Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Indiana Law Journal

Volume 16 | Issue 2 Article 3

12-1940

Court, Congress and Trade Barriers

Breck P. McAllister
University of Washington

COURT, CONGRESS AND TRADE BARRIERS

BRECK P. McALLISTER*

"I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end."—from a speech of Mr. Justice Holmes at a dinner of the Harvard Law School Association of New York on February 15, 1913, published in Speeches by Oliver Wendell Holmes (1913) p. 98 at 102.

"Spasmodic and unrelated instances of litigation cannot afford an adequate basis for the creation of integrated national rules which alone can afford that full protection for interstate commerce intended by the Constitution. We would, therefore, leave the questions raised by the Arkansas tax for consideration of Congress in a nation-wide survey of the constantly increasing barriers to trade among the States."—from the joint dissent of Mr. Justice Black, Mr. Justice Frankfurter and Mr. Justice Douglas in *McCarroll v. Dixie Greyhound Lines*, 309 U. S. 176, 189 (1940).

In our federal system we have one Congress, forty-eight state legislatures and innumerable municipal and other local legislative bodies. In this state of governmental affairs both the Supreme Court and Congress, each in its own way, have tried to play a part in the difficult task of resolving and dissolving the inevitable clashes of power that have occurred from time to time. The excerpts quoted at the head of this article reveal sharply divergent views as to the proper part that each should play in this important task of government. These two agencies are not, of course, the only ones that may play some part in pouring oil on troubled legislative waters, but they are the only two that will be discussed in this article. Others will be treated elsewhere in this symposium.

The movement against state trade barrier laws brings us at the outset to the question, what is meant by a trade barrier law? One witness at the hearings before the Temporary National Economic Committee on trade barriers said

* Professor of Law, University of Washington.

that a trade barrier was "the counterpart on the national scene of a tariff wall in international trade."[1] Another witness elaborated this same idea by describing it as "any state statute or regulation which, on its face, or in practical effect, tended to operate to the disadvantage of persons, products, or services coming from sister States, to the advantage of local residents, products and business."[2] There must then be some discrimination—be it obvious or devious—against goods from out of state, and it was pointed out that discrimination may be of two kinds. It may grow out of the statutes and regulations of one State or it may grow out of the cumulative effect of the non-discriminatory diversity of the laws of the several States.[3] These are obviously two very different kinds of trade barriers and each must be dealt with quite differently from the other.

These definitions assume the ideal of a great free trade area in which our national economy may flourish without let or hindrance from local legislators bent upon setting themselves apart in economic isolation from those who live and work in other states. When the time comes to approve or condemn it must never be forgotten that all barriers have two sides. They may be disagreeable to those who must meet and overcome them if they can but they may be of real importance to those who stand behind them.

The Supreme Court in its commerce clause opinions has said many fine things about this ideal of a great free trade area. Thus, in 1827 Chief Justice Marshall remarked that "the oppressed and degraded state of commerce previous to the adoption of the Constitution can scarcely be forgotten" and he doubted "whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress."[4] In 1940 Chief Justice Hughes put it this way—"In confiding to Congress the power to

[1] Testimony submitted to the Temporary National Economic Committee by Mr. Frank Bane, Executive Director, Council of State Governments (1940) 12 Bureau of National Affairs, Inc., 266.

[2] Testimony submitted to the Temporary National Economic Committee by Mr. A. H. Martin Jr. Executive Director, Marketing Laws Survey, W.P.A. (March 18, 1940), 12 Bureau National Affairs, Inc., 282.

[3] *Ibid.*

[4] Brown v. Maryland, 12 Wheat. 419, 445-446 (U. S. 1827).

regulate interstate commerce, the aim was to provide a free national market,—to pull down and prevent the re-erection of state barriers to the free intercourse between the people of the States. That free intercourse was deemed, and has proved, to be essential to our national economy. It should not be impaired."[5] Statements of this sort abound in commerce clause opinions yet the ideal remains no more than that. It is no reality and never has been. We have never had "a free national market" or "free intercourse between the people of the States." Our national economy has had to grow as best it could amidst an "immense mass"[6] of state and municipal legislation and legislation, too, that has met with the approval of the Supreme Court.

The importance of this situation was amply demonstrated in the fine work of Professor Melder, published in 1937.[7] It is confirmed in more recent studies.[8] These studies reveal situations that stand in sharp contrast to the fine ideal about the freedom of our national economy. Three justices of the Supreme Court have recently pointed out that the responsibility of the court is a limited one and that "the remedy, if any is called for . . . is within the ample reach of Congress."[9] The Attorney General has doubted whether there is much the Supreme Court can do about it,[10] and others have said much the same thing.[11] If the views of the three dis-

[5] *See* McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 59 (1940) (dissenting opinion).

[6] The expression is that of Chief Justice Marshall in 1824 in *Gibbons v. Ogden*, 9 Wheat. 1, 202 (U. S. 1824).

[7] *See* STATE AND LOCAL BARRIERS TO INTERSTATE COMMERCE IN THE UNITED STATES (University of Maine Studies, 2nd Series, No. 43, 1937).

[8] *See* Taylor, Burtis, and Waugh, *Barriers to Internal Trade in Farm Products*, A Special Report to the Secretary of Agriculture by the Bureau of Agricultural Economics (U. S. Dept. Agric. March, 1939); Comparative Charts of State Statutes Illustrating Barriers to Trade Between States by the *Marketing Laws Survey, W. P. A.* (May, 1939); State Trade Barrier Hearings before the Temporary National Economic Committee (March, 1940).

[9] See the joint dissent of Mr. Justice Black, Mr. Justice Frankfurter and Mr. Justice Douglas in *McCarroll v. Dixie Greyhound Lines*, 309 U. S. 176, 183 (1940) and the quotation from this dissent at the head of this article.

[10] See the speech of Attorney General Jackson on The Supreme Court and Interstate Barriers (Jan. 1940) 207 ANNALS 70.

[11] See the testimony of Mr. Frank Bane *supra* note 1, at 270. Professor Elliott of the School of Government, Harvard University, at the same hearings, cited *supra* note 1, at 481 points out that "the Court refuses more and more to occupy the difficult role that it has previously maintained (with a few exceptions) of being an umpire of the federal system in this much disputed area. It invites Congress to remedy the evil."

senters in the *McCarroll* case should some day prevail over those expressed by Mr. Justice Holmes in the quotation at the head of this article then we will have to look for a new umpire for our federal system. Congress or some other agency will have to take up at whatever point the Supreme Court decides to drop out.

