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CONSTITUTIONAL LAW - PUBLIC UTILITIES - STANDING OF PUBLIC UTILITIES TO CHALLENGE THE CONSTITUTIONALITY OF THE TVA

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CONSTITUTIONAL LAW — PUBLIC UTILITIES — STANDING OF PUBLIC UTILITIES TO CHALLENGE THE CONSTITUTIONALITY OF THE TVA—Eighteen electric utilities, with non-exclusive franchises and in direct competition with

the TVA in selling power wholesale to municipalities, cooperatives and large industrial plants, sought to enjoin the activities and projects of the TVA and its directors as being unconstitutional and as contravening their rights under the fifth, ninth, and tenth amendments. Fraud, duress, and misrepresentations in securing customers were charged. A court of three judges dismissed the bill, holding that there was no fraud or duress and that the TVA was constitutional.[1] Fourteen utilities appealed to the United States Supreme Court. *Held*, with Justices Butler and McReynolds dissenting, that the utilities had no standing to challenge the constitutionality of a statutory grant of power merely because the exercise thereof resulted in competition. *Tennessee Electric Power Co. v. Tennessee Valley Authority*, (U. S. 1939) 59 S. Ct. 366.

The federal government has entered into competition with private interests with comparative frequency the past twenty-five years, though its right to do so has never been squarely challenged in the courts on constitutional grounds.[2] It is axiomatic that the constitutionality of a statute will be determined only when necessary to the decision of an actual controversy involving a direct invasion of a legal right—"one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." [3] But it is difficult to find any legal right of an individual or of a business that is invaded by government competition. In our economic system, it is necessary that there be no general right to be free from competition. Hence it is uniformly held that one may not complain of the competition of private or municipal corporations, even though their activities be ultra vires.[4] Competitors of lessees of state and federal property have no standing to question the validity of the leases.[5] Non-exclusive franchises do not protect public utilities from the

[1] Tennessee Electric Power Co. v. Tennessee Valley Authority, (D. C. Tenn., 1938) 21 F. Supp. 947, decided by a special three judge court as required to determine certain cases involving the constitutionality of congressional enactments, 50 Stat. L. 752 (1937), 28 U. S. C. (Supp. 1938), § 380a.

[2] The most striking example was during the world war period. The Supreme Court never passed directly on the legality of such operations, but there are dicta and tacit assumptions that they were constitutional. Similarly, the development of the government parcel post, money order service, and postal savings banks has gone unchallenged. For other examples, see comment in 83 UNIV. PA. L. REV. 662 (1935).

[3] Principal case, 59 S. Ct. 366 at 369. See also Massachusetts v. Mellon, 262 U. S. 447 at 488, 43 S. Ct. 597 (1923); Brandeis, J., concurring in Ashwander v. Tennessee Valley Authority, 297 U. S. 288 at 341, 56 S. Ct. 466 (1936); Alabama Power Co. v. Ickes, 302 U. S. 464 at 479, 58 S. Ct. 300 (1938). See also 47 HARV. L. REV. 677 (1934); Culp, "Methods of Attacking Unconstitutional Legislation," 22 VA. L. REV. 723, 891 (1936).

[4] Railroad Company v. Ellerman, 105 U. S. 166 (1881); Kardo Co. v. Adams, (C. C. A. 6th, 1916) 231 F. 950; Keen v. Mayor and Council of Waycross, 101 Ga. 588, 29 S. E. 42 (1897).

[5] United States ex rel. New York Warehouse, Wharf, & Terminal Assn. v. Dern, (App. D. C. 1934) 68 F. (2d) 773, cert. denied, 292 U. S. 642, 54 S. Ct. 776 (1934); Franklin Township v. Tugwell, (App. D. C. 1936) 85 F. (2d) 208; Milwaukee Horse & Cow Comm. Co. v. Hill, 207 Wis. 420, 241 N. W. 364 (1932); Security National Bank v. Bagley, 202 Iowa 701, 210 N. W. 947 (1926).

