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Trade Barriers

Some Historical and Constitutional Considerations†

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"Instead of one frontier between the United States and the rest of the world—as was clearly the intent of the Constitution—we bid fair soon to have forty-eight new frontiers, one for every State, raised against every other State as well as against all the rest of the world." In these words James Harvey Rogers writing in *Harpers*[1] describes a state of affairs that is visibly a matter of both legal and economic importance. Federal bureaus, State governments and numerous individual agencies presently seek measures that will remove these obstacles to free trade among the States and prevent a further spread of the mischief. The origin of the practice, its historical significance and some of the more outstanding legal ramifications are of more than passing interest to those whose interests extend beyond purely intrastate limits.

The depression years have projected upon the national scene economic problems of major importance. Not least among them have been those arising out of increased budgetary requirements of State governments, to assume responsibility and provide relief for the unemployed and other dependents of the community whose plight makes some form of public assistance necessary. In addition to public treasuries, individual enterprise, no longer able to withstand the blow of repeated financial reverses and the burden of increased taxation, has sought new sources of revenue. The search in both instances appears to have uncovered at least a temporary expedient in a form of local protectionism that has come to be classified, rather generally, as "trade barriers."

The trade barrier is not an unusual device but because of the nature and plurality of its manifestations it does not easily adapt itself to a precise and all inclusive definition. In its most conventional form a trade barrier may be partially defined as a law, regulation or method imposed by one State against products, goods or labor grown, manufactured or originating in another State, the objective of which is to reduce competition thereby giving an advantage to articles or labor of local origin. This definition, while general in nature and patently deficient, covers a majority of the situations that have arisen. Within these rather sweeping terms are intended to fall tariffs, both protective and for revenue, as well as those superficially innocuous measures that have been ingeniously devised to come within the apparent letter of our constitutional law, but whose purposes in reality extend beyond.

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†Courtesy of District of Columbia Bar Association Journal.

*Of the District of Columbia Bar.

[1] "From State Rights to State Autarchy," *Harpers*, November, 1938.

The definition is not intended to include those necessary measures resorted to by the States in the proper protection of their people or in the lawful regulation of their internal affairs.

Although it would prove impractical to specify the many individual laws constituting trade barriers, it may be of interest to isolate a number of those that predominate.

MOTOR VEHICLES

The tendency in recent years to closely regulate the flow of vehicular traffic on the highways, especially in the phase that involves the interstate transportation of merchandise by motor carrier, provides, perhaps, the most severe burden on trade between the States. It is obviously constitutional and within the right of a State to prescribe minimum safety standards that must be maintained by trucks traveling within its political boundaries. It is also considered lawful for a State to exact a reasonable tax from interstate motor carriers for the use of her roads. However, measures designed to restrict the flow of interstate traffic by the imposition of endless and annoying regulations, the principal purpose of which is to discourage the movement of vehicles bearing foreign products, are certainly alien to the spirit of Federal unity. These tactics are, nevertheless, frequently employed.

Laws burdening interstate transportation generally exist in the form of registration requirements, taxation on mileage or gross receipts, and weight restrictions. In many cases common and contract carriers are subjected to the authority of State vehicle or public service commissions where the imposition of administrative regulations offer discouraging obstructions to those whose activity is interstate in scope.

A statute in a single State, when considered alone, will not always reveal the broad effect such laws have on an interstate system. It must be borne in mind that a carrier doing an extensive interstate business will have to comply with the laws of all States through which its trucks must travel and thus the individual laws must be considered in a cumulative aspect. Where the carrier must meet excessive registration fees and mileage taxes in successive States through which its vehicles pass, the hardship imposed is readily apparent.

The following quotation taken from a recent report clearly presents a partial picture of the condition:

> "Seven States grant no reciprocity to commercial vehicles of other States. And, while reciprocity in one form or another is provided for in the laws of the remaining 41 States, only 9 States grant complete reciprocity as to all fees. The 32 States granting partial reciprocity range all the way from almost complete reciprocity to reciprocity on a very limited basis. It should also be noted that the benefits of reciprocity decrease as the distance between the reciprocating States increases. Furthermore, the statutes do not reveal to what extent reciprocity is actually put into practice. It would be necessary to examine the orders of the administrative agencies enforcing the laws, in order to ascertain the real situation.
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> "Taxes on trucks which enter a State, not subject to reciprocity, are often heavy and usually increase sharply with the size of the truck. For a 5-ton

truck, for example, taxes vary from $30 in Illinois to $400 in Alabama and Georgia. As an example of the cost to an interstate trucker it is interesting to note that such trucker traveling from Alabama to South Carolina (ignoring the extra fees if a trailer is involved) would be required to pay $400 in Alabama, $400 in Georgia and $300 in South Carolina on a 5- to 6-ton truck, or a total of $1,100. In some States it is possible for interstate trucks to pay a mileage tax in lieu of registration charges, but these are often higher for interstate than for intrastate vehicles."[2]

Under their authority to maintain safety practically all of the States have passed laws regulating weight, length and width of trucks, as well as the number and position of lights, and similar requirements. In many instances it is quite obvious that the requirements go beyond the bounds of reasonableness and are intended to be a source of harassment to discourage the "foreign" carrier.

