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Labor Law—State Fair Employment Practices Acts—The Power of the States to Act in the Field of Job Discrimination in the Face of Current and Proposed Federal Activity.—Colorado Anti-Discrimination Comm'n v. Continental Airlines

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Ninth Circuit of the Court of Appeals, in *Local 383, Laborers v. NLRB*,³⁰ specifically overruled the NLRB's position. It appears from this decision that it is legal to use coercion to *obtain* a hot cargo clause but illegal to use coercion to *enforce* such an agreement.³¹ The Court of Appeals was probably correct in its literal interpretation of the statute, but the question arises whether Congress purposely excluded construction unions from section 8(b)(4)(A) or whether Congress inadvertently created a loophole in the law.

The argument that even though the agreement is valid it is still unenforceable³² does not satisfactorily resolve the question. The real inquiry to be considered is whether or not the union has the right to subject an employer to coercion for the purpose of obtaining an unenforceable agreement. Since this right appears to be based only on the wording of the statute—section 8(b)(4)(A)—perhaps the statute should be changed.

Except in the construction industry, the law relating to hot cargo clauses is becoming settled. In the garment industry, unions may legally obtain and enforce hot cargo agreements without being subjected to section 8(b)(4)(B).³³ In other areas of commerce and industry, hot cargo clauses are illegal and a violation of section 8(e).³⁴ Current law in the construction industry has left hot cargo clauses totally unenforceable even in judicial proceedings.³⁵ Thus, the clause will only have meaning where the employer voluntarily chooses to comply with it. Perhaps in its next go-around at improving labor legislation, Congress will take a stand on whether hot cargo clauses should be banned in the construction industry or should be given the legality and enforceability of other contract provisions.

ROBERT M. STEINBACH

Labor Law—State Fair Employment Practices Acts—The Power of the States to Act in the Field of Job Discrimination in the Face of Current and Proposed Federal Activity.—*Colorado Anti-Discrimination Comm'n v. Continental Airlines*.¹—Petitioner applied for an available position as an airline pilot with respondent. Upon being rejected, he complained to the Colorado Anti-Discrimination Commission, which, acting under the authority

³⁰ 323 F.2d 422 (9th Cir. 1963). The litigation involving Local 383 extended over several years, and it illustrates the diversity of opinion between the NLRB and the courts. In 1961 the district court granted a temporary injunction against the union for a violation of section 8(b)(4)(B), but the court refused to find a violation of section 8(b)(4)(A). *Kennedy ex rel. NLRB v. Local 383, Laborers*, supra note 29. In 1962 the NLRB held in *Local 383, Laborers*, supra note 27, that the union had violated section 8(b)(4)(A) in picketing to obtain a hot cargo agreement. The union appealed from the Board holding and the Court of Appeals reversed.

³¹ *Local 383, Laborers, v. NLRB*, supra note 30.

³² *Ibid.*

³³ Section 8(e), LMRA, supra note 13.

³⁴ *NLRB v. Local 17, Lithographers*, 309 F.2d 31 (9th Cir. 1962); *Local 9, Typographers v. NLRB*, 311 F.2d 121 (D.C. Cir. 1962).

³⁵ *Local 48, Sheet Metal Workers*, supra note 1.

¹ 372 U.S. 714 (1963).

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of the Colorado Anti-Discrimination Act of 1957,² found that petitioner was denied employment solely because of his race. Respondent was ordered to cease and desist such discriminatory practices and to enroll petitioner in its next training course. On review, the District Court of the City and County of Denver set aside the Commission's order and dismissed petitioner's complaint on the ground that the Colorado Act could not constitutionally be applied to an air carrier in interstate commerce. The court stated that this state action imposed an undue burden on commerce and that Federal law had preempted the field of protecting citizens employed in interstate commerce from racial discrimination.³ The Colorado Supreme Court affirmed, addressing itself only to the Commerce Clause issue.⁴ The United States Supreme Court granted certiorari.⁵ HELD: Federal law, in the form of Congressional Acts and Executive Orders, has not preempted the field of protecting employees in interstate commerce from this type of discrimination in employment.

