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STATE POWER TO REGULATE INTERSTATE COMMERCE: BARNWELL RE-ADOPTED?

The commerce clause is an affirmative grant of power to Congress "to regulate commerce . . . among the several states."[1] Because of the affirmative cast of the commerce clause, courts have held that there exists a negative implication that state action regulating interstate commerce is precluded as an interference with power reserved to the federal government.[2] Yet, it is obvious that state regulations differ both in significance of the state interest advanced and in impact on the federal interest of assuring an unimpeded flow of commerce among the several states. Thus, the courts have been reluctant to exclude completely state regulations, but have tended to strive for a compromise between the state and national interests.[3] The standard to be followed in determining the validity of state regulations and the role of the courts in that determination,[4] have

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1. U.S. CONST. art. 1, § 8.

2. The Supreme Court of Justice Marshall favored the view that, by implication, the commerce clause prohibited all state regulation of interstate commerce whether Congress had passed legislation or remained silent. See Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). But see Willson v. Black Bird Creek Marsh Co., 27 U.S. (4 Pet.) 245 (1829). In contrast, Justice Taney argued that the commerce clause, as a grant of power to Congress, did not prohibit state action; state legislation affecting interstate commerce was permissible so long as it did not invade an area of existing federal legislation. However, this theory never won the support of a majority of the Court. See the six concurring opinions in License Cases, 46 U.S. (5 How.) 504 (1847). Also see The Passenger Cases, 48 U.S. (7 How.) 283 (1849) (Taney, C.J., dissenting); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842); Groves v. Slaughter, 40 U.S. (15 Pet.) 449 (1841) (Taney, C.J., concurring); City of N.Y. v. Miln, 36 U.S. (11 Pet.) 102 (1837).

3. The standards applied by courts succeeding the Taney era recognized valid state and national spheres of regulation. Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851), compromised the Marshall and Taney views in holding that the exclusive control of Congress over interstate commerce was limited to subjects of "national" consequence needing a "uniform" system of regulation; absent federal legislation, the states were free to regulate matters of "local" nature. Leisy v. Hardin, 135 U.S. 100 (1890), further developed the *Cooley* standard in holding that nothing inherent in the commerce clause prevented state action which regulated interstate commerce. Rather, the will of Congress, express or implied, might prohibit state regulation. Thus, the Court replaced *Cooley's* rigid position with a flexible presumption against the validity of state legislation in areas of national consequence. During the next half century the Court began to speak in terms of "indirect" and "direct" burdens on interstate commerce, allowing only the former, rather than in terms of the need for "national" or "local" regulation. Yet the Court's basic approach of specifying an area of interstate commerce from which state regulations were precluded, regardless of benefit to local interests, remained the same. See, *e.g.*, Baldwin v. Seelig, 294 U.S. 511 (1935); Buck v. Kuykendall, 267 U.S. 307 (1925); Smith v. St. Louis & S.W.R.R., 181 U.S. 248 (1901); Plumley v. Massachusetts, 155 U.S. 461 (1894).

4. For practical purposes, the polar views of Marshall and Taney precluded the question of state power to affect interstate commerce from judicial determination. The

been long-standing points of contention before the Supreme Court. The recent decision in *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P.R.R.*[5] may indicate a significant change in the Court's approach to the problem.[6]

Barnwell and Southern Pacific

South Carolina Highway Department v. Barnwell Brothers,[7] written by Justice Stone, represented a new approach to a standard for determining the validity of state regulations affecting interstate commerce.[8] The case concerned the constitutionality of a South Carolina safety statute that set more stringent weight and width requirements for vehicles than those existing in all but four other states. Justice Stone attempted to articulate a standard which acknowledged the conflicting considerations of a law benefiting local interests while burdening interstate commerce and to set forth guidelines for evaluating such legislation. In the unanimous decision upholding the state law, the Court discarded the past conclusory standards[9] and held that state laws regulating interstate commerce would be valid if the state legislature "had acted within its province[10] . . . and if the means of regulation chosen are reasonably

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role of the courts was limited to the minimal functions of deciding the applicability of the commerce clause to a given fact situation and to interpreting and reconciling relevant state and federal legislation. See cases cited *supra,* note 2. Under the *Cooley* standard the courts assumed the role of determining on a case-by-case basis whether the need for uniformity of regulation existed, but without establishing any guidelines for making the determination. The lack of guidelines made the *Cooley* standard conclusory rather than a meaningful guide to legitimate state action, and the further development in *Leisy* merely gave the courts the additional task of anticipating the will of Congress. The later adoption of the "indirect-direct" burden terminology failed to change the conclusory nature of the standard as applied.

