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Pre-emption of State Regulation and Constitutional Exclusion - Regulation of "Elevation" in Interstate Commerce - Public Service Commission v. Western Maryland Railway Company

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Pre-Emption Of State Regulation And Constitutional Exclusion — Regulation Of "Elevation" In Interstate Commerce

Public Service Commission v. Western Maryland Railway Company[1]

By ROBERT E. POWELL

The Public Service Commission of Maryland, after conducting an oral hearing wherein it determined that it had jurisdiction over the leasing of grain elevators under the provisions of Article 78, Section 24(b)(1) and (3) and

[1] *The Daily Record*, Sept. 19, 1959 (Cir. Court of Baltimore City).

Section 75(a) of the Annotated Code of Maryland,[2] issued an order directing the General Counsel of the Commission to apply for an injunction to restrain the Western Maryland Railway Company from leasing certain grain elevator facilities, owned by the Railway, to the Louis Dreyfus Corporation, without first applying for and obtaining the approval of the Commission. Over 99½% of the grain passing through the facilities in question was moving in interstate or foreign commerce.

The Court found that Congress through the enactment of Section 1(3) of the Interstate Commerce Act,[3] which includes "elevation" in the definition of "transportation" as used in the Act, and Section 1(4) of that Act,[4] which asserts the regulatory powers of Congress over facilities used in transportation, had brought the regulation of facilities used for purposes of elevation within the jurisdiction of the Interstate Commerce Commission, and that the authority granted under that act was paramount, excluding from the field the form of local regulation under which the Public Service Commission of Maryland was asserting its

[2] 7 MD. CODE (1957) Art. 78, §24(b) provides:

"*Acts prohibited without prior authorization of Commission.* — Hereafter, no public service company shall, without the prior authorization of the Commission:

(1) Assign, lease or transfer any franchise or right thereunder or enter into any agreement or contract materially affecting such franchise or right;

* * * * * *

(3) Abandon or discontinue in whole or in part the exercise of any franchise or right;"

§75(a) provides:

"The Commission may require the continuance of any service rendered to the public by any public service company under any franchise, right, or permit after its expiration date, if any; and no service under a franchise, right or permit shall be discontinued or abandoned without the consent of the Commission, which shall be granted if the Commission finds that the present or future public convenience and necessity permits such discontinuance or abandonment."

[3] 49 U.S.C.A. (1959), §1(3) provides that:

"The term 'transportation' as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and *facilities* of shipment or carriage, irrespective of ownership or of any . . . connection with the receipt, delivery, *elevation*, and transfer in transit, ventilation, refrigeration or icing, *storage*, and handling of property transported." [Emphasis added.]

[4] 49 U.S.C.A. (1959), §1(4) provides that:

"It shall be the duty of every common carrier subject to this chapter to provide and furnish *transportation* upon reasonable request therefor, and to establish *through routes* with other such carriers. . . . It shall be the duty of every such common carrier establishing through routes to provide reasonable *facilities* for operating such routes . . . ." [Emphasis added.]

The above sections of the Interstate Commerce Act have been quoted by the author from the 1959 Code. They are substantially the same as the 1951 Code under which the principal case was decided.

jurisdiction. The Court was also of the opinion that, even in the absence of the Congressional legislation, the burden placed upon interstate activities of the Railway, through application of the Maryland statute by the Commission was of a "direct" nature and hence would be invalid under the Commerce Clause of the Constitution.

I. PRE-EMPTION

It has long been established that, where Congress has exercised its power in relation to a specific phase of interstate commerce, a state or local regulation will be held to be inoperative if either it conflicts directly with the regulation of Congress, or intrudes into a field which Congress meant to completely occupy by its legislation.[5]

In *Union Pacific R.R. v. Updike Grain Company*,[6] the Supreme Court discussed for the first time the effect of Congress having placed "elevation" within the definition of "transportation" in the Interstate Commerce Act. The Court there sustained the lawfulness of allowances paid by the Union Pacific to private elevator operators for performing services on its behalf, on the ground that "elevation" was within the meaning of "transportation", which under the Interstate Commerce Act the Railroad was required to furnish and must pay for when furnished for it by another concern.[7]

