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Federal and State Economic Regulation--A Preemption Problem

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NOTES

FEDERAL AND STATE ECONOMIC REGULATION— A PREEMPTION PROBLEM

In *Florida Lime & Avocado Growers, Inc. v. Paul*[1] the United States Supreme Court, by a five-to-four decision, upheld a California statute[2] which required that all avocados sold or transported in California must contain eight per cent oil by weight. The effect of this statute was to exclude from California many Florida-grown avocados, although they were mature under the standards promulgated by the Agricultural Adjustment Act.[3] Florida avocado growers sought to enjoin enforcement of the California statute on a number of grounds. First, they contended that the Agricultural Adjustment Act should preclude application of the California statute under the supremacy clause, and second, they believed that the California statute, as applied, denied them equal protection. Finally, they urged that the imposition of the California statute either unreasonably burdened or discriminated against interstate marketing of avocados, in violation of the commerce clause. A majority of the Court rejected the first two contentions, but, because of a question as to whether certain evidence was admitted, they remanded the unreasonable-burden question for a new trial.[4]

When the Court studied the supremacy contention, it applied what have come to be the standard tests for preemption.[5] The first inquiry was to see if there was a "direct irreconcilable conflict"[6] between the two statutes; next the Court examined the subject of avocado maturity regulations to see if it demanded "national uniformity."[7] The final test applied was to determine whether or not Congress included in the Agricultural Adjustment Act a "clear and manifest design"[8] to preclude state maturity regulations. The majority, relying on *Bibb v. Navajo Freight Lines, Inc.*,[9] held that there was no conflict because it was not physically impossible for the Florida avocado to comply with both the federal and the state maturity regulations. In deciding that there was no clear and manifest intent on the part of Congress to "oust" all state maturity regulations, the Court relied on its decision in *Campbell v. Hussey*.[10] That case involved the Federal Tobacco Inspection Act,[11] and the legislative history of that statute em-

[1] 373 U.S. 132 (1963).

[2] CAL. AGRI. CODE § 792.

[3] 48 Stat. 31 (1933), as amended, 7 U.S.C. §§ 601-59 (1964).

[4] 373 U.S. at 154. Although the district court held that the California oil test did not violate the commerce clause, the Supreme Court did not review the question because it could not ascertain the record upon which the lower court's decision was based.

[5] Abraham & Loder, *The Supreme Court and the Preemption Question*, 53 KY. L.J. 289 (1965).

[6] Sinnot v. Davenport, 63 U.S. (22 How.) 227, 243 (1859).

[7] Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).

[8] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[9] 359 U.S. 520 (1959).

[10] 368 U.S. 297 (1961).

[11] 49 Stat. 731 (1935), as amended, 7 U.S.C. §§ 501-17 (1964), 511(a): "[W]ithout uniform standards of classification and inspection the evaluation of tobacco is susceptible to speculation, manipulation and control."

phasizes the necessity for uniform inspection practices to protect the producers and public.[12] The majority in the *Avocado* case stated that these purposes were absent from the legislative history of the Agricultural Adjustment Act. Therefore, the Court held that Congress exhibited no intention that state avocado maturity regulations should yield to the federal act. And, finally, a necessity for national uniformity in avocado maturity regulations did not exist, reasoned the Court, because avocado maturity standards were not "vital to national interests,"[13] but were traditionally left to state control.

The dissenting justices, confining their opinion solely to the supremacy problem, applied the same tests for preemption as the majority, but reached diametrically opposite conclusions. For example, where the majority saw no conflict, the dissent argued that there was a definite conflict between the two statutes, evidenced by the fact that six per cent of the "federally mature" Florida avocados were excluded from California markets.[14]

An attempt at a reconciliation of the two opinions would be a strenuous task. However, by a thorough examination of one aspect of the dissent, one might perceive not only a different view of the *Avocado* case, but also a clearer understanding of the complex problem of preemption in interstate commerce. The dissent stated that the problem was a purely *economic* one, economic in the sense that the marketing of immature avocados resulted in consumer dissatisfaction, a diminution of demand for the fruit, and ultimately in a small return to the farmer.[15]

The purposes of this note are to illustrate the economic objectives of both the federal and state maturity regulations, and further, to examine whether or not it is a valid application of the preemption doctrine to require state legislation concerning maturity standards, having an economic effect, to yield to federal regulations.