5. 393 U.S. 129 (1968).

6. The question of federal power under the commerce clause is beyond the scope of this comment except as incidental to it. For a full discussion of federal power under the commerce clause see Stern, *The Commerce Clause and the National Economy,* 1933-1945 (pts. 1 and 2), 59 HARV. L. REV. 645, 883 (1946).

7. 303 U.S. 177 (1938).

8. In a vigorous dissent in Di Santo v. Pennsylvania, 273 U.S. 34 (1927), concurred in by Justices Holmes and Brandeis, Justice Stone had previously attacked the long standing "indirect-direct" burden test as "little more than using labels to describe a result. . . ," alleging that the test was "too mechanical, too uncertain in its application, and too remote from actualities. . . ." Rather, he argued, the validity of the state law should be determined by a "consideration of all the facts and circumstances, such as the nature of its regulation, its function, the character of the business involved and the actual effect on the flow of commerce." 273 U.S. at 44.

9. See note 4 *supra.*

10. The "province" aspect of the *Barnwell* test never served as an effective limitation on state action. *Barnwell* did not set any guidelines for determining what constitutes a permissible "province" for state action regulating interstate commerce, and the case itself is of little help since the subject of the legislation—state highways—has traditionally been within the domain of state control. One prominent commentator asserted that relevant guidelines could be found in the *Cooley* criteria for state action in matters of local interest. Dowling, *Interstate Commerce and State Power,* 27 VA. L. REV.

adapted to the end sought."[11]

In requiring that the state's regulation of interstate commerce be "reasonably adapted to the ends sought," the Court was basically applying the due process clause.[12] The action of a state legislature could stand if, aided by the traditional presumption of rationality, it were reasonable in light of the statutory purposes.[13] Conflicting evidence of the reasonableness or burden on interstate commerce posed by the state action merely indicated a policy choice had been made by the legislature.[14] Thus, under *Barnwell* the Court's role was limited to determining whether there was a rational basis for the state provision, and a finding of such rationality overcame both commerce clause "burden" and due process objections.[15] The vagueness of the "province" test and the laxity of the reasonableness standard increased the power of the states to regulate commerce in areas where Congress had not acted.

The Court seemingly rejected the *Barnwell* approach several years later in *Southern Pacific Co. v. Arizona*.[16] The case focused on the constitutionality of an Arizona safety statute regulating the length of trains. The plaintiff claimed, and the Court agreed, that the statute, rather than being a safety measure, created a dangerous situation, caused delay, and increased the cost of interstate commerce. Echoing the concern evident in *Cooley v. Board of Wardens*[17] for judicial enforcement of uniform regulations in conveyances of a national consequence, where Congress had remained silent, the Court declared itself the "final arbiter"[18] for the competing national and state interests. The ultimate matter to be determined was the "nature and extent of the burden which the state regulation . . . imposes on interstate commerce" balanced with the extent to which the state law advanced the local interest.[19] Thus, under *Southern Pacific*, a state statute could no longer satisfy the com-

1, 9 (1940). However, the "province" concept was so vague that subsequent decisions citing *Barnwell* seemed unable to utilize it to evaluate state action. See, *e.g.*, McGoldrick v. Berwind White Co., 309 U.S. 33, 45 (1940); Maurer v. Hamilton, 309 U.S. 598, 603 (1940); Philadelphia-Detroit Lines v. Simpson, 37 F. Supp. 314, 315 (S.D. W.Va. 1940); Columbia Terminals Co. v. Lambert, 30 F. Supp. 28, 31 (E.D. Mo. 1939); City of Atlanta v. National Bituminous Coal Comm'n, 26 F. Supp. 606, 610 (D.D.C. 1938).

11. The Court found control of public highways to be traditionally a "province" of state action and the South Carolina statute to be a rational approach to highway safety and maintenance. 303 U.S. at 190, 192.

12. The Court in *Barnwell* cited due process cases in stating this requirement. 303 U.S. at 190, 191.

13. 303 U.S. at 191.

14. *Id.*

15. *Id.*

16. 325 U.S. 761 (1945).