Throughout our history the Supreme Court has never been our only umpire. Court and Congress have each played a part in promoting and striking down trade barriers. It is impossible in an article of this length to pass the history of our national commerce in review and discuss the work of Court and Congress in terms of trade barriers. We can do no more than sample how each has done its work. This may reveal the aptitudes of each.

I

In some cases states have sought to erect insurmountable barriers—out and out prohibitions of trade in particular goods. Liquor, oleomargarine and convict-made goods are the examples that stand out. The Supreme Court quickly recognized the power of the states to prohibit the sale of liquor and oleomargarine[12] but in the face of this admission it set up the original package doctrine of the commerce clause, in the name of a freedom of trade that the states did not want, to frustrate the effective operation of the state statutes.[13] In this state of affairs Congress took a hand and did its best to help the states keep their barriers high and effective.[14] The Supreme Court would have saved itself and Congress a lot of trouble if it had stuck by its views of

[12] Bartemeyer v. Iowa, 18 Wall. 129 (U. S. 1874) (liquor); Mugler v. Kansas, 123 U. S. 632 (1887) (liquor); Powell v. Pennsylvania, 127 U. S. 678 (1888) (oleomargarine).

[13] Leisy v. Hardin, 135 U. S. 100 (1890) (liquor). This was not always so, see the *License Cases*, 5 How. 504 (U. S. 1847). The oleomargarine case is *Schollenberger v. Pennsylvania*, 171 U. S. 1 (1898).

[14] The Wilson Act of 1890, 26 STAT. 313 sustained in *In re Rahrer*, 140 U. S. 545 (1891) and the Webb-Kenyon Act of 1913, 37 STAT. 699-700 sustained in *Clark Distilling Co. v. Western Marlyand Ry.*, 242 U. S. 311 (1917). As to oleomargarine Congress acted in 1902 by passing an Act modeled after the Wilson Act. 32 STAT. 193 (1890), 21 U. S. C. §23 (1934). At the same time it levied a tax of ten cents a pound on colored oleomargarine and this was sustained in *McCray v. United States*, 195 U. S. 27 (1904). The states may levy prohibitive taxes too, *A. Magnano Co. v. Hamilton*, 292 U. S. 40 (1934).

1847 in the *License Cases*[15] and had recognized that if a state may prohibit trade in liquor and oleomargarine at home, it should be free to protect its action from frustration through goods from out of state. Some may say that the court struck a blow for freedom of interstate trade but it was for a freedom that neither the states nor Congress wanted.

The foregoing prohibitory barriers are not discriminatory. All who would sell the proscribed liquor, oleomargarine and, more recently, convict-made goods are hit alike.[16] It is quite true that where there is no domestic manufacture at all it is the out-of-state manufacturer who is barred from the state unless he can get to market with a lawyer on the commerce clause but the Supreme Court has never treated this as having any significance. An oleomargarine statute may seek to compel people to buy butter from the local dairy by barring the competing product that is made out of state. In this sense it hits directly at interstate commerce, but if this was treated as significant it would prevent a state so situated from passing any kind of a prohibitory law. The discrimination against interstate commerce, if such it be, must be overlooked, and it is.

As far as trade barriers go, our conclusion must be that so far as Court and Congress are concerned the states have ample power to do about as they please. The Supreme Court even intimated in *Whitfield v. Ohio*[17] that the original package doctrine was "more artificial than sound"[18] and that the states might erect barriers—against convict-made goods at least—without any helping hand from Congress. This is surely an invitation to try it. The only query that remains is as to discriminatory state action.[19] As a matter of fact it is hard to see why any of these measures should be condemned as trade barriers when they operate as flat prohibitions. At any rate there is no basis for condemning them because of any lack of power to erect them.

---

[15] 5 How. 504 (U. S. 1847).

[16] This point was stressed by the Supreme Court in sustaining the convict-made goods federal consent statutes in *Whitfield v. Ohio*, 297 U. S. 431, 437 (1936) and *Kentucky Whip and Collar Co. v. Illinois Central R. R.*, 299 U. S. 334, 351 (1937). On liquor see *Scott v. Donald*, 165 U. S. 58, 100 (1897).

[17] 297 U. S. 431 (1936).

[18] *Id.* at 440.

[19] The point is discussed in Strong, *Cooperative Federalism* (1938) 23 Iowa L. Rev. 455, 465-469.

In another group of situations state power, if it was to operate at all, might easily come into conflict with the laws of another state. This was bound to be the case if states were free to regulate interstate railroad rates and in 1886 the Supreme Court struck down such an effort and declared that only Congress could do this.[20] Congress accepted the invitation the next year with the passage of the Interstate Commerce Act. The confusion that might easily have grown out of the diversities of state laws was averted. *Buck v. Kuykendall*[21] in 1925 did for interstate busses and trucks what the *Wabash* case of 1886 did for interstate railroad rates but the case was not so clear. There were caveats in later cases.[22] At any rate Congress stepped in in 1935 with the Motor Carrier Act[23] and took over, among other things, the matter of issuing certificates of convenience and necessity for interstate routes and also some control over interstate rates. Again uniformity displaced diversity. The story of the radio waves that know no state lines is much the same. Radio must be controlled by Congress if it is to exist at all.[24] The airplane too flies interstate and Congress again has written uniform rules.[25] In none of these cases is state action excluded entirely. There are constant problems that grow out of real and supposed conflicts between state statute and Act of Congress and between state statute and commerce clause. These questions must be answered by the courts.[26]

---

[20] Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U.S. 557 (1886). But earlier the opposite view had been taken in *Chicago & N.W. R.R. v. Fuller*, 17 Wall. 553 (U.S. 1873), *Peik v. Chicago & N.W. R.R.*, 94 U.S. 164 (1877).

[21] 267 U.S. 307 (1925).

[22] Bradley v. Public Utilities Commission of Ohio, 289 U.S. 92 (1933); Interstate Busses Corp. v. Holyoke Street Ry. Co., 273 U.S. 45 (1927); Eichholz v. Public Service Commission, 306 U.S. 268 (1939).

[23] 49 STAT. 543 (1935), 49 U.S.C. §301 (Supp. 1935). See Note (1936), 36 Col. L. Rev. 945.

[24] Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co., 289 U.S. 266 (1933).

[25] This began with the Air Commerce Act of 1926, 44 STAT. 568, 49 U.S.C. §171 and was enlarged in the Civil Aeronautics Act of 1938, 52 STAT. 977, 49 U.S.C. §401 (Supp. 1938).

