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THE OCTROI AND THE AIRPLANE*

A RECONSIDERATION OF SOME OLD PROBLEMS OF LOCAL TAXATION AND OF COMMERCE AMONG THE SEVERAL STATES

ARTHUR E. SUTHERLAND, JR. AND STEPHEN P. VINCIGUERRA†

I.

Contemplation of the folly of one's predecessors gives a warming sense of superiority. No longer, it is gratifying to note, does the State of New York impose on "merchandise . . . brought into this state by land or water . . . the duties and imposts herein after mentioned, that is to say, every gallon of molasses, one penny, every gallon of distilled spiritous liquors, four pence . . . every pound of starch or hair powder, four pence . . . every clock twenty shillings, every dozen of scythes, siths, or axes, twelve shillings;"—these and the similar state duties imposed by our ancestors on many other things have gone with the Articles of Confederation.¹ To be sure, the products of other parts of the United States entered New York free of duty in 1787; but the vessels carrying them, even though owned by citizens and coming from Connecticut or New Jersey ports, paid tonnage fees for the privilege of bringing to New York the goods its people needed. And New York was not alone in its tariff policies. "Besides the vain attempts to supply their respective treasuries by imposts, which turned their com-

*Octroi. 17 *NEW INT. ENCYC.* (2d ed. 1916) 363. "The term applied to the toll or tax in kind levied from a very early period in France and other countries of Europe on articles of food which were brought past the barrier or entrance of a city or town. The octroi came eventually to be levied in money, and was abolished in France at the Revolution. In 1799, however, it was reestablished, under the pretext that it was required for purposes of charity, and since then it has been successively changed and modified. The proceeds of the octroi duty which is at present levied at the gates of the French towns are divided so that one-tenth goes to the national treasury and the rest to local expenses. These duties are allowed on drinks, eatables, fuel, fodder, and building materials. A new octroi must be established by statute, and every increase in the rates requires the approval of the higher authorities. The octroi duties are not popular, since they increase considerably the cost of living in towns and cities; but it would be difficult to abolish them, since the towns depend upon them very largely for revenue. Outside of France they are found also in Italy and a few towns of Bavaria and Austria."

†This paper owes a great deal to Mr. William J. Greer, now a sixth term student at Cornell Law School. His efficiency in producing, on demand, data ranging from the constitution of 16th century Poland to documents of the 79th Congress, demonstrates an unexpected similarity in the skills required for naval gunnery and for legal research.

¹N. Y. Laws, Ch. 81, 10th Sess., passed 11 April, 1787. In justice to the early law-makers, note should be made of the exemption of many such desirable imports as "Fustick and all other dye woods, sheeps and cotton wool, whale bone . . . woad, madder, chocineal, rocou, bees wax and eliphants teeth, and all goods and merchandise of any of the United States of America."

merce into the neighboring ports . . . the States having ports for foreign commerce, taxed and irritated the adjoining States, trading thro' them, as N. Y. Pena. Virga. and S-Carolina. Some of the States, as Connecticut, taxed imports as from Mass'tts higher than imports even from G.B. of wch Massts. complained to Virga. and doubtless to other States. . . . In sundry instances of N.Y. N.J. Pa. and Maryd. . . . the navigation laws treated the citizens of other States as aliens."²

Not long ago, every schoolboy learned that the Constitution of 1789 changed all this unhappy state of affairs by entrusting to Congress the power to regulate interstate commerce, and by forbidding the states to tax imports or exports or to levy tonnage dues without Congressional consent.³ However, few human customs actually die out. The comfortable confidence that tariff competition between state and state ended in the eighteenth century has never been well justified. In 1868, the Supreme Court considered a tax laid by the city of Mobile on sales at auction, including sales, in original packages, of goods brought in from other states. To the objection that this was an impost or duty on imports, the Court answered that Article I, Section 10 of the Constitution forbade such levies only on imports from foreign countries.⁴ Mr. Justice Nelson dissented vigorously. A specious equality in the incidence of such a tax, said he, often cloaks what is in practice discrimination against goods from other states. If Alabama can thus tax imported whiskey, see the absurd consequences that logically follow.—

"The State of Pennsylvania supplies New York with the article of coal from her mines which is consumed in that State. The trade is very great, and is increasing every year as the facilities for the conveyance of the article by railroads into the interior of the State are multiplied. According to the judgment of the court in the present case the State of New York may tax these sales if she makes no discrimination. She may, therefore, pass a law imposing a tax on all sales of coal in the State as the State of Alabama has done in respect to sales of whiskey. Such a law may be passed and enforced without imposing any burden upon her own people, as there is no coal of any comparative value in the State but what is brought into it from abroad. So, in turn Pennsylvania can tax the salt and plaster of New York, carried into that state, with like impunity to her people. Massachusetts may tax the grain and flour of the West, carried into the State, by a like law, as she does not raise a suf-

²Madison, *Preface to Debates in the Convention of 1787*, quoted in 3 FARRAND, RECORDS OF THE FEDERAL CONVENTION (rev. ed. 1937) 547.

