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CONSTITUTIONAL LAW - INTERGOVERNMENTAL IMMUNITIES - STATUTORY CONSTRUCTION-APPLICABILITY OF PRICE CONTROL LEGISLATION TO SALES BY STATES

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CONSTITUTIONAL LAW — INTERGOVERNMENTAL IMMUNITIES — STATUTORY CONSTRUCTION—APPLICABILITY OF PRICE CONTROL LEGISLATION TO SALES BY STATES—The Administrator, Office of Price Administration, brought action against the Commissioner of Public Lands of the State of Washington to enjoin the sale of timber on state school lands at a price in excess of that fixed by Price Regulation No. 460, implementing the Emergency Price Control Act. The lands were granted to the state for the support of common schools by the Congressional Enabling Act which admitted Washington to the Union. The state law required the sale of such timber to the highest bidder. On certiorari

from the circuit court of appeals which reversed a judgment of the district court denying relief, *held*, affirmed. The Emergency Price Control Act should not be construed to read an exemption in favor of the State of Washington to sell timber on school land grants in excess of a price determined by authority of the act. Such a construction of the Emergency Price Control Act does not contravene the Tenth Amendment of the Federal Constitution. *Case, Commissioner of Public Lands v. Bowles*, (U.S. 1946) 66 S. Ct. 438.

Justice Black, speaking for the Court, put the constitutional holding on the basis that the state's power to make the sale must be in subordination to the power of Congress to fix prices in order to carry on the war.[1] The significance of this decision, along with the companion case decided the same day,[2] lies not in any disaffirmance of the doctrine of Dual Federalism—that shibboleth rarely speaks coherently as a formula when brought face to face with the "supremacy" and "necessary and proper" clauses:[3] rather, it lies in the notions of statutory construction therein expressed and in the sense of judicial restraint implicit in it. Granting the force of cases like *United States v. California*,[4] and conceding the

[1] By striking at the statute in relation to the power of Congress to regulate the prices of state school-land timber, the State of Washington brought itself within the doctrine of Yakus v. United States, 321 U.S. 414, 64 S. Ct. 660 (1944), that while the act denies a defendant in an enforcement proceeding the right to challenge the validity of the regulation, it does not deny him the right to attack the Emergency Price Control Act itself on constitutional grounds.

[2] Hulbert v. Twin Falls County, Idaho, (U.S. 1946) 66 S. Ct. 444. The county, proceeding in compliance with the requirements set forth by Idaho Code Ann. (1932) § 30-708 requiring the sale of county property to be made to the highest bidder, offered for sale at public auction a used farm tractor. Hulbert's bid of $1,050 was the highest and the county accepted the bid. In an action by the county in the state district court to compel Hulbert to comply with his bid, Hulbert defended on the ground that he was willing to pay any legal amount but that the price bid was above that set by the Office of Price Administration. Complaint in intervention was filed by the administrator. The trial court held the Emergency Price Control Act constitutionally applied to the county and consequently the maximum price as fixed by the intervenor administrator was controlling. The Supreme Court of Idaho reversed the trial court, holding that Congress did not intend the Emergency Price Control Act to apply to the states, and hence not to their political subdivisions. On certiorari, the United States Supreme Court reversed the Idaho State Supreme Court on the same theory as in the principal case which was decided the same day.

[3] See CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 142, 143, 173, 174 (1946), for the general proposition that it is the doctrine of the Supreme Court today that when an exercise of national power is otherwise constitutional, there is no reserved power to nullify it, but that the supremacy of the national government within its sphere does not enable it to press its otherwise constitutional measures to the extent that they menace the right of the *peoples* of the states to maintain effective governments for state purposes. For a study of the evolution of a legal concept, compare cases like City of New York v. Miln, 11 Pet. (36 U.S.) 102 (1837), and Hammer v. Dagenhart, 247 U.S. 251, 38 S. Ct. 529 (1918), with United States v. Darby, 312 U.S. 100, 61 S. Ct. 451 (1941). See also Texas v. White, 7 Wall. (74 U.S.) 700 (1868).