[26] On railroads, see REYNOLDS, DISTRIBUTION OF POWER TO REGULATE INTERSTATE CARRIERS (1928); on busses and trucks, see Kauper, *State Regulation of Interstate Motor Carriers* (1933) 31 Mich. L. Rev. 920, 1097; Note, *Federal Motor Carrier Act* (1936) 36 Col. L. Rev. 945; on radio, see Van Allen, *State and Municipal Regulation of Radio* (1931) 1 J. Radio L. 35; on airplanes, see Tuttle and Bennett, *Extent of Power of Congress over Aviation* (1931) 5 U. of Cin. L. Rev. 261; Newman, *Aviation Law and the Constitution* (1930) 39 Yale L. J. 1113.

The point of all this as far as state trade barriers are concerned is that the Supreme Court in the *Wabash* case and again in *Buck v. Kuykendall* was laying down the policy that in those cases no control was better than the diversities and conflicts that would grow out of state control. It was plain enough that there would be some control and in both cases Congress accepted the judicial invitation. Against this brief background the recent case of *South Carolina Highway Dept. v. Barnwell Bros.*[27] stands in sharp contrast. In that case a unanimous court sustained the validity of state weight and width limitations on trucks against the claim that the statute was in conflict with the federal Motor Carrier Act and also with the commerce clause. The South Carolina statute was not discriminatory but the court was ready to admit that it burdened the interstate truck. This is one of those situations in which the barrier to trade grows out of the cumulative effect of the non-discriminatory diversity of a large number of state laws. That the barriers are real and serious is plain enough. The decision might be put down as a judgment that the diversities and barriers that would grow out of state control are better than no control at all but the opinion of the court does not run along those lines. The opinion runs along the line that the barriers may stand until Congress sees fit to do something about them. It is not a judicial function to strike down these barriers. "Courts do not sit as Legislatures, either state or national. They cannot act as Congress does when, after weighing all the conflicting interests, state and national, it determines when and how much the state regulatory power shall yield to the larger interests of a national commerce."[28] The court is apparently unwilling to strike any blow for the freedom of interstate trucks and busses from these burdensome state regulations. It is now said to be a legislative and not a judicial function to strike it. The Supreme Court will no longer act as umpire in this field. A new one must be found. It is obvious that Congress will have to do the job.

II

We come now to an "immense mass" of statutes enacted under the police power of the states. These deal with ani-

[27] 303 U. S. 177 (1938).
[28] *Id.* at 190.

mal and plant quarantines, milk and dairying, nursery stock, food, drugs and cosmetics, weights and measures, grades, standards and labels, public safety and all such. They are broadly classified as measures to protect the public health, safety and general welfare. Without going into any detailed analysis of the cases in each category, it is enough to say that with rare exceptions the Supreme Court has sustained these laws against the claim that they were invalid as direct burdens on interstate commerce.[29] Some of the rare, though important, exceptions are found in cases where the Supreme Court has detected some discrimination against goods from out of state either in the terms of the statute or in some masquerade.[30] In the cases involving an inspection fee, the court has looked to see whether the amount of the fee bore some proper relation to the cost of inspection.[31]

In this state of constitutional affairs it is plain enough that if a lot of states pass laws of this kind and if each has its own ideas as to what kind of a law should be passed, the interstate distributor will find the road to market beset with difficulties and expense. He may even find himself barred entirely. His prayer will be that if there must be such laws let them at least be uniform or nearly so. The distributor who stays within his own state lines must meet only one law and as to him it is uniform. The interstate distributor has another prayer, too. Again, if there must be such laws, let them at least operate equally against him and the local distributor. He will seek to tear off the mas-

[29] Many cases could be cited for this. For examples; Savage v. Jones, 225 U.S. 501 (1912) (food for animals); Patapsco Guano Co. v. North Carolina, 171 U.S. 345 (1898) (fertilizer); Weigle v. Curtice Bros., 248 U.S. 285 (1919) (prohibition of sale of food products containing benzoate of soda); Corn Products Refining Co. v. Eddy, 249 U.S. 427 (1919) (formula disclosure); McDermott v. Wisconsin, 228 U.S. 115 (1913) (labelling); Bourjois v. Chapman, 301 U.S. 183 (1937) (cosmetics). Many milk cases are collected in Note (1935) 3 Geo. Wash, L. Rev. 494. Many cases are collected in GAVIT, THE COMMERCE CLAUSE (1932) §142, 144-149.

[30] Minnesota v. Barber, 136 U.S. 313 (1890) (sale of fresh meat prohibited unless from animals inspected in the state within twenty-four hours before slaughter); Brimmer v. Rebman, 138 U.S. 78 (1891) (sale of fresh meat slaughtered one hundred miles or more from place of sale prohibited until inspected locally); Voight v. Wright, 141 U.S. 62 (1891) (sale of flour brought into state prohibited until inspected); Hale v. Bimco Trading, Inc., 306 U.S. 375 (1939) (inspection of cement imported from a foreign country).

[31] Standard Oil Co. v. Graves, 249 U.S. 389 (1919); Phipps v. Cleveland Refining Co., 261 U.S. 449 (1923); D. E. Foote & Co. v. Stanley, 232 U.S. 494 (1914).

querade of health and the public weal and expose the state law in all its economic sin as a barrier deliberately erected to protect the home merchants and keep him out. He will proclaim an unholy—and unconstitutional—alliance between health and sin.

The Supreme Court has done little to answer these prayers. It has found no way of making uniformity a requirement of constitutionality and it is hard to see how it could do so. The import of this statement is that where a barrier grows out of the cumulative effect of the non-discriminatory diversity of state laws there is nothing the Supreme Court can be expected to do to relieve the situation. It has also been reluctant to detect economic sin except in the rare cases already mentioned where masquerade has not been attempted or is pretty obvious.[32]

It is easy enough to say that where state laws have created such a bog that the national distributor is unduly burdened, Congress ought to take over the field and produce order. But that is more easily said than done. The fact is that Congress has seldom done this. More often than not, it has simply added its law to the crowded field. From the point of view of the national distributor, little is gained by this but from the point of view of effective action by government—some government—the story is very different. Three samples of federal action will make the position of Congress clear.

