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THE capacity of the federal government to deal with the increasingly irritating problem of interstate trade barriers is an important question high-lighted by the recent Supreme Court decision in *McGoldrick v. Gulf Oil Corp.*[1] The Court there decided that in view of the superior federal authority over foreign commerce Congress could validly prohibit an otherwise legal city sales tax on imported petroleum manufactured into fuel oil and sold for use on foreign-bound ships.

This decision has particular significance because it might indicate the way for Congress to deal with many obstacles to interstate commerce,[2] of which local tax barriers are but one example.[3] Barriers to this trade are appearing in many other forms, and coincident with these increasing burdens[4] there has arisen a growing insistence on their reduction or elimination.[5] Typical examples of interstate trade barriers are quarantine and inspection laws designed or enforced so as to prevent the entry of out-of-state goods, packaging and labeling laws setting up standards favorable to local products, highway and merchant trucker regulations, "health" laws designed to encourage the use of local

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[1] 309 U. S. 414, 60 S. Ct. 664 (1940), rehearing denied, Gulf Oil Co. v. McGoldrick, 309 U. S. 699, 60 S. Ct. 887 (1940).

[2] "Interstate commerce" is used throughout to include foreign commerce as well, except where the context clearly requires otherwise.

[3] The question of when a tax is a trade barrier is not always a simple one. Taxes that smack of penalties, such as those imposed by some dairy states on the sale of margerine, obviously discourage its transportation from margerine-producing states. Use taxes imposed on products for which a sales tax has been paid in another state are also barriers. Use or sale taxes imposed on an interstate sale by the state of destination are barriers in a sense, but they do no more than equalize the advantage which out-of-state sellers would otherwise have over local merchants.

[4] One of these new obstacles is the use tax, concerning which it has been said: "The present problem . . . is of national moment. Maintenance of open channels of trade between the States was not only of paramount importance when our Constitution was framed; it remains today a complex problem. . . ." See dissent by Justices Black, Frankfurter, and Douglas in McCarroll v. Dixie Greyhound Lines, 309 U. S. 176 at 185, 60 S. Ct. 504 (1940), rehearing denied, 309 U. S. 696, 60 S. Ct. 610 (1940).

[5] Former Secretary of Commerce Hopkins has said: "In the past few years the problem of interstate barriers to free trade between the several States has grown to be

goods (e.g., the margerine laws of the dairy states), requirements that liquor sold locally must contain certain locally grown products, and home product specifications for the construction of state buildings.[6]

Our federal system, with its geographic dispersion of authority, has fostered these interstate barriers. They have flourished under a constitutional scheme designed to remedy certain faults of a weak confederation, one of the most notable of which was internal trade obstacles.[7] Indictment on this ground, however, is questionable, because these state-erected obstacles have grown in the absence of Congress' exercise of its delegated federal authority over interstate commerce. The *Gulf Oil* case suggests that superior control as a possible remedy.[8]

a serious threat to the economic life and business well-being of our country. It has resulted in loss of business generally." N. Y. TIMES 1:2-3 (Nov. 24, 1939).

The most active organization working against interstate barriers is the Council of State Governments. Several of its meetings have been devoted to the problem, and these discussions have been printed for wide circulation. The council has published a Trade Bureau Research Bulletin Series in which the members of its research staff have analyzed the various restrictions. Almost all the states have appointed commissions on interstate cooperation to work in conjunction with the council. As a result of the council's activity the problem has been receiving widespread discussion. A large section of a recent volume of the Annals of the American Academy of Political and Social Science was devoted to "Interstate Relations." See "Intergovernmental Relations," 207 ANNALS 54 et seq. (Jan. 1940), particularly Melder, "Trade Barriers between States," id. 54; Jackson, "The Supreme Court and Interstate Barriers," id. 70; Gallagher, "Work of the Commissions on Interstate Co-operation," id. 103. The popular press has been noticing the problem with increasing frequency. E.g., see Bolles, "Balkanizing America," 50 CURRENT HISTORY 16 (July, 1939): Buell, "Death by Tariff," 18 FORTUNE 32 (Aug. 1938); "The War between the States," BUSINESS WEEK 31 (July, 15, 1939); Deery, "Trade Barriers," BUSINESS WEEK 20 (Oct. 7, 1939); Editorial, "These United States," 105 COLLIERS 86 (May 4, 1940); Finney, "Our Economic Civil War," 49 AMERICAN MERCURY 273 (March, 1940); Editorial, "Our Interstate Embargoes," 101 NEW REPUBLIC 183 (Dec. 6, 1939); Editorial, "The United States' War on the United States," 212 SAT. EVE. POST 24 (Nov. 11, 1939).

[6] See TAYLOR, BURTIS and WAUGH, BARRIERS TO INTERNAL TRADE IN FARM PRODUCTS (U. S. Dept. Agr. 1939); Melder, "State and Local Barriers to Interstate Commerce in the United States," UNIV. MAINE STUDIES, 2d Series, No. 43 (1937); THE MARKETING LAWS SURVEY: COMPARATIVE CHARTS OF STATE STATUTES ILLUSTRATING BARRIERS TO TRADE BETWEEN STATES (Works Progress Administration 1939); Lockhart, "State Tax Barriers to Interstate Trade," 53 HARV. L. REV. 1253 (1940); 34 ILL. L. REV. 44 (1939).

[7] See 2 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, p. 308 (1911); THE FEDERALIST, No. XLII ("The defect of power in the existing Confederacy to regulate the commerce between its several members, is in the number of those which have been clearly pointed out by experience."); 1 STORY, CONSTITUTION OF THE UNITED STATES, 5th ed., § 259 (1891).

[8] Federal inspection legislation has been suggested to combat the restrictions on trade caused by local inspection requirements. See 53 HARV. L. REV. 1185 (1940).

THE ANTECEDENTS IF NOT THE PRECEDENTS OF THE GULF OIL DECISION

The *Gulf Oil* case raised the question whether Congress might so exercise its authority over interstate commerce as to prohibit a state-imposed sales tax burden upon such trade. Superficially, it might seem that the unanimity of that decision was foreshadowed by several previous sales, gross receipts, and privilege tax opinions, even though the Court membership repeatedly split in those earlier cases. They dealt with the typical tax problem involving the validity of state action in view of the superior federal authority which had not been exercised. The question then was: Congress having said nothing, how far can the states go? That the Court should have disagreed over the residue of power retained by the states after the delegation of commerce authority to the federal government is not surprising. A more confusing feature is that the two divergent groups on the tribunal have not had a constant membership; justices tolerant of the legislation in some cases have been intolerant in others where the basis for distinction is at least not obvious.

The most divergent and for that reason perhaps the most consistent courses for several years have been followed by the Chief Justice and Justices Roberts and McReynolds on the one hand and Justice Black on the other. The attitude of Justice Black is one of "hands off" for two reasons. In the first place, he does not believe that the mere grant of interstate commerce authority by the states to the federal government, without its subsequent exercise, divests the states of much power. His view of a "sound position," as set out in his dissent in *Gwin, White & Prince v. Henneford*,[9] is that:

> "state laws are not invalid under the Commerce Clause unless they actually discriminate against interstate commerce or conflict with a regulation enacted by Congress."

Again, in the same opinion he said:

> "I would return to the rule that—except for state acts designed to impose discriminatory burdens on interstate commerce because it *is* interstate—Congress alone must 'determine how far [interstate commerce] . . . shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited.'"[10]

[9] 305 U. S. 434 at 446, 59 S. Ct. 325 (1939).

[10] Id., 305 U. S. at 455 (1939). Part of the quotation is from Welton v. Missouri, 91 U. S. 275 at 280 (1875).

This remark suggests that in the absence of Congressional regulation Justice Black would condemn a state tax only if it laid a discriminatory burden upon interstate trade.[11] He feels that as a practical matter a state must be free to burden interstate commerce with discriminatory taxes or else intrastate business will be taxed to the relative advantage of its competition from outside the state.[12] Therefore, he rejects the "direct burden" test.