In *Chicago, R. I. & P. Ry. v. Hardwick Elevator Company*,[8] the Supreme Court, in striking down a Minnesota statute which required railroads to furnish care at terminal points within a specified period of time and imposing a penalty upon the railroads for failure to comply, ruled that Congress had included "cars" in the definition of "transportation", and therefore, in requiring the carrier to furnish "transportation" on reasonable request therefore, it had pre-empted the field to the exclusion of the Minnesota

[5] Gibbons v. Ogden, 9 Wheat. 1 (U.S. 1824). Under the Interstate Commerce Act see: Southern Ry. Co. v. Reid, 222 U.S. 424 (1912); Chi. R. I. &c. Ry. v. Hardwick Elevator Co., 226 U.S. 426 (1913); St. Louis, Iron Mt. & S. Ry. v. Edwards, 227 U.S. 265 (1913); N.Y. Central R.R. v. Hudson County, 227 U.S. 248 (1913); Missouri Pacific Ry. v. Porter, 273 U.S. 341 (1927); Chicago v. Atchison, Topeka & Santa F. R. Co., 357 U.S. 77 (1958). For application of this doctrine under other statutes see: Cloverleaf C. v. Patterson, 315 U.S. 148 (1942); Garner v. Teamsters Union, 346 U.S. 485 (1953); Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955); Guss v. Utah Labor Board, 353 U.S. 1 (1957), noted 18 Md. L. Rev. 50 (1958); San Diego Unions v. Garmon, 353 U.S. 26 (1957); Meat Cutters v. Fairlawn Meats, 353 U.S. 20 (1957).

[6] 222 U.S. 215 (1911).

[7] See also: Interstate Com. Comm. v. Diffenbaugh, 222 U.S. 42 (1911); Omaha Elevator Co. v. Union Pacific R. Co., 249 F. 827 (8th Cir. 1918).

[8] 226 U.S. 426 (1913).

legislature. The Court in concluding said "there can be no divided authority over interstate commerce, and . . . the regulations of Congress on that subject are supreme."[9]

Similarly, in *N. Y. Central R.R. v. Hudson County*,[10] the Supreme Court struck down an ordinance of the Board of Chosen Freeholders of New Jersey regulating ferries on the ground that Congress had already exercised its regulatory power in the field by including "ferries" in the definition of "railroads" as used in Section 1(3) of the Interstate Commerce Act.

It became clear from the preceding interpretations of the definition of "transportation" as used in applying the Interstate Commerce Act that Congress has delegated complete regulatory powers in regard to "elevation" to the Interstate Commerce Commission. The effect of such delegation of powers is seen through a series of cases in which the Supreme Court held invalid State legislation requiring the transport of freight as soon as received by a common carrier,[11] imposing penalties for delay in delivery to consignees,[12] regulating equipment used on trains carrying the United States mail,[13] regulating equipment used on locomotives,[14] regulating the issuance, form and substance of bills of lading,[15] regulating rates charged for elevation of goods traveling in interstate commerce,[16] and requiring transfer companies used by railroads in inter-terminal transfer of interstate passengers and baggage to secure certificates of convenience and necessity before they could operate.[17] In each instance the Court held the respective acts invalid on the grounds that they were regulatory measures in a field which Congress had occupied to the exclusion of the states.

The basic doctrines with reference to state exercise of power over commerce were reviewed in *Southern Ry. Co. v. Reid*,[18] wherein the Court speaking through Mr. Justice McKenna said:

> "As to the extent of the power and the occasions for its exercise, controversies have arisen, and in deciding

[9] *Ibid.*, 435.
[10] 227 U.S. 248 (1913).
[11] Southern Ry. Co. v. Reid, 222 U.S. 424 (1913).
[12] St. Louis, Iron Mt. & S. Ry. v. Edwards, 227 U.S. 265 (1913).
[13] Penna. R.R. Co. v. Pub. Service Comm., 250 U.S. 566 (1919).
[14] Napier v. Atlantic Coastline, 272 U.S. 605 (1926).
[15] Missouri Pacific v. Porter, 273 U.S. 341 (1927).
[16] Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).
[17] Chicago v. Atchison, Topeka & Santa F. R. Co., 357 U.S. 77 (1958).
[18] 222 U.S. 424, 434-435 (1913). The footnotes in this quotation are not those of the Court, but were added by the author.