In the field of food, drugs and now cosmetics, Congress has made no move, beyond the passage of its laws, to exclude state action. There were many state food and drug laws on the books before the first federal act of 1906 was passed[33] and they have continued in effect. The new Food, Drug and Cosmetic Act of 1938[34] is simply a more effective attack on the problem and, like its predecessor, contains nothing designed to stop state action. On the contrary, like its predecessor, it may promote a further movement for state laws patterned after it. It is quite true that considerable uniformity among state laws has been attained but this is a matter of choice and not compulsion. Diversity to some

[32] See Note 30 *supra.*

[33] Strong, *Cooperative Federalism* (1938) 23 Iowa L. Rev. 459, 479-482; Salthe, *State Food, Drug & Cosmetic Legislation and its Administration* (1939) 6 Law & Contemp. Prob. 165.

[34] 52 STAT. 1040 (1938), 21 U.S.C. §301 ff. (Supp. 1938).

degree is bound to continue so long as all may stand on the statute books. The federal law depends, of course, upon the power of Congress over interstate commerce but in food and drugs this may go to the point of retail sale.[35] There may be conflict with state law at this and other points. If there is, it is up to the Supreme Court to find it for it is clear enough that conflict spells invalidity to state action. The court has been reluctant to find it or to find that Congress has "occupied the field."[36] It remains to be seen whether it will be found in identical state and federal laws.[37]

But there is much to be said for the continuance of state power. It would be a bold Congress that would at one stroke supersede all state action as applied to goods that move interstate. It has been a wise Supreme Court that has been wary about finding conflict and invalidating state statutes on that ground. Concurrent power makes for more effective action by government and this is more important than some diversity and the troubles for the national distributor that go with it.

The story of quarantines is a different one. Here again the states may act but only within limits. A state cattle quarantine, for example, was sustained against the argument that it burdened interstate commerce[38] but only on a showing that it was a "proper quarantine." "The prevention of disease is the essence of a quarantine law,"[39] the court said, and thus distinguished an earlier case in which a quarantine had been condemned as a burden because it was not so limited.[40] These cases were decided before Congress stepped into the field. Congress acted with respect to livstock in 1903 and 1905 and with respect to plants in 1912. A state quarantine on alfalfa was then declared invalid[41] on the theory that

---

[35] McDermott v. Wisconsin, 228 U.S. 115 (1913).

[36] It was not found in *Savage v. Jones*, 225 U.S. 501 (1912) or in *Weigle v. Curtice Bros.*, 248 U.S. 285 (1919), or in two more recent cases, *Kelly v. State of Washington*, 302 U.S. 1 (1937) and *H. P. Welch Co. v. State of New Hampshire*, 306 U.S. 79 (1939). Its discovery in *McDermott v. Wisconsin*, 228 U.S. 115 (1913) sets this case apart.

[37] This point is discussed briefly by Professor David F. Cavers in a comment on the new North Carolina Food, Drug & Cosmetic Act of 1939 in 17 N. C. L. Rev. 400, 414.

[38] Smith v. St. Louis & S. W. R. Co., 181 U.S. 248 (1901).

[39] *Id.* at 255.

[40] Hannibal & St. J. R. R. v. Husen, 95 U.S. 465 (1877).

[41] Oregon-Washington R. & N. Co. v. Washington, 270 U.S. 87 (1926).

Congress had taken over the field even though no federal quarantine had been actually declared. This was a direct blow at state power and for uniformity but Congress quickly amended the federal act to make it perfectly clear that state quarantines might stand until the federal government had put one in operation.[42]

If quarantines are to be condemned as trade barriers it is because they are perverted from their proper purpose and are set up and used to gain economic ends. Health among cattle and plants at home is surely an important matter for any government. The Supreme Court once said that "any pretense or masquerade will be disregarded, and the true purpose of a statute ascertained,"[43] and it sounded as though the court would be quick to strike down a quarantine that looked too much like an economic barrier, but *Mintz v. Baldwin*[44] in 1933 has disspelled any such hope.[45] The quoted phrase refers only to "the true purpose of a statute" but the "pretense and masquerade" are much more apt to occur in some particular order issued under an impeccable statute. The task of ferreting out the economic sin in what is set before the court as a health order is not an easy one. It may require choice among competing biological and health claims. It will surely require a close scrutiny of the findings, if such there be, that support the order and even with the best of will the court that finds its way through all this may come out with the discovery that there is some economic sin in every quarantine. How much should it permit? How important is health when weighed against market protection?

The same alliance between health and economics is shown just as vividly in the health and inspection measures that did much to create the sheltered markets called milk sheds that supply great consuming centers with fluid milk. Courts have only rarely rooted out these tariff walls. The sheds were created by cities and states in the name of

[42] 44 STAT. 250 (1926), 7 U.S.C. §161 (1934). This amendment was passed about six weeks after the Supreme Court decision.

[43] *Smith v. St. Louis & S. W. R. R.*, 181 U.S. 248, 257 (1901).

[44] 289 U.S. 346 (1933)

[45] MELDER, STATE AND LOCAL BARRIERS TO INTERSTATE COMMERCE IN THE UNITED STATES (University of Maine Studies, 2nd series No. 43, (1937), 134-137 makes out a good case for the economic motivation of the New York order involved in this case.

health,[46] but they were destroyed by the Supreme Court in the name of economic sin when New York State sought to project its price control throughout a milk shed that extended into other states.[47] New York tried hard to convince the court that its effort was "to make its inhabitants healthy and not to make them rich"[48] but this time the court would have none of such talk. The opinion of Mr. Justice Cardozo is vibrant with an insistence that "one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement,"[49] and that "the peoples of the several states must sink or swim together."[50] There was no such fine talk when in the same year the Supreme Court intimated that even without congressional aid the state of Ohio might bar from its markets goods made by convict labor in other states[51] or when two years later the court permitted South Carolina to bar from its highways interstate trucks that did not conform to its weight and width requirements[52] or when, in another milk case, it permitted Pennsylvania to fix the price to be paid to a producer in that state for milk to be shipped interstate to New York.[53] *Baldwin v. Seelig* has made it impossible for any state with a milk shed that extends into another state to engage in effective price control of milk but now health and economics are once more happily reunited. This time they march under a federal banner.[54]

In the case of interstate quarantines, it would, of course, be within the power of Congress to take over the whole business. The price of uniformity would be a destruction of state power in this important field. Congress so far has not been willing to take the step. Perhaps Congress felt, as did Mr. Justice McReynolds and Mr. Justice Sutherland, that these vital matters should not be left to "the slow char-

[46] The story will be found in HAMILTON, PRICE AND PRICE POLICIES (1938) 461-474.

[47] Baldwin v. Seelig, 294 U.S. 511 (1935).

[48] *Id.* at 523.

