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THE COMMERCE CLAUSE AS A SHELTER FOR DISCRIMINATION

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I. INTRODUCTION

FOR ALMOST THIRTY years, the city of San Francisco has actively striven to protect its gay population from any form of discrimination in the commercial or marketplace settings. A shining example of this support was the passing of a 1972 local code blocking city businesses from contracting with companies that discriminate on the basis of sexual orientation.[1] Subsequent amendments to the code by the San Francisco Board of Supervisors focused on benefits packages. The final amended ordinance ("Ordinance") bars any company that discriminates in the provision of benefits "between employees with domestic partners and employees with spouses and/or between the domestic partners and spouses of such employees, where the domestic partnership has been registered with a governmental

[1] *See* S.F. ADMIN. CODE § 12B (1997).

entity pursuant to state or local law authorizing such registration."[2]

The Ordinance's nondiscrimination requirements apply to "any of a contractor's operations within San Francisco" as well as "any of a contractor's operations elsewhere in the United States."[3] Although San Francisco International Airport ("SFO") lies outside the city's boundaries, the Ordinance's reach extended to SFO's ability to enter into commercial relationships, including placing conditions on who may enter into SFO-related contracts with San Francisco.[4]

In 1998, the Ordinance was challenged by the principal trade organization for airlines in the United States, the Air Transport Association ("ATA").[5] As of mid-1997, fifteen ATA members flew into SFO, including Federal Express and United Airlines, neither of which provided domestic-partner benefits to employees nationwide.[6] Included among the ATA's four arguments against the Ordinance was a constitutional challenge based on the idea that it "is invalid under the United States Constitution as an attempt by the City to regulate conduct performed beyond its borders."[7] The ATA contended that the Ordinance violated the Commerce Clause[8] insofar as it placed an undue burden on interstate commerce.[9]

In the ATA's suit against the city, it argued that, as a federally regulated industry, the airlines were exempt from the Ordinance's mandate forcing them to extend domestic-partner benefits throughout the country.[10] The ATA contended that it was unconstitutional for the city to force its will on the entire airline industry.[11] The ATA couldn't fathom the audacity of a city ordinance geared toward punishing airlines for something that had no direct connection to San Francisco.

The ATA saw this as a classic case of overzealous local legislation. "This is not an issue over sexual orientation," said Sue

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[2] *Id.* § 12B.1(b).

[3] *Id.* § 12B.1(d).

[4] *See* Air Cal. Inc. v. City & County of San Francisco, 865 F.2d 1112, 1117 (9th Cir. 1989).

[5] Air Transp. Ass'n of Am. v. City & County of San Francisco, 992 F. Supp. 1149, 1156 (N.D. Cal. 1998).

[6] *Id.*

[7] *Id.* at 1160.

[8] *See* U.S. CONST. art. I, § 8. *See also* discussion *infra* Part III.

[9] *See Air Transp. Ass'n of Am.*, 992 F. Supp. at 1156.

[10] *Id.*

[11] *Id.*

Thurman, a United spokesperson.[12] "It's about whether or not a local government can dictate the employee policies of a company engaged in interstate commerce."[13] The Ordinance, however, was of a far more personal nature for San Francisco. Said City supervisor Leslie Katz: "[T]hey could do it because it's the right, decent and fair thing to do."[14]

In a confusing double-edged decision, the U.S. District Court for the Northern District of California ruled in favor of the ATA, finding that the Ordinance violated the Commerce Clause to the extent that it impermissibly regulates extraterritorial commerce.[15] The true meaning of the ruling was unclear because, while it allowed the Ordinance to be applied to businesses within the city, the court prevented the Ordinance's reach from extending to out-of-state businesses that contract with San Francisco.[16]

The hazy decision left both sides claiming victory. Lawyers for the airlines viewed the decision as a showing that no single city can set rules for the airline industry. "The court has said you can't apply this lawfully to a nationwide industry," said Brendan Dolan, an airlines attorney.[17] Said San Francisco City Attorney Louise Renne, "This is the first major decision upholding a domestic partners ordinance."[18]

But upon closer inspection, this ruling cannot accurately be described as anything more than a hollow victory for proponents of the Ordinance. While it acknowledged that a public locale may be able to take a stance against companies that discriminate, it placed an insurmountable obstacle in the path of a complete victory over discrimination. That obstacle is the Commerce Clause.[19]

The court explained that the Commerce Clause forbade the Ordinance from imposing burdens on interstate commerce.[20] The burden here was that once a company signed a San Fran-

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[12] Gregory Lewis, *United Sues Over Partners Law*, S. F. EXAMINER, Aug. 29, 1998, at A-1.

[13] *Id.*

[14] *Id.*

[15] *Air Transp. Ass'n of Am.*, 992 F. Supp. at 1159.

[16] *See id.* at 1165.

[17] *See* Maria LaGanga & Stephanie Simon, *Court Upholds S.F.'s Domestic Partner Benefits Ordinance*, L.A. TIMES, Apr. 11, 1998, at A1.

[18] Edward Epstein, *Judge's Ruling Affirms Domestic Partner Law in S.F. But Rules on Compliance Cut*, S. F. CHRON., Apr. 11, 1998, at A11.

[19] *See Air Transp. Ass'n of Am.*, 992 F. Supp. at 1161.

[20] *Id.* at 1165.

cisco contract, it would then be barred from providing unequal discriminatory benefit packages to its workers throughout the country without facing city-imposed penalties.[21] "The Ordinance burdens interstate commerce because out-of-state companies that provide discriminatory benefits packages are barred from obtaining certain City contracts."[22] This ruling was contrary to the Supreme Court's long history of applying the Commerce Clause as a remedy for discriminatory and morally questionable activities that impact interstate commerce.[23] The federal district court in California disregarded the Ordinance's anti-discriminatory purpose in favor of ensuring a free flow of interstate commerce.[24]

The court acknowledged that the Ordinance sought to combat a societal evil, stating that "San Francisco has a long history of taking a principled stand against discrimination and of being in the forefront of efforts to ban discrimination based on sexual orientation."[25] Yet, despite this recognition of the Ordinance's purpose, the city's anti-discriminatory goals were not enough to overcome a Commerce Clause argument. Said the court: "[T]he Ordinance is impermissibly extraterritorial to the extent the Ordinance is applied to out-of-State conduct that is not related to the purposes of the City contract."[26]

Thus, the court set a pecking order for Commerce Clause application, with top priority going to the best interests of unhindered interstate commerce. All other concerns, whether of a morally questionable or discriminatory nature, were secondary at best. Airlines could continue using SFO, which was subject to city ordinances, even if those airlines had benefits policies that stood for everything that San Francisco had fervently opposed for over three decades.[27]

This comment will explore the rationale behind this ruling by the Northern District of California and explain why it was a dangerous application of the Commerce Clause. Included is a showing of how the ruling contradicts most Supreme Court rul-

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[21] *Id.* at 1163.

[22] *Id.* at 1164.

[23] *See* discussion *infra* Parts III.A, C, IV.

[24] *See Air Transp. Ass'n of Am.*, 992 F. Supp. at 1161-62.

[25] *Id.* at 1164. *See also* Alioto's Fish Co. v. Human Rights Comm'n of San Francisco, 120 Cal. App. 3d 594, 605 (Cal Ct. App. 1972) (ruling that the city can prohibit a contractor from discriminating on the basis of sexual orientation).