³U. S. CONST. Art. I, § 10. John Fiske said that this provision ". . . secured absolute free-trade between the states, with the surrender of all control over commerce into the hands of the federal government." THE CRITICAL PERIOD (1896) 268. The words quoted were written about 1885.

⁴Woodruff v. Parham, 8 Wall. 123 (U. S. 1868).

ficient supply for home consumption, and a general tax upon all sales would not harm her people. In like manner she can tax the cotton and rice of the Southern States, and sugar of Louisiana, and those in turn can tax her cotton, woolen manufacture, and shoes carried into those States. The lumber of Wisconsin can be taxed at Chicago, its principal mart, by a general law of Illinois, without any serious prejudice to the interests of the people of that State. The gold dust and gold and silver bars of California carried to New York can be taxed upon a like principle without prejudice to her people."⁵

Reductio ad absurdum is a dangerous sort of reasoning. Instead of showing the absurdity of the principal proposition, it often ends up by demonstrating the acceptability of the supposedly extreme example.⁶ By 1944 the Supreme Court had found that neither the commerce clause nor the prohibition against state import tariffs prevented the City of New York from laying a sales tax on Pennsylvania coal when brought to New York.⁷ It had decided that comptometers imported into California from Illinois were subject to a "use tax," to be collected by the importer from its customers,⁸ and that Washington could lay a use tax on the importer of construction machinery of two per cent of its cost (including the cost of importation), to even up for a sales tax imposed on sales made within the state.⁹ The Court had upheld a tax by Minnesota on the entire value of a fleet of airplanes based in that state, though the fleet operated in seven other states and was taxed in six of them.¹⁰ Insurance,¹¹ fuel in the tank of an omnibus,¹² or airplane,¹³ radio broadcasts,¹⁴ clothing of late metropolitan design and of corresponding appeal to dwellers in far places,¹⁵—all these and many other sorts of goods and services, sold without regard to state boundaries, have been the object of state taxation. Sometimes the object has been revenue, sometimes protection of local enterprise, sometimes both. The Supreme Court,

⁵*Id.* at 146. Mr. Justice Nelson appears to have been thinking of a lack of damage to nonexistent local producers of the imported commodity. Of course, as is always true, the consuming public ultimately pays the bill.

⁶See Note (1946) 31 CORNELL L. Q. 376, 381.

⁷McGoldrick v. Berwind-White Coal Co., 309 U. S. 33, 60 Sup. Ct. 88 (1940).

⁸Felt and Tarrant Co. v. Gallagher, 306 U. S. 62, 59 Sup. Ct. 376 (1939).

⁹Henneford v. Silas Mason Co., 300 U. S. 577, 57 Sup. Ct. 524 (1937).

¹⁰Northwest Airlines v. Minnesota, 322 U. S. 292, 64 Sup. Ct. 950 (1944); see the dissent of Stone, C. J., at 310, 64 Sup. Ct. at 959. These opinions contain a thorough review of the problem presented by state taxes on fleets of railroad cars.

¹¹Prudential Insurance Co. v. Benjamin, —U. S.—, 66 Sup. Ct. 1142 (1946).

¹²McCarrroll v. Dixie Greyhound Lines, 309 U. S. 176, 60 Sup. Ct. 504 (1940).

¹³Edelman v. Boeing, 289 U. S. 249, 53 Sup. Ct. 591 (1933).

¹⁴Fisher's Blend Station v. State Tax Commission, 297 U. S. 650, 56 Sup. Ct. 608 (1936).

¹⁵Best & Co. v. Maxwell, 311 U. S. 454, 61 Sup. Ct. 334 (1940).

voting in varying proportion, has sustained most of these taxes, struck down a few. A lawyer, called on to predict the outcome of a given case, may well hesitate to answer with assurance; and may even excuse his reluctance by complaining at the puzzling inconsistencies in the decisions of the Supreme Court of the United States.

The task of the Supreme Court is not an enviable one, in cases where several states are taxing or in a position to tax migratory chattels. The owner of goods has money desired by the taxgatherer, who is physically able to seize the goods and hold them to ransom; and the Court must say whether or not the collector will be given his way. Fundamentally the decision must be based on the Court's practical reconciliation of competing state and national policies, regardless of whether it talks of a metaphysical "jurisdiction to tax" and the Fourteenth Amendment,¹⁶ or of the commerce clause and undue burdens on trade between the states. As the questions become closer, the grounds of decision become more and more refined and elusive. A Tennessee seller of machinery receives orders from buyers in Arkansas, and ships the required machinery to Arkansas from Tennessee. Arkansas seeks by suit to collect from the Tennessee vendor a tax which the Arkansas courts have called a "sales" tax. In another case a Minnesota seller, by a similar course of business ships goods from Minnesota to a buyer in Iowa, and Iowa sues the seller to collect a tax, which in this case is called a "use tax." Iowa is successful, Arkansas fails.¹⁷ One gathers that Arkansas should have called her impost a "use tax," as only difference in nomenclature indicates the difference in result.