[49] *Id.* at 527.

[50] *Id.* at 523.

[51] Whitfield v. Ohio, 297 U.S. 431 (1936).

[52] South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177 (1938).

[53] Milk Control Board v. Eisenberg Farm Products, 306 U.S. 346 (1939).

[54] United States v. Rock Royal Co-op. Inc., 307 U. S. 533 (1939)

ity of a far-off and perhaps supine federal bureau."[55] At any rate it has acted in that way. A compromise has been proposed whereby the states would continue to issue their orders but they would not become effective until approved by the Secretary of Agriculture or at least should be subject to his veto.[56] There is much to be said in favor of this kind of administrative policing of state quarantine orders. The Secretary is apt to be a much better ferret than the Supreme Court and the process of review and with it the attainment of a greater degree of uniformity is much more apt to be brought about by him than by the justices. Local economic pressures are more likely to evaporate at Washington, D.C. than at the state capitol. This is not stuff for the justices.

The story of laws dealing with weights, measures, grades, labels and containers is different from either of the others just considered. State power in this field is ample and has never been seriously doubted.[57] The commerce clause has created no difficulty.[58] Congress too has ample power. Here, under its power to fix the standard of weights and measures,"[59] it may fix standards for all dealings in a given commodity, both interstate and intrastate, while under the commerce clause it is limited, of course, to interstate commerce. No argument is needed to show the desirability of uniformity in laws of this kind. Transportation and refrigeration have developed to the point where the market for agricultural products has become national and it is with respect to these products that these laws have had their greatest development.[60] Congress has in many important instances taken over the field and produced the uniformity that was badly needed. It has done so with cotton,[61] grain,[62] and tobacco.[63]

[55] *See* Oregon-Washington R. & N. Co. v. Washington, 270 U.S. 87, 103 (1926) (dissenting opinion).

[56] *See* Taylor, Burtis, and Waugh, *supra* Note 8, at 96, 97.

[57] Schmidinger v. Chicago, 226 U.S. 578 (1913) (weights and measures); Hauge v. Chicago, 299 U.S. 387 (1937) (public weightmaster); Armour & Co. v. North Dakota, 240 U.S. 510 (1919) (containers); Pacific States Box & Basket Co. v. White, 296 U.S. 176 (1935) (containers); Peterson Baking Co. v. Bryan, 290 U.S. 570 (1934) (standard sizes of loaves of bread); Corn Products Refining Co. v. Eddy, 249 U.S. 427 (1919) (labels); Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925) (labels).

[58] Hauge v. Chicago, 299 U.S. 387 (1937).

[59] U.S. CONST. ART. I, §8 (5).

[60] Taylor, Burtis, and Waugh, *supra* Note 8, at 68-84.

It has made a move in that direction with peanuts,[64] fresh fruits and vegetables,[65] and wool,[66] and has set standards for apples and pears destined for export.[67] All of the foregoing were enacted under the commerce clause. The power over weights and measures has been used to fix standard sizes of barrels for apples, fruits and vegetables, and of hampers, round stave baskets and splint baskets for fruits and vegetables.[68] Apparently only the commerce power was used in the case of barrels for lime and certain types of baskets for fruits and vegetables.[69] In spite of these efforts Congress has not taken over the whole field and state power still exists in many instances.[70] The road to uniformity leads straight to Congress but in this case, unlike the others, it is a road that few will hesitate to recommend.

III

When we turn from the foregoing regulatory state statutes to state taxation—be it for revenue or regulation or both —we come to a matter as to which Congress has done nothing of importance today.[71] The Supreme Court has been left to

[61] United States Cotton Standards Act, 42 STAT. 1517 (1923), 7 U.S.C. §51 (1934).

[62] United States Grain Standards Act, 39 STAT. 482 (1916), 7 U.S.C. §71 (1934).

[63] The Tobacco Inspection Act, 49 STAT. 735 (1935), 7 U.S.C. §511 (Supp. 1935).

[64] 49 STAT. 1898 (1936), 7 U.S.C. §954 (Supp. 1936).

[65] Perishable Agricultural Commodities Act, 46 STAT. 538 (1930), 7 U.S.C. §499N. (1934).

[66] 45 STAT. 593 (1928), 7 U.S.C. §415 c. (1934).

[67] 48 STAT. 123 (1933), 7 U.S.C. §581 (1934).

[68] 37 STAT. 250 (1912), 15 U.S.C. §§231-236, 257-257i (1934).

[69] 37 STAT. 250 (1912), 15 U.S.C. §§237-242, 251-256 (1934).

[70] See, for example, *Pacific States Box & Basket Co. v. White*, 296 U.S. 176 (1935).

[71] In an Act of May 31, 1870, 16 STAT. 144 (1870), 8 U.S.C.§135 (1934) Congress declared that "no tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country, which is not equally imposed and enforced upon every person immigrating to such State from any foreign country." It was applied in *In re Ah Fong*, 3 Sawy 144, 1 Fed. Cas. No. 102, (C. C. Cal. 1874) but with such decisions as *Henderson v. Wickham*, 92 U.S. 259 (1876), *Chy Lung v. Freeman*, 92 U.S. 275 (1876), and *People v. Compagnie Generale Transatlantique*, 107 U.S. 59 (1883) in which non-discriminatory state taxes and other requirements were invalidated, the Act of 1870 is of no importance today. Perhaps mention should be made of congressional action to permit state taxation of national banks, see Rottschaefer, *State Taxation of National Bank Shares* (1923) 7 Minn. L. Rev. 357.

its own devices in policing state taxes that were challenged under the commerce and due process clauses. In doing this important job it has built up a great body of decisions. Those dealing with the commerce clause were recently reviewed and given a new twist in the *Berwind-White* case.[72] It was there said that "Forms of state taxation whose tendency is to prohibit the commerce or place it at a disadvantage as compared or in competition with intrastate commerce and any state tax which discriminates against the commerce, are familiar examples of the exercise of state taxing power in an unconstitutional manner."[73] A large number of cases were cited for this and it was said that they were predicated on "a practical judgment as to the likelihood of the tax being used to place interstate commerce at a competitive disadvantage"[74] and reference was made to "the recognized danger that, to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state."[75] On the other hand, it was made clear that interstate commerce must pay its way and other groups of cases were cited to show how states might tax even though the burden of the tax "when distributed through the play of economic forces" might affect interstate commerce.[76] "Courts," it was said, "are called upon to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed."[77] It is, then, duly against unduly and the Supreme Court will call the turn when state taxing statutes come before it. This is obviously a difficult and important task and it has been carried out with the aid of formulas that give to the court a broad discretion.

