Boston College Law Review

Volume 4 | Issue 3 Article 12

4-1-1963

Trade Regulation

Nelson G. Ross

(4)(a)) and the three month priority rule (section 9-312(2)) on the farmer's financial dealings with his creditors will be more ascertainable after the amendment has had time to operate. Similarly, only time will tell if the deletion of section 9-204(2)(a) is really, as the foregoing analysis suggests, inconsequential. The infinite potential in the law for novel fact situations should caution one that perhaps such is not the case.

STEPHEN WILLIAM SILVERMAN

TRADE REGULATION

FEDERAL

On October 15, 1962, Congress enacted into law an amendment[1] to Section 9(a) of the Census Bureau Reports Act.[2] The amendment specifically provides that no department, bureau, or agency of the government, other than the Department of Commerce, shall have access to copies of census reports retained by the reporting companies.[3] The effect of this amendment is to extend to the company-retained copies of census reports the same immunity from legal process previously accorded only to the original reports which had been submitted to the Census Bureau solely for statistical purposes.

The amendment was precipitated by the United States Supreme Court decision in *St. Regis Paper Co. v. United States*.[4] Prior to this decision, three lower federal court decisions,[5] a presidential proclamation,[6] an Attorney

---

1 Pub. L. No. 87-813 (Oct. 15, 1962).

2 13 U.S.C. § 9 (1958).

3 13 U.S.C. § 131 (1958) provides that a census of manufacturing shall be taken, compiled and published every five years. 13 U.S.C. § 224 (1958) imposes a fine of $500 or imprisonment for not more than sixty days or both upon the owner, official, agent or person in charge of any company who, when requested, neglects or refuses to answer completely and correctly to the best of his knowledge all questions relating to his company contained in any census form.

4 368 U.S. 208 (1961). The Federal Trade Commission subpoenaed certain corporate records of the St. Regis Paper Co. in connection with its investigation of St. Regis for possible violations of the antitrust laws. When the Commission found that the information supplied was not sufficient for a finding, an order was issued to require the production of other corporate records including file copies of reports previously submitted to the Census Bureau. St. Regis claimed that such reports were confidential and refused to turn them over to the Commission. The United States, at the request of the Commission, brought suit in the district court seeking a mandatory injunction to compel compliance with its order.

5 FTC v. Dilger, 276 F.2d 739 (7th Cir. 1960); FTC v. Orton, 175 F. Supp. 77 (S.D.N.Y. 1959); United States v. Bethlehem Steel Corp., 21 F.R.D. 568 (S.D.N.Y. 1958). The *Bethlehem* court held that the privileged status was accorded the *information* furnished to the Census Bureau and not merely the reports.

6 46 Stat. 3011 (1929). President Hoover, following the enactment of the Census Bureau Reports Act, proclaimed:

> The sole purpose of the census is to secure general statistical information regarding the population and resources of the country, and replies are required from individuals only to permit the compilation of such general statistics. No person can be harmed in any way by furnishing the information required.

General's Opinion,[7] and the very language of the census form itself[8] re-enforced the reasonably held belief that company file copies were extended the same confidentiality and immunity from legal process as were afforded the original reports submitted to the Census Bureau. However, Mr. Justice Clark, speaking for the majority in *St. Regis*, interpreted section 9 immunity to apply only to original Bureau reports when he stated that "the prohibitions against disclosure contained in §9 run only against the officials receiving such information and do not purport to generally clothe census information with secrecy."[9]

The impact of the *St. Regis* decision was immediately manifest. Both government and industry depend upon reliable statistical reporting of highly confidential data for predicting economic trends and planning for the future. The success of the reporting program is predicated upon the fact that businesses can offer data freely and voluntarily without fear that the reported information will be used against the reporting establishment. With the cloak of immunity removed from the company-retained copies, Census Bureau operations were immediately hindered. Reporting companies, rather than subject their file copies to the possibility of disclosure, destroyed them, severing the continuity so essential to uniform and consistent reporting over successive reporting periods.[10] Due to the loss of faith by businesses in the Government's assurances of immunity,[11] the number of responses immediately decreased.[12] Recognizing the detrimental aspects of the *St. Regis* case on the Census Bureau's reporting program, Secretary of Commerce Hodges, in requesting that Congress abrogate the effects of the decision by amending Section 9 of the Census Bureau Reports Act, pointed out that the success of the program would be undermined unless immediate legislative action were taken.[13] Congress responded by enacting the amendment under discussion.

