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Resident retail merchants long have sought and obtained legislative preference and advantage over non-resident competitors. Directed first at peddlers and itinerant merchants and later at national chains, the legislative protection generally has failed to create sufficient economic advantage and so the demand for further legislation continues. Questions of constitutionality arise under both the federal and the state constitutions.

Non-discriminatory licenses imposed on peddlers, transient merchants, merchant truckers, and various other merchandising outlets[1] have been upheld either under the power of taxation or under the police power.[2] The United States Supreme Court approved such a license tax in 1868.[3] Two years later a patently discriminatory license tax based on residence was held invalid as a violation of the privileges and immunities clause.[4] Then in *Robbins* v. *Shelby Taxing District*, the Court facing a similar discriminatory license tax failed to invoke the privileges and immunities clause and instead held that the statute as applied to a drummer was invalid on the ground that Congress had an exclusive power over interstate commerce.[5] This decision established a distinction between peddler and drummer; the former carrying his goods with him, the latter soliciting orders for subsequent interstate delivery.[6] This distinction based on time and manner of delivery of the merchandise seems unsound, particularly in the light of recent sales tax cases.[7] But it has resulted in a competitive advantage to the non-resident manufacturer selling goods through peddler merchandisers over resident retailers and non-resident distributors using other distributive methods. Such decisions indicate the capacity of federal intervention to create as well as remove trade barriers.[8]

The more important result of the *Robbins* case is that the commerce clause has become the sole protection in the federal courts against discriminatory legislation either as to persons or goods.[9] Some state courts hold a discriminatory tax violative of the privileges

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[1] IND. STAT. ANN. (Burns 1933) 42-401. For study of comparative legislation, see MARKETING LAWS SURVEY WPA (1939). For the purposes of this comment, statutes and municipal ordinances are not distinguished.

[2] Emert v. Missouri, 156 U.S. 296 (1895), South Bend v. Martin, 142 Ind. 31, 41 N. E. 315 (1895).

[3] Woodruff v. Parham, 8 Wall. 123 (U. S. 1868).

[4] Ward v. Maryland, 12 Wall. 418 (U. S. 1870).

[5] Robbins v. Shelby Taxing District, 120 U. S. 489 (1886).

[6] This distinction has been maintained through the years. Emert v. Missouri, 156 U. S. 296 (1895); Real Silk Mills v. Portland, 268 U. S. 325 (1924). *But cf.* Town of Sellersburg v. Stanforth, 209 Ind. 229, 198 N. E. 437 (1935), (1936) 12 Ind. L. J. 70.

[7] Lockhart, *The Sales Tax in Interstate Commerce* (1939) 52 Harv. L. Rev. 617.

[8] See, McAllister, Courts, Congress, and Barriers, supra, p. 144.

[9] New York State v. Roberts, 171 U. S. 658 (1898).

and immunities clause.[10] That clause, however, provides no protection to the foreign corporation engaging in intrastate business.[11]

Some states have attempted to exclude peddler merchandising through prohibitive license taxes.[12] A more successful approach is the city ordinance declaring peddling and soliciting without an express invitation a public nuisance.[13] Such prohibition is attacked generally as an unreasonable exercise of the police power[14] and in the case of the drummer as a violation of the commerce clause.

Although direct burdens on interstate commerce are invalid, incidental burdens resulting from the states' exercise of its police or taxing power are permitted.[15] Thus, a license tax which exempts manufacturers located within the state has been sustained.[16] Although a discrimination results, it is sustained for an accumulation of reasons: the tax is on the business rather than the goods;[17] the inequality is compensated for by a consideration of the entire tax system;[18] the complaint is usually a foreign corporation;[19] there is no evidence of an intent to discriminate.[20]

The Supreme Court has refused to invoke the equal protection clause against discriminatory license taxes. If the discrimination is

[10] Smith v. Farr, 46 Colo. 364, 104 Pac. 401 (1909), State v. Cohen, 133 Me. 293, 177 A. 403 (1935).

