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Container Legislation, Equal Protection, Commerce Clause, Minnesota v. Clover Leaf Creamery Company

Craig B. Paynter

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CONCLUSION

The Court's decision in *Associated Dry Goods* acts as a reaffirmation of the Fifth Circuit's decision in *Kessler*. While an open disclosure policy has been adopted, the EEOC will have to restrict the access of related employee files to aggrieved individual employees. The Court expressed concern with the importance of the private right of action under Title VII, where the charging party acts as a "private attorney general"⁶⁰ whose purpose is to further effectuate the ban on employment discrimination. However, the balance between administrative and judicial functions of the EEOC may have been disrupted by the army of "attorney generals" which the Court has enlisted. With full disclosure of conciliatory information, the individual employee wields a powerful weapon. The effectiveness of this weapon eventually may be eliminated, however, if employers refuse to cooperate with the EEOC in voluntarily providing the ammunition of statistical information during prelitigation conciliation and negotiation attempts.

KENNETH WITTENAUER

 CONSTITUTIONAL LAW

Container Legislation • Equal Protection • Commerce Clause

Minnesota v. Clover Leaf Creamery Company, 101 S. Ct. 715 (1981)

THE PROBLEMS of litter, solid waste, and natural resource depletion are often inexorably linked to the liquid manufacturing and packaging industry. Legislative efforts to ameliorate these problems may therefore involve various controls of containers.¹ When states enact container legislation, however, terms must be carefully chosen to avoid conflict with both state and federal constitutions.²

In *Minnesota v. Clover Leaf Creamery Co.*,³ the United States Supreme Court struck down an equal protection challenge to state legislation banning certain containers in the milk industry. The Court's approach to this challenge is striking; equally significant is the Court's departure from its usual

⁶⁰ *Id.* at 824.

¹ See generally Greef & Martin, *Beverage Container Legislation: A Policy and Constitutional Evaluation*, 52 TEX. L. REV. 351 (1974).

² The most frequent challenges involve claimed violations of the Due Process, Equal Protection and Commerce clauses.

³ 101 S. Ct. 715 (1981).

stance of avoiding Constitutional issues when there are other possible grounds for decision.

The stated purpose of the Minnesota statute⁴ controlling milk containers was to reduce the problems of litter, solid waste and resource depletion, all of which were legislatively determined to be exacerbated by the use of the banned containers. In compliance with state policy of encouraging the reuse and recycling of material to reduce amounts of solid waste,⁵ the container statute specifically expresses a preference for returnable and reusable packaging.⁶ The statutory ban, however, extends only to the sale of milk in plastic, nonreturnable, nonrefillable containers.⁷ No other substances, such as paperboard, are specifically prohibited.⁸

A group composed of milk packagers, sellers and persons involved in the manufacture and distribution of plastic containers⁹ challenged the constitutionality of the statute. The Minnesota District Court held¹⁰ that the statute was unconstitutional in that (1) it deprived plaintiffs of the equal protection of the law in contravention of the fourteenth amendment,¹¹ (2) it deprived plaintiffs of substantive due process in contravention of the fourteenth amendment¹² and the Minnesota constitution,¹³ and it constituted an unreasonable burden upon interstate commerce in contravention of the Constitution.¹⁴

The district court stated that "the actual basis of the statute was to promote economic interests of certain segments of the local dairy and pulpwood industry."¹⁵ The court reasoned that since the statute would not encourage the use of returnable containers which is the stated goal, the means chosen were not rationally related to the public purpose to be served.¹⁶ Consequently, the statute constituted an "unreasonable, arbitrary and

⁴ MINN. STAT. ANN. § 116 F.21 (West 1980).

⁵ *Id.* at § 116 F.01 (West 1977).

⁶ *Id.* at § 116 F.21 (West 1980).

⁷ *Id.* at § 116 F.22. *See also* Clover Leaf Creamery Co. v. State, 289 N.W.2d 79, 81 (Minn. 1979).

