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CONSTITUTIONAL LAW-INTERSTATE COMMERCE-CONGRESSIONAL CONSENT TO DISCRIMINATORY STATE TAXATION

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RECENT DECISIONS

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—CONGRESSIONAL CONSENT TO DISCRIMINATORY STATE TAXATION—South Carolina statutes [1] imposed upon foreign insurance companies a tax of 3 per cent of the aggregate premiums received from business done within the state, without reference to its interstate or local character, as a condition to receiving a certificate of authority to do business within the state. No similar tax was imposed upon domestic insurance companies. The Prudential Life Insurance Company, a New Jersey corporation doing business in South Carolina, refused to pay, contending that since it was a discriminatory tax it was unconstitutional. Furthermore, Prudential challenged the power of Congress to consent to the levying of such discriminatory taxation by the states.[2] The South Carolina courts upheld the tax.[3] On appeal to the United States Supreme Court, *held*, affirmed. The power of Congress over commerce is plenary, subject only to the restraints of the Constitution. This power it can exercise alone or in conjunction with the co-ordinate action of the individual states. *Prudential Life Insurance Company v. Benjamin*, (U.S. 1946) 66 S. Ct. 1141.

The Supreme Court's opinion in the *South-Eastern Underwriters* [4] case holding that the business of insurance when transacted across state lines was interstate commerce [5] conceivably threatened the comprehensive regulatory and

[1] S.C. Code Ann. (1942) §§ 7948 and 7949.

[2] 15 U.S.C. (Supp. 1946) §§ 1011-1015. The pertinent sections are: § 1011. The Congress hereby declares ". . . that the continued regulation and taxation by the several States of the business of insurance is in the public interest and that the silence on the part of Congress shall not be construed to impose any barriers to the regulation or taxation of such business by the several States."

§ 1012 (a) "The business of insurance and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

(b) "No act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates, to the business of insurance. . . ."

[3] 35 S.E. (2d) 586 (1945). The South Carolina court also found that the taxes were not discriminatory.

[4] United States v. South-Eastern Underwriters Assn., 322 U.S. 533, 64 S. Ct. 1162(1944), 44 COL. L. REV. 772 (1944). For a thorough analysis of this question, before the decision in the principal case, emphasizing the interstate aspects of insurance, see Timberg, "Insurance and Interstate Commerce," 50 YALE L. J. 959 (1941). For discussions after this decision, see Powell, "Insurance as Commerce," 57 HARV. L. REV. 937 (1944); Patterson, "The Future of State Supervision of Insurance," 23 TEX L. REV. 18 (1944).

[5] Prior to its decision in South-Eastern Underwriters Insurance Co. v. United States, the Supreme Court had held that the commerce clause did not deprive the individual states of their power to regulate and tax specific activities of foreign insurance companies. Paul v. Virginia, 8 Wall. (75 U.S.) 168 (1869); New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495, 34 S. Ct. 167 (1913); Madden v. Kentucky, 309 U.S. 83, 60 S. Ct. 406 (1940). None of these cases, however, involved the issue of federal power within this field.

taxation controls developed when the "business" of insurance was the exclusive concern of the individual states.[6] To avoid any possible confusion that might result if the Court should, as a sequel to the *South-Eastern Underwriters* decision, invalidate any challenged state controls, Congress passed the McCarran Act[7] which provided for the continued regulation of insurance by the states. This act crystallized the issue that faced the Court in the principal case. Failing to convince the Court that Congress by the McCarran Act intended only to insure the continued constitutionality of non-discriminatory state legislation affecting insurance, Prudential then maintained that the commerce clause "of its own force" and without reference to any action by Congress whether through its silence or otherwise, forbids discriminatory state taxation of interstate commerce.[8] Conceding that the South Carolina statute is discriminatory, the Court directly met this challenge to federal and state power.[9] The specific question posed by Prudential's challenge—the right of a state to discriminate against interstate commerce in reliance upon Congressional authorization—had never been decided. But the judicial history of commerce clause decisions offered, at least, the following discernible trends.[10] (1) In the absence of federal legislation state regulatory and taxation statutes discriminating against interstate commerce had been held invalid. This is the line of authority that Prudential chiefly relied on in its attack on the South Carolina statutes.[11] (2) The power of the federal government to legislate in the field of interstate commerce has been steadily increased.[12] (3) Co-ordinated action by Congress and the states in the regulation

[6] The South-Eastern Underwriters decision did not necessarily invalidate all state regulation of taxation within this field. In answer to the argument that it would, Justice Black expressly replied that, ". . . there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states." 322 U.S. 533 at 548, 64 S. Ct. 1162 (1944).

[7] See note 2, supra.

[8] In Southern Pacific Co. v. Arizona, 325 U.S. 761, 65 S. Ct. 1515 (1945), the Court said it was unnecessary to decide whether or not ". . . this long-recognized distribution of power between the national and state governments is predicated upon the implications of the commerce clause itself, . . . or upon the presumed intention of Congress, where Congress has not spoken. . . ."

[9] See note 3, supra.

[10] Generally, see Dowling, "Interstate Commerce and State Power," 27 VA. L. REV. 1 (1940); Consent to discriminatory state legislation, 45 COL. L. REV. 927 (1945); Howard, "Constitutional Law Cases in the United States Supreme Court, 1941-1946," 11 MO. L. REV. 197 at 219-263 (1946); Ganoe, "The Roosevelt Court and the Commerce Clause," 24 ORE. L. REV. 71 (1946).