competition of municipal or other public utilities subsequently authorized.[6] The fact that the government may subsidize or loan money to a municipal utility gives a competitor no right to question the validity of the loan or grant, since the harm comes only from the municipal utility's competition.[7] It is not strange, therefore, that the court in the principal case, when faced for the first time with the problem of direct competition between the federal government and private business, laid down the rule that substantial economic injury resulting from government competition is *damnum absque injuria* and invades no legal right of the injured party.[8] Such a far-reaching result has naturally caused a storm of criticism among private interests[9] and raises the question as to just how the constitutionality of governmental business activity can properly be raised by a competitor. As a federal taxpayer, he clearly has no standing.[10] But where the enforcement of a statute results in coercion of customers or some other act analogous to a tort, its validity may be questioned.[11] If the government attempts

[6] Puget Sound Power & Light Co. v. Seattle, 291 U. S. 619, 54 S. Ct. 542 (1934); Alabama Power Co. v. Guntersville, 235 Ala. 136, 177 So. 332 (1937); Skaneateles Waterworks Co. v. Skaneateles, 184 U. S. 354, 22 S. Ct. 400 (1902); City of Joplin v. Southwest Missouri Light Co., 191 U. S. 150, 24 S. Ct. 43 (1903); Knoxville Water Co. v. Knoxville, 200 U. S. 22, 26 S. Ct. 224 (1906). See also annotation in 114 A. L. R. 192 (1938).

[7] Alabama Power Co. v. Ickes, 302 U. S. 464, 58 S. Ct. 300 (1938), commented on in 36 MICH. L. REV. 587 (1938), and 51 HARV. L. REV. 897 (1938); Duke Power Co. v. Greenwood County, 302 U. S. 485, 58 S. Ct. 306 (1938); Allegan v. Consumers' Power Co., (C. C. A. 6th, 1934) 71 F. (2d) 477, cert. denied, 293 U. S. 586, 55 S. Ct. 100 (1934); Arkansas-Missouri Power Co. v. City of Kennett, (C. C. A. 8th, 1935) 78 F. (2d) 911; Metropolitan-Edison Co. v. Ickes, (D. C. D. C. 1938) 22 F. Supp. 639, affd. 304 U. S. 541, 58 S. Ct. 947 (1938); Missouri Utilities Co. v. City of California, (D. C. Mo. 1934) 8 F. Supp. 454.

[8] Carolina Power & Light Co. v. South Carolina Public Service Authority, (C. C. A. 4th, 1938) 94 F. (2d) 520, was a forerunner of the principal case in holding that no right of the public utility was invaded by competition of the state Public Service Authority or by any sales that it made.

[9] For a critical comment on the case, see Cleminson, "Your Potential Competitor —Your Government," 66 PUB. SERV. MAG. 92 (March, 1939). See also vigorous criticism in 87 UNIV. PA. L. REV. 610 (1939).

[10] Frothingham v. Mellon, 262 U. S. 447 at 487, 43 S. Ct. 597 (1923); Alabama Power Co. v. Ickes, 302 U. S. 464 at 478, 58 S. Ct. 300 (1938). In state courts, however, state and local taxpayers may enjoin unauthorized acts of the state or city. Also see Franklin Township v. Tugwell, (App. D. C. 1936) 85 F. (2d) 208, where taxpayers of a township, in which the United States Resettlement Administration proposed to erect a model community, were held to possess enough interest to maintain a suit to enjoin such action since the withdrawal of land by the United States from taxation would compel them to pay higher taxes.

[11] Courts in such a case are apt to find the interest invaded comparable to one protected in private litigation and hence give relief. Pierce v. Society of Sisters, 268 U. S. 510, 45 S. Ct. 571 (1925); Truax v. Raich, 239 U. S. 33, 36 S. Ct. 7 (1915); American Bank & Trust Co. v. Federal Reserve Bank of Atlanta, 256 U. S. 350, 41 S. Ct. 499 (1921). If the utilities in the principal case had been able to sustain their allegation that the "yardstick" rates were directed at unlawful regulation of intrastate rates rather than being a mere incident of competition, it would not have

to take his property by condemnation proceedings, he may defend on the ground that the legislative sanction for such action is illegal.[12] Or if a competitor enters into a contract with the government, anyone interested in the contract, such as a stockholder of the firm, may seek to prevent its enforcement till the government's authority has been determined.[13] There is one further basis, peculiar to public utilities, under which the Court might well have decided the constitutionality of the TVA. In state and lower federal courts, it is well settled that non-exclusive public utility franchises are property rights that will be protected against unlawful and illegal competition of municipal and other public utilities, though not against their lawful competition.[14] The "pith" of the utilities' complaint here was not the lawful competition of the TVA, but the very right of the TVA to compete at all in selling power wholesale.[15] It would have been a logical step to hold that these franchises also protect utilities against illegal competition by the federal government and therefore that the allegation of illegality is enough to raise the constitutional issue.[16] But the refusal of the

been difficult to hold that the utilities had such an interest as would be protected against such an invasion and that the TVA was unconstitutional in this aspect. But the Court found the allegation to be unwarranted. Principal case, 59 S. Ct. 366 at 373.