[26] *Air Transp. Ass'n of Am.*, 992 F. Supp. at 1165.

[27] *See id.*

ings dealing with similar types of issues. Also included is an overview of Commerce Clause application to various types of relevant issues that were predominant in this San Francisco case. The court's application is lethal in that it kills any hope the city has of fully purging itself of companies that discriminate against gays. When analyzed in the manner adopted by the Northern District Court of California, the Commerce Clause will always stand in the way of local efforts to erase evils such as sex-based discrimination.

II. DOMESTIC PARTNER BENEFITS AND THE COURTS

A. HARD ROAD FOR DOMESTIC PARTNERS SEEKING BENEFITS

Historically, the courts have not been kind to proponents of work benefits for same-sex partners.[28] The majority of litigation regarding the denial of spousal benefits to employees in same-sex relationships has failed.[29] Most of these failed attempts were challenges to the benefits policies of state or local government employers under state employment discrimination statutes or constitutional provisions.[30]

One Achilles heel for seekers of same-sex benefits has been that the federal government has been reluctant to impose a mandate on private employers to provide domestic partner benefits.[31] Another problem is that same-sex marriage participants do not meet the definition of "spouse" provided by state marriage laws.[32] This is because no state currently recognizes same sex marriages as a legal marriage.[33] Therefore, since employment benefits traditionally have flowed to couples by virtue of their recognized marriage, same-sex partners have been unable to gain benefits because they are not per se legally married.

B. MARKETPLACE COMPETITION CLEARS PATH

Despite the inability to gain support from the federal government and the elusiveness of legal marital status, the tide has

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[28] *See* Paul Lynd, *Domestic Partner Benefits Limited to Same-Sex Couples: Sex Discrimination Under Title VII*, 6 WM. & MARY J. WOMEN & L. 561 (2000).

[29] *Id.*

[30] *See, e.g.*, Hinman v. Dep't of Personnel Admin., 167 Cal. App. 3d 516 (Cal. Ct. App. 1985). (rejecting claims of sexual-orientation and marital-status discrimination); Ross v. Denver Dep't of Health and Hosps., 883 P.2d 516 (Colo. Ct. App. 1994) (same).

[31] *See* Lynd, *supra* note 28.

[32] *Id.*

[33] *See id.*

shifted in favor of those seeking domestic partner benefits. Because of the competition for employees in the labor marketplace, employers have been motivated to extend same-sex benefits packages.[34]

"Employers recognize that more comprehensive compensation packages, including domestic partner benefits, are essential to attracting or retaining current employees."[35] Such benefits have become a key hiring or retention tool, especially in the fields of high technology, entertainment and media industries, financial and insurance firms, academia and law firms.[36] "Competition for employees in some of these segments of the labor market . . . has been intense in some circumstances. The existence or absence of domestic partner benefits can be, respectively, an incentive or deterrent to an individual accepting or continuing employment with an employer."[37] Employers offering benefits to domestic partners include American Express, Barnes & Noble, Chevron, Microsoft, and Walt Disney.[38] Many local governments have also adopted domestic-partner benefits for employees, including Boston and Cambridge, Massachusetts, Seattle, Washington, and Travis County, Texas.[39] As of 1998, ATA members Federal Express and United Airlines had yet to join the trend.[40]

III. THE COMMERCE CLAUSE

A. Beginnings of The Commerce Clause

In the landmark 1824 case *Gibbons v. Ogden*,[41] Chief Justice John Marshall set guidelines for Congress's power to control commerce amongst the states. It was the first significant description of the Commerce Clause, the constitutional vehicle by which Congress can regulate commerce between the states.[42] Included in the Commerce Clause is an implied limitation on

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[34] *See id.* at 568.

[35] *Id.*

[36] *See* Lynd, *supra* note 28, at 568.

[37] *Id.*

[38] Todd Foreman, *Nondiscrimination Ordinance 101 San Francisco's Nondiscrimination in City Contracts and Benefits Ordinance: A New Approach to Winning Partnership Benefits*, 2 U. Pa. J. Lab. & Emp. L. 319, 334 (1999).

[39] *See id.* at 344.

[40] *See* Air Transp. Ass'n of Am. v. City & County of San Francisco, 992 F. Supp. 1149, 1156 (N.D. Cal. 1998).

[41] Gibbons v. Ogden, 22 U.S. 1 (1824).

[42] *See* U.S. Const. art. I, § 8, cl. 3.

the power of state and local governments to enact laws impacting interstate commerce.[43]

The setting was a dispute between a shipping company that monopolized the waters surrounding New York and New Jersey and a competing independent contractor.[44] In ruling that navigation on the internal waters of a state, much less the waters between two states, was a subject for regulation by Congress pursuant to the Commerce Clause, the Supreme Court allowed Congress a broad power to regulate commerce between states.[45] In the context of this issue, Marshall declared that the term commerce meant "intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."[46] Marshall stretched Congress's reach to the fullest: "No sort of trade can be carried on . . . to which this power does not extend."[47]

To prevent federal regulation from running rampant, Marshall gave the reigns of congressional power a slight tug by establishing boundaries. "It may very properly be restricted to that commerce which concerns more States than one. . . . [I]ts action is to be applied to all the internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States. . .."[48] Thus, the question of whether Congress may take action under the Commerce Clause hinges on "whether the activity sought to be regulated is 'commerce which concerns more States that one' and has a real and substantial relation to the national interest."[49]

Over the next 70 years, the Supreme Court consistently found that numerous types of commerce fit this distinction of "'commerce which concerns more states than one' and has a real and substantial relation to the national interest."[50] Everything from meat packing (which the Court ruled was an intrastate activity that was part of a stream of commerce that crosses state lines)[51]

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[43] *See id. See also* New Energy Co. of Ind. v. Limbach, 486 U.S. 269 (1988); Cooley v. Bd. of Wardens, 53 U.S. 299 (1851).

[44] *See Gibbons*, 22 U.S. at 1.

[45] *See id.*

[46] *Id.* at 190.

[47] *Id.* at 193-94.

[48] *Id.* at 194-95.

[49] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 255 (1964).

[50] *Id.*

[51] In *United States v. Swift*, 196 U.S. 375 (1905), the Court tracked the stream of commerce as cattle delivery from Texas to Chicago for slaughter, and then it looked to the meat being shipped nationwide.

to the distribution of lottery tickets (which the Court determined as having affects in interstate commerce)[52] were within Congress's grasp.

B. Limitation of Commerce Clause Power

The Court took a sudden about-face in 1905 with its controversial ruling in *Lochner v. New York*, a decision that set the tone for the Court's disallowance of legislative interference with ordinary trades.[53] The Court ruled as unconstitutional a New York law that prohibited employers from contracting with workers to provide over sixty hours of labor per week. The Court contended that the government could not infringe on the right to contract. "Labor law pure and simple" is a flat-out illegitimate state end.[54] The message was clear: If the legislature can control the labor market, it will control other markets as well. The emphasis on the right to freedom to contract led to the Court finding many laws unconstitutional over the early part of the 20th Century.

