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CONSTITUTIONAL LAW — AGRICULTURAL ADJUSTMENT ACT — VALIDITY OF MILK LICENSES UNDER SECTION 8 (3)—Pursuant to the authorization of Section 8 (3) of the Agricultural Adjustment Act,[1] the Secretary of Agriculture issued a blanket license in the Baltimore Sales Area whereby the distributors of fluid milk or its products in the current of interstate or foreign commerce were subjected to detailed regulation of production and purchase and resale prices. The plaintiff dairy company, handling milk produced and consumed exclusively within the state, sought an injunction against the enforcement of the license. *Held*, in granting a final decree, that the plaintiff's activities were not in the current of and that they did not in any way affect interstate commerce so that they could be subjected to the regulations imposed by the license. *Royal Farms Dairy, Inc. v. Wallace*, (D. C. Md. 1934) 8 F. Supp. 975.

The licensing section of the Agricultural Adjustment Act presents three constitutional difficulties,[2] chief of which is the question of the power of the federal

[1] 48 Stat. 31, U. S. C. tit. 7, sec. 601 *et seq*. Section 608 (3) grants to the Secretary of Agriculture the power,

> "To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof. . . . Such licenses shall be subject to such terms and conditions, not in conflict with existing Acts of Congress or regulations pursuant thereto, as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof. The Secretary of Agriculture may suspend or revoke any such license, after due notice and opportunity for hearing, for violation of the terms or conditions thereof. Any order of the Secretary suspending or revoking any such license shall be final if in accordance with law. Any such person engaged in such handling without a license as required by the Secretary under this section shall be subject to a fine of not more than $1000 for each day during which the violation continues."

[2] The Supreme Court has not passed upon the constitutionality of this section. Several decisions in the lower federal courts have upheld the constitutionality. Economy Dairy Co. v. Wallace, Beck v. Wallace, (D. C. Sup. Ct., Aug. 29, 1933) 61 WASH. L. REP. 633; Capital City Milk Producer's Ass'n v. Wallace, (D. C. Sup. Ct. 1933) 1 UNITED STATES LAW WEEK 197; United States v. Shissler, (D. C. N. D. Ill. 1934) 7 F. Supp. 123. All of these decisions involved a preliminary injunction. But in a case involving a final decree, the same result was reached. United States v. Calistan Packers, Inc., (D. C. N. D. Cal. 1933) 4 F. Supp. 660. See 13 ORE. L. REV. 245 (1934); 20 VA. L. REV. 671 (1934). *Cf.* Mefferd v. Hunter, (D. C. S. D. Cal. 1934) 2 UNITED STATES LAW WEEK 201; Hillsborough Packing Co. v. Wallace, (D. C. S. D. Fla. 1934) 1 UNITED STATES LAW WEEK 501, denying the constitutionality of Section 8 (3). The decision was reversed in Yarnell v. Hillsborough Packing Co., (C. C. A. 5th, 1934) 70 F. (2d) 435, upon the ground that the constitutional question was not properly presented to the court by the bill for preliminary injunction.

government to regulate the marketing of agricultural products in a state.[3] By the terms of the act, the constitutional basis for this federal supervision is the delegated power of the federal government to regulate interstate commerce.[4] In order to determine whether this regulatory power may be extended to include regulation of this exclusive intrastate activity upon the theory that federal control is essential to the rehabilitation of interstate commerce, some definition of its scope must be determined.[5] Certain decisions, in establishing guiding principles by which the extent of this power under the commerce clause is measured, have regarded federal regulation of local production as a usurpation of the powers reserved to the states by the Tenth Amendment.[6] On the other hand, federal interference with intrastate business may be justified when there exists such a real and substantial relation between local and interstate commerce that the former affects the latter.[7] Upon this basis, the government has evolved two theories by which

Same, Sparks v. Mellwood Dairy, (C. C. A. 6th, 1934) 2 UNITED STATES LAW WEEK 348. However, the constitutionality was denied in Valley Dairy Co. v. Wallace, (C. C. A. 9th, 1935). See N. Y. Times, March 5, 1935, p. 14. For cases sustaining the constitutionality of the processing tax (Section 609) and the Sugar Quota regulations (Section 608a), see Franklin Process Co. v. Hoosac Mills Corp., (D. C. Mass. 1934) 8 F. Supp. 552; Ewa Plantation Co. v. Wallace, (D. C. Sup. Ct. 1934) 2 UNITED STATES LAW WEEK 147. See Brewster, "Is the Process Tax Constitutional?," 19 A. B. A. J. 419 (1933).

