INTRODUCTION

NOEL T. DOWLING*

To put the conclusion of the matter at the beginning, I believe it is in order to say that the general problem of the maintenance of the federal system, including the special problem of state taxation of multiple business with which this symposium is concerned, has all but become political in character and that the ultimate answers will have to come from Congress rather than the Supreme Court. This seems to me to be the composite, and salutary, result of more than a century of litigation over the adjustment of state and national power in the operation of the federal system.

The constitutional story which runs through that litigation is fascinating, even if sometimes bewildering. It hangs chiefly, not wholly, on the commerce clause. There is no need to tell more of it here than enough to indicate the trend and sweep of the development on the two major aspects of the clause, namely, as a grant of power to Congress and as a source of limitation on the powers of the States. Both parts of the story start with a single case in 1824 and, curiously enough, reach their climax in cases only three years apart in the 1940's.

As for the power of Congress, the story runs its course from *Gibbons* v. *Ogden*[1] to *Wickard* v. *Filburn*.[2] John Marshall may not have had a gift of prophecy, but surely he could write for the future. "The genius and character of the whole government seem to be [he said in *Gibbons*], that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of exerting some of the general powers of the government." That formula, superimposed on what had been said in *McCulloch v. Maryland*[3] about implied powers, gave Congress a green light for the expansion of national power. But I do not read *Gibbons v. Ogden* as a judicial intimation of uncontrolled—or at all events, only politically controlled—discretion in Congress to determine the bounds of its own delegated powers. On the contrary, I read it as pre-supposing judicially ascertained constitutional limitations on that power. Yet, with *Hammer v. Dagenhart's*[4] "departure" from principle having been corrected by the overruling of that case in *United States v. Darby*,[5] the judicial trend has been towards leaving the scope of Congressional power to Congress'

*Harlan Fiske Stone Professor Emeritus of Constitutional Law, Columbia University.

[1] Gibbons v. Ogden, 22 U.S. (Wheat.) 1 (1824).
[2] Wickard v. Filburn, 317 U.S. 111 (1942).
[3] McCulloch v. Maryland, 17 U.S. (Wheat.) 316 (1819).
[4] Hammer v. Dagenhart, 247 U.S. 251 (1918).
[5] United States v. Darby, 312 U.S. 100 (1941).

judgment and responsibility. So marked has been this trend that in *Wickard v. Filburn*, sustaining national regulation of minor details of agricultural production in the States, the Court thought it worthwhile to sound a warning that "effective restraints" on the exercise of the commerce power "must proceed from political rather than from judicial processes." And for that warning, it must be said, the Court did find some support in *Gibbons v. Ogden*.[6] All the same, *Wickard* is not a holding that the question is political or that judicial review has been renounced. Actually the Court went into the merits and concluded that the subject matter there controlled had, potentially at least, a substantial effect upon the interstate market. As the arbiter of Congressional power, then, the Court continues in a standby position. On the present outlook, however, the chances are small that any regulation enacted by Congress will be upset as an invasion of state powers. The Tenth Amendment, once thought to have an operative effect of its own, is now "but a truism." Congress is in full control at the national end of the interstate problem.

Congress' control is even more firmly fixed with respect to what the States can do. Here the course of the story runs from *Gibbons v. Ogden* to *Southern Pacific Company v. Arizona*.[7] I take these as landmark cases, despite the fact that the actual decision in neither of them touches the point under present consideration and that each deals with regulation as compared to taxation. The overtone of *Gibbons v. Ogden* was that the boundaries of state power are fixed by the Constitution and are to be ascertained by the Court.[8] That continued to be true until *Cooley v. Board of Wardens*,[9] when the idea of an "authoritative" voice in Congress began to assume a conspicuous place in the Court's exposition.[10] Since then the divisions in the Court, often and sharp, have come

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[6] The reference is to this fragment of Marshall's opinion: "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to secure them from its abuse." Gibbons v. Ogden, *supra* at p. 197.

[7] Southern Pacific Company v. Arizona, 325 U.S. 761 (1945).

