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STATE POLICE REGULATION OF PERSONS DEALING IN INTERSTATE COMMERCE

By HARRY POLIKOFF*

The recent decision of the Supreme Court of the United States in *Milk Control Board of Pennsylvania v. Eisenberg Farm Products, Inc.*\(^1\) compels reexamination of a number of decisions of the Court affecting the extent to which persons\(^2\) may be licensed or otherwise subjected to police regulation by states with respect to dealings in interstate commerce.

Where state regulation is limited to the exclusively intrastate business of the licensee, no serious question is raised notwithstanding that such person also deals in interstate commerce. However, where the interstate activities are affected, questions of increasing concern are raised.

It has been said, "The raw material of modern government is business."\(^3\) This is clearly demonstrated in the fact that few businesses may be conducted today without the owners thereof being licensed by municipality, county, state or the federal government—and sometimes by two or more of these jurisdictions. Dealers in milk,\(^4\) liquor, grain, oil, fertilizer, fresh produce, tobacco, drugs, cotton are only a few of the business men subjected to police ordinances and statutes in virtually every state of the nation. These measures are usually designed to protect or promote public health, safety or morals, or to prevent fraud, imposition or unfair practices, in the furtherance of public welfare. The means adopted to this

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159 S. Ct. 528 (1939).

\(^1\) "Person" is herein used to include an individual, partnership, association or corporation.

\(^2\) FRANKFURTER, Mr. JUSTICE HOLMES AND THE SUPREME COURT (1938) 5.

\(^3\) Milk Control Board v. Eisenberg Farm Products, Inc., 59 S. Ct. 528 (1939), involved a statute which probably is the maximum in valid regulation under the state police power (exclusive of liquor regulations and statutes with respect to public utilities). Hence it makes an appropriate illustration in discussing the respective spheres of federal and state powers.

it in New York."
end are often the requirement of license, adherence to certain practices and abstinence from others, bond or other guarantee of responsibility, filing information, examination or inspection of books, records, operations, or goods handled; and sometimes extend to the requirement of minimum rates for wages or raw material, or maximum hours of employment or operation.

Where all or the largest part of an enterprise involves the handling (not manufacture) of goods for shipment to other states, or of goods received from other states, to what extent is the handler subject to the state police statutes which impose such "business regulation"?

Prior to the Eisenberg case, receivers of commodities for exportation to other states seemed to be cleared of state police regulation by several sweeping decisions, including Lemke v. Farmers Grain Company, Shafer v. Farmers Grain Company, and DiSanto v. Pennsylvania. In the Lemke case, the Court held unconstitutional a statute of North Dakota which required operators of grain elevators to obtain licenses therefor, authorized the state grain inspector to determine the margin of profit realized on grain purchased, prescribed certain grain standards, and authorized state examination of the operator's plant, books and records. The majority opinion was based upon the invalidity of the price-fixing provision, limiting the margin of profit; it was held that the other provisions of the enactment were not severable; that the whole constituted a violation of the interstate commerce clause because virtually all of the grain received at the elevator was ultimately shipped to other states.

North Dakota promptly amended and reenacted its statute regulating grain elevators, removing the objectionable price-fixing provision. Once again the Court, in the Shafer case, set the statute aside as an infringement of the commerce clause. Whereas three justices had dissented in the Lemke case, here only Mr. Justice Brandeis did so.

The DiSanto case (which, like the Eisenberg case, arose in Pennsylvania)
involved a statute which required persons selling steamship tickets to procure a state license and to post a bond. Again, a divided court invalidated the statute under the commerce clause, the majority relying in part upon the Shafer decision.

In view of these authorities, it is not surprising that the Court of Common Pleas of Dauphin County and the Supreme Court of Pennsylvania refused to sustain the Milk Control Law of Pennsylvania in its application to Eisenberg Farm Products, Inc., buying milk within the state for shipment in interstate commerce. In a well-reasoned opinion, Judge Sheely in the court below relied upon the Farmers Grain cases; in the Supreme Court, Mr. Chief Justice Kephart (reluctantly) held the issue "controlled" by these and the DiSanto case, although stating, "We have felt, and still feel," that state power attached in the absence of federal legislation. However, distinguishing these three earlier decisions in one sentence, the Supreme Court of the United States, again divided, reversed the state court and sustained the statute.