In response to the demand for anti-discrimination legislation, and in view of federal inactivity in this area, the states have enacted a vast body of anti-discrimination laws. In particular, since 1945 twenty-five states have adopted Fair Employment Practices Acts. The Colorado Act is typical of statutes in force in twenty states in that it establishes a board to hear, investigate and adjudicate complaints, to enjoin violations, and to compel affirmative action to remedy any individual wrong.⁶ The state commissions have, as a matter of course, assumed jurisdiction over employers within the state operating in interstate commerce.⁷ Prior to the instant case, this jurisdiction had never been directly challenged in federal or state courts.⁸

The Commerce Clause ramifications of the assumption of jurisdiction over employers in interstate commerce has been well documented elsewhere.⁹

² Colorado Anti-Discrimination Act of 1957, Colo. Rev. Stat. §§ 80(24)(1)-80(24)(8) (1960 perm. supp.). § 80(24)(6) makes it unlawful for an employer "to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation against, any person otherwise qualified, because of race, creed, color, national origin or ancestry." § 80(24)(7) confers on the Colorado Anti-Discrimination Commission broad investigatory and enforcement powers. § 80(24)(8) provides for judicial review and enforcement of Commission orders.

³ 6 Race Rel. Rep. 805 (1961).

⁴ — Colo. —, 368 P.2d 970 (1962).

⁵ 371 U.S. 809 (1962).

⁶ E.g., Mass. Laws Ann. ch. 151B, §§ 1-10 (1957 and 1962 Supp.); N.Y. Executive Law §§ 290-301; Pa. Stat. Ann. tit. 43 §§ 951-963 (1952 and 1962 Supp.). For a complete list of state fair employment laws, see 5 Lab. Rel. Rep. 393, 394 (1960).

⁷ Note, The Right to Equal Treatment: Administrative Enforcement of Anti-discrimination Legislation, 74 Harv. L. Rev. 526, 566 (1961); 5 Lab. Rel. Rep., 393, 394 (1960).

⁸ For a subsequent state case in accord with the instant case see *Delaney v. Conway*, 39 Misc. 2d 499, 241 N.Y.S.2d 384 (Supreme Court 1963).

⁹ On the Colorado Supreme Court level: 62 Colum. L. Rev. 1348 (1962); 76 Harv. L. Rev. 404 (1962); 37 Ind. L.J. 490 (1962); 37 Notre Dame Law. 720 (1962); 15 Stan. 523 (1963); 35 Colo. L. Rev. 211 (1963); 110 U. Pa. L. Rev. 1033 (1962); 48 Va. L. Rev. 1149 (1962);

On the U.S. Supreme Court level: 32 Cinn. L. Rev. 313 (1963); but see 37 Notre Dame Law. 720 (1962).

In the instant case the Supreme Court takes a rather oblique approach to the Commerce Clause issue, placing the emphasis upon the racial discrimination aspect

However, recent federal activity in the form of decisions interpreting broad anti-discrimination provisions in federal statutes regulating interstate commerce, and executive orders requiring the insertion of an anti-discrimination clause in government contracts, raises the more subtle issue of federal occupation of the field to the exclusion of state action.¹⁰

The problem of federal preemption is an extremely tacky one and its resolution requires a determination of precisely what the state is attempting to do in the case at hand, and an examination of the relationship of the federal and state interest and powers involved.¹¹ It is settled that state legislation against racial discrimination is a valid exercise of the police power of the states.¹² On the other hand, the Constitution vests in Congress the power to regulate "commerce among the States,"¹³ and the power to stipulate terms and conditions of government contracts inheres in the Executive.¹⁴ Thus, when the state police power is exerted against employers engaged in interstate commerce and subject to Federal Executive Orders, this particular application of state power transforms what was by its nature an exercise of a reserved power, into an exercise of a power that may be deemed merely

rather than upon the employment relationship aspect. A more traditional approach, following *Sherlock v. Alling*, 93 U.S. 99 (1876) might have been taken, but probably would not have produced so decisive a result.