The momentum of *Lochner* steamrolled even the best-intentioned government attempts at commerce regulation. During the Depression years of the 1930s, President Franklin Deleanor Roosevelt wanted to utilize federal government regulation to rescue the drowning economy. But the court invalidated several New Deal programs on the ground that Congress exceeded its power under the Commerce Clause.[55]

Subscribing to a markedly different approach to the food market than previously taken in *United States v. Swift*, the Court in *A.L.A. Schechter Poultry Corp. v. United States* invalidated a congressional act designed to control labor rules for the New York poultry industry.[56] The code, which applied to "transaction[s] in or affecting interstate commerce," was determined to be an excessive application of the Commerce Clause. *In Carter v. Carter Coal Co.*, federal laws geared toward easing labor tensions within the coal industry were invalidated by the Court because the dysfunction that the government was seeking to correct was only indirectly related to national economic harmony.[57]

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[52] *See* Champion v. Ames, 188 U.S. 321 (1903).

[53] Lochner v. New York, 198 U.S. 45 (1905).

[54] *Id.* at 57.

[55] *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); *see also* Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[56] *Schechter Poultry*, 295 U.S. at 549.

[57] *Carter*, 298 U.S. at 303.

C. Rapid Expansion of Commerce Clause Application

It wasn't until 1937 that the Court loosened the leash on federal control. In *NLRB v. Jones & Laughlin Steel Corp.*, the Court upheld the jurisdiction of the National Labor Relations Board to regulate labor relations in the steel industry.[58] The Court turned a deaf ear to the commonly used arguments of "flow of commerce" or "direct-indirect impact."[59] It instead adopted a realistic economic approach by recognizing that a labor stoppage of the Pennsylvania intrastate manufacturing operations would have a substantial effect on commerce.[60] Regarding their dismissal of previously accepted arguments, the Court warned that "the scope of [the commerce] power . . . may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them . . . would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."[61] More recently, the Court stated that "in the years since [*Jones & Laughlin Steel Corp.*] . . . Congress has had considerably greater latitude in regulating conduct and transactions under the Commerce Clause . . . ."[62]

The court remained completely deferential to congressional exercise of commerce power until 1995, when it ruled in *United States v. Lopez* that laws making it a federal crime to knowingly possess a firearm in a school zone exceeded Congress' authority under the Commerce Clause.[63] Crucial to the *Lopez* holding—and to the discussion herein—is the Court's identification of three broad categories of activity that may be regulated by Congress through its commerce power. These categories remain the standard by which all Commerce Clause issues are determined.[64]

First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate

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[58] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937).

[59] *Carter*, 298 U.S. at 238.

[60] *Jones & Laughlin Steel Corp.*, 301 U.S. at 59.

[61] *Id.* at 37. *See also* Healy v. Beer Inst., 491 U.S 324, 336 (1989) (ruling that the Commerce Clause precludes state and local laws that have the extraterritorial effect of regulating "commerce occurring wholly outside the boundaries of a State").

[62] United States v. Morrison, 529 U.S. 598, 608 (2000).

[63] United States v. Lopez, 514 U.S. 549, 551 (1995).

[64] In *Morrison*, the most recent Supreme Court case to deal with the Commerce Clause, the Court followed these *Lopez* guidelines in ruling against Congress' reliance on the Commerce Clause.

and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. "Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce . . . ."[65]

If the trend had continued to favor governmental deference in Commerce Clause matters, the Ordinance in San Francisco would have easily survived scrutiny. But the new trend against government control would influence future courts' application of the *Lopez* standards, and ultimately have a damaging impact on the fate of the San Francisco Ordinance.[66]

IV. COMMERCE CLAUSE APPLIED TO MORAL ISSUES

A. COMMERCE CLAUSE USED TO STIFLE MORAL WRONGS

Moral issues, such as the one regarding gay benefits in *Air Transportation Association of America v. City & County of San Francisco,*[67] are no strangers to the Commerce Clause. The Supreme Court has never hesitated to uphold state or city legislation prohibiting moral wrongs. The Court has ruled that federal legislation intended to curtail the disruptive effect of such evils as racial discrimination[68] and deceptive sales practices[69] on interstate commerce constitutes proper application of the Commerce Clause.

This concern for protecting interstate commerce from the ill-effects of moral wrongs has prompted Congress to extend the exercise of its power to gambling,[70] criminal enterprises,[71] fraudulent security transactions,[72] misbranding of drugs,[73] and discrimination against shippers.[74] From this it would seem that a compelling moral argument could be made for extending the Commerce Clause to the San Francisco Ordinance, which was

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[65] *See Lopez*, 514 U.S. at 558-59.

[66] *See* S.F. ADMIN. CODE §9.B (1997).

[67] *Air Transp. Assoc. of Am. v. City & County of San Francisco*, 992 F. Supp. 1149, 1156-57 (N.D. Cal. 1998).

[68] *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S 241 (1964).

[69] *See* FTC v. Mandel Bros., Inc., 359 U.S. 385 (1959).

[70] *See* Champion v. Ames, 188 U.S. 321 (1903).

[71] *See* Brooks v. United States, 267 U.S. 432 (1925).

[72] *See* SEC v. Ralston Purina Co., 346 U.S. 119 (1953).

[73] *See* Weeks v. United States, 245 U.S. 618 (1918).

[74] *See* United States v. Baltimore & Ohio R.R. Co., 333 U.S. 169 (1948).

implemented to defeat what the city believed was a moral wrong against same-sex couples.

B. *Morrison* Limits Commerce Clause Reach Into Moral Wrongs

Despite such rulings that seem to take a moral high ground, the federal government's application of the Commerce Clause is often limited when it comes to moral issues. The Court's 2000 ruling in *United States v. Morrison*,[75] which left violence against women out of the Commerce Clause's reach, makes all the more difficult a Commerce Clause claim for gay benefits. How could one argue that a company's refusal to grant benefits to same-sex couples fits within the Commerce Clause when the Supreme Court has just ruled that the most immoral of all activities, rape, does not fall under the Clause's umbrella?

In *Morrison*, the Supreme Court resisted a moralistic argument, made on behalf of a rape victim in Virginia, that such violence against women met the third *Lopez* prong of "'activity substantially affect[ing] interstate commerce.'"[76] Central to the *Morrison* ruling was a statement by Chief Justice Souter in his dissenting opinion in *Lopez*: "[A]ny conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far."[77] The Court interpreted this to mean that Commerce Clause regulation should extend strictly to those activities that have an obvious relation to interstate commerce, those that are "economic" in nature.[78]

Apparently, violence against women did not meet this requirement. In *Morrison*, the petitioner alleged that three male students raped her and that this attack violated the Violence Against Women Act (VAWA),[79] which provides a federal civil remedy for the victims of gender-motivated violence. Specifically, petitioners argued that the Commerce Clause provided Congress with the authority to enact the civil remedy provision of the VAWA because rape substantially impacts interstate commerce.[80]

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[75] *See* United States v. Morrison, 529 U.S. 598 (2000).

[76] *See id.* at 610 (citing *Lopez*, 514 U.S. at 559).

[77] *See Lopez*, 514 U.S. at 580.

[78] *Morrison*, 529 U.S. at 613.

[79] 42 U.S.C. § 13981 (2001).

[80] *See Morrison*, 529 U.S. at 604.