On the other hand, part of a dissenting opinion in which he joined in *McCarroll v. Dixie Greyhound Lines*[13] reflects a less kindly disposition toward the states' freedom of action:

> "This Court has but a limited responsibility in that state legislation may here be challenged if it discriminates against interstate commerce *or is hostile to the congressional grant of authority*."

The last part of the statement, unfortunately phrased in terms of a legal result, does not disclose what kind of state action would be regarded as unconstitutional; taken alone, it is a conclusion with which no one could disagree. The observation, however, is not without significance. The fact that it is in the disjunctive form and follows the reference to discrimination might indicate a view by the dissenting justices that some state legislation not discriminatory against interstate commerce would nevertheless be invalid.[14]

The author of this remark is not disclosed in the report; Justices Black, Frankfurter and Douglas concurred in the dissenting opinion in which it appears. If Justice Black must share in the responsibility for

[11] There is some reason to believe that Justice Black's tolerance of state taxes goes to an extreme beyond that indicated in the text. In one of his dissents he seemed to view approvingly judicial interpretation of the commerce clause as having 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." Adams Mfg. Co. v. Storen, 304 U. S. 307 at 331, 58 S. Ct. 913 (1938). If a state may not lay discriminatory burdens on interstate commerce because of Congress' declaration, silently given, that it should not, then it seems to follow that such discrimination could be sanctioned by express Congressional permission. Cf. Scott v. Donald, 165 U. S. 58, 17 S. Ct. 265 (1897) (Wilson Act interpreted as not permitting state laws discriminatory against out-of-state liquor); State Board of Equalization of California v. Young's Market Co., 299 U. S. 59, 57 S. Ct. 77 (1936) (Twenty-first Amendment of United States Constitution held to permit a state law discriminatory against out-of-state liquor). See Warren and Schlesinger, "Sales and Use Taxes: Interstate Commerce Pays Its Way," 38 COL. L. REV. 49 at 60-63 (1938).

[12] See Adams Mfg. Co. v. Storen, 304 U. S. 307 at 328, 58 S. Ct. 913 (1938).

[13] 309 U. S. 176 at 184, 60 S. Ct. 504 (1940) (italics supplied).

[14] See Lockhart, "State Tax Barriers to Interstate Trade," 53 HARV. L. REV. 1253 at 1258-1259 (1940).

the above statement, he seems to have retreated in an undetermined degree from his previous position in the *Gwin, White & Prince* case. In that connection it is interesting to note that Justices Frankfurter and Douglas were not on the bench at the time of Justice Black's earlier expression, although all three concurred in the later opinion conceding the invalidity of state legislation *either* discriminatory against interstate commerce "or" (what?). From this circumstance it might be deduced that Justice Black has consistently adhered to his early rigid test for unconstitutionality,[15] while one or both of the newer justices concede some sort of a "direct burden" criterion.

The second reason for Justice Black's "hands off" policy is his view of the extremely limited function of the judiciary. His attitude is that this is a complicated problem with which only a legislature has the facilities to cope, that the fine questions of discretion which it entails are not the proper concern of the courts. His views are set forth at some length in his *Gwin, White & Prince* dissent, a part of which reads:

> "If the combined valid and non-discriminatory taxes of many States raise a problem, only Congress has power to consider that problem and to regulate with respect to it. Neither a State, nor a State with the approval of this Court, has the constitutional power to enact rules to adjust and govern conflicting state interests in interstate commerce. . . .
>
> "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. A broad and deliberate legislative investigation which no court can make—may indicate to Congress that a wise policy for the national economy demands . . . [that a nondiscriminatory gross receipts taxes be sanctioned]."[16]

In their dissent in *McCarroll v. Dixie Greyhound Lines* Justices Black, Frankfurter, and Douglas repeated the same view when they said:

> "Judicial control of national commerce—unlike legislative

[15] But compare Justice Black's remark in a dissent in which he alone participated: "All state taxes on gross receipts from interstate commerce do not discriminate against, *or impose extraordinary burdens upon*, that commerce. Those that do not, do no more than impose a normal burden of government upon that commerce." Adams Mfg. Co. v. Storen, 304 U. S. 307 at 320, 58 S. Ct. 913 (1938) (italics supplied).

[16] 305 U. S. 434 at 448, 449-450, 59 S. Ct. 325 (1939).

restrictions—must from inherent limitations of the judicial process treat the subject by the hit-and-miss method of deciding single local controversies upon evidence and information limited by the narrow rules of litigation. 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 . . . tax for consideration of Congress in a nation-wide survey of the constantly increasing barriers to trade among the States. Unconfined by 'the narrow scope of judicial proceedings' Congress alone can, in the exercise of its plenary constitutional control over interstate commerce, not only consider whether such a tax as now under scrutiny is consistent with the best interests of our national economy, but can also on the basis of full exploration of many aspects of a complicated problem devise a national policy fair alike to the States and our Union."[17]

The attitude of Justices Black, Frankfurter, and Douglas, then, is that here is a problem so complex that the Court should not intrude its judgment save in very rare instances involving discrimination against interstate commerce or, perhaps, extreme direct burdens on it.[18]

The conservative branch of the Court, as represented by Chief Justice Hughes and Justices McReynolds and Roberts, has been relatively quick to condemn state taxes as burdensome upon interstate commerce. The action of these justices, however, does not bespeak a denial of the complexity or seriousness of the problem. Their position is that in the absence of Congressional action over interstate commerce some limitation on the states should be exercised by the Court. Granting the intricacy of the problem, they regard the Court as performing only a stop-gap function in the interim until Congress acts.

As has previously been observed, different majorities have prevailed in recent cases involving state taxes and the interstate commerce clause,

[17] McCarroll v. Dixie Greyhound Lines, 309 U. S. 176 at 188-189, 60 S. Ct. 504 (1940), rehearing denied, 309 U. S. 696, 60 S. Ct. 610 (1940).

[18] This attitude might seem to be that of a states-rights partisan. Justice Frankfurter, however, in writing of Chief Justice Taney's extreme position that the mere grant of the commerce power did not operate to limit state power, says: "This was not the dialectic of a states-rights doctrinaire like Calhoun. Taney's views seem rather to derive from his conception of the judicial function, from his unwillingness to open the door to judicial policy-making wider than the Constitution obviously required." Frankfurter, "Taney and the Commerce Clause," 49 Harv. L. Rev. 1286 at 1291 (1936).

some justices refusing to be constant travelers in any one group. On the one extreme, the Chief Justice and Justices McReynolds and Roberts carried a majority in *Adams Mfg. Co. v. Storen*[19] in holding invalid a tax upon gross receipts derived from the sale of articles in interstate commerce because there was a risk of multiple taxation by several states so long as there was no apportionment. In *Gwin, White & Price v. Henneford*[20] the same three members prevailed in their conclusion that a business privilege tax measured by gross receipts from interstate commerce without apportionment involved risks of multiple taxation upon such commerce and was therefore invalid. More recently, in *McCarroll v. Dixie Greyhound Lines*,[21] this group, again augmented, found unconstitutional a tax upon the use of gasoline applicable to persons driving into the state motor vehicles carrying more than twenty gallons. These three justices fell into a minority in the milestone case of *McGoldrick v. Berwind-White Coal Mining Co.*[22] They unsuccessfully sought to reapprove with a square decision a previous Supreme Court implication that a tax upon an interstate sale by the state of destination is unconstitutional.[23]

Justice Black, who dissented alone in the multiple burden cases of *Adams Mfg. Co.* and *Gwin, White & Prince*, was joined in his disagreement with the majority in the *Dixie Greyhound Lines* use tax case by the newer members of the bench, Justices Frankfurter and Douglas. These three judges carried a majority in the *Berwind-White* decision.

