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The rules in question were old when the Great Charter was still in its infancy; but the necessity of certainty and precision in determining the quality of interests in property, has preserved them intact to the present day.

CONSTITUTIONAL LAW—INTERSTATE AND FOREIGN
COMMERCE—LIMITATION ON POWER OF STATES
TO REGULATE

With the power of the federal government to regulate agriculture, labor, industry and business under the commerce clause¹ greatly expanded as the result of recent decisions,² attention has been focused upon the corresponding problem of the extent to which the grant of power to the federal government to regulate interstate and foreign commerce constitutes a limitation upon the power of the states.³ A recent decision in the case of *Bob-Lo Excursion Co. v. People of State of Michigan*⁴ may serve to redefine the extent of that limitation.

The excursion company operated an amusement park upon an island in Canadian waters fifteen miles from Detroit, and steamships by which persons were brought to and from Detroit. No passengers were accommodated overnight on the island or for passage to points beyond. Officers ejected a colored girl who came aboard with a party, otherwise composed of white girls. The excursion company was for this reason convicted of a misdemeanor under a state statute⁵ which forbade denial of equal accommodations on public conveyance to any persons because of color. Appealing from a decision of the State Supreme Court affirming the conviction, the carrier contended that the state statute transgressed the limitations of the commerce clause, relying on two earlier decisions, one⁶ of which held a state statute requiring equality of accommodation for colored passengers inapplicable to a packet plying in interstate commerce, and the other⁷ of which held a state

¹ U. S. Const., Art. 1, § 8, cl. 3.

² See, e.g., *Wickard Filburn*, 317 U. S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1943); *United States v. Darby Lumber Co.*, 312 U. S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941); *United States v. South-Eastern Underwriters' Association*, 322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944).

³ See Dowling "Interstate Commerce and State Power Revised Version" 47 *Columbia L. Rev.* 546 (1947).

⁴ 68 S. Ct. 358 (U.S. 1948).

⁵ Michigan Civil Rights Act, Penal Code §§ 146-8, as amended Public Act 117, 1937; Mich. Stats. Ann. (1946) Cum. Supp. §§ 28.343-6. The text of the Act is given in a marginal note to the principal case.

⁶ *Hall v. de Cuir*, 95 U. S. 485, 24 L. Ed. 547 (1878).

⁷ *Morgan v. Commonwealth of Virginia*, 328 U. S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317, 165 A.L.R. 574 (1946).

statute requiring segregation of colored passengers to be inapplicable to a bus operated in interstate commerce. The Supreme Court affirmed, holding that there was no inconsistency, present or threatened, between the state policy enforced through this statute and any federal or Canadian interest; and that the commerce, although admittedly foreign, was of such a peculiarly local character to permit state regulation.

There is little or no problem when Congress has taken action to regulate any particular activity in or affecting interstate or foreign commerce. In such cases, the federal statute supersedes all inconsistent state laws.⁸ Where the court has held the federal power to be a limitation upon state power, Congress may cede power to regulate to the states.⁹ This does not violate the rule that federal legislative power may not be delegated to the states; because the power is not exclusively federal.¹⁰ The problem arises only when, as in the principal case, there is no conflict with a superior federal statute, and an individual engaged in commerce seeks to avoid state regulation on the ground that state power to act is limited by the general terms of the federal organic law.

The cases heretofore decided have attempted to define the limitation upon state power in terms of the requirements of the federal grant. Since the grant of power to the federal government is not expressly declared to be exclusive, it was held by the Supreme Court, in the first test,¹¹ that federal power should be construed as exclusive to, and only

⁸ See e.g., *Erie Railroad Co. v. People of the State of New York*, 233 U. S. 671, 34 S. Ct. 756, 58 L. Ed. 1149, 52 L.R.A. (N.S.) 266 (1914).

⁹ *In re Rahrer*, 140 U. S. 545, 11 S. Ct. 865, 35 L. Ed. 572 (1891), federal statute permitting states to prohibit sale of liquor shipped in interstate commerce; *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408, 66 S. Ct. 1142, 90 L. Ed. 1023 (1946), sustaining state taxes on the insurance business consequent upon a federal statute providing that the insurance business shall continue to be subject to state laws; *Robertson v. California*, 328 U. S. 440, 66 S. Ct. 1160, 90 L. Ed. 1040 (1946), sustaining state regulation of insurance business.