Relying on numerous congressional findings on violence against women, petitioner claimed that these activities had an adverse impact on interstate commerce. Regarding rape, the evidence focused on such findings as "close to half a million girls now attending high school will be raped before they graduate;"[81] and "almost 50 percent of rape victims lose their jobs or are forced to quit because of the crime's severity."[82] Congress found that crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.[83]

The Court first rejected this argument by drawing a parallel between rape and the handguns in schools issue of *Lopez*. The Court found rape to be similar to gun-toting teens because both were of "noneconomic, criminal nature."[84] According to the Court, the link between these activities and interstate commerce was "attenuated."[85] Said the Court: "Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[86] The Court also ruled that Congress intended the VAWA to pertain to activity of a broader more intrastate nature. Regarding the massive congressional findings on violence against women and its alleged affect on interstate commerce, the Court ruled that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation."[87]

To support this ruling, the Court fell back on *Lopez*: "[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make

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[81] S. REP. NO. 101-545, at 31 (1990) (citing ROBIN WARSHAW, I NEVER CALLED IT RAPE 117 (1988)).

[82] S. REP. NO. 102-197, at 53 (1991) (citing E. Ellis, et. Al., *An Assessment of a Long-Term Reaction to Rape*, 90 J. ABNORMAL PSYCHOL. 264 (1981)).

[83] *Morrison*, 529 U.S. at 615 (quoting H.R. CONF. REP. NO. 103-711, at 385 (1994)).

[84] *Id.* at 610.

[85] *Id.* at 612.

[86] *Id.* at 613.

[87] *Id.* at 614.

it so."[88] Clearly, the Court was ordering the federal government to butt out of "[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce," which has always been the duty of the states to control.[89]

The *Morrison* ruling disarmed a federal weapon aimed at curtailing rape and punishing those committing violent crimes against women. Other such well-intentioned efforts, like San Francisco's attempt to discourage discrimination against gays, would also be defused by Commerce Clause limitations.[90]

V. COMMERCE CLAUSE AND TRANSPORTATION LAW

A. CLAUSE PROTECTS TRANSPORTATION OF PEOPLE

Historically, the federal government's Commerce Clause powers were commonly extended to transportation-related activities, especially when discriminatory practices were involved. Basically, anything that interfered with the transport of people, whether it is the mode of transportation itself or the housing of that mode, was within grasp of the Clause.

The movement of passengers was long ago placed within the reach of the Commerce Clause. In 1913, Justice McKenna, speaking for the Court in *Hoke v. United States*, stated that "Commerce among the States . . . consists of intercourse and traffic between their citizens, and includes the transportation of persons and property."[91] Four years later in *Caminetti v. United States*, the Court ruled that "[t]he transportation of passengers in interstate commerce . . . is within the regulatory power of Congress, under the commerce clause . . . and the authority of Congress to keep the channels of interstate commerce free from

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[88] *Lopez*, 541 U.S. at 557 (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring)) (internal quotation marks omitted).

[89] *See Morrison*, 529 U.S. at 618. Although *Morrison* concluded that violence against women did not fit into the "interstate activity" category, subsequent rulings based partially or significantly on *Morrison* have deemed that some seemingly less significant issues fit the category for Commerce Clause purposes. In *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), a split panel ruled that a federal regulation protecting endangered wolves met the *Morrison* economic activity test and was thus subject to Commerce Clause scrutiny. In *United States v. Napier*, 233 F.3d 394 (6th Cir. 2000), the court ruled that possession of a weapon while subject to a domestic violence order impacts interstate commerce.

[90] *See* Air Transp. Ass'n of Am. v. City & County of San Francisco, 992 F. Supp. 1149, 1164-65 (N.D. Cal. 1998).

[91] Hoke v. United States, 227 U.S. 308, 320 (1913).

immoral and injurious uses has been frequently sustained, and is no longer open to question."[92] As transportation methods advanced into the modern era of automobile and then air travel, so to did federal regulation into those aspects of travel.[93] Eventually, it would apply to airport terminals.[94]

B. Impact of Discrimination on Transportation

In 1960, the Court was faced with a direct question of the effect of discriminatory behavior within transportation facilities on interstate commerce. The fascinating case of *Boynton v. Virginia* addressed racial discrimination by owners and managers of terminal restaurants.[95] The Court found that these discriminatory practices had an adverse affect on interstate commerce.

Boynton involved a black law student who was traveling by bus from Washington D.C. to Alabama. During a forty-minute stopover in Richmond, he refused to leave the whites-only section of a Richmond Trailways Bus Terminal restaurant. He was subsequently convicted and fined $10 on a charge that he "[u]nlawfully did remain on the premises of the Bus Terminal Restaurant of Richmond, Inc. after having been forbidden to do so by the Assistant Manager."[96] Specifically, the student was found to have violated a Virginia code which said that "[i]f any person shall without authority of law go upon or remain upon the . . . premises of another, after having been forbidden to do so by the owner . . . he shall be deemed guilty of a misdemeanor."[97] Among the student's claims on appeal was a Commerce Clause argument that, as an interstate passenger, he was due federal protection against discrimination in the terminal

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[92] Caminetti. v. United States, 242 U.S. 470, 491 (1917).

[93] *See* Morgan v. Virginia, 328 U.S. 373, 383 (1946) (finding that the nature of travel makes no difference in the power of federal regulation of transportation and stating that "[t]he recent changes in transportation brought about by the coming of automobiles [do] not seem of great significance."). *See also* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 271 (1964) (Black, J., concurring) (noting that all varieties of transportation and factors associated with that transportation can be subject to the Commerce Clause: "The facilities and instrumentalities used to carry on this commerce, such as railroads, truck lines, ships, rivers, and even highways are also subject to congressional regulation, so far as is necessary to keep interstate traffic upon fair and equal terms.").

[94] *See Air Transp. Ass'n of Am.*, 992 F. Supp. at 1164.

[95] *See* Boynton v. Virginia, 364 U.S. 454 (1960).

[96] *Id.* at 455-56 (emphasis and internal quotation marks omitted).

[97] *Id.* at 456 (quoting Va. Code § 18-225 (1958)).

restaurant, which was used by the bus carrier to serve interstate passengers . . . .[98]

The Supreme Court analyzed this portion of the student's claim by referring to previous rulings regarding discrimination against blacks in railroad dining cars. In *Henderson v. United States*, the Court ruled that discrimination in service to passengers due to their color in railroad dining cars violated the Commerce Clause.[99] In making its decision, the *Henderson* Court focused more on discrimination as a whole rather than its impact on interstate commerce: "Where a dining car is available to passengers holding tickets entitling them to use it, each such passenger is equally entitled to its facilities in accordance with reasonable regulations."[100]

The *Boynton* Court transferred this anti-discrimination theme into its holding, but more specifically addressed the interstate commerce ramifications. Instead of a straight Commerce Clause analysis, the *Boynton* court opted to explore the Interstate Commerce Act. Section 216 of Part II of the Interstate Commerce Act provides that "[i]t shall be unlawful for any common carrier . . . engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person in any respect whatsoever; or to subject any particular person . . . to any unjust discrimination or any unjust . . . prejudice."[101]

The Court first ruled that bus terminals fell within the Act's definition of a "carrier" because the Act was devised to apply to "interstate transportation facilities and property operated or controlled by a motor carrier."[102] Thus, the Court forbade the terminal restaurant's blatant prejudice by finding that "the terminal and restaurant must provide [their] services without discriminations prohibited by the Act. In the performance of these services, under such conditions the terminal and restaurant stand in the place of the bus company in the performance of its transportation obligations."[103]

While the *Boynton* and San Francisco cases both deal with discriminatory practices regarding transportation, the *Boynton* decision doesn't translate into a favorable finding for the San

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[98] *See id.*

[99] Henderson v. United States, 339 U.S. 816 (1950).

[100] *See id.* at 824.

