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Constitutional Law - Interstate Commerce - Negative Implications of the Commerce Clause

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Notes

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—NEGATIVE IMPLICATIONS OF THE COMMERCE CLAUSE

The City of Madison, Wisconsin, enacted an ordinance[1] prohibiting the sale of milk there, unless it was processed and bottled at an approved pasteurization plant, located within five miles of the central square of Madison. Appellant, an Illinois corporation, was refused a license to sell milk in that city because its plants were located outside the five mile radius (actually situated in the State of Illinois) and here seeks a declaratory judgment as to the constitutionality of the ordinance. Ten times the amount of milk required by the area was produced within the restricted zone, but no milk labeled "Grade A" by United States Public Health Service standards was distributed in Madison. The milk which appellant seeks to sell is labeled "Grade A" by Chicago authorities, whose standards, as adopted, are those of the United States Public Health Service. *Held*, the ordinance places a discriminatory burden on interstate commerce and is unnecessary for the protection of local health interests, reasonable and adequate alternatives being available. Such a regulation would invite a multiplication of preferential trade areas destructive of the very purpose of the commerce clause. *Dean Milk Company v. City of Madison, Wisconsin*, 71 S. Ct. 295 (U.S. 1951).

There was no federal legislation with which the ordinance might conflict, nor was there any dispute as to the avowed purpose of the enactment[2]—a health law. It was granted that the city might legislate on the subject matter in the interest of safety, health and well being of the community, even though interstate commerce be thereby affected.[3] But because of "reasonable alternatives" the Court deemed local interest so slight that the burden on interstate commerce prevailed. Thus was created an additional restriction on the powers of the states to legislate in the field

1. General Ordinance of the City of Madison, 1949, § 7.21. Another ordinance (§ 7.11) was challenged in its provision relieving municipal authorities from the duty to inspect farms located beyond twenty-five miles from the center of the city. The Supreme Court of Wisconsin ordered this complaint dismissed for want of a justiciable controversy, after decision on Section 7.21 was reached.

2. 71 S. Ct. 295, 297 (U.S. 1951).

3. Ibid.

affecting interstate commerce; heretofore, the "reasonable alternatives" concept was not applied to commerce.[4]

With the case of *Cooley v. Board of Wardens of Port of Philadelphia*[5] the Court dedicated itself to a process of contrasting local benefit with interstate commerce burden. The original doctrine[6] still effective today,[7] the modern version being disclosed[8] in *Southern Pacific Company v. Arizona*,[9] as: "in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it."

There are certain factors, exclusive of the innovation of the instant case, which have determined, generally, the Court's decision in a particular case. If a state statute has for its purpose the protection of public health, safety and welfare,[10] and is not intended to protect local economic interests by excluding or discriminating against the industry of other states;[11] or if the statute is

4. The Court refused to invoke the "reasonable alternative" restriction to protect freedom of speech. Feiner v. New York, 71 S. Ct. 303 (U.S. 1951), but did utilize it to protect First Amendment rights. Schneider v. New Jersey, 308 U.S. 147, 162 (1939).

5. 53 U.S. 299 (1851).

6. "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 . . . and some . . . as imperatively demanding that diversity." Cooley v. Board of Port Wardens, 53 U.S. 299, 319 (1851).

7. In California v. Thompson, 313 U.S. 109, 116 (1941), Justice Stone wrote for the Court, "The decision in the *Di Santo* case was a departure from this principle which has been recognized since *Cooley v. Board of Port Wardens, supra.* It cannot be reconciled with later decisions of this Court which have likewise recognized and applied the principle, and it can no longer be regarded as controlling authority."

8. So said the Court in California v. Zook, 336 U.S. 725 (1949).

9. 325 U.S. 761, 767 (1945).

10. Patapsco Guano Co. v. North Carolina Board of Agriculture, 171 U.S. 345 (1898) (fertilizer); Savage v. Jones, 225 U.S. 501 (1912) (food for animals); McDermott v. Wisconsin, 228 U.S. 115 (1913) (labelling); Weigle v. Curtice Bros., 248 U.S. 285 (1919) (prohibition of sale of food products containing benzoate of soda); Corn Products Refining Co. v. Eddy, 249 U.S. 427 (1919) (formula disclosure); Bourjois, Inc. v. Chapman, 301 U.S. 183 (1937) (cosmetics).

