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Constitutional Law-Relation of Federal and State Governments- Applicability of State Minimum Price Regulations to Federal Procurement

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CONSTITUTIONAL LAW—RELATION OF FEDERAL AND STATE GOVERNMENTS—APPLICABILITY OF STATE MINIMUM PRICE REGULATIONS TO FEDERAL PROCUREMENT—The United States accepted the lowest bids for the supply of milk at three military installations in California. Because these bids were below the minimum prices for wholesale milk prescribed by state law,¹ California instituted proceedings in the state courts for civil damages and injunctive relief against the successful bidders. The United States brought a separate action in a federal district court asking that the state be enjoined from applying its minimum price regulations to milk purchases by the armed services on the grounds that the military installations were federal enclaves over which the United States has exclusive jurisdiction and that the state regulatory scheme burdened the United States in the exercise of its powers to maintain the armed forces and to regulate federal territory.² The three-judge district court granted the injunction on a motion for summary judgment.³ On appeal to the United States Supreme Court, *held*,

¹ CAL. AGRIC. CODE § 4350.

² *United States v. Warne*, 190 F. Supp. 645 (N.D. Cal. 1960).

³ A three-judge district court is required whenever a party seeks to enjoin a state statute on the grounds of its unconstitutionality. 28 U.S.C. § 2281 (1958). Appeal may be taken directly to the Supreme Court from an order granting or denying the injunction. 28 U.S.C. § 1253 (1958). See *Florida Lime & Avacado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960); *The Supreme Court, 1959 Term*, 74 HARV. L. REV. 81, 137-39 (1960).

affirmed in part and in part vacated and remanded,⁴ three Justices dissenting.⁵ The application of state minimum price regulations to purchases by the armed services out of appropriated funds is inconsistent with the federal military-procurement policy. *Paul v. United States*, 371 U.S. 245 (1963).

The statutes on which the Court chiefly relied in the principal case speak in terms of competitive bidding to assure the government of the lowest possible price.⁶ Competitive bidding is not always required, however, and contracts may be negotiated under a number of circumstances, one of which arises when it is "impracticable to obtain competition."⁷ An argument, based upon this provision, can be made that Congress intended to accommodate federal procurement to valid state price and rate regulations. However, the Armed Services Procurement Regulations⁸ do not relax the basic requirement of competition to secure the lowest price for the government, even when the contract is negotiated.⁹ Nor do the regulations provide for negotiation when rates or prices are fixed by state law. The Court felt that the Armed Services Procurement Act and the associated regulations manifested a federal policy of competition—with no exception for state price and rate regulations. Thus state regulations which effectively eliminate price competition are in conflict with federal policy.

The approach of the Court in the principal case is markedly different from that taken in *Penn Dairies, Inc. v. Milk Control Comm'n*,¹⁰ which dealt with similar facts. In the latter case Pennsylvania refused to renew the

⁴ The Court found that the federal procurement policy applied only to the purchases made with appropriated funds and not to the purchases made with nonappropriated funds for use in military clubs and for resale at post exchanges. As to the latter purchases, the judgment was vacated and the case remanded to determine whether such transactions were exempt from state regulations as sales taking place on federal enclaves within the exclusive jurisdiction of the United States. *Pacific Coast Dairy, Inc. v. Department of Agriculture*, 318 U.S. 285 (1943). If the basic state law concerning minimum milk prices antedated the acquisition of the installations by the United States, current price controls are applicable to sales on these installations. See *James Stewart & Co. v. Sadrakula*, 309 U.S. 94 (1940). If the basic law did not antedate the acquisition, it must still be determined whether these tracts are federal enclaves and whether the sales took place on the enclave. See generally Laurent, *Federal Areas Within the Exterior Boundaries of the States*, 17 TENN. L. REV. 328 (1942); Pillsbury, *Law Applicable to National Parks and Other Federal Reservations Within a State*, 22 CALIF. L. REV. 152 (1934).