[101] 49 U.S.C. § 316(d) (current version at 49 U.S.C. §§ 10701, 10741 (2002)).

[102] *Boynton*, 364 U.S. at 459-60.

[103] *Id.* at 464.

Francisco Ordinance. *Boynton* is only indirectly related to the San Francisco case, mainly because the Court in *Boynton* didn't find the Virginia code unconstitutional, only its application. *Boynton* does however raise an awareness of the Court's view on discrimination in interstate commerce.

VI. COMMERCE CLAUSE AND ANTI-DISCRIMINATION LAWS

A. COMMERCE CLAUSE APPLICATION TO FIGHT DISCRIMINATION

Had the discriminatory practices by the airlines in question in San Francisco been related to skin-color rather than sexual orientation, the Ordinance would have surely been upheld. This conclusion is drawn from the Supreme Court's history of approving Commerce Clause legislation geared towards halting racial discrimination.

In *Heart of Atlanta Motel, Inc. v. United States*,[104] the Court rejected an attack on the constitutionality of Title II of the Civil Rights Act of 1964 brought by the owners of an Atlanta hotel that refused to rent rooms to blacks. Heart of Atlanta, a large motel in downtown Atlanta, was appealing a district court order enjoining the owners "from continuing to violate Title II of the Civil Rights Act of 1964 by refusing to accept Negroes as lodgers solely because of their race."[105] Among other things, the Act, which came about due to the strong urgings of Presidents Robert F. Kennedy and Lyndon B. Johnson, sought to "prevent discrimination . . . in places of accommodation and public facilities."[106] The Court focused on the "overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse."[107] Included in that evidence, which comprised various Senate Committee hearings and reports, was a letter from the Administrator of the Federal Aviation Agency stating that it was his "belief that air commerce is adversely affected by the denial to a substantial segment of the traveling public of adequate and desegregated public accommoda-

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[104] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 243 (1964).

[105] *Id.* at 268 (Black, J., concurring).

[106] *Id.* at 247. Specifically, Title II, § 201(a) provides that: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a (2001).

[107] *Heart of Atlanta Motel*, 379 U.S. at 257.

tions."[108] The ultimate conclusion was that "this uncertainty stemming from racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community."[109]

Unwilling to adhere to the Act, which would have required the hotel owners to adjust their policy to accommodate all races, the owners argued that the operation of the motel was of a "purely local character."[110] The Court rejected this claim by reasoning that "'if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.'"[111]

By granting power to Congress under the Commerce Clause to apply the Act to a motel that discriminates against blacks, the Supreme Court appeared to place a stamp of approval on federal acts directed towards ending discriminatory practices. Yet, San Francisco's Ordinance, which was constructed to deter anti-gay policies, received no such stamp from the Northern District of California.

VII. COMMERCE CLAUSE AND LOCAL INTERESTS

A. Local Interests Prevail Regardless of National Impact

In California, the district court found local interests to be subordinate to national interests in unfettered interstate commerce. However, in 1989 the Maryland Supreme Court fully recognized and supported the anti-discriminatory goals of the City of Baltimore in *Board of Trustees of Employees' Retirement System v. Mayor of Baltimore*[112] Maryland's highest court ruled that a city may have a legitimate and strong public interest in disassociating itself from discriminatory practices. In this instance, a city ordinance called for divesture of city funds from companies that had business dealings with South Africa. "[I]t is indisputable that the Ordinances effectuate legitimate, local public interests .... They permit the City and its citizens to distance themselves from the moral taint of coventuring in firms that . . . help to

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[108] *Id.* at 253 (quoting S. Rep. No. 872, at 12-13 (1963)).

[109] *Id.*

[110] *Id.* at 258.

[111] *Id.* (quoting United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460, 464 (1949)).

[112] Board of Trustees of Employees' Retirement Sys. v. Mayor of Baltimore, 562 A.2d 720, 755 (Md. 1989). A more detailed analysis of the impact of this case can be found *infra* Part VIII.D.

maintain South Africa's system of racial discrimination."[113] The court then reached a conclusion that San Francisco probably wishes had been repeated by the Northern District of California in 1998: "[The Ordinances] express the City's sensitivity to the deep feeling of its citizenry on this matter of fundamental human dignity."[114]

VIII. COMMERCE CLAUSE LIMITATIONS TO LOCAL REGULATIONS: ADVERSE IMPACT ON OUTSIDE STATES

A. EXTRA-TERRITORIAL EFFECT

The Supreme Court has made it clear that it would be imprudent to argue for an ordinance like San Francisco's without fully considering its potential impact on outside states. One consideration should be whether the ordinance is dealing with business activity that is not occurring anywhere within that state. In other words, should the Ordinance be upheld when the discriminatory measures it seeks to admonish do not occur anywhere within San Francisco?

As the Supreme Court made clear in *Healy v. Beer Institute*, "the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State."[115] *Healy* involved a Connecticut beer-price-affirmation statute that required out-of-state beer shippers to assure that their posted prices for products sold to Connecticut wholesalers are, as of the time of posting, no more than the prices for those products in neighboring states.[116] In 1984, a brewers' trade association and major producers and importers of beer filed suit against the statute.[117] The association claimed that the statute violated the Commerce Clause by regulating out-of-state transactions and unduly burdening interstate commerce.[118]

The brewers were concerned that the statute established price limitations on products to be sold in other states.[119] Once the

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[113] *Id.*

[114] *Id. See also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989) (ruling that local governments have a compelling interest "in assuring that public dollars . . . do not serve to finance the evil of private prejudice.").

[115] Healy v. Beer Institute, 491 U.S. 324, 337 (1989).

[116] *See id.* at 326.

[117] *Id.*

[118] *Id.* at 327-28.

[119] *Id.* at 328.

brewers posted a price in Connecticut, they would be unable to change their prices in the neighboring states.[120]

The Supreme Court took heed of the brewers' concerns and scrutinized every possible impact of the Connecticut statute on interstate commerce.[121] The Court's goal: to determine whether the statute had the practical effect of regulating commerce occurring wholly outside Connecticut.[122] In particular, the Court sought to maintain "the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres."[123]

In making a determination as to the effects on wholly out-of-state commerce, the Court's critical inquiry was "whether the practical effect of the regulation [was] to control conduct beyond the boundaries of the State."[124] The answer was a resounding "yes," mostly because the statute would impact price settings in bordering Massachusetts, New York, and Rhode Island.[125] Despite the statute's purpose of protecting Connecticut citizens from overpriced beer, the Court ruled in favor of the brewers because "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature."[126]

The California District Court closely followed *Healy* when analyzing the impact of the San Francisco Ordinance. The district court found that the Ordinance had a similar effect as the Connecticut statute in *Healy* because "[o]nce a company signs a City contract, it cannot provide discriminatory benefit packages to its

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[120] *Id.* at 338.

[121] *Id.* at 327.

[122] *Id.* at 330.

[123] *Id.* at 335-36 (footnotes omitted).

[124] *Id.* at 336.

[125] Each state was impacted differently. New York was affected because the brewers' promotional discounts applied in that state. The statute treated such promotions as a reduction in price. Thus, the New York brewers would be locking in their Connecticut prices at the promotional New York price. Because Connecticut does not permit volume discounts, brewers in Rhode Island would have their Connecticut prices set at the lowest of their volume-discounted prices. Massachusetts brewers would be burdened by having to predict future prices before posting their Connecticut price.