The real uncertainties in the Court's membership, apart from Justice Murphy, whose position in this field has not yet been defined, are Justices Stone and Reed. They both enabled their conservative colleagues to prevail in the *Gwin, White & Prince* and *Dixie Greyhound Lines* cases, but in the *Berwind-White* opinion they joined with Justices Black, Frankfurter, and Douglas in approving the state legislation. The *Gwin, White & Prince* situation involved a privilege tax by the state of origin, while the *Berwind-White* case presented a sales tax by the

[19] 304 U. S. 307, 58 S. Ct. 913 (1938).

[20] 305 U. S. 434, 59 S. Ct. 325 (1939).

[21] 309 U. S. 176, 60 S. Ct. 504 (1940), rehearing denied, 309 U. S. 696, 60 S. Ct. 610 (1940).

[22] 309 U. S. 33, 60 S. Ct. 388 (1939).

[23] Compare Bowman v. Continental Oil Co., 256 U. S. 642, 41 S. Ct. 606 (1921) (injunction against sales tax on gasoline sold before and after entry from outside of state) with Sonneborn Bros. v. Cureton, 262 U. S. 506, 43 S. Ct. 643 (1923) (Bowman decision qualified so as not to apply to sales of goods after entry from outside of state); see Powell, "New Light on Gross Receipts Taxes," 53 HARV. L. REV. 909 at 915 et seq. (1940).

state (more properly, city) of destination. It has been suggested that there are reasons for differentiating the taxing powers of these two states,[24] but the Supreme Court has not yet done so, unless the *Berwind-White* decision itself draws that distinction *sub silentio*.[25]

To be compared with Justice Stone's position in the *Adams Mfg. Co.* and *Gwin, White & Prince* cases is his opinion in *South Carolina State Highway Dept. v. Barnwell Bros.*,[26] in which he said:

> "Congress, in the exercise of its plenary power to regulate interstate commerce, may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation . . . curtail to some extent the state's regulatory power. But that is a legislative, not a judicial function. . . ."

In the *Barnwell Bros.* case, in which these remarks appeared, the plaintiffs operated trucks in interstate commerce. The Supreme Court refused to enjoin the enforcement against them of a South Carolina statute limiting the width of motor vehicles to ninety inches and their weight to 20,000 pounds. A three-judge district court below had found that eighty-five to ninety per cent of trucks in interstate commerce exceeded both these limits; it had concluded unanimously that these restrictions would seriously impede interstate commerce.[27] On the other hand, in the *Adams Mfg. Co.* and *Gwin, White & Prince* cases state taxes were found invalid although no actual multiple state taxation was shown, there being only the potentialities of such burdens.

Justice Reed's position has also been interesting. Condemning taxes in the *Gwin, White & Prince* and *Dixie Greyhound* cases, he upheld the sales levy in the *Berwind-White* case. His willingness in the first

[24] The suggestion is that a tax by the buyer's state would equalize the competitive advantage possessed by out-of-state sellers, while a tax by the seller's state might or might not. Furthermore, it has been urged that a sales tax, being measured by the volume of business done, is preferable to a privilege or license tax. See Lockhart, "The Sales Tax in Interstate Commerce," 52 HARV. L. REV. 617 (1939).

[25] With reference to these two decisions it has been pointed out that Justices Stone and Reed hold the balance of power. They command a majority (liberal colleagues) to sustain a tax involving no serious threat of discrimination against interstate commerce. McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 60 S. Ct. 388 (1939). They carry a different majority (conservative colleagues) to condemn a tax thought to threaten discrimination although not actually doing so. Gwin, White & Prince v. Henneford, 305 U. S. 434, 59 S. Ct. 325 (1939). See Lockhart, "State Tax Barriers to Interstate Trade," 53 HARV. L. REV. 1253 at 1255 (1940).

[26] 303 U. S. 177 at 189-190, 58 S. Ct. 510 (1938), rehearing denied, 303 U. S. 625, 58 S. Ct. 510 (1938).

[27] Barnwell Bros. v. South Carolina State Highway Dept., (D. C. S. C. 1937) 17 F. Supp. 803.

two cases to sanction the view that some taxes are unconstitutional as a "direct burden" upon interstate commerce should be read against the background of his arguments a year before as solicitor general in *James v. Dravo Contracting Co.*[28] In that case, involving a state gross receipts tax on goods sold to an independent contractor engaged in federal construction work, the United States appeared as amicus curiae. In his brief the solicitor general went beyond the requirements of the cases at bar[29] to urge upon the Court the practical scrapping of the intergovernmental immunity doctrine as previously developed by the Supreme Court, so that sales directly to the United States or the states would not be exempt from state or federal taxes, respectively, except only if those taxes were discriminatory because not of general application. If the preservation of the independent sovereignties of the federal and state governments does not require a "direct burden" test, it might well be doubted whether such a criterion ought to be employed in the interstate commerce field where the central authority has clear power to assert its superiority if it wishes.

However much the justices may differ among themselves about how far a state may go in taxing interstate commerce as long as Congress has not acted, however inexplicable the actions of individual justices in certain cases might appear in light of their previous records, upon one principle there is unanimous agreement: Congress may, if it wishes, expressly assert its superiority over interstate commerce and by so speaking constitutionally forbid state taxes upon interstate commerce.

This principle, which was necessary to the decision in *McGoldrick v. Gulf Oil Corp.*, had been clearly foreshadowed in earlier tax cases.

[28] 302 U. S. 134, 58 S. Ct. 208 (1937).

[29] The Dravo case was argued with Silas Mason Co. v. Washington Tax Commission, 302 U. S. 186, 58 S. Ct. 233 (1937). In both controversies the taxes complained of had been assessed against independent contractors doing work for the federal government. Upon the basis of previous authority a gross receipts tax on such contractors might have been held valid on the theory that a tax on an independent contractor is not a direct burden on the government. Cf. Gromer v. Standard Dredging Co., 224 U. S. 362, 32 S. Ct. 499 (1912) (territorial tax on property owned by contractor doing federal work); Metcalf & Eddy v. Mitchell, 269 U. S. 514, 46 S. Ct. 172 (1926) (net income tax); see Lowndes, "Taxation and the Supreme Court, 1937 Term," 87 UNIV. PA. L. REV. 1 at 5 (1938). The Supreme Court, however, indicated in the Dravo case that it does not any longer place much weight on that distinction. Previous decisions indicated that a tax on a sale of property directly to the government was a direct burden and therefore invalid. Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U. S. 218, 48 S. Ct. 451 (1928); Indian Motocycle Co. v. United States, 283 U. S. 570, 51 S. Ct. 601 (1931). The Dravo opinion observed that these must be "limited to their particular facts." 302 U. S. 134 at 151.

Even those least anxious to restrict state legislation had gone out of their way to affirm it. Justice Black, for example, said:

> "*Until Congress in the exercise of its plenary power over interstate commerce fixes a different policy*, it would appear desirable that the States should remain free to adopt tax systems imposing uniform and non-discriminatory taxes upon interstate and intrastate business alike." [30]

In holding valid the sales tax by the city of destination in the *Berwind-White* case, Justice Stone found:

> "no adequate ground for saying that the present tax is a regulation which *in the absence of Congressional action*, the commerce clause forbids." [31]

Where the justices adopt a tolerant attitude toward a state tax, as in the two instances above, they acknowledge the federal superiority over interstate commerce by conceding that Congress might expressly prohibit such a burden. From the attitude of those judges who condemn local taxes upon the ground that the mere grant of power over interstate commerce to the federal government has prevented such burdens, it follows *a fortiori* that such taxes would be declared void in the face of an express Congressional prohibition. In the view of these justices the assertion of federal authority would be effectively employed to validate state action otherwise unconstitutional.[32] In taking this latter view of the question, Justice Stone has observed:

> "For half a century . . . it has not been doubted that state taxation of local participation in interstate commerce, measured by the entire volume of the commerce, is . . . foreclosed. During that period Congress has not seen fit to exercise its constitutional power to alter or to abolish the rules thus judicially established." [33]

Up to this point, then, we find the Supreme Court members split over how far the mere grant to Congress of superior authority over

[30] Adams Mfg. Co. v. Storen, 304 U. S. 307 at 327, 58 S. Ct. 913 (1938) (italics supplied).

