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CONSTITUTIONAL LAW — STATE PRORATION ACTS — REGULATION OF PRODUCTION WHEN SALES ARE LARGELY INTERSTATE — The plaintiff, a raisin packer in the state of California, was prevented from purchasing in open market to fill his out-of-state orders because of the California Agricultural Proration Act.[1] By its provisions the producers of raisin grapes are required to turn over seventy per cent of their produce to state "pools." The remaining thirty per cent may be sold without restriction, providing the producer holds certificates issued by a commission. Packers are permitted to purchase only from such certificate holders. These packers operate within California, buying from producers and selling to jobbers, wholesalers, brokers, etc., for resale to the public. Ninety-five per cent of the raisins produced within the state are sold to outside consumers. The plaintiff sought to restrain enforcement of the program. *Held*, one justice dissenting, that the statute is an unconstitutional attempt to stabilize prices by controlling the supply of raisins in interstate commerce. *Brown v. Parker*, (D. C. Cal. 1941) 39 F. Supp. 895.

When a court is considering the constitutionality of a state law covering a field concerning which Congress has not yet acted, it is inclined to sustain such a statute if it be directed toward the public health, safety, or morals [2] or toward conservation of resources.[3] The same holds true where a locality is by taxation or regulation merely protecting its industry's reputation [4] or placing it upon a fair footing with that of other states.[5] The manifest purpose of the statute in the

revealing the rationale of the legislation. *Even in the absence of such aids the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.*" Justice Stone in United States v. Carolene Products Co., 304 U. S. 144 at 152, 58 S. Ct. 778 (1938). (Italics added.) In the important footnote 4 which appears on the same page as the above statement it is suggested that alleged invasion of civil liberties requires closer judicial scrutiny.

[13] Cf. the following statement from Justice Holmes' dissent in Tyson & Brother v. Banton, 273 U. S. 418 at 446, 47 S. Ct. 426 (1927): "The truth seems to me to be that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it."

[1] Cal. Gen. Laws (Deering, 1937), Act 143a (Stat. 1933, p. 1969; as amended by Stat. 1935, pp. 1586, 2087).

[2] Townsend v. Yeomans, 301 U. S. 441, 57 S. Ct. 842 (1937); California v. Thompson, 313 U. S. 109, 61 S. Ct. 930 (1941).

[3] Champlin Refining Co. v. Corporation Commission of Oklahoma, 286 U. S. 210, 52 S. Ct. 559 (1932).

[4] Sligh v. Kirkwood, 237 U. S. 52, 35 S. Ct. 501 (1915).

[5] Oliver Iron Mining Co. v. Lord, 262 U. S. 172, 43 S. Ct. 526 (1923); Henneford v. Silas Mason Co., 300 U. S. 577, 57 S. Ct. 524 (1937); Ford Motor Co. v. Beauchamp, 308 U. S. 331, 60 S. Ct. 273 (1939); McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 60 S. Ct. 388 (1940).

instant case, however, was to boost the prices of a commodity in which California has a near monopoly, by restraining the free flow of commerce. Such efforts have seldom been upheld.[6] Epecially is this true when, due either to discrimination by the legislature or to market locations, the effect is greater upon interstate than upon intrastate commerce.[7] Finally, the courts will often take it upon themselves to determine whether, in a given case, it is preferable that there should be a national policy and uniformity of regulation or that the matters in question are better left to the judgment of the locality.[8] It is quite possible that the court in the present case was influenced by the strong policy which the national government has adopted with regard to certain agricultural commodities, looking not so much to technical legal points as to practical results. Along with these approaches have been developed more or less technical tests which may be applied. It has been frequently stated that a state law will not fail if its effect upon interstate commerce is only "indirect" or "incidental." [9] As a standard this is of little value, but it shows a recognition that every intrastate regulation will unavoidably have some effect upon interstate commerce. Although both the majority and the dissenting opinions apply the test in their favor in the case at hand, it would seem apparent from what has already been said that the purpose and result of the California Agricultural Proration Act were to affect interstate commerce directly. Another equally nebulous test arises from the notion that production is peculiarly within the orbit of local government even though its regulation may vitally affect interstate commerce. The concept of the separability of production and the commerce in which it results was dealt a death blow by the recent case

[6] Lemke v. Farmers' Grain Co. of Embden, North Dakota, 258 U. S. 50, 42 S. Ct. 244 (1922); Foster-Fountain Packing Co. v. Haydel, 278 U. S. 1, 49 S. Ct. 1 (1928); Baldwin v. G. A. F. Seelig, Inc., 294 U. S. 511, 55 S. Ct. 497 (1935); Mutual Orange Distributors v. Agricultural Prorate Commission of California, (D. C. Cal. 1940) 35 F. Supp. 108.

