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NOTES

THE POWER OF CONGRESS TO SUBJECT INTERSTATE COMMERCE TO STATE REGULATION

The federal Hawes-Cooper Act provides that all goods manufactured by convicts and "transported into any state .... for use, consumption, sale, or storage, shall upon arrival .... be subject to .... the laws of such state .... as though manufactured .... in such state."[1] In *Whitfield v. Ohio*, the defendant sold in the original packages convict-made shirts transported from Alabama, and was fined for violation of a statute of Ohio prohibiting the sale of such goods on the open market.[2] The United States Supreme Court granted

[1] 45 Stat. 1084 (1929), 49 U.S.C.A. § 60 (supp. 1935).

[2] Ohio Gen. Code 1929, § 2228–1. The apparent discrimination in favor of goods made within the state was prevented by a constitutional provision and statute prohibiting the sale of goods made by convicts in Ohio. Ohio Const., art. 2, § 41; Ohio Gen. Code 1929, § 2228–1.

certiorari.[3] The defendant contended that the state Act was an unconstitutional regulation of interstate commerce, and that the Hawes-Cooper Act was an attempted delegation of federal legislative power to the states. The Supreme Court held both acts constitutional.[4] Three judges concurred specially without opinions.[5]

It is well settled that the states can regulate interstate commerce even without federal permission in a proper case,[6] *i.e.*, in a matter not of national interest nor requiring uniformity of treatment throughout the United States.[7] The Supreme Court in *Leisy v. Hardin*[8] partly settled the line between the interstate commerce which a state can and that which it cannot regulate by declaring a state prohibition void so far as it affected commodities from other states in original packages.[9] But the Court intimates in the *Whitfield* case that the "original package" test is to be abandoned,[10] and that the state prohibition might have been valid even without the Hawes-Cooper Act. So far as this *dictum* would permit state regulation of commodities in original packages it contrasts strangely with the recent decision in *Baldwin v. Seelig*[11] which invalidated a state regulation of milk after it had been poured out of the original containers into bottles. Thus the "original package" test has been found wanting on the one side because it restricts state powers too greatly, and on the other because it lets them extend too far. It would seem, therefore, that the doctrine has outlived its usefulness and is being discarded. The Court perhaps is groping, as in the period before *Leisy v. Hardin*, for a new basis of separating state and federal jurisdictions under the commerce clause.[12]

[3] The Ohio Appellate Court affirmed the conviction on the ground that the Hawes-Cooper Act validated such regulation by the state. Whitfield v. State, 49 Ohio App. 530, 197 N. E. 605 (1935). Petition for writ of error dismissed, 129 Ohio St. 543, 196 N. E. 164 (1935).

[4] Whitfield v. Ohio, 56 Sup. Ct. 532 (1936).

[5] Justices VanDevanter, McReynolds, and Stone.

[6] It is assumed that in case of conflict the federal regulation would prevail even in that part of interstate commerce subject to state powers. Southern Ry. Co. v. Reid, 222 U.S. 425 (1912).

[7] Cooley v. Board of Wardens, 12 How. (U.S.) 299 (1852); Compagnie Française v. Louisiana State Board of Health, 186 U.S. 385 (1902); Kane v. New Jersey, 242 U.S. 160 (1916); Minnesota Rate Cases, 230 U.S. 352 (1913); see *id.*, 369 ff. for a collection of cases applying this rule. See Sholley, The Negative Implications of the Commerce Clause, *ante* p. 556.

[8] 135 U.S. 100 (1890).

[9] The original package test also was applied in Schollenberger v. Pennsylvania, 171 U.S. 1 (1898). *Cf.* Baldwin v. Seelig, 294 U.S. 511 (1935).

[10] ". . . . the unbroken package doctrine, as applied to interstate commerce, has come to be regarded . . . . as more artificial than sound." Sutherland, J., 56 Sup. Ct. 532, 535. Sonneborn Bros. v. Cureton, 262 U.S. 506 (1923) is cited. In that case a non-discriminatory state tax on commodities brought into the state and resting there in original packages was sustained, and the "original package" doctrine was discarded as a basis for testing the validity of state taxation.

[11] 294 U.S. 511 (1935).

[12] See Sholley, *op. cit. supra* note 7, at 585.