[8] "It has been contended by the Counsel for the appellant, that, as the word 'to regulate' implies in its nature, full power over the thing regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing." There is, said Marshall, "great force" in the argument, and "the Court is not satisfied that it has been refuted." Gibbons v. Ogden, *supra* at p. 209.

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

[10] "The Act of 1789 [consenting to state regulation of pilots] contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the States * * *"

"Viewed in this light, so much of this Act of 1789 as declares that pilots shall continue to be regulated 'by such laws as the States may respectively hereafter enact for that purpose,' instead of being held inoperative, as an attempt to

largely on the role of the Court in the silence of Congress. It is now accepted that, absent Congressional action, the Court is the arbiter of the validity of state laws impinging on interstate commerce, and that the Court makes its decision on a balancing of national and local interests.[11] But where Congress has given expression to its will whether state laws shall or shall not prevail, an unbroken line of cases supports the authority of the Congressional voice. Chief Justice Stone summed the law up in *Southern Pacific*: "Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the States to regulate the commerce in a manner which would otherwise not be permissible, . . . or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce." So much for the regulatory power of the States and the dominant voice of Congress.

Tax cases seem to be taken by the Court as presenting a different situation. Though here the Court also acts as arbiter in the absence of Congressional action, not much is heard of the balancing-of-interests process of *Southern Pacific* or of the familiar national-local-interests formula of *Cooley*. To be sure, something comparable seemed to be developing in Mr. Stone's thinking when he began to talk in terms of a "practical judgment" as to the effect of state taxes on interstate commerce.[12] At anv rate the trend was away from the position that interstate commerce "cannot be taxed at all" towards the point that interstate commerce "must pay its way." Whatever the trend, it seems to have come to a halt with Mr. Stone's passing from the scene.[13]

But even if there be a difference in the Court's role in the two classes of cases where Congress has not acted, I see no reason to doubt that the pronouncement in *Southern Pacific* holds good for taxation as well as for regulation. Certainly, Mr. Stone made no distinction in his description of Congressional power. As a matter of fact it was in connection with tax cases—those having to do with inter-governmental immunities—that he did much of the development of his ideas about the

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confer on the States a power to legislate, of which the Constitution had deprived them, is allowed an appropriate and important signification."

Id at p. 319.

[11] Thus, "the matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference." Southern Pacific *supra*, at p. 770.

[12] For example in McGoldrick v. Berwind-White Coal Co., 309 U.S. 33 (1940).

[13] See Dunham, *Gross Receipts Taxes in Interstate Transactions*, 47 Col. L. Rev. 211 (1947).

mutual accommodation of national and state interests. As early as 1926, within a year after he came to the Court, Mr. Stone began, in *Metcalf & Eckly v. Mitchell*[14], to whittle away at the base and scope of the immunity enjoyed by one government as against taxation by the other. And in 1938 he spoke for the Court in formulating the rule of *Helvering v. Gerhardt*[15] that state taxation of federal instrumentalities is dependent, not on a requirement of the Constitution, but on the intention of Congress.[16] In the *Helvering* opinion he stated the power of Congress over state taxation of federal instrumentalities in the same way that six years later in *Southern Pacific* he phrased the power over state regulation of commerce. Thus in *Helvering*: "Congress may curtail an immunity which might otherwise be implied, . . . or enlarge it beyond the point where, Congress being silent, the Court would set its limits." But the carry-over of the rule of *Southern Pacific* to taxation does not depend on further analogy or argument; *Prudential Insurance Company v. Benjamin*[17] supplied any needed authority. There the Court sustained an Act of Congress giving permission to the States to impose a tax on interstate business which the Court assumed (without deciding) would otherwise have been invalid. The case for power in Congress to reconcile National and State powers over commerce appears to be beyond dispute.

And there is a tolerably clear case for the exercise of that power. It has been said, for example, that Congress alone can consider whether a given tax "is consistent with the best interests of our national economy" and, on the basis of a full exploration of the many aspects of the complicated problem, "devise a national policy fair alike to the States and our Union."[18] Doubts have been expressed on many sides whether the judicial process is adequate to the task in hand.[19] Certainly no shining success has attended the efforts up to this time. Even if it were possible for the Supreme Court to stretch the judicial process so as to overcome some of the defects of the "hit-and-miss method" of deciding single local controversies upon evidence limited by the narrow rules of litiga-

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[14] Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926).