¹⁰ The preemption question also raises itself with respect to power of the NLRB to prevent unfair employment practices; J. M. Albert discusses five devices the Board might use: (1) decertification of unions which discriminate against negroes; (2) the setting aside of representation elections where an employer or a union makes "exacerbated" appeals to racial bias; (3) the removal of discriminatory collective bargaining contracts as bars to representation petitions by stranger unions; (4) the prevention of a union, acting in its "statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair," and the prevention of employer participation in such conduct; (5) the making it an unfair labor practice for an employer or a union to make such exacerbated appeals to racial bias in a representation campaign as would support the setting aside a representation election.

Mr. Albert points out that the remedial powers of the NLRB in this area are limited and concludes that these devices, some of which are less effective than others, make a poor substitute for an effective federal fair employment program. NLRB—FEPC?, 16 Vand. L. Rev. 547, 549, 558-93 (1963).

Preemption in this area would probably follow the decisions on this issue under the NLRA, as amended. For a discussion on the unique preemptive effect of the NLRA, see *Sovern*, Section 301 and the Primary Jurisdiction of the NLRB, 76 Harv. L. Rev. 529 (1963) and *Peralta*, Federal Jurisdiction in Labor Management Relations Under Section 301 of the Taft-Hartley Act: The Aftermath of the Lincoln Mills Decision, 22 Rev. Col. Abo. P.R. 79 (1961).

¹¹ *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142-46 (1963); *Head v. New Mexico Bd.*, 374 U.S. 424, 429-32 (1963); *Campbell v. Hussey*, 368 U.S. 297-302 (1961); *Pennsylvania v. Nelson*, 350 U.S. 497, 501-510 (1956); *California v. Zook*, 336 U.S. 725, 730 (1949); *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 772 (1947); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

¹² *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 110 (1953); *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 94 (1945).

¹³ U.S. Constitution, Art. I, § 8, cl. 3; *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299 (1851).

¹⁴ *People v. Tremaine*, 226 App. Div. 331, 235 N.Y. Supp. 555, 563-4, (1929); citing *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825).

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permissive, involving as it does an encroachment into an area where the federal interest is dominant and federal jurisdiction paramount.

Absent an express federal declaration of an intent to exclude state action,¹⁵ the degree of permissiveness of state regulation depends on the relative predominance of the federal interest measured against the seriousness of the local concern and the urgency for local action. In an area of supreme federal interest and importance, the federal power borders on the exclusive and the coincidence of a state with a federal regulation will usually mean the invalidation of the former.¹⁶ Where, however, the dictates and exigencies of national policy do not require uniform regulation or untrammelled federal action and the overwhelming importance of the federal interest is less readily apparent, and where the state's concern in the matter is genuinely grave and the need for state action critical, the tendency has been to allow the state to take action. In particular, when the challenged state law attempts to apply the police power to attain a legitimate state end, the Supreme Court has taken a long, hard look at the realities of the situation.

Formally the enterprise is one of the interpretation of the Act of Congress to discover its scope. Actually it is often the enterprise of reaching a judgment whether the situation is so adequately handled by national prescription that the impediment of further State requirements is to be deemed a bane rather than a blessing.¹⁷

¹⁵ *Pennsylvania v. Nelson*, supra note 11, at 501-502; *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, supra note 11, at 780 (Frankfurter's concurrence).

¹⁶ *Pennsylvania v. Nelson*, supra note 11, at 504 (invalidation of state law making sedition against the federal government a state offense); *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 413-14, 418-19 (1948) (invalidation of California law making all those ineligible for federal citizenship ineligible for commercial fishing license); *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (dictum); *Hines v. Davidowitz*, supra note 11, at 67-74 (invalidation of Pennsylvania statute imposing duty of registration upon aliens); but see, *Union Brokerage Co. v. Jensen*, 322 U.S. 202-210 (1944) (upholding of Minnesota foreign corporation law to a firm engaged in foreign commerce). See also note on trade regulation dealing with constitutionality of a state statute proposing labeling of goods imported from foreign countries, 4 B.C. Ind. & Com. L. Rev. 631 (1963).