⁵ Mr. Justice Stewart, in his dissenting opinion, agreed that Congress could immunize federal procurement from state minimum price laws. However, after examining the history of the legislation in question, he concluded that Congress had not done so, but instead had intended federal procurement to be accommodated to valid state rate and price regulations of general applicability. Principal case at 270.

⁶ Armed Services Procurement Act, 10 U.S.C. § 2305(a) (1958) states: "The specifications and invitations for bids shall permit such free and full competition as is consistent with the procurement of the property and services needed by the agency concerned."

⁷ Armed Services Procurement Act, 10 U.S.C. § 2304(a)(10) (1958).

⁸ Heads of departments are authorized to promulgate regulations, not inconsistent with law, respecting, among other things, the distribution and performance of the department's business. REV. STAT. § 161 (1875), as amended, 5 U.S.C. § 22 (1958).

⁹ 32 C.F.R. § 1.300-1 (1961); 32 C.F.R. § 3.101 (1961).

¹⁰ 318 U.S. 261 (1943).

license of a contractor who sold milk to the federal government at a price below the state minimum. The Court, in allowing the imposition of state minimum price regulations, exhibited a deferential attitude toward state regulations and indicated that an unambiguous congressional purpose would be necessary to set aside otherwise valid state regulations.¹¹ The principal case shows a sharp change of attitude in the present Court. Although the present statute is substantially the same as that involved in the *Penn Dairies* decision,¹² the Court nevertheless struck down the state minimum price regulations because Congress failed to except them explicitly from its provisions. The *Penn Dairies* case was not overruled; rather, it was distinguished on narrow grounds.¹³

This change in attitude first became apparent in *Public Util. Comm'n v. United States*.¹⁴ In that case the Court invalidated a state scheme of regulated rates as applied to the federal government and its contractors. The state regulatory policy was deemed to be inconsistent with the federal policy of negotiated rates, embodied in statutes analogous to those in *Penn Dairies*. However, in addition to the above mentioned policy conflict, the state transportation regulations, because of their nature, were susceptible to invalidation as an impingement on the execution of federal functions.¹⁵ Thus the federal policy of competition may not have been in itself sufficient to override the state regulations.¹⁶

In the absence of legislation, the federal government enjoys an implied immunity from both regulatory and revenue producing statutes.¹⁷ The policy that the federal government should be free from interference by the states in the execution of federal functions underlies this immunity.¹⁸ There

¹¹ In *Penn Dairies, Inc. v. Milk Control Comm'n*, 318 U.S. 261 (1943), the Court stated at 275: "An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command read in the light of its history, remains ambiguous. . . . [W]e should be slow to strike down legislation which the state concededly had power to enact, because of its asserted burden on the federal government."

¹² It is significant that the dissenting opinion in *Penn Dairies*, written by Mr. Justice Douglas, took the same view of the federal statutes and regulations then in effect as the majority opinion in the principal case, written by Mr. Justice Douglas, took of the federal statutes and regulations now in effect. *Penn Dairies, Inc. v. Milk Control Comm'n*, *supra* note 11, at 281 (dissenting opinion).

¹³ The distinction was that the regulations in effect when the *Penn Dairies* suit was begun stated that purchases could be made in the open market, where price was fixed by law or regulation. However, the Court in *Penn Dairies* suggested that this regulation was not determinative. (The regulation had been eliminated before the appeal to the Supreme Court.) *Penn Dairies, Inc. v. Milk Control Comm'n*, *supra* note 11, at 278.

¹⁴ 355 U.S. 534 (1958).

¹⁵ See *Supreme Court, 1957 Term*, 72 HARV. L. REV. 77, 161-64 (1958).

¹⁶ In *United States v. Georgia Pub. Serv. Comm'n*, 371 U.S. 285 (1963), which came down the same day as the principal case, the Court held that Georgia rate regulations could not be enforced against government contractors transporting the personal effects of civilian employees of the federal government.

