cases only insofar as the Courts have expressly deemed it a substantive element of the test of constitutionality."[57]

The court of appeals noted three established exceptions to the rule against judicial inquiry into legislative motive.[58] First, when a law infringes the rights of a suspect class the Supreme Court has held that it is not enough simply to show that the legislation has a disproportionate impact on that class. The aggrieved party also must prove a discriminatory intent on the part of the decision makers.[59] Accordingly, in such an instance it is not only permissible, but also necessary for courts to consider legislative motive because "the very nature of the constitutional question requires an inquiry into legislative purpose."[60]

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54. *Id.* at 384. The *O'Brien* Court distinguished the use of legislative intent to interpret a statute and the use of legislative motive to void a statute. The Court stated: "When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature . . . ." *Id.* at 383. The Court warned, however, that "[i]t is entirely a different matter when we are asked to void a statute that is . . . constitutional on its face . . . ." *Id.* at 384. *See also* Edwards v. Aguillard, 482 U.S. 578, 636-37 (1987) (Scalia, J., dissenting) (Justice Scalia presents a well-reasoned general discussion on the dangers of judicial inquiry into legislative motivation.).

55. *Campbell*, 883 F.2d at 1262.

56. *O'Brien*, 391 U.S. at 383 n.30.

57. 883 F.2d at 1259.

58. *Id.*

59. *See* Washington v. Davis, 426 U.S. 229, 242 (1976) (racial discrimination); *see also* Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 274 (1979) (gender discrimination).

60. United States v. O'Brien, 391 U.S. 367, 383 n.30 (1968). The Supreme Court described the need for heightened protection of suspect classes in Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977). In *Arlington Heights* the Court said, "[I]t is because legislators . . . are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their deci-

Second, the Court has recognized an exception that relates to establishment of religion cases. In *Lemon v. Kurtzman*[61] the Court established a three-part test to determine whether legislation impermissibly establishes religion. The first part of the *Lemon* test requires that "the statute must have a secular legislative purpose . . . ."[62] Accordingly, the "substantive element of the test of constitutionality"[63] in an establishment case will require inquiry into legislative motive.

Finally, the Supreme Court has allowed inquiry into legislative motive when a content-based statute directly impairs a party's right to free speech. In *Arkansas Writers' Project, Inc. v. Ragland*[64] the Court struck down a state sales tax scheme that taxed general interest magazines but exempted newspapers and religious, professional, trade, and sports journals because it violated the First Amendment's freedom of the press guarantee.[65] *South Carolina Education Association v. Campbell* is distinguishable from *Ragland*, however, because the payroll deduction statute did not directly impair the SCEA's First Amendment rights based on the content of its speech or publications.

The significance of the Fourth Circuit's decision in this case is that the court specifically declined to expand the number of exceptions currently recognized by the Supreme Court.[66] The case did not present a suspect class, an establishment of religion, or a direct, content-based impairment of the SCEA's first amendment rights.

Although the Fourth Circuit's conservative approach may be questioned by some, it is in keeping with the role of appellate courts. The Supreme Court has established the precedent for deciding legislative

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sions. . . . But racial discrimination is not just another competing consideration." *Id.* at 265.

61. 403 U.S. 602 (1971).

62. *Id.* at 612 (citation omitted).

63. South Carolina Educ. Ass'n v. Campbell, 883 F.2d 1251, 1259 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 1129 (1990).

64. 481 U.S. 221 (1987).

65. *Id.* at 227-31. The Court stated, "Our cases clearly establish that a discriminatory tax on the press burdens rights protected by the First Amendment." *Id.* at 227 (citation omitted). The Court further noted that "the basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its *content*." *Id.* at 229 (emphasis in original).

66. "The challenged legislation in the case at bar is clearly not among the limited and well defined exceptions to the principle discouraging judicial inquiry into legislative motive." *Campbell*, 883 F.2d at 1259. A decision in favor of the SCEA would have been an expansion of the recognized exceptions and also would have abrogated the well-settled rule that the First Amendment "does not impose any affirmative obligation on the government . . . ." Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463, 465 (1979).

intent cases. The Fourth Circuit followed that precedent in *South Carolina Education Association v. Campbell.*

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