[31] McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 at 49-50, 60 S. Ct. 388 (1940) (italics supplied).

[32] The question raised by the two views is: "Upon whom should the burden of inducing Congressional action rest—upon those who seek to burden national commerce by such barriers, or upon those injured by them?" Lockhart, "State Tax Barriers to Interstate Trade," 53 HARV. L. REV. 1253 at 1288 (1940).

[33] Gwin, White & Prince v. Henneford, 305 U. S. 434 at 441, 59 S. Ct. 325 (1939).

interstate commerce restricted the states' power to tax that commerce. Signs abounded, however, that given a case of Congress exercising that authority, all the justices would join in happy agreement. It is against the background of these indications that we shall consider the unanimous decision in *McGoldrick v. Gulf Oil Corp.* However eager the Supreme Court might have been for the opportunity of elevating its previous implications to a holding, it will be seen that if the *Gulf Oil* controversy was selected as the vehicle to carry out that idea, it was a peculiar choice.[34]

THE GULF OIL CASE

In the *Gulf Oil* case the plaintiff's predecessor had imported crude petroleum. Customs entry had been made pursuant to warehouse bond in order to take advantage of certain provisions of the 1932 Revenue Act and the 1930 Tariff Act; these exempted from duty imported crude oil intended for manufacture and sale for use as fuel in foreign commerce. Customs entry of the oil in controversy, together with its refining, sale, and delivery alongside foreign-bound ships all had occurred in New York City. This case involved the validity of the city's assessment of a tax upon the sale of the fuel oil to a ship operator. In holding the tax invalid, the Supreme Court pointed out that an exemption of imports from duty by Congress is a regulation by it of foreign commerce. The purpose of this regulation was to enable the importer to meet foreign competition in the sale of fuel oil. Since this purpose would have been defeated had the tax been permitted to stand, it was held that the levy was invalid as an infringement of the Congressional regulation.[35]

Superficially the unanimous *Gulf Oil* decision seems to be the expected outgrowth of previous intimations by conservative and liberal justices alike. The qualification in the *Berwind-White* majority opinion —that a tax upon an interstate sale by the state of destination was valid "in the absence of Congressional action"[36]—was negatived in the *Gulf*

[34] One cannot know for a certainty whether the Gulf Oil controversy was welcomed for such a purpose. Presumably the Court believed its previous intimations were in point, in which case the constitutional question of Congress' power to prohibit this tax would have been so clear as not to warrant discussion. That question was not mentioned.

[35] Cf. West India Oil Co. v. Domenech, (U. S. 1940) 61 S. Ct. 90 (import exemption held not to prohibit Porto Rico sales tax; Gulf Oil case distinguished in view of Organic Act, passed before federal exemption statutes, permitting tax on property brought into Porto Rico, Justices Reed and Roberts dissenting).

[36] McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 at 49, 60 S. Ct. 388 (1939).

Oil case, because Congress had impliedly declared that this oil should be free of local taxes. The dissenting justices in the *Berwind-White* case felt that the tax should have been stricken down even though Congress had not spoken; from their position it follows all the more certainly that a levy prohibited by Congress is bad.

The expectation of a unanimous finding in the *Gulf Oil* case is not, however, so easily justified. Once having decided that the exemption from duty constituted a regulation of foreign commerce by Congress, the Court treated the controversy as involving only a problem of statutory construction: did Congress by this regulation intend to preclude this kind of local tax? The opinion was restricted in this way although serious question about whether the federal power over foreign commerce had been constitutionally exercised would have arisen had it been determined that this oil had been removed from foreign commerce.[37] This constitutional question whether the prohibition lay within the federal authority was nowhere discussed, although it seems to have been put in issue by the record.[38] The city's counsel, however, failed to press the matter in their brief.[39] The existence of such a constitutional problem was perhaps indirectly recognized by the Court in three ambiguous statements appearing in the opinion. One of these reads:

"The Congressional regulation, read in the light of its purpose,

[37] See infra, pp. 774 to 779.

[38] The original writ of certiorari was dismissed because a short opinion below by the New York Court of Appeals did not indicate that the decision rested solely upon a federal ground. McGoldrick v. Gulf Oil Corp., 309 U. S. 2, 60 S. Ct. 375 (1940). Accordingly, the court of appeals amended the remittitur with the statement that: "the affirmance was on the grounds that the City Sales Tax as applied here violated Article 1, Section 8, Clause 3 [commerce clause], and Article 1, Section 10, Clause 2 [prohibition on state import duties], and Article 6, Clause 2 [supremacy clause] of the United States Constitution, and on no other grounds." Supplemental Record 4. Upon the basis of this statement the case was then decided on the merits. If the Congressional exemption from local tax was an invalid exercise of the foreign commerce power, the tax would not violate the commerce clause (unless it violated it for some reason apart from its repugnance to the federal legislation).

[39] The position was taken that the oil was no longer in foreign commerce, but this related only to an argument that the tax was not void as a tax on imports and not to the argument that Congress had transcended its foreign commerce authority. Brief for Petitioner upon Reargument 14-19. The city actually raised the question of Congress' power to prohibit a local tax on a local transaction, but only for the purpose of construing the statute so as to avoid raising constitutional doubts (i.e., for the purpose of proving that Congress did not intend to prohibit such a tax). Id. 29-30. The highest state court to hear this case and give a full opinion split over the question whether Congress could constitutionally prohibit this tax. Gulf Oil Corp. v. McGoldrick, 256 App. Div. 207, 9 N. Y. S. (2d) 544 (1939).

> is tantamount to a declaration that in order to accomplish constitutionally permissible ends, the imported merchandise shall not become a part of the common mass of *taxable* property within the state . . . and shall not become subject to the state taxing power."[40]

Whether the Court concluded that this oil had left foreign commerce is obscured by the negative pregnant in the above statement. Perhaps the Court intended to emphasize the qualification in the phrase, "common mass of *taxable* property," and meant that the oil was not taxable even though no longer in foreign commerce. The tenor of the whole observation, however, leads a reader to believe that such a limitation was not intended, rather that the Court meant that the customs exemption prevented the oil from becoming part of the common mass of property, which was taxable (this relative phrase being descriptive and not limiting). Furthermore, a qualified meaning would lead to a redundancy. Either the observation about not becoming a part of the common mass of "taxable" property, or the concluding remark, "and shall not become subject to the state taxing power," would then be superfluous.

Nevertheless, it is quite possible that in making this statement the Court did not have in mind the question whether this oil continued in foreign commerce. That part of the opinion in which the remark appears deals with the interpretation of the customs and revenue statutes involved. Thus, the paragraph of which it is a part begins:

> "The question remains, whether the present tax conflicts with the Congressional policy adopted by the Acts of Congress which we have discussed."[41]

Perhaps the ambiguous statement refers only to the problem of whether an intention to prohibit local taxes might be read into Congress' action in granting the customs exemption. If it was addressed to this question of Congress' intention, the Court has merely said that Congress indicated its desire that this oil be free from local tax. In that event the Court has expressed no opinion here on the constitutional question.

The Court's meaning is further confused by another part of the opinion which reads:

[40] McGoldrick v. Gulf Oil Corp., 309 U. S. 414 at 429, 60 S. Ct. 664 (1940) (italics supplied), rehearing denied, Gulf Oil Co. v. McGoldrick, 309 U. S. 699, 60 S. Ct. 887 (1940).

[41] Id., 309 U. S. at 428.

