Michigan Law Review

Volume 35 | Issue 8

1937

POLICE POWER - VALIDITY OF A STATE STATUTE FIXING MAXIMUM CHARGES FOR TOBACCO WAREHOUSEMEN

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POLICE POWER — VALIDITY OF A STATE STATUTE FIXING MAXIMUM CHARGES FOR TOBACCO WAREHOUSEMEN — A statute of the state of Georgia [1] prescribed maximum charges for handling and selling leaf tobacco. In this action, warehousemen sought to restrain the enforcement of the act, attacking it as an arbitrary exercise of state power contrary to the Fourteenth Amendment of the Federal Constitution and also as placing a substantial burden on interstate commerce in violation of the commerce clause. *Held*, that the statute was

[1] Ga. Laws (1935), pp. 476-478. Statutes similar to the one here in question can be found in North Carolina (N. C. Code, 1931, §§ 5124-5126), Virginia (Va. Code, 1930, c. 58), and South Carolina (S. C. Code, 1932, § 7197).

a constitutional exercise of the state's police power. *Townsend v. Yeomans*, (U. S. 1937) 81 L. Ed. 840.

For a long time, regulation of business like that in the principal case could only be validly imposed on a "business affected with a public interest." [2] That test tended to crystalize the types of businesses that could be regulated. However, in *Nebbia v. New York*,[3] a more realistic approach was taken by the majority of the Court, permitting a flexible test for the validity of the regulation in question. In that case, Justice Roberts, speaking for the majority of the Court, stated, "The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good." [4] The validity of the questioned regulation would, therefore, depend on an analysis of the facts in each case, and only on a clear showing of arbitrary action should a court declare legislative action invalid.[5] That there is adequate reason for the regulation of tobacco warehouses has been

[2] Certain factors were sought, such as monopoly, virtual monopoly, necessity for the regulation, dedication to public use, or an analogy to businesses previously regulated. Under this test, regulation of grain elevators was sustained in Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77 (1877); Budd v. New York, 143 U. S. 517, 12 S. Ct. 468 (1892); Brass v. North Dakota, 153 U. S. 391, 14 S. Ct. 857 (1894). Regulation was also sustained in Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 22 S. Ct. 30 (1901) (stockyard charges); Tagg Bros. & Moorehead v. United States, 280 U. S. 420, 50 S. Ct. 220 (1930) (stockyard broker's fees); Pipe Line Cases, 234 U. S. 548, 34 S. Ct. 956 (1914) (regulation of pipe lines); German Alliance Insurance Company v. Lewis, 233 U. S. 389, 34 S. Ct. 612, L. R. A. 1915C 1189 (1914) (regulation of fire insurance rates); O'Gorman & Young v. Hartford Insurance Co., 282 U. S. 251, 51 S. Ct. 130 (1931) (regulation of insurance salesmen's commissions).

Regulation was declared invalid in Tyson & Bro. v. Banton, 273 U. S. 418, 47 S. Ct. 426, 58 A. L. R. 1236 (1927) (broker's fees on theater tickets); Ribnik v. McBride, 277 U. S. 350, 48 S. Ct. 545 (1928) (fees of an employment agency); Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 47 S. Ct. 506, 52 A. L. R. 163 (1927) (milk prices throughout the state); Williams v. Standard Oil Co., 278 U. S. 235, 49 S. Ct. 115, 60 A. L. R. 596 (1929) (price of gasoline); Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 43 S. Ct. 630, 27 A. L. R. 1280 (1923) (compulsory arbitration act for food industries); Frost Trucking Co. v. Railroad Comm., 271 U. S. 583, 46 S. Ct. 605, 47 A. L. R. 457 (1926) (requirement of a certificate of convenience and necessity of a private carrier); New State Ice Co. v. Liebmann, 285 U. S. 262, 52 S. Ct. 371 (1932) (requirement of a certificate of convenience and necessity as a condition precedent to entering the ice business).

[3] 291 U. S. 502, 54 S. Ct. 505, 89 A. L. R. 1469 (1934).

[4] Nebbia v. New York, 291 U. S. 502 at 536, 54 S. Ct. 505, 89 A. L. R. 1469 (1934).

