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CONSTITUTIONAL LAW — COMMERCE CLAUSE — REGULATION OF RENOVATED BUTTER MANUFACTURE — Plaintiff, who was engaged in the manufacture of renovated butter from packing stock butter, brought an action to enjoin Alabama officials from enforcing state laws relating to the inspection

and seizure of the raw material. Plaintiff contended that since the production of renovated butter was taxed and regulated by the United States, state action was excluded. The federal act conferred upon the Secretary of Agriculture, among other things,[1] the duty of ascertaining "whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other States or in course of exportation or shipment he shall have power to confiscate the same." The Secretary of Agriculture could not condemn the packing stock butter, whereas the state statute authorized the state commissioner to condemn it when held for renovation.[2] The district court refused an injunction. *Held,* reversed.[3] Since there was federal supervision of the materials and composition of the manufactured goods, similar state regulation of the same subject was precluded. *Cloverleaf Butter Co. v. Patterson,* (U. S. 1942) 62 S. Ct. 491.

Although it is clear that a state statute must yield to conflicting or coincident national laws passed within the scope of delegated powers,[4] it is often difficult to ascertain whether particular enactments are inconsistent. While general rules are of little help in specific cases, it has been held that the conflict must be direct and positive, and evident from the terms of the statutes.[5] Even in the absence of conflicting provisions, the Supreme Court has inferred from a comprehensive set of regulations a Congressional intent to "occupy the field"; that is, to exclude all state legislation on the same subject matter.[6] This opens the way to a very

[1] 32 Stat. L. 197 (1902), 26 U. S. C. (1940), §§ 2320 to 2327. The statute contained comprehensive provisions for the regulation of both manufacturer and retailer.

[2] 2 Ala. Code (1940), § 495. In a little over a year, more than twenty thousand pounds of packing stock butter were seized from petitioner's factory by state officials in the enforcement of this law. Principal case, 62 S. Ct. 491 at 493.

[3] Four justices dissenting: Stone, Frankfurter, Murphy and Byrnes.

[4] Gibbons v. Ogden, 9 Wheat. (22 U. S.) 1 (1824); Willson v. Black-Bird Creek Marsh Co., 2 Pet. (27 U. S.) 245 (1829); Gilman v. Philadelphia, 3 Wall. (70 U. S.) 713 (1865); 12 C. J. 17 (1917); 15 C. J. S. 273 (1939). For cases dealing with coincidence between state and federal laws, see Charleston & Western Carolina Ry. v. Varnville Furniture Co., 237 U. S. 597, 35 S. Ct. 715 (1915); Pennsylvania R. R. v. Public Service Commission, 250 U. S. 566, 40 S. Ct. 36 (1919).

[5] Sinnot v. Davenport, 22 How. (63 U. S.) 227 (1859); Missouri, Kansas & Texas Ry. v. Haber, 169 U. S. 613, 18 S. Ct. 488 (1898); Reid v. Colorado, 187 U. S. 137, 23 S. Ct. 92 (1902). No direct conflict was found in Savage v. Jones, 225 U. S. 501, 32 S. Ct. 715 (1912); Mintz v. Baldwin, 289 U. S. 346, 53 S. Ct. 611 (1933); Maurer v. Hamilton, 309 U. S. 598, 60 S. Ct. 726 (1940).

[6] Such intent has been inferred from the broad scope of authority delegated to enforce railroad legislation, Southern Ry. v. R. R. Commission of Indiana, 236 U. S. 439, 35 S. Ct. 304 (1915); New York Central R. R. v. Winfield, 244 U. S. 147, 37 S. Ct. 546 (1917); or from the obvious necessity of national uniformity, for instance the bankruptcy statute, International Shoe Co. v. Pinkus, 278 U. S. 261, 49 S. Ct. 108 (1929). The Court has faced an even more difficult problem where Congress has merely delegated broad authority to an officer, or administrative agency, to establish regulations over a certain subject matter, but no action has yet been taken. Though it would seem that state regulations should continue under these circumstances, H. P. Welch Co. v. New Hampshire, 306 U. S. 79, 59 S. Ct. 438 (1939); noted 38 MICH.

