# The Supreme Court and Interstate Barriers

By Robert H. Jackson

> The oppressed and degraded state of commerce, previous to the adoption of the constitution, can scarcely be forgotten. . . . Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving control over this important subject to a single government. It may be doubted, whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction, that commerce ought to be regulated by congress.[1]

THE history of the times which immediately preceded the Constitutional Convention abundantly justifies the opinion thus expressed by Chief Justice Marshall. The Revolutionary War was followed by an economic breakdown and an accompanying commercial war between the states. Beginning in 1784 protective tariffs were erected by New England and most of the Middle states. Connecticut levied discriminatory duties on goods from Massachusetts, and Pennsylvania discriminated against Delaware. Tribute was exacted from the coasting trade, notably by New York, through the imposition of clearance fees. Even market boats from New Jersey, carrying butter and cheese and garden vegetables, were subject to entrance fees when rowed across from Paulus Hook to Cortlandt Street. Madison drew a classic picture of "New Jersey, placed between Philadelphia and New York, . . . likened to a cask tapped at both ends; and North Carolina, between Virginia and South Carolina, to a patient bleeding at both arms." Discrimination was followed by retaliation, and the meetings and resolves of embittered merchants bore an ominous resemblance to those which in 1775 had prepared the way for revolution.[2]

On the anvil of this experience the Constitutional Convention of 1787 hammered out one of the great implements of federal power.[3] Article I, Section 8, paragraph 3 of the Constitution provides: "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

## Difficulty in Application

These concise words have been a source of almost continuous litigation and vexation for the Supreme Court. The clause has been the focus of many of the most important conflicts between federal power and states' rights. It forms the warp into which theoreticians have woven strange designs of laissez faire and patterns to separate acts of commerce from antecedents such as production or mining and from subsequent acts such as distribution. Its application has always been difficult and its breadth not always consistently understood. Marshall described it as a "sovereign" power, "complete in itself." This majestic concept was narrowed until in 1918 in the Child Labor case [4] the majority found it a puny power indeed. Now we are returning to its authentic

[1] Brown v. Maryland, 12 Wheat. 419, 445–446.

[2] See Fiske, *The Critical Period in American History*, Chap. IV; Story, *On the Constitution*, Secs. 259–61.

[3] See *The Federalist*, No. XLII; 5 Elliot, *Debates*, Introduction by Madison, pp. 109–22.

[4] Hammer v. Dagenhart, 247 U. S. 251.

rigor and simplicity. The Supreme Court again holds that Congress may regulate commerce among the several states.[5]

No more difficult problem has arisen under the commerce clause than its application to break down barriers to interstate trade erected by a state to obtain some provincial advantage. Some of these barriers are obvious and easy to strike down. Others are disguised in inspection laws which actually serve or at least simulate a public good. Others are subtle discriminations in administration which usually elude the judicial power. But the decisions of the Supreme Court show how frequently commerce has invoked the clause to save it from local pride, jealousy, or selfishness.

### CHIEF JUSTICE MARSHALL'S OPINION

The problem was first presented to the Supreme Court in *Gibbons* v. *Ogden*, in 1824.[6] Chief Justice Marshall, speaking for the Court, held invalid a New York statute granting to Livingston and Fulton the exclusive privilege of navigating the waters of the state by steamboat, and refused to enjoin Gibbons from navigating between New York and New Jersey. Gibbons had invoked the protection of both the commerce clause and a coasting license under an Act of Congress of 1793. Marshall's opinion is far from lucid, but part of his discussion emerges as the broad doctrine that power over interstate commerce is confided "exclusively" to Congress. This interpretation ignores the reliance of counsel and Court on a conflict between state and Federal laws covering the same subject, but it has, with modifications, become central to our whole constitutional scheme: the commerce clause, by its own force, without national legislation, puts limits upon the power of the states which the Supreme Court may delineate.

