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CONSTITUTIONAL LAW-COMMERCE CLAUSE-VALIDITY OF NEW YORK MILK LICENSING LAW

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CONSTITUTIONAL LAW—COMMERCE CLAUSE—VALIDITY OF NEW YORK MILK LICENSING LAW—A New York statute required the licensing of all milk dealers in the state, and authorized the refusal of such a license upon a finding by the commissioner of agriculture that its issuance would "tend to a destructive competition in a market already adequately served."[1] Petitioner, an out-of-state corporation, sought a license for an additional plant for the processing of milk to be purchased locally and to be distributed out of state, but was denied a license on the ground stated in the statute as quoted above. Denial of the license was sustained by the New York Court of Appeals.[2] On appeal to the United States Supreme Court, *held,* reversed. *H. P. Hood & Sons, Inc. v. Du Mond,* (U.S. 1949) 69 S. Ct. 657.

In what may be the most important commerce clause decision to be handed down in many years, the Supreme Court hints a repudiation of the standard test for constitutionality of state regulations of commerce, that is, balancing of state and national interests,[3] and at the least indicates a less sympathetic attitude toward such regulation. The opinion, written by Justice Jackson, represents a triumph for his position, first clearly stated in 1941, that an overemphasis upon local interests leads toward "Balkanization" of commerce, contrary to the traditions of free trade which he would uphold.[4] The tenor of the decision is

[1] N.Y. Agriculture and Markets Law (McKinney, 1938) §258-c.

[2] 297 N.Y. 209, 78 N.E. (2d) 476 (1948).

[3] Cooley v. Board of Port Wardens, 12 How. (53 U.S.) 298, 319-320 (1851). This test was apparently abandoned for the "direct burden" test in Di Santo v. Pennsylvania, 273 U.S. 34, 47 S.Ct. 267 (1927). California v. Thompson, 313 U.S. 109, 61 S.Ct. 930 (1941), overruled the Di Santo case, however, returning explicitly to the earlier view.

[4] Duckworth v. Arkansas, 314 U.S. 390 at 400-401, 62 S.Ct. 311 (1941); Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 at 43-45, 68 S.Ct. 358 (1948). Until the instant decision, there appeared to be another "trend" within the Court, represented chiefly by Justice Black, but abandoned by him in this case, to the effect that the "balance of interests" test was too harsh, and that any state regulation of commerce that was neither discriminatory nor in conflict with federal statutes must be upheld. S. Carolina State Highway Comm. v. Barnwell Bros., Inc., 303 U.S. 177, 58 S.Ct. 510 (1938); Adams Mfg. Co. v. Storen, 304 U.S. 307 at 331-332, 58 S.Ct. 913 (1938); McCarroll v. Dixie Greyhound Lines, Inc., 309 U.S. 176 at 188-189, 60 S.Ct. 504 (1940); So. Pac. Co. v. Arizona, 325 U.S. 761 at 789-792, 795-796, 65 S.Ct. 1515 (1945); Barnett, "The Supreme Court, the Commerce Clause, and State Legislation," 40 Mich. L. Rev. 49 (1941); 21 Ore. L. Rev. 385 at 391-392 (1942).

that state regulations of interstate commerce, though enacted in furtherance of local interests, will be declared invalid if they tend toward economic isolation of the state creating them. The Court notes that the commerce clause was designed to prevent economic rivalry between the states, and returns to the theory that regulatory powers in this field were relinquished to Congress.[5] The majority also relies upon four cases decided in the early 1920's involving the grain and natural gas industries.[6] In these cases state laws were invalidated as "direct burdens" on commerce, and little mention was made of local interests. Heavy reliance is also placed on a recent case which involved, however, a much more severe restriction of interstate commerce as compared with possible local benefit.[7] Basically, however, the principal opinion appears to be the result of a revival of the fear that any regulation aimed at betterment of local conditions by restriction of interstate commerce will lead to retaliatory measures by other states, with a resultant stifling of intercourse. In language reminiscent of the last decade of the nineteenth century, the Court turns back the envisaged threat by invalidating the statute.[8] Dissenting opinions by Justice Black, with whom Justice Murphy agrees, and by Justice Frankfurter, joined by Justice Rutledge, trace the history of state regulatory measures, pointing out that in recent years regulation of competitive conditions and of prices have generally been upheld as matters of local concern,[9] and denounce the abandonment of the "balance of

[5] Principal case at 662-663.

[6] West v. Kansas Nat. Gas Co., 221 U.S. 229, 31 S.Ct. 564 (1911); Lemke v. Farmer's Grain Co., 258 U.S. 50, 42 S.Ct. 244 (1922); Pennsylvania v. West Virginia, 262 U.S. 553, 43 S.Ct. 658 (1923); Shafer v. Farmer's Grain Co., 268 U.S. 189, 45 S.Ct. 481 (1925).

[7] Baldwin v. Seelig, 294 U.S. 511, 55 S.Ct. 497 (1935). In this case the Court regarded the statute, intended to control milk prices in New York, as reaching into Vermont to regulate prices there as well, in order to aid the local plan. The Court said, id. at 522: " 'It is the established doctrine of this court, that a state may not, in any form or under any guise, directly burden the prosecution of interstate business,' " [quoting from Intl. Text Book Co. v. Pigg, 217 U.S. 91 at 112, 30 S.Ct. 481 (1910)].

[8] Principal case at 665: "Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and that no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality."

[9] Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505 (1934), upheld price regulations on milk as a police measure in the public interest against attacks under the due process clause. Milk Control Board v. Eisenberg Farm Products, 306 U.S. 346, 59 S.Ct. 528 (1939), upheld license, bond and minimum price regulation on milk dealers. Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307 (1943), upheld a proration program subjecting two-thirds of the state's raisin crop to marketing controls. The Court, speaking through Justice Stone, said, id. at 362: "Such regulations . . . are to be sustained, not because they are 'indirect' rather than 'direct' . . . not because they control interstate activities in such a manner as only to affect the commerce rather than to command its operations. But they are to be upheld because upon a consideraion of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress."

interest" test. In the majority's lack of discussion of this test, together with its reliance upon the older cases, there appears a return to the repudiated "direct burden" test of constitutionality, if not to the even older philosophy that all control of commerce is properly vested in Congress. While this decision, handed down by a divided Court, may be taken as only a temporary revision of the Court's views on this question, its immediate consequences in adding to pressure on Congress for national regulatory legislation, and in casting doubt on previously accepted state controls of interstate businesses, should not be underestimated.

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