17. See note 3 *supra*.

18. 325 U.S. at 769.

19. 325 U.S. at 770, 775.

merce clause simply by being rational, but might still violate that clause because of a consequential burden imposed on interstate commerce outweighing the benefits to local interests. As the "final arbiter" the Court assumed the task of understanding and balancing complex and conflicting evidence regarding the benefits to local interests of state legislation with its concomitant burden on interstate commerce.[20] The Court's role was clearly enlarged under the *Southern Pacific* approach, while state power, in contrast to that under *Barnwell*, was greatly decreased.

Southern Pacific represented the Court's adoption of Justice Stone's reasoning first expressed in his dissent in *Di Santo v. Pennsylvania*.[21] The law appeared to be settled[22] after *Southern Pacific*, in spite of dissents in the case from Justices Black and Douglas. The former contended that the Court lacked the fact-finding ability to substitute its judgment on debatable questions of reasonable action for that of a state legislature,[23] and that, in doing so, the Court was improperly acting as a "super-legislature" by making policy decisions that should be left to the elected representatives of the people.[24]

The Firemen Case

The Court's decision in *Firemen* raises the possibility that the arguments of Justices Black and Douglas have finally prevailed. *Firemen* concerned the constitutionality of Arkansas' "full crew" laws specifying a minimum number of employees for service on train crews.[25] The

20. The *Firemen* decision in the district court is a prime example of such factual considerations undertaken by the courts. 274 F. Supp. 294 (W.D. Ark. 1967). See also, *e.g.*, cases cited *infra*, note 22.

21. See note 8 *supra*.

22. See, *e.g.*, Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960); Bibb v. Navajo Freight Lines, 339 U.S. 420 (1958); California v. Zook, 336 U.S. 725 (1948); Bob-Lo Excursion Co. v. Michigan, 333 U.S. 78 (1947); Panhandle Pipelines v. Commissioner, 332 U.S. 507 (1947); Freeman v. Hewitt, 329 U.S. 249 (1946); Morgan v. Virginia, 328 U.S. 373 (1946); Robertson v. California, 328 U.S. 440 (1946); Nippert v. Richmond, 327 U.S. 416 (1945).

23. It should be noted that a court, unlike a legislature which can control the fact-finding process, is limited to the evidence submitted by the opposing parties for a basis of its decision.

24. 325 U.S. at 788, 789. Other discussions of the history of state power to regulate interstate commerce can be found in Burkhardt, *Regulation of Interstate Commerce by the States—Action by Will of Congress*, 18 MISS. L.J. 230 (1947); Dowling, *Interstate Commerce and State Power—Revised Version*, 47 COLUM. L. REV. 547 (1947); Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1 (1940); Givens, *Commerce Clause and the Interdependent Economy*, 53 A.B.A.J. 719 (1967); Haskins, *John Marshall and the Commerce Clause of the Constitution*, 104 U. PA. L. REV. 23 (1955); Mann, *The Marshall Court: Nationalization of Private Rights and Personal Liberty From the Authority of the Commerce Clause*, 38 IND. L.J. 117 (1963); Tillett, *Mr. Justice Black, Chief Justice Marshall and the Commerce Clause*, 43 NEB. L. REV. 1 (1963).

25. ARK. STAT. ANN. §§ 73-720 *et seq.*, ARK. STAT. ANN. §§ 73-726 *et seq.* (1957 Repl.).

plaintiff railroad company argued that the state law, in the light of current technological knowledge regarding railroad safety, impermissibly burdened interstate commerce in derogation of the commerce clause and was arbitrary and unreasonable in violation of the fourteenth amendment.[26]

The district court, relying upon *Southern Pacific*, had weighed the conflicting evidence and found that because of new technological advances the safety features of the Arkansas statute alleged by the state were outweighed by the burden the statute imposed upon interstate commerce.[27] On appeal to the Supreme Court, the district court's decision was reversed and the Arkansas law upheld. The Court noted that the constitutionality of state "full-crew" laws had been affirmed in the past and held that the existence of evidence to support the statutes as rational provisions by the Arkansas legislature was sufficient to satisfy the commerce clause as well as the due process clause.[28] The Court acknowledged the existence of conflicting evidence but refused to balance the local interest in safety with the national interest favoring unimpeded commerce among the states as it would have done under *Southern Pacific*. Instead the Court indicated that where a state statute was supported by evidence, debatable questions of the statute's propriety were public policy decisions to be made by elected representatives.[29]