[15] Helvering v. Gerhardt, 304 U.S. 405 (1938).

[16] Thus, "in considering the immunity of federal instrumentalities from state taxation two factors may be of importance which are lacking in the case of a claimed immunity of state instrumentalities from federal taxation. Since the acts of Congress within its constitutional power are supreme, the validity of state taxation of federal instrumentalities must depend (a) on the power of Congress to create the instrumentality and (b) its intent to protect it from taxation . . ." *Id.* at p. 411, fn.

[17] Prudential Insurance Company v. Benjamin, 328 U.S. 408 (1946).

[18] Justices Black, Frankfurter and Douglas, dissenting, in McCarroll v. Dixie Greyhound Lines, 309 U.S. 176, 189 (1940).

[19] See, *A Suggested Approach,* in HARTMAN, STATE TAXATION OF INTERSTATE COMMERCE, 1953, p. 275.

tion,[20] the main result would be that the Court had merely come closer to the legislative way of doing the job. The preferable method, as it seems to me, is for Congress to recognize the problem as essentially legislative in character and to take it up for remedial action.

There are, of course, differences of opinion whether Congress should do anything at all; and, if so, what. No doubt—at least so I hope—some of the principal papers to follow will deal with these phases of the matter. My part in the present enterprise is mainly to help provide a constitutional background and to offer any incidental suggestions which may seem appropriate for Congressional action. As to the latter, I would welcome the enactment of a law exhibiting and built around three major features: (1) establishment of a substantive rule against state taxation which unreasonably interferes with the national interests in commerce; (2) creation of an administrative agency for effectuating the substantive rule; and (3) postponement of the operative date of the substantive rule for at least six months, possibly a year.

By the way of comment, the first thing to be said is that no new departure in the law would be involved in the adoption of the suggested substantive rule. Indeed, a rule to that effect has already come to be law in the Supreme Court. That, as I see it, is the result of the long line of cases on the commerce clause. Perhaps it is more accurate to say that the result has come about through a combination of action by the Court and acquiescence by Congress. Congress, as Chief Justice Stone pointed out in *Southern Pacific*, "has left it to the courts to formulate the rules" in respect of state action impinging on commerce and "has accommodated its legislation to those rules." More specifically to the point is Mr. Justice Black's statement in *Adams Mfg. Co. v. Storen*,[21] that the judicial interpretation of the commerce clause has "gradually evolved the principle that non-action by Congress is tantamount to a Congressional declaration that the flow of commerce from State to State must be free from unfair and discriminatory burdens." Despite variations in the terms employed by the Court the judicial efforts have the common aim of building up a barrier for the protection of national interests in commerce against unreasonable state interference. It will be observed in the above quotation that Mr. Black takes the view that the barrier depends upon a "Congressional declaration" somehow derived from non-action by Congress. Mr. Stone left open the question whether it comes from "implications of the commerce clause itself" or the "presumed intention of Congress."[22]

Not much need be said about the creation of an administrative agency

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[20] See footnote 18, *supra*.

[21] Adams Manufacturing Company v. Storen, 304 U.S. 307 (1938).

[22] At p. 768 of Southern Pacific, *supra*. To me, as I have indicated in *Interstate Commerce and State Power—Revised Version*, 47 Col. L. Rev. 546, 559 (1947), the barrier is better described as a form of national common law developed by the Court for the governance of the States in an area, commerce, where Congress has unquestioned power to prescribe the applicable statute law.

for effectuating the substantive rule. We have long since become accustomed to such agencies as useful, if not sometimes indispensable, means of bringing special talents and procedures into the development and administration of the law in new and complicated areas. The delegated function of making subsidiary regulations should be of particular value here since in its exercise the agency would be able to supply what the courts are not geared to give and what would involve Congress itself in an excess of detail.

Postponement of the effective date of the substantive rule could produce beneficial results. It would cushion the impact of the rule on the States and other interested parties. It would afford the members of the newly created agency a period of grace to inquire into and reflect upon their assigned task in preparation for the days of hard decisions just ahead.