¹⁰ Compare *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 40 S. Ct. 438, 64 L. Ed. 834, 11 A.L.R. 1145 (1920), holding that the power of Congress to prescribe rules of maritime law is exclusive and cannot be delegated to the states, with *Cooley v. Board of Wardens*, 12 How. 299, 13 L. Ed. 996 (1851), holding that a state law regulating licensing of harbor pilots, to constitute a permissible regulation of interstate and foreign commerce, where, by an early act of Congress, it was provided that pilotage should continue to be regulated by the several states. The court (Curtis, J.) said: "If the Constitution excluded the states from making any law regulating commerce, certainly Congress cannot regrant, or in any manner reconvey to the states, that power."

¹¹ *Cooley v. Board of Wardens of Philadelphia*, 12 How. 299, 13 L. Ed. 996 (1851). See note 10, *supra*. "Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them what is really applicable but to a part. What-

to, the extent of necessity. Thus, if the subject of regulation imperatively demands a uniform rule, Congress has exclusive power and state power is limited.¹² On the other hand, if the matter to be regulated requires local and diversified treatment and can never effectively be controlled by a uniform national rule, the federal constitution does not prohibit state action.¹³ The court came to assume the role of arbiter, determining in doubtful cases whether the problem could be dealt with nationally or required diversified treatment.¹⁴ Such a formula, restated only recently by Chief Justice Stone,¹⁵ is consistent with the position assumed by the judicial branch in the government:

ever subjects of the power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

¹² *Leisy v. Hardin*, 135 U. S. 100, 10 S. Ct. 681, 34 L. Ed. 128 (1890), holding unconstitutional a state prohibition law when applied to liquor imported in interstate commerce. *Southern Pacific Co. v. State of Arizona*, 325 U. S. 761, 65 S. Ct. 1515, 89 L. Ed. 1469 (1945), holding unconstitutional a state law limiting the length of freight and passenger trains as applied to movement of trains in interstate commerce.

¹³ *Cooley v. Board of Wardens of Philadelphia*, 12 How. 299, 13 L. Ed. 996 (1851), upholding conviction for violation of state law regulating use and compensation of pilots to enter Port of Philadelphia. "The nature of the subject when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants." *Parker v. Brown*, 317 U. S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943), upholding a state proration law controlling production of raisins, 95% of which were sold in interstate commerce, because (per Stone, C. J.) "the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character and the practical difficulties involved, may never be adequately dealt with by Congress." "The states may regulate matters which, because of their number and diversity, may never be adequately dealt with by Congress." Stone, C. J., in *Southern Pacific Co. v. State of Arizona ex rel. Sullivan*, 325 U. S. 761, 65 S. Ct. 1515, 89 L. Ed. 1469 (1945). See also *State of California v. Thompson*, 313 U. S. 109, 61 S. Ct. 930, 85 L. Ed. 1219 (1941).

¹⁴ "For a hundred years it has been accepted Constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this clause the final arbiter between the competing demands of state and national interests." Stone, C. J., in *Southern Pacific Co. v. State of Arizona ex rel. Sullivan*, 325 U. S. 761, 65 S. Ct. 1515, 89 L. Ed. 1469 (1945). See also *California v. Thompson*, 313 U. S. 109, 61 S. Ct. 930, 85 L. Ed. 1219 (1941).

¹⁵ See note 13 *supra*. For an appraisal of the work of Stone in restating the law in this field, see Dowling, *op. cit.* note 3, *supra*.

it determines only questions of power and limitations thereon by construction of organic law. It is not concerned with the wisdom or appropriateness of legislation.

The dissenting opinion of Mr. Justice Jackson, in which the Chief Justice concurred, seems to be based on an appreciation of the foregoing principles. If it is established, as he believed it was, in the cases relied upon by appellant,¹⁶ that the racial problem as it relates to interstate commerce may appropriately be handled uniformly by the federal government, failure of Congress to act does not expose interstate commerce to the burden of local rules, no matter what policy the state seeks to advance. "The sphere of a state's power has not been thought to expand or contract because of the policy embodied in a particular regulation." The inference may therefore be drawn, if there is a real conflict between the prevailing and dissenting opinions, that the rule of *Cooley v. Board of Wardens*¹⁷ is no longer followed.

The majority of the court took the view that the limitation of the commerce clause cannot be invoked unless there is hostility, actual or threatened, between the state and federal rules. It found no inconsistency present, and the possibility of future conflict remote, inasmuch as federal law in related fields and the Canadian law were actually similar.¹⁸ Certainly this is a refusal to treat the problem as one of defining the automatic limitations of the federal constitution, and the substitution of a test of actual or potential conflict. The holding of the majority is tempered, however, by an attempt to distinguish the cases on which appellant relied¹⁹ by saying that those cases were actually cases of transportation in interstate commerce, while the court could not conceive, in the field of foreign commerce, "a segment so completely and locally isolated . . . so peculiarly and almost exclusively affecting . . . people and institutions" of a single state. Is this the equivalent of saying that excursion trips to foreign countries or other states, which terminate in an immediate return to the place of departure, present local problems which can never be regulated adequately by Congress?