⁸ Minnesota's regulation of milk containers in this manner is unique. *Minnesota v. Clover Leaf Creamery Co.*, 101 S. Ct. at 721, n. 3. Plastic and paperboard containers have been banned by executive action in Ontario, Canada. *Clover Leaf Creamery Co. v. State*, 289 N.W.2d at 81, n. 6. (Minn. 1979).

⁹ Plaintiffs included Society of Plastics Industry, Inc., Phillips Petroleum Co., Hoover Universal, Inc., M-H Packaging Systems, Inc., Clover Leaf Creamery Co., Wells Dairy, Inc., Weber & Barlow Store, Inc., and Marigold Foods, Inc. *Clover Leaf Creamery Co. v. State* 289 N.W.2d at 80, n.1.

¹⁰ *Id.* at 80, n.2.

¹¹ U.S. CONST. amend. XIV, § 1.

¹² *Id.*

¹³ MINN. CONST. art. I, § 7.

¹⁴ U.S. CONST. art. I, § 8, cl. 3.

¹⁵ Petition for Writ of Certiorari at A-24, *Minnesota v. Clover Leaf Creamery Co.*, 101 S. Ct. 715 (1981). (The decision of the District Court of Minnesota is unreported.)

¹⁶ *Id.* at A-25-27.

capricious interference with the production, marketing and consumption of milk."¹⁷

The opinion ostensibly recognized the "presumption of validity" which is given state legislation when challenged on equal protection grounds.¹⁸ Yet, the district court held that the statute was unconstitutional since it failed to bear a "fair and substantial relation to the object of the legislation."¹⁹

The Minnesota Supreme Court limited its decision to the equal protection issue²⁰ which it considered to be determinative.²¹ The court conceded that the statute "deals with legitimate state interests"²² of encouraging the recycling of materials and reducing solid wastes. However, following a review of the debates, relevant findings of fact and documentary material,²³ the supreme court found that the statute bore no rational relation to that legitimate state interest.²⁴ The decision of the district court was affirmed.

A persuasive dissent by Justice Wahl²⁵ argued that an economically motivated legislative remedy may proceed in a step-by-step fashion, a point recently reiterated by the United States Supreme Court in *New Orleans v. Duke*s.²⁶ The Court stated in *Dukes* that it was not the function of the Supreme Court "to judge the wisdom or desirability of legislative policy determinations."²⁷ The State of Minnesota appealed the decision to the United States Supreme Court pursuant to 28 U.S.C. Section 1257,²⁸ and *certiorari* was granted.²⁹

¹⁷ *Id.* at A-27.

¹⁸ *Id.* at A-29.

¹⁹ *Id.* at A-32.

²⁰ *Clover Leaf Creamery Co. v. State*, 289 N.W.2d at 81.

²¹ The court made no findings on the other issues considering its analysis of the equal protection issue sufficient to resolve the due process challenge. The court decided it was unnecessary to address the Commerce clause issue having resolved the case on the basis of equal protection. *Id.* at 87, n.20.

²² *Id.* at 82.

²³ *Id.* at 83. Reports on the problems of solid waste disposal and energy depletion were compiled by the Midwest Research Institute, the United States Environmental Protection Agency, The Weyerhaeuser Corporation, a milk packaging group working for the Ministry of Environment in the province of Ontario, Canada and a 1969 study, the "Egg-Shell Report", on the disposable characteristics of containers. *Id.* at n.13.

²⁴ *Id.* at 87.

²⁵ *Id.* (Wahl, J., dissenting).

²⁶ 427 U.S. 297, 303 (1976) (citing *Katzenbach v. Morgan*, 384 U.S. 641 (1966)).

²⁷ 427 U.S. at 303 (citing *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952)).

²⁸ 28 U.S.C. 1257 (1976) provides that:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed as . . . follows: . . . (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

²⁹ *Minnesota v. Clover Leaf Creamery Co.*, 445 U.S. 949 (1980).

