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process rights of prisoners had colored the *Gagnon* ruling. When the rights at issue are "among the most fundamental and basic of those guaranteed by the Fourteenth Amendment,"[25] a case-by-case approach is inappropriate. According to the Fifth Circuit, an absolute right to appointed counsel exists in child dependency proceedings because of the critical nature of the rights adjudicated in such cases.

One may well conclude that the Fifth Circuit's approach to child dependency proceedings probes more deeply into the requirements of the due process clause than does the Florida analysis. But unless the Supreme Court of Florida eventually accepts the Fifth Circuit's position, or until the Supreme Court of the United States resolves the issue, the two jurisdictions remain in conflict on the question of right to counsel in dependency matters.

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Dormant Commerce Clause Revisited: *Kassel v. Consolidated Freightways Corp.*

The extent of permissible state regulation of interstate commerce under the "dormant" commerce clause has troubled the Supreme Court of the United States ever since Chief Justice Marshall interpreted the clause as a limitation on the states.[1] The Supreme Court has recognized, however, that certain state regulations may be matters of local concern, legitimately within the state's police power.[2] Because of the peculiarly local nature of highway safety regulations, for example, the Court traditionally has cloaked them with a "strong presumption of validity."[3] Despite this presumption, the Supreme Court in *Kassel v. Consolidated Freightways Corp.*,[4] held that an Iowa statute prohibiting trucks longer than fifty-five feet from traveling its roads imposed an unconstitutional

25. 618 F.2d at 384. *See* No. 78-2063, slip op. at 5058 n.8.

1. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189-222 (1824). For an excellent discussion of Marshall's view of the commerce clause, see F. FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WHITE (1937).

2. Health and consumer protection, for example, are matters of local concern. *See, e.g.*, Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 351 (1977).

3. Bibb v. Navajo Freight Lines, 359 U.S. 520, 524 (1959).

4. 101 S. Ct. 1309 (1981).

burden on interstate commerce.

Although the Iowa statute generally restricted trucks to fifty-five feet in length, the statute contained exemptions: vehicles hauling livestock,[5] farm equipment,[6] and mobile homes[7] could reach a combined length of sixty feet. Certain trucks called "doubles" could also be as long as sixty feet.[8] In addition, Iowa's statute provided a "border-cities" exemption that permitted border cities to adopt the length limitations of a neighboring state, thereby allowing oversized trucks to travel within a border city's limits and to certain designated commercial areas in Iowa.[9]

Consolidated Freightways Corporation (Consolidated), a major interstate carrier, brought suit in federal district court, challenging the constitutionality of Iowa's statutory scheme.[10] The district court entered judgment for Consolidated, concluding that the Supreme Court's decision in *Raymond Motor Transportation, Inc. v. Rice*[11] was controlling. In *Raymond*, two of the largest interstate carriers in the country[12] had challenged a Wisconsin law that banned trucks over fifty-five feet from its highways. Wisconsin defended its statute by asserting that it was a reasonable safety measure authorized by the state's police power. The state "virtually defaulted," however, in producing evidence sufficient to persuade the Court that the law made *any* contribution to highway safety.[13] In light of the Wisconsin law's undisputed burden on interstate commerce,[14] the *Raymond* Court decided that the scale tipped

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5. IOWA CODE ANN. § 321.457(3) (West Supp. 1980-1981).

6. *Id.* § 321.456(4) (West 1966).

7. *Id.* § 321.457.

8. *Id.* § 321.457(6).

9. *Id.* § 321.457(7) (West Supp. 1980-1981).

10. Consolidated Freightways Corp. v. Kassel, 475 F. Supp. 544 (S.D. Iowa 1979). Because of Iowa's law, Consolidated could not use its 65-foot trucks through Iowa. Interstate 80 runs through Iowa and links the east and west coast. All states except New Jersey, Pennsylvania, and Iowa permitted 65-foot trucks on their roads. Interstate 35, a principal north-south route, also runs through Iowa. Sixty-five-foot trucks were legal in all states on "I-35" except for Iowa.

Consolidated diverted its 65-foot trucks around Iowa, increasing distances and, in turn, the costs of its trucking operation. The added distance also subjected the interstate road system to more wear and tear and resulted in a greater number of accidents and fatalities on the road. *Id.* at 547.

11. 434 U.S. 429 (1978).

12. Consolidated was a plaintiff in *Raymond*, as well. *Id.* at 431.

13. *Id.* at 444. In *Raymond*, plaintiffs claimed that the state law forced them to divert their trucks around Wisconsin; this diversion increased operating costs and caused substantial delays. *Id.* at 445. The state of Wisconsin made no attempt to rebut plaintiffs' contentions. *Id.* n.20.

14. *Id.* at 447.

overwhelmingly in favor of the federal interest in maintaining an unobstructed flow of interstate commerce.