Firemen as a Re-adoption of Barnwell

Among the several possible interpretations of the *Firemen* decision, the most significant is the implication that the Supreme Court has reverted to the *Barnwell* approach. *Firemen* may be read as indicating that state legislation will be upheld if it is within a proper province for state action and is rational in light of the ends sought—the position taken in *Barnwell*. There are a number of similarities between the cases. Both *Firemen* and *Barnwell*, unlike *Southern Pacific*, maintain that debatable questions of the reasonableness of a rational statute are for determination by legislative bodies. In addition, in both *Firemen* and *Barnwell* the Court seemed concerned with limiting state action to the state's "province" but did not elucidate the term. Traditionally, the object of the state legislation in both cases has been within the domain of state safety regulations, and Professor

26. The plaintiff railroad claimed the Arkansas "full-crew" laws were ineffective as a safety measure and were burdening interstate commerce by causing an increase in operation expenses and time delays. 393 U.S. 129, 132 (1968).

27. 274 F. Supp. 294 (W.D. Ark. 1967).

28. 393 U.S. at 139.

29. "We think it plain that in striking down the full crew laws . . . the District Court indulged in a legislative judgment wholly beyond its limited authority.
* * *
[T]he question of safety in the circumstances of this case is essentially a matter of public policy which can only be fixed by the people acting through their elected representatives." 393 U.S. at 136, 138.

Dowling's contention that "province" meant local interests not regulated by Congress[30] could be applied to both cases. Thus, in addition to pointing to the history upholding state "full-crew" laws, the Court in *Firemen* noted that Congress had legislated in the area but had not overridden state laws, thereby implying that "full-crew" legislation was to be left to the states.[31]

Support for the inference that the Court has returned to *Barnwell* can also be found in the fact that the *Firemen* opinion was written by Mr. Justice Black who had followed his vigorous dissent in *Southern Pacific* with strong dissents in later opinions employing the balancing rationale.[32] Justice Black had continually used language like that to be found in *Firemen*, arguing that where there was conflicting evidence regarding the burdens and benefit of state action regulating interstate commerce, the Court was improperly acting as a "super legislature"[33] in overturning a rational state statute instead of "leaving that choice to the elected representatives of the people."[34] The same emphasis on decreasing the role of the judiciary was clearly reflected in the *Firemen* decision.

Also of significance in indicating that the Court has discarded *Southern Pacific* is the possibility that the result in *Firemen* could have been reached on the basis of the *Southern Pacific* rationale. The plaintiff railroad company claimed that the burdens on interstate commerce caused by the Arkansas statutes derived from loss of time and money caused by the state laws. The Court points out that in past cases employing *Southern Pacific* these burdens have been held insufficient by themselves for striking down state laws.[35] Also, the Court could have concluded that the *Southern Pacific* approach of balancing the relevant facts resulted in a decision for the state. Thus, the Court seems to have purposely used a different approach than that taken in *Southern Pacific*.

Firemen as an Aberration

Whether *Firemen* indicates a significant shift in the Supreme Court's analysis of state power to regulate interstate commerce is a question

30. See note 10 *supra*.
31. 393 U.S. at 134.
32. After dissenting in *Southern Pacific*, Justice Black again dissented in Nippert v. Richmond, 327 U.S. 416 (1945). The Court next applied the *Southern Pacific* rationale in Morgan v. Virginia, 328 U.S. 373 (1946). In *Morgan* Justice Black again voiced his dissent from *Southern Pacific* but acquiesced in the Court's future use of the balancing rationale.
33. Southern Pacific Co. v. Arizona, 325 U.S. 761, 788 (1945) (Black, J., dissenting).
34. *Id.* at 789.
35. 393 U.S. at 139, 140.

which must await further developments in the case law. Arguably, *Firemen* is simply an aberration of little long-run consequence. The Court may have felt that loss of time and increase in operational expense were not sufficient burdens to justify striking down the long-standing and closely-scrutinized Arkansas statute;[36] however, upholding the statute under *Southern Pacific* would have necessitated overruling the district court's discretionary determination of facts. Reluctance to do so may have led to the Court's decision to sustain the Arkansas statute merely on proof of the existence of evidence affording the statute a rational basis. It is also possible that the Court meant to discourage any further litigation over the Arkansas "full-crew" statutes in *Firemen* in light of the continued scrutiny by the Arkansas legislature and the fact that the Court had previously upheld them three times.[37] If the Court's intention was to prevent such additional litigation, the significance of *Firemen* should be limited to the factual situation presented.