¹⁷ T. R. Powell, *Current Conflicts Between the Commerce Clause and the State Police Power*, 12 Minn. L. Rev. 607 (1928), quoted by Justice Frankfurter in *Bethlehem Steel*, supra note 11, at 783.

In the following cases the state law was upheld: *Head v. New Mexico Bd.*, supra note 11, at 429-32 (state law on professional advertising against claim of preemption by Federal Communications Act); *Florida Lime and Avocado Growers v. Paul*, supra note 11, at 141-52 (California statute requiring all avocados imported or sold in state to have a higher minimum oil content than required by federal standards); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960) (application of city smoke abatement ordinance to federally licensed steamship); *California v. Zook*, supra note 11 (statute duplicating requirement of ICC certification); *Allen-Bradley Local v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 741-2, 747-51 (1942) (application of state labor law to prevent strike violence); *Savage v. Jones*, 225 U.S. 501, 529-40 (1912) (Indiana law requiring disclosure of formulas on foods offered for sale in state while in interstate commerce against claim of preemption by Pure Food and Drug Act).

In these cases the state law was invalidated: *Campbell v. Hussey*, supra note 11 (Georgia statute requiring tagging of tobacco subject to federal grading and identifica-

Accordingly, if the demand for prevention and elimination of discrimination in employment is acute and an effective solution to the problem necessitates resort to all available means, both national and local, the courts should not be too quick to imply a federal intent to exclude state action.

That racial discrimination in employment is not only a matter of substantial local concern and a valid object of state regulation, but also a problem demanding immediate and decisive action on all levels, is a proposition few would contest.¹⁸ Further, it is difficult to see any overriding national policy imperative in this area such as would necessitate, or even make desirable, the foreclosure of state regulation. Ultimately, whether a state Fair Employment Practices Act may be applied to an employer in interstate commerce and subject to federal executive orders should depend upon whether the federal government has explicitly declared an intent to interdict state regulation, or upon whether federal activity in the area is so pervasive and so intensive as to make the existence of coincidental state regulation a real impediment to the achievement of the federal goal, and so make the conclusion of such intent inescapable.

—In the instant case,¹⁹ the Court unanimously rejected the respondent's contention that the Civil Aeronautics Act,²⁰ now the Federal Aviation Act,²¹

tion regulations); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) (application of tort law and labor relations statute to conduct arguably within compass of § 7 or § 8 of NLRA, as amended); *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 159-69 (1942) (application of state food and drug law to federally controlled manufacture of renovated butter); *Missouri R.R. v. Porter*, 273 U.S. 341 (1927) (state law prohibiting rail carriers from making agreements limiting liability for cargo loss); *Charleston & W.C.R.R. v. Varnville Furniture Co.*, 237 U.S. 597, 601-09 (1915) (state law establishing standards of liability for loss on rail carriers different from those of Act to Regulate Commerce); *McDermott v. Wisconsin*, 228 U.S. 115, 124-37 (1913) (state law proscribing labels on glucose mixtures permitted by Pure Food and Drug Act).

An examination of these cases reveals that the state statute will usually be upheld when it achieves a result the Supreme Court deems desirable and does not deny the working and effect of a federal regulation or abridge what approaches being a federally granted right. Some cases are close, and might well have gone either way.

¹⁸ "Every recession demonstrates the old adage that the Negro is the first fired and the last hired. The Negro unemployment rate in the 1960 decline, for example, was roughly double that for whites. . . . Whether direct or indirect, the price of discrimination comes high. . . . From menial work, job insecurity, and unemployment, the stifling circle of discrimination leads on to slums, family instability, and school drop-outs. . . . At worst it means miseducation, juvenile delinquency, vice, and police brutality. Beyond all this is waste of human resources, loss of latent skills, and above all a blight on our moral stature." W. Mendelson, *Discrimination/Based on the Report of the United States Commission on Civil Rights* (1961). See also, *United States Commission on Civil Rights, Hearings Before the United States Commission on Civil Rights* (1962); *United States Commission on Civil Rights, Employment* (1961); *United States Commission on Civil Rights, the Fifty States Report* (1961); *Senate Special Comm. on Unemployment Problems, 86th Cong., 2d Sess., Studies in Unemployment, 173-223* (1960); and *Senate Special Comm. on Unemployment Problems, 86th Cong., 2d Sess., Readings in Unemployment* (1960).