Undeniably, governmental departments must have access to certain corporate records in order to detect, prevent and prosecute violations of the law. However, the benefits derived from reliable statistical reporting warrant a grant of immunity to both Bureau and company-retained copies, though governmental departments are obliged to seek their information elsewhere. Without such immunity to both copies of the reports, the basic purpose[14] underlying the Census Bureau Reports Act would be defeated.

Had the effect of the *St. Regis* decision not been counteracted, the result

---

[7] 36 Ops. Att'y Gen. 366 (1930).

[8] The census report form contains assurance of immunity by providing that: "Your report is confidential and only sworn census employees will have access to it. It cannot be used for the purpose of taxation, investigation or regulation." The file copy recites that said copy is to be retained by the reporting company for future reference.

[9] Supra note 4, at 217-18. In a vigorous dissent, Mr. Justice Black attacked the majority's strict interpretation of the scope of immunity provided by section 9 and asserted that it was Congress' intention to have all copies, both Bureau and company-retained, accorded the immunity.

[10] U.S. Code Cong. & Ad. News 5122, 5124 (Nov. 5, 1962).

[11] Supra notes 6, 7 & 8.

[12] Supra note 10.

[13] Ibid.

[14] See supra note 6.

would have been a reduction in the accuracy of the statistics and an increase in the cost of obtaining the vital information.[15] The amendment alleviates the adverse effects of the *St. Regis* case by restoring to businesses an assurance of confidentiality in conformity with the letter and spirit of the Census Bureau Reports Act.

STATE

The Massachusetts legislature recently enacted into law a statute imposing identification and marking requirements upon the sale of certain goods imported from foreign countries.[16] This statute prohibits the sale or offering for sale of any "machinery, hardware, ladders, shoes or other footwear, fabrics, suits or other wearing apparel, sporting goods or equipment, radios or parts thereof, scallops, fish or fish products, which have been imported from a foreign country" unless such goods are conspicuously identified as "imported goods" by a sign displayed in a place where it can give adequate notice to prospective purchasers of their foreign origin.[17] In addition, if the goods have an individual price marking, the statute requires that the goods themselves be marked with the words "imported goods" or the name of the country of origin.[18] There is a reasonable basis for questioning the constitutional validity of this statute.

Any discussion of the constitutionality of a state statute must necessarily involve the jurisdiction of the state legislature to enact such a measure. There are three specific instances in which a state legislature is devoid of jurisdiction to legislate.

First, where a state act conflicts with a constitutional federal statute, the former must yield since the federal law is supreme.[19] The Massachusetts act requires the posting of a sign reading "imported goods," and if the goods

[15] Supra note 10.

[16] Mass. Gen. Laws ch. 94, § 277B (Supp. 1962).

[17] Under the statute, the letters in the sign stating "imported goods" must be at least as large as the price figures. The new law also prohibits the advertising of these goods unless the advertisement specifically designates that they have been imported. Excluded from liability under this provision are newspaper publishers, owners and operators of radio and television stations and other persons furnishing a medium for advertising for the sale of such goods.

[18] The additional marking provision states that "If the goods have an individual price marking [e.g., price tag], then in like manner, *they* shall also be marked with the words 'Imported Goods' or the country of origin indicated." (Emphasis supplied.) Whether "they" refers to "price marking" or to "goods" is ambiguous. Since both "they" and "goods" are plural and "price marking" is singular, the logical construction is that "they" refers to "goods."