By carefully examining the facts of the Eisenberg case, its full implications are clear, since few regulatory statutes are as far-reaching as the Milk Control Law of Pennsylvania. The entire supply handled by the defendant was shipped in interstate commerce; therefore every question raised in the earlier cases was raised here. The defendant, a Pennsylvania corporation, bought its milk supply at a receiving plant operated by it within the state, from Pennsylvania farmers. At this plant, the milk of the individual farmers was weighed and tested, then dumped into large receiving tanks wherein the milk was accumulated and cooled solely for the purpose of shipment; the milk was transferred directly from these cooling tanks to tank trucks operated for the defendant, the journey of which was continuous from the plant to New York. All of the milk thus received by the defendant was shipped to and resold in New York; none was sold in Pennsylvania.

The Milk Control Board, in equity proceedings, sought to restrain the defendant from doing business without complying with the Milk Control Law. The three main grievances were that the defendant refused (1) to obtain a license, (2) to file a bond for the protection of farmers from whom milk was purchased on credit, and (3) to pay such farmers certain minimum prices prescribed by the Board. Additional statutory requirements, indirectly involved, required that the defendant file certain information pertaining to its business, keep certain records, and permit their examination by the Board; it happened that the defendant was not required to pay a license fee. The Board desired to apply the statute to intrastate and interstate milk dealers, alike.

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1844 Dauph. 326.
1285 Pa. 1 (1923).
14Supra, note 13; see also note 11.
15Act of April 30, 1935, P.L. 96; revised, extended, and proceedings thereunder continued by, Act of April 28, 1937, P.L. 417, 31 PURD. STATS. (Pa.) §101 et. seq. "Milk dealer" is defined to include dealers within the state for sale within or without the state.
So far as the language and spirit of the opinions are concerned, it is difficult to reconcile the Farmers Grain cases with the result reached by the Supreme Court of the United States in the Eisenberg case—and impossible to reconcile the DiSanto case with the latter. On their facts, the differences are greater; these will be discussed below. Apparently, the only difference between the cases is that the persons affected dealt in grain and steamship tickets, rather than milk. Hence, the question arises: in this type of regulation, what facts should be sought in order to determine whether the state may or may not license and otherwise regulate dealers in interstate commerce?

The Constitution of the United States delegates to Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." This provision has been interpreted to mean, however, that in matters "admitting of diversity of treatment according to the special requirement of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act." This is not a new principle. Over a century ago the Court announced that the delegation of power over interstate commerce to the Federal Government was not exclusive. A classification of commerce powers was made in Covington & Cincinnati Bridge Co. v. Kentucky, as follows:

"The adjudications of this court with respect to the power of the states over the general subject of commerce are divisible into three classes. First, those in which the power of the state is exclusive; second, those in which the states may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the states cannot interfere at all."

Probably the first state regulation of business which tested the commerce clause came before the Court in Mayor, etc. of New York v. Miln. Here the Court sustained a statute requiring masters of vessels arriving in the port of New York to report to city officials certain information upon all passengers carried. It soon became clear, as later so well expressed in Simpson v. Shepard, that

"... there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation

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17Art. I, Sec. 8, Cl. 3.
19Mayor, etc. of New York v. Miln, 11 Pet. 102, 9 L. Ed. 648 (1837); see Wilson v. Blackbird Creek Marsh Co., 2 Pet. 245, 7 L. Ed. 412 (1829); Cooley v. Board of Wardens of the Port, 12 How. 299, 13 L. Ed. 996 (1851).
21154 U. S. 204 (1894).
2211 Pet. 102; 9 L. Ed. 648 (1837).
23The Minnesota Rate Cases, 230 U. S. 352 (1913).
from the foundation of the government because of the necessity that they should not remain unregulated, and that their regulation should be adapted to varying local exigencies; hence . . . the states should continue to supply the needed rules until Congress should decide to supersede them. Further, it is competent for a state to govern its internal commerce to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals, and welfare of its people, although interstate commerce may incidentally or indirectly be involved.

The licensing and regulatory statutes with which this article is concerned clearly fall within the "protective measures" above described, and within the second classification of the Covington rule: the sphere in which the states may act in the absence of legislation by Congress.

However, Simpson v. Shepard was but one of a host of cases which sought to differentiate between such measures "directly" and "indirectly" or "incidentally" affecting interstate commerce. Many other decisions sought to differentiate between "burdening" and "incidentally" affecting interstate commerce. What could these broad, elastic words mean? They constitute neither a principle nor a fact. Yet their tyranny has dictated the course of a large part of the respective spheres of influence in our dual system of government.