A perusal of the Agricultural Adjustment Act itself reveals that its objectives were primarily of an economic nature: the declaration of policy states that the statute was enacted "to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices "[16] A reading of the Federal Register indicates the governmental concern with the conditions in the avocado industry.[17] It reports the very detailed and inclusive marketing agreements that were proposed. Many cases also assert that the Act manifested a purpose to improve the economic situation of the industry.[18] The California supreme court stated in *United States v. Superior Court:*[19]

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[12] Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 147 (1963).

[13] *Id.* at 144.

[14] 373 U.S. 132, 166 (1963).

[15] *Id.* at 169.

[16] 62 Stat. 1257 (1948), 7 U.S.C. § 602(1) (1965).

[17] 19 Fed. Reg. 2418-430, 2424(4)(e) (1954). "As has been indicated heretofore, the Florida avocado growers are now receiving relatively low returns for their crops. Probably the most important single factor is that of maturity. An immature avocado is unpalatable, and increases consumer resistance and materially affects the marketing of the entire crop."

[18] *E.g.*, Panno v. United States, 203 F.2d 504 (9th Cir. 1953); United States v. Rock Royal Co-op, 26 F Supp. 534 (N.D.N.Y. 1939).

[19] 19 Cal. 2d 189, 191, 120 P.2d 26, 27 (1941).

> The Agricultural Marketing Agreement Act of 1937 in establishing a plan for regulating the interstate marketing of agricultural products, is designed to raise farm prices and thus restore to the farmer a lost purchasing power, to prevent waste from overproduction and to eliminate the evils of unfair competition.

From an examination of the policy stated in the legislative and case reports, it would seem clear that the nature and purpose of the federal legislation was economic.

The federal regulations or "marketing agreements" that controlled the marketing of avocados were promulgated by the Florida growers in cooperation with the Secretary of Agriculture.[20] Since these agreements were adopted by the growers as self-help measures to increase their income and protect themselves, it is improbable that the Florida growers would have omitted any important segment of the growing or marketing from control.[21] In *Parker v. Brown*,[22] upon which the majority in the *Avocado* case relied, the Supreme Court held the California Agricultural Prorate Act[23] not to be preempted by the Agricultural Adjustment Act. Pursuant to the state statute, many farmers adopted an extensive marketing program for raisins. Contemporaneously, there were no federal marketing orders concerning raisins then in effect. Since there were no federal regulations that could supersede the state program, the Supreme Court upheld the California act, stating that it should remain in effect at least until the Secretary of Agriculture adopted a raisin marketing plan. Clearly these two cases are distinguishable. In *Parker* no federal marketing agreements were in effect, but in the *Avocado* case the Secretary of Agriculture had adopted a pervasive regulatory scheme encompassing the marketing and maturity standards of avocados.

Many of the unfavorable economic conditions that prompted adoption of the federal marketing regulations by the Florida growers also existed in the California avocado industry. While discussing the California act, the district court stated that the marketing of immature avocados increases sales resistance, lowers prices, and diminishes the return to the grower.[24] To eliminate this cause of diminished return to the California growers, it was deemed necessary to enact certain legislation on maturity standards. The California growers, unlike the Florida growers and the Secretary of Agriculture, believed the oil test to be the most accurate gauge of maturity. From this brief statement of the conditions in the California industry and consequent legislative remedy, it may be concluded that the adoption of this section of the Agricultural Code,[25] like the adoption of the federal act, was to fulfill an economic purpose.

After it is concluded that the California statute is economic legislation, a

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[20] 48 Stat. 34 (1933), as amended, 7 U.S.C. § 608b (1964); 49 Stat. 757 (1935), as amended, 7 U.S.C. § 608c(8) (1964). The Secretary of Agriculture is empowered by the Act to issue a wide variety of orders covering agricultural produce. However, many of these orders are not put into effect until a majority of the handlers of the produce sign a "marketing agreement."

[21] See 19 Fed. Reg. 2418-430 (1954) which gives a detailed example of the agreement concerning the Florida avocados.

[22] 317 U.S. 341 (1943).

[23] Cal. Stat. 1933, ch. 754, at 1969. For the present codification of the original Prorate Act see CAL. AGRI. CODE §§ 2000-2401.

[24] Florida Lime & Avocado Growers, Inc. v. Paul, 197 F Supp. 780, 782-83 (N.D. Cal. 1961).