In spite of the suggestion that the federal act might not have been necessary, *Whitfield v. Ohio* clearly holds that the Hawes-Cooper Act is valid. The opinion declares that the Hawes-Cooper Act is essentially the same as the Wilson Act sustained in *In re Rahrer*,[13] which rendered intoxicating liquors subject to state laws "enacted in the exercise of .... police powers."[14] However, there is a difference between the acts which seems important in the light of earlier decisions of the Court. The first objection to enabling acts, such as the Wilson and Hawes-Cooper Acts has been that they delegate to the states some part of the federal power to regulate interstate commerce.[15] This objection was answered in *In re Rahrer* by relying upon that part of the Wilson Act which limited the state laws operating under it to such as were passed in the exercise of the reserved police power.[16] Thus, the Court concluded, the federal act contemplated only such laws as the state had reserved power to enact, and its effect was merely negative, *i.e.*, to take away from certain commodities the protection from state regulation which they had previously enjoyed under the commerce clause.[17] Had the state regulation in the *Rahrer* case been a typical "commercial regulation," this analysis would not have been open to the court, and the exercise of the state power would have been even more difficult to explain without running afoul of the objection based upon delegation of federal powers. The state regulation in the *Whitfield* case is a typical regulation of commerce;[18] its validity therefore must rest upon some rationalization not employed in the *Rahrer* case. But on this point there is no illumination in the opinion.

Assuming, however, that the federal power to subject interstate commerce to state regulation exists, a natural question is whether it may be used for attacking the child labor problem. It is likely that *Leisy v. Hardin*[19] and *Baldwin v. Seelig*[20] stand in the way of any substantial state control of the products of child labor. *Hammer v. Dagenhart*,[21] on the other hand, prevents Congress from absolutely prohibiting the transportation of such products in interstate commerce. Thus is created a void between state and federal powers, through which

[13] 140 U.S. 545 (1891). The Wilson Act was passed to avoid the decision in Leisy v. Hardin.

[14] 26 Stat. 313 (1890), 27 U.S.C.A. § 121 (supp. 1935).

[15] The objection, if meritorious, would render the federal act unconstitutional. See Cooley v. Board of Wardens, 12 How. (U.S.) 299 (1852); similarly, if the act were deemed to adopt state laws, it would be void. Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920).

[16] It has been held from an early date that the delegation to Congress of its power over commerce did not take away the police powers of the states. Gibbons v. Ogden, 9 Wheat. (U.S.) 1, 203 (1824); Minnesota Rate Cases, 230 U.S. 352, 408 (1913).

[17] For a critical treatment of distinctions of this type, see Sholley, *op. cit. supra* note 7.

[18] The act was so treated by the state court. Whitfield v. State, 49 Ohio App. 530 (1935). Before passage of the Hawes-Cooper Act an attempt to license dealers in goods made by convicts in other states had been held invalid by the Ohio Supreme Court, as a regulation of interstate commerce. Arnold v. Yanders, 56 Ohio St. 417 (1897).

[19] 135 U.S. 100 (1890). [20] 294 U.S. 511 (1935). [21] 247 U.S. 251 (1918).

the traffic in child labor products moves unmolested.[22] A statute like the Hawes-Cooper Act, but directed against the products of child labor would, if sustained, partly fill this gap.[23] In holding such an act constitutional, moreover, *Hammer v. Dagenhart* need not be overruled, for the power of Congress to subject interstate commerce to state laws is not necessarily limited as is the power to prohibit interstate commerce outright.[24] The latter power is asserted directly against the goods prohibited. The former merely removes a shield, and permits the state power to act. Different considerations of policy may govern where one power is used, rather than the other.[25] It is significant that the state power, when permitted to take effect, seems broader in scope than the federal power to prohibit. This difference is illustrated by the contrast between *Whitfield v. Ohio* and *Hammer v. Dagenhart.* In the *Whitfield* case the tendency of convict-made goods to lower wages and create bad competitive conditions was held a proper ground for exercising the state's power to regulate.[26] In the *Hammer* case it was held that the same tendency of child-made goods would not justify a federal prohibition.[27] It is thus possible that Congress will be permitted to subject commodities to state regulation when a federal prohibition would be stricken down.

It is probable, however, that the line of cases establishing and limiting the power of Congress to prohibit interstate commerce would have an important bearing on the ultimate result of cooperative federal and state legislation directed against child-made goods. Federal prohibitions and acts subjecting commodities to state laws have been sustained which dealt with things immediately

[22] Corwin, The Power of Congress to Prohibit Commerce, 18 Cornell L. Q. 477 (1933). The *dictum* in Whitfield v. Ohio stating that the local statute might have been valid without the Hawes-Cooper Act, may be construed to mean that a state prohibition of child labor products would be upheld, especially because the evil which is urged against them, *i.e.*, their bad effect upon competitors using adult labor, furnished the ground for upholding the prohibition of convict-made goods. See 56 Sup. Ct. 532, 535. But in view of the recent decision in Baldwin v. Seelig, such a result seems unlikely.