A vigorous voice lifted in revolt was that of Mr. Justice Cardozo in Baldwin v. Seelig, wherein a unanimous court decreed that "formulas and catchwords are subordinate"; that the "nice distinctions . . . made at times between direct and indirect burdens" may be "irrelevant." The Court soon lapsed into the old language, but later, in South Carolina v. Barnwell Bros., the Court frankly conceded that a state statute regulating motor vehicles "materially interfered with" or "burdened" interstate commerce and sustained it nevertheless. In the Eisenberg opinion, Mr. Justice Roberts only reverted to the distinction between "burden" and "incidental burden" as a means to an end, realistically stating: "That question can only be answered by weighing the nature of the respondent's activities, and the propriety of local regulation of them, as disclosed by the record."

Thus, if we are seeking rules, we at last have one: the rule of propriety. The effect of such rule is to discard dogma, and instead to raise such queries as whether the statute, in its practical operation, is or is not one which should fall as imposing

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24 Townsend v. Yeomans, 301 U. S. 447 (1937), e. g.
29 303 U. S. 117 (1938).
a regulation infringing upon the rights of another state or of the United States, instead of regulating the persons affected thereby; and whether the business men under regulation can reasonably carry on their activities in interstate commerce, notwithstanding the state regulation, in relation to competitors or potential competitors in interstate or in intrastate commerce. This rule is frank recognition of the judicial process by which the commerce clause should be interpreted, of the inevitability that both legislatures and courts—government—follow the practicalities of this commercial world in adopting and interpreting rules of human conduct.

In fact, the practical necessity that the states and their respective citizens "get along" if the Union were to exist, compelled the recognition that certain types of legislation would defeat this objective. If any single thought can be said to underly the commerce clause, it is the desire not to "gain for those within the state an advantage at the expense of those without." One common kind of statute intended to be forbidden is described by James Madison in a concise history of the commerce clause, as follows:

"It is very certain that it grew out of the abuse of the power by the importing states in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the states themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged."

Other statutes intended to be forbidden by the framers of the Constitution are found in the Articles of Confederation; certainly the problem was similar in 1777 and 1787. Here it is stated:

"The better to secure and perpetuate mutual friendship and intercourse... the people of each state shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively..."

The Constitution, being a delegation of powers to a central government rather than a compact between states, did not require this lengthy statement.

Taken in its setting, we therefore find that at the time the commerce clause was written, the "rule of propriety" would have outlawed three types of legislation:

31 South Carolina v. Barnwell Bros., 303 U. S. 117 (1938) (see footnote 2 of the opinion).
33 Art. IV.
importing states legislating against goods or persons of exporting states, by erecting tariff or financial barriers against movement from other states; states legislating in a manner tending to discriminate against the movement of goods to, or the activities of persons within the state dealing with, other states; exporting states legislating with respect to persons or activities within the state of destination.

The clearest description of the first type of statute is found in Baldwin v. Seelig:

"What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation . . . Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents."

A clear statement of the second type is found in South Carolina v. Barnwell Bros.:

"In each of these cases regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states."

The third classification is apparently the only manner in which to explain other decisions, and was never isolated until the Eisenberg case, from which Mr. Justice Roberts distinguished the Lemke case as follows:

". . . Lemke v. Farmers Grain Co., 258 U. S. 50, condemned a state statute affecting commerce, over ninety per cent of which was interstate and essaying to regulate the price of commodities sold within the state payable and receivable in the state of destination . . ."

In the Eisenberg situation, the defendant, all of whose milk supply was shipped in interstate commerce, was held subject to the state law which operated so as to require that it pay a certain price within the state to the milk producers of the state who sold to the defendant. This is a far cry from the regulation of prices paid in states other than the legislating one.

34294 U. S. 511, 527 (1935).
35303 U. S. 177 (1938).
However, can the Shafer and DiSanto cases be reconciled with or factually distinguished from the Eisenberg case? Mr. Justice Roberts’ explanation that the former “dealt with a state law intended to regulate commerce almost wholly interstate in character” does not seem complete, inasmuch as the quantum of commerce affected has not prevented the Court from sustaining state statutes in many cases.37 One writer has taken the view that the Shafer case turned on the fact that Congress had already occupied the field,38 and a careful reading of the opinion convinces that the Court was shocked by a state statute which added to prior regulation imposed on the grain industry by Congress. Congress having acted upon the subject matter of the statute, it is unnecessary to attempt to classify it: regardless of its type, it must fall before the exercise of the higher, federal power.