[7] In Shafer v. Farmers' Grain Co. of Embden, 268 U. S. 189, 45 S. Ct. 481 (1925), 90% of the produce went into interstate commerce; in Foster-Fountain Packing Co. v. Haydel, 278 U. S. 1, 49 S. Ct. 1 (1928), 95%; in Milk Control Board v. Eisenberg Farm Products, 306 U. S. 346, 59 S. Ct. 528 (1939), "only a small fraction." Attention is again directed to the fact that in the principal case 95% of the produce goes to out-of-state consumers.

[8] Justice Curtis utilized this approach in Cooley v. Board of Wardens of Port of Philadelphia, 12 How. (53 U. S.) 299 at 319 (1851): "Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation." Also see Townsend v. Yeomans, 301 U. S. 441, 57 S. Ct. 842 (1937); Milk Control Board v. Eisenberg Farm Products, 306 U. S. 346, 59 S. Ct. 528 (1939); California v. Thompson, 313 U. S. 109, 61 S. Ct. 930 (1941).

[9] Minnesota Rate Cases, 230 U. S. 352, 33 S. Ct. 729 (1913); Oliver Iron Mining Co. v. Lord, 262 U. S. 172, 43 S. Ct. 526 (1923); United Leather Workers' International Union, Local Lodge or Union No. 66 v. Herkert & Meisel Trunk Co., 265 U. S. 457, 44 S. Ct. 623 (1924); Townsend v. Yeomans, 301 U. S. 441, 57 S. Ct. 842 (1937).

of *United States v. Darby*,[10] supporting a federal statute regulating production. Nevertheless that concept persists where state legislation is under consideration,[11] and in the principal case both majority and minority discuss the application of such test to the instant facts. Some courts have found a solution by talking in terms of goods destined for interstate commerce,[12] while others, like the dissent in this case, have rejected such a test.[13] The test most recently gaining approval in the Supreme Court makes discrimination against interstate commerce the only fatal flaw. It grows out of the belief that the judiciary has gone much too far into the domain of the legislature and that it is up to Congress to take steps to pre-empt the fields which it wishes exclusively reserved to itself.[14] Liberal as is this test, it is believed that the instant statute would fail to meet it because of the great proportion of California raisins sold in interstate commerce. Because of this and the other failings mentioned, in all probability the decision of the district court will be affirmed if appealed.

[10] 312 U. S. 100, 61 S. Ct. 451 (1941).

[11] Heisler v. Thomas Colliery Co., 260 U. S. 245, 43 S. Ct. 83 (1922); Oliver Iron Mining Co. v. Lord, 262 U. S. 172, 43 S. Ct. 526 (1923); United Leather Workers' International Union, Local Lodge or Union No. 66 v. Herkert & Meisel Trunk Co., 265 U. S. 457, 44 S. Ct. 623 (1924); Utah Power & Light Co. v. Pfost, 286 U. S. 165, 52 S. Ct. 548 (1932); Champlin Refining Co. v. Corporation Commission of Oklahoma, 286 U. S. 210, 52 S. Ct. 559 (1932); Mutual Orange Distributors v. Agricultural Prorate Commission of California, (D. C. Cal. 1940) 35 F. Supp. 108.

[12] Kidd v. Pearson, 128 U. S. 1, 9 S. Ct. 6 (1888); Lemke v. Farmers' Grain Co. of Embden, North Dakota, 258 U. S. 50, 42 S. Ct. 244 (1922).

[13] Heisler v. Thomas Colliery Co., 260 U. S. 245, 43 S. Ct. 83 (1922).

[14] This is the position of Justice Black and, to a somewhat lesser extent, of Justices Douglas and Frankfurter. See CORWIN, CONSTITUTIONAL REVOLUTION, LTD. 111 (1941); and Barnett, "The Supreme Court, the Commerce Clause, and State Legislation," 40 MICH. L. REV. 49 at 75-77 (1941). It is suggested that the present national emergency may cause at least a partial withdrawal from a theory which would place such heavy burdens on Congress.