To be sure, taxation by only one state, no matter what its rationale, would still be bearable. The trouble comes with plurality.¹⁸ If the owner of an airplane regularly lands it in eight states, and has to pay money to each, the total payments may well put him out of business; yet to carry goods

¹⁶Holmes' well-known remark in *Union Transit Co. v. Kentucky*, 199 U. S. 194, 211, 26 Sup. Ct. 36, 41 (1905) bears repetition. "It seems to me that the result reached by the Court probably is a desirable one, but I hardly understand how it can be deduced from the Fourteenth Amendment."

¹⁷*McLeon v. Dilworth Co.*, 322 U. S. 327, 64 Sup. Ct. 1023 (1944); *General Trading Co. v. State Tax Commission*, 322 U. S. 335, 64 Sup. Ct. 1028 (1944). One of the most puzzling features of these cases is the fact that the taxing state was in each instance able to get personal jurisdiction, in its own courts, over the non-resident defendant. See Professor Powell's Note (1944) 57 HARV. L. REV. 1086.

¹⁸"Such a tax, at least when not apportioned to the activities carried on within the state—burdens the commerce in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce and would, if sustained, expose it to multiple tax burdens, each measured by the entire amount of its commerce, to which local commerce is not subject." Stone, J., in *Gwin v. Henneford*, 305 U. S. 434, 439, 59 Sup. Ct. 325, 327 (1939).

or perform services through several states without the occurrence of something which can be called a "taxable event" in each, is hard to imagine. The Supreme Court is here trying to cope with an economic problem, not one of rhetoric. How much toll can the states be let to take on transient commerce without stopping it? The senior federal judiciary have become consulting physicians to the fabled goose, and no mere legal reasoning can tell them when the supply of golden eggs is apt to end.

Drawn between the increasing State demands for revenue, and the obvious need for protecting the flow of commerce, the Court has begun to doubt that its means are appropriate to the undertaking. In 1944, Justices Black, Frankfurter and Douglas, dissenting from the Court's opinion in *McCarroll v. Dixie Lines* expressed a strong feeling that this was a field for Congress rather than the courts. "Judicial control of national commerce—unlike legislative regulations—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 Arkansas 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 the many aspects of a complicated problem devise a national policy fair alike to the States and our Union. Diverse and interacting state laws may well have created avoidable hardships. . . . But the remedy, if any is called for, we think is within the ample reach of Congress."¹⁹

¹⁹309 U. S. 176, 188, 60 Sup. Ct. 504, 510 (1944). Mr. Justice Jackson expressed much the same idea in 1944, when, concurring in *Northwest Airlines v. Minnesota*, 322 U. S. 292, 307, 64 Sup. Ct. 950, 958 (1944) he said: "The evils of local taxation of goods or vehicles in transit are not measured by the exaction of one locality alone, but by the aggregation of them. I certainly do not favor exemption of interstate commerce from its 'just share of taxation.' But history shows that fair judgment as to what exactions are just to the passer-by cannot be left to local opinion. . . . In all ages and climes those who are settled in strategic localities have made the moving world pay dearly. This the commerce clause was designed to end in the United States. . . . But the whole problem we deal with is unprecedented. I do not think we can derive from decisional law a satisfactory adjustment of the conflicting needs of the nation for free air commerce and the natural desire of localities to have revenue

This paper is intended as a hasty survey of the possible arrangements which the Congress might make to ensure to the states a reasonable tax revenue from commercial sources, and still to forestall the erection of a customhouse at every city gate.

II.

Congress could simply prohibit all state taxation of interstate trade,²⁰ but that drastic remedy is commendable for its verbal simplicity only. The states can not spare all the revenue. Increasing specialization, in industry and commerce, increases the percentage of our goods that move from state to state before they come to rest in consumers' hands. When a farm and the village or city near it could produce all the farmer and his family needed for a decent life, and when the United States was largely a rural and small-town nation, interstate commerce provided a much smaller proportion of the total objects of possible taxation than it does today.²¹ Now Detroit makes our automobiles, Rochester our cameras, Florida grows oranges for Ohio, and the latest Hollywood film simultaneously delights audiences on a thousand Main Streets.²² Electric power is generated and distributed from great

from the business that goes on about them." The problem of overlapping state taxes on decedents' estates is in many ways similar to that here discussed. It does not, however, present the question of interference with interstate commerce which makes such taxes as that on air traffic so serious.