A few years later, in 1827, *Brown* v. *Maryland*[7] provided the occasion for a practical application of the intimations in *Gibbons* v. *Ogden*. A Maryland statute had levied a discriminatory tax on an importer selling articles of foreign origin in their original packages. The opinion of Marshall ignores the feature of discrimination and discusses the case as though the Maryland tax were on the selling of goods of whatever origin. With considerable ingenuity, Marshall found a license in the Federal Tariff Act giving an importer the right to sell "in the original package." He then dispensed with the relevance of the argument by declaring that the majority "suppose the principles laid down in this case, to apply equally to importations from a sister state." The "principles" were limitations which Marshall derived from the existence of the commerce clause, upon the power of the states to impose general taxes upon dealings with goods yet in the original packages in which they arrived from other states. This particular application was formally rejected in *Woodruff* v. *Parham*, in 1869,[8] sustaining a nondiscriminatory tax on goods in the original package,[9] but the doctrine survived to restrict state regulation.[10] Considerable time elapsed before discrimination against interstate and foreign commerce, as to which Marshall remained ambiguously silent, was decisively prohibited in *Welton* v. *Missouri*, in 1876.[11]

### CHIEF JUSTICE TANEY'S OPINION

The opinion of Taney in The License

[5] Currin v. Wallace, 306 U. S. 1; Mulford v. Smith, 307 U. S. 38.

[6] Gibbons v. Ogden, 9 Wheat. 1.

[7] See *supra* note 1.

[8] Woodruff v. Parham, 8 Wall. 123.

[9] See Brown v. Houston, 114 U. S. 622; Sonneborn Bros. v. Keeling, 262 U. S. 506.

[10] Leisy v. Hardin, 135 U. S. 100; cf. Baldwin v. Seelig, 294 U. S. 511, 526–528.

[11] Welton v. Missouri, 91 U. S. 275.

Cases[12] illustrates an approach quite different from that of Marshall. It appeared to Taney to be

> very clear that the mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the States. The controlling and supreme power over commerce with foreign nations and the several States is undoubtedly conferred upon Congress. Yet, in my judgment, the State may nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbours, and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress.

Even the protection afforded by the original-package doctrine, Taney insisted, is derived from an act of Congress and does not emanate from the commerce clause.[13]

The reasons which induced Taney to refuse to place limitations upon the power of the states because of assumed conflict with the "dormant" commerce clause also led him to restrict the interpretation of Federal laws when used to show a conflict with state enactments. The considerations are brought into focus in the suit by Pennsylvania to enjoin as an obstruction to navigation the maintenance of a bridge across the Ohio River authorized by Virginia. The suit was part of a struggle between steamboat and railroad interests for dominance in transportation. The variety of interests at stake led Taney to urge against the assumption of jurisdiction that Congress "has better means of obtaining information than the narrow scope of judicial proceedings can afford."[14]

[12] The License Cases, 5 How. 504, 572.

[13] 5 How. at 574, 577. But see Leisy v. Hardin, *supra* note 10.

[14] Pennsylvania v. Wheeling Bridge Co., 13 How. 518, 592 (1852) (dissenting opinion). See Illinois Central R. Co. v. Public Utilities Comm'n, 245 U. S. 493, 510.

## PRESENT STATUS

Neither Marshall nor Taney was to have his approach fully established. Various attempts at social legislation during the period under consideration[15] at length led to a reformulation of theory in *Cooley* v. *Board of Wardens,* in 1851.[16] The doctrine now classic is that over subjects of commerce which are "in their nature national, or admit of only one uniform system, or plan of regulation," Congress alone may legislate, while over subjects concerning which there exists "no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation," the state may legislate until supplanted by Congress. Thus emerges a basis for supporting state regulations of interstate commerce. The local benefits to be secured are balanced by the Supreme Court against the inconvenience to interstate commerce. Regulations of local matters may be invalid if unduly burdensome to interstate commerce,[17] while a stream of commerce national in character may be subjected to local regulation if the effect is "indirect."[18]

A variety of state regulations intimately affecting interstate carriers themselves has been upheld in the absence of conflicting Congressional legislation. The state may construct dams and bridges over navigable streams,[19] require

[15] The License Cases, *supra* note 12; The Passenger Cases, 7 How. 283.

[16] Cooley v. Board of Wardens, 12 How. 299.

[17] E.g., Brimmer v. Rebman, 138 U. S. 78 (inspection law).

[18] E.g., Munn v. Illinois, 94 U. S. 113 (grain elevator regulation).

[19] Wilson v. Black-Bird Creek Marsh Co., 2 Pet. 245; Gilman v. Philadelphia, 3 Wall. 713; Lake Shore & M. S. R. Co. v. Ohio, 165 U. S. 365.

fees for policing and regulating the harbor,[20] insure the seaworthiness of tugs,[21] and control the location of docks and impose wharfage and other charges for special services.[22] The safety of its citizens may be thought to require special controls on motor carriers. Accordingly, it may restrict operation to uncongested highways,[23] limit the hours of continuous service of drivers,[24] and regulate the size and weight of the equipment on its highways.[25] Local safety may be the basis for imposing burdens even on interstate railroads.[26] The importance of *The Granger Cases*[27] in the development of the due process clause should not obscure the material effect such permitted regulation has had upon interstate commerce in grain.