[19] U.S. Const. art. VI, cl. 2 provides "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." See McDermott v. Wisconsin, 228 U.S. 115 (1913) which held a Wisconsin statute repugnant to the commerce clause where it conflicted with the Federal Food and Drug Act (34 Stat. 768 (1906) (now 52 Stat. 1059 (1938), 21 U.S.C. § 331 (1958)) by requiring the labeling of glucose mixtures brought into the state in accordance with the state labeling statute and prohibiting all other labels on the container, including that required by the federal statute. Compare Savage v. Jones, 225 U.S. 501 (1912) which upheld a state labeling law as not being in conflict with the federal statute.

have an individual price marking, the statute requires that the specific goods be marked. The federal statute also requires the actual labeling of goods.[20] The purpose underlying both the federal and the Massachusetts statutes appears to be to notify prospective purchasers of the foreign origin of the goods and to thereby influence their will in deciding whether or not to purchase the imported goods.[21] Hence, although the Massachusetts act provides a supplementary means of notification, the respective statutes do not conflict either as to method of, or purpose for, the identification of imported goods.

However, the Massachusetts act does conflict with the federal statute in another respect. The federal regulations exempt certain classes of imported goods from the marking requirements, e.g., products exported from the United States and returned,[22] and parcels containing articles under one dollar in value.[23] The Massachusetts act conflicts with the federal regulations in that it requires the marking of some federally exempted goods including the aforesaid. As to these conflicting provisions, the Massachusetts act appears to be invalid.

Second, a state act is invalid where it is merely duplicative of a federal statute in an area demanding uniform regulation.[24] The justification for invalidating the coincidental state measure is that the dual regulatory system often creates an overlapping and confusing menace which destroys the uniformity for which Congress may have enacted the regulation.[25] The Massachusetts act, to the extent that it requires the marking of the imported goods, duplicates the federal requirements in this area. A similar situation arose in the case of *Hines v. Davidowitz*,[26] wherein both a Pennsylvania statute and a federal statute imposed identical alien registration requirements. Mr. Justice Black, speaking for the majority, struck down the Pennsylvania statute, stating that the ultimate question of constitutionality of the state law depends upon whether, under the circumstances of the particular case, the state law

> stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. And in that determination, it is of importance that this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority.[27]

---

[20] 67 Stat. 509 (1953), 19 U.S.C. § 1304(a) (1958).

[21] This purpose of the federal marking regulations was clearly defined by the Court of Custom and Patent Appeals in United States v. Friedlaender, 27 C.C.P.A. 297 (1940).

[22] 19 C.F.R. § 11.10(b)(4) (1961).

[23] 19 C.F.R. § 11.10(b)(5) (1961). See 19 C.F.R. § 11.10 (1961) for a complete list of articles exempted from the federal marking requirements.

[24] Charleston & Western Carolina Ry. v. Varnville Furniture Co., 237 U.S. 597, 604 (1915), wherein Mr. Justice Holmes stated that "When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."

[25] Hines v. Davidowitz, 312 U.S. 52 (1941).

[26] Ibid.

[27] Id. at 67-68.

The enforcement of the Massachusetts act under consideration will impede the purposes and objectives of Congress in the area of international relations and foreign trade. With respect to trade with foreign nations, it is imperative that the federal government maintain a uniform commercial policy.[28] Massachusetts has legislated one set of marking regulations for foreign products. Conceivably, the other forty-nine states could establish their own diverse requirements. It is manifest that such diverse marking requirements would constitute an undue burden on the conduct of our national trade policy, seriously impairing the strength of our foreign trade program.

However, the Supreme Court in certain cases has made exceptions and upheld duplicative measures, especially in the area of traffic safety regulation which is considered a valid exercise of the states' police power over a subject predominantly local in scope.[29] The cases which have upheld overlapping state statutes dealt with a legislative area totally unrelated to the subject under consideration and, therefore, cannot be used as a basis for upholding the Massachusetts act.

Finally, the state lacks jurisdiction to legislate in an area in which Congress has preempted or "occupied the field."[30] Whether Congress has preempted the field can be determined from its intent to preclude state action in the particular area.[31] Such an intent may be indicated by the terms of the federal act.[32] Frequently, however, congressional intent to preempt the field does not appear in the language of the statute itself. The United States Supreme Court in *Pennsylvania v. Nelson*,[33] faced with the issue of whether Congress had preempted the field of sedition, indicated that congressional intent may be determined by answering the following queries: First, does the federal statute touch a field in which the national interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject? Second, would state administration of the law interfere with, and present a danger to the federal program? Third, is the federal

[28] Board of Trustees of the Univ. of Ill. v. United States, 289 U.S. 48 (1933). The need for a uniform legal standard among the states concerning the importation of foreign goods has influenced the Supreme Court to adhere to the policy that only Congress may determine what articles are to be imported into this country, and the terms upon which such importation is permitted. For cases following this view, see Weber v. Freed, 239 U.S. 325 (1915); Brolan v. United States, 236 U.S. 216 (1915); The Abby Dodge, 223 U.S. 166 (1912); Buttfield v. Stranahan, 192 U.S. 470 (1904).