[126] *Healy*, 491 U.S. at 336.

employees anywhere in the United States without facing penalties imposed by the City."[127] In other words, via the Ordinance, San Francisco "regulates certain extraterritorial practices of City contractors."[128]

Thus, the California district court passed on an opportunity to curb the discriminatory practice of some ATA members' benefit packages. One argument can be made that this was necessary to protect the interests of outside states. The counter argument, and the result of the *Healy* decision, is that discriminatory practices can often find a safe haven within the Commerce Clause.

B. Court's Preference for State Autonomy Over Local Goals

More recent Commerce Clause rulings by the Supreme Court, which stress state autonomy, will make it difficult for anti-discriminatory ordinances like the one in San Francisco to survive constitutional challenges. As seen in the 1996 case *BMW of North America v. Gore*, any perceived threat to a state's ability to control its own commerce will be extinguished.[129]

In *BMW*, the Court had to decide if the Alabama Supreme Court could include the actions of out of state BMW dealers when determining punitive damages against an in-state BMW distributor.[130] The Alabama dealer in this case had violated state law by not revealing to a customer that a car sold to that buyer had been repainted prior to sale.[131] The dealer was following BMW's national nondisclosure policy, which did not require dealers to reveal repairs that effect less than 3% of the car.[132] The customer sued BMW for its national nondisclosure policy.[133] The conduct of the Alabama dealer—not disclosing every presale repair to a car—was illegal in Alabama, but legal in several other states.[134]

In finding the $2 million penalty set by the Alabama Supreme Court excessive, the Supreme Court fell back on the *Healy* principles. Said the Court:

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127 Air Transp. Ass'n of Am. v. City & County of San Francisco, 992 F. Supp. 1149, 1162 (N.D. Cal. 1998).

128 *Id.*

129 BMW of N. Am. v. Gore, 517 U.S. 559 (1996).

130 *Id.*

131 *Id.*

132 *Id.*

133 *Id.*

134 *Id.* at 571.

> [W]hile we do not doubt that Congress has ample authority to enact such a policy for the entire Nation, it is clear that no single State could do so, or even impose its own policy choice on neighboring States . . . [O]ne State's power to impose burdens on the interstate market for automobiles is not only subordinate to the federal power over interstate commerce, . . . but is also constrained by the need to respect the interests of other States.[135]

The most damaging aspect of this decision with regard to the San Francisco Ordinance is the Supreme Court's fervent stance on protecting any form of state commerce from an outside state's law. "[B]y attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy choices of other States . . . . Alabama does not have the power . . . to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents."[136]

C. Autonomy Argument Adversely Impacts Ordinance

The *BMW* ruling provides a model argument for opponents of the San Francisco Ordinance. That argument would be that the Ordinance is attempting to alter the national benefits policies of certain airlines. If the State of Alabama couldn't infringe this on BMW for a policy as insignificant as automobile repairs, then a major policy affecting company benefits is also untouchable.

This emphasis on state autonomy ultimately was a major factor in the California court's decision against the Ordinance. In discussing the extraterritorial reach of the Ordinance, the court pointed out that "[o]nce a company signs a [San Francisco] contract, it cannot provide discriminatory benefit packages to its employees anywhere in the United States without facing penalties imposed by the city."[137] Regardless of San Francisco's goal of defending its citizens' right not to deal with companies that practice discrimination, the court remained staunch on protecting state autonomy: "[T]he City effectively regulates certain extraterritorial practices of city contractors . . . [T]he Ordinance is unconstitutional as applied to out-of-State conduct."[138] Obviously, it didn't matter that the out-of-State conduct being protected was discrimination.

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[135] *Id.*

[136] *Id.* at 572-73.

[137] *Air Transp. Ass'n of Am.*, 992 F. Supp. at 1162.

[138] *Id.*

D. Citizen's Interests v. State Autonomy

Despite its insistence on protecting state autonomy, the Supreme Court has not looked favorably on Commerce Clause arguments used to protect discriminatory practices that run counter to the interests of a state's citizenry. As evidenced in *City of Richmond v. J.A. Croson Co.*, a city can take measures to ensure that its citizens' money is not used to further discrimination.[139] The highest court in Maryland took a similar stance in *Board of Trustees of Employees' Retirement System of Baltimore v. Mayor of Baltimore.*[140]

While *Croson* is known mostly as a landmark case in the equal protection arena, it also provides the basis for an argument for protecting a citizenry's interest against supporting companies that discriminate. In *Croson*, the Supreme Court shot down a city plan requiring "prime contractors . . . awarded [city] contracts to subcontract a certain percentage of their profit from each contract to Minority Business Enterprises" because it violated the Equal Protection Clause.[141]

But while reaching this conclusion, the Supreme Court did recognize that a city has the power to protect its citizens from indirectly supporting entities that discriminate: "It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice."[142]

The Maryland Supreme Court used this idea of blocking the financing of private prejudice in the *Board of Trustees of the Employees' Retirement System of Baltimore* case. The court was faced with a Commerce Clause challenge against a pair of city ordinances requiring city employee pension systems to divest their holdings in companies with business interests in South Africa. The Trustees contended that the Baltimore ordinances placed an "impermissible burden on interstate commerce and improperly regulate foreign commerce."[143]

The court recognized the potential burdens on interstate commerce that could be brought on by the ordinances, but de-

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[139] City of Richmond v. J.A. Croson Co., 488 U.S. 462 (1989).

[140] Board of Trustees of Employees' Retirement Sys. of Baltimore v. Mayor of Baltimore, 562 A.2d 720 (Md. 1989).

[141] *See Croson*, 488 U.S. at 477.

[142] *Id.* at 492.

[143] *Bd. of Trustees*, 562 A.2d at 749.

cided that the purpose of these ordinances—fighting discrimination—outweighed any financial consequences. "While we do not dispute that the ordinances impose some burden . . . that burden is not excessive in relation to the benefits."[144] Then, in a move that should have been made by the Northern District Court of California, the Maryland Supreme Court firmly defended the city's desire not to support racism. Said the court:

> [I]t is indisputable that the Ordinances effectuate legitimate, local public interests. The divestiture provisions respond to the local interest in managing the City's finances and in ensuring that pension funds are invested in a socially responsible manner. They permit the City and its citizens to distances themselves from the moral taint of coventuring in firms that, in the view of many, help to maintain South Africa's system of racial discrimination. . . . [T]hey express the City's sensitivity to the deep feeling of its citizenry on this matter of fundamental human dignity.[145]

The court then applied a balancing test that, if applied to the San Francisco Ordinance, would appear to favor the Ordinance. The test pitted local concerns versus the relative burden of these concerns on interstate commerce. "The Ordinances embody the City's moral condemnation of racial discrimination. The use of pension funds . . . is an issue of deep concern . . . to all citizens of Baltimore who are sensitive to slavery's persistent legacy . . . . [T]he Ordinances burden on the interstate sale of securities does not outweigh these unique and profound local concerns."[146]

When the Northern District Court of California applied this balancing test to the San Francisco Ordinance, the scales again tilted toward protecting local public interest and away from interstate commerce. The California court construed the Maryland Supreme Court's balancing test to mean that such ordinances fail if the burden they place on interstate commerce are "excessive in relation to the putative local benefits."[147] With regard to the application of the Ordinance to ATA members within California that use discriminatory benefits practices, the court determined that the Ordinances were not overly burdensome. "[T]he local interest in dissociating the City from discrimination justifies the minor burden of requiring companies to modify discriminatory benefit plans, especially because con-

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[144] *Id.* at 755.