The Minnesota Supreme Court, like the district court below it, recognized that this was economically and environmentally motivated and therefore applied the rational-basis test³⁰ for constitutionality under the Equal Protection clause.³¹ The Supreme Court of the United States agreed that the correct test had been applied and found that the only controversy to be resolved was whether the "classification between plastic and nonplastic non-returnable milk containers is rationally related to achievement of the statutory purposes."³² However, in applying the same standard, the Court reached an opposite conclusion and reversed the Minnesota courts.³³

The Supreme Court, through Justice Brennan, almost dismissed the argument against constitutionality without even looking at the merits of the opposing parties' claims. Justice Brennan suggested that since the state courts admitted that the evidence was "in sharp conflict,"³⁴ the constitutionality of the statute was at least debatable. If so, it was reasoned, the challengers of the statute could not prevail under the rational-basis test.³⁵ The Court, however, did proceed to evaluate the merits of the respective contentions.

The State of Minnesota claimed that the Minnesota Supreme Court had impermissibly substituted its judgment for that of the legislature by analyzing the statute afresh under the equal protection clause.³⁶ The state claimed the statute bore a rational relationship to the legitimate state goals of non-proliferation of disposable containers, promotion of energy conservation, minimization of economic dislocation associated with move-

³⁰ When a statute is challenged as being violative of the Equal Protection clause, there are at least three possible standards by which that statute may be measured to determine its validity.

Under the "rational-basis" test the party attacking the statute must show that the classification bears no reasonable relation to the state interest to which it is directed, that it is arbitrary. The Court will give discretion to state Legislatures acting under their police powers and allow them to provide for some inequality in classification. This test is consistently applied in analyzing statutes that are predominantly economic.

The "strict scrutiny" test is utilized when a classification involves either a suspect class (*i.e.* race or alienage) or a fundamental right (*i.e.* voting or travel). When this test is employed, the state must show more than a rational relation to a legitimate state interest; it must show that the classification is necessary to promote a compelling governmental interest and that the means chosen, although intrusive, are the least drastic means available.

An intermediate test has judicially emerged to meet criticism of the use of the two-test approach. The burden under the "rational-relation" test is so great that generally statutes tested under it are found to be valid while application of the "strict-scrutiny" test more frequently result in a finding that the classification is impermissible. The intermediate review requires that the classification bear a fair and substantial relationship to the legitimate state interest. Classifications regarding sex or legitimacy have been subjected to the intermediate standard. *See* J. NOWAK, R. ROTUNDA, J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW*, 524-26, 1978.

³¹ *Clover Leaf Creamery Co. v. State*, 289 N.W.2d at 81.

³² *Minnesota v. Clover Leaf Creamery Co.*, 101 S. Ct. at 723.

³³ *Id.* at 727.

³⁴ *Id.* at 724.

³⁵ *Id.*

³⁶ *Brief of Petitioner 27-36, Minnesota v. Clover Leaf Creamery Co.*, 101 S. Ct. 715 (1981). 4

ment toward greater use of "environmentally superior containers" and easing the solid waste disposal problem.³⁷

The milk packagers contended that because the district court specifically found that the actual purpose of the act was to protect the economic interests of certain segments of the local dairy and pulpwood industries over the economic interests of out-of-state segments of the dairy and plastic industries,³⁸ there was no factual basis for banning the plastic containers. Moreover, there was evidence to suggest that the plastic bottle had been in wide use in Minnesota for years.³⁹ Finally, it was argued that the statute would not encourage a move toward greater use of returnable containers and would only complicate the solid waste problem.⁴⁰

Justice Brennan found the state arguments "fully supportable."⁴¹ He emphasized the fact that states need not strike at all evils at the same time or in the same way and that a legislature may implement its program step-by-step.⁴² The decision raised two additional theorems which merit individual attention.

First, the Court proclaimed that "the Equal Protection Clause is satisfied by our conclusion that the Minnesota Legislature *could rationally have decided* that its ban on plastic nonreturnable milk jugs might foster greater use of environmentally desirable alternatives."⁴³ This differs from the axiom long favored by the Court⁴⁴ because it requires the rational relationship to be drawn from any *demonstrated* facts rather than from those facts which are imaginable. While this approach is not new,⁴⁵ it does allow for the novel holding in this case.