Until recently this discretion has been exercised with a faithful—perhaps too faithful—regard for the freedom of interstate transactions from state taxes. In important instances the interstate sale enjoyed a competitive advantage

[72] McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940).
[73] *Id.* at 45.
[74] *Id.* at 45.
[75] *Ibid.*
[76] *Id.* at 46.
[77] *Id.* at 48.

over the intrastate sale. But when the court sustained the use tax in 1937[78] and a sales tax on an interstate sale by the state of destination in 1940,[79] it was plain that the balance was being restored. These taxes, standing alone, are not open to the reproach that they set up barriers to interstate trade. Equality is their theme, as the court put it, and equality of this kind is not a trade barrier. It remains to be seen what the court will do when a given interstate transaction is sought to be taxed by two or more states. That issue is still open. Two or more equalities may add up to a burden and unconstitutionality or they may not.

One interesting point about this recent group of cases is that three justices do not believe that the court is a suitable agency of government to deal with problems of this kind. Mr. Justice Black was the first to develop this point of view[80] but a more recent dissent shows that he has won over Mr. Justice Frankfurter and Mr. Justice Douglas to this idea.[81] In his dissent in the *Gwin, White & Prince* case Mr. Justice Black said that "only a comprehensive survey and investigation of the entire national economy—which Congress alone has power and facilities to make—can indicate the need for, as well as justify, restricting the taxing power of a State so as to provide against conjectured taxation by more than one State on identical income."[82] It was said too that no court can make such a broad legislative investigation. In the joint dissent in the *McCarroll* case the same idea was put in different words and judicial control of national commerce was likened to a "hit and miss method" that furnished no "adequate basis for the creation of integrated national rules which alone can afford that full protection for interstate commerce intended by the Constitution."[83] At another point it was said that the task of "striking a fair

[78] Henneford v. Silas Mason Co., Inc., 300 U.S. 577 (1937).

[79] McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940).

[80] *See* Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938) (dissenting opinion); Gwin, White & Prince v. Henneford, 305 U.S. 434 (1939) (dissenting opinion).

[81] See the joint dissent of these three in *McCarroll v. Dixie Greyhound Lines*, 309 U.S. 176, 183 (1940).

[82] *See* Gwin, White & Price v. Henneford, 305 U.S. 434, 449 (1939) (dissenting opinion).

[83] See Note 81 *supra*, at 189.

balance involves incalculable variants and therefore is beset with perplexities."[84]

There is something very appealing about this point of view. The justices with rare self-denial are seen handing over the perplexities to Congress. We see that body engaged in a nation-wide survey weighing perlexity against perplexity as it juggles the incalculable variants in its legislative mind. Out of this, we are assured, will come integrated national rules and thereafter all will be well for our national economy. It is difficult to resist the appeal of a broad survey and the fat volumes that make up its record. It always seems so orderly and sure. Cast against it the judicial process, in spite of its marble columns and bulging briefs, does seem hit and miss for it can never be more—on the record—than the case of A against B. The justices have little control over the survey that makes up the record. They can never direct A to sue B in such a way as to bring up a nice point that will round out the picture. The justices must take a point when, as, and if it comes before them. The judicial survey may span many decades and the rules that evolve from it must be pieced together from many decisions. There will be perplexities in the process of piecing and many will remain for good measure at every stage.

So far Congress has stayed well away from playing any part in the writing of rules whereby the validity of state taxes may be determined. The joint dissent of the *McCarroll* case is the most explicit invitation yet received. If two more justices are won over to join in it at some future time, then the power of the states to tax will undergo an abrupt and far reaching change.

It is impossible in a discussion of this length to debate the merits and implications of this proposal. It will be enough to note a few points and queries. How far does the invitation extend? It was expressed by the three justices in a case involving a state gasoline tax as applied to an interstate bus but Mr. Justice Black extended it alone in two earlier cases involving taxes on gross receipts as applied to interstate businesses. Doubtless the two converts would have joined in the earlier invitation. Does it extend, however, to multiple state taxation of interstate sales, to income,

[84] *Id.* at 184.

inheritance and estate taxes, to capital stock and other corporate taxes, to property taxes as applied, for example, to movables like railroad cars, to taxes on drummers and peddlers, to taxes applied before, during or after an interstate movement of goods? Evidently the three justices approve the continuance of the judicial swatting of state taxes that discriminate against interstate commerce,[85] but would they stop swatting some or all of these other taxes when they run afoul of judicial notions of interstate commerce or jurisdictional due process? The perplexities and incalculable variants are still with us in the solution of these problems and the judicial process works in the same hit and miss way. The justices shed no light when they tell us that "This Court has but a limited responsibility in that state legislation may here be challanged if it discriminates against interstate commerce (so much is clear enough) or is hostile to the congressional grant of authority."[86] It is this last phrase that tells nothing, and the citation of the *Berwind-White* case is meaningless. Assuming now that Congress has set forth on its survey of one or more of these fields of state taxation and after having assembled volumes of perplexities sets out to do something, what may it do? May it, for example, declare that a state may not levy a tax that has therefore been sustained against attack under the commerce or due process clauses? An affirmative answer would, of course, bestow on Congress a vast power over state taxation. It might easily be that the political perplexities that operate in Congress would see to it that no such answer was even hazarded in any legislative product that came from that body. The power of a state to tax free from control by Congress is after all a precious one and one not easily taken over. If the answer is negative, then the field in which Congress might operate is sharply limited.

We must leave this interesting subject here. It has been dealt with in one aspect in two law review articles.[87] The fact that Congress has done nothing about these problems so far shows that Supreme Court policy has not, at least, outraged Congress to the point of action. In the realm

[85] *Id.* at 183.

[86] *Id.* at 184.

[87] Lowndes, *State Taxation of Interstate Sales* (1935) 7 Miss. L. J. 223; Perkins, *The Sales Tax and Transactions in Interstate Commerce* (1934) 12 N. C. L. Rev. 99.

of guessing it is unlikely that Congress will do anything unless it is driven to it when the three justices become five. The invitation of the three is apt to be declined with pleasure.

