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CONSTITUTIONAL LAW - COMMERCE CLAUSE - POWER TO REGULATE INTRASTATE TRANSACTIONS - MILK PRICES

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CONSTITUTIONAL LAW — COMMERCE CLAUSE — POWER TO REGULATE INTRASTATE TRANSACTIONS — MILK PRICES — Pursuant to the Agricultural Marketing Agreement Act of 1937, conferring on the Secretary of Agriculture the power to regulate the handling of milk which is "in the current of interstate or foreign commerce, or which *directly* burdens, obstructs or affects interstate or foreign commerce in such commodity or product thereof," [1] the secretary issued marketing orders fixing minimum prices to be paid to producers of milk in the Chicago area. Respondent, who purchased and sold milk only within the state of Illinois, refused to comply with the order. The United States sought enforcement of the order, but the complaint was dismissed. *Held*, reversed and remanded. Congress has the power under the commerce clause to regulate intrastate transactions which affect interstate commerce even though this effect is caused only by competition, and such power was conferred upon the Secretary of Agriculture by the act. *United States v. Wrightwood Dairy Co.*, (U. S. 1942) 62 S. Ct. 523.

It is now generally accepted that Congress has the power to regulate those intrastate activities which affect interstate commerce; [2] and it has been expressly held that Congress the power to regulate the price of milk distributed through the medium of interstate commerce.[3] Of particular interest in the principal case is the holding that the statute involved confers upon the Secretary of Agriculture the full power possessed by Congress to regulate the price of intrastate commodities which affect the price of similar commodities handled through the

[1] 50 Stat. L. 246 (1937), 7 U. S. C. (1940), § 671.

[2] Houston, E. & W. T. Ry. v. United States, 234 U. S. 342, 34 S. Ct. 833 (1913); Swift & Co. v. United States, 196 U. S. 375, 25 S. Ct. 276 (1905); National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615 (1937); National Labor Relations Board v. Fainblatt, 306 U. S. 601, 59 S. Ct. 668 (1939); Currin v. Wallace, 306 U. S. 1, 59 S. Ct. 379 (1939); United States v. Darby, 312 U. S. 100, 61 S. Ct. 451 (1941).

[3] United States v. Rock Royal Co-op, 307 U. S. 533, 59 S. Ct. 993 (1939).

medium of interstate commerce.[4] In *Federal Trade Commission v. Bunte Bros.*[5] a different conclusion was reached by the Court in interpreting section 5 of the Federal Trade Commission Act[6] on the theory that this statute should be so interpreted as to restrain a federal agency from exercising a "pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local law."[7] A contrary approach is enunciated in the *Minnesota Rate Cases* and the *Shreveport Rate Case*, which held that the Interstate Commerce Commission possessed the power to fix intrastate carrier rates when such rates affected those of interstate carriers.[8] The theory of the Court in interpreting the Interstate Commerce Act seems to be that the statute confers upon the commission the power to act when the proposed action is in accord with the purpose of the act, provided there is no express statutory provision to the contrary.[9] Weight is also given to the fact that the commission considered the problems carefully and in the light of its investigation concluded that it had jurisdiction.[10] It is possible to reconcile the decision of the *Shreveport* case with that of the *Bunte Bros.* case on the basis of different activities which the different statutes seek to regulate, but, as pointed out by Justice Douglas,[11] such differences are more

[4] The Court concludes that the word "directly" as used in the act was not intended to limit the power of the secretary, but in view of the legislative history of the act was intended to confer on the secretary all the power Congress possessed under the Constitution.

[5] 312 U. S. 349, 61 S. Ct. 580 (1941).

[6] Section 5 of the act provides that "unfair methods of competition *in commerce* are hereby declared unlawful." 38 Stat. L. 719 (1914), 15 U. S. C. (1934), § 45. The Court in Federal Trade Comm. v. Bunte Bros., 312 U. S. 349, 61 S. Ct. 580 (1941), speaking through Justice Frankfurter, held that Congress in granting the commission the power to prevent unfair methods of competition "in commerce" did not extend the commission's authority to include the methods of an intrastate business which affected interstate commerce. Justices Douglas, Black and Reed dissented.

[7] Federal Trade Commission v. Bunte Brothers, 312 U. S. 349 at 354, 61 S. Ct. 580 (1941).