> "From the time of importation until the moment when the bunker 'C' oil is laden on vessels engaged in foreign trade, the imported petroleum and its product, the fuel oil, *is segregated from the common mass of goods and property within the state*, and is subject to the supervision and control of federal customs officers."[42]

This statement also can be explained away by its position in the opinion. It is not in that part devoted to the Court's reasons and conclusions but occurs in a preliminary section in which the applicable statutes and regulations are quoted and their operations discussed. Thus, the Court points out that pursuant to these provisions the bonded oil is kept separate from other oil; in that sense "the common mass of goods and property within the state" can be used synonymously with "property no longer in foreign commerce," and in this sense "common mass," of course, is not *one* mass. Whether the Court also employed the expression in this latter very technical sense to indicate that foreign commerce continued is not clear. Very conceivably, it did not intend that meaning.

Of the three ambiguous statements the one which most clearly indicates the Court's belief one way or the other is the following:

> "For present purposes we may assume without deciding, that had the crude oil not been imported in bond it would, upon its manufacture, have become a part of the common mass of property in the state and so would have lost its distinctive character as an import and its constitutional immunity as such from state taxation."[43]

The conclusion that the Supreme Court itself believed that the oil in this particular case had not become a part of the common mass of property in the state can be drawn only by inference, because the remark speaks not of the actual situation in controversy but of one where oil is not imported in bond, and also because it is only an assumption rather than a definite expression of opinion. Furthermore, the inference must be drawn from a statement in itself ambiguous. Does the Court mean that the fact of not coming in under bond was necessary for the oil to become part of the common mass? To put the question in its converse aspect, is oil prevented from becoming part of the common mass by its admission under bond? If the Court's statement be read literally,

[42] Id., 309 U. S. at 425-426 (italics supplied).
[43] Id., 309 U. S. at 423.

the words, "and so," seem to lend favor to that interpretation. That is, the property loses its import character and tax immunity because it is part of the common mass, and importation under bond seems to be the necessary precedent to the property's entering the common mass.

If any one of the three confusing statements we have discussed appeared alone in the opinion, one might be justified in drawing no conclusion as to whether the Court believed that this oil had ceased being in foreign commerce. The significant feature is that, however ambiguous each remark taken alone might be, the least improbable construction of all three indicates the same conclusion, the Court's view that the entry under bond prevented this oil from leaving foreign commerce. In view of this cumulative evidence we shall suppose that this was the justices' belief.

The Court's conclusion is difficult to support. Whether or not the oil became a part of the common mass of property within the state is a question of fact, and the physical status of the property cannot be altered by its having entered under bond. True, it might be kept separated pursuant to bond, but the identity of oil might be preserved even though no entry under bond was made. In such a case, the oil would become part of the common mass of property within the state after its processing. And the physical status of refined oil which has been entered under bond is exactly the same. Two barrels of oil after refining, both identifiable back to their customs entries, are both part of the common mass of property within the state, and the fact that one barrel was entered under bond—an incidental piece of history—does not change its physical condition. Furthermore, we may presume that the Court would also have exempted from tax oil which had not been entered under bond but which had been subjected to a drawback. It certainly would not be argued that such property had been prevented from entering the local common mass.[44] Upon the basis of this analysis the following interpretation seems preferable: whether oil is subject to state taxation depends upon whether it has been entered under bond and upon whether it is a part of the common mass of property. The

[44] The logic is not foolproof. From the fact that bonded oil was exempt from tax on account of its not having left foreign commerce, it does not necessarily follow that drawback oil need suffer a different fate because it does leave foreign commerce. That is, bonded oil might be exempt on account of its not having left foreign commerce and also for some other reason on account of which drawback oil would also be exempt. (As a matter of fact, it is our view that both are perhaps exempt solely on account of another reason.) The drawback oil situation is suggested in the text as a makeweight in addition to other reasons and is not urged as being in itself conclusive of the argument advanced.

latter is a question of fact, and its answer does not turn upon how customs entry was made but rather upon what has been done to affect the oil physically.

Even though it be granted that bonded entry of itself did not prevent this oil from joining the common mass of property within the state, the question whether it did or not is still not answered. That problem is the next inquiry.[45]

Since the oil in the *Gulf* case had been stopped for reasons other than merely to facilitate transit, upon the basis of generally held concepts it is probable that it was no longer in foreign commerce.[46] After its importation and delivery into bonded crude oil tanks the oil was subjected to a heating process which removed the more volatile liquids (gasoline and gas oil). The resulting product was bunker fuel oil, and this was placed in bonded fuel oil tanks. Then it was delivered into bonded lighters which carried the oil to the bunker fuel tanks of foreign-bound vessels. It was the sale at this last point which New York City unsuccessfully sought to tax. Obviously the stopping, handling, and processing of the oil was not necessary for continued transportation, as, for example, when oil is temporarily stored because ships are not available.[47] In the *Gulf Oil* case the product was operated upon in order to change its form and make it more readily salable.[48] True, in an

[45] The question whether the oil at the time of its sale was in foreign commerce on account of its intended use in foreign commerce is not discussed in the text. On the basis of present authority the answer is clearly no. Eastern Air Transport v. South Carolina Tax Commission, 285 U. S. 147, 52 S. Ct. 340 (1932); cf. Nashville, Chattanooga & St. Louis Ry. v. Wallace, 288 U. S. 249, 53 S. Ct. 345 (1933); Edelman v. Boeing Air Transport, 289 U. S. 249, 53 S. Ct. 591 (1933); Southern Pacific Co. v. Gallagher, 306 U. S. 167, 59 S. Ct. 389 (1939).

[46] General Oil Co. v. Crain, 209 U. S. 211, 28 S. Ct. 475 (1908); Bacon v. Illinois, 227 U. S. 504, 33 S. Ct. 299 (1913); see Champlain Realty Co. v. Brattleboro, 260 U. S. 366 at 374-375, 43 S. Ct. 146 (1922); cf. Kelley v. Rhoads, 188 U. S. 1, 23 S. Ct. 259 (1903) (tax on sheep grazing while in interstate transit held unconstitutional); Carson Petroleum Co. v. Vial, 279 U. S. 95, 49 S. Ct. 292 (1929) (oil held to be in continuous foreign commerce although stopped awaiting arrival of ships or accumulation of full shipload). When gas in high pressure interstate transmission lines is sent into smaller local lines and its pressure is reduced, its interstate journey is deemed ended. East Ohio Gas Co. v. Ohio Tax Commission, 283 U. S. 465, 51 S. Ct. 499 (1931); Southern Natural Gas Corp. v. Alabama, 301 U. S. 148, 57 S. Ct. 696 (1937).

[47] Carson Petroleum Co. v. Vial, 279 U. S. 95, 49 S. Ct. 292 (1929).

[48] The highest New York court which gave a full opinion in this case fell into disagreement. Part of the dissent reads: "It cannot be said that the crude oil imported from Venezuela was not subjected to manufacture by refining, since it is the undisputed fact that its character was completely changed by the elaborate process through which it passed. . . . The imported crude oil was converted as completely as ore which is im-

economic sense these operations were necessary for continued transit, but we are looking now to physical rather than economic necessities.[49]

A situation strikingly similar to that in the instant case appeared in *Gulf Fisheries Co. v. MacInerney*.[50] There Texas attempted to impose a license fee on wholesale fish dealers. An injunction against its collection was sought by a dealer engaged in catching fish in the Gulf of Mexico. He unloaded his catch at a wharf in Texas where it was weighed, washed, and re-iced. Then it was shipped away from the wharf as soon as possible. The Supreme Court refused to strike down the imposition as an impost on imports. The basis of Justice Brandeis' opinion was that the fish had been so acted upon as to become part of the common mass of property within the state.

