Michigan Law Review

Volume 35 | Issue 4

1937

CONSTITUTIONAL LAW -- INTERSTATE COMMERCE -- VALIDITY OF FEDERAL STATUTE PROHIBITING INTERSTATE SHIPMENT OF PRISON-MADE GOODS

Joseph H. Mueller
University of Michigan Law School

COMMENTS

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — VALIDITY OF FEDERAL STATUTE PROHIBITING INTERSTATE SHIPMENT OF PRISON-MADE GOODS — The recent decision of the Supreme Court in *Kentucky Whip & Collar Co. v. Illinois Central R. R.*,[1] provides an effective method of circumventing the doctrine of *Hammer v. Dagenhart*,[2] which held that Congress may not prohibit the interstate transportation of commodities which are harmless except for their economic effect in the state of destination. It is hailed by the advocates of reform as furnishing an avenue of approach to such problems as the regulation of minimum wages and hours and child labor.[3]

The decision involves the validity of the Ashurst-Sumner Act.[4]

[1] (U. S. 1937), 57 S. Ct. 277.

[2] 247 U. S. 251, 38 S. Ct. 529 (1918). This decision had already been "elbowed into rather narrow quarters." Corwin, "Congress's Power to Prohibit Commerce—A Crucial Constitutional Issue," 18 CORN. L. Q. 477 at 500 (1933).

[3] See N. Y. TIMES, p. 10: 1 (Jan. 5, 1937).

[4] 49 Stat. L. 494 (1935), 49 U. S. C. (Supp. II, 1936), § 61 et seq.

This act, together with the Hawes-Cooper Act,[5] to which it is a sequel, was passed at the behest of associations of manufacturers and organized labor[6] in an effort to eliminate the "unfair competition"[7] of prison-made goods with the products of free labor. Both acts were directly modeled after two earlier federal statutes regulating the interstate shipment of intoxicating liquor.[8] In spite of this close adherence to precedent, there was considerable doubt as to the constitutionality of the Ashurst-Sumner law.[9] The act provides that

> "It shall be unlawful for any person knowingly to transport or cause to be transported in any manner or by any means whatsoever, or aid or assist in obtaining transportation for or in transporting any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners . . . into any State . . . where said goods, wares, and merchandise are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise in violation of any law of such State. . . ."[10]

The act further requires the labelling of all such goods which are consigned for interstate shipment.[11]

Questioning the constitutionality of the statute, plaintiff, a manufacturer employing prison labor, sought a mandatory injunction to compel an interstate carrier to accept unbranded prison-made products consigned for other states, some of which had statutes forbidding the sale of such commodities.[12] The injunction was refused in the lower

[5] 45 Stat. L. 1084, 49 U. S. C., § 60 (1929), recently upheld in Whitfield v. Ohio, 297 U. S. 431, 56 S. Ct. 532 (1936); 49 HARV. L. REV. 1007 (1936); 34 MICH. L. REV. 1244 (1936).

[6] H. Hearings on H. R. 7729, 70th Cong., 1st sess. (1928) (Committee on Labor); U. S. Bureau of Labor Statistics, Bul. No. 595, p. 210 (1933).

[7] The Federal Trade Commission has declared it to be an unfair trade practice to sell prison-made goods as products made by free labor. Matter of Commonwealth Mfg. Co., 11 F. T. C. 133 (1927). For the extent of this competition, see U. S. Bur. of Lab. Stat., Bul. No. 595, pp. 1-2. (1933); 12 ENCYC. SOC. SCI. 417 et seq. (1934); S. Rep. 906, 74th Cong., 1st sess. (1935) (report of the Senate Committee on the Judiciary concerning the Ashurst-Sumner Act).

[8] Wilson Act, 26 Stat. L. 313 (1890), 27 U. S. C., § 121, sustained in In re Rahrer, 140 U. S. 545, 11 S. Ct. 865 (1891); Webb-Kenyon Act, 37 Stat. L. 699 (1913), 27 U. S. C., § 122, upheld in Clark Distilling Co. v. Western Maryland Ry., 242 U. S. 311, 37 S. Ct. 180 (1917).

[9] Kentucky Whip & Collar Co. v. Illinois Central Ry., (D. C. Ky. 1935) 12 F. Supp. 37; 21 CORN. L. Q. 357 (1936); 49 HARV. L. REV. 466 (1936).

[10] 49 Stat. L. 494 (1935), 49 U. S. C. (Supp. II, 1936), § 61.

[11] Ibid., § 62.