### THE ORIGINAL-PACKAGE DOCTRINE

The state may also enforce policies directed not at the carriers but at articles of commerce which it considers socially injurious. Subject to conflicting legislation of Congress, the state may regulate the importation of unhealthy swine or cattle,[28] and may protect its citizens against noxious articles or foods[29] and against fraudulent and deceptive substitutions of one article for another.[30] The enforcement of these state policies, however, encounters the original-package doctrine. Rejected as a limitation on the taxing power, the doctrine forms the basis for curtailing state regulation of articles transported from another state as long as they remain in the original packages.

Adequate control of the social problems arising from the use of intoxicating liquors was materially hindered by the application given this doctrine in *Leisy* v. *Hardin*. Potentially it offered broad means of evasion of state restrictions through shipment of proscribed articles from extrastate sellers direct to the consumer.[31] But the doctrine was confined to "legitimate" articles of commerce; thus noxious articles and articles unfit for consumption or misbranded were not within its scope. Liquor remained a legitimate subject of commercial intercourse, however, and some other expedient had to be found. The restrictions imposed by the Court on local control were effectively overcome by Congressional action complementing the state laws. The Webb-Kenyon Act of 1913, sustained in *Clark Distilling Co.* v. *Western Maryland Ry.*,[32] prohibited the transportation of intoxicating liquors into any state when it was intended they should be received or used in violation of its laws. The same device for effectuating state policies was recently applied to convict-made goods.[33] It has also been used with reference to explosives, diseased plants, and game killed in violation of state law.[34]

[20] Cooley v. Board of Wardens, *supra* note 16; Clyde Mallory Lines v. Alabama, 296 U. S. 261.

[21] Kelly v. Washington, 302 U. S. 1.

[22] Packet Co. v. Keokuk, 95 U. S. 80; Cummings v. Chicago, 188 U. S. 410; Ingels v. Morf, 300 U. S. 290.

[23] Bradley v. Public Utilities Comm'n, 289 U. S. 92; cf. Buck v. Kuykendall, 267 U. S. 37.

[24] Welch v. New Hampshire, 306 U. S. 79.

[25] South Carolina Highway Department v. Barnwell Bros., 303 U. S. 177.

[26] St. Louis & Iron Mountain Ry. Co. v. Arkansas, 240 U. S. 518; cf. Seaboard Air Line Ry. v. Blackwell, 244 U. S. 310.

[27] Munn v. Illinois, *supra* note 18; also 94 U. S. 155, 164, 179, 180, 181.

[28] Mentz v. Baldwin, 289 U. S. 346.

[29] Crossman v. Lurman, 192 U. S. 189; Price v. Illinois, 238 U. S. 446; Bourjois Inc. v. Chapman, 301 U. S. 183.

[30] Plumley v. Massachusetts, 155 U. S. 461; Hygrade Provision Co. v. Sherman, 266 U. S. 497.

[31] Cf. Austin v. Tennessee, 179 U. S. 343.

[32] Clark Distilling Co. v. Western Maryland Ry., 242 U. S. 311.

[33] Kentucky Whip & Collar Co. v. Illinois Central Ry. Co., 299 U. S. 335.

[34] Cf. 1 Stat. 474; 14 Stat. 81; 35 Stat. 1137; 45 Stat. 69, 1084.

### CURTAILMENT OF STATE REGULATION

The formula expressed in *Cooley* v. *Board of Wardens* also operates to curtail vast fields of state regulation. Thus the commerce clause itself sets limitations on state control of interstate rail carriers so as to prevent local service requirements from unduly burdening the efficiency and convenience of interstate traffic.[35] Matters once thought to be within state competence have been withdrawn: in 1886 the power of a state to forbid discriminatory interstate rates was denied[36]—a decision which gave material impetus to the passage of the Interstate Commerce Act of 1887. Any form of discrimination against interstate commerce and any attempt to gain a local advantage by throwing the attendant burdens of legislation on those without the state are likewise declared to be prohibited by thte commerce clause.[37] It may be observed, however, that this formula is much more difficult of application than of statement. The complicated growth of commerce-clause limitations on the taxing power of the states is a complete story in itself.[38] A brief review of only a few decisions raises considerable doubt as to the feasibility of leveling the barriers to interstate trade by the tedious process of case-by-case adjudication.