This being true of the fish, it seems that the oil in the *Gulf* case was in a similar position. The fish, like the oil, had been brought to port from a journey in foreign commerce, had been processed in preparation for sale, and then had resumed transit. If the break in the movement of the fish was sufficient to cause it to lose its character as an article in foreign commerce, the same was true of the oil. Indeed, the case for the oil having joined the common mass of property in the state is perhaps the stronger. While the substance itself of the oil was considerably changed, the fish, although acted upon, were still the identical fish.

The *Gulf Fisheries* decision is difficult to reconcile with the language, if not the holding, in *Southern Pacific Terminal Co. v. Interstate Commerce Commission*.[51] The Terminal Company had given certain preferences to Young, who was in the business of buying cotton seed cake, for the most part outside Louisiana. This cake he shipped by rail to himself at the Terminal Company's pier in Louisiana where

ported from abroad and exported as steel, or as logs imported from abroad and exported as lumber. In the process of refining, several of the constituent ingredients of the crude oil were withdrawn and sold here for domestic use, the residue only constituting the bunker fuel oil which is the subject of this proceeding. The refining of the crude oil here was not a mere incident for convenience in transportation, as was the case in the decisions on which the petitioner relies." Gulf Oil Corp. v. McGoldrick, 256 App. Div. 207 at 214, 9 N. Y. S. (2d) 544 (1939).

[49] Like other lines, this one becomes dimmer the more closely controversies approach it on each side. E.g., the stopping of oil for only as long as is necessary to fill orders previously received is "not in necessary delay or accommodation to the means of transportation." General Oil Co. v. Crain, 209 U. S. 211 at 230, 28 S. Ct. 475 (1908). But the grazing of sheep is a necessary incident to their transportation, even though they fatten on the way. Kelley v. Rhoads, 188 U. S. 1, 23 S. Ct. 259 (1903).

[50] 276 U. S. 124, 48 S. Ct. 227 (1928).

[51] 219 U. S. 498, 31 S. Ct. 379 (1911).

it was ground into meal, sacked and loaded into ships. The Supreme Court held proper an Interstate Commerce Commission order for the Terminal Company to cease and desist its practice of failing to charge wharfage fees for handling Young's cake and meal while charging others as well as its practice of allowing wharf space to Young and not to others.[52] The disturbing feature of the case is some language in the opinion which perhaps indicates the Court's view that the foreign commerce never was interrupted:

> "[The goods] were all destined for export and by their delivery to the Galveston, Harrisburg and San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination, the Terminal Company being a part of the railway for such purpose. The case . . . comes under *Coe v. Errol.*[53] . . . where it is said that goods are in interstate, and necessarily as well in foreign, commerce where they have [been], actually started in the course of transportation to another State, or delivered to a carrier for transportation.'"[54]

On the other hand, the Court was very much concerned over the effect of these preferences upon foreign commerce,[55] and the case might merely mean that the questioned activities, although local in nature, had such a direct effect upon foreign commerce that the jurisdiction of the Interstate Commerce Commission had to cover them in order to protect the commerce itself.[56]

The *Southern Pacific Terminal* case bothered Judge Learned Hand in *Baltimore & Ohio R. R. v. United States.*[57] The suit was brought

[52] Young paid a pier rental which was less than the amount wharfage fees charged others would have aggregated.

[53] 116 U. S. 517, 6 S. Ct. 475 (1886).

[54] Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498 at 527, 31 S. Ct. 379 (1911).

[55] The Terminal Company was a part of the Southern Pacific System although a separate corporation. It owned tracks leading from its wharves to the Galveston, Harrisburg and San Antonio Railway. Advertising circulars of the Southern Pacific System showed terminal charges. By virtue of his preferential arrangement, Young made 30 to 40 cents per ton of cake in addition to ordinary profit. 219 U. S. 498 at 505. Thus, he was "able to dominate the Texas market and to command the foreign trade." Id. at 524.

[56] The highest New York court to give a full opinion in the Gulf Oil case apparently did not believe that the Southern Pacific Terminal case could be distinguished in this way. Relying on that case, the majority held that mere processing does not reduce imports to the status of commingled goods. Gulf Oil Corp. v. McGoldrick, 256 App. Div. 207, 9 N. Y. S. (2d) 544 (1939).

[57] (D. C. N. Y. 1936) 15 F. Supp. 674.

to review an Interstate Commerce Commission order to establish through rates. Crude methanol was shipped by various persons to a refinery in Cadosia, New York, where it was mixed and then sent to consumers, each shipper receiving credit for his share. Some methanol originating within New York State was sent to Cadosia and from there shipped outside the state. Other shipments starting outside the state went to Cadosia and from there to points within the state. Judge Hand held that in neither case was there a through interstate movement. The *Southern Pacific Terminal Co.* case seemed "difficult to reconcile." [58] Furthermore:

> "It may . . . be that, if this decision stood alone, we should have to say that even a combination of manufacture and a temporary stop at a selling depot would not break the journey." [59]

Judge Hand felt that *Arkadelphia Milling Co. v. St. Louis Southwestern Ry.*[60] "contradicts it if it stands for so broad a result." [61] This case involved the power of the Arkansas Railroad Commission to fix rates for the transportation of rough lumber from the Arkansas woods to mills in the same state for manufacture into staves, hoops, and headings, and for drying, the whole process occupying several months. Ninety-five per cent of the production was sent out of the state, but at the time the lumber was transported to the mills it was not known to whom sales would be made. The Supreme Court noted that the manufacturing process "materially changed [the lumber's] character, utility, and value," [62] and it upheld the local authority.

If the *Southern Pacific Terminal* case decided that the cotton seed cake was not interrupted in its journey in foreign commerce by its manufacture into meal and its sacking, it seems to have been contradicted by the *Arkadelphia Milling* decision. If, however, the earlier holding was merely that the wharfage preferences so affected the foreign commerce as to be subject to Interstate Commerce Commission order even though the transportation stopped at the pier, the two decisions are reconcilable. The only question in the *Arkadelphia Milling* case was whether the lumber commenced its interstate journey before or after treatment at the mill; the problem was such a narrow

[58] Id. at 676.

[59] Id. at 676.

[60] 249 U. S. 134, 39 S. Ct. 237 (1919).

[61] (D. C. N. Y. 1936) 15 F. Supp. 674, 766.

[62] Arkadelphia Milling Co. v. St. Louis S. W. Ry., 249 U. S. 134 at 151, 39 S. Ct. 237 (1919).

one because the authority in issue was that of a local and not of the federal regulating commission.

To summarize briefly on this question whether the oil in the *Gulf* case had entered the common mass of property in the state, we feel justified in an affirmative conclusion in spite of the *Southern Pacific Terminal* case. Either the decision there that the cotton seed cake had not stopped its journey had been contradicted *sub silentio* by the later decisions in *Arkadelphia Milling Co. v. St. Louis Southwestern Ry.* (the suggestion of Judge Hand) and in *Gulf Fisheries Co. v. MacInerney*, or else the *Southern Pacific Terminal* decision approved the federal authority on broader grounds.

If the lumber in the *Arkadelphia Milling* case and the fish in the *Gulf Fisheries* dispute entered the common mass of property locally situated, the conclusion seems indicated that the same was true of the oil in the *Gulf* case. But even if that is granted, the question whether the local tax on the sale of oil should have been permitted is still far from solved.

The many cases holding that once articles which moved in interstate commerce have joined the common mass of property locally situated they are subject to state taxation are not decisive, because in those controversies the federal government did not seek to exercise its power over interstate commerce in order to prevent the taxes. The possibility that the central government might expressly assert its authority was recognized in 1868 by an obiter remark made in *Woodruff v. Parham.*[63] That milestone decision sanctioned a state sales tax on merchandise auctioned off in the original packages in which it had previously been shipped from other states. After finding that the tax was not discriminatory against interstate commerce nor violative of the privileges and immunities clause, Justice Miller pointed out how Washington, were it so inclined, might deal with possible irritating consequences of this decision:

> "There is also, in addition to the restraints which those provisions impose by their own force on the States, the unquestioned power of Congress, under the authority to regulate commerce among the States, to interpose, by the exercise of this power, in such a manner as to prevent the States from any oppressive interference with the free exchange of commodities by the citizens of one State with those of another."[64]

[63] 8 Wall. (75 U. S.) 123 (1868).
[64] Id. at 140.