¹⁶ *Hall v. de Cuir*, 95 U. S. 485, 24 L. Ed. 547 (1878), and *Morgan v. Virginia*, 328 U. S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317, 165 A.L.R. 547 (1946).

¹⁷ See notes 11, 13, *supra*.

¹⁸ "The province of Ontario enacted in 1944 its Racial Discrimination Act, Session Laws 1944, c. 51. Federal legislation has indicated a national policy against racial discrimination in the requirement, not urged here to be specifically applicable in this case, of the Interstate Commerce Act that carries subject to its provisions provide equal facilities for all passengers, 49 U.S.C. § 3 (1) . . . extended to carriers by water and air, 46 U.S.C. § 815, 49 U.S.C. §§ 484, 905 . . . Federal legislation also compels a collective bargaining agent to represent all employees in the bargaining unit without discrimination because of race. 45 U.S.C. § 151 et seq." Marginal note 16, by the court in the principal case.

¹⁹ See note 16, *supra*.

An affirmative answer would seem to be so indicated by the fact that two justices²⁰ concurred specially, holding that conflict,²¹ actual or potential, is the sole test. At least, the prevailing opinion is not wholly inconsistent with the views expressed in the dissenting opinion by Mr. Justice Jackson.

No one of these three opinions denies that there was regulation of foreign commerce. An appeal to the Fourteenth Amendment having been abandoned,²² the court did not consider whether the carrier would be compelled to accept custom which, regarding the peculiar nature of its business and the current depravity of the Middle West,²³ would drive away desirable clientele and depreciate the property devoted to public use without compensation. Subsequent cases²⁴ have proved that this would be useless: proprietary interests will not be protected when the civil rights of others are incidentally offended. One suspects that the majority was determined to give encouragement to legislative experiments in this field, and loath to permit the mere technicalities of the law to block progress. In that respect, the case offers an interesting contrast to precedents,²⁵ in which the commerce clause was held to prevent state experiments in the prohibition of intemperance and the repeal of the law of supply and demand, respectively. Absent a question of civil rights, the court may be disposed to return again to *Cooley v. Board of Wardens*.²⁶

²⁰ Douglas, Black, JJ.

²¹ "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." The court cited *Missouri Pacific Co. v. Larabee Flour Mills Co.*, 211 U. S. 612, 29 S. Ct. 214, 53 L. Ed. 352 (1908), holding that a state may impose a duty to exchange cars carrying interstate freight to expedite service; but see, *contra*, *St. Louis S.W.R. Co. v. Arkansas*, 217 U. S. 136, 30 S. Ct. 476, 54 L. Ed. 698, 29 L.R.A. (N. S.) 802 (1909). Earlier cases are probably no longer controlling because the court no longer takes the view that the "reserved powers" of the federal government. Compare *United States v. Butler*, 297 U. S. 1, 56 S. Ct. 312, 80 L. Ed. 477, 102 A.L.R. 914 (1936), with *United States v. Darby Lumber Co.*, 312 U. S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941).

²² See marginal note 12 to the opinion in the principal case.

²³ It is now presumed that a confession obtained from a colored youth by police officers in Canton, Ohio, after midnight, is unlawfully extorted. *Haley v. State of Ohio*, 332 U. S. 596, 68 S. Ct. 302 (1947).

²⁴ Restrictive covenants respecting use of land based upon race or color, are not illegal, but may not be enforced in state courts. *Shelle v. Kraemer*, 68 S. Ct. 836 (U. S. 1948).

²⁵ *Lelsy v. Hardin*, 135 U. S. 100, 10 S. Ct. 681, 34 L. Ed. 128 (1890); *Baldwin v. Seelig*, 294 U. S. 511, 55 S. Ct. 497, 79 L. Ed. 1032, 101 A.L.R. 55 (1935).

²⁶ Note 11, *supra*.

The case may also be important in that it places foreign commerce on a par with interstate commerce with respect to the state's power of regulations. If there has been some doubt²⁷ whether that be true, it has scarcely been dissipated by a case involving a mere segment of foreign commerce, peculiarly and exclusively affecting the people of a single state.

²⁷ Possibly because of the fact, noted by Cardozo, J., in *Baldwin v. Seelig*, 294 U. S. 511, 55 S. Ct. 497, 79 L. Ed. 1032, 101 A.L.R. 55 (1935), that foreign commerce is protected by specific prohibitions on imports and duties, while interstate commerce is protected only by the implications of the commerce clause, it has been felt that all limitations with respect to foreign commerce must be express; possibly also because of the fact that foreign commerce and incidental matters are often regulated by treaty.