¹⁹ *Supra* note 1, at 722-25.

²⁰ 52 Stat. 973, as amended, 49 U.S.C. §§ 401-722 (1952 ed.).

²¹ 72 Stat. 731, 49 U.S.C. §§ 1301-1542 (1958 ed.).

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the Railway Labor Act,²² and Federal Executive Orders requiring the insertion of an anti-discrimination clause in government contracts²³ had occupied the field of preventing employment discrimination by an interstate air carrier.

There is nothing in the Civil Aeronautics Act or its successor that indicates any Congressional intent to occupy the field of protecting airline employees from job discrimination. Its broad anti-discrimination provision²⁴ aims primarily at protecting customers from discriminatory practices, especially in the setting of rates.²⁵ It does strictly regulate the hiring of flight personnel and prescribe the necessary qualifications for employment as an airline pilot, but these regulations relate chiefly to health and safety.²⁶ Even assuming, as did the Court in the instant case, that the Act extends to the banning of racial discrimination in employment and that the Civil Aeronautics Board and the Administrator of the Federal Aviation Agency can use their broad certification power to prevent job discrimination by airlines, the lack of a manifestation of a Congressional intent to exclude state legislation in this field, together with an utter failure by the federal agencies to exert any authority they may have in this area, scarcely furnishes a rational basis for rejecting the application of a state fair employment measure against an airline.

The Railway Labor Act, certain provisions of which apply to airlines,²⁷ has been held to prevent exclusive bargaining agents, acting under its authority, from discriminating against minority groups which they are bound to represent, and it has even been applied to enjoin employers from carrying out discriminatory agreements.²⁸ But the force of the Act is directed primarily at unions: it imposes on them the duty of fair representation; its effect on employers is tangential. It carries no mandate to refrain from unfair employment practices *per se* and cannot be held to bar the application of state Fair Employment Practices Acts to employers.

Assuming, for the sake of argument, that Federal Executive Orders on government contracts apply to airlines carrying mail and that they could

²² 44 Stat. 577, as amended, 45 U.S.C. §§ 151-188 (1958).

²³ Executive Order No. 10479, 18 Fed. Reg. 4899 (1953); Executive Order No. 10557, 19 Fed. Reg. 5655 (1954); Executive Order No. 10925, 26 Fed. Reg. 1977 (1961), revoking and superseding previous orders.

²⁴ 49 U.S.C. § 1374(b) (1958). "No air carrier or foreign air carrier shall make, give or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever." §§ 1422-23 and 1429 confer authority over certification that could be invoked to sanction any discriminatory practices by airlines.

²⁵ Compare Interstate Commerce Act § 3(1), 49 U.S.C. § 3(1) (1958) and the cases under it. The Civil Aeronautics Act has been held to prevent racial discrimination against customers. *Fitzgerald v. Pan American World Airways*, 229 F.2d 499 (2d Cir. 1956).

²⁶ *People v. Western Airlines*, 42 Cal. 2d 621, 268 P.2d 723, appeal dismissed, 348 U.S. 859 (1954).

²⁷ §§ 151, 152, 154-163, 181-188.

²⁸ *Conley v. Gibson*, 355 U.S. 41 (1957); *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944); *Brotherhood of Railway Trainmen v. Howard*, 343 U.S. 768 (1952).

preclude state action,²⁹ there is not the slightest hint that the Executive intended to oust state regulation in their field of operation.³⁰

The Court's decision on the issue of supersession is proper. The federal interest involved is not so predominant as to militate against state action. Nor has Congress or the Executive evinced an intent to supersede state Fair Employment Practices legislation; nor does there exist a comprehensive and effective federal regulatory scheme governing the area such as would support an implication of federal preemptive intent.