11. Minnesota v. Barber, 136 U.S. 313 (1890) (sale of fresh meat prohibited unless from animals inspected in the state within twenty-four hours before slaughter); Brimmer v. Rebman, 138 U.S. 78 (1891) (sale of fresh meat slaughtered one hundred miles or more from place of sale prohibited until inspected locally); Voight v. Wright, 141 U.S. 62 (1891) (sale of flour brought into state prohibited until inspected); Baldwin v. Seelig, 294 U.S. 511 (1935) (in which Justice Cordozo wrote for the Court, "Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents." [294 U.S. 511, 527]); Hale v. Bimco Trading, Inc., 306 U.S. 375 (1939) (inspection of cement imported from

reasonably adapted to the end in view[12] and has as its text the regulation of an activity essentially local in nature,[13] then its validation is imminent.

The protection of public health by state enactment has been a decidedly influential factor, the Court upholding laws concerning prohibition of sale of a skimmed milk product,[14] quarantine of infected sheep,[15] transportation of dead animals,[16] prohibition of artificially colored coffee,[17] and quarantine and inspection fees for incoming ships.[18] Even when the health legislation has completely stopped the stream of commerce,[19] it has been upheld.

As to the protection of local economic interests at the expense of other states, the Court concluded: "Any pretense or masquerade will be disregarded, and the true purpose of the statute ascertained."[20] In *H. P. Hood & Sons v. DuMond*,[21] which possibly foreshadowed the decision in the *Dean* case, the Supreme Court, after concluding that the law had discrimination for its purpose, discarded the juristic balancing process and peremptorily invalidated the statute.

A striking illustration of the reasonableness of state enactments is the Georgia "blow-post" law, which required trains to stop at all grade crossings. This statute was adjudged valid as a safety measure;[22] but seven years later, when evidence was introduced proving the delays to be disproportionate to the safety achieved, the statute was invalidated.[23] Also, in *Southern Pacific Company v. Arizona*[24] sufficient facts are presented in the opinion

a foreign country); Edwards v. California, 314 U.S. 160 (1941); Toomer v. Witsell, 334 U.S. 385 (1948); H. P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525 (1949).

12. In South Carolina State Highway Department v. Barnwell Bros., Inc., 303 U.S. 177, 190 (1938), Justice Stone wrote that "judicial function, under the commerce clause . . . stops with the inquiry whether the state legislature . . . has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought."

13. Cooley v. Board of Wardens of Port of Philadelphia, 53 U.S. 299 (1851); Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945).

14. Hebe Co. v. Shaw, 248 U.S. 297 (1919).

15. Rasmussen v. Idaho, 181 U.S. 198 (1901).

16. Clason v. Indiana, 306 U.S. 439 (1939).

17. Crossman v. Lurman, 192 U.S. 189 (1904).

18. Morgan's S.S. Co. v. Louisiana Board of Health, 118 U.S. 455 (1886).

19. Compagnie Francaise de Navigation a Vapeur v. Louisiana Board of Health, 186 U.S. 380 (1902) (preventing landing of all passengers where epidemic exists at port of entry); Manigault v. Springs, 199 U.S. 473 (1905) (dam across navigable waterway).

20. Smith v. St. Louis and S.W.R.R., 181 U.S. 248, 257 (1901). See also Minnesota v. Barber, 136 U.S. 313 (1890).

21. 336 U.S. 525 (1949).

22. Southern Ry. v. King, 217 U.S. 524 (1910).

23. Seaboard Air Line Ry. v. Blackwell, 244 U.S. 310 (1917).

24. 325 U.S. 761 (1945).

to reveal the approach of the Court in ascertaining whether or not the legislation should be upheld as accomplishing beneficial results.[25]