[145] *Id.*

[146] *Id.*

[147] *Air Transp. Ass'n of Am.*, 992 F. Supp. at 1164-65.

tractors can comply with the Ordinance without increasing their benefit costs."[148] Ecstatic over this portion of the decision, Tom Ammiano, a gay supervisor who was a driving force behind the Ordinance, crowed, "I am as happy as a pig in a poke. The law was left standing."[149]

But this proved to be a hollow victory for supporters of the Ordinance. Because the Ordinance was deemed to be impermissibly extraterritorial with regard to the out-of-state activities of ATA members, it was found to be in violation of the Commerce Clause.[150] The airlines would only have to extend same-sex benefits to their in-state businesses.[151]

IX. EXCESSIVE BURDEN DILEMMA

A. THE EXPENSE ARGUMENT

The key problem was that, despite the obvious legitimacy of the local interest, the Ordinance would force significant financial burdens on ATA members that wished to contract with the airport. A high financial burden can cause the scales to tip away from local public interest.[152] In *Pike v. Bruce Church, Inc.*, the Supreme Court was faced with a Commerce Clause argument regarding an Arizona act requiring all cantaloupes grown in the state and offered for sale to be packed in a manner that met the approval of a state supervisor.[153] To meet this requirement, the growing company would need a harvesting factory in Arizona where a state inspector could do his duties. In this case, the appellee company circumvented the act by transporting the harvested cantaloupes to their California factory, which was only thirty-one miles from the growing site in Arizona.[154]

When the official in charge of enforcing the act brought suit, the grower countered with a Commerce Clause argument that it would be too expensive for the company to adhere to the act. The grower claimed that it could only satisfy the act by building facilities within Arizona.[155] The grower estimated that "the practical effect of the . . . order would be to compel the company to

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148 *Id.*
149 Epstein, *supra* note 18.
150 *Air Transp. Ass'n of Am.*, 992 F. Supp. at 1162.
151 *See supra* Part VIII.A.
152 *See* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).
153 *See id.* at 138.
154 *Id.* at 139.
155 *Id.* at 140.

build packing facilities in . . . Arizona, that would take many months to construct and would cost approximately $200,000."[156]

The Supreme Court believed that there existed a legitimate local purpose, but that the interest could not withstand a showing of a disproportionate burden on interstate commerce. "If a legitimate local purpose is found, then the question becomes one of degree."[157] Here, the degree of the state's interest—an indirect financial perk gained by enhancing the reputation of instate growers—was not enough to justify the financial burden it placed on the grower. Said the Court,

> [T]he State's tenuous interest in having the company's cantaloupes identified as originating in Arizona cannot constitutionally justify the requirement that the company build and operate an unneeded $200,000 packing plant . . . Even where the State is pursing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal.[158]

The California court's reliance on the *Pike* decision frustrated San Francisco's efforts to battle discrimination. This Commerce Clause argument, which cites expense as a burden, makes it easy for those who discriminate to continue their practices without fear of intrusion by the courts.

X. GETTING THE ORDINANCE PAST THE COMMERCE CLAUSE

A. THE LEGITIMATE LOCAL PURPOSE TEST

Obviously, the impact of the Ordinance on the citizens of San Francisco was not enough to sway the Northern District Court of California. However, one tactic that may have swayed the court to fully favor the Ordinance would have been application of the *Hughes* test.

The notion of giving deference to local interests was advanced by the Supreme Court in *Hughes v. Oklahoma.*[159] The Court ruled that the test to be applied when faced with a local regulation that discriminates against interstate trade is: (1) the statute must serve a legitimate local purpose; and (2) the purpose must be one that cannot be served as well by available non-discriminatory means.[160]

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156 *Id.*

157 *Id.*

158 *Id.* at 145.

159 Hughes v. Oklahoma, 441 U.S. 322 (1979).

160 *See id.*

The Supreme Court later applied this test in *Maine v. Taylor*, when a statute against importing live baitfish faced a Commerce Clause challenge.[161] The Court ruled that a Maine statute does not violate the Commerce Clause; the ban "serve[d] legitimate local purposes" of protecting the state's unique fisheries from parasites and non-native species that might be included in shipments of live baitfish and it was shown that such purposes "could not adequately be served by available nondiscriminatory alternatives."[162]

The state satisfied the first prong by showing that there were "substantial uncertainties" regarding the impact of baitfish parasites on Maine's unique wild fish population.[163] The consequences of that exposure were equally uncertain. The second prong, regarding available nondiscriminatory alternatives, was met by showing that "testing procedures for baitfish parasites had not yet been devised."[164]

An application of the *Hughes* test to the San Francisco Ordinance may have guided the Northern District Court of California in another direction than the one taken. The city would have no problem satisfying the first prong. Because of its prominent gay population and long tradition of protecting gay rights, San Francisco clearly has a legitimate and substantial interest in prohibiting its businesses from contracting with companies that have discriminatory benefits packages.

Satisfying the second prong would be more problematic. ATA could argue that the expense required to extend such benefits to same-sex couples is too burdensome. This is the common argument of companies with discriminatory benefits packages.[165] San Francisco could counter this by explaining that, not only would equal benefits packages be inexpensive, but would actually give the airlines a competitive edge in attracting employees.[166] Also, San Francisco could follow Maine's argument that, even if it must "make reasonable efforts to avoid restraining the free flow of commerce across its borders, . . . it is not required to develop new and unproven means of protection at an uncertain cost."[167] And just as Maine did not need to de-

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161 Maine v. Taylor, 477 U.S. 131 (1986).
162 *Id.* at 151.
163 *See id.* at 142.
164 *Id.* at 143.
165 *See generally* Lynd, *supra* note 28.
166 *See* Foreman, *supra* note 38.
167 *Taylor*, 477 U.S. at 147.

velop an alternate method, neither must San Francisco be responsible for developing a less restrictive alternative.

B. MARKETPLACE PARTICIPATION EXCEPTION

The marketplace participation exception is a common, and often successful, response to Commerce Clause challenges against local regulations.[168] If a party can prove that it fits under the market participant doctrine, it is immune from the Commerce Clause claim of being too burdensome on interstate commerce. According to the Supreme Court, if a locality or state "is acting as a market participant rather than as a market regulator, the . . . Commerce Clause places no limitations on its activities."[169] Furthermore, as explained by the Supreme Court in *Reeves Inc. v. Stake*, "state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants . . . . [W]hen acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause."[170]

Market participant status is proven by showing that the entity that promulgated the ordinance or regulation is acting as a buyer or seller in a market rather than in "its distinctive governmental capacity."[171] This buyer or seller status can be obtained by a showing that the state spent its own money when entering into the commercial activity in question. This standard was established in 1983 in *White v. Massachusetts Council Construction Employers, Inc.*[172] In *White*, the mayor of Boston established an executive order, which required that city-funded construction contracts be performed by a minimum portion of local residents.[173] The Supreme Court had to decide if this restriction violated the Commerce Clause.[174] The Court ruled in favor of the order, stating that it fit the market participation exception because "[i]nsofar as the city expended only its own funds in entering into construction contracts for public projects, it was a

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168 The Supreme Court allowed the exception in *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983) and in *Reeves, Inc v. Stake*, 447 U.S. 429 (1980).