Several years later, when the Supreme Court was faced with a comparable situation involving a property rather than a sales tax, it again indicated the possibility of federal control:

> "When Congress shall see fit to make a regulation on the subject of property transported from one State to another, which may have the effect to give it a temporary exemption from taxation in the State to which it is transported, it will be time enough to consider any conflict that may arise between such regulation and the general taxing laws of the State." [65]

In its later opinions the Supreme Court has continued to limit the state tax cases by pointing out that the local impositions were approved in the absence of federal regulation.[66] Very recently it said:

> "Nor are the cases in point which are cited by petitioner with respect to the exercise of the power of the State to tax goods, which have not begun to move in interstate commerce or have come to rest within the State, or to adopt police measures as to local matters. In that class of cases the question is not with respect to the extent of the power of Congress to protect interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with that paramount authority." [67]

[65] Brown v. Houston, 114 U. S. 622 at 634, 5 S. Ct. 1091 (1885).

[66] In upholding a state tax on grain, the interstate transit of which had been interrupted pursuant to through bills of lading for inspecting, weighing, grading, cleaning, and other operations, Justice Hughes said: "The question . . . is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with this paramount authority." Bacon v. Illinois, 227 U. S. 504 at 516, 33 S. Ct. 299 (1913). The question of federal regulation arose soon afterwards, and Chief Justice Taft then observed: "Such a contract [a through bill of lading similar to that in the Bacon case] does not prevent the local taxing of the grain while in Chicago; but it does not take it out of interstate commerce in such a way as to deprive Congress of the power to regulate it. . . ." Chicago Board of Trade v. Olsen, 262 U. S. 1 at 33, 43 S. Ct. 470 (1923). See also Stafford v. Wallace, 258 U. S. 495 at 526, 42 S. Ct. 397 (1922); Minnesota v. Blasius, 290 U. S. 1 at 9, 54 S. Ct. 34 (1933). There is language in the Bacon, Chicago Board of Trade, and Stafford cases which might be interpreted as meaning that although the interstate commerce continued the states nevertheless could tax. That interpretation, however, is not required by the language. The opinions can be at least equally well construed as referring to the federal interstate commerce power over local transactions directly affecting that commerce. Since the property was stopped and its form changed for reasons associated with profit rather than merely to facilitate transit, it seems that the property had left interstate commerce. See supra, pp. 770-771.

[67] Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U. S. 453 at 466, 58 S. Ct. 656 (1938).

It is these cases which hint of the problem actually in issue and so disappointingly slighted in *McGoldrick v. Gulf Oil Corp.* The answer to the basic constitutional question posed by that case was given by the attitudes of neither conservative nor liberal justices in the majority and dissenting opinions in the immediately preceding line of sales, privilege, and gross receipts tax cases; the prevailing and dissenting views in those cases indicated unanimous agreement that Congress might, if it cared to, prohibit a tax on things moving in foreign or interstate commerce.[68] The problem involving substantial difficulty had been noticed, although it was not directly involved, in the opinions concerned with state taxation of articles which had entered the common mass of local property after their transit interstate; without delimiting the federal authority over interstate commerce, the Court has repeatedly indicated that at times that authority might properly be exercised so as to prevent state taxes on property locally situated. The problem not treated in *McGoldrick v. Gulf Oil Corp.* was whether this was one of those occasions.

Even before the recomposition of the Supreme Court under the New Deal, it was apparent that Congress' interstate and foreign commerce power extended to the regulation of local matters in certain situations where, for example, there was "a real or substantial relation or connection" between the local activity and interstate commerce,[69] or where the intrastate operations might be "a means of injury to that which has been confided to Federal care,"[70] or where they might "impose a direct burden on . . . interstate commerce."[71] Thus, it was baldly stated:

> "the power of Congress is [not] to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by the relation of that subject to commerce and its effect upon it. . . . that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce . . . and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves."[72]

[68] See supra, pp. 763-765.

[69] Southern Ry. v. United States, 222 U. S. 20 at 26, 32 S. Ct. 2 (1911).

[70] Houston, E. & W. T. Ry. v. United States (Shreveport case), 234 U. S. 342 at 351, 34 S. Ct. 833 (1914).

[71] Hill v. Wallace, 259 U. S. 44 at 69, 42 S. Ct. 453 (1922).

[72] United States v. Ferger, 250 U. S. 199 at 203, 39 S. Ct. 445 (1919). There are other conspicuous examples of local commerce being subjected to federal regulation.

In extending its social and economic legislation, the Roosevelt administration has gone far beyond the confines of interstate commerce as such, and coincident with that tendency the Supreme Court in recent years has made it increasingly clear that it is the effect upon interstate commerce of the matter regulated rather than the question whether it was a part of that commerce which determines the extent of the federal authority.[73] Typical of the rationale employed was that in the *Labor Board Cases*:[74]

> "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."

The worst that can be said of "tests" such as "close and substantial relation," or "close and intimate effect," or "real and substantial relation" is that they are not guiding principles at all but mere paraphrases of legal results previously arrived at. The best that can be said is that such criteria involve questions of degree to such an extent as to make them almost unworkable.

In determining whether the *Gulf Oil* exemption from city tax of a local sale was within the federal commerce power, the decided cases are not totally unhelpful, however inadequate their declared principles might seem. Some cases are so close on their facts to the *Gulf Oil* situation as to merit scrutiny on the basis of analogy. Thus, federal regula-

E.g., Second Employers' Liability Cases, 223 U. S. 1, 32 S. Ct. 169 (1912); Railroad Commission of Wisconsin v. Chicago, B. & Q. R. R., 257 U. S. 563, 42 S. Ct. 232 (1922); see Swenson, "The Passing of the State Commerce Power," 8 TEMPLE L. Q. 53 at 64 et seq. (1933).

[73] "In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects." Schechter Poultry Corp. v. United States, 295 U. S. 495 at 546, 55 S. Ct. 837 (1935). See Farage, "That Which 'Directly' Affects Interstate Commerce," 42 DICK. L. REV. 1 (1937). Recent opinions make it abundantly clear that the federal authority is not confined to matters which are themselves interstate commerce. National Labor Relations Board v. Jones & Laughlin Steel Corp. (Labor Board Cases), 301 U. S. 1, 57 S. Ct. 615 (1936); Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U. S. 453, 58 S. Ct. 656 (1938); Currin v. Wallace, 306 U. S. 1, 59 S. Ct. 379 (1939); Mulford v. Smith, 307 U. S. 38, 59 S. Ct. 648 (1939); Northwestern Improvement Co. v. Ickes, (C. C. A. 8th, 1940) 111 F. (2d) 221. See Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381 at 393, 394, 60 S. Ct. 907 (1940).

[74] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 at 37, 57 S. Ct. 615 (1936).

tions of stockyards[75] and of sales on commodity markets[76] have been approved even though the property formerly in interstate commerce and about to re-enter it had stopped. More recently, provisions for inspection and grading of tobacco and for its sale at designated markets were held constitutional, Congress' express purposes having been to avoid manipulations, unreasonable price fluctuations, and resulting burdens upon the interstate and foreign commerce which the bulk of the product subsequently entered.[77] A situation even more remote from the flow of commerce was involved when sales of tobacco produced in excess of quotas assigned by the United States Secretary of Agriculture were held subject to federal penalty imposed pursuant to the commerce clause, since most of the tobacco was destined for foreign or interstate shipment.[78]

If these cases are authority, a reasonable guess is that the city tax on the local sale in the *Gulf Oil* case, coming after importation and manufacture, and before foreign commerce, was subject to federal prohibition. To employ the phrase previously condemned as useless, if ever a regulation of a local activity bore a "close and substantial relation" to interstate or foreign commerce, it was this prohibition, designed as it was to better the position of American refined oil in competition with that manufactured elsewhere; presumably, without this exemption at least some fuel oil sales would have been lost to this country and the commerce to that extent would have been stopped.