When the Court decides that an activity requires uniformity of action, state statutes may be invalidated for that reason alone.[26] However, some contradictory cases have cast considerable doubt on the outcome of certain litigation of state statutes. The Court, after balancing the conflicting interests, allowed the State of California to protect local raisin interests at the expense of other states in *Parker v. Brown*,[27] even though ninety-five per cent of the raisins consumed in this country are produced in California. In *Milk Control Board v. Eisenberg Farm Products*,[28] the Court permitted another discriminatory economic regulation. Pennsylvania milk dealers were required to pay producers the prices prescribed by the Milk Control Board with the inevitable effect of raising the price of milk shipped interstate. It was stressed that only a small fraction of Pennsylvania milk was shipped interstate—but the volume was considerable, nevertheless. Both of these cases compromised the previous certainty with which state discriminatory legislation was invalidated. That previous certainty was somewhat reestablished, however, in *H. P. Hood & Sons v. DuMond*.[29] There the Court invalidated a New York statute, which would have precluded the interstate shipment of New York milk, because the already short milk supply of Troy, New York, would be further reduced by a destructive competitive situation created by the statute. *Baldwin v. G. A. F. Seelig, Incorporated*,[30] cited in *Hood v. DuMond*, forbade the application of a New York statute which would have regulated the price of milk paid to farmers in Vermont. As opposed to the *Hood* case, the state and national interests were balanced before a conclusion was reached.

The national-local commerce concept has also been the subject of contradictions. In *South Carolina State Highway Department*

25. This decision, however, was not based upon reasonableness, but upon the national-local commerce concept.

26. Morgan v. Virginia, 328 U.S. 373 (1946).

27. 317 U.S. 341 (1943). Although the decision was substantially influenced by the cooperation of the Secretary of Agriculture in lending money in support of the California program, the effect of the decision was to permit economic discrimination. The Court sought to classify the raisin industry as intrastate, but this characterization has lost its effect in determining whether or not a state may regulate. See Houston, East & West Texas Ry. v. United States, 234 U.S. 342 (1914).

28. 306 U.S. 346 (1939).

29. 336 U.S. 525 (1949).

30. 294 U.S. 511 (1935).

v. Barnwell Brothers[31] the Court upheld a state statute regulating the width and weight of trucks, even though the limitation excluded trucks of a size not unusual in interstate commerce. Such transportation is clearly national in nature. Also, in *Parker v. Brown*,[32] the raisin industry was far removed from concepts of "local" characterization, but the state restriction was upheld.[33]

Regulation for public health, safety, and welfare, coupled with reasonable adaptation of the statute to such ends, previously had predetermined almost certain validation of state legislation by the Supreme Court.[34] But the *Hood* and *Dean* cases have arrested or halted this tendency. The "reasonable alternatives" restriction has increased the Court's discretionary power in invalidating state statutes.[35]

It is interesting to note the circumstances which probably caused the initiation of the "reasonable alternatives" restriction in the instant case. Annual expenditures for milk and milk products have made America's dairy industry the foremost part of agricultural endeavor.[36] Because of the absence of federal regulation, the burden thereby devolves upon states and cities. State police measures, relating to milk, which seek to protect consumer health and prevent fraud on the consumer, have been upheld quite consistently,[37] thus Balkanizing the field. The dairy industry provided the Court with a prime opportunity, if not inducement, to strike down legislation of a state because that state could exercise its police power with less discrimination.

A recent article on the problems involved in state regulation of the milk industry includes a statement which presaged the introduction of "reasonable alternatives" restrictions in the *Dean* case. "If trade barriers were necessarily involved in these measures for protecting public health, there would be no valid ground for advocating their elimination. They would be a cheap price to

31. 303 U.S. 177 (1938).

32. 317 U.S. 341 (1943).

33. The Court has held in other cases that subjects which are national in nature may be regulated by states. McGoldrick v. Berwind-White Co., 309 U.S. 33 (1940); Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941); California v. Thompson, 313 U.S. 109 (1941); Duckworth v. Arkansas, 314 U.S. 390 (1941); Robertson v. California, 328 U.S. 440 (1946).

34. Parker v. Brown, 317 U.S. 341 (1943) is a terminal example of such validation.

35. H. P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525 (1949).

36. See Note, 3 Geo. Wash. L. Rev. 494 (1935) for a discussion of the problems of the dairy industry. See also, Burtis, Barriers and the Milk Industry, 16 Ind. L.J. 191 (1940).