Statutes which in terms discriminate against interstate commerce are easily weeded out. Thus in *Cook* v. *Pennsylvania*[39] the Court invalidated a tax on the sale at auction of imported goods which exempted similar sales of domestic goods. Similarly, an ordinance imposing a wharfage fee on vessels landing products other than of domestic origin was stricken in *Guy* v. *Baltimore*.[40] Discriminations in favor of local wines and beers and other local products were of early origin and met with a like disposition.[41]

### INSPECTION LAWS

Not all attempts at gaining a local advantage are so obvious. Many are clothed in the plausible garb of inspection laws. In *Minnesota* v. *Barber*[42] the Court invalidated a statute forbidding the sale of fresh meat unless it was inspected in the state within twenty-four hours prior to slaughter. The argument that proper inspection can be made only prior to slaughter was met with considerable skepticism, together with the suggestion that outside inspection could be relied upon. A similar attitude was expressed in *Brimmer* v. *Rebman*,[43] invalidating a statute requiring the inspection of all meat slaughtered over one hundred miles from the place of sale. The law did not discriminate against meat because of its extrastate origin, but merely differentiated between meat slaughtered close to market and that slaughtered at a distance. Nevertheless, the Court held that its necessary tendency was to stop interstate commerce in meat, and accordingly it went beyond the limits of inspection. Only last term, the Court condemned a Florida statute which, in the guise of an inspection law, imposed an onerous and discriminatory exaction on imported cement. Mr. Justice Frankfurter, speaking for the Court

[35] E.g., Herndon v. Chicago, R. I. & P. R. Co., 218 U. S. 135; Chicago B. & Q. R. Co. v. Railroad Commission, 237 U. S. 220.

[36] Wabash St. L. & Pac. Ry. v. Illinois, 118 U. S. 557.

[37] E.g., Steamship Co. v. Port Wardens, 6 Wall. 31; Robbins v. Shelby County, 120 U. S. 489; Baldwin v. Seelig, 294 U. S. 511.

[38] Powell, "Indirect Encroachment on Federal Authority" (1919), 31 Harv. L. Rev. 572, 721, 932; 32 *Ibid.*, 234, 374, 634, 902.

[39] Cook v. Pennsylvania, 97 U. S. 566.

[40] Guy v. Baltimore, 100 U. S. 434.

[41] Welton v. Missouri, 91 U. S. 275; Ward v. Maryland, 12 Wall. 418; Guy v. Baltimore, 100 U. S. 434; Tiernan v. Rinker, 102 U. S. 123; Walling v. Michigan, 116 U. S. 446; Voight v. Wright, 141 U. S. 62.

[42] Minnesota v. Barber, 136 U. S. 313.

[43] See *supra* note 17.

for the first time, referred to Marshall's great decision in *Brown* v. *Maryland* and declared that "such assumption of national powers by a state has, ever since March 12, 1827 . . . been found to be in collision with the Constitution." [44]

Other attempts to protect a particular industry have met with more success. A statute forbidding the sale of oleomargarine colored to resemble butter was upheld as applied to sales in the original package, on the ground that it prevented deception.[45] Recently an excise tax of fifteen cents per pound on all butter substitutes sold within the state of Washington was found to be proper.[46] The limits appear to be delineated by two decisions striking down one statute forbidding the sale of oleomargarine sold in the original package and another prohibiting sales of oleomargarine when not colored pink.[47]

State regulation of interstate motor traffic and the requirement of reasonable fees for special services and the cost of inspection serves an important need in the absence of Federal legislation. Yet the tests of validity often appear merely formal. A fee declared invalid because found to be excessive in one case may be upheld in another after the statute has been rephrased and the accounting method changed.[48] A Tennessee tax on the privilege of using the highways was declared invalid because the measure employed bore no sufficient relation to the extent or manner of use,[49] while a South Carolina regulation of size and weights, which seriously impeded motor truck transportation through the state, was upheld as a reasonable exercise of legislative discretion.[50] Relief from the "border wars" and ports-of-entry restrictions reported in current literature [51] appears to be dependent on the promulgation of uniform regulations under the Motor Vehicle Act of 1935.[52]

The use of inspection laws and of quarantines to protect local industries from injury through the introduction of diseased plants or animals has long been recognized as valid and necessary.[53] A discriminatory statute, such as one forbidding the importation of cattle during a long season of the year, is repugnant to the commerce clause.[54] Yet the Secretary of Agriculture reports current use of inspection laws and quarantines as a means of achieving market restriction.[55]

### PRESUMPTIVE VALIDITY

The statement of the cases in many instances demonstrates the presumptive validity of state legislation. There are pressing social and economic needs that call for relief through local regulation. The menace consists in its perversion. The purpose to discriminate may not appear on the face of the most burdensome measure. It often appears only in its administration and application, and this is usually not susceptible of proof. The question before the Court in most instances is not whether state

[44] Hale v. Bimco Trading Co., 306 U. S. 375, 380.

