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INTERSTATE TRADE BARRIERS

GENERAL INTRODUCTION

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For 150 years we have blandly assumed that the United States is a nation and that the constitutional fathers by scrapping the Articles of Confederation had discarded the post-revolutionary theory that the United States was a confederation of independent sovereign nations. We have pridefully pointed to the fact that the United States is the greatest free trade area in the world. And the delegates meeting in Philadelphia in 1787 wrote into the constitution the provision that Congress should have the power "to regulate Commerce with foreign Nations, and among the several states, and with the Indian tribes."

A glance at the state of our neighbors across the Atlantic today should serve us the strongest possible warning of the eventual disaster resulting from the erection of barriers to trade carried to its logical extreme.

Of course, our intranational restrictions to trade have been mild in comparison to the international walls that have been built, but they have become so alarming that in 1938 the Governors' Conference broke a 30 years' precedent of officially refusing to take a position on current issues and authorized a release to the press stating that all of the governors assembled viewed the current trend toward the erection of tariff walls as one of the most alarming problems

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facing state governments and calling upon the several states to halt the trend before further damage might be done.

Hundreds of trade barriers are today obstructing the free flow of commerce among the states. Such measures, which in practice violate the spirit, if not the principle, underlying the commerce clause of the Constitution, are on the statute books of almost all the states. They are enforced generally under the state police and taxation powers, operate to benefit local producers and distributors, and tend to stimulate political and economic sectionalism.

A trade barrier is the counterpart on the national scene of a tariff wall in international trade. It is "a statute, regulation or practice which operates or tends to operate to the disadvantage of persons, products or commodities coming from sister states, to the advantage of local residents or industries."[1] It usually tends to protect the domestic market from out-of-state competition by restricting imports, and by so doing restricts the market for exports.

This trade war among the states is not new in our history. It was so widespread under the Articles of Confederation that Madison wrote:

> "The practice of many states in restricting the commercial intercourse with other states and putting their productions and manufactures on the same footing with those of foreign nations, though not contrary to the Federal Articles, is certainly adverse to the spirit of the union, and tends to beget retaliating regulations, not less expensive and vexatious to themselves than they are destructive of the general harmony."[2]

The framers of the Constitution endeavored to take precautions against the recurrence of such a situation when they gave to Congress the power "to regulate commerce . . . among the several states"[3] and specifically stated that

> "no state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its in-

[1] S. Chesterfield Oppenheim, Marketing Laws Survey, in address before the National Conference on Interstate Trade Barriers, Chicago, April 15, 1939.

[2] From letter of James Madison, 1787, urging calling of Constitutional Convention.

[3] U.S. CONST. Art. I, § 8.

spection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."[4]

In commenting upon these sections Chief Justice John Marshall stated: "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."[5] And many years later, Roger Taney, also Chief Justice of the Supreme Court, stated: "But further and more mature reflection has convinced me that the rule laid down by the Supreme Court is a just and safe one, and perhaps the best that could have been adopted for preserving the right of the United States on the one hand, and of the states on the other, and preventing collision between them."[6]

The effect on interstate commerce cannot be measured accurately in dollars and cents, but it can be established that interstate trade barriers have a decidedly restrictive influence. Some burden without completely restraining trade. Others entirely obstruct trade. The sum total of these measures create, on a national scale, a mottled pattern of regulations and taxes which, by their very absence of uniformity, cause unnecessary hardships and inconveniences to anyone engaging in interstate commerce. In line with accepted principles of economics, it is evident that restrictions on marketing limit competition, thereby tending to raise prices and lower standards of quality. The consumer inevitably pays the bill. And while one or two groups in a state may temporarily benefit, the whole citizenry ultimately suffers, and in many cases the law acts as a boomerang—injuring those whom it is designed to help.

One trade barrier is of little importance to the national economy, but one thousand are a matter of grave concern. Of most significance, therefore, are their cumulative aspects, particularly when we find that a trade barrier, if successful in protecting a local market, may first suggest itself for

[4] U.S. CONST. Art. I, § 8.
[5] Brown v. Maryland, 12 Wheat 419, 446 (U.S. 1827).
[6] The License Cases, 5 How 504, 575 (U.S. 1847).

adoption by other states, and secondly lead to retaliation by affected states.