[23] See 49 Harv. L. Rev. 466 (1936).

[24] "If the power of Congress to remove the impediment to state control presented by the unbroken package doctrine be limited in any way (a question which we do not find it necessary to consider). . . . ." Sutherland, J., 56 Sup. Ct. 532, 535.

At least one court does not think it inconsistent to limit the power to prohibit completely without similarly limiting the power to subject goods to state control. In Kentucky Whip & Collar Co. v. Illinois Cent. R. Co., 12 F. Supp. 37 (Ky. 1935), the court, in a *dictum*, declared unconstitutional that part of the federal Ashurst-Sumners Law which prohibits the transportation of convict-made goods into a state for use against the laws of such state. In the same opinion the decisions of the state courts in Whitfield v. Ohio, sustaining the Hawes-Cooper Act, are cited with approval. 12 F. Supp. 37, 42.

[25] See p. 640 *infra.*

[26] 56 Sup. Ct. 532, 535. The bad competitive effect of convict-made goods is the basis of the federal and state legislation. See Brief for Respondent, pp. 6–10.

[27] 247 U.S. 251, 273.

harmful to the user, such as adulterated foods,[28] or instruments of fraud, such as stolen cars[29] and misbranded articles,[30] or with a comparatively insignificant traffic, such as convict-made goods.[31] *Hammer v. Dagenhart*, however, limited the power to prohibit in two ways: first by distinguishing the former cases sustaining federal prohibitions on the ground that they affected things harmful in themselves and producing harmful consequences at their destination;[32] second, by declaring that the power could not be used to subject local industries, not themselves interstate commerce, to federal regulation. The requirement that the articles prohibited be harmful in themselves is avoided by cooperative legislation through the distinction pointed out above, *i.e.*, the broader scope of the state power when it is permitted to act. The second objection, that state power will be destroyed by federal prohibitions based upon local manufacturing conditions, vanishes when the cooperative method is used. Federal enabling acts recognize and rely upon the individual states. No state could join in destroying the interstate market until it had adopted for its own industries such regulations as it demanded of others, for discriminatory state measures would be struck down.[33] A substantial number of states would have to adopt prohibitory measures for themselves before a serious effect on the interstate market could be produced. The decision may supply a means, so far as constitutional theory can do so, of dealing with child labor without constitutional amendment.

THE VALIDITY OF STOCKHOLDERS' VOTING AGREEMENTS IN ILLINOIS

Modern corporate financing frequently requires the creation of a united majority of stockholders, by a contract or trust, which will successfully resist both the attack of the original parties to the undertaking and the objections raised by transferees of the affected shares. The necessity of making binding agreements among stockholders arises upon the creation, the reorganization, or the winding up of a corporation; or in the securing of loans made to the corporation;

[28] Hipolite Egg Co. v. U.S., 220 U.S. 45 (1911). Perhaps intoxicating liquors (Clark Distilling Co. v. Western Md. Ry. Co., 242 U.S. 311 (1917); U.S. v. Hill, 248 U.S. 420 (1919)) and prostitutes (Hoke v. U.S., 227 U.S. 308 (1913)) can also be included in this class.

[29] Brooks v. U.S., 267 U.S. 432 (1925).

[30] Seven Cases v. U.S., 239 U.S. 510 (1916); Weeks v. U.S., 245 U.S. 618 (1918).

[31] Whitfield v. Ohio, 56 Sup. Ct. 532 (1936).

[32] The requirement that goods prohibited from interstate commerce by federal law be harmful in themselves was first used as a description, in supporting decisions sustaining the power to prohibit. The Lottery Case, 188 U.S. 321 (1903). In Clark Distilling Co. v. Western Md. Ry. Co., 242 U.S. 311 (1917), the prohibition was sustained on the ground of the "exceptional" nature of the prohibited commodity—intoxicating liquor. In Hammer v. Dagenhart the harmful or exceptional nature of the commodities involved in the earlier cases became a basis for distinguishing them and so a limitation upon the federal power to prohibit.

[33] Welton v. Missouri, 91 U.S. 275 (1876); Walling v. Michigan, 116 U.S. 446 (1886).