37. For collections of cases see 18 A.L.R. 235 (1922); 42 A.L.R. 556 (1926); 58 A.L.R. 672 (1929); 80 A.L.R. 1225 (1932); 101 A.L.R. 64 (1936); 110 A.L.R. 644 (1937); 119 A.L.R. 243 (1939); 155 A.L.R. 1383 (1945).

pay for the prevention of serious outbreaks of disease. Fortunately, this is not the choice that confronts us. The true choice is between public health regulations that have a trade-barrier aspect and equally effective regulations that do not."[38]

The multiple burdens of state and local regulations are illustrated in this statement from the report of the Federal Trade Commission: "Usually each State, subdivision of a State, and municipality, insists on making its own inspection and will not accept inspections by authorities of other jurisdictions. Operators of country receiving plants and farmers supplying them sometimes find it necessary to submit to as many as seven or more separate inspections."[39]

However, statements in the opinion of *South Carolina State Highway Department v. Barnwell Brothers*[40] are opposed to the utilization of the "reasonable alternatives" restriction in commerce. There the Court said, "And in reviewing a state highway regulation where Congress has not acted, a court is not called upon, as are state legislatures, to determine what, in its judgment, is the most suitable restriction to be applied of those that are possible, or to choose that one which in its opinion is best adapted to all the diverse interests affected. . . . When the action of a Legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision. . . . It is not any the less a legislative power committed to the states because it affects interstate commerce, and courts are not any the more entitled, because interstate commerce is affected, to substitute their own for the legislative judgment." The *Dean* case raises questions as to the Court's procedure in future cases. One interpretation of the decision would be that the use of the "reasonable alternatives" test was nothing more than an exercise of the usual method of contrasting national interest against that of the state, with the former prevailing. *Cities Service v. Peerless Oil & Gas Company*,[41] decided subsequent to the *Dean* case, gives credence to this

38. Burtis, supra note 36, at 193.

39. Report of the Federal Trade Commission on the Sale and Distribution of Milk and Milk Products, New York Milk Sales Area, 75th Cong., 1st Sess., House Doc. 95 (1937) 3.

40. 303 U.S. 177, 190 (1938).

41. 71 S. Ct. 215 (U.S. 1951). There the Court allowed the State of Oklahoma to regulate the taking of natural gas from a common source of supply, though there was an impact on interstate commerce resulting therefrom. The Court said, "The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo on interstate

interpretation. It is possible, however, that the novel language of "reasonable alternatives" has provided a method for carte blanche invalidation of state statutes, undercutting the time-honored formula of the *Cooley* case.[42] Even though the *Cities Service* case minimizes this possibility, a case with a fact situation similar to the *Dean* case might well attract the Court to utilize "reasonable alternatives," thereafter its expansion into doctrine being but a matter of judicial discretion. Such an eventuality would be a usurpation of legislative function by the judiciary.

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EFFECT OF RESPONSIVE VERDICT STATUTE—INDICTMENTS—FORMER JEOPARDY

On February 11, 1948, defendant was indicted for manslaughter. The following week a jury of twelve returned a verdict of negligent homicide, which was responsive to the charge of manslaughter at that time.[1] The conviction and sentence were set aside on June 15, 1948, and the case was remanded for a new trial.[2] Some twenty months later, on February 13, 1950, defendant was arraigned under the same indictment, but only on the charge of negligent homicide. His counsel objected to the arraignment, protesting that there was no written charge accusing him of negligent homicide for the reason that negligent homicide was no longer responsive to, nor included in, a charge of manslaughter.[3] This objection was overruled, along with the subsequent objections to the clerk's reading of the manslaughter indictment, with the negligent homicide verdict endorsed on the back, to the jury, and the court's permitting the jury to retire to the jury room with the indictment and prior conviction endorsed thereon. *Held*, that it was proper to arraign defendant under the original manslaughter indictment, and try him for negligent homicide. *State v. Crittenden*, 49 So. 2d 418 (La. 1950).

The appellant's contention that the use of the original indictment with the endorsement of the negligent homicide verdict

commerce, that it safeguard an obvious state interest, and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions." (71 S. Ct. 215, 220.) This opinion was written by Mr. Justice Clark, as was that of the *Dean* case.

42. 53 U.S. 299 (1851).

1. Art. 386, La. Code of Crim. Proc. of 1928, as amended by La. Act 147 of 1942.

2. State v. Crittenden, 214 La. 81, 36 So. 2d 645 (1948).

3. Art. 386, La. Code of Crim. Proc. of 1928, as amended by La. Act 161 of 1948.