Heeding the warning of *Raymond*—that a mere recital of a safety purpose will not shield a state's highway regulation from an attack under the commerce clause—Iowa made an "all out effort"[15] to present evidence supporting the legitimacy of its regulation as a safety measure. But Iowa failed to persuade the district court in *Kassel* that Iowa's truck length restrictions made a safety contribution substantial enough to justify encumbering interstate commerce. According to the district court, the evidence "convincingly, if not overwhelmingly,"[16] established that Consolidated's sixty-five-foot trucks were just as safe as the fifty-five-foot trucks permitted under Iowa law. The United States Court of Appeals for the Eight Circuit accepted the district court's findings and upheld its decision as a proper application of *Raymond*.[17]

The Supreme Court affirmed in a plurality opinion written by Justice Powell.[18] For Powell, *Kassel* was "*Raymond* revisited."[19] The trial record supported the district court's finding that Consolidated's trucks were as safe as the shorter trucks mandated by Iowa law. In addition, the effect and legislative history of the statute's exemptions favored Iowa citizens at the expense of interstate commerce,[20] and evidenced a discriminatory purpose.[21] After weighing the "asserted safety purpose [of the state law] against the degree of interference with interstate commerce,"[22] the Court held the statute invalid under the commerce clause.

In a concurring opinion, Justice Brennan agreed that the Iowa statute discriminated against interstate commerce.[23] According to Justice Brennan, however, a balancing of the law's effect as a valid safety measure against its effect on interstate commerce is not an appropriate method for reviewing a state's highway regulation. Instead, argued Brennan, the Court should have examined the state lawmakers' actual intent in passing the legislation for more conclu-

15. 475 F. Supp. at 548.

16. *Id.*

17. Consolidated Freightways Corp. v. Kassel, 612 F.2d 1064, 1069 (8th Cir. 1979).

18. 101 S. Ct. 1309, 1313 (1981). Justices White, Blackmun, and Stevens joined in Justice Powell's plurality opinion.

19. *Id.* at 1316.

20. *Id.* at 1319-20.

21. *Id.* at 1320.

22. *Id.* at 1316 (quoting *Raymond*, 434 U.S. at 443).

23. *Id.* at 1320. Justice Marshall joined Justice Brennan's concurring opinion.

sive evidence reflecting discriminatory motive.[24]

Justice Rehnquist dissented.[25] He argued that the conclusion of the plurality and concurring opinions "seriously intrudes upon the fundamental right of the States to pass laws to secure the safety of their citizens."[26] He claimed the trial record supported the legislature's determination that fifty-five-foot and sixty-foot length requirements related to safety. The question for the Court should have been whether Iowa's legislature had acted rationally in imposing the truck length restrictions. Because of the strong presumption of validity traditionally accorded a state's highway regulation, Iowa had to demonstrate only that the regulation's benefit was more than slight. Rather than comparing the impact on safety of Iowa's truck length limitation to that of Consolidated's truck lengths, the Court should have weighed the benefit of the state's regulation against the harm of having no regulation at all. A state legislature may determine, as a matter of policy, what constitutes a reasonable length for trucks. According to Justice Rehnquist, a classification should not be "rejected merely because the weight of the evidence in court appears to favor a different standard."[27]

By striking down the state regulation in *Kassel*, the Court expanded the scope of *Raymond*, which had expressly limited its holding to a case in which the state had failed to make even a colorable claim that its highway regulation contributed to safety.[28] In *Kassel*, the state produced expert witnesses, studies, and statistics to defend its law, but the Court concluded that the evidence had slight probative value.[29]

As Justice Rehnquist pointed out in his dissenting opinion, however, the record did support the state's contention that the law promoted highway safety. In light of the deference usually accorded highway regulations said to promote safety, it is curious that the Court did not view the evidence in a more favorable light. The Court apparently based its decision on its view that the law was really a pretext for discrimination. Both the plurality and the concurring opinions concluded that the statute discriminated against interstate commerce: the plurality reached its decision by considering only the imbalance between the law's benefit to high-

24. *Id.* at 1321.
25. *Id.* at 1324. Chief Justice Burger and Justice Stewart joined Justice Rehnquist.
26. *Id.*
27. *Id.* at 1329 (quoting Clark v. Paul Gray, Inc., 306 U.S. 583, 594 (1939)).
28. 434 U.S. at 447-48.
29. 101 S. Ct. at 1317.

way safety and its burden on interstate commerce. The dissenting opinion, however, found the law nondiscriminatory, based on some evidence that it was intended to promote safety.

If the Court continues to apply the *Raymond* balancing approach to state highway laws affecting interstate commerce, then no matter what evidence a state produces, *Kassel* suggests that the Court will no longer clothe that law with a presumption of validity. Rather, the Court's interpretation of the evidence may turn mainly on the law's effect on interstate carriers; the greater the burden, the greater the presumption that the law is a mere pretext for discrimination.

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