The classic illustration, often referred to, involves an Iowa melon grower who set out for St. Louis with a truck load of cantaloupes and being stopped by a highway patrol at Mount Pleasant, Iowa, complied with an order to install "three green lights." Upon reaching his destination, however, he was greatly disturbed to discover that his compliance with the Iowa regulation was in complete discord with the laws of Missouri, where the authorities severely reprimanded him and ordered immediate removal of the lights. Presumably the "three green lights" were necessarily reinstalled before the truck could lawfully return to its point of origin.

There are now virtually forty-eight "highway codes" that present a confusing array to all who conduct an interstate trucking business, while obviously the intrastate carrier, who seldom ventures outside of his State boundaries, need have little, if any, concern for the problems of his "foreign" competitors. Such conditions do not seem to come within the broad purpose of the commerce clause.

PORTS OF ENTRY

Under the guise of a lawful exercise of police power, the port of entry principle has flourished as a convenient expedient for the enforcement of vehicular regulation, and inspection and quarantine laws.

In 1934 the State of Kansas passed a law establishing ports of entry for the purpose of requiring the registration and inspection of all trucks operating for hire. On vehicles operating *for hire* a complete inspection was required. Ton mile taxes were also imposed and collected by the port authorities.

One's immediate reaction to the system as applied to trucking is not entirely unfavorable for it is reasonable to demand of the interstate operator fees for the use of roads maintained at State expense. From a financial point of view, however, records show that it has been a highly profitable venture for the State, and, bearing in mind the ultimate pur-

[2]From "Barriers to Trade Between States," prepared by the Marketing Laws Survey of the Works Progress Administration.

pose of the commerce clause, let us briefly consider what the result has been.

Shortly after the Kansas measure appeared, Nebraska retaliated by establishing ports of entry for the control of petroleum—a product in commerce to which Kansas is a sizeable contributor. Oklahoma also quickly enacted similar measures. In another section of the United States, Maine enacted a law creating ports of entry for the enforcement of its motor vehicle code, and Delaware, observing the imminent hazard, replied with a defensive gesture by setting up a port of entry law to be effective if similar laws were adopted by two or more adjoining States.

Plainly, one may not always ascribe as the primary purpose of all regulations administered under the port of entry a wilful desire to discriminate against outside sources of supply. Nevertheless, many of the tactics employed have a rather serviceable nuisance value that helps to depress interstate shipments and appreciably diminish the out-of-State competition. In some cases the real purposes of the statutes are ill concealed as, for example, where the State imposes a higher annual license tax, or ton mile tax, on vehicles conducting interstate operations.

The constitutionality of some of these measures is doubtful. Others, while clearly offensive, appear able to withstand constitutional attacks with impunity by reason of artful drafting that places them beyond the pale of the Court's power to question. It is quite evident that in all States where the regulations have been supplemented by the port of entry, as a means of enforcement, the free flow of commerce between States has been interfered with in a major degree.

INSPECTION AND QUARANTINE

Under the heading of inspection and quarantine laws, as applied to food products, the open desire of several of the States to favor home grown commodities is somewhat more apparent.

A quarantine law may function in two different ways—first, as a legitimate means of controlling the possible spread of disease and insects and, secondly, as an obstruction that effectively operates to exclude commodities produced outside of a State. When viewing a quarantine measure objectively, it is sometimes difficult to distinguish between the functions. Consequently, and because of the broad authority of a State to protect the welfare of its citizens, the discriminatory feature is difficult to displace. Generally certain facts surrounding the use of inspection and quarantine measures assist in exhibiting their dual capacity for good and evil.

It has been found in States growing citrus fruits that quarantine measures have been adopted by individual States—and properly so—to exclude the citrus products of adjoining States, thereby preventing the spread of plant disease. Investigating this a step further, however, it will also be discovered that the quarantine is continued long after the

danger of plant disease has passed, and that it is alternately enforced or discontinued, depending upon the ability of home growers to adequately supply domestic market demands. Thus the merits of the law become subservient to its less desirable feature of protectionism, and at the same time the whole procedure continues to damage national economic welfare.

