Washington University Law Review

Volume 22 | Issue 2

January 1937

Constitutional Law—Interstate Commerce—Trade Regulation—Commodities Exchange Act

such agreements tend toward monopoly and higher prices.[24] On the other hand it is argued that the protection given to the owner of the trade-mark extends to the retailer and ultimate consumer because of the elimination of uneconomic practices, such as the sale of "loss leaders" results in lower prices in general.[25]

O. R. A.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—TRADE REGULATION—COMMODITIES EXCHANGE ACT—[Federal].—In 1922 Congress passed the Grain Futures Act[1] providing for the regulation of trading in grain futures (sales for future delivery) in interstate commerce. In 1936 it passed the Commodities Exchange Act[2] amending the Grain Futures Act by extending it to transactions in various commodities other than grain.

In two recent cases, plaintiffs brought suit to enjoin the enforcement of the latter act on the ground that it was a regulation of intrastate commerce and hence not within the power of Congress. In one case the injunction was refused, in the other the bill was dismissed for want of equity.[3]

The judicial interpretation of that clause of the Federal Constitution granting to Congress the power to regulate commerce among the several states has had a kaleidoscopic history. Definition of the concept of interstate commerce has always been a perplexing problem to the courts. As to what is commerce, the earliest cases gave a broad definition, calling it not only "traffic," but the whole of commercial intercourse.[4] In subsequent cases this concept shrank to one of transportation, covering generally whatever was transported, by whatever means.[5]

Public opinion, aroused at attempted monopolies, and changes in its membership[6] caused the Supreme Court to expand the definition again, this time

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24. Note, 30 Ill. Law Rev. l. c. 645 (1936); see also, Goldsmith and Winks, Price Fixing: Nebbia to Guffey (1936) 31 Ill. L. Rev. 179.

25. The Illinois act reads: "An Act to protect trade mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade-mark, brand or name." Supra, note 5. Note, 30 Ill. L. Rev. l. c. 646; Pub. W. 130: 2281, 2283, 2296, (Dec. 12, 1936); Business Week, page 13-14 (Dec. 12, 1936); 171 Printer's Ink (June 27, 1935) 7.

1. 42 Stat. 998, 7 U. S. C. A. sec. 3 (1922).

2. 49 Stat.—, U. S. C. A. Aug. 1936 Supp. 92 (1936).

3. Board of Trade of Kansas City v. Milligan, 4 U. S. Law Week 65 (D. C. W. D. Mo., 1936); Moore v. Chicago Merc. Exchange, 4 U. S. Law Week 35 (D. C. N. D. Ill., 1936).

4. Gibbons v. Ogden, 22 U. S. (9 Wh., 6 Curt.) 1, 189, 6 L. ed. 1 (1824).

5. Phila. & Reading R. R. Co. v. Penna., 82 U. S. (15 Wall.) 232, 21 L. ed. 146 (1873); U. S. v. E. C. Knight Co., 156 1, 15 S. Ct. 249, 39 L. ed. 325 (1895).

6. Four new appointments were made between 1895 and 1905, while Mr. Justice Harlan, who had dissented in the Knight case, remained on the bench.

with unusual celerity.[7] The power was held to cover not only interstate commerce itself, but also matters "directly affecting" such commerce. The *Swift* case,[8] sustaining the regulation of stockyards through which interstate shipments of stock and meat passed, was the most important decision in this cycle, and marked the recognition of the concept of interstate commerce (and matters directly affecting it) as a pragmatic one, bolstering this bold stand with the inclusive definitions of the early cases, and distinguishing the *Knight*[9] case to the Court's own satisfaction. The ground behind this outpost was quickly consolidated.[10] Congress soon passed the Futures Trading Act,[11] which taxed grain futures sales, exempting those made under Federal Regulations. This law was held unconstitutional by the Supreme Court as being on its face not a tax measure but an attempt to regulate something over which Congress had no jurisdiction.[12] Trying again, in the Grain Futures Act[13] Congress stated that these sales directly affected interstate commerce and limited the act in terms to interstate transactions. The regulation was sustained,[14] *Hill v. Wallace*[15] being distinguished on the ground that in the act involved in that case Congress had not had its commerce power in mind, and had not been attempting to exercise it.

The difference between the two statutes seemed only verbal. Apparently believing that the *Olsen* case[16] meant that the Court would accept Congressional findings of fact as to what directly affected interstate commerce,

7. Addyston Pipe and Steel Co. v. U. S., 175 U. S. 211, 20 S. Ct. 67, 44 L. ed. 126 (1899); Swift and Co. v. U. S., 196 U. S. 375, 25 S. Ct. 276, 49 L. ed. 518 (1905). See E. S. Corwin, *The Twilight of the Supreme Court* (1935) ch. 1, esp. pp. 15-47, 49-50; and notes pp. 194, 195.

8. Supra, note 7.

9. 156 U. S. 1, 15 S. Ct. 249, 39 L. ed. 325 (1895).

10. U. S. v. Patten, 226 U. S. 525, 33 S. Ct. 141, 57 L. ed. 333 (1912); R. R. Comm'rs of Wisconsin v. C. B. & Q. R. R., 257 U. S. 563, 42 S. Ct. 232, 66 L. ed. 371 (1922); Lemke v. Farmer's Grain Co., 258 U. S. 50, 42 S. Ct. 244, 66 L. ed. 458 (1922); Stafford v. Wallace, 258 U. S. 495, 42 S. Ct. 397, 66 L. ed. 333 (1922).