[25] CAL. AGRI. CODE § 792.

question may arise concerning the real motive for adopting the eight-per-cent-oil test. There was definitely fierce competition between the California and Florida avocado industries at the time the California statute was enacted,[26] and perhaps the aim of the California act was to exclude much of the produce of competitors. Any discussion about the intent of the California legislature would be mere conjecture, though, because the legislative history of the statute gives no indication of its purpose.[27] Nevertheless, one must be cognizant of the far-reaching effect of this economic statute enacted under the state police power. By its own terms, the statute forbids the marketing or transporting in California of *any* avocado, unless it contains eight per cent oil by weight.

The conclusion that this legislation is pervasive and economic is helpful if an affirmative answer can be given to this question: does federal economic legislation concerning specific subject matter preclude state regulation concerning the same subject? Apparently the Supreme Court has never held that a state statute was preempted solely on the grounds of an economic conflict between state and federal legislation. Thus there is a requirement of careful analysis of cases where the Court has held state legislation of an economic nature to be preempted.

In cases that involve conflicting state and federal economic legislation, the Court often encounters the problem of whether to base its decision on undue burden or preemption grounds. Where state legislation was enacted for the obvious purpose of favoring local industry or discriminating against interstate commerce, the Court will readily void the state statute as an undue burden under the commerce clause.[28] Frequently, though, a state will enact legislation for the ostensible purpose of protecting health or conserving resources, but the ultimate effect (or perhaps the primary objective) of the legislation is to promote or protect local industry.[29] In the cases involving the latter fact situation, the Court has either struck down the state statute as an undue burden or held it void under the supremacy clause.[30]

Discussed below are three cases, representing the apparent modern trend, where state economic legislation was held precluded because of its repugnancy to federal laws under the supremacy clause, and not because the legislation was an undue burden on interstate commerce. For example, in the recent case of *Northern Natural Gas Co. v. Kansas Comm'n*,[31] the Kansas State Corporation Commission ordered a natural gas company, engaged in interstate commerce, to

[26] Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 153 n.19 (1963).

[27] 49 CALENDAR OF LEGISLATIVE BUSINESS 174, Bill 446 (1931).

[28] Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); Hood & Sons v. DuMond, 336 U.S. 525 (1949). In the *Dean Milk Co.* case a city ordinance made it unlawful to sell, as pasteurized, any milk in the city unless it was bottled within five miles of Madison. The Supreme Court stated: "In thus erecting an economic barrier protecting a major local industry against competition from without the state, Madison plainly discriminates against interstate commerce. This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people " 340 U.S. at 354.

[29] Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 220 (1959).

[30] *Compare* Buck v. Kuykendall, 267 U.S. 307 (1925), *with* City of Chicago v. Atchison, T. & S.F Ry., 357 U.S. 77 (1958).

[31] 372 U.S. 84 (1963).

purchase gas in equal amounts from all the Kansas wells to which it was connected. After an extensive analysis of the purpose and effect of these orders, the Supreme Court held that they were not conservation measures. Moreover, the Court found that these orders were an attempt to regulate the purchase of natural gas, and, as such, invaded the exclusive jurisdiction of the Federal Power Commission, and were also in opposition to the Natural Gas Act.[32] On these grounds the Court held the State Commission orders to be preempted.

A fact situation analogous to the *Avocado* case occurred in *Public Util. Comm'n v. United States.*[33] The federal statute,[34] there permitted agencies of the federal government to negotiate their own freight rates in order to procure the least costly means of transportation. It would seem that legislation for the express purpose of securing inexpensive transportation for the Government is of an economic nature. In opposition to these regulations, a section of the California Public Utilities Code[35] granted the state commission power to determine rates that common carriers could charge the agencies of the United States. The Supreme Court held that the state statute could not be the determining factor as to what rates were to be paid by the United States when there was a specific federal statute covering the subject.[36] The conflict, stated the Court in the *Public Util. Comm'n* case, was of the precise type which the supremacy clause was designed to resolve.[37] *Quaere:* Is the latter fact situation distinguishable in type from the *Avocado* case where the state statute determined which Florida avocados could enter California?

One more case further exemplifies the proposition that state economic legislation enacted under the police power is preempted when it conflicts with federal economic legislation. The Supreme Court, in *City of Chicago v. Atchison, T & S.F Ry.*,[38] affirmed a lower court judgment which held a city ordinance[39] repugnant to both the Constitution and federal statutes. The case concerned an interterminal shuttle service for interstate passengers. This service was necessary because the tracks of many railroads terminate in different parts of Chicago. A number of railroads decided to provide such a shuttle service themselves, and

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[32] 52 Stat. 821 (1938); 15 U.S.C. § 717 (1964).