[45] Plumley v. Massachusetts, 155 U. S. 461. See Capitol City Dairy Co. v. Ohio, 183 U. S. 238.

[46] Magnano Co. v. Hamilton, 292 U. S. 40.

[47] Schollenberger v. Pennsylvania, 171 U. S. 1; Collins v. New Hampshire, 171 U. S. 30.

[48] Compare Ingels v. Morf, 300 U. S. 290, with Clark v. Paul Gray, Inc., 306 U. S. 583. See Dixie Ohio Co. v. Comm'n, 306 U. S. 72.

[49] Interstate Transit Co. v. Lindsey, 283 U. S. 183, 190.

[50] South Carolina Highway Department v. Barnwell Bros., *supra* note 25.

[51] See Report to the Secretary of Agriculture, *Barriers to Internal Trade in Farm Products* (1939), pp. 38–54.

[52] See Welch v. New Hampshire, 306 U. S. 79.

[53] See inspection laws listed in Gibbons v. Ogden, 9 Wheat. 1, 119–123, and in Turner v. Maryland, 107 U. S. 38, 51–54. Also 1 Stat. 474.

[54] Railroad Co. v. Husen, 95 U. S. 465.

[55] Report, *supra* note 51, pp. 68–97.

regulation is preferable to Federal regulation, but whether state control is better than no control at all. Unable to solve the problems in any practicable manner, the Supreme Court must be slow to condemn laws which do not clearly discriminate against interstate commerce. As the Court recently observed: "Its function is only to determine whether it is possible to say that the legislative decision is without rational basis." [56]

The difficulties implicit in attempts to invalidate state legislation on grounds other than discrimination are recorded in the decisions. The original-package doctrine as a limitation on nondiscriminatory regulation of intoxicating liquors was overcome by Congressional enactment.[57] The confusion in the tax field is illustrated by two recent decisions of the New York Court of Appeals. In *Sears, Roebuck & Co.* v. *McGoldrick*,[58] the Court sustained a tax upon sales of bulky merchandise contracted for in New York. The goods, so the parties understood, were to be delivered direct to the buyer from factories and warehouses located in other states. On the same day the Court held invalid a tax upon quantities of oil for steamships contracted for in New York and to be delivered in New York by barge from tanks located in New Jersey.[59] The first case was distinguished on the ground that the delivery from extrastate warehouses was a matter of indifference to the buyer, while the oil in New Jersey was specifically contracted for.

These confusions arise from attempts to apply some of the nice distinctions that have grown about the doctrine that a tax "on" interstate commerce is invalid.[60] A nondiscriminatory tax by the state of destination on a sale negotiated *prior* to interstate transportation is a tax on an "interstate sale" and hence invalid; [61] but a nondiscriminatory tax by the state of destination on a sale negotiated *subsequent* to interstate transportation is not repugnant to the commerce clause.[62] The doctrine is further refined by distinguishing between vendors and agents of extrastate sellers.[63] Finally, the equivalent of a tax on an interstate sale may be imposed by means of a tax on the "use" within the state.[64] The latest decisions of the Court have shown a tendency to explain earlier decisions in terms of the risk of multiple taxation.[65] Even here, dissenting opinions suggest that actual multiple taxation may be a more practical test of discrimination than the mere possibility of it.[66]

Entirely apart from the inability of the Court to eliminate barriers to trade through adjudication of the issue of discrimination, many types of discrimination exist completely free of commerce-clause restrictions. Thus, the state may use its purchasing power substantially as it pleases. Employment policies on

[56] Stone, J., in Clark v. Paul Gray, Inc., 306 U. S. 583, at 594.

[57] See *supra* note 32.

[58] Sears, Roebuck & Co. v. McGoldrick, 279 N. Y. 184.

[59] Compagnie Generale Transatlantique v. McGoldrick, 279 N. Y. 192.

[60] See Robbins v. Shelby County, 120 U. S. 489, 492; Helson v. Kentucky, 279 U. S. 245; cf. Wiloil Corp. v. Pennsylvania, 294 U. S. 169, 175.