This has been the history. A number of years ago a state decided to use only building material produced in the state in the construction of its public buildings. Now a score of states do likewise. In order to stimulate production and to reduce unemployment, a state decided to use in its public institutions only coal mined within its boundaries. Other states immediately followed suit. "Buy at home" as a slogan appealed to one legislature; now its connotation finds sympathetic response in many of our states. And it is well known that, increasingly, technical and administrative talent in public service has little if any market save in its own state of residence. Trade barriers, in other words, conform on the whole to a few simple patterns which, used by one political unit in an effort to favor its own, are copied by others; and the more copied—the more restrictive the barriers become.

Direct retaliations by affected states have followed inevitably. Retaliation leads to counter-retaliation, and counter-retaliation to still more stringent measures. In some instances, states have been on the verge of severing relationships and engaging in general commercial warfare. Such was the case, for instance, when three states, suffering from a beer trade barrier in another state, threatened to cease purchasing any liquors whatever from that state unless the enforcement of its law was relaxed, and to boycott any and all products from the state.

The discriminations affect a large variety of products shipped in interstate commerce. Liquor is probably the most flagrant example because of the impetus given to trade barriers against this product by the twenty-first amendment to the Federal Constitution. Agricultural and horticultural products are also faced with certain restrictions in crossing state boundaries. In this instance the protection of public health is frequently the purpose, such as when the sole purpose is to prevent the spread of plant disease or to assure the shipment of high quality milk. But in other cases the exclusion is solely for economic reasons. Discriminations against citrus fruit, oelomargarine, and milk frequently come within this category. Similar trade barriers are placed against motor trucks by restrictive size, weight, and license fee requirements. The use tax without the compensatory offset provision acts as a barrier, as do state purchase preference laws.

These barriers proved such a threat to the normal return to economic prosperity that a nation-wide campaign to remove them was initiated by the states themselves. The Federal Government, through the Departments of State, Agriculture, Labor, Commerce, Interior, and Justice, lent willing support and cooperation. The states very naturally worked through their joint agency the Council of State Governments and contacts with the federal departments were carried on through that organization.

The closely-knit movement culminated in a National Conference on Interstate Trade Barriers in Chicago last April. This meeting, called by the Council of State Governments, brought together over 400 state and federal officials and other individuals interested in probing the implications of these trade barriers and in formulating a program for their removal. The conference was given wide publicity throughout the country and generally brought the problem to the attention of the public. State officials carried home with them clearly defined conceptions of what constitute these trade barriers and constructive proposals for their elimination.

Surveys of the Council of State Governments and the United States Department of Agriculture which have been made since that time point to a sharp reversal in this economic trend. More than 20 states have repealed or vetoed trade barrier laws while in a number of others measures were defeated in committee or on the legislative floor. It is generally conceded that the ground work laid at the National Conference was largely instrumental in the success of the movement.

Some of the more important actions taken were repeals of antidiscriminatory liquor laws in Indiana and Missouri; the repeal of the Oklahoma port-of-entry law at a time when Texas proposed to pass one in retaliation; and the repeal of trucking restrictions by New Mexico, as well as the adoption of offset provisions for its use tax law. A salutary note is to be found in legislative resolutions approved in Maryland and Florida expressing opposition to trade barriers, and Governor Culbert L. Olson's advisement to the California Legislature that "any legislation tending to establish trade barriers against the products of other states sold in California will be vetoed."

Some producers and all consumers suffer from unwarranted barriers to trade. Manufacturers find themselves producing for more and more localized markets. The efficient are penalized and the inefficient subsidized, while the consumer pays the bill. Furthermore, if unchecked, the erection of these barriers would have progressively serious consequences, for discrimination breeds retaliation, counter-retaliation, as proven by experience within recent years.

This kind of legislation and administration was born of the desparation of depression politics when states were trying to stave off the bankruptcy of many of their industries and were seeking to protect their sources of revenue. In doing this the states have followed the world pattern of economic isolationism. It appears that on our national scene the pendulum has begun to swing in the opposite direction. But too many trade barriers still exist to justify any assertion that the intent of the commerce clause—free trade among the states—has again been realized.