¹⁷ This doctrine originated in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

¹⁸ In *McCulloch v. Maryland*, *supra* note 17, the Court said at 436: "[T]he States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control

is little doubt that direct state regulation of the operations of the federal government would be readily invalidated.¹⁹ On the other hand, in the absence of conflicting federal regulations, the states may impose safety and other regulations on one doing business for the federal government.²⁰ However, where the regulation interferes with the effective discharge of federal functions, it is unconstitutional regardless of whether the object sought to be regulated is the federal government or merely a government contractor.²¹ Thus, where such a statute is attacked as unconstitutionally applied to a private person in the service of the government, the Court must examine the degree to which the regulation burdens the government. In the principal case, the issue was squarely before the Court, but was not discussed. Neither the federal statutes²² nor the federal regulations²³ involved in this case applied to the purchases made with nonappropriated funds. The case was remanded to determine whether these sales were immune as taking place in federal enclaves within the exclusive jurisdiction of the United States.²⁴ Therefore, at least implicitly, the Court recognized that the state regulations are not an unconstitutional burden on the federal government,²⁵ in the absence of legislative policy to the contrary. This is reasonable, since there is very little actual interference with the operations of the federal government. The state regulations in no way impair the ability of the federal government to select contractors, or determine terms of contract other than price. Nor do they subject the federal government to the administrative procedures of the state. The only burden on the government is economic, and that alone has been declared to be insufficient to invalidate state legislation.²⁶

The states clearly have the power to regulate milk prices,²⁷ and their interest in maintaining such regulations is quite strong. The Supreme Court, by excluding the federal government from the operation of this legislation, has to some extent undermined the efficacy of the state system of

the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."

¹⁹ See *Mayo v. United States*, 319 U.S. 441 (1943); *Arizona v. California*, 283 U.S. 423 (1931); *Johnson v. Maryland*, 254 U.S. 51 (1920). Taxation cases may generally be resolved by determining who bears the legal incidence of the tax. Compare *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954), with *Alabama v. King & Boozer*, 314 U.S. 1 (1941).

²⁰ See *James Stewart & Co. v. Sadrakula*, 309 U.S. 94 (1940).

²¹ *Ibid.*

²² Armed Services Procurement Act, 10 U.S.C. § 2303 (1958).

²³ 32 C.F.R. § 1.102 (Supp. 1963).

²⁴ See note 4 *supra*.

²⁵ On this point, the principal case and *Penn Dairies* are perfectly reconcilable. *Penn Dairies* held that the Pennsylvania milk regulations did not violate the federal government's implied immunity. *Penn Dairies, Inc. v. Milk Control Comm'n*, 318 U.S. 261, 278 (1943).

²⁶ See *Alabama v. King & Boozer*, 314 U.S. 1 (1941); *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937).

²⁷ *Nebbia v. New York*, 291 U.S. 502 (1934).

regulation.²⁸ The sole basis of the decision is a federal policy favoring competition; such a policy no doubt exists. However, Congress did not clearly intend to override state minimum price laws in the pursuit of competition. Nor are the regulations perfectly clear, since it appears that a procurement officer could readily accept the state's minimum prices without violating any provision of the regulations. The only definitive statement of federal policy came from the official who rejected the bids submitted at the state minimum price. This, it seems, amounts to far less than the inflexible congressional purpose that the Court in *Penn Dairies* would have required to set aside the state regulations. Thus, by enjoining the state from enforcement of its price regulations, the Court has discarded the cautious approach of *Penn Dairies*. However, no language in this opinion can be regarded as broadening the implied immunity of the federal government. If, in this case, the Court has done an injustice to congressional intent, the door remains open for Congress to make its meaning more explicit.

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²⁸ The theory of minimum milk price regulation is that it fosters safety in production, curbs unfair practices, and assures a steady source of supply. To what extent these objectives are frustrated by the decision in the principal case is open to question, since the price is regulated on other market levels, the federal government is an intelligent buyer, and specific state legislation is aimed at safety and trade practices.