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CONSTITUTIONAL LAW-COMMERCE CLAUSE-STATE REGULATION OF INTERSTATE COMMERCE

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CONSTITUTIONAL LAW—COMMERCE CLAUSE—STATE REGULATION OF INTERSTATE COMMERCE—The City of Madison enacted an ordinance prohibiting the sale within the municipality's jurisdiction of milk not pasteurized and bottled within five miles of the city's central square.[1] Plaintiff, an Illinois corporation engaged in distributing milk and milk products in Illinois and Wisconsin, had its pasteurization plant in Illinois, approximately sixty-five miles from Madison. After it had been denied a permit to distribute milk in Madison, plaintiff brought an action for a declaratory judgment as to the validity of the ordinance. The ordinance was upheld by the Wisconsin Supreme Court as a reasonable exercise of the municipality's police power.[2] On appeal to the United States Supreme Court, *held,* reversed, Justices Black, Douglas and Minton dissenting. The ordinance unduly burdens interstate commerce in view of the reasonable

[1] General Ordinances of the City of Madison, 1949, §7.21.
[2] 257 Wis. 308, 43 N.W. (2d) 480 (1950).

and adequate alternatives available.[3] *Dean Milk Co. v. City of Madison, Wisconsin,* (U.S. 1951) 71 S.Ct. 295.

During the past decade the Supreme Court has been divided into three camps on the question of the Court's function in enforcing the negative implications of the commerce clause against local attempts at regulation of interstate commerce. The traditional approach, which had been followed by the Court since *Cooley v. Port Wardens,*[4] found its chief proponent in Chief Justice Stone. Basically, Stone's position, as stated and developed in a series of majority opinions, involved a judicial balancing of interests.[5] A distinction was drawn between those aspects of interstate commerce which are fundamentally national in scope and those which are of primarily local interest. If the state regulation in question dealt with the former, the duty of the Court under the Stone view was to strike it down as an encroachment on the powers of Congress to determine national policy.[6] If the regulation dealt with the latter, it would be upheld, provided it did not conflict with existing congressional legislation and did not unduly burden or obstruct commerce.[7] A second view is that of Justice Jackson, who has been disturbed by the growing tendency of the states to "Balkanize" commerce through the imposition of numerous local trade barriers.[8] In his opinion, the Court should invoke the commerce clause to strike down all local regulations tending to "retard, burden or constrict" the flow of commerce.[9] The third position, taken by Justice Black with the consistent support of Justice Douglas, is that the constitutional grant of power over commerce to Congress did not also pass a concurrent power to the Court to nullify state regulations of commerce. Black's contention has been that the Court's only function in applying the commerce clause to state legislation is to determine whether it conflicts with congressional legislation or patently discriminates against interstate commerce.[10] If it does neither, Black would uphold it, on the ground that any attempt to weigh the conflicting interests involved is a

[3] For similar decisions in the state courts, see: La Franchi v. City of Santa Rosa, 8 Cal. (2d) 331, 65 P. (2d) 1301 (1937); Grant v. Leavell, 259 Ky. 267, 82 S.W. (2d) 283 (1935); Larson v. Minneapolis, 190 Minn. 138, 251 N.W. 121 (1933). See, also, Miller v. Williams, (D.C. Md. 1935) 12 F. Supp. 236.

[4] Cooley v. Port Wardens of Philadelphia, 12 How. (53 U.S.) 299 (1851).

[5] See Stone's opinion in Southern Pacific Co. v. Arizona, 325 U.S. 761, 65 S.Ct. 1515 (1945).

[6] Southern Pacific Co. v. Arizona, supra note 5; Edwards v. California, 314 U.S. 160, 62 S.Ct. 164 (1941); McCarroll v. Dixie Greyhound Lines, Inc., 309 U.S. 176, 60 S.Ct. 504 (1940).

[7] Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307 (1943); Duckworth v. Arkansas, 314 U.S. 390, 62 S.Ct. 311 (1941); California v. Thompson, 313 U.S. 109, 61 S.Ct. 930 (1941); Milk Control Board v. Eisenberg, 306 U.S. 346, 59 S.Ct. 528 (1939).