11. 42 Stat. 187, 1 U. S. C. A. sec. 1 (1921).

12. Hill v. Wallace, 259 U. S. 44, 42 S. Ct. 453, 66 L. ed. 822 (1922). An omen of this decision had come in the case of Hammer v. Dagenhart, 247 U. S. 251, 38 S. Ct. 529, 62 L. ed. 1101 (1918), holding that Congress had no power to exclude from interstate commerce the products of child labor. Bailey v. Drexel Furniture Co., 259 U. S. 20, 42 S. Ct. 499, 66 L. ed. 817 (1922), holding that Congress could not do indirectly, by means of the taxing power, what it had no right to do directly by the act involved in Hammer v. Dagenhart, carried out the theme begun in the Dagenhart case. Hill v. Wallace was considered at the same time as Bailey v. Drexel Furniture Co., and both laws involved fell into the limbo of unconstitutionality for apparently the same reason. See generally, E. S. Corwin, *The Commerce Power versus States Rights* (1936).

13. 42 Stat. 998, 7 U. S. C. A. sec. 3 (1922).

14. Board of Trade of Chicago v. Olsen, 262 U. S. 1, 43 S. Ct. 470, 67 L. ed. 839 (1922); Comment, 8 St. Louis Law Review 261 (1922).

15. 259 U. S. 44, 42 S. Ct. 453, 66 L. ed. 822 (1922).

16. Supra, note 14.

Congress later passed the National Industrial Recovery Act,[17] to regulate industry in order to remove the burden which the national economic depression had placed on interstate commerce; and the Bituminous Coal Conservation Act,[18] to regulate coal production as directly affecting interstate commerce.

At this stage the court had ready to hand two lines of precedent, one (composed of the early and the very late cases) stating a broad definition of interstate commerce and inextricably related activity; and the other (composed of the cases in the middle period) stating a very narrow definition. Neither of the groups of cases expressly overruled the other, and the Court chose the narrower definition, holding both laws unconstitutional. In the *N. I. R. A.* case[19] the Court said the law attempted to regulate situations where interstate commerce had ended; in the *Guffey Coal Bill* decision,[20] that Congress had attempted to govern situations where such commerce had not yet begun.

Plaintiffs in the instant cases attempted to cut into the ground covered by the *Olsen* case[21] on the theory that it was overruled by these two later decisions, but the District Courts refused to take that view, thus maintaining the advances made up to the *N. I. R. A.* and *Guffey Coal Bill* cases.[22] Since the *Swift*[23] and *Olsen*[24] cases were expressly stated by the Supreme Court to be inapplicable in the *Schechter* case;[25] and the *Swift* case, upon which the *Olsen* case rests, was similarly held inapplicable in the *Guffey Coal Bill* decision,[26] the instant cases express the present state of the authorities.

V. C. B.

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17. 48 Stat. 195, 15 U. S. C. A. sec. 701 (1933).
18. 49 Stat. 991, 15 U. S. C. A. sec. 801 (1935).
19. Schechter v. U. S., 295 U. S. 495, 55 S. Ct. 837, 79 L. ed. 1570 (1935). See E. S. Corwin, The Schechter Case—Landmark or What (1935) 13 N. Y. U. L. Q. Rev. 151; R. F. Fuchs, A Postscript—The Schechter Case (1935) 20 ST. LOUIS LAW REVIEW 297. Cf. U. S. v. Butler, 297 U. S. 1, 56 S. Ct. 312, 80 L. ed. 287 (1935), holding that Congress cannot regulate agriculture by the use of the appropriation power.
20. Carter v. Coal Co., — U. S. —, 56 S. Ct. 855, 80 L. ed. 749 (1936). The court had let fall a considerable number of statements to the effect that manufacturing and the extractive industries are not commerce. See Kidd v. Pearson, 128 U. S. 1, 9 S. Ct. 6, 32 L. ed. 349 (1888); Crescent Cotton Oil Co. v. Mississippi, 257 U. S. 129, 42 S. Ct. 42, 66 L. ed. 166 (1921); Anderson v. Shipowner's Asso., 272 U. S. 359, 47 S. Ct. 125, 71 L. ed. 298 (1926); United Mine Workers v. Coronado Coal Co., 259 U. S. 344, 42 S. Ct. 125, 66 L. ed. 975 (1921).
21. Bd. of Trade of Chicago v. Olsen, 262 U. S. 1, 43 S. Ct. 470, 67 L. ed. 839 (1922).
22. Schechter v. U. S., 295 U. S. 495, 55 S. Ct. 837, 79 L. ed. 1570 (1935); Carter v. Coal Co., — U. S. —, 56 St. Ct. 856, 80 L. ed. 749 (1936).
23. Swift & Co. v. U. S., 196 U. S. 375, 25 S. Ct. 276, 49 L. ed. 518 (1905).
24. Supra, note 21.
25. Supra, note 22.
26. Carter v. Coal Co., — U. S. —, 56 S. Ct. 855, 80 L. ed. 749 (1936).