The Court did not squarely locate the position of state laws against job discrimination in its relation to federal law, and, consequently, did not clearly indicate what would be the status of such laws if the federal government were to decide to take more affirmative action in this field. On the strength of what the Court has said on the preemption issue, however, it may be possible to delineate the area of permissible state action and to predict with some degree of certainty the limiting effect of future federal action.

The Court quotes conflicting language dealing with the result reached when federal and state action in a particular field coincide:

When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.³¹

On the other hand, "[the mere] fact of identity does not mean . . . the automatic invalidity of state measures."³² In upholding the validity of the Colorado Act against the contended preemptive effect of the Civil Aeronautics Act, the Court relied on its decision in *California v. Zook*³³ and dicta in

²⁹ It is not certain that they could. The orders in question were not issued under specific congressional authorization or under express Constitutional authority. If a federal executive order could foreclose state action, the test would have to be at least as strict as that for Congressional acts.

³⁰ The use of executive orders to ban discrimination by government contractors began in 1941 with the issuance of Executive Order 8802, 6 F.R. 3109. Subsequent executive orders continued and extended the program. E.O. 9346, 8 F.R. 7183 (1943); E.O. 9664, 10 F.R. 15301 (1945); E.O. 10308, 16 F.R. 12303 (1951); E.O. 10479, 18 F.R. 4899 (1953); E.O. 10925, 26 F.R. 1977 (1961), revoking and superseding previous orders. All of the orders establish primary responsibility for enforcement with the particular contracting agencies. They cover a very limited area, contain no express declaration of preemptive intent, and furnish scarce support for implying such an intent. They do, however, state the urgent need for full equality of employment opportunity.

As to the desirability of state action, the President's Committee on Civil Rights declared in 1947: ". . . The enactment of a federal fair employment practice act will not render similar state legislation unnecessary." To Secure These Rights, 102 (1947). Executive Order 10479 charged the Committee on Government Contracts to "establish and maintain cooperative relationships with agencies of state and local governments." Executive Order 10925 urges cooperation with all agencies in order to obtain compliance with the order by all "representatives of workers" who are or may be engaged in work under government contracts.

³¹ *Charleston & W.C.R. R. v. Varnville Furniture Co.*, supra note 17, at 597, 604 (1915).

³² *California v. Zook*, supra note 17, at 730.

³³ *Ibid.*

*Bethlehem Steel Co. v. New York State Labor Relations Bd.*³⁴ to the effect that the states will be allowed to act in areas of substantial local importance unless it is impossible to reconcile concurrent state and federal exercise of power. It appears, then, that the Supreme Court does not consider the interest of the federal government in regulating unfair employment practices supreme and exclusive, and that nothing short of an actual conflict between a state and federal regulation will be held to bar state efforts to eliminate such practices.

What will happen if and when the federal government embarks on a broad fair employment practices program would thus depend upon how comprehensive and pervasive the program is, and upon whether or not an accommodation of federal and state interests and policies can be achieved. Absent an expression of federal preemptive intent, the courts should hesitate to imply such an intent unless it is impossible to reconcile dual regulation in this area.³⁵

If a strong federal program is enacted with explicit provision for its effect on existing state laws, the preemption issue would appear only in limited contexts.³⁶ But, if such provision is lacking the prospect of effective

³⁴ Supra note 11.

³⁵ Bills proposing a federal fair employment practices program now pending in Congress include: H.R. 27, 316, 330, 405, 1967, 3523, 4031, 4573, 4874, 4896, 4915, 6120, and 6692, and S. 773, 1210, 1211, and 1937, 88th Cong. 1st Sess. (1963). All the Senate bills are available for hearings. Of the House bills only 405 has been acted upon. It was reported out with amendments by the Committee on Education and Labor on July 22, 1963. H.R. Rep. No. 570 88th Cong. 1st Sess. (1963).