Support for the contention that *Firemen* is an aberration can also be found in the fact that it does not expressly overrule *Southern Pacific* or follow *Barnwell.* Moreover, language is used in *Firemen* that would seem unnecessary to a decision relying on *Barnwell.* Thus, the Court's discussion of time delays and money losses as burdens on interstate commerce attributable to the Arkansas statute is irrelevant to a decision upholding a state statute because it is supported by reasonable evidence.

Barnwell, Southern Pacific and Firemen Reconciled

A third possible interpretation of *Firemen* is that the case does not depart from *Southern Pacific,* but, in conjunction with *Barnwell,* merely explains the application of the *Southern Pacific* standard. Language used in *Southern Pacific* could serve as a basis for reconciling the three cases. In *Southern Pacific* the Court stated that the ultimate concern regarding state power to regulate interstate commerce is "the nature and extent of the burden. . ." and the "relative weights of the state and national interest involved."[38] Assuming that state interests are afforded greater weight as the matter dealt with by the state becomes of more local concern, it appears that the Court in all three cases first determined the nature of the state interest involved and the amount of benefit accruing to that interest, then balanced those determinations with the statute's burden on

36. The Court, in *Firemen,* mentioned the continued study by the Arkansas legislature of the "full-crew" laws. 393 U.S. at 139.

37. The Arkansas statutes in question were upheld in Missouri Pac. R. Co. v. Norwood, 283 U.S. 249, 290 U.S. 600 (1931); St. Louis, I.M. & S.R. Co. v. Arkansas, 240 U.S. 518 (1916); Chicago R.I. & R.R. Co. v. Arkansas, 219 U.S. 453 (1911). All of these holdings were reaffirmed in *Southern Pacific.* 393 U.S. at 130.

38. 325 U.S. at 770.

interstate commerce. Arguably, if in the Court's judgment the balance clearly favored upholding the statute, the Court would sustain the statute merely on proof that it had a rational basis. Under this rationale, if the Court determined that the balance suggested a closer question, the Court would decide between the conflicting evidence of the statute's reasonableness.

All three cases contain language which would support this analysis. Both *Barnwell* and the earlier litigation over the same Arkansas "full-crew" laws at issue in *Firemen* were relied on by the plaintiff in *Southern Pacific*. In discussing the plaintiff's contentions, the Court reaffirmed that the Arkansas statutes imposed a "minimal burden" on interstate commerce.[39] Furthermore, *Firemen* reasserts *Southern Pacific's* recognition of the insufficiency of time delays and increased cost to overturn statutes such as "full-crew" laws which serve a recognized local interest.[40] Thus, given a valid state interest and a "minimal burden" like that in *Firemen*, the Court ruled that proof of a rational basis for the state's action was enough to sustain the statute.

Similarly, state highways, the field of legislation in *Barnwell*, were recognized by *Southern Pacific* as a field where "the state has a far more extensive control than . . . [it has over] interstate railroads" which constituted the field of legislation in both *Southern Pacific* and *Firemen*.[41] Given legislation in an area of such vital state interest the Court in *Barnwell* was willing to accept a more serious burden on interstate commerce than that in *Firemen* and still uphold the state law simply on proof that it had a rational basis.

However, in *Southern Pacific*—a closer case—the Court was not convinced that Arizona had acted in an area of strong state interest;[42] and the Court also foresaw the possibility that the statute created a more dangerous situation than that which the state action was designed to correct.[43] Accordingly, the Court assumed the task of deciding between conflicting evidence. Thus, the decision to make this public policy determination when a closer question concerning state interference with interstate commerce was presented suggests the possibility that two distinct lines of cases exist concerning state power to regulate interstate commerce.

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39. 325 U.S. at 782
40. 393 U.S. at 139.
41. 325 U.S. at 783. See also, *e.g.*, Maurer v. Hamilton, 309 U.S. 598 (1940), for a discussion of the great degree of state control over state highways. *Barnwell* itself recognizes the extensive state interest in state highways. 303 U.S. at 187.
42. 325 U.S. at 783.
43. 325 U.S. at 781.