A special word should be said about two kinds of state and local taxes that have been put on the carpet as trade barriers. The first are those that apply to the drummer and peddler of goods from out of state. Beginning with the decision in *Robbins v. Shelby County Taxing District*[88] in 1887, the Supreme Court has consistently invalidated fixed-sum license taxes imposed on drummers engaged in taking orders for goods to be shipped interstate even though the taxes do not discriminate against such goods.[89] The *Robbins* case involved a drummer who took orders from local retailers but in 1925 in *Real Silk Hosiery Mills v. City of Portland*[90] the same result was reached where the drummer was taking orders direct from the consumer. The Green River type ordinance is simply a new way by which local merchants are trying to protect their business against the inroads of the direct seller. It remains to be seen what its fate will be in the Supreme Court.[91] The authority of the *Robbins* case was recognized in the *Berwind-White* case.[92] But when it comes to peddlers the situation is different. If the license tax discriminates against goods from out of state, then it is invalid,[93] but it will be sustained if it is non-discriminatory.[94] It is easy to see how peddlers and drummers were distinguished in terms of commerce clause doctrine, but in terms of burdens on interstate merchandising it is not so easy to see. The peddler today is typically the so-called merchant trucker who peddles goods from out of state and between possible taxes on him as a peddler and taxes on

[88] 120 U.S. 489 (1887).

[89] Lockhart, *The Sales Tax in Interstate Commerce*, (1939) 52 Harv. L. Rev. 617.

[90] 268 U.S. 325 (1925).

[91] This type of ordinance declares it to be a criminal nuisance for a solicitor to call at a residence without a previous invitation. The whole subject is discussed in Jensen, *Burdening Interstate Direct Selling Under Claims of State Police Power* (1940) 12 Rockey Mt. L. Rev. 257.

[92] McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940).

[93] Welton v. Missouri, 91 U.S. 275 (1876).

[94] Emmert v. Missouri, 156 U.S. 296 (1895); Singer Sewing Machine Co. v. Brickell, 233 U. S. 304 (1914); Wagner v. City of Covington, 251 U.S. 95 (1919).

him as a trucker it is plain enough that his lot is not a happy one. It is quite possible for state, county, and city—in combination or only one or more—to keep him out of business entirely. The fact that most peddlers are peddling goods from out of state makes no difference. Peddlers have always been subject to a local retail sales tax. Since the *Berwind-White* case the sales of drummers are subject to it too, but in spite of this the drummer may still drum—unless the Supreme Court sustains a Green River type ordinance and puts him out of business in so far as he drums his trade from consumers—but the peddler may be barred from peddling. It is hard to believe that the Supreme Court—particularly the present one—could be induced to say a good word for the peddler in the name of equal protection or commerce clause and it is even harder to imagine that Congress has the power, even if it has the will, to do anything if the perplexities are passed over to it. So perhaps all we can do is drop the subject with the wishful thinking of the Attorney General that "such petty barriers have long since proved to be not only economically futile but also disastrous to peace and good will. A realization of these facts by the residents of each locality would make the choice of means to level trade barriers relatively unimportant."[95] Perhaps the day may come when our thousands of governing bodies will feel that way about it but in the meantime the lot of the peddler will continue to be a most unhappy one.

The other tax situation that calls for a special word is the taxation of the interstate bus and truck. The Supreme Court has for a long time and in a variety of decisions recognized that the state may exact compensation from the interstate as well as from the intrastate bus and truck for its use of the state highway. Thus, it has sustained a mileage tax,[96] a tax on gasoline used in interstate transportation when the tax is levied on withdrawal from storage prior to use[97] or on the local sale prior to use,[98] and it is more than likely that it would today sustain a tax on use in interstate

[95] Speech of Attorney General Jackson *supra* Note 10, at 78.

[96] Interstate Busses Corporation v. Blodgett, 276 U.S. 245 (1928).

[97] Nashville C. & St. L. R. R. v. Wallace, 288 U.S. 249 (1933); Edelman v. Boeing Air Transport, 289 U.S. 249 (1933).

[98] Eastern Air Transport v. South Carolina Tax Commission, 285 U.S. 147 (1932).

transportation.[99] The court has also sustained a variety of flat fee licenses but only on a showing that the amount of the fee has some relationship to the use or at least maintenance of the highways. The cases are as numerous as the state statutes are varied and no detailed review is possible here.[100] It is hard to believe that state treasurers have any real cause to complain about the present state of affairs. Plenty of ways are open to them to secure compensation for the use of the highways of the state. The complaint is coming from the interstate truck that makes only an occasional and limited use of the highways. The Supreme Court has shaped its doctrine in such fashion that this truck may be barred by the exaction of compensation that is too much for a use that is too little.[101] If this doctrine works in an intolerable fashion it may well be that Congress will have to step in. It might do so either under the commerce clause or perhaps by conditioning its grants of money for the building of highways.

IV.

A brief word should be said about a miscellany of state statutes that have been pointed to as examples of state parochialism. Thus, a state or local government may decree by statute or regulation that it will buy only products produced by local producers or that it will employ only local residents or citizens on its public works. This kind of preferential employment has been consistently sustained in the Supreme Court[102] and doubtless the same result would be reached in a buy at home case. The notion underlying these

[99] The court intimates as much in *McCarroll v. Dixie Greyhound Lines*, 309 U.S. 176 (1940). Cases that look the other way are readily distinguishable. Thus, *Helson v. Commonwealth of Kentucky*, 279 U.S. 245 (1929), which involved use of gasoline in running an interstate ferry may be put aside because use of the water was not the same as use of a state built highway. *Bingaman v. Golden Eagle Western Lines*, 297 U.S. 626 (1936) which involved use of gasoline by an interstate bus may be put aside because the tax had there been construed as not levied as compensation for use of the highways.

[100] See Kauper, *State Taxation of Interstate Motor Carriers* (1933, 1934) 32 Mich. L. Rev. 1, 171, 351; Note (1938) 7 Geo. Wash. L. Rev. 275; (1940) 8 *id.* 873.

[101] *See Aero Mayflower Transit Co. v. Georgia Public Service Commission*, 295 U.S. 285, 289 (1935) where the court said, "The fee is for the privilege of a use as extensive as the carrier wills that it shall be. . . . One who receives a privilege without a limit is not wronged by his own refusal to enjoy it as freely as he may."

cases is that the state is the sole proprietor of its own public works and governmental undertakings.