Second, Justice Brennan found that "it is not the function of *the courts* to substitute *their evaluation* of legislative facts for that of the legislature."⁴⁶ This language is similar to that found in *Day-Brite Lighting v. Missouri*,⁴⁷ where it was declared that "we do not sit as a superlegislature to weigh the wisdom of the legislation nor to decide whether the policy which it expresses offends the public welfare."⁴⁸ This maxim has been interpreted as delineating conduct to be avoided by the Supreme Court.⁴⁹ A careful ex-

³⁷ 101 S. Ct. at 725-27.

³⁸ *Id.* at 722.

³⁹ *Clover Leaf Creamery Co. v. State*, 289 N.W.2d at 86.

⁴⁰ *Minnesota v. Clover Leaf Creamery Co.*, 101 S. Ct. at 723-24.

⁴¹ *Id.* at 725.

⁴² *Id.*

⁴³ *Id.* (emphasis added).

⁴⁴ See *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911).

⁴⁵ See e.g. *Williamson v. Lee Optical of Oklahoma Co.*, 348 U.S. 483 (1955).

⁴⁶ *Minnesota v. Clover Leaf Creamery Co.*, 101 S. Ct. at 727 (emphasis added).

⁴⁷ 342 U.S. 421 (1952).

⁴⁸ *Id.* at 423.

⁴⁹ *New Orleans v. Duke*, 427 U.S. at 303.

amination of Justice Brennan's holding in *Clover Leaf Creamery Co.* will reveal that the restraint from acting as a superlegislature is being extended to state courts as well.⁵⁰ This appears to be true at least within the confines of applying a rational-basis test to a statute challenged as violating the Equal Protection clause.

Having rejected the contention that the statute violated the Equal Protection clause, the Court next considered whether the regulation was prohibited by the Commerce clause. This consideration was initiated despite the Court's self-imposed policy of avoiding constitutional decisions whenever possible.⁵¹ The Court felt justified in this departure in that the issue had been fully briefed and argued and because of the factual similarities between Equal Protection and Commerce clause analysis.⁵² Justice Powell's opinion in the case questioned the wisdom of such a departure.⁵³

The Commerce clause, like the Equal Protection clause, has undergone extensive interpretation and application over the years. Yet, unlike the Equal Protection clause, no readily definable set of standards have been developed with which to test the constitutionality of statutes under the Commerce clause.⁵⁴ Rather:

Case law interpreting the clause has gradually created a multifaceted approach to assessing the validity of such state action. Generally, the rule is that the regulation will be upheld only if it is rationally related to a legitimate state purpose and the resultant burden on interstate commerce is outweighed by the state interest involved.⁵⁵

The milk packagers, relying on the argument that the statute had a discriminatory purpose of favoring in-state over out-of-state concerns, contended that the statute was the embodiment of economic protectionism.⁵⁶ They felt that the regulation would halt the flow of goods at the state border and thus impose too great a burden on interstate commerce as compared to the putative local benefits.⁵⁷

The state countered by arguing that while some burdens might be placed on interstate commerce, incidental burdens on that commerce are acceptable.⁵⁸ The state further argued that the statute burdened both local

⁵⁰ *Minnesota v. Clover Leaf Creamery Co.*, 101 S. Ct. at 726.

⁵¹ The Minnesota Supreme Court did not reach a decision on this issue and the case could have been remanded for such a determination or avoided altogether.

⁵² *Minnesota v. Clover Leaf Creamery Co.*, 101 S. Ct. at 727, n.14.

⁵³ *Id.* at 729-30 (Powell, J., concurring in part and dissenting in part).

⁵⁴ Note, *State Environment Protection Legislation and the Commerce Clause*, 87 HARV. L. REV. 1762, 1763-64 (1974).