See also the observations of Black, J., dissenting in *Gwin v. Henneford*, 305 U. S. 434, 455, 59 Sup. Ct. 325, 335 (1939); and of Hughes, C. J., dissenting in *McGoldrick v. Berwind-White Co.*, 309 U. S. 33, 69, 60 Sup. Ct. 388, 403 (1940).

²⁰Mr. Justice Jackson, concurring in the *Northwest Airlines* case, 322 U. S. 292, 303, 64 Sup. Ct. 950, 956 (1944), said, "Congress has not extended its protection and control to the field of taxation, although I take it no one denies that constitutionally it may do so. It may exact a single uniform federal tax on the property or the business to the exclusion of taxation by the states. It may subject the vehicles or other incidents to any type of state and local taxation, or it may declare them tax-free altogether."

²¹An old Staffordshire mug, bedecked with sheaves of wheat and hand tools of husbandry, bears a poem that well describes this happy state of rural autarchy.

"Let the Wealthy and Great
Roll in Splendor and State,
I envy them not I declare it;
I eat my own Lamb,
My Chickens and Ham -
I shear my own Fleece and I wear it.
I have Lawns, I have Bow'rs,
I have Fruits, I have Flow'rs,
The Lark is my morning alarmer.
So jolly Boys now,
Here's God speed the Plough,
Long Life and success to the Farmer."

²²If the captious reader object that many of these things are obvious, let him reflect

central hydraulic projects. Tugboat crews strike and Manhattan, whose sustenance comes from a distance, begins to starve. Taxation might be defined with crude realism as the process of obtaining money, by threats of various sorts of interference, from people who have money to pay for freedom from interference; and it is obvious that there is now proportionately more to be got from taxing trade in various ways than there used to be; and much more of that trade is coming to move in interstate channels.

Not supply routes and business customs alone are changing; the law is changing, bringing within more and more inclusive definitions of interstate commerce much that has long been thought of as purely local. From 1868 to 1944 law students were told with confidence that the business of insurance, even when it was carried on across state lines, was not interstate commerce.²³ In 1944 this doctrine was changed²⁴ and the greater part of a business with assets of thirty-seven billion dollars, collecting annual premiums of over six billions²⁵ moved into the category of commerce between the states. In that same year, twenty-one million out of a total of 38,627,000 gainfully employed workers (other than agricultural) in the United States were engaged in interstate commerce or in the production of goods for such commerce.²⁶ To estimate the percentage of the tax income of all the states which is derived from interstate commerce is a difficult task; but as over fifty-three per cent of the 1943 tax revenues of all the states (not including the revenues of their political subdivisions) came from general sales, use, and gross-receipts taxes, motor fuel sales taxes, and license and privilege taxes;²⁷ and as these are the types of taxation which figure most prominently in the interstate-commerce cases, it is apparent that taxation of interstate commerce is so important a source of state revenues that it can not be eliminated without at least a partial substitute.²⁸ Then too, it is obvious that under

that the significance of the obvious is often unappreciated. Scorn of the obvious is a sin of intellectual vanity. The delight of a numerous public in the editorials of the late Mr. Arthur Brisbane represented a wholesome instinct.

²³Paul v. Virginia, 8 Wall. 168 (U. S. 1868.)

²⁴United States v. South-Eastern Underwriters Ass'n., 322 U. S. 533, 64 Sup. Ct. 1162 (1944).

²⁵*Id.* at 540, 64 Sup. Ct. at 1167.

²⁶Annual Report, Wage and Hour and Public Contracts Division (1944) p. 8; (1944) 59 MONTHLY LABOR REV. 433. See Note (1946) 31 CORNELL L. Q. 376.

²⁷U. S. Dept. of Commerce, Bu. of Census (1945). 66 STATISTICAL ABSTRACT 314. To obtain this percentage there has been deducted from Revenue by States that derived from other than tax sources. The proportion of the remaining revenue supplied by the types of taxation mentioned is then easily calculated.

²⁸This conclusion is supported by the important part played in local financing by such imposts as the New York City sales/compensating use taxes. See Adm'v Code of the City of New York, §§ M 41-15.0, N 41-1.0.

a blanket prohibition of state taxation of trade between the states the difficulty of determining what constitutes such a forbidden tax on interstate commerce would be formidable, and the burden would ultimately rest on the Supreme Court—just as it now does in the case of the comparable determination required by the Fair Labor Standards Act of 1938.²⁹ Administrative simplification could be achieved by a variant,—forbidding the states to make any use of those types of taxes which bear heaviest on interstate commerce—general sales, use and gross-receipts taxes, motor fuel, license and privilege taxes, but the dislocation of state revenues by removing such important sources would still be prohibitive.

III.