[29] See California v. Zook, 336 U.S. 725 (1949), where the Court, by a bare majority, held that the Federal Motor Carrier Act (49 Stat. 543 (1935), as amended, 54 Stat. 919, 921 (1940), 49 U.S.C. § 301, 303(b) (1958)) did not prevent California from imposing overlapping regulatory measures prohibiting the sale and arrangement of any transportation over the state's public highways unless such carriers had been issued a permit from either the state or the Interstate Commerce Commission. The area of traffic safety regulation is considered a proper subject for the exercise of the state police power. See Maurer v. Hamilton, 309 U.S. 598 (1940); South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938). In addition, the Court in *Zook* stressed the fact that Congress in enacting the federal statute, did not appear to intend to preclude state legislation on the same subject.

[30] Pennsylvania v. Nelson, 350 U.S. 497 (1956); New York Cent. R.R. v. Winfield, 244 U.S. 147 (1917).

[31] Pennsylvania v. Nelson, supra note 30.

[32] Southern Ry. v. Railroad Comm'n of Ind., 236 U.S. 439 (1915).

[33] Supra note 30.

scheme of regulation so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it? Affirmative answers to the foregoing questions would reasonably lead to the conclusion that Congress has intended to preempt the field.

Mr. Jusice Curtis in *Cooley v. Board of Wardens of the Port of Phila.*[34] first set forth the test of preclusion with the question: Is this a field predominantly national in character or is it sufficiently local to warrant diverse local regulation? It is immediately apparent upon examination of the area of marking of foreign imports that we are dealing with a subject of paramount national importance which, as previously indicated, demands a uniform national system of regulation.

In the fifty years prior to the enactment of the Massachusetts act, Congress, pursuant to the express authority granted to it by the Constitution,[35] has enacted a pervasive scheme of regulation in the area of marking and labeling imported goods. The conclusion is inescapable that Congress intended to preclude supplementary legislation by the states. The comprehensive federal statute expressly provides that

> *every article* of foreign origin (or its container) . . . imported into the United States shall be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or container) will permit in such a manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article.[36] (Emphasis supplied.)

Congressional intent to enact an all-encompassing measure is further indicated in the terms of the statute which vests the Secretary of the Treasury with discretionary authority to impose supplementary regulations necesssary to prevent deception or mistake in the marking and labeling of foreign articles.[37] Thus, Congress has manifested its intent to preempt the field of marking and labeling of imports by legislating a pervasive scheme of regulation in an area which is dominantly federal in interest and in which state action would endanger the federal program.

Therefore, it would seem that Massachusetts lacked jurisdiction to enact the statute in question on at least two grounds: first, the Massachusetts act is coincident with the federal statute in an area of national significance and, second, Congress "occupies the field" of marking and labeling imports. Even if it could be assumed that the Massachusetts act were valid, it appears to be invalid to the extent that its provisions conflict with the federal regulations.

The constitutional validity of the Massachusetts act must further be questioned on the basis of its discriminatory purposes and effects. The commerce clause of the Constitution was interpreted in *Welton v. Missouri*[38] to

---

[34] 53 U.S. (12 How.) 298 (1851).

[35] U.S. Const. art. I, § 8, cl. 3 provides that "Congress shall have the Power to regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes."

[36] Supra note 20. Section 1304(d) prohibits delivery to any market until such goods are marked accordingly.

[37] 19 U.S.C. §§ 1304(a)(1) & (2) (1958).