[8] See the dissent in Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28, 68 S.Ct. 358 (1948); and the concurring opinion in Duckworth v. Arkansas, supra note 7.

[9] This was essentially the position stated by Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat. (22 U.S.) 1 (1824). See, also, Willson v. Black-Bird Creek Marsh Co., 2 Pet. (27 U.S.) 245 (1829).

[10] See the dissents in Southern Pacific Co. v. Arizona, supra note 5; McCarroll v. Dixie Greyhound Lines, Inc., supra note 6; Adams Manufacturing Co. v. Storen, 304 U.S. 307, 58 S.Ct. 913 (1938).

legislative function, to be left to Congress.[11] Both Black's and Jackson's views were confined to minority opinions until the death of Stone in 1946. After that time, the Court seemed undecided as to which of the three courses it would follow. There were hints that the Court might be willing to accept Black's view and leave the problem in the hands of Congress.[12] On the other hand, in *Hood v. Dumond*,[13] the majority went to the other extreme in endorsing the position of Jackson.[14] In the principal case, the Court seems to have returned, at least temporarily, to the Stone view. The statute in question was struck down, but not before the Court had carefully considered its effect on interstate commerce on the one hand, as weighed against the benefits to local health and safety on the other. The Court found that the regulation of municipal milk supplies is a subject susceptible of reasonable local regulation, and that the regulation in question did not conflict with existing federal legislation; but it held that in view of the available alternative means of assuring an adequate and healthful milk supply,[15] the benefit secured to the city by the regulation in question was outweighed by the burdens thereby placed on dealers engaged in interstate commerce. While the decision in one case is not conclusive, there are signs that the principal case may represent a stabilization of the Court's position in this field, and a recognition that the alternatives to the Stone view have proved inadequate.[16] It now seems clear that to adopt Black's view would leave the states free to erect multifarious trade barriers at will, hindered only by the sporadic and necessarily piecemeal correction which Congress could administer. On the other hand, to strike down mechanically all local burdens on interstate commerce without regard to the conflicting interests involved would leave large areas of commerce free from any regulation whatever. In those areas as yet untouched by federal legislation, questions will continue to arise as to when specific state regulations are legitimate or are unduly discriminatory or burdensome on inter-

[11] This was the view of Chief Justice Taney. License Cases, 5 How. (46 U.S.) 504 (1947). FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 50 (1937).

[12] Capitol Greyhound Lines, Inc. v. Brice, 339 U.S. 542, 70 S.Ct. 806 (1950); Kotch v. Board of River Pilot Commissioners, 330 U.S. 552, 67 S.Ct. 910 (1947).

[13] 336 U.S. 525, 69 S.Ct. 657 (1949).

[14] See Mendelson, "Recent Developments in State Power to Regulate and Tax Interstate Commerce," 98 UNIV. PA. L. REV. 57 (1949).

[15] The suggested alternatives were inspection of incoming milk supplies, with the shippers paying the reasonable cost of such inspection, or the adoption of the Model Milk Ordinance of the United States Public Health Service, which provides for common inspection standards among the participating municipalities. The dissent characterized the consideration of alternative methods of regulation as a new limitation on local police powers. However, the availability of such alternatives seems to have been implicit in the consideration of many earlier cases in which local health regulations were struck down. Schoolenberger v. Pennsylvania, 171 U.S. 1, 18 S.Ct. 757 (1898); Minnesota v. Barber, 136 U.S. 313, 10 S.Ct. 862 (1890).

[16] Justice Black has indicated his willingness to modify his position in Morgan v. Virginia, 328 U.S. 373, 66 S.Ct. 1050 (1946), and in Hood v. DuMond, 336 U.S. 525, 69 S.Ct. 657 (1949). Justice Douglas has also apparently abandoned his former position, having joined with the majority in Hood v. DuMond. Justice Jackson concurred in the majority opinion in the principal case.

state competition. By their nature they will be judicial questions, to be resolved by a careful weighing of the interests involved, not by the application of mechanistic formulas going to either extreme. The decision in the principal case is an encouraging indication that the Court is again prepared to assume its historic duty of deciding those questions.

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