⁵⁵ *Id.* at 1764.

⁵⁶ *Minnesota v. Clover Leaf Creamery Co.*, 101 S. Ct. at 727, n.15.

⁵⁷ *Id.* at 728.

⁵⁸ Reply Brief of the Petitioner, 4-21, *Minnesota v. Clover Leaf Creamery Co.*, 101 S. Ct.

and out-of-state retailers in an equal fashion.⁵⁹ Moreover, most retailers, if not all, were still packaging milk in various containers and could shift production away from plastic containers without too much economic dislocation.⁶⁰

The Court found that the statute regulated "evenhandedly" by prohibiting *all* milk retailers from selling their products in plastic, nonreturnable containers.⁶¹ The Court was persuaded by the fact that the milk products would continue to flow freely across the border, "since most dairies package their products in more than one type of container."⁶² It was pointed out by the Court that the packagers had suggested "no approach with a lesser impact on interstate activities."⁶³ The Court concluded that,

A nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry. Only if the burden on interstate commerce clearly outweighs the State's legitimate purposes does such a regulation violate the Commerce Clause.⁶⁴

Two important facts regarding the milk industry in this case fortify the Court's reasoning. In Minnesota, packagers utilized a number of different types of packaging materials to ship milk to the consumer.⁶⁵ Moreover, the plastic milk jugs which were the subject of *Minnesota v. Clover Leaf Creamery Co.* were late arrivals on the scene in Minnesota. These factors alone may not have been enough to tip the scales used in Commerce clause analysis to the side of the state. The presence of the alternative containers, however, minimized the burden the statute placed on the milk industry in several ways. First, the economic dislocation associated with a switch to another type of container would be minimized. Second, this would allow the flow of goods across the Minnesota border to continue without serious interruption.⁶⁶ The combination of these factors made it logical in this case to find that the legislative ban did not burden interstate commerce.

⁵⁹ *Id.*

⁶⁰ Economic dislocation is a descriptive term referring to the job losses and plant closings that often accompany a shift to a new method of production.

⁶¹ *Minnesota v. Clover Leaf Creamery Co.*, 101 S. Ct. at 728.

⁶² *Id.*

⁶³ *Id.* at 729.

⁶⁴ *Id.* The court is referring to the pulpwood industry as the predominantly in-state industry which may have benefitted from the regulation by a shift to paperboard containers.

⁶⁵ *Id.* at 728.

⁶⁶ Easily distinguishable is the brewing industry. Since establishing nationwide operations, brewers have become virtually dependent upon nonreturnable cans and bottles. A ban on those containers in that industry would more easily constitute an impermissible interference with commerce. See Greef & Martin, *supra* note 1, at 367-75, for a discussion of state container legislation and its effect on interstate commerce.

RECENT CASES
CONCLUSION

The majority opinion in *Clover Leaf Creamery Co.* reaffirmed the application of the rational-basis standard when a statute encompassing economic concerns is challenged under the Equal Protection clause. The decision continues to recognize the viability and acceptability of a step-by-step approach when states seek to ameliorate environmental problems.

The opinion may, however, go beyond affirming past Court holdings. Justice Brennan felt that, in this limited context, not only will the Supreme Court not sit as a superlegislature to review the wisdom of state regulations but that state courts will be similarly restrained. A greater amount of deference to state legislative decision-making may result; in fact, the opinion may be construed as an invitation for state legislatures to seize a more active role in reducing environmental problems in areas involving no fundamental rights or suspect classes.

Even more than encouraging the legislatures to take a more active role in this context, the opinion seems to reward the State of Minnesota for enacting this particular legislation. By enacting the restriction before the undesirable container became embedded in the industry and commerce of Minnesota, the legislature encouraged merchants both inside and outside the state to make use of the readily available alternatives to the banned containers. The Court seems to have been sufficiently impressed by the practical advantages and workability of the statute. One could infer that preventive measures are preferable to remedial actions in the eyes of the Court.

CRAIG B. PAYNTER