169 S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 93 (1984).

170 *Reeves*, 447 U.S. at 439.

171 New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 275 (1988).

172 *See White*, 460 U.S. at 204.

173 *See id.*

174 *Id.* at 206.

market participant . . . ."[175] San Francisco spent city funds to build SFO, thus it satisfies this requirement of the doctrine.

Also, San Francisco is far from the first locality to seek immunity from the Commerce Clause for an ordinance that benefits its own citizens to the potential detriment of out-of-state individuals outside of California. States have often successfully used the marketplace participation exception to aid their own people to the disadvantage of those in outside states. As established by the Supreme Court in *Hughes v. Alexandria Scrap Corp.*, "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens . . . ."[176]

For example, in *Reeves*, the Supreme Court ruled that a South Dakota policy that directed proceeds from a state-owned cement plant only to state residents was not implicated by the Commerce Clause because the state had market participant immunity.[177] The Court concluded that the Commerce Clause was never intended to interfere with a state's right to unhindered participation in the marketplace. Said the Court, "There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market."[178] And, just as San Francisco sought the right to pick which companies they could contract with (i.e., companies that didn't practice discrimination), South Dakota also desired to choose its business associates. The Court placed South Dakota in the same light as an individual businessman and granted the same protections, stating that the market participant doctrine rests in part on "'the long recognized right of a trader . . . freely to exercise his own independent discretion as to parties with whom he will deal.'"[179]

C. Does the Ordinance Stretch or Break Market Participation Boundaries?

There are two major pitfalls that need to be avoided for the Ordinance to prevail via the Market Participation Doctrine. First, the Ordinance must not affect areas in which San Fran-

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[175] *Id.* at 214-15.

[176] Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976).

[177] *See Reeves*, 447 U.S. at 429.

[178] *Id.* at 437.

[179] *Id.* at 438-39 (quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919)).

cisco is not a market participant. As set forth by the Supreme Court in *South-Central Timber Development, Inc. v. Wunnicke*, "[t]he State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market."[180] So, while the Ordinance is proper as it pertains to the city in which it is designated to protect, it may be poisoning itself by impacting the commerce of foreign states.

In *Wunnicke*, a city in Alaska had conditioned the selling of Alaskan timber on the basis that the manufacture of the timber occurs within the state. The Supreme Court ruled that, despite having reached market participation status, the requirement violated the Commerce Clause.[181] The Court set a boundary for an exception to the doctrine, stating that "the limit of the market participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further."[182]

When San Francisco argued for the marketplace participant exception, the Northern District of California analyzed whether the Ordinance burdened markets in which San Francisco was not a participant. This was done by applying a version of the *Wunnicke* test, which the court set out as "whether, by implementing the Ordinance, the City inappropriately reaches beyond the sphere of economic activity in which it is participating in an attempt to regulate commerce beyond its borders."[183] Based on a footnote from the *Hughes* decision, the court narrowed the realm of who may be legally impacted within this "sphere of economic activity" to those "working for the city."[184]

This seemingly insignificant footnote in *Hughes* was deadly when applied to the Ordinance. The Northern District Court of California ruled that the Ordinance impermissibly regulated out-of-state commerce. Because the Ordinance requires contractors with SFO to guarantee they will not use discriminatory benefits packages in any of their businesses elsewhere in the country, the court ruled that "the Ordinance reaches too far to be shielded by the market participant exception . . . [T]his class of economic activity encompasses much more than that in which the City is a major participant . . . and the individuals

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[180] S.-Cent. Timber Dev. Inc., v. Wunnicke, 467 U.S. 82, 97 (1984).

[181] *Id.* at 84.

[182] *Id.* at 97.

[183] Air Transp. Ass'n of Am. v. City & County of San Francisco, 992 F. Supp. 1149, 1163 (N.D. Cal. 1998).

[184] *Id.*

affected by the Ordinance could hardly be described, even informally, as 'working for the city.'"[185]

Also, because the Ordinance would seemingly punish contractors for their out-of-California activities, it was deemed inappropriate.[186] The penalties set out by the Ordinance—two-year ban from working with the city and forfeiture of money owed by the city—inadvertently serve a regulatory purpose. "The Ordinance, therefore, has a 'substantial regulatory effect outside [the] particular market' in which the city participates."[187]

But the Ordinance could have found some salvation under *Wunnicke* if the city could show that the Ordinance could be altered to fit within the market participant doctrine. In his fiery dissent to the majority ruling in *Wunnicke*, Justice Rehnquist argued that the State of Alaska could have reached its desired result by altering its law to clearly fall within the doctrine.[188] Therefore, the city would have to show that it could restructure the doctrine in such a manner as to serve its anti-discriminatory goals without forcing contractors to changing their discriminatory practices throughout the United States.

Obviously, such a modification would be conceptually impossible. Because ATA members are based throughout the country, there is no practical method by which the Ordinance could be re-written to affect only instate activities. This fact was not lost on the Northern District of California: "Rehnquist's criticisms . . . do not apply here. There is no way that the City could modify this portion of the Ordinance so that it would meet the requirements of the marketplace participant doctrine . . . . [T]he imposition of national nondiscrimination guarantees pursuant to the Ordinance is not shielded by the marketplace participant exception."[189]

D. A Commerce Clause Argument in Favor of the Ordinance

Obviously, the *Hughes* test and Market Participant Doctrine are difficult arguments filled with landmines at each turn. Perhaps a safer approach for clearing local regulations like the Ordinance would be a policy-based Commerce Clause argument.

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185 *Id.*

186 *Id.*

187 *Id.*

188 *S.-Cent. Timber Dev.*, 467 U.S. at 101-03 (Rehnquist, J. dissenting).

189 *Air Transp. Ass'n of Am.*, 992 F. Supp. at 1163.

Since the courts disfavor legislation that unduly burdens interstate commerce, San Francisco could argue that the Ordinance is necessary to ease the burden that discrimination against homosexuals places on interstate commerce.

This argument would be based on the idea that happier domestic partners are more productive in the marketplace, and thus less likely to be a drain on the local or national economies. Extending domestic partner benefits promotes the "economic stability of the partners individually and of the families created by the partners. The larger society will benefit from these improvements . . . For example, partners in stable relationships will be more productive, more involved in their community, and less likely to be dependent on social programs."[190] Therefore, a lack of local ordinances that mandate domestic partner benefits places a burden on any interstate commerce that involves participants of same sex marriages.

Considering the Supreme Court's inconsistent application of the Commerce Clause to local regulations—especially those ordinances that strive to erase moral evils such as discrimination—this argument may just work.

XI. CONCLUSION

The Supreme Court's inconsistent application of the Commerce Clause leaves little hope for any locale that seeks to cleanse itself of discrimination. Every time a city enacts legislation to realize this goal, an opposing party can claim it is unconstitutional under a variety of Commerce Clause arguments. Whether it is a "burden on interstate commerce" argument, or one of "extraterritoriality," the local legislation will face constant lethal challenges that it has very little chance of surviving.

Unfortunately, those that strive to fight discrimination through city ordinances are left with little or no hope for victory. As San Francisco learned, the most that can be gained by establishing an anti-discrimination ordinance is a partial victory. The Commerce Clause makes complete victory impossible.

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[190] Philip Horne, *Challenging Public- and Private-Sector Benefit Schemes Which Discriminate Against Unmarried Opposite-Sex and Same-Sex Partners*, 4 LAW & SEXUALITY 34, 38 (1994).