[4] United States v. California, 297 U.S. 175, 56 S. Ct. 421 (1936). The Supreme Court held that California by engaging in interstate commerce by rail subjected itself to

plenary nature of the war power, it is nevertheless significant that the Court considered immaterial the fact that the state in making the sale was not engaged in a sales business having the incidents of private enterprise but instead was selling the timber for the purpose of gaining revenue to carry out an essential governmental function.[5] Likewise, it is significant that the Court brushed aside the fact that under section 205(e) of the act, the state would be subject to the remedial treble damages provisions for non-compliance and that under section 205(f)(1) the administrator would have the power to require the state to get a license from him to sell its commodities and that under section 205(f)(2), the license would be subject to suspension by the administrator.[6] The construction of the statute centers in sections 904(a) and 942(h). Section 904(a) makes it unlawful for "any person" to violate maximum price regulations which the act empowers the administrator to make, while section 942(h) defines the term

the commerce power as a common carrier. Therefore the State of California as a *common carrier* was subject to penalty for violation of the Federal Safety Appliance Act, 27 Stat. L. 531, § 2 (1893), 45 U.S.C. (1940) § 2 and 29 Stat. L. 85, § 6 (1896), 45 U.S.C. (1940) § 6. The Court quickly disposed of the argument advanced that since the statute was silent as to states, they should not be within the act unless named in it. In the words of the Court, "Language and objectives so plain are not to be thwarted by resort to a rule of construction whose purpose is but to resolve doubts, and whose application in the circumstances would be highly artificial." 297 U.S. 175 at 186. The Court considered it immaterial whether the state operated the railroad in its "sovereign" or "private" capacity. But note also that the Court considered the state to be in business in operating the carrier. For the conceptual implications of this case in its impact on state sovereignty, see note, 45 YALE L. J. 1118 (1936).

[5] Compare with the cases establishing that state instrumentalities whether operating in a governmental or proprietary capacity are not immune from federal regulation, those concerned with state immunity from federal non-discriminatory taxation. In Helvering v. Gerhardt, 304 U.S. 405, 58 S. Ct. 969 (1938), Justice Stone limited the reciprocal immunity doctrine enunciated in Collector v. Day, 11 Wall. (78 U.S.) 113 (1871), by stating that the immunity of the state will extend only to those situations where the state is *directly* taxed while acting in a governmental capacity. See South Carolina v. United States, 199 U.S. 437, 26 S. Ct. 110 (1905); Allen v. Regents, 304 U.S. 439, 58 S. Ct. 980 (1938); Ohio v. Helvering, 292 U.S. 360, 54 S. Ct. 725 (1934). Thus a state going into private enterprise cannot claim immunity from federal taxation any more than a private corporation can. A recent case, State of New York v. United States, (U.S. 1946) 66 S. Ct. 310 brings into bold relief the varying views held by the present Court. The Court held that the State of New York in selling mineral water bottled from mineral springs owned by the state was not immune from a non-discriminatory federal excise tax on soft drinks. Though the problem before the Court could have easily been resolved by the doctrine of the Helvering case or by resort to South Carolina v. United States, Justice Frankfurter rejected "limitations upon the taxing power of the Congress derived from such untenable criteria as 'proprietary' against 'governmental' activities of the States or historically sanctioned activities of the Government or activities conducted merely for profit. . . ." Instead he urges as criteria that ". . . so long as Congress taps a source of revenue . . . not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State." Query, what revenue is uniquely capable of being earned by a state only? But see concurring opinion of Chief Justice Stone.

[6] But see § 302(h) which would preclude the state from criminal liability.

"person" to include the "United States or any agency of the foregoing." Citing one case which involved state immunity from federal taxation [7] and two cases which were concerned with the control of state instrumentalities through the commerce power,[8] the Court easily read "state" into the phrase "any other government." But assuming that the statute admits of such a construction, is it reasonable to infer that the effect of relatively isolated sales by a state acting in a governmental function so affects the sensitivity of the whole price structure as to raise a Congressional intention to include these facts within the purview of the act? Did Congress contemplate licensing the states in their exercise of governmental functions? Did Congress intend that the legislative scheme would be so all inclusive as to bring the functional operations of state governments within the treble damage provisions of the act? Considering the fact that the statute is, quoting Justice Douglas, "at best ambiguous," [9] it is submitted that it would be less difficult to raise such an inference of Congressional intention if the states were so acting in a sales business having the incidents of private business. When the state is in business the effect of sales by their volume would bear a substantial relationship toward the problem which inspired the legislation—the spiral of inflationary prices in an economy geared to war time production with the attendant scarcity of consumer and durable goods. Seen in this perspective and viewed as a matter of statutory construction, the case stands in contrast to the factual situations and the type of legislation involved in *United States v. California* or *State of Ohio v. Helvering*. Looking at the decision from another direction, the analysis leads to the approach suggested by Justice Douglas who dissented alone. Sections 205(e), 205(f)(1), and 205(f)(2) are rather substantial intrusions on state power. They raise awkward constitutional problems. Why precipitate a constitutional issue unless it is required by the explicit language of the statute or unless the peculiar facts of a case are so compelling that a constitutional issue is necessarily raised in giving effect to legislative policy? Quoting Justice Douglas: "I would