[12] Alabama Power Co. v. Gulf Power Co., (D. C. Ala. 1922) 283 F. 606.

[13] Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 56 S. Ct. 466 (1936).

[14] Georgia Power Co. v. Tennessee Valley Authority, (D. C. Ga. 1936) 14 F. Supp. 673; City of Campbell v. Arkansas-Missouri Power Co., (C. C. A. 8th, 1932) 55 F. (2d) 560; Iowa Southern Utilities Co. v. Cassill, (C. C. A. 8th, 1934) 69 F. (2d) 703; Gallardo v. Porto Rico Ry., Light & Power Co., (C. C. A. 1st, 1927) 18 F. (2d) 918; Iowa Southern Utilities Co. v. Town of Lamoni, (D.C. Iowa, 1935); 11 F. Supp. 581; Tennessee Public Service Co. v. City of Knoxville, 170 Tenn. 40, 91 S. W. (2d) 566 (1936); Tennessee Electric Power Co. v. City of Chattanooga, 172 Tenn. 505, 114 S. W. (2d) 441 (1937); Citizens Electric Illuminating Co. v. Lackawanna & Wyoming Valley Power Co., 255 Pa. 145, 99 A. 462 (1916); Puget Sound Traction, L. & P. Co. v. Grassmeyer, 102 Wash. 482, 173 P. 504 (1918); New York, N. H. & H. R. Co. v. Deister, 253 Mass. 178, 148 N. E. 590 (1925). See also the rather dubious decision of Frost v. Corporation Commission, 278 U. S. 515, 49 S. Ct. 235 (1929), criticized in 28 MICH. L. REV. 179 (1929). Certificates of convenience and necessity are also held to protect a utility against unlawful competition. Public Utilities Comm. v. Garviloch, 54 Utah 406, 181 P. 272 (1919); Darling v. Darling, 118 Misc. 817, 194 N. Y. S. 897 (1922); Hall, "Certificates of Convenience and Necessity," 28 MICH. L. REV. 276 (1930).

[15] The legality of the right of the municipalities and cooperatives to compete is unquestioned, since they are authorized to do so by state laws. But the basic question is whether the TVA has a right to compete in selling power wholesale to these groups. The majority either missed or avoided this primary problem by asserting that "damage consequent on competition, otherwise lawful, is in such circumstances *damnum absque injuria*." Principal case, 59 S. Ct. 366 at 371. This assumes the very point in issue—whether the competition is otherwise lawful.

[16] It is true that the utilities derive their franchises from the states and that the TVA derives its authority from the national government. It might therefore be argued that the franchises will protect the authorized utilities only against competition lacking valid authorization from the same government which granted the utilities their franchises. But such a distinction is more technical than real.

Court so to hold places the public utilities in the same category as ordinary businesses; to raise the constitutional issue, they must show some injury other than that occurring solely from government competition, even though it be illegal and unconstitutional. To private business, the federal government owes no judicially cognizable duty to compete within its constitutional limits. The practical results of this case have been to end the legal objections of the public utilities to the TVA program [17] and to give the government full leeway in the development of its power program.[18] The legal results have been to limit the rights protected by non-exclusive franchises and to eliminate one possible way of raising constitutional issues. The soundness of the latter depends on the view taken as to the desirable scope of judicial review.

[17] Wendell L. Wilkie, president of the Commonwealth & Southern Corp., has announced that the utilities have exhausted their legal remedies and will no longer fight the TVA. N. Y. TIMES 27:1 (Feb. 2, 1939).

[18] One week after this decision, the TVA purchased nearly all the property of the Tennessee Electric Power Co. for approximately $80,000,000. N. Y. TIMES, § 1, 1:4 (Feb. 5, 1939).