> which the power of the State over the general subject of commerce has been divided into three classes: First, those in which the power of the State is exclusive;[19] second, those in which the States may act in the absence of legislation by Congress;[20] third, those in which the action of Congress is exclusive and the States cannot act at all."[21]

To be complete, there should be added a fourth (the antithesis of "two" above) namely where the states may not act (as to matters national in character) by reason of the Commerce Clause, even though Congress has failed to regulate;[22] and a fifth, that even where the states are precluded from acting by reason of the Commerce Clause, Congress can delegate to the states power to act or remove any obstacle which may be thought to stem from its power.[23]

The Court in the instant case found that the attempted exercise of power by the Public Service Commission in Maryland fell under the third category set forth above, in holding that Congress through the Interstate Commerce Act intended to cover the field of regulating "elevation" by bringing it within the definition of "transportation" as used in the Interstate Commerce Act. However, the Court

[19] For discussion see: Gibbons v. Ogden, 9 Wheat. 1 (U.S. 1824); Cooley v. Board of Wardens of Port of Philadelphia, 12 How. 299 (U.S. 1851), conc. op. of Mr. Justice Daniel, 325; Kidd v. Pearson, 128 U.S. 1 (1888); Diamond Glue Co. v. United States Glue Co., 187 U.S. 611, 616 (1903); Oliver Iron Co. v. Lord, 262 U.S. 172 (1923). There is some question today as to whether there actually is a phase of commerce wherein the regulatory power of the states is exclusive. See: Wickard v. Filburn, 317 U.S. 111 (1942).

[20] California v. Thompson, 313 U.S. 109 (1941); Cooley v. Board of Wardens of Port of Philadelphia, 12 How. 299 (U.S. 1851); Morgan v. Louisiana, 118 U.S. 455 (1886); License Cases, 5 How. 504 (U.S. 1847); Anderson v. Pacific Coast S.S. Co., 225 U.S. 187 (1912); Ore.-Washington Co. v. Washington, 270 U.S. 87, 101 (1926). In relation to this doctrine, it has been stated that state regulations of commerce should be sustained unless Congress has clearly spoken to the contrary. See the dissents by Mr. Justice Black in Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945), *dis. op.* 784, 789; Hood & Sons v. Du Mond, 336 U.S. 525 (1949), *dis. op.* 545; McCarroll v. Dixie Lines, 309 U.S. 176 (1939), *dis. op.* 183; and also the dissent of Mr. Justice Douglas in Southern Pacific Co. v. Arizona, *supra*, *dis. op.* 795.

[21] Guss v. Utah Labor Board, 353 U.S. 1 (1957), noted 18 Md. L. Rev. 50 (1958); Gibbons v. Ogden, 9 Wheat. 1 (U.S. 1824); Chi. R. I. &c. Ry. v. Hardwick Elevator Co., 226 U.S. 265 (1913); N.Y. Central R.R. v. Hudson County, 227 U.S. 248 (1913); Missouri Pacific v. Porter, 273 U.S. 341 (1927); Chicago v. Atchison, Topeka & Santa F. R. Co., 357 U.S. 77 (1958).

[22] Cooley v. Board of Wardens of Port of Philadelphia, 12 How. 299, 318 (U.S. 1851); Buck v. Kuykendall, 267 U.S. 307 (1925); Di Santo v. Pennsylvania, 273 U.S. 34 (1927); Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945); and Hood & Sons v. Du Mond, 336 U.S. 525 (1949).

[23] Southern Pacific Co. v. Arizona, *ibid.*, 769; citing *inter alia* Adams Express Co. v. Kentucky, 238 U.S. 190, 198 (1915); Ky. Whip & Collar Co. v. I. C. R. Co., 299 U.S. 334, 350, 351 (1937) and Whitfield v. Ohio, 297 U.S. 431 (1936). See also: Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946).

also ruled that, even if Congress had not so pre-empted the field, the provisions of the Public Service Commission Law of Maryland asserting regulatory jurisdiction over the leasing of franchise rights of common carriers was unconstitutional on the grounds that it placed a "direct burden" on interstate commerce.