[61] The Court has so assumed: Robbins v. Shelby County, 120 U. S. 489, 492; Sonneborn Bros. v. Cureton, 262 U. S. 506, 515; Henneford v. Silas Mason Co., 300 U. S. 577, 583.

[62] Woodruff v. Parham, *supra* note 8; Sonneborn Bros. v. Cureton, 262 U. S. 506.

[63] Compare Robbins v. Shelby County, 120 U. S. 489, with Banker Bros. Co. v. Pennsylvania, 222 U. S. 210.

[64] Hannaford v. Silas Mason Co., 300 U. S. 577; Southern Pacific Ry. Co. v. Gallagher, 306 U. S. 167.

[65] Western Live Stock v. Bureau of Revenue, 303 U. S. 250; Adams Manufacturing Co. v. Storen, 304 U. S. 307; Gwin, White & Prince Inc. v. Henneford, 305 U. S. 434.

[66] See dissenting opinions of Black, J.: 304 U. S. at 316; 305 U. S. at 442.

state public works favoring local residents and business firms have been sustained.[67] The ensuing discrimination and retaliation may impose difficult barriers to trade between the states, all secure from constitutional attack.

The Twenty-first Amendment reserved certain powers to the states to insure adequate control of the social and moral problems incident to the liquor traffic. The power thus given to protect social policies many states have turned, under pressure from local liquor interests, to protection of home industry. Discriminatory sales taxes and special restrictions are placed on those who sell out-of-state wines and beers. The Court is powerless to prevent economic provincialism from perverting such state power to purposes not intended by the amendment but not precluded by its provisions.[68]

## MEANS OF PROTECTING INTERSTATE TRADE

We must not forget that while the commerce clause of itself will not keep open the channels of interstate trade, the Congress has a wide choice of means to use the grant of power effectively to achieve that end.

Litigation to enjoin or to resist the enforcement of interstate barriers is successful against most of the obvious or declared discriminations against interstate commerce by states and municipalities. The Government has not hesitated to intervene to assist private litigants in that endeavor,[69] but litigation has definite limitations. Federal executive power, like the judicial power, is properly reluctant to attribute any undeclared and improper purpose to a sovereign state where its acts are asserted to be innocent of the purpose to discriminate, and where they serve a useful local end. If local regulations are within the state's power—and that power is considerable—the Federal Government cannot assume or ask the courts to assume to explore the motives.

The Supreme Court has held, however, that where an application of state power, such as the regulation of local rail rates, is in practice to discriminate against or to burden interstate commerce, then regardless of motive, the Federal power is adequate to prevent that result.[70] This power can be made effective through a Federal administrative agency, such as the Interstate Commerce Commission,[71] with authority to invalidate local regulations found to burden the national commerce unduly.[72] Local inspection and quarantine laws which prove burdensome because of their very diversity might be superseded by uniform regulations.[73] It has been suggested that even state taxation powers may also be restricted so as not to burden interstate trade unduly.[74] To shield the national commerce from regulations which, however well intended, have the effect of an undue burden on the national commerce, Congress may make its own choice of means and procedures.

Whether the protection of interstate trade shall be accomplished by existing controls or by a further extension of Federal controls, the most important thing is the existence of an informed public opinion which will identify and condemn efforts to fasten parochialism upon the national commerce from any

[67] Heim v. McCall, 239 U. S. 175; Atkin v. Kansas, 191 U. S. 207.

[68] Mahoney v. Triner Corp., 304 U. S. 401; State Board v. Young's Market, 299 U. S. 59.

[69] Hale v. Bimco Trading Co., *supra* note 44.

[70] The Shreveport Case, 234 U. S. 342; McDermott v. Wisconsin, 228 U. S. 115.

[71] See 223 I. C. C. 109.

[72] The Shreveport Case, *supra* note 70.

[73] See Oregon-Washington R. R. & Nav. Co. v. Washington, 270 U. S. 87.

[74] See Black, J., dissenting in Gwin, White & Prince Inc. v. Henneford, 305 U. S. 434, at 451–52, 455. But cf. The Federalist (Lodge ed.), No. XXXII, pp. 185, 187.

source. Balkanism is as much a state of mind as a condition of geography. We cannot afford to let trade selfishness set up legal frontiers in America where trade must halt. Such petty barriers have long since proved to be not only economically futile but also disastrous to peace and good will. A realization of these facts by the residents of each locality would make the choice of means to level trade barriers relatively unimportant.

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