Occasionally one of these laws so clearly exposes its motives and at the same time so boldly violates constitutional prohibitions, that it is possible for the Supreme Court to quickly deprive it of validity. When, several years past, the State of Minnesota added to its statutes a requirement that all meat distributed within the State would have to be inspected within 24 hours after slaughter, which clearly prevented the sale of out-of-State meat, the Court held the law a burden on interstate commerce, and accordingly unconstitutional.[3] For the one example cited, however, there are scores of laws that have since arisen and create an equally oppressive burden on commerce, but which are not subject to such sure detection by the Court. The sacredness of State rights of regulation is sometimes a shield worked to damaging extremes.

DAIRY PRODUCTS

A section of the New York Milk Act provided that prices, as fixed by the Act, extended to the whole milk supply, including that part produced outside of New York. The Supreme Court, through the case of *Baldwin v. Seelig*[4] declared this provision unconstitutional as a direct burden on interstate commerce. The decision has been a landmark in the field of dairy products and Mr. Justice Cardozo, sensing the rising trend toward economic isolation on the part of the States, emphasized the desire of the Court to check the practice.

Despite the beneficial effect of this decision the condition has by no means been entirely corrected.

In the matter of dairy products, inspection laws, licensing and registration requirements are again employed to achieve domestic preference. In almost all of the States the inspection of fluid milk and milk products is required. In many States the statute demands inspection at the source of supply. A milk control board, by arbitrarily fixing the limits within which the required inspection will be made, may easily confine the purchase of milk to any desired range. Refusal to send inspectors beyond the established limits is often justified by a plea of lack

[3] *Minnesota v. Barber*, 136 U. S. 313, 34 L. Ed. 455, 10 S. Ct. 862.

[4] *Baldwin v. G. A. F. Seelig*, 294 U. S. 511, 83 L. Ed. 991, 59 S. Ct. 1002: "It is the established doctrine of this Court that a State may not in any form, or under any guise, directly burden the prosecution of interstate business. * * * If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the States to the power of a nation."

of funds. The State of Connecticut prohibits inspections, except in case of emergency or shortage, to extend beyond the natural milk shed.

The State milk control boards, by the issuance of administrative regulations may further the discrimination against the out-of-State dairy farmer. Apropos of this possibility the following quotation is of interest:

> "All milk dealers must be licensed under the milk control laws of most of the States. To secure such a license and to keep it, distributors must conform to numerous rulings and requirements of the State milk control board. In many States a dealer's license may be refused or revoked for action 'demoralizing to price structure.' It is claimed by dealers in certain States that the milk board puts effective pressure upon them to decrease or at least not to increase their out-of-State purchases of fluid milk. Such charges would be difficult to prove, but the powers of the milk boards are often so broad and include such wide areas of administrative discretion that there is a clear possibility that their authority might be so used. To the extent that State boards do use their powers in this way, appreciable hindrance to interstate trade may result."[5]

It is not possible to discuss the many manifestations of trade barrier legislation in the present article. Use and compensation taxes, preferences for home labor and enterprise, and similar measures are also contributors to the new dilemma. The foregoing examples, it is hoped, will serve to illustrate the practice, at least partially, and a brief reference to some of the constitutional aspects may be of interest.

HISTORICAL SIGNIFICANCE OF THE COMMERCE CLAUSE

The commerce clause, obviously a measure premised on prophetic apprehension, was included in the Constitution to prevent an injudicious use of local favoritism by the States in their enthusiasm to advance domestic interests. The present tendency to guard too jealously the welfare of local endeavor to the exclusion and injury of national interests bears not even the distinction of originality.

The calling of the Constitutional Convention in 1786 was in part due to a similar economic rivalry that had its inception during the colonial period. The Articles of Confederation had failed to stem the growing drift toward interstate tariffs and this, coupled with an instinctive hate for any form of centralized authority, found the Federal Government but a mere figurehead lacking the power to enforce measures that would restore free trade among the States.

As early as 1785 George Washington had observed in a letter to James Warren of Massachusetts that "the confederation appears to me to be little more than a shadow without a substance, and Congress a nugatory body, their ordinances being little attended to."[6] The Articles of Confederation, in failing to provide the Federal Government with

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[5] "Barriers to Internal Trade in Farm Products," a special report to the Secretary of Agriculture, prepared by the Bureau of Agricultural Economics, U. S. Department of Agriculture. This publication treats the problem, as it exists in relation to farm products, most comprehensively.