II. Constitutional Exclusion

In regard to this latter ruling, the trial court said: "It has long been held that if state regulation imposes a *direct burden* upon interstate commerce, such regulation must fall regardless of Federal legislation",[24] thereby applying the so-called "direct burden" test which the Supreme Court has used in a number of cases to test the constitutionality of state regulations of commerce.[25] The "direct burden" test is but one of several approaches used by the court in applying the basic doctrine, stemming from *Cooley v. Board of Wardens of Port of Philadelphia*,[26] that where subjects of regulation demand that their regulation, if any, be prescribed by a *single* authority, the states may not act at all, but where the subjects of regulation are essentially local in character, not requiring uniformity of control, the states may act (at least until Congress pre-empts the field).[27]

The other principle approaches used by the Court have been: (1) to *weigh* all of the circumstances surrounding each attempted state or local regulation in regard to the state and national interests involved to determine whether the need for interstate commerce to be free and untrammeled out-weighs the local interest in the type of regulation involved regardless of its nature;[28] (2) to strike down

[24] *The Daily Record*, Sept. 19, 1958 (Cir. Ct. of Baltimore City). [Emphasis added.]

[25] Seaboard Airline Ry. v. Blackwell, 244 U.S. 310 (1917), which speaks the language of "direct burden" but "weighs" all the facts as under Mr. Justice Stone's "weighing" approach, *infra*, *circa*, ns. 39-46; Buck v. Kuykendall, 267 U.S. 307 (1925); Bush Co. v. Maloy, 267 U.S. 317 (1925); Shafer v. Farmers Grain Co., 268 U.S. 189 (1925); Di Santo v. Pennsylvania, 273 U.S. 34 (1927), overruled in California v. Thompson, 313 U.S. 109 (1941), discussed in 41 Col. L. Rev. 1104 (1941); Hood & Sons v. Du Mond, 336 U.S. 525 (1949), noted 37 Cal. L. Rev. 667 (1949), 35 Corn. L. Q. 211 (1949), 34 Minn. L. Rev. 60 (1949) and 3 Vand. L. Rev. 113 (1949).

[26] 12 How. 299, 319 (U.S. 1851).

[27] Maurer v. Hamilton, 309 U.S. 598 (1940); Welch Co. v. New Hampshire, 306 U.S. 79 (1939). The problem involved with the Cooley doctrine is that the two areas of regulation overlap, and the definition of those areas depends upon which power, state or federal, is stressed. As a result the Court has from time to time sought more specific tests in order to better define the area left over to state control.

[28] California v. Thompson, 313 U.S. 109 (1941), noted 41 Col. L. Rev. 1104 (1941); Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945); and Mr. Justice Stone's dissent in Di Santo v. Thompson, 273 U.S. 34 (1927), *dis. op.* 43, 44, all discussed *infra*, *circa*, ns. 41-43, 45-51.

all regulations (or taxes) which on their face or by necessary operation discriminate against interstate commerce (the one approach which has been consistently accepted by the Court);[29] and (3) in the absence of discrimination against interstate commerce, to accept state and local police regulations as valid unless expressly denounced by congressional legislation.[30] The third approach has been espoused vigorously by Justices Black and Douglas, but never accepted by a majority of the Court.

Support for the use of the "direct burden" approach in the instant case is seen in *Bush Company v. Maloy*[31] and *Buck v. Kuykendall*,[32] both of which were decided on the same day in 1925, and in the fairly recent case of *Hood & Sons v. Du Mond*.[33] In the first two cases the Supreme Court struck down statutes of Maryland and Washington which required common carriers for hire to obtain a permit, in the nature of a certificate of convenience and necessity which could be denied on the basis of adequate existing service, as a prerequisite to the operation of interstate business which required the use of the highways of the respective states. In the third case a New York statute forbidding dealers from buying milk from producers without first obtaining a license, which would not be granted if the activity of the dealer would tend toward destructive competition, was found to be unconstitutional on the ground that the requirement established an economic barrier

[29] Minnesota v. Barber, 136 U.S. 313 (1890); Dean Milk Co. v. Madison, 340 U.S. 349 (1951). The same doctrine has been applied in the analogous field of state taxation of interstate commerce. Minnesota v. Blasius, 290 U.S. 1, 8 (1933); McGoldrick v. Berwind-White Co., 309 U.S. 33 (1939), wherein the Supreme Court speaking through Mr. Justice Stone upheld the validity of a New York Sales Tax as applied to goods coming into the state through interstate commerce and being sold therein. The Court in discussing discriminatory taxes said:

> "Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes . . . which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey" [48].