[8] Minnesota Rate Cases, 230 U. S. 352, 33 S. Ct. 729 (1912); Houston, E. & W. T. Ry. v. United States, 234 U. S. 342, 34 S. Ct. 833 (1913). The Court in the Bunte Bros. case relied on the absence of express language in the statute as a basis for withholding jurisdiction from the commission. The act which created the Interstate Commerce Commission contained an express provision to the effect that the commission was not to have jurisdiction over carriers engaged in carrying wholly within one state. 24 Stat. L. 379 (1887), and amendment of 1906, 34 Stat. L. 584 (1906), 49 U. S. C. (1934), § 1. Yet the Court interpreted this provision to mean that the commission had jurisdiction over intrastate rates affecting interstate commerce.

[9] "It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at, and there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach." Houston, E. & W. T. Ry. v. United States, 234 U. S. 342 at 356, 34 S. Ct. 833 (1914).

[10] Id., 234 U. S. at 359.

[11] Dissenting in Federal Trade Commission v. Bunte Bros., 312 U. S. 349 at 358, 61 S. Ct. 580 (1941), "The interrelation between the intrastate and interstate activities in the instant case is hardly less intimate than in the Shreveport Case. The fact that the nexus here is economic and not physical is inconsequential." That the decision of

artificial than real. In the express language of the principal case there is nothing to indicate disapproval of the approach of the *Bunte Bros.* case.[12] On the other hand, it is interesting to note that economic activity is involved in the principal case as well as in the *Bunte Bros.* case and that the particular regulation approved in the principal case (price control) in the past has been considered a subject less fit for regulation than the prevention of unfair competition.[13] Whether or not one feels free to think of the principal case as overruling the *Bunte Bros.* case, the result of the principal case seems more desirable from an economic [14] and practical [15] point of view.

the Bunte case may have been based on the Court's disfavor of the Federal Trade Commission, see 39 MICH. L. REV. 1228 (1941).

[12] There is a substantial difference between the statutes involved: the Agricultural Marketing Agreement Act is unambiguous to the extent that control of some intrastate activities is rested in the Secretary of Agriculture; while the statute setting up the Federal Trade Commission does not expressly touch upon the question whether control of any intrastate activities is within the jurisdiction of the Federal Trade Commission. Further, it may be noted that Justice Frankfurter, who wrote the majority opinion in the Bunte Bros. case, concurred with the decision of Justice Stone in the principal case and that Justice Stone concurred with Justice Frankfurter in the Bunte Bros. case.

[13] See Williams v. Standard Oil Co. of Louisiana, 278 U. S. 235, 49 S. Ct. 115 (1929); Morehead v. New York ex rel. Tipaldo, 298 U. S. 587, 56 S. Ct. 918 (1936). However, the concept that price control was beyond the power of both state and federal governments because a violation of the due process clauses of the Fifth and Fourteenth Amendments has fallen into disrepute. See Olsen v. State of Nebraska, ex rel. Western Reference & Bond Assn., 313 U. S. 236, 61 S. Ct. 862 (1941), and cases cited therein.

[14] The economic result of the Bunte Bros. case was to leave a "no man's land" in the field of regulation of unfair competition until Congress should see fit to confer unequivocally the power desired by the Federal Trade Commission. On the other hand, the decision of the principal case allowed a handling of the problem in all of its aspects without the need of further legislation.

[15] "In this case as in the other [Shreveport case] the problem is the existence of administrative authority to provide effective protection of interstate commerce against discrimination. In the Shreveport Case statutory doubts were resolved so as to strengthen the administrative process even against the claim that thereby the state authorities would be 'shorn of those powers which alone can justify their existence.' Similar arguments should not deter us from being tolerant of an asserted power, admittedly constitutional, to deal effectively with the realities of economic interdependence." Federal Trade Commission v. Bunte Bros., 312 U. S. 349 at 358, 61 S. Ct. 580 (1941), Justice Douglas dissenting. The same liberal approach is advocated in interpreting state statutes regulating interstate commerce where the federal government has not acted or has acted only to a partial extent. The primary purpose in interpreting statutes dealing with economic problems should be to allow for the maximum of regulation so that if it is necessary it may be undertaken. See Dowling, "Interstate Commerce and State Power," 27 VA. L. REV. 1 (1940).