Tax-sharing is a familiar device in state financing,³⁰ and theoretically the Federal Government could forbid the states to tax interstate commerce or to levy those types of taxes which most obstruct it, and still, to keep the states in spending-money, could levy an appropriate tax itself, and distribute a proper share of the yield to the states on the basis of population. The difficulties here are practical, not theoretical. Suspicion by the states of a "devouring Federal Government" is by no means dead. The clamor that arose for the return of the federal employment service to the states is too recent to allow anyone seriously to contemplate the entire withdrawal from state control of a large amount of taxation, with consequent diminution in the number of state officials, and corresponding increase in federal influence. Then too, the operation of a shared-tax plan would be unequal as between states. A federal manufacturer's sales tax shared according to population would exceed the existing yields in some sales-tax states, underpay those now produced in others. The people of states now having no sales taxes would feel a new and perhaps unwelcome burden. States where there were many manufacturers would be contributing to less industrial states. The proposal would find many friends; but state politics are still of vast importance in national affairs, and the prospect of adoption of such a plan seems pretty remote.³¹

A modification of the straight federal tax with grants-in-aid, which would eliminate some of the objections mentioned, is a system of voluntary state

²⁹See R. I. Fricke in a Note (1946) 31 CORNELL L. Q. 376.

³⁰See for example N. Y. FINANCE LAW Art. 4A.

³¹A full discussion of one such proposal, with the arguments on both sides, can be found in *A State Shared Federal Sales Tax*, prepared for the Interstate Commission on Conflicting Taxation by Clarence Kerr in 1935, and issued by the American Legislators Assoc., Drexel Avenue and 58th St., Chicago.

supplements to certain federal taxes, imposed at the option of the states, to be collected by the federal government along with its own tax; but returned only to the states of its source.³² In order to achieve freedom of trade from capricious and unequal local exactions however, with this device there would have to go a federal prohibition of undesirable local imposts. Federal help in collecting good taxes is not a substitute for uniform inhibition against collecting bad ones.

IV.

Various forms of multiple agreements between the states have been proposed as means of keeping plural taxation within sustainable limits. All suffer from the fact that there are forty-eight states. Reciprocity and retaliation—by legislative standing offers to do unto others as they do to the proposing state—is a rather clumsy device. It has had some success in the field of inheritance taxation, but like all voluntary cooperative ventures, its permanency is uncertain.³³ Legislation which might be sponsored by the National Conference of Commissioners on Uniform State Laws, in the hope of adoption by most or all states, is another form of the same thing, and in this field leaves the national commerce of the United States, like Poland under the *liberum veto*, at the mercy of a single dissenter who may think to profit by non-cooperation.³⁴ The same can be said of agreements between the states, entered into under the compact clause of the Federal Constitution.³⁵ In theory, reasonable-minded representatives of all the states, or of all those whose commerce is in danger from multiple taxation, should be able to sit down together and work out an agreement of mutual forbearance by which each would get a reasonable share of the available revenue, but under which the total burden would not be more than the traffic could bear. The objection has been raised that an adequately comprehensive interstate compact might “freeze all interstate fiscal relationships once and for all into a rigid mold.”³⁶ This is not necessarily so. The states concerned could conceivably agree, with Congressional assent, to erect some sort of interstate body which would continually adopt the tax policies of the contracting parties to the constantly changing commercial situation. The idea is not unprecedented. Those concerns engaged in the baseball and the moving

³²*Conflicting Taxation*, The American Legislators Association and the Council of State Governments, Drexel Ave. and 58th St., Chicago (1935) p. 24.

³³*State Tax Comm. v. Aldrich*, 316 U. S. 174, 62 Sup. Ct. 1008 (1941) is an interesting example of the operation of an experiment in cooperative legislation in the field of death duties.

³⁴JONES, HISTORY OF POLAND (1795).

³⁵Art. I, § 10, Cl. 3.

³⁶*Conflicting Taxation*, Interstate Comm. on Conf. Taxation (1935) p. 27.

picture businesses have "czars" whose duty it is to keep their subjects from reciprocally cutting off one another's noses to spite their respective faces. But a problem not unknown in international law is equally difficult in the field of multilateral treaties between the states,—what about the dissenter? If a state grows dissatisfied with the working of the plan and refuses to play, the means of compulsion are not entirely clear. Would the Supreme Court decree specific performance? Or would the recalcitrance of one of the high contracting parties raise one of those political and non-justiciable controversies which the court has prudently ruled to be for Congressional decision only?³⁷

There is something strange about the proposal to assemble representatives of the several states to draw up a compact for regulating the flow of commerce between themselves, amid doubts as to how that compact can be enforced. It produces a vaguely uneasy feeling that we have been through all this once before. This is where we came in! Exactly that problem was concerning a group of state delegates in Annapolis in September, 1786,³⁸ and the ultimate result was the adoption at Philadelphia the next year of the commerce clause in the present Constitution.³⁹ Thanks to that organic Statute the states are already represented in the Congress, a standing body with such plenary power over interstate commerce that it can reach far down into matters apparently local and even fix the wages of the night watchmen and elevator operators in an office-building in New York City.⁴⁰ With the commerce power, Congress can control state taxation of trade between the states, and unaided by further compacts can achieve uniformity of regulation throughout the United States, by its own legislation, and provide appropriate means of enforcing it.⁴¹ There seems to be little reason for restricting Congressional activity in this important business to mere ratification or rejection of agreements made between the states.