[30] McCarroll v. Dixie Lines, 309 U.S. 176 (1939), *dis. op.* 183, 189; Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945), *dis. ops.* 784, 789, 795; Hood & Sons v. Du Mond, 336 U.S. 525 (1949), *dis. op.* 545, 563, 564; see *infra*, *circa*, ns. 47-48.

[31] 267 U.S. 317 (1925).

[32] 267 U.S. 307 (1925). For similar cases involving the Public Service Commission of Maryland but not necessarily reaching a like conclusion see: Pub. Serv. Comm'n. v. Gas Etc. Corp., 162 Md. 298, 159 A. 758 (1932); Pub. Serv. Comm'n. v. Rwy. Co., 146 Md. 580, 127 A. 112 (1924). See also: Penna. R.R. Co. v. Public Serv. Com., 126 Md. 59, 94 A. 330 (1915).

[33] 336 U.S. 525 (1949), noted 37 Cal. L. Rev. 667 (1949); 35 Corn. L. Q. 211 (1949), 34 Minn. L. Rev. 60 (1949), 3 Vand. L. Rev. 113 (1949).

against competition, and therefore, placed a "direct burden" upon interstate commerce.

In each of the above cases, it is interesting to note that the regulation was an economic or business type control related to adequacy of service to the public and the hazard of additional competition (a utility-type regulation sustained originally against due process objection only by special justification)[34] and hence could be said to be directed at or a "direct burden" on the business itself. This is distinguished from the normal type of regulation which could be said to be *directed at* health, safety or morals and only an indirect burden on any business involved, a distinction which was emphasized by the court in *Hood & Sons v. Du Mond* in comparing the result of that case with *Milk Control Board v. Eisenberg*, wherein the court had sustained a somewhat similar statute licensing dealers in milk.[35]

In dealing with commerce clause objections to state statutes controlling health, safety, morals, and related areas where state power to act has for years been easily sustained as against due process objection, the court has found it easy to state that these are matters of purely local concern which only indirectly affect interstate commerce. Thus, non-discriminatory state laws have been sustained in regard to the weight, size, width, and height of vehicles operating on its highways,[36] imposing taxes to defer costs of highway construction and maintenance,[37] and providing

[34] See also: Munn v. Illinois, 94 U.S. 113 (1876); German Alliance Ins. Company v. Kansas, 233 U.S. 389 (1914); Ribnik v. McBride, 277 U.S. 350 (1928); but, this doctrine of need to show business affected with a public interest to sustain certification or price control was abandoned in Nebbia v. New York, 291 U.S. 502 (1934), *Cf.* Lincoln Union v. Northwestern Co., 335 U.S. 525, 535-536 (1949); 47 Harv. L. Rev. 130 (1933). For further discussion in the motor carrier area, see Brown and Scott, *Regulation of the Contract Motor Carrier under the Constitution*, 44 Harv. L. Rev. 530 (1931); Michigan Commission v. Duke, 266 U.S. 570, 578 (1925).

[35] *Supra* n. 33, 530-531; Milk Board v. Eisenberg Co., 306 U.S. 346, 352-353 (1939). In the Eisenberg case, sustaining provisions of a statute requiring license, bond, and regulation of prices to be paid to producers, the Court found that their purpose "obviously is to reach a domestic situation in the interest of the welfare of the producers and consumers" [352] and their effect on interstate commerce is "incidental and not forbidden by the Constitution, in the absence of regulation by Congress" [353]. Construing this in the Hood case, the Court indicated that New York's "regulations, designed to assure purchasers a fair price and a responsible purchaser, and consumers a sanitary and modernly equipped handler, are not challenged . . . . [O]nly additional restrictions, imposed for the avowed purpose and with the practical effect of curtailing the volume of interstate commerce to aid local economic interests . . . are in question" [531-2].