[12] (U. S. 1937) 57 S. Ct. 277 at 279. For a collection of state laws restricting the disposition of prison products, see U. S. Bureau of Labor Statistics., Bul. No.

federal courts,[13] and the Supreme Court affirmed the decision sustaining the act.[14]

The decision is based on the broad principle that Congress may deny the use of the facilities of interstate commerce to prevent the frustration of valid state laws restricting the possession, sale, or use of certain commodities. The labelling provisions of the act were found to be merely incidental to this general purpose and amply supported by authority.[15] To the contention that the statute denied due process the Court replied that the act was not arbitrary or capricious, but a reasonable recognition of "the fundamental interests of free labor." Likewise, it was pointed out that since Congress had formulated its own policy and established its own rule, there was no question of delegation of authority to the states.[16]

There is little question as to the power of Congress to prohibit the interstate movement of persons or commodities which endanger or tend to obstruct the facilities of interstate transportation,[17] or which are detrimental to public health, safety, or morals[18] in the state of destination. If, however, the articles are harmless except for their economic effect, they may not be excluded, according to the decision in *Hammer v. Dagenhart*.[19] This case created considerable uncertainty

596, p. 135 et seq. (1933); 21 CORN. L. Q. 357 at 361, note 35, (1936). See also the report of the Committee on the Judiciary of the Senate in S. Rep. 906, 74th Cong. 1st sess. (1935).

[13] Kentucky Whip & Collar Co. v. Illinois Central Ry., (D. C. Ky. 1935) 12 F. Supp. 37, affd. (C. C. A. 6th, 1936) 84 F. (2d) 168; 26 J. CRIM. LAW 764 (1936); 13 N. Y. UNIV. L. Q. REV. 287 (1936).

[14] (U. S. 1937) 57 S. Ct. 277.

[15] Hipolite Egg Co. v. United States, 220 U. S. 45, 31 S. Ct. 364 (1911); Seven Cases v. United States, 239 U. S. 510, 36 S. Ct. 190 (1916); Weeks v. United States, 245 U. S. 618, 38 S. Ct. 219 (1918).

[16] This question was definitely settled in an earlier decision involving a similar regulation of intoxicating liquor. Clark Distilling Co. v. Western Maryland Ry., 242 U. S. 311, 37 S. Ct. 180 (1917).

[17] Grayson v. Lynch, 163 U. S. 468, 16 S. Ct. 1064 (1896); United States v. Delaware & H. Co., 213 U. S. 366, 29 S. Ct. 527 (1908); Horn v. Mitchell, (C. C. A. 1st, 1916) 232 F. 819; 2 WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES, 2d ed., 993 (1929).

[18] Champion v. Ames, 188 U. S. 321, 23 S. Ct. 321 (1903); Hipolite Egg Co. v. United States, 220 U. S. 45, 31 S. Ct. 364 (1911); Hoke v. United States, 227 U. S. 308, 33 S. Ct. 281 (1913). For a collection of statutes and cases, see Corwin, "Congress's Power to Prohibit Commerce—A Crucial Constitutional Issue," 18 CORN. L. Q. 477 (1933).

[19] 247 U. S. 251, 38 S. Ct. 529 (1918). In this case Congress forbade the shipment of goods produced in factories where children were employed. The Court rested its decision either on the ground that Congress could not prohibit harmless commodities, or that the act was a regulation of manufacturing, or both. It seems that both were relied on in the opinion.

and confusion as to the extent of Congressional power to prohibit interstate commerce, and the type of articles which might be excluded.[20]

The proposition that Congress may not exclude harmless commodities was considerably weakened by two subsequent decisions sustaining acts of Congress prohibiting the interstate transportation of stolen automobiles and kidnapped persons.[21] On the basis of these two precedents, the Court in the instant case repudiates the contention that Congress may not prohibit useful and harmless commodities even if they are useful and harmless.[22] No mention is made of the *Child Labor Case*[23] in this connection, but later in its opinion the Court distinguishes it on two grounds: (1) that the aim of the Child Labor Act[24] was to place local production under federal control; and (2) that the use of interstate commerce was not necessary to the accomplishment of a harmful result.[25] As to the first point there may be a reasonable difference of opinion,[26] but as to the second it seems that the Court is drawing a rather illusory distinction. The same objection could be urged against an act excluding the products of prison labor. In both cases the labor involved precedes interstate commerce, and the unfair competition by its products is made possible by reason of their access to the channels of interstate commerce.

This apparent inconsistency can be reconciled on a more important ground, namely, the obvious difference in operation and effect between the Child Labor[27] and the Ashurst-Sumner Acts.[28] The former involves an outright prohibition on the part of Congress alone, while the latter requires cooperation by state law as a condition to the

[20] See Gordon, "The Child Labor Law Case," 32 HARV. L. REV. 45 (1918); Powell, "Child Labor, Congress, and the Constitution," 1 N. C. L. REV. 61 (1922).

[21] Brooks v. United States, 267 U. S. 432, 45 S. Ct. 345 (1925); Gooch v. United States, 297 U. S. 124, 56 S. Ct. 395 (1936). Just because a violation of criminal law was involved would not seem to make the object of the crime harmful. Moreover, the primary evil sought to be prevented preceded the transportation in interstate commerce.

[22] (U. S. 1937) 57 S. Ct. 277 at 281.