[11] Doctrine of Paul v. Virginia, 8 Wall. 168 (1868). This problem is beyond the scope of this comment.

[12] Carrollton v. Bazette, 159 Ill. 284, 42 N. E. 837 (1896), People v. Rawley. 231 Mich. 374, 204 N. W. 137 (1925).

[13] Town of Green River, Wyoming v. Fuller Brush Co., 65 F (2d) 112 (C.C.A. 10th, 1933) reversing 60 F (2d) (D. Wyo. 1932). The court construed the ordinance as aimed at the "place" of solicitation rather than the act and therefor any regulation of interstate commerce is merely incidental. Also that the ordinance was not such an arbitrary use of the police power as would cause the court to override legislative discretion. Town of Green River v. Bunger, 50 Wyo. 52, 58 P (2d) 456 (1936); McCormick v. Montrose, 99 P (2d) 969 (Colo. 1939). Sawyer, *Federal Restraint on the State's Power to Regulate House to House Selling* (1934) 6 Rocky Mt. L. Rev. 85.

[14] In N. J. Good Humor v. Board of Comm'rs, 124 N.J.L. 162, 11 A (2d) 113 (1940) the court said, "it is not within the bounds of reason to prohibit particular classes of business, lawful in themselves, for the enrichment of another class. Orangeburg v. Farmer, 181 S. C. 143, 186 S. E. 783 (1936); Prior v. White, 131 Fla. 1, 180 So. 147, 116 A.L.R. 1176, 1189 (1938); *accord* but distinguishable because discriminatory: Jewel Tea Co. v. Bel Air, 172 Md. 536, 192 Atl. 417 (1937); White v. Culpeper, 172 Va. 630, 1 S. E. (2d) 269 (1939).

[15] WILLIS, CONSTITUTIONAL LAW (1936) ch. XI.

[16] New York State v. Roberts, 171 U. S. 658 (1898); Reymann Brewing Co. v. Brister, 179 U. S. at 445 (1900); Armour & Co. v. Virginia, 246 U. S. 1 (1917).

[17] New York State v. Roberts, 171 U. S. 658, 664 (1898). *But cf.* Welton v. Missouri, 91 U. S. 275 (1875).

[18] New York State v. Robert, 171 U. S. 658, 664 (1898).

[19] *Id.* at 665.

[20] This is a value judgment and only in an extreme case will the court look beyond the statute. Minn. v. Barber, 136 U. S. 313 (1889).

interstate the commerce clause applies. If it is intrastate, the court will not invalidate the tax, for the fact it "discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction."[21] State courts on the other hand using the federal equal protection clause have held invalid license taxes discriminating on the basis of residence.[22] Here as elsewhere, a legal discrimination does not exist if the legislatve classification is reasonable. Thus, a license tax on all peddlers except residents is clearly an invalid discrimination under the equal protection clause of the fourteenth amendment,[23] or the privileges and immunities clause of the state constitution.[24] A license tax on all peddlers excepting established merchants if interpreted to permit established merchants to peddle must fall for the same reasons.[25] But if it is interpreted as a classification of two modes of merchandising, it is a reasonable classification although it may create a geographcal discrimination and barrier. This anomaly is explained on the ground that the discrimination does not relate to persons in the same class but only between classes. It is merely imposing a just proportion of the burden of government upon a class of occupations or persons which otherwise would not be licensed or taxed.[26] Yet, if courts look beyond the form of the statute, they would discover a discrimination based on residence alone.[27] And this discrimination frequently creates a burden on interstate trade[28] and may result in a barrier to interstate trade.[29]

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[21] Board of Tax Comm'rs. v. Jackson, 283 U. S. 527, 537, 73 A.L.R. 1464, 1481 (1930).

[22] Hughes v. Rudd, 178 La. 588, 152 S. 300 (1934); State v. Cohen, 133 Me. 293, 177 Atl. 403 (1935).