[11] Welton v. State of Missouri, 91 U.S. 275 (1875); Robbins v. Shelby County Taxing District, 120 U.S. 489, 7 S. Ct. 592 (1887); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 55 S. Ct. 497 (1935); Best & Co. v. Maxwell, 311 U.S. 454, 61 S. Ct. 334 (1940); Nippert v. Richmond, (U.S. 1946) 66 S. Ct. 586.

[12] Both in the scope of federal power, Reid v. Colorado, 187 U.S. 137, 23 S. Ct. 92 (1902); Champion v. Ames, 188 U.S. 321, 23 S. Ct. 321 (1903); United States v. Darby Lumber Co., 312 U.S. 100, 61 S. Ct. 451 (1941), and in the determination of the area that is within the field of commerce, Stafford v. Wallace, 258 U.S. 495, 42 S. Ct. 397 (1922); N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S. Ct. 615 (1937); Kirschbaum Co. v. Walling, 316 U.S. 517, 62 S. Ct. 1116 (1942);

of interstate commerce had been previously sustained.[13] The most widely known co-operation involved Congressional consent to state action in the control of the liquor and prison-made goods industries according to local demands and policies.[14] Superficially these cases suggest a direct analogy. Yet analysis reveals that the state laws passed pursuant to the federal enabling acts were not discriminatory in nature, and although the Court in part rested its decisions on the ultimate power of Congress over commerce, the force of such holdings was qualified by the pointed reference that it was the exceptional nature of the subject matter that accounted for judicial sufferance of Congressional control.[15] Such qualification would seem to rest on the premise that the commerce clause contains within itself an implied prohibition against the exercise of unrestricted control by Congress.[16] Justice Rutledge, relying upon the latter two trends mentioned above—not so much on their reasoning as their direction,—concludes that the commerce clause contains no inherent constitutional limitation restricting the power of Congress.[17] Federal control as regards interstate commerce is "subject only to the restraints upon its authority by other constitutional provisions and the requirement that it shall not invade the domain of action reserved exclusively to the states." [18] Whether this approach will in any way augment the power of the states to regulate and tax interstate commerce in the absence of affirmatively expressed consent by Congress is debatable [19] for nowhere does the court suggest that con-

Wickard v. Filburn, 317 U.S. 111, 63 S. Ct. 82 (1942); Roland Elec. Co. v. Walling, (U.S. 1946) 66 S. Ct. 413.

[13] Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. (59 U.S.) 421 (1855); In re Rahrer, 140 U.S. 545, 11 S. Ct. 865 (1891); Clark Distilling Co. v. Western Maryland Ry. Co., 242 U.S. 311, 37 S. Ct. 180 (1917); Kentucky Whip & Collar Co. v. Illinois Central R. Co., 299 U.S. 334, 57 S. Ct. 277 (1937); International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154 (1945). Generally, see McGovney, "Webb-Kenyon Law and Beyond," 3 IOWA L. BUL. 145 (1917); Biklé, "The Silence of Congress," 41 HARV. L. REV. 200 (1927). Sholley, "Negative Implications of the Commerce Clause," 3 UNIV. CHI. L. REV. 556 (1936).

[14] In re Rahrer, 140 U.S. 545, 11 S. Ct. 865 (1891); Clark Distilling Co. v. Western Maryland Ry. Co., 242 U.S. 311, 37 S. Ct. 180 (1917); Kentucky Whip & Collar Co. v. Illinois Central R. Co., 299 U.S. 334, 57 S. Ct. 277 (1937).

[15] See Clark Distilling Co. v. Western Maryland Ry. Co., 242 U.S. 311 at 332, 37 S. Ct. 180 (1917).

[16] If it is conceded that Congress has the power to consent to state legislation upon a subject matter that previously had been decided to be within the exclusive jurisdiction of Congress, it appears to follow that limitations upon state power are attributable to Congressional rather than constitutional sources, regardless of whether the original denial of power to the state resulted from the finding that the subject matter demanded uniform treatment or that the legislation was discriminatory. However, it may be argued that the Congressional legislation did not serve any substantive purpose but merely indicated that the subject matter was erroneously put within the exclusive control of Congress by the court.

[17] Cf. the trend curtailing intergovernmental tax immunity. See, Powell, "The Waning of Intergovernmental Tax Immunities," 58 HARV. L. REV. 633 (1945).

[18] See, Consent to discriminatory state legislation, 45 COL. L. REV. 927 (1945), for possible limitation upon the power of Congress once the commerce question has been hurdled.

[19] 46 COL. L. REV. 882 (1946).

sent to discriminatory state legislation will be spelled out in the absence of affirmative action by Congress. The fact that the commerce clause had as a major purpose the avoidance of destructive and retaliatory legislation among the states in the field of interstate commerce should serve as a deterrent to the Court's finding an intention of Congress to sanction such state legislation other than in its affirmatively expressed declarations.[20] Aside from the possible implications of the decision regarding state power when Congressional control is dormant, the present decision follows a consistent pattern of the present Court in enlarging the legislative power of federal and state governments.[21] It also recognizes another means by which both governments can by the concurrent exercise of their respective powers constrict that area in which problems remain unattacked because they are out of the reach of each government acting separately.[22]

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[20] See note 18, supra. Also Abel, "The Commerce Clause in the Constitutional Convention and in Contemporary Comment," 25 MINN. L. REV. 432 (1941).

[21] For a full discussion of this trend, see Barnett, "Constitutional Interpretation and Judicial Self-Restraint," 39 MICH. L. REV. 213 (1940); White, "New Theories of Constitutional Construction," 92 UNIV. PA. L. REV. 238 (1944).

[22] See generally Koenig, "Federal and State Co-operation under the Constitution," 36 MICH. L. REV. 752 (1938).