[6] From Sparks' Edition of *Washington's Writings*, Vol. 9, p. 139.

adequate control over commerce, had supplied a powerful argument to the determined group then shaping the destiny of our Nation. It was insisted that the sole remedy rested in the calling of a constitutional convention. Economic conditions at the time left little question as to the logic and timeliness of this asseveration.

Among the occupations pursued by the people, agriculture then predominated and commercial channels were occupied principally by a flow of farm commodities. A number of the less powerful States, gripped by a fear that an equality in commercial intercourse would inevitably lead to their domination by the stronger surrounding States, immediately sought a balance. In the fallacious belief that protective tariffs offered a solution, several of the States enacted laws excluding agricultural and industrial commodities produced in adjoining States. Retaliation by the States affected quite naturally led to the prevalence of similar measures. Before long these legal barriers had functioned so effectively and had so undermined commercial activity that the economic structure of the Nation wavered threateningly on the verge of collapse.[7]

Alarm mounted. With the aid of James Madison a constitutional convention was arranged to meet at Annapolis in 1786. The fruit of the Annapolis assembly was a report recommending that a second convention be held at Philadelphia on May 14, 1787.

In the course of the extensive debates that developed our charter of government at the later convention, frequent were the declarations insisting that Federal control in matters of commerce was a thing of vital necessity. The evolution of the commerce clause is a permanent tribute to the accuracy of that view. By conferring upon Congress authority to regulate national commerce it was assumed that the States would be permanently restrained in any future attempt to imprudently raise barriers, and that the offensive spectre of State jealousies would consequently be forever banished.

THE POWER OF CONGRESS

During nearly half a century following the adoption of the Constitution, but little congressional action was required in so far as the necessity to regulate commerce was concerned.[8] It was also discovered that for many years the mere presence of the commerce clause within the Constitution exercised an influence alone sufficient to restrain the States from enacting laws manifesting discriminatory characteristics.

The interpretation of the power thus entrusted to Congress was in later times a troublesome duty for the Courts in many instances. Its application to particular situations of fact under varying conditions has

[7] *The Framing of the Constitution*, by Max Farrand (1913), p. 7.

[8] Outside of certain acts passed in 1790 and 1793, whereby Congress undertook to supervise particular phases of commerce by water, the power lay in a dormant state until the passage of the Interstate Commerce Act in 1887.

given the commerce clause a somewhat faceted profile. In the sense of application, it will, apparently, forever retain certain unpredictable qualities.

Chief Justice Marshall, through the famed case of *Gibbons v. Ogden*,[9] in addition to pointing out that the authority of Congress is complete and plenary, laid down the rule that in respect of commerce by water, the Federal power is as well exclusive.

Unfortunately, the evolution of the Federal power as it pertains to inland commerce had not been similarly simple and distinct. The cases reveal that subsequent to *Gibbons v. Ogden* the Supreme Court found it difficult to adopt a consistent view respecting the exclusiveness of the Federal power to regulate commerce by land.[10] There had been no definite determination as to whether the mere grant of authority to the Federal Government had by its own force operated to completely divest the States of all power in the premises or on the other hand, whether the States retained control where Congress had failed to occupy the field. It remained for the case of *Cooley v. The Port Wardens*,[11] decided in 1852, to settle the question by establishing the doctrine that prevails today.

Briefly, the rule may be said to exist as follows: The power of Congress to regulate foreign and interstate commerce is both absolute and exclusive: the States retain the right to exercise exclusive control over commerce carried on within their territorial boundaries unless such purely intrastate commerce is so related to, and so affects and burdens interstate commerce as to require Federal regulation in the protection of the latter.[12] Finally, the third field embraces that aura wherein the States may legislate on matters of local concern—even though the regulations imposed may affect interstate commerce—until such time as Congress may deem it necessary to act. The right of the States in the last mentioned classification is premised on the passiveness of Congress which is considered a tacit declaration that for the time being, and until

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[9]Wheaton 1, 6 L. Ed. 23.

[10]*Brown v. Maryland*, 12 Wheaton 419, 6 L. Ed. 678; *Wilson v. Blackbird Creek Co.*, 2 Pet. 245, 7 L. Ed. 412; *New York v. Miln*, 11 Pet. 102, 9 L. Ed. 648; *License Cases*, 5 How. 504, 2 L. Ed. 256; *Passenger Cases*, 7 How. 283, 12 L. Ed. 702.

[11]12 How. 299, 13 L. Ed. 996.