[5] This was clearly stated by Justice Roberts in Nebbia v. New York, 291 U. S. 502 at 536, "It is clear that there is no closed class or category of business affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether the circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory." See also, Chicago, B. & Q. R. R. v. McGuire, 219 U. S. 549 at 569, 31 S. Ct. 259 (1911).

recognized by courts in states which produce a large quantity of tobacco.[6] Under the careful factual analysis of the Court in the instant case, there should be little doubt as to the validity of the regulation there imposed.[7] The attack under the commerce clause, however, presents the real contention of counsel in the appellate court. It was shown that practically the entire tobacco product of the state was shipped outside the state. Assuming that under the facts presented federal regulation would be valid, it does not necessarily follow that state regulation would be invalid. When uniformity is required in the regulation of interstate commerce, state action is excluded even in the absence of federal regulation.[8] It is significant to note that in the grain elevator cases of *Munn v. Illinois*,[9] *Budd v. New York*,[10] *and Brass v. North Dakota*,[11] it was held that state regulation was not excluded.[12] It would seem, therefore, that local problems could here also be subjected to state regulation. However, a comprehensive scheme to regulate the buying of grain, empowering a state officer to determine the margin of profit which a buyer might realize and to fix the price of grain bought for shipment in interstate commerce, has been held to create a substantial burden on interstate commerce in violation of the commerce clause.[13] Another problem is presented by the fact that there is federal regulation in this field. The Tobacco Inspection Act of 1935 [14] aims to establish uniform standards of classification and inspection for the protection of producers and purchasers. But the intent to supersede all state regulation imposed

[6] Nash v. Page, 80 Ky. 539 (1882), holding tobacco warehouses "affected with a public interest" without the aid of legislative fiat; Reaves Warehouse Corp. v. Comm., 141 Va. 194, 126 S. E. 87 (1925). Compare Tallahassee Oil & Fertilizer Co. v. Holloway, 200 Aala. 492, 76 So. 434 (1917).

[7] The facts showed that the market season in Georgia is short, from three to five weeks, and earlier than the North Carolina market, most of those engaged in the sales in Georgia moving on to the North Carolina markets. Because of the short market in Georgia, it is usually necessary to grade, store and bundle the tobacco of the growers at the warehouse. Practically all sales, except a few sales to speculators, are made by auction at the warehouses. There were fifteen towns which were known as markets, and a market could not be established unless large purchasers would send their buyers there.

[8] This is really a question for legislative determination, but it was adopted by the courts to determine when even in the absence of federal regulation, state regulation could not enter the field. See Cooley v. Board of Wardens of the Port of Philadelphia, 12 How. (53 U. S.) 299 (1851).

[9] 94 U. S. 113 at 135, 24 L. Ed. 77 (1877).

[10] 143 U. S. 517 at 545, 12 S. Ct. 468 (1892).

[11] 153 U. S. 391, 14 S. Ct. 857 (1894).

[12] See also Cargill Co. v. Minnesota, 180 U. S. 452 at 470, 21 S. Ct. 423 (1901); Minnesota Rate Cases, 230 U. S. 352 at 399, 400, 33 S. Ct. 729 (1913); Hendrick v. Maryland, 235 U. S. 610 at 622, 35 S. Ct. 140 (1915); Sproles v. Binford, 286 U. S. 374 at 390, 52 S. Ct. 581 (1932).

[13] Lempke v. Farmers Grain Co. of Embden, 258 U. S. 50, 42 S. Ct. 244 (1921). See also Shafer v. Farmers Grain Co. of Embden, 268 U. S. 189, 45 S. Ct. 481 (1925); Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 42 S. Ct. 106 (1921).

[14] 7 U. S. C., c. 21A, § 511 et seq. (1935).

under the police power is not to be presumed by a mere occupation of a limited part of the field.[15] The Tobacco Inspection Act of 1935 [16] is silent on those problems on which state regulation was already in force, and hence, it would seem that Congress intended to permit state regulation as it had heretofore existed.

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[15] Savage v. Jones, 225 U. S. 501 at 533, 32 S. Ct. 715 (1911); Atlantic Coast Line v. Georgia, 234 U. S. 280 at 294, 34 S. Ct. 829 (1913); Illinois Central R. R. v. Public Utilities Comm., 245 U. S. 493 at 510, 38 S. Ct. 170 (1918); Carey v. South Dakota, 250 U. S. 118 at 122, 39 S. Ct. 403 (1919); Lehigh Valley R. R. v. Public Utilities Comm., 278 U. S. 24 at 35, 49 S. Ct. 69 (1928); Atchison, Topeka & Santa Fe Ry. v. Railroad Comm., 283 U. S. 380 at 392, 393, 51 S. Ct. 553 (1930); Hartford Indemnity Co. v. Illinois, 298 U. S. 155 at 158, 56 S. Ct. 685 (1935).

[16] 7 U. S. C., c. 21A, § 511 et seq. (1935).