[23] 247 U. S. 251, 38 S. Ct. 529 (1918).

[24] 39 Stat. L. 675 (1916).

[25] (U. S. 1937) 57 S. Ct. 277 at 282.

[26] It has been suggested that in so far as the Child Labor Act prevented goods made by adults from being shipped in interstate commerce because children were being employed in the same factory to produce articles for local consumption, its effect would be analogous to a law prohibiting the use of interstate commerce to manufacturers who kept a mistress, since neither local production nor the keeping of a mistress would be dependent on interstate markets. Gordon, "The Child Labor Law Case," 32 HARV. L. REV. 45 at 61-62 (1918); Powell, "Child Labor, Congress and the Constitution," 1 N. C. L. REV. 61 at 62-63 (1922); 49 HARV. L. REV. 466 at 471 (1936).

[27] 39 Stat. L. 675 (1916).

[28] 49 Stat. L. 494 (1935), 49 U. S. C. (Supp. II 1936), § 61 et seq.

operation of its prohibitory provisions. This difference is significant and justifies the different treatment of the two acts by the Court. It represents the sound distinction between Congressional dictation of local policy and federal legislation designed to promote the enforcement of the internal policy of a state as established by its own laws.[29]

In this respect the principal case provides an effective method of circumventing the doctrine of *Hammer v. Dagenhart*,[30] without overruling it entirely. The principle that Congress may not deny the facilities of interstate commerce to a particular commodity for the ostensible purpose of regulating matters reserved to the states still obtains. It applies, however, only to an outright prohibition on the part of Congress alone. Where the prohibition operates by virtue of cooperative federal and state law there can be no question of an invasion of reserved powers[31] because Congress is merely preventing the use of interstate commerce to defeat or frustrate a state law establishing its own policy.[32] It would seem clear that federal legislation which enables a state to exercise its constitutional authority effectively is not a usurpation but a recognition of such authority.

The decision is noteworthy in that it takes a long step in the direction of closing the so-called gap[33] between national and state power.[34] It also tends to promote uniform national and state laws

[29] This distinction was emphasized and relied on in the circuit court of appeals and probably influenced the Court in the principal case. Kentucky Whip & Collar Co. v. Illinois Central Ry., (C. C. A. 6th, 1936) 84 F. (2d) 168.

[30] 247 U. S. 251, 38 S. Ct. 529 (1918).

[31] This assumes, of course, that Congress does no more than to exclude from interstate commerce articles intended for possession or use in contravention of state law. To the extent that the prohibition goes beyond merely aiding state policy and establishes a policy of its own, it would seem to become an outright prohibition, as that term is used above, which might operate to regulate matters reserved to the states. See United States v. Hill, 248 U. S. 420, 39 S. Ct. 143 (1919).

[32] This is the keystone on which the instant decision rests. It is a much sounder basis than that used in sustaining the Webb-Kenyon Act [supra, note 8] where it was said that since Congress can prohibit intoxicating liquor entirely, it may exercise the lesser power of forbidding its shipment only into those states which restrict its use, etc. This seems to imply that both types of regulation are based on the same considerations of policy in spite of the fact that their consequences, as I have indicated above, may be entirely different. See Clark Distilling Co. v. Western Maryland Ry., 242 U. S. 311, 37 S. Ct. 180 (1917).

[33] See Corwin, "Congress's Power to Prohibit Commerce—A Crucial Constitutional Issue," 18 CORN. L. Q. 477 passim (1933); Powell, "Commerce, Pensions, and Codes, II," 49 HARV. L. REV. 193 at 194-196 (1935).

[34] On this basis Congress recently prohibited the shipment of oil produced in excess of state allowances. 49 Stat. L. 30 (1935), 15 U. S. C. (Supp. II, 1936), § 715 et seq., upheld in Locke v. United States, (C. C. A. 5th, 1935) 75 F. (2d) 157, certiorari denied in 295 U. S. 733, 55 S. Ct. 644 (1935).

It would seem that similar legislation might be adopted with respect to any commodity which a state may restrict by reason of its harmful consequences.

with respect to the regulation of commercial problems that have outgrown state lines.[35] It is important to note, however, that the decision does not give Congress and the states a *carte blanche* to accomplish whatever social or economic reforms may appear desirable. The Court expressly limits its decision to subjects of commerce "as to which the power of the state may constitutionally be exerted by restriction or prohibition in order to prevent harmful consequences. . . ."[36] This limitation on the type of state legislation which Congress may seek to enforce by cooperative action refers primarily to the constitutional guaranties of due process and equal protection, and would undoubtedly have been implied had it not been expressed.

Joseph H. Mueller

---

[35] It has been recently suggested that Congress might use this power to secure a uniform incorporation law. Stevens, "Uniform Incorporation Laws Through Interstate Compacts and Federal Legislation," 34 MICH. L. REV. 1063 at 1078 (1936).

[36] (U. S. 1937) 57 S. Ct. 277 at 282.