H.R. 405 and S. 1210 (hereinafter cited as H. and S., respectively) are typical. The program they propose is a comprehensive one and should provide for effective regulation. In substance, with the exception of the number of employees or union members necessary for jurisdiction, their provisions are identical with those of the strong state acts. They seek:

- (1) the permanent establishment of a Full Employment Opportunity Committee. H. § 7; S. § 6.
- (2) the assumption of jurisdiction over all employers and labor unions with a designated number of employees or members. H. § 3; S. § 3.
- (3) the outlawing of "unlawful employment practices." H. § 5; S. § 5.
- (4) the empowering of the Committee to hear, investigate and adjudicate complaints, to enjoin violations, and to require affirmative action necessary to redress individual wrongs. H. § 10; S. § 7.
- (5) the conferring on the Committee the power to make rules and regulations necessary to obtain the ends of the Act. H. § 18(a); S. § 13(a).
- (6) the establishment of a procedure for judicial review and enforcement of Committee orders, with exclusive jurisdiction in the federal courts. H. § 11; S. § 8. Both provide for agreements whereby the federal body would refrain from administering the program if it is satisfied that the state agency is doing an effective job. H. § 12(b); S. § 7(a). Absent such an agreement, the Senate measure would expressly preclude state regulation, § 7(a), while the House bill would expressly permit it. § 12(a). It is difficult to perceive any desirable effect exclusion would have.

³⁶ Where state action is expressly excluded, the question is much more likely to arise: e.g., when the employer or union has fewer than the jurisdictional number of employees or members, when the state act imposes more rigid standards or proscribes activity not forbidden by the federal law, or when the statute of limitations exceeds that of the federal measure, or before effective federal regulation has become a fait accompli.

federal administration makes a sure prediction on how much leeway will be allowed the states at least theoretically difficult.

The existence of a pervasive federal regulatory scheme would afford ample grounds for implying Congressional intent to foreclose state action. There would always be the danger of a "mischievous conflict," produced when the federal and state agencies, acting on the same subject matter and applying similar standards, arrive at different results.⁸⁷ The problem of "forum-shopping" would also arise.⁸⁸ A consideration of the practicalities of the situation, however—the necessity for immediate and thoroughgoing action, the demonstrated ability of at least some of the states to accomplish results, and the sheer inadequacy of any federal program, however grandly conceived, to reach and regulate every aspect of the problem and to remedy every individual wrong technically within the scope of the act—outweighs the difficulties and dangers threatened by concurrent federal and state regulation. Indeed, it is submitted, if any area calls for concerted action, it is that of employment discrimination. The decision in *Colorado v. Continental* should have the effect of encouraging rather than limiting such action, regardless of potential Congressional action.

JEROME K. FROST

Securities Exchange Act—Treatment of Intrastate Use of Telephone.—*Rosen v. Albern Color Research, Inc.*¹—and *Nemitz v. Cunmy*.²—In the *Rosen* case, the plaintiff brings an action under Section 10(b) of the Securities Exchange Act of 1934³ alleging misrepresentations and failures to disclose by the defendant during transactions for the sale of securities conducted in part through telephone conversations. At the time of the telephone conversations both parties were within the city limits of Philadelphia. In this hearing on a motion which the court treated as a motion for summary judgment, the fundamental issue concerned the determination of whether this use of the telephone was a transaction in *interstate* or *intrastate* com-

⁸⁷ *Bethlehem Steel Corp. v. New York State Labor Relations Bd.*, supra note 11, at 775.

⁸⁸ Pennsylvania, six of whose cities have Fair Employment ordinances, provides for an election of forum by the party and then foreclosure. It also provides for the possibility of conflict by declaring that the state rule is to be applied by municipal courts in event of conflict. Pa. Stat. Ann., tit. 43, § 962(b).

¹ 218 F. Supp. 473 (E.D. Pa. 1963).

² 221 F. Supp. 571 (N.D. Ill. 1963).

³ 48 Stat. 881 (1934), 15 U.S.C. § 78j (1958).

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.