[33] 355 U.S. 534 (1958); see generally *The Supreme Court 1957 Term*, 72 HARV. L. REV. 77, 161 (1958).

[34] "Purchases of and contracts for property and services covered by this chapter shall be made by formal advertising. However, the head of an agency may negotiate such a purchase or contract " 10 U.S.C. § 2304 (1964).

[35] CAL. PUB. UTIL. CODE § 530, which states: "The commission may permit common carriers to transport property at reduced rates for the United States, state, county, or municipal governments, to such extent and subject to such conditions as it may consider just and reasonable."

[36] *Accord,* United States v. Georgia Pub. Serv. Comm'n, 371 U.S. 285 (1963); *But see* Penn Dairies, Inc. v. Milk Control Comm'n, 318 U.S. 261 (1943). In the latter case a milk dealer sold dairy products to the Army at prices lower than required by state law. After his application to renew his milk license was turned down, the dealer sought to have the Pennsylvania Milk Control Law invalidated. It was held that the state law was not preempted.

[37] 355 U.S. 534, 544 (1958).

[38] 357 U.S. 77 (1958).

[39] CHICAGO, ILL., MUNICIPAL CODE § 28-31.1. (1955).

ended their existing contracts with an independent transfer company. At this time the city had in effect a detailed plan to regulate and license public passenger vehicles for hire. However, after the termination of the contract, the ordinance was amended to provide that no license would be granted unless the City Commissioner first deemed that public convenience and necessity required additional service. The amendment seemed to be a justifiable regulation to prevent overcrowding streets and to promote the public welfare; yet, in actuality, it gave the City Commission the power to forbid an interstate carrier from providing service regulated by the Interstate Commerce Act.[40] Although the Court might have rested its decision to invalidate the ordinance on the undue burden ground, it stated, "In our judgment the provisions of the Interstate Commerce Act preclude the city from exercising any veto power over such transfer service "[41]

In the three cases discussed immediately above, federal economic legislation was held to preempt state economic legislation over the same subject matter. The primary concern here is to determine whether or not the doctrine of these cases could be validly applied to the *Avocado* case. In making this determination, a brief comparison of pertinent legislation and the particular conflicts involved, in both the *Avocado* and the above-discussed cases, is helpful.

It has already been indicated that both the relevant sections of the California Agricultural Code, and the (federal) Agricultural Adjustment Act, were economic statutes. The primary purpose of the (federal) Natural Gas Act was to protect the consumer against unjust rates, but it also included sections on rate fixing, depreciation rates, and costs of natural gas property.[42] The Interstate Commerce Act also contains a number of economic provisions, concerning rate control, rebates and consolidations.[43]

For a complete and effective comparison between the *Avocado* case and the discussed cases one must find similarity not only among the federal statutes, but also among the state statutes. The orders of the Kansas Commission and the California Agricultural Code display many similarities. The orders were issued as conservation measures while the California maturity regulations were adopted to prevent deception. Thus, both were adopted ostensibly as public welfare measures, but the ultimate purpose of each was economic. The purpose of one was to increase the income to the avocado grower, and the purpose of the other was to regulate the purchase of natural gas. The section of the California Public Utilities Code conferred on the Public Utilities Commission the power to determine just and reasonable rates paid by the agencies of the federal government.

The final subjects of comparison are the actual conflicts that arose between state and federal legislation in the discussed cases and in the *Avocado* case. The dissent in the *Avocado* case correctly points out that there is a definite conflict between the two statutes, based on the fact that approximately six per cent of the Florida avocados are excluded from California each year. But the more basic conflict is that the California legislation may, by imposing its own maturity standards, exclude avocados from California *which are mature by federal standards.* A similar conflict existed in the *Atchison* case, where the city ordinance permitted a local commission to determine whether or not an interstate carrier,

[40] 24 Stat. 379 (1887), as amended (codified in scattered sections of 49 U.S.C.).
[41] 357 U.S. at 85.
[42] 52 Stat. 822-24 (1938), 15 U.S.C. §§ 717c, 717d, 717e (1964).
[43] 24 Stat. 379 (1887), as amended (codified in scattered sections of 49 U.S.C.).