V.

Whoever takes pen in hand to draft a federal statute allotting to the respective states their fair shares of the taxable body of interstate commerce will find himself in trouble at once. It is possible to think of an allocation formula for a fleet of airplanes.⁴² Probably one could be devised to control

³⁷See *Colegrove v. Green*, —U. S.—, 66 Sup. Ct. 1198 (1946).

³⁸JOHN FISKE, *THE CRITICAL PERIOD OF AMERICAN HISTORY* (1896) 216.

³⁹Art. I, § 8, Cl. 3.

⁴⁰*Borden Co. v. Borella*, 325 U. S. 679, 65 Sup. Ct. 1223 (1945).

⁴¹See Note 20 *supra*.

⁴²See H. R. 3446, introduced by Mr. Bulwinkle in the House on June 12, 1945,

multiple taxation of the insurance business, or of the business of selling comptometers by mail, or of sending New York clothes to North Carolina, or of carrying passengers and freight from Memphis to St. Louis by automobile. The real trouble comes on attempting to draw a formula that will take care of all these, and of scores of others now in existence, and of those to be invented next year and the year after. Surely no one would advocate a separate statute for every type of business, with annual amendments to fit changes of circumstance; but if Congress alone is to make the rules, it must undertake that detailed program. A more workable plan would be for Congress to fix broad standards for the protection of interstate trade against cumulative tax exactions, and to create a commission charged with the detailed rule-making, and the administrative enforcement of the law. To be sure, this suggestion means one more administrative agency added to the others, and means additional outcry against a Federal Government which has already (we may expect again to hear) erected a multitude of new offices and sent hither swarms of officers to harass our people and eat out their substance. The trouble with that criticism is its failure to propose an effective substitute. The United States of America is an extremely large and very complicated organization; and much as one might yearn for a more primitive day when the whole country could be run with the sturdy simplicity of an Adirondack county, one feels creeping doubts whether such a day ever existed in the past, and an unhappy certainty that if it ever did, that day has gone forever. The regulation of the octroi in this age of airplanes is being handled by the Supreme Court, with difficulty and in spasmodic and unrelated instances of litigation only,—as we learn from the justices themselves.⁴³ If federal regulation is necessary, administrative rule-making within a framework of Congressionally declared policy would provide a far more comprehensive and contemporary type of control.

Administrative agencies performing comparable functions have become well-established in the Federal Government. The Tariff Commission is one example. It is charged by statute⁴⁴ with the duty of investigating the comparative costs of production of foreign and domestic goods and of recommending changes in the protective tariff which have the force of law when approved and proclaimed by the President.⁴⁵ Thus there is in existence a

discussed by Mr. Rollin Browne in (1945) 31 CORNELL L. Q. 182, 196, and by Mr. Martin Saxe in the same volume at 228.

⁴³*McCarroll v. Dixie Greyhound Lines*, 309 U. S. 176, 189, 60 Sup. Ct. 504, 510 (1944). Dissent of Black, Frankfurter and Douglas.

⁴⁴46 STAT. 696 *et seq.* (1930), 19 U. S. C. § 1330 *et seq.* (1940).

⁴⁵The changes which may be thus made are limited to a stated percentage of the

commission charged with regulating national import duties to protect American manufacturers from foreign competition: is it so radical an extension to create a commission so to regulate state import duties as to protect interstate trade from confiscation by multiple imposts?

The country has grown so used to another great regulatory commission that no one thinks it in any way extraordinary. The Interstate Commerce Commission exercises a wide control over carriers by rail, highway, pipeline, and water, fixing rates and the quality of service, and regulating competition.⁴⁶ Not only do state statutes have to give way when they purport to regulate interstate carriers in a manner conflicting with federal regulation, but even state regulation of local commerce falls when it discriminates against trade between states.⁴⁷ From time to time complaints are heard of the performance of this or that function by the Commission; but it has been in existence since 1887, through good times and bad, under many administrations, some of one political complexion, some of another; and, if it had been really unpopular it would have been abolished long ago. One can scarcely imagine a ground-swell of popular sentiment for repeal of the Interstate Commerce Act and a return of the railroads to the states!⁴⁸

The taxing power is so essential a part of a state's means of existence that the proposal to limit it will hardly raise a chorus of cheers. To be sure the use of that power is now limited by the decisional rules of the Supreme Court; but people are used to the Supreme Court; and the Fourteenth Amendment with its express limitations on state action is nearly eighty years old. Administrative bodies on the other hand still have a novel sound. There is a vague feeling that they are alien to the American way of life. To discuss a federal commission with power to limit the taxing power of the sovereign states is practically impossible without using the word "control"; and today "control" is a horrid word. There is no virtue that is positive in the proposal. No one would get his pay raised, at least directly, as a result of the creation of an Interstate Tax Commission. Its only merit is negative, in its inhibition of the worse evils of destructive

duty previously fixed by statute. See 46 STAT. 701 (1930), 19 U. S. C. § 1336 (1940). This procedure is constitutional, *J. W. Hampton Jr. & Co. v. United States*, 276 U. S. 394, 48 Sup. Ct. 348 (1928).