[38] 91 U.S. 275 (1875).

forbid the imposition of burdens by a state upon interstate or foreign commerce if unreasonable or discriminatory. The object of vesting the federal government with the exclusive power to regulate commerce with foreign nations and among the states was to insure uniformity of regulation in order to prevent the discriminatory type of state legislation which existed prior to the adoption of the Constitution.[39]

However, the Supreme Court has recognized that the states, in the exercise of their police power, must be permitted to enact measures for the protection of their citizens' health and safety.[40] Therefore, in each case that has come before it involving discriminatory legislation, the Supreme Court has examined the burden which the statute in question placed upon commerce and measured this against the interest which the state law sought to protect; and where the Court has determined that the state's interest in protecting its citizens has outweighed the national interest in maintaining a free flow of commerce, the statute has been sustained.[41] However, the Supreme Court in *Dean Milk Co. v. City of Madison*[42] altered this test when it declared that even where the state enacted a valid measure to protect the health of its citizens, if the statute overly burdened commerce or discriminated against out-of-state producers, it would be struck down unless the local interests could be protected in no other way.[43] The Court was clear in its view, moreover, that protection of the local economy is not considered a valid exercise of the state's police power and that where a state statute is enacted primarily for the purpose of erecting economic barriers and not for the purpose of protecting the health and welfare of its citizens, the statute will not be upheld.[44]

There have been exceptional cases where protective economic measures designed to reach a local situation in the interest of the welfare of producers and consumers have been upheld by the Supreme Court. In *Milk Control Bd. v. Eisenberg Farm Prods.*,[45] a Pennsylvania statute required that milk dealers obtain a license to operate, file a bond and pay producers milk prices set by the board. The Supreme Court, in upholding the law, stressed three factors: the activity affected was essentially local, very little milk was shipped out of state, and no attempt was made to curtail out-of-state shipments. But note, unlike the Massachusetts act, the Pennsylvania statute did not discriminatorily affect out-of-state interests. In fact, the effects of the law only negligibly extended beyond the state borders.

---

[39] H.P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949).

[40] Bradley v. Public Util. Comm'n of Ohio, 289 U.S. 92 (1933) (denial of a license to run a bus line upheld where the issuance of the license would have crowded the highways and endangered the safety of the citizens); Mintz v. Baldwin, 289 U.S. 346 (1932) (New York statute requiring certification by the state of origin that cattle shipped from out of state were inspected by sanitary officials against Bang's disease, upheld); Reid v. Colorado, 187 U.S. 137 (1902) (Colorado statute making it unlawful to bring diseased cattle into the state, upheld).

[41] Ibid.

[42] 340 U.S. 349 (1951).

[43] Id. at 354.

[44] Ibid. Accord, H. P. Hood & Sons v. Du Mond, supra note 39; Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935); Minnesota v. Barber, 136 U.S. 313 (1890).

[45] 306 U.S. 346 (1939).

Many of the foreign products designated by the Massachusetts statute to be conspicuously distinguished from goods of domestic origin are the same products which are manufactured by the state's most important, yet ailing industries. Local labor unions and manufacturers have been demanding additional protection against increasing foreign competition within the state. The Massachusetts act appears to be an attempt to satisfy these pleas by providing measures designed to influence the general buying public to purchase domestic products in lieu of similar foreign goods. But in attempting to guide the choice of the purchasing public for the purpose of protecting the local economy, the statute unconstitutionally discriminates against foreign producers.

The regulations imposed by the Massachusetts act, unlike those in the *Eisenberg* case, will produce extra-territorial burdens on foreign producers. Since the effects of the economic regulation will be felt outside of Massachusetts, it cannot be declared a valid exercise of the state police power. While in many respects, additional measures may be required to adequately inform the public that certain goods are imported, this is strictly a function of the federal government. For only the Government possesses the requisite power to enact such economically protective measures, to determine such policy, and to take the appropriate action to accomplish the desired results.

In conclusion, the reasons for construing the Massachusetts act to be unconstitutional are twofold. First, Massachusetts lacks the necessary jurisdiction to legislate in the area of marking foreign imports, for the legislation is duplicative of the federal act and concerns an area of national interest which has been constantly regulated under a uniform system by Congress, and in which area Congress has manifested its intention to "occupy the field." Further, the Massachusetts act is invalid to the extent that it conflicts with the federal statute by requiring the marking of certain classes of goods which are exempt under federal law. Second, the Massachusetts act appears to discriminate against foreign producers in an effort to protect local economic interests, and thus the act places an unconstitutional burden on foreign commerce.

NELSON G. ROSS