The same notion has been applied when the state seeks to prefer its residents when it comes to what is called the common property or resources of the state. Thus, a state may restrict the planting of oysters in its streams to citizens of the state,[103] forbid aliens from killing wild game,[104] forbid the transportation beyond its borders of game lawfully killed,[105] and of water from its streams.[106] An effort was made to assimilate natural gas into this line of cases but it failed when an Oklahoma statute that sought to prohibit its export was invalidated[107] and a like fate befell a West Virginia statute that sought to give a preference to domestic users.[108] Louisiana was rebuffed too when it sought to build up its local shrimp canning industry by prohibiting the export of unshelled shrimp[109] It remains to be seen what will happen to the statutes now on the books that seek to prohibit the export of, or give local preference to, hydro-electric energy generated from the waters of the state.[110]

Congress has done something about the interstate movement of natural gas and electricity. In both the Natural Gas Act of 1938 and the Federal Power Act of 1935 it has written down on the statute books that these utilities shall not "make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage,"[111] and these acts also contain provisions empowering the commission to require the utilities to extend their facilities and furnish adequate service.[112] It re-

[102] Heim v. McCall, 239 U.S. 175 (1915); Atkin v. Kansas, 191 U.S. 207 (1903).

[103] McCready v. Virginia, 94 U.S. 391 (1877).

[104] Patsone v. Pennsylvania, 232 U.S. 138 (1914).

[105] Geer v. Connecticut, 161 U.S. 519 (1896).

[106] Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908).

[107] West v. Kansas Natural Gas Co., 221 U.S. 229 (1911).

[108] Pennsylvania v. West Virginia, 262 U.S. 553 (1923).

[109] Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928).

[110] See ELSBREE, INTERSTATE TRANSMISSION OF ELECTRIC POWER (1931) 9-57.

[111] See the Natural Gas Act, 52 STAT. 822 (1938), 15 U.S.C. §717 c (b) (1939), and the same words appear in the Federal Power Act, 49 STAT. 851, 16 U.S.C. C §824 d (b) (Supp. 1939).

[112] Natural Gas Act, 52 STAT. 822 (1938), 15 U.S.C. §717 f (1939) Federal Power Act, STAT. 16 U.S.A. §824 f.

mains to be seen whether these provisions will have any bearing on the validity of state preference laws.

This very brief survey of the parts played by Court and Congress in our federal system points to a few general observations. By and large most of the state laws that are pointed to as trade barriers are perfectly valid laws. That means that the Supreme Court can be looked to to strike down only the most obvious attempts to hit at interstate commerce. One of the prices we pay for our federal system is an abundance of laws coming from a multitude of legislative bodies. The states have rights and, what is more, they are exercising them. Our national economy has had to grow in this system but its growth has never been bounded within politically drawn lines. Economic man has a way of spreading all over the lot. In recent years government has sought to play an ever greater part in the control of this kind of man and with this the statute books bulge, the pages of rules and regulations, like the guinea pigs, beget more pages, and the public payrolls expand.

In this state of affairs the need for an umpire to call fair or foul in clashes between state and state and state and nation is more important than ever before. The object of the discussion that has gone before was to show that both Court and Congress have played important parts in this task.

In appraising the aptitudes of each it is noteworthy that when Congress has done anything it has done it by passing a tax or regulatory law of some kind. These laws might involve taking over the field entirely to the exclusion of state action on the particular subject or they might simply add the federal law on top of existing state laws. In this last case more often than not federal action stands as an effort to fortify and complement well defined and pre-existing state policies within the limits of federal power under the commerce clause.[113] Perhaps this kind of federal action should not be called umpiring at all. It might well be said that Congress was simply taking its part in the regulatory game and that sometimes it was sending the state team to the showers and playing the whole game itself while at other times it was sending in only a pitcher or a few fielders or

[113] This point is fully developed in a brilliant article by Professor Strong, *Cooperative Federalism* (1938) 23 Iowa L. Rev. 459.

a pinch hitter now and then or perhaps just sitting on the bench. At any rate Congress so far has not distinguished itself by undertaking to write well integrated rules to be applied to umpire a state game in which it took no part.

The Supreme Court has always undertaken to say whether state or nation or both should play in the game when both clamor to play the whole game or perhaps just to play shortstop. It has some rules for that. But when Congress sits in the grandstand—silently—and won't play the court has also undertaken to say whether the states may play at all and, if so, it has different sets of rules for whatever games the states may want to play. At least three justices do not want the court to continue to do this and they would rout the moody Congress out of the stands to do it—for someone must do it. These justices evidently think that Congress has some special aptitudes that the justices do not possess. Perhaps it has but it will be a novel task and however well or badly Congress does it the justices will never make good their escape from this important responsibility for they will still have to make the rules of Congress work.

When it comes to specific trade barriers it is always easy to say that Congress ought to take over the regulatory task and produce the desired uniformity. It has often done so and no doubt will continue to do so. Events are more likely to shape the fields of state and nation in the tasks of government than are the outcries for and against the powers of each. The Supreme Court is exposed to events and outcries alike and it is often in a position where it can do little to shape the course of state and nation. Thus, in *South Carolina State Highway Dept. v. Barnwell Bros.*[114] it was tolerant of state action as to weight and width limitations as applied to interstate trucks. The intolerable consequences that may flow from this may call on Congress to take some action. If the decision had gone the other way different consequences might easily have called for like federal action. Federal control followed soon after *Baldwin v. Seelig*[115] had frustrated state action. A different decision might just as easily have produced such conflicts in state control that federal action would have come nearly as quickly. It is hard

[114] 303 U.S. 177 (1938).
[115] 294 U.S. 511 (1935).

to believe too that the *Wabash* decision[116] in 1886 would have postponed federal control of interstate railroad rates for very many years if it had gone the other way. So it goes. In cases such as these where control by some government is an insistent demand the Supreme Court must play a subordinate role as umpire between state and nation. It is for this reason that the preference expressed in the *Barnwell* case for legislative action need cause no real concern.

In the case of state taxes, however, the situation seems quite different. The Supreme Court has gone on its own for a long time and its decisions have covered nearly every kind of state tax. Neither events nor outcries have moved Congress to action. At no time in this or any other field of action need Congress sit back and await a judicial invitation to act. If the rules worked out by Supreme Court decisions over many years had produced intolerable consequences Congress could have tried its legislative hand at any time and it still can even if the justices who join in the invitation never number more than three. It is for this reason that the action of the three seems unwise. The task is difficult enough no matter what agency of government tries to do something about it. The task is shared now in the sense that Congress may at any time step in and try its hand if the Supreme Court produces intolerable policies. The three justices would try to take the court out of the game entirely. It is hard to see any good reason for doing this. The hit and miss methods of the justices have not as yet, at least, produced such results that Congress has been driven to action. If that time comes Congress is free to go to work and it need not await any invitation from the Court.

---

[116] Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U.S. 557 (1886).