Reliance, however, should not be so naively placed upon the proposed analogies and suggested rationale as conclusive in the *Gulf Oil* controversy. In all of those cases the Court answered the question whether legislation should have been upheld or not in the affirmative, and it might seem to follow that the result in the *Gulf Oil* case should have been expected since the majority members of the present bench exercise unusual judicial restraint and the freedom with which legislation was once striken down is lacking now. Be it noted, however, that *McGoldrick v. Gulf Oil Corp.* involved a situation where, no matter what the decision on the merits, either one piece of legislative handiwork or another had to fall. If the Court was restrained, as it was, in knocking out the federal legislation, the local enactment had to fail; and if the Court were restrained, as it was not, in knocking out the local legislation, the federal enactment had to fail.

[75] Stafford v. Wallace, 258 U. S. 495, 42 S. Ct. 397 (1922).

[76] Chicago Board of Trade v. Olsen, 262 U. S. 1, 43 S. Ct. 470 (1923).

[77] Currin v. Wallace, 306 U. S. 1, 59 S. Ct. 379 (1939).

[78] Mulford v. Smith, 307 U. S. 38, 59 S. Ct. 648 (1939).

The Court, therefore, seems to have extended the federal commerce power for purposes of tax immunity into the field of local commerce, a peripheral domain where the limits of the central authority have in the past remained vague and elastic. That the *Gulf Oil* opinion does this without discussion is the more surprising, since the federal law involved not only the regulation of intrastate commerce but a positive prohibition against so fundamental an attribute of state sovereignty as a local tax, a tax which was not upon interstate commerce and which, therefore, would have been valid but for Congress' action.[79]

SIGNIFICANCE OF THE GULF OIL DECISION

The significance of this prohibition is somewhat obscured by the coincidence of the customs exemption with the prohibition against local

[79] That there was a substantial constitutional question in the Gulf Oil case is also suggested, somewhat indirectly, by the fact that the prohibition was upheld as an exercise of the commerce rather than the customs power. The Court said: "The laying of a duty on imports, although an exercise of the taxing power, is also an exercise of the power to regulate foreign commerce. . . . The exemption of imports from the duty or the allowance of a drawback . . . is likewise a regulation of foreign commerce. . . . Customs regulations to insure the devotion of the imports to the intended use are likewise within the Congressional power since such regulations are not only necessary or appropriate to protect the revenue, but are means to the desired end, the regulation of foreign commerce. . . ." 309 U. S. 414 at 428. It is true that the federal customs power may be used to regulate. Hampton, Jr., & Co. v. United States, 276 U. S. 394, 48 S. Ct. 348 (1928); Board of Trustees v. United States, 289 U. S. 48, 53 S. Ct. 509 (1933). Nevertheless, it would be a remarkable extension of that authority if Congress were permitted to say to the states: "Under our noncustoms power we tell you not to tax." Accordingly, it is not surprising to find the decision based on the federal commerce power. That feature of the opinion calls to mind an interesting and still unclosed chapter of recent Supreme Court history which both highlights the significance of the Gulf Oil decision and also raises again the question of why a serious constitutional problem was overlooked. That there are some limits to how far Congress may regulate matters of local concern even in the exercise of one of its delegated powers seems to be the inference from the not yet officially dead Agricultural Adjustment Act decision. United States v. Butler, 297 U. S. 1, 56 S. Ct. 312 (1936). That opinion purported to accept the superior authority of Congress to tax "for the general welfare," but at the same time it struck down the tax as being a regulation of agriculture, a local matter exclusively reserved to the states. The dictum in that case now appears destined for the longer life because a subsequent decision by a renovated court seems to permit under the commerce power substantially that which was previously forbidden under the tax authority. Mulford v. Smith, 307 U. S. 38, 59 S. Ct. 648 (1939). There have been previous instances of similar vacillation by the Court. Compare Chicago Board of Trade v. Olsen, 262 U. S. 1, 43 S. Ct. 470 (1923), with Hill v. Wallace, 259 U. S. 44, 42 S. Ct. 453 (1922); Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381, 60 S. Ct. 907 (1940), with Carter v. Carter Coal Co., 298 U. S. 238, 56 S. Ct. 855 (1936). Under the present state of authority one cannot know for certain whether some local matters are so local that Congress cannot touch them even though they "directly affect" interstate commerce.

tax. The extent to which the decision might lead can be illustrated by an example which is free of that confusing feature. Suppose Congress had not exempted this oil from duty and instead taxed it the same as oil destined for American consumption. Also, suppose Congress had decreed that, in order to foster sales in foreign trade (the same purpose as in the instant case) this oil, if kept separated and identifiable and if refined for use in foreign commerce, should not be subject to local taxes. The facts are varied from the *Gulf Oil* situation only in that here the federal government does not itself contribute to the avowed purpose. That, however, should make no difference in result; in each situation there has been the same regulation of foreign commerce for the same purpose. Nevertheless, in the hypothetical case the conclusion of nontaxability seems more doubtful because the limitation of state power is more striking. Had the *Gulf Oil* controversy resulted differently, a local tax would have been permitted upon property which might not have come in but for a Congressional dispensation, yet this local tax would itself tend to destroy the purpose of Congress in granting the exemption. The inequity of a different result under the peculiar facts of the *Gulf Oil* case obscures a full realization of how real a triumph that decision was of federal over state power. But, one might object to the example suggested, it is not appropriate because it involves an exercise of the commerce authority whereas the *Gulf Oil* case was concerned with the exercise of the authority to levy (or not levy) import duties. The answer to this is that the Supreme Court rested its opinion upon the commerce power, holding that the prohibition was an exercise of that authority.[80]

The full implications of the decision are lost not only because of the unfairness of a different result in the particular case but also because of other factors peculiar to the *Gulf Oil* controversy. The oil happened to have been refined at a coastal point and then it reentered foreign commerce. Let us suppose instead that raw silk is imported and manufactured into hose in St. Louis for sale in Chicago. Congress willing a prohibition against the taxes, it seems the *Gulf Oil* decision ought to defeat a property tax by Missouri and a sales tax by illinois.[81] The possible widespread consequences of the decision were appreciated in a dissenting opinion below when it was said:

"That conclusion [that the tax was invalid] involves consequences

[80] See supra, note 79.

[81] Cf. McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 60 S. Ct. 388 (1939).

which are so far-reaching and so dangerous as to require close examination of its premises. For it means that raw material may be imported into the several States to be there manufactured on private property and sold by private corporations, and that, if destined for export or even for transportation to another State, both the raw material and the finished product are exempt from state taxation. . . . If, then, property having a situs within the State for the purposes both of manufacture and sale may be withdrawn from State taxation because the finished product is destined . . . for use elsewhere, transactions of great magnitude which have heretofore been regarded as subject to local taxation will be exempt, to the great detriment of the States." [82]

In a very unobtrusive way, therefore, the *Gulf Oil* decision represents an ascendancy of federal power at the expense of state authority. This is not to say that the decision seems unwarranted. It might lead to the partial solution of a bad problem steadily growing worse. By resting its decision in the *Gulf Oil* case upon the federal commerce power the Supreme Court has given a cue to Congress for dealing with the broad problem of interstate trade barriers, whether the obstacles be taxes or regulations. The real significance of the decision is that it might lead to reductions in these barriers, whether they have arisen pursuant to the state tax power or the state police power.

[82] See Gulf Oil Corp. v. McGoldrick, 356 App. Div. 207 at 213-214, 9 N. Y. S. (2d) 544 (1939).