⁴⁶49 U. S. C. *passim*.

⁴⁷*Shreveport Rate Case*, 234 U. S. 342, 34 Sup. Ct. 833 (1914); *Minnesota Rate Cases*, 230 U. S. 352, 33 Sup. Ct. 729 (1912); 41 STAT. 484 (1920), 49 U. S. C. § 13 (4) (1940).

⁴⁸There are many Federal administrative bodies which might be given as additional examples,—the Trade Commission, the Securities Exchange Commission, the Federal Communication Commission, and so on.

localism in tax policies; and there is little emotional appeal to the man in the street in the protection of interstate commerce against multiple state exactions. It has no bright promise to warm his enthusiasm. A choice of evils leaves the chooser cold. Unhappily, however, the people of the United States face such a choice now. They must either stand the present disorder in interstate taxation, or do something about it, and whatever they do must in the nature of things, interfere with states' taxing as they please.

In the field of air transportation a movement for federal control, stimulated by a Congressional investigation,⁴⁹ is already well advanced, and a bill has been introduced in the House of Representatives by Representative Bulwinkle of North Carolina with the avowed purpose of evoking study and criticism by all concerned.⁵⁰ The bill has had favorable comment from two former Presidents of the New York State Tax Commission, Mr. Martin Saxe and Mr. Rollin Browne.⁵¹ Its principles seem well adapted to wider application than to the field of aviation alone.

(1). The proposed legislation lays down a general standard for the guidance of the administrative agency concerned, in distributing the tax-corpus of an airline among several states according to an "allocation formula" based on tonnage, revenues, arrivals and departures, and wages and salaries paid to employees. Some such Congressional standard is necessary to make delegated legislative power constitutional.⁵² The Bulwinkle bill (Section 3(G)) allows the administrative agency in charge to vary the Congressional allocation formula in cases where it would produce an inequitable result, and the constitutional viability of so large a grant of discretion is doubtful unless the standard for the exercise

⁴⁹See 58 STAT. 723 (1944), as am'd, 58 STAT. 926 (1944), 49 U. S. C. § 425 n (Supp. 1941-45).

⁵⁰H. R. 3446, 79th Cong., 1st Sess. (1945), introduced by Mr. Bulwinkle of North Carolina. This proposal was the fruit of legislation requiring the Civil Aeronautics Board to consult with appropriate State authorities and report on means of eliminating undue multiple taxation of airlines, and of the work of the Board under this mandate. See 58 STAT. 723 (1944), as am'd, 58 STAT. 926 (1944), 49 U. S. C. § 425n (Supp. 1941-45); H. R. Doc. No. 141, 79th Cong., 1st Sess. (1945). See the discussion of this bill by Mr. Martin Saxe, *Federal Control of the State Taxation of Airlines* (1945) 31 CORNELL L. Q. 228.

⁵¹See Mr. Saxe's article mentioned in note 49. See Mr. Browne's article, *Federal State Tax Coordination* (1945) 31 CORNELL L. Q. 182. Mr. Browne feels that H. R. 3446 "gives too much authority and control over state taxes to a federal agency," but concludes that, "by and large, this legislation is a step in the right direction. It should be enacted. After a short trial period, it should be extended, with appropriate modifications, to all forms of interstate transportation, transmission and communication. Finally, the principle embodied in it should be extended to all forms of interstate commerce." *Id.* at 197.

⁵²*Panama v. Ryan*, 293 U. S. 388, 55 Sup. Ct. 241 (1935).

of the discretion is prescribed by Congress in considerable detail. Here, then, is a practical problem for the draftsman of a statute applying not to airlines alone, but to all forms of interstate commerce. How devise a form of words applicable to matters as diverse as airlines and insurance, buslines and broadcasts, coal-shipments and mail-order sales of gadgets? It is easy to say that the Commission shall so allocate the tax opportunities among the states that no one shall get more than a fair share, and so that the commerce in question is not bled to death; but it is not certain that enough has then been said. The *Hot Oil* and the *Schechter* cases⁵³ can not entirely be written off as relics of a by-gone intransigence. In writing an Interstate Tax Commission Act, someone will have to be ingenious and a little verbose to ensure freedom from the charge of undue delegation of legislative power without legislative guidance.