[12]"The authority of Congress extends to every part of interstate commerce and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter." *Simpson v. Shepard*, 230 U. S. 352, 57 L. Ed. 1511, 335 S. Ct. 729.

Congress decides to act, matters of local concern may be regulated by State authority.[13]

LEGAL JUSTIFICATION

Latitude given the States in the policing of interstate transactions having a local significance sufficient to warrant the imposition of local regulations supplies the source of many impediments.

Laws violating the objectives of constitutional restraint under the commerce clause are generally brought into being and justified under four powers which the Constitution clearly reserves to the States. These are, namely, (1) the power of taxation, (2) the general police power which the States may invoke in the preservation of health, (3) the States' general power to impose regulations in the maintenance of public safety and morals, and (4) certain proprietary powers reserving to the States the right to conserve natural resources, and the ownership of public works and property.

State legislatures, it is true, are confined to certain rather well defined limits when enacting laws deriving validity from one of the powers enumerated. The Supreme Court has also from time to time prescribed the extent a State may go in the use of these powers without usurping the Federal function. Despite constitutional limitations and the zeal of the Court in enforcing their observance, the complexities of present day civilization have ushered in countless questionable laws and regulations supposedly framed for protective and preventative purposes. The spread of pests and disease, safety on the highways, the prevention of fraudulent business practices, the influx of poverty-stricken migrants destined ultimately to swell the list of public dependents, merchandising schemes employing monopolistic methods, and a myriad of similar modern problems form the bases for stricter local supervision.

In many instances, perhaps, the laws thus instituted in some measure serve to curb minor perils and detriments better consigned to oblivion; but any incidental benefit accruing is far surpassed by the effect in the majority of cases where the intention, undeniably, is to

[13]It should be borne in mind that there is, however, a distinction in character between the subjects on which Congress may fail to legislate. On the one hand, in matters of local concern, inaction is deemed to be permissive of State legislation, while on the other, where the subject is strictly interstate in nature, the failure of Congress to interpose its authority is deemed declaratory of the fact that there shall be no form of State interference. The principles are clearly enunciated in *Bowman v. Railroad Co.*, 125 U. S. 507, 8 S. Ct. 689, 31 L. Ed. 700: "Where the subject upon which Congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, the improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port * * * and the like, which can properly be regulated only by special provisions adapted to their localities, the State can act until Congress interferes and supersedes its authority; but where the subject is national in its charcater, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free."

exclude the products of other States which, in turn, results in damage to the Nation in its collective aspect.

In view of the problem presented it may be of some interest if by way of conclusion brief reference is made to possible solutions.

First, all of the obstructions to commerce are undoubtedly violative of the broad spirit of the Constitution if not in direct conflict with constitutional prohibitions. In many cases the laws clearly contravene the restrictions imposed by the commerce clause, and are accordingly unconstitutional. In the latter situation, however, a lack of sufficient interest on the part of those affected oftentimes delays the raising of a question of constitutionality with the result that the abuse is permitted to continue until such time as an aggrieved party is willing to cause the machinery of the courts to function.

Another group of barriers embraces laws which, while an indirect burden on interstate commerce, cannot be attacked on grounds of unconstitutionality because Congress has not occupied the field involved. Laws of this nature create a difficult problem as the promulgation of specific statutes by Congress, to divest the States of local regulatory authority over this phase of interstate commerce, presents obvious ramifications.

It has been suggested that the creation of a bureau or agency vested with authority to investigate, make recommendations to Congress, and possibly initiate action in respect of the offending laws, would supply at least a partial solution. Even this method of approach would seem ineffectual against the camouflaged measures previously mentioned.

Perhaps the shortest and most facile method of disposing of the menace is to be found in the plan of attack adopted by the Council of State Governments. This body, composed of State executives, has pursued a nation-wide campaign to obtain the co-operation of all the States in abandoning this type of legislation. Recent reports indicate that great progress has been made. The 1939 sessions of many of the State legislatures reveal that the lawmakers have, courageously, either refused to approve measures exhibiting discriminatory characteristics, or have repealed similar laws already in operation. Through the medium of public education and the continued co-operation of the States, it seems safe to predict that the condition may be substantilaly corrected within a reasonable time.

In any event, from both the standpoints of law and economic regularity it is apparent that the situation is one of more than minor importance. It is submitted that the full support of the Bar is again essential and that it will, as in past constructive endeavors, have a forceful bearing on the establishment of a permanent and sound commercial policy among the States.

(NOTE) Since the above was prepared we believe that a decision of the Supreme Court of the State of Arkansas has declared unconstitutional a law taxing gasoline in out of state automobiles in excess of 20 gallons.