[23] Rodgers v. Kent Circuit Judge, 115 Mich. 441, 73 N. W. 381 (1897). Notes (1929) 61 A. L. R. 337, (1938) 112 A. L. R. 63.

[24] State v. Cohen, 133 Me. 293, 177 Atl. 403 (1935); Ideal Tea Co. v. Salem, 77 Ore. 182, 150 Pac. 852 (1915).

[25] Whipple v. South Milwaukee, 218 Wis. 395, 261 N. W. 235 (1935); Ideal Tea Co. v. Salem, 77 Ore. 182, 150 Pac. 852 (1915).

[26] Martin v. Rosedale, 130 Ind. 109, 29 N. E. 410 (1891); Campbell Baking Co. v. Harrisonville, 50 F (2d) 670 (C.C.A. 8th, 1931); American Bakeries Co. v. Sumter, 173 S. C. 94, 174 S. E. 919 (1934) appeal dismissed for want of a substantial federal question in 293 U. S. 523 (1934).

[27] Campbell Baking Co. v. Maryville, Mo., 31 F (2d) 466 (W. D. Mo. 1929).

[28] "The fact is that the purpose of this ordinance, masquerading in the guise of a revenue measure, and thinly veiled, is to cause the appellant to cease selling its products to merchants in Harrisonville in competition with local producers . . . . The real question is whether there is to be freedom of trade and barter between citizens of different communities in the same state, as there is between those of different states, or whether such business activities are to be hampered and in effect prohibited by unreasonable and arbitary exactions under color of legitimate taxation." *See* Campbell Baking Co. v. Harrisonville, 50 F. (2d) 670, 681 (C.C.A. 8th, 1931) (Dissenting Opinion).

[29] For example a license tax on peddlers of farm produce imposed by an urban state is not discriminatory in form but may require the

The constitutionality of these discriminatory statutes is uncertain in Indiana.[30] In *Sears* v. *Board of Comm'rs*, our court sustained such legislation[31] on the basis of a decision later reversed by the United States Supreme Court.[32] The federal privileges and immunities clause was held to apply to persons or property only and as this was a privilege tax it was outside the constitutional limitation.[33] The court held inapplicable the state privileges and immunities clause on the ground that it applied only to Indiana citizens and did not protect non-residents.[34]

Since this decision no statute has been involved in litigation, but several municipal ordinances have been questioned. The doctrine of the Robbins case was followed in municipal ordinance cases, until 1935,[35] when in *Sellersburg* v. *Stanforth*,[36] the court upheld a license tax on peddlers in Indiana who filled their orders subsequently in Kentucky, the court holding that peddling was an intrastate business.

The exemption of farm produce or farmers peddling their own produce[37] is a common exemption in the license tax statutes. A majority of the courts hold such statutes unconstitutional as a violation of the equal protection clause of the fourteenth amendment.[38] Where

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suppliers of farm products produced in adjoining states to be marketed through resident merchants in the regulating state. Although the burden seems to be imposed uniformly upon a class of persons and upon a class of goods, the effect is to place a burden which is co-extensive with states lines and which may therefore be called a barrier.

[30] IND. STAT. ANN. (Burns 1933) 42-201; 42-501. (License tax on non-residents but none on residents).

[31] 36 Ind. 267 (1871).

[32] Ward v. Maryland, 9 Am. L. Reg. (n.s.); 424, rev'd 12 Wall. 418 (U.S. 1870).

[33] In Grafty v. Rushville, 107 Ind. 502, 8 N. E. 609 (1886) an ordinance discriminating on the basis of counties was invalidated under the state privileges and immunities clause and the court declared the ordinance in violation of the federal constitution under both the commerce clause and the privileges and immunities clause. This decision would seem to have overruled Sears v. Bd. of Comm'rs, 36 Ind. 267 (1871) but for South Bend v. Martin, 142 Ind. 31, 41 N. E. 315 (1895) which approved the Grafty case, supra, on the state constitution but not as to the federal constitution as no interstate commerce was involved in that case.