broad exercise of judicial discretion in the way of statutory interpretation. Basically the test resolves itself into a question of whether the operation and effect of the state statute interferes with the operation and policy of the federal statute.[7] The instant case, following *Hines v. Davidowitz*,[8] in which a state alien registration statute was held to be precluded by a similar federal act,[9] appears to indicate a new approach. Here it is difficult to see any "direct and positive" conflict between the state and federal provisions, although Justice Reed finds the power of the Alabama official to confiscate the packing stock butter to be an interference with the federal agent's discretionary authority to seize the renovated product itself. On the other hand, the purpose of both acts is to protect the consumer from a deleterious food, and it appears that the achievement of this end depended largely on the supplementary character of the state regulations.[10] However, in finding an "occupation of the field" the Court here and in the *Hines* case has gone far beyond limitations set out in the development of that doctrine. Previously it was suggested that, in the absence of an express provision, an intent completely to supersede the state laws would not be inferred unless the latter were actually repugnant to the federal legislation.[11] Except in railroad regulation, it might have been thought that the Court would rely solely on the presence of a conflict in its adjustment of state and federal laws. This seems especially desirable where the state is exercising its police power to protect the lives and health of the public. Yet in the principal case, in spite of the dubious conflict and the advantages to be gained by continued enforcement of the state statute, the Court goes to the other extreme and raises a presumption of exclusive federal control from the mere passage of the act.[12] The result is interesting in light of Justice Black's view of shifting to Congress the exposition of the commerce clause and retaining only the judicial power to strike down discrimina-

L. REV. 92 (1939); the Court has occasionally found a Congressional intent to supersede. Oregon-Washington R. R. & Navigation Co. v. Washington, 270 U. S. 87, 46 S. Ct. 279 (1926); Napier v. Atlantic Coast Line R. R., 272 U. S. 605, 47 S. Ct. 207 (1926).

[7] In a recent decision Justice Black said, "Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U. S. 52 at 67, 61 S. Ct. 399 (1941).

[8] 312 U. S. 52, 61 S. Ct. 399 (1941), noted in 29 GEORGETOWN L. J. 755 (1941).

[9] Though the case might have been settled merely on the ground of coincidence, the Court went further and found a federal intention to occupy the field.

[10] Justice Stone pointed out in his dissent that without cooperation by state officials it would be very difficult to trace the contaminated material once it had been processed. See dissenting opinion, principal case, 62 S. Ct. 491 at 505.

[11] Actually this would have meant discarding the "occupation of the field" test completely. Since the limits of the "field" which may be said to have been covered may admit of great elasticity, such a standard should rightly have been rejected as too ambiguous. See Townsend v. Yeomans, 301 U. S. 441, 57 S. Ct. 842 (1937); Kelly v. Washington ex rel Foss Co., 302 U. S. 1, 58 S. Ct. 87 (1937); Maurer v. Hamilton, 309 U. S. 598, 60 S. Ct. 726 (1940); 86 UNIV. PA. L. REV. 532 (1938).

[12] "Congress hardly intended the intrusion of another authority during the very preparation of a commodity subjected to the continuous surveillance and comprehensive specifications of the Department of Agriculture." Principal case, 62 S. Ct. 491 at 503.

tory state legislation in the absence of federal action.[13] The proponents of this view include those who see therein an opportunity to expand federal power as a whole and also those who regard it as a means of preserving states' rights. Though these divergent groups agree on the major premise, it is quite natural that the "nationalists" will attribute great importance to any legislation which Congress does enact, while the adherents of states' rights will seek to preserve those rights as much as possible. But whatever may be the Court's attitude toward the commerce clause in the future,[14] it is clear that by declaring unconstitutional the Alabama renovated butter act the federal task was made much more difficult in this instance because it is doubtful whether Congress will be able to reach the gap formerly filled by the state act.

[13] See the dissents in Adams Manufacturing Co. v. Storen, 304 U. S. 307, 58 S. Ct. 913 (1938); Gwin, White & Prince v. Henneford, 305 U. S. 434, 59 S. Ct. 325 (1939); McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 60 S. Ct. 388 (1940); McCarroll v. Dixie Greyhound Lines, 309 U. S. 176, 60 S. Ct. 504 (1940); also, Lockhart, "State Tax Barriers to Interstate Trade," 53 HARV. L. REV. 1253 (1940); Barnett, "The Supreme Court, The Commerce Clause, and State Legislation," 40 MICH. L. REV. 49 (1941).

[14] This much heralded reinterpretation of the commerce clause may be temporarily halted, at least, after Justice Jackson recently expressed himself for the first time as categorically opposed to any such doctrine. Duckworth v. State of Arkansas, (U. S. 1941) 62 S. Ct. 311 at 314.