[7] State of Ohio v. Helvering, 292 U.S. 360, 54 S. Ct. 725 (1934). Here the Court held that whether the word "person" as used in a statute includes a state depends upon the connection in which it is used and that as used in 26 U.S.C. (1940) § 205 which imposed a tax upon every person who dealt in intoxicating liquors, the word "person" includes a state. Note that here the Court enunciated the doctrine that instrumentalities by which the states exert "governmental" functions are exempt from taxation by the United States as opposed to non-governmental functions which cannot claim immunity. But compare the language used in State of New York v. United States, (U.S. 1946) 66 S. Ct. 310.

[8] State of California v. United States, 320 U.S. 577, 64 S. Ct. 352 (1944), where the state of California and the city of Oakland competed with privately owned waterfront terminals in San Francisco Bay and were held subject to the orders issued by the Maritime Commission which prescribed maximum free time and maximum demurrage charges under §§ 16 and 17 of the Shipping Act of 1916. The language in the statute ran, "that it shall be unlawful for any common carrier by water, or *other person* subject to this act." 30 Stat. L. 734 as amended by 49 Stat. L. 1518, 46 U.S.C. (1940) §815. (Italics added.) But note that in this case the state and municipality engaged in competition with private business. The other case cited, United States v. California, 297 U.S. 175, 56 S. Ct. 421 (1936), is discussed in note 4, supra.

[9] See dissenting opinion, Hulbert v. Twin Falls County, Idaho, (U.S. 1946) 66 S. Ct. 444. Justice Douglas here states his reasons for dissenting in the principal case.

choose the construction which avoided the constitutional issue.[10] Only in the event that the language of the Act was explicit would I assume that Congress intended even in days of war to interfere with the traditional sovereignty of the states to the extent indicated." [11] Looked at from the point of view of the supremacy of the war power over the receding confines of the Tenth Amendment, the decision does not appear extraordinary.[12] It presents a concrete case to solidify Mr. Corwin's statement that "the War Power is unaffected by the principle of Dual Federalism; against it there are no states' rights, but to the contrary an active duty on part of the states to cooperate to the extent of their powers with the national government on the home front." [13] It is also in accord with previously enunciated rules of statutory construction that legislation providing for the national defense and prosecution of the war shall be liberally construed to accomplish its objectives and shall not be impeded by technical interpretations.[14]

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[10] A plausible construction of the phrase "The United States . . . or any other government" is that it means the United States or comparable national sovereignties—foreign governments. Justice Givens in his opinion for the court in Twin Falls County v. Hulbert, (Idaho 1945) 156 P. (2d) 319, fastened attention on the statistical abstract of the United States promulgated by the Department of Commerce, 1942, together with other government publications, indicating the magnitude of exports and imports, including lend-lease operations. This evidence, he suggested, has a probative effect in pointing to the conclusion that Congress used the language "any other government" to mean foreign governments. He cited A MANUAL OF PRICE CONTROL, December, 1943-March, 1943, Lecture series delivered at the Training Program for the Office of Price Administration, United States Printing Office, pp. 221-234, to the effect that the theories and practices of the Office of Price Administration were on the basis that "any other government" meant national sovereignties; and SECOND REVISED MAXIMUM EXPORT PRICE REGULATION, Office of Export-Import Price Control, Office of Price Administration, United States Printing Office, pp. 1, 2(1943).

[11] Hulbert v. Twin Falls County, Idaho, (U.S. 1946) 66 S. Ct. 444.

[12] Looking at United States v. California from a conceptual point of view—that a state in its "sovereign" capacity is subordinated to the commerce power, it is not shocking that a state acting in its "governmental" capacity should be required to yield to the war power.

[13] CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 56 (1946). See also Gilbert v. Minn., 254 U.S. 325. 41 S. Ct. 125 (1900).

[14] See SUTHERLAND, STATUTORY CONSTRUCTION, Horack, 3d ed., § 7216 (1943). United States v. Montgomery Ward & Company, (C.C.A. 7th, 1945) 150 F. (2d) 369; Sweetser v. Emerson, (C.C.A. 1st, 1916) 236 F. 161-163. Rexford Knitting Company v. Moore & Tierney, (C.C.A. 2d, 1920) 265 F. 177; Anderson v. United States, (C.C.A. 8th, 1920) 264 F. 75; Bowles v. Montgomery Ward & Company, (C.C.A. 7th, 1944) 143 F. (2d) 38.