(2). In leaving entirely to state control the real property and tangible personal property permanently located within a state, the Bulwinkle bill makes a wise concession, which will probably have to be followed in any general legislation. Realistically it makes little difference to a business whether a state, taking from it a thousand dollars in taxes, ascribes the taking to the value of a brick building, or to some ambulatory abstraction like good-will. The cost to the business is the same, either way; and if a state sees part of its tax-revenues from interstate commerce removed by federal legislation, it may, in a sort of fiscal xenophobia, assess the local buildings and chattels of an interstate trading stranger higher than those of the home boys. But there are some court safeguards against the more exaggerated forms of this sort of clannishness,⁵⁴ and at least the taxpayer has the consolation of being subject to taxation by only one state respecting localized property. Probably the best reason for excluding from federal control the realty and fixed tangibles of a concern doing interstate business, is the habit of thought of people generally. They are used to considering such assets as peculiarly the subject of local taxation, and an effort to change that frame of mind would be too difficult to be practicable.

(3). Another wise provision of the Bulwinkle bill is the participation by state representatives in the administration of the statute; and such consultative representation of the states in any general Interstate Tax Commission which Congress might set up would tend to diminish opposition from states which otherwise might resist because strangers were set over

⁵³*Panama v. Ryan*, 293 U. S. 388, 55 Sup. Ct. 241 (1935); *Schechter v. United States*, 295 U. S. 495, 55 Sup. Ct. 837 (1935).

⁵⁴For example, N. Y. CIVIL PRACTICE ACT, Art. 78.

them. The Bulwinkle bill (Section 3(F)) designates the Civil Aeronautics Board as the administrative agency charged with determining and certifying to the air carriers and the Governors of the states concerned the allocations of the taxable assets of the air lines, and with making rules and regulations for the uniform interpretation of the Act by the carriers and by the several states. Section 2(A) declares unlawful any state tax imposed in excess of the allocation made by the Board. The Board thus actually cuts up the tax melon and distributes it among the eager and suspicious states. A power so unusual, whether in air commerce or any other field, will undoubtedly not be granted unless the state tax authorities feel that they are at least consulted about the cutting-up. To provide such an opportunity, the bill sets up an Advisory Committee, to be selected by the Board, from a panel of "State or local tax officials or persons otherwise experienced in or familiar with the problems of taxation, tax administration, or air transportation." The power to allot fractions of the total taxable assets remains in the Board;—as its name indicates, the committee of local officials is advisory only. To this there is however one noteworthy exception. Where the Board departs from the method of allocation prescribed by statute, it must have the concurrence of the Advisory Committee of state experts. The general principle of state consultation is a valid one; and the draftsman of an Interstate Tax Commission Act will do well to provide for calling on the state authorities for advice if he hopes to get his bill accepted in Congress.

(4). The troublesome subject of judicial review is a little less difficult today than it was last year when the Bulwinkle bill was introduced. The adoption of the Administrative Procedure Act⁵⁵ sets up a general guide for review which would probably be accepted by Congress in formulating any new and general legislation regulating state taxes on interstate trade.

VI.

Here then are the outlines of a federal statute which could fill the need pointed out by the McCarroll dissenters.⁵⁶ Such a statute must provide an adequately comprehensive and detailed standard for the guidance of the administrative agency in parceling out the tax opportunities among the states concerned. A federal commission should be created to do the work of allocation; and state taxes which attempt by any means to reach more assets than those allotted should be declared invalid. Realty and chattels

⁵⁵Administrative Procedure Act, Approved June 11, 1946, Public L. 404, 79th Cong., 2d Sess.

⁵⁶See note 19 *supra*.

having a fixed place in a state should be left to state control; and state officials should be consulted about the allotment of the other assets, not for political reasons alone but because the advice they give could be of the greatest value in guiding the federal body. The decision of the federal agency should govern, however, in case of disagreement: that was the reason for writing the commerce clause in the Federal Constitution. And the courts should review the determinations of the administrative agency according to the plan of the Administrative Procedure Act of June 11, 1946.

Neither the drafting of an appropriate statute within constitutional bounds, nor its administration when enacted seems impossible. The delicate question is one of high policy,—whether to take from the states their present freedom to tax commerce between one another, limited only by the occasional rulings of the Supreme Court on constitutional grounds. One thinks of the words of Mr. Justice Holmes, spoken a third of a century ago about a similar problem—

“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.”⁵⁷

When Holmes wrote in 1913, there were no airlines promising breakfast in New York and lunch on the Pacific coast,⁵⁸ and when the commerce clause was written we carried our trade in sloops. But neither then nor now could this nation thrive on tariffs between the states.⁵⁹

⁵⁷HOLMES, COLLECTED LEGAL PAPERS (1920) 296.

⁵⁸See N. Y. Times, Oct. 14, 1946, p. 15.

⁵⁹Baldwin v. Seelig, 294 U. S. 511, 55 Sup. Ct. 497 (1935).