[34] *But cf.* Grafty v. Rushville, 107 Ind. 502, 8 N. E. 609 (1886); South Bend v. Martin, 142 Ind. 31, 41 N. E. 315 (1895).

[35] The term peddler includes a solicitor under Indiana statutes. Fallis v. Gas City, 169 Ind. 508, 82 N. E. 1056 (1907). The following cases exempt the solicitor from state regulation if interstate delivery is subsequent to the sale: Martin v. Rosedale, 130 Ind. 109, 29 N. E. 410 (1891); South Bend v. Martin, 142 Ind. 31, 41 N. E. 315 (1895); and Huntington v. Mahan, 142 Ind. 695, 42 N. E. 463 (1895).

[36] 209 Ind. 229, 198 N. E. 437 (1935), (1936) 12 Ind. L. J. 70.

[37] MARKETING LAWS SURVEY WPA (1939).

[38] State v. Pehrson, 205 Minn. 573, 287 N. W. 313 (1939), (1940) 38 Mich. L. Rev. 544; Jewel Tea Co. v. Bel Air, 172 Md. 536, 192 A. 417 (1937). *Contra*: People v. De Blaay, 137 Mich. 402, 100 N. W. 598 (1904); *cf.* St. Louis v. Meyer, 185 Mo. 583, 84 S. W. 914 (1904).

the minority view prevails, modern transportation facilities and retail practices make these statutes effective interstate barriers against the importation of produce from other states.[39]

Transient merchant legislation[40] generally is similar to the peddler, drummer, and merchant trucker legislation already discussed; but a peculiar Indiana interpretation of this legislation should be noted. Although the statute is non-discriminatory in form the court has held the statute inapplicable to transient merchants who also have a fixed place of business within the county.[41] Thus, giving, in fact, an advantage to the local merchant. If the court should interpret the statute similarly on a state-wide basis to the disadvantage of out of state licensees the statute would become a true barrier statute—and probably in violation of the equal protection clause as interpreted by some state courts.

Barriers in the field of itinerant merchandising are created most frequently through discriminatory enforcement. And this unfortunately can seldom be redressed in the courts.[42] Thus, in these fields perhaps more than in others there is real substance to the trade barrier thesis. Discrimination arising from state and municipal legislation, aggravated by the bias of local enforcing authorities, effectively prevents equal competition. The persons involved are seldom financially able to litigate the discriminations and so they remain and multiply.[43]

W.S.H.

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[39] Nebraska although regulating the merchant trucker exempts farmers peddling their own produce. Neb. L. (1939) ch. 101.

[40] The term "transient merchant" generally distinguishes the temporary merchant who occupies a building for the sale of his goods. Definitions are impractical, however, as all the terms are used interchangeably according to the particular state involved.

[41] Harding & Miller Music Co. v. Cushman, Treas., 183 Ind. 218, 108 N. E. 865 (1915).

[42] The mere fact that a law or ordinance has not been enforced against other persons is no defense to the person against whom it is being enforced. Mackay Tele. & Cable Co. v. Little Rock, 250 U. S. 94 (1918); Schmidt v. Indianapolis, 168 Ind. 631, 80 N. E. 632 (1907). *But see*, Cumberland Coal Co. v. Bd. of Revision, 284 U. S. 23 (1931); Sioux City Bridge v. Dakota County, 260 U. S. 441 (1933). Relief is granted from intentional systematic discrimination in tax assessments. Quare, Whether this approach may be used to eliminate the administrative induced trade barrier?

[43] Even against the national distributive organizations the legislative power of the local merchant has been strong. This has been particularly apparent in the municipal ordinance field. See, Sikes and Parrish, *supra* p. 220. Even much state legislation is asserted to have unseen barrier effect. For example, gross income taxation with low basic exemptions which favor small over large merchandizing units; unfair trade acts with increasingly large markups for operating costs; anti-discrimination and loss leader statutes with arbitrary price definitions.