[3] See Corwin, "Congress's Power to Prohibit Commerce — A Crucial Constitutional Issue," 18 CORN. L. Q. 477 (1933); Duane, "Marketing Agreements under the Agricultural Adjustment Act: Their Contents and Constitutionality," 82 UNIV. PA. L. REV. 91 (1933); Maurer, "Constitutional Aspects of the National Recovery Act and the Agricultural Adjustment Act," 22 GEORGETOWN L. J. 207 (1934); Carpenter, "Constitutionality of the National Industrial Recovery Act and the Agricultural Adjustment Act," 7 So. CAL. L. REV. 125 (1934). For a complete discussion of the commerce power under the NIRA, see 47 HARV. L. REV. 85 (1933).

[4] United States Constitution, Art. 1, sec. 8, cl. 3: "The Congress shall have Power . . . To regulate Commerce . . . among the several States. . . ."

[5] See "Federal Power Versus State Power over Trade and Industry," 1 UNITED STATES LAW WEEK 718 (1934), and cases collected; "Power of Federal Government to Regulate Agriculture," 1 UNITED STATES LAW WEEK 625 (1934), an excellent statement of the government's position, with cases collected, on the appeal of the Hillborough's Packing Co. case (note 2, supra). Among those relied upon were Coronado Coal Co. v. United Mine Workers of America, 268 U. S. 295, 45 Sup. Ct. 551 (1924); Board of Trade v. Olsen, 262 U. S. 1, 43 Sup. Ct. 470 (1922); Tagg Bros. & Moorhead v. United States, 280 U. S. 420, 50 Sup. Ct. 220 (1929); Brooks v. United States, 267 U. S. 432, 45 Sup. Ct. 345 (1924); Hipolite Egg Co. v. United States, 220 U. S. 45, 31 Sup. Ct. 364 (1911); Foster-Fountain Packing Co. v. Haydel, 278 U. S. 1, 49 Sup. Ct. 1 (1928).

[6] Hammer v. Dagenhart, 247 U. S. 251, 38 Sup. Ct. 529 (1917); Bailey v. Drexel Furniture Co., 259 U. S. 20, 42 Sup. Ct. 449 (1921). The interpretation given the doctrine enunciated in Hammer v. Dagenhart will be of controlling importance in deciding the constitutionality of the agriculture legislation. *Cf.* United States v. Ferger, 250 U. S. 199, 39 Sup. Ct. 445 (1919).

[7] Houston, E. & W. T. R. R. v. United States, 234 U. S. 342, 34 Sup. Ct. 833 (1913); Southern Pac. Terminal Co. v. I. C. C., 219 U. S. 498, 31 Sup. Ct. 279 (1910); Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729 (1912); Dayton-

the intrastate processor is sought to be brought within the statutory limit.[8] The first, characterized, as an "economic" conception of interstate commerce,[9] proceeds upon the assumption that the price received for the intrâstate marketing of fluid milk is so interrelated with the price of the products of milk actually moving in interstate commerce that the price of the former substantially affects the price of the latter.[10] Clearly distinguished from this line of argument is the second theory, the application of which is limited to large metropolitan areas where the enormity of milk consumption requires importation from foreign producers of approximately one-half the milk consumed. Because the sale and price of this milk is admittedly subject to regulation, it is deduced that the inextricable mingling of this milk with that produced within the state justifies federal regulation of the latter to secure the desired economic adjustment. Only one case in the lower federal court has accepted this argument to sustain the validity of the milk licenses.[11] The Fifth Amendment, prohibiting the taking of property without due process of law, also offers an obstacle to the retail price fixing provided by the license. Traditional legal justification for this type of regulation has been the judicial determination that the business was one affected with a public interest.[12] But by regarding price fixing as merely another regulatory device available to the governing powers rather than a legislative restriction distinct from the super-

Goose Creek R. R. v. United States, 263 U. S. 456, 44 Sup. Ct. 169 (1923); Swift & Co. v. United States, 196 U. S. 375, 25 Sup. Ct. 276 (1905); Stafford v. Wallace, 258 U. S. 495, 42 Sup. Ct. 397 (1922); Morgan v. United States, (D. C. W. D. Mo. 1934) 8 F. Supp. 766; Board of Trade v. Olsen, 262 U. S. 1, 43 Sup. Ct. 470 (1922). These cases, involving a movement in interstate commerce, emphasized the close connection between the activity regulated and interstate commerce.

[8] Jerome Frank, "Survey of AAA Litigation During Year 1934," 2 UNITED STATES LAW WEEK 305 (1934).

[9] Duane, "Marketing Agreements under the Agricultural Adjustment Act: Their Contents and Constitutionality," 82 UNIV. PA. L. REV. 91 at 106 (1933).