[36] S. C. Hwy. Dept. v. Barnwell Bros., 303 U.S. 177 (1938); Sproles v. Binford, 286 U.S. 374 (1932); Morris v. Duby, 274 U.S. 135 (1927); and Bradley v. Pub. Util. Comm'n., 289 U.S. 92 (1933).

[37] Hendrick v. Maryland, 235 U.S. 610 (1915); Kane v. New Jersey, 242 U.S. 160 (1916).

for inspections or quarantine.[38] In the development of doctrine such laws met no serious difficulty with the "direct burden" test but were subject to objection under the Commerce Clause only if they placed too heavy a burden upon interstate commerce,[39] or if they conflicted with pre-existing federal laws.[40]

Two cases, *Di Santo v. Pennsylvania*[41] and *California v. Thompson*,[42] dealing with essentially the same problem, but getting opposite results within fourteen years, well illustrate the extent to which the result in a given case may be controlled by which one of the above referred to tests is applied, and at the same time spell out the beginning of Mr. Justice Stone's weighing approach as a dissenting opinion and its later acceptance as a majority view. Using the "direct burden" test in the *Di Santo* case, the Court held invalid a Pennsylvania statute which required that a license be obtained by all persons selling steamship tickets or transportation to or from foreign countries, which license was only to be granted after proof of good character and fitness, and assessing a fee of fifty dollars to be paid by all such persons. In addition the license was made revocable for misbehavior on the part of the licensee. The majority of the Court reasoned that this statute placed a direct economic burden upon interstate and foreign commerce, and therefore, could not be sustained under the Commerce Clause.

Mr. Justice Stone, with whom Justices Brandeis and Holmes concurred, delivered a strong dissent disagreeing with the test used by the court in striking down the Pennsylvania statute. He said:

> "In this case the traditional test of the limit of state action by inquiring whether the interference with commerce is *direct* or *indirect* seems to me too mechanical, too uncertain in its application, and too remote from actualities, to be of value. In thus making use of the expressions 'direct' and 'indirect interference' with commerce, we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached."[43]

[38] Mintz v. Baldwin, 289 U.S. 346 (1933); Whipple v. Martinson, 256 U.S. 41 (1921); Kelley v. Washington, 302 U.S. 1 (1937). See also 33 Col. L. Rev. 1063 (1933).

[39] Buck v. Kuykendall, 267 U.S. 307 (1925); Bush Co. v. Maloy, 267 U.S. 317 (1925).

[40] Penna. R.R. Co. v. Pub. Service Comm., 250 U.S. 566 (1919); Napier v. Atlantic Coastline, 272 U.S. 605 (1926).

[41] 273 U.S. 34 (1927).

[42] 313 U.S. 109 (1941), noted 41 Col. L. Rev. 1104 (1941).

[43] *Supra*, n. 41, *dis. op.* 43, 44.

It was the opinion of Mr. Justice Stone that all of the circumstances surrounding the regulation and its application should be weighed, before reaching a decision, namely the nature and purpose of the regulation, the character of the business involved, and the actual effect that the regulation would have upon the flow of commerce. In his opinion this "weighing approach" as applied to the *Di Santo* case would have led to the conclusion that the regulation concerned interests peculiarly local in nature and did not infringe upon the national interest in maintaining the free flow of commerce (a result similar to that obtained in the *Eisenberg* case).[44]

The effect of Mr. Justice Stone's dissent in the *Di Santo* case is seen in the Court's decision in *California v. Thompson*[45] where the Court, applying the so-called "weighing approach", upheld a California statute which required a license and bond from transportation agents within the state who negotiated for interstate bus transportation. The Court, in an opinion by Mr. Justice Stone, said:

> "Since the decision in [the Di Santo] case this Court has been repeatedly called upon to examine the constitutionality of numerous local regulations affecting interstate motor vehicle traffic. It has uniformly held that *in the absence of pertinent Congressional legislation* there is constitutional power in the states to regulate interestate commerce by motor vehicle wherever it affects the safety of the public and convenient use of the highways, provided only that the regulation does not in any other respect *unnecessarily obstruct interstate commerce.*"
>
> "[The states] must be deemed to possess the power to regulate the negotiations for such transportation where they affect matters of *local concern* which are in other respects within state regulatory powers, and where the regulation does not infringe the *national interest* in maintaining the free flow of commerce and in preserving *uniformity* in the regulation of the commerce in matters of *national concern.*"[46]