[10] Lower federal courts have unanimously rejected this position on the question of interstate commerce in cases involving the licensing of fluid milk. Hill v. Darger, (D. C. S. D. Cal. 1934) 8 F. Supp. 189; Douglas v. Wallace, (D. C. W. D. Okla. 1934) 8 F. Supp. 379; United States v. Greenwood Dairy Farms, (D. C. S. D. Ind. 1934) 8 F. Supp. 398; United States v. Nuenendorf, (D. C. S. D. Iowa 1934) 8 F. Supp. 403. The same result has been reached in the attempted enforcement of the NRA codes. United States v. Mills, (D. C. Md. 1934) 7 F. Supp. 547; United States v. Eason Oil Co., (D. C. W. D. Okla. 1934) 8 F. Supp. 365, both cases containing an exhaustive discussion of the constitutional power of the federal government to regulate interstate commerce.

[11] United States v. Shissler, (D. C. N. D. Ill. 1934) 7 F. Supp. 123. *Cf.* Edgewater Dairy Co. v. Wallace, (D. C. N. D. Ill. 1934) 7 F. Supp. 121; Columbus Milk Producers' Co-operative Ass'n v. Wallace, (D. C. N. D. Ill. 1934) 8 F. Supp. 1014, both cases rejecting the argument as immaterial since the license regulated the production of milk and hence could not be interstate commerce.

[12] Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77 (1876); Tyson v. Banton, 273 U. S. 418, 47 Sup. Ct. 426 (1927); Williams v. Standard Oil Co., 278 U. S. 235, 49 Sup. Ct. 115 (1929); Adkins v. Children's Hospital, 261 U. S. 525, 43 Sup. Ct. 394 (1923). See 32 MICH. L. REV. 63, 832 (1933-34); Hale, "The Constitution and the Price System: Some Reflections on Nebbia v. New York," 34 COL. L. REV. 401 (1934).

vision of the conduct of a business, due process requires only that the legislation be reasonable, free from discrimination, and that it bear a reasonable relation to the ends sought by the legislature.[13] Upon this approach, the decision in *Nebbia v. New York*[14] furnishes strong authority for the validity of the licensing section in question,[15] particularly in view of the existing economic conditions.[16] Lastly, the section is criticized as an unconstitutional delegation of legislative powers to an executive officer. Decisions have admitted that the separation of powers theory of government does not prohibit, within certain limitations, the exercise of discretion by an executive officer in promulgating rules to enforce a federal statute. These limitations require only that the legislature define sufficiently the primary policy of the statute by which future conduct is to be measured, leaving the general details to be supplied by executive action.[17] In view of the decision in *Panama Refining Co. v. Ryan*,[18] the validity of Section 8 (3) may be vulnerable to this line of constitutional attack, but it seems arguable that the language of the licensing section, in so far as it provides the conditions upon which the license may be issued,[19] sets up a primary standard sufficient to justify a different result from that reached under Section 9 (c) of the NIRA.[20]

H. F. B.

[13] Nebbia v. New York, 291 U. S. 502, 54 Sup. Ct. 505, 89 A. L. R. 1469 (1933); German Alliance Ins. Co. v. Lewis, 233 U. S. 389 at 411, 34 Sup. Ct. 612 at 618 (1914). See dissent of Mr. Justice Stone in Ribnik v. McBride, 277 U. S. 350, 48 Sup. Ct. 545 (1928). *Cf.* New State Ice Co. v. Liebmann, 285 U. S. 262, 52 Sup. Ct. 371 (1932); Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 47 Sup. Ct. 506 (1927).

[14] 291 U. S. 502, 54 Sup. Ct. 505, 89 A. L. R. 1469 (1933).

[15] Although People v. Nebbia involved the power of a state to regulate milk prices under the Fourteenth Amendment, there should be no difference in approach by the Court in the application of the Fifth Amendment.

[16] "Emergency" has been recognized as a ground for extending the limits of due process. Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 43 Sup. Ct. 630 (1923); Block v. Hirsh, 256 U. S. 135, 41 Sup. Ct. 458 (1921); Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298 (1917); Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 41 Sup. Ct. 465 (1921).

[17] United States v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480 (1911); Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349 (1904); Hampton, Jr. & Co. v. United States, 276 U. S. 394, 48 Sup. Ct. 348 (1928). See 31 MICH. L. REV. 786 (1933).

[18] 293 U. S. 388, 55 Sup. Ct. 241 (1935).

[19] See note 2, supra. As declared by Section 602, the policy of the act is, briefly, to re-establish the pre-war purchasing power of the farmer by the maintenance of economic balance between production and consumption of agricultural commodities, to be accomplished by gradual correction of existing inequalities, and to protect the consumer's interest by readjustment of farm production.

[20] 48 Stat. 200; U. S. C. tit. 15, sec. 709 (c), authorizing the President to prohibit the transportation in interstate or foreign commerce of petroleum produced or withdrawn from storage in excess of the amount permitted by state law.