The opinion further stated that the *Di Santo* case was a departure from this principle which had been recognized since *Cooley v. Board of Wardens of Port of Philadelphia.*[47]

[44] 306 U.S. 346 (1939).
[45] 313 U.S. 109 (1941).
[46] *Ibid.*, 115-116. [Emphasis added.]
[47] 12 How. 299 (U.S. 1851), see note 27, *supra.*

The "weighing approach" came to full fruition in *Southern Pacific Company v. Arizona*,[48] where the Court, again speaking through Mr. Chief Justice Stone, held in a 7-2 decision that the Arizona Train Limit Law of 1912, which prohibited the use of more than fourteen passenger cars or seventy freight cars as a safety measure and imposing a penalty for non-compliance, was legislation affecting subject matter which required national uniformity and was of a nature which Congress alone could regulate under the Commerce Clause, and therefore, the Arizona Law was unconstitutional. After summarizing prior law and doctrine, Mr. Justice Stone enunciated and applied his "weighing approach" in the following words:

> ". . . the matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the *relative weights* of the *state* and *national interests* involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the Commerce Clause from state interference."[49]

Justices Black and Douglas delivered separate dissenting opinions in which both took the view that in absence of discrimination such legislation as under discussion should be sustained until Congress should clearly speak to the contrary. The former strongly criticized the Arizona courts and the Supreme Court for hearing and reviewing massive evidence as to why the state legislature passed the Train Limit Law and the necessity therefor. The Court, according to him, was acting as a "super-legislature" by determining a matter necessarily of public policy which "a century and a half of constitutional history admonishes this Court to leave . . . to the elected legislative representatives of the people themselves . . . ."[50] Mr. Justice Douglas, also dissenting, in enunciating essentially the same view, stated that the doctrine should be ". . . that the courts should intervene only where the state legislation discriminated against interstate commerce or was out of harmony with laws which Congress had enacted."[51]

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[48] 325 U.S. 761 (1945), noted 31 Va. L. Rev. 943 (1945).
[49] *Ibid.*, 770-771.
[50] *Supra* n. 48, *dis. op.* 784, 789.
[51] *Supra* n. 48, *dis. op.* 795.

From the above decisions, it would appear that the majority of the Supreme Court after the *Di Santo* case, and particularly during Chief Justice Stone's administration, had shifted from the "direct-indirect" approach to the "weighing approach" in determining the validity of state regulations of commerce (although it is to be noted that the cases did not involve so-called business or economic controls, as distinguished from health, safety or morals controls). However, the Court, except where discrimination against interstate commerce was manifest, remained divided as to what test should properly be applied to administer the *Cooley*[52] doctrine, and four years later a 5-4 decision in *Hood & Sons v. Du Mond*,[53] as earlier observed, used the "direct burden" test to strike down a New York statute which forbade dealers from purchasing milk from producers without first obtaining a license, which would not be granted if the activity of the dealer would tend toward destructive competition.[54] The principle enunciated in that case illustrates that the majority once again felt that any legislation which has the effect of directly interfering with the free market is per se bad.[55]

As in *Southern Pacific Company v. Arizona*,[56] two justices wrote dissenting opinions in the *Hood & Sons* case.[57] Mr. Justice Black took the position that the New York regulation was a proper exercise of the police power of that state, in that it had a right to protect local business from dangerous competition. Furthermore, he could not find that the New York regulation was discriminatory, and therefore, in accordance with his views in *Southern Pacific Company v. Arizona*, he was of the opinion that the state statute should stand. Mr. Justice Frankfurter, with whom Mr. Justice Rutledge joined in dissenting, took the position that the majority erred in not sufficiently weighing the underlying factors, which gave rise to the New York statute, to determine "whether or not the restriction of competition among dealers in milk does in fact contribute to their eco-

[52] 12 How. 299 (U.S. 1851).

[53] 336 U.S. 525 (1949), noted 37 Cal. L. Rev. 667 (1949), 35 Corn. L. Q. 211 (1949), 34 Minn. L. Rev. 60 (1949), 3 Vand. L. Rev. 113 (1949).

[54] *Supra, circa*, ns. 33-35.

[55] The doctrines used by the Court in the preceding cases are substantially the same as those applied in state taxation and labor disputes affecting interstate commerce. Minnesota v. Blasius, 290 U.S. 1 (1933); McGoldrick v. Berwind-White Co., 309 U.S. 33 (1940), *supra, circa*, n. 29; Freeman v. Hewit, 329 U.S. 249 (1946); Guss v. Utah Labor Board, 353 U.S. 1 (1957), noted 18 Md. L. Rev. 50 (1958). See also: 47 Col. L. Rev. 211 (1947); 54 Col. L. Rev. 261 (1954).

[56] 325 U.S. 761 (1945), *dis. ops.* 784, 795, noted 31 Va. L. Rev. 943 (1945).

[57] 336 U.S. 525 (1949), *dis. ops.* 545, 564, noted as indicated, *supra* n. 53.

nomic well-being and, through them, to that of the entire industry."[58]

There can be no question but that the operation and maintenance of a grain elevator is essential to the free flow of interstate and foreign commerce, and that the regulation, under which the Public Service Commission of Maryland asserted its jurisdiction in the instant case, was an economic control and in that sense placed a *direct burden* upon such commerce, as found by the trial court. The only problem is in determining whether the Court was correct in using the "direct burden" doctrinal approach for testing the constitutionality of local regulations of commerce, or whether it should have used the weighing approach of Mr. Justice Stone. Since it is not clear what approach would prevail on the Court today, there is no clear prediction possible as to what the Supreme Court would rule as to the applicable test, or even as to how far a state may go in regulating commerce in any particular manner.

The cases discussed above would seem to indicate that the result reached by the trial court in the instant decision was correct and that the test chosen was the one which the majority of the Supreme Court has followed in several cases raising commerce clause objections to state economic controls placed on business. On the other hand, it would seem that at the time of *Southern Pacific v. Arizona*, Mr. Chief Justice Stone had assembled a clear majority in favor of his "weighing" approach which he felt should supersede and replace all others. A survey of the cases, however, with the majority shifting from time to time as to the test to be used, leaves this writer in doubt as to what might be expected from the present Supreme Court.

"[W]ere we writing on a clean slate",[59] this writer would find the simplest, if not the best, test to be that of Mr. Justice Black of sustaining all non-discriminatory state regulations until Congress either expressly denounces the regulatory measure or supersedes it by imposing its own. It could be argued that the Court should adopt this view as being most consistent with that which it has espoused in handling objections to state regulations under the Due Process Clause, namely that ". . . it is for the legislature, not the courts, to balance the advantages and disadvantages of [a] new requirement".[60] As Mr. Justice Black might urge, it

[58] *Ibid.*, 564, 573.

[59] Borrowing a phrase from Mr. Justice Frankfurter — see Galvan v. Press, 347 U.S. 522, 530 (1954).

[60] Williamson v. Lee Optical Co., 348 U.S. 483, 487 (1955). See also: Nebbia v. New York, 291 U.S. 502 (1934); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421

would only be leaving to Congress the legislative task of asserting clearly when national regulations exclude state controls, and also when state controls have intruded where Congress feels uniform freedom from control is required.

However, until some clearer pronouncement from Congress, or the Court, occurs, the difficulty of choosing the applicable test from outstanding majority opinions so as to predict the validity of any future state regulation is illustrated by the generality of the conclusion recently drawn by Professor Thomas Reed Powell, ". . . that one might safely say that the states may regulate commerce some, but not too much".[61]

(1952); Berman v. Parker, 348 U.S. 26 (1954). The repudiation of a jurisprudence of formulas in the above cases, as in the area with respect to the extent of the power of Congress under the Commerce Clause (see Wickard v. Filburn, 317 U.S. 111, 123-124 (1942) would indicate the ultimate weakness in this area of the "direct burden" nomenclature.

[61] POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION (1956) 178. Professor Powell, after voicing the cited conclusion, then said:

> "Once I asked Mr. Justice Holmes why counsel should not give up prating about national and local, uniformity and diversity, and tell the court that the law is free for a decision either way, and then add: 'I propose to confine myself to practical consideration why my way is wiser than my opponent's way.' He remarked: 'I wish to God they would'." *Ibid.*