The DiSanto case—if one examines its facts but ignores its language—is a clear example of the discriminatory (second type) statute. The act involved, by its title, was limited to the regulation (licensing and bonding) of persons selling steamship tickets to or from foreign countries. This necessarily involved regulation of foreign commerce and foreign commerce only—discriminatory legislation, imposing restrictions upon such commerce of which local commerce was left free (notwithstanding that illiterate foreigners required protection with respect to local financial dealings, as well as foreign). That this point was not even raised in the DiSanto case indicates how the subject has been clouded by the accordion words “burden” or “indirect burden.” Here, as in all cases, the cataloguing of factual situations brings the result within or without the rule of propriety.39

It is easy to be “wise after the event,” but, reflecting upon the Farmers Grain cases, it is difficult to understand why the Court used language so broad as virtually to ignore the line of authorities based on Munn v. Illinois,40 which sustained statutes regulating the grain industry. Furthermore, the Court about the same time held unequivocally that the Congress had the power to regulate various aspects of the dealings in grain and livestock,41 including such matters as licensing, bonding, storage rates, handling charges and trade or price practices, notwith-

38Gavit, Interstate Commerce (1932) 244, 261.
39Cf. 2 Willoughby, Constitution of the United States (2nd Ed., 1929) Sec. 605, p. 1021, to the effect that the cases “rest upon their individual merits.” This is not inconsistent with the contention herein that the apparently conflicting decisions fall into three patterns.
4094 U. S. 113 (1876). This case has been time-honored as authority for state rate regulation; that the warehouseman regulated therein was a shippers in interstate commerce has become obscured, although the Court discussed this phase of the case as well. The line of cases based on Munn v. Illinois, pertaining to state regulation of grain warehouses or elevators, consists of Brass v. State of North Dakota, 153 U. S. 391 (1894); People v. Budd, 143 U. S. 517 (1892); W. W. Cargill Co. v. State of Minnesota, 180 U. S. 452 (1900), in all of which it was held that state licensing and other regulations (such as bonding, inspection of records, or the prescribing of certain handling charges) were applicable to the interstate commerce (exporting to states other than the legislating state, and to foreign countries) of the licensee.
standing that the regulated person and all his activities took place physically within a single state; this, long before the broad recognition of the relation between local activities and interstate commerce, in recent opinions approving of federal jurisdiction. Little wonder, therefore, that *Munn v. Illinois* and its succeeding cases appeared to be in the discard. For example, nothing the Court said in the *DiSanto* case could explain why dealers in interstate and foreign grain could be licensed and bonded under the state police power, but not dealers in foreign steamship tickets. That the latter statute was discriminatory was not noted until the *Eisenberg* opinion.

The extent of state authority was further clouded in the *Attleboro* case. Here, as in the cases just discussed, police regulation of an exported commodity was sought. The state attempted to prescribe a rate for electricity including that produced within the state and sold within the state for transmission to another state. This case was relied upon heavily by the defendant in the *Eisenberg* case, as authority against application of the price-fixing provision of the Pennsylvania Milk Control Law to dealers purchasing milk produced within Pennsylvania from Pennsylvania farmers, for sale by such dealers in other states; however, the case was not distinguished in the *Eisenberg* opinion. It is clear that the *Attleboro* case falls within the third type of situation above: legislation by an exporting state with respect to persons or activities within the state of destination; even the dissenting opinion admitted "the electricity is delivered for use in another state," and the delivery was made at the state line. In the *Eisenberg* case, the milk was delivered in the regulated transaction between producer and dealer within the state. Thereupon the dealer could sell within the state, without the state, or drink the milk himself. A second delivery had to take place, from the dealer to his customer in the other state, but this delivery was not regulated; if the price of this second transaction were prescribed, it certainly would have been held invalid. The "propriety of local regulation" is certainly lacking where its incidents must be borne by persons beyond the boundaries of the regulating jurisdiction; here, the temptation to "gain for those within the state an advantage at

43Supra note 40.
44Supra note 40. Apparently the bonding provision of the Illinois statute was not brought in issue in *Munn v. Illinois*; cf. Brass v. State of North Dakota, 133 U. S. 391 (1894); see, however, Merchants Exchange of St. Louis v. State of Missouri, 248 U. S. 365 (1919), in which a statute requiring grain weighers to be licensed and bonded was sustained in its application "to grain received from or shipped to points without the state."
47Supra note 46, at 91.
48Highland Farms Dairy, Inc. v. Agnew, 300 U. S. 608 (1937). In the *Eisenberg* opinion, the Court states: "The Commonwealth does not essay to regulate or to restrain the shipment of the respondent's milk into New York or to regulate its sale or the price at which respondent may sell it in New York."
the expense of those without" is obvious, as also the practical difficulties of enforcing such measures. This is certainly a situation in which regulation, if any at all is to be imposed, must emanate from the central government; here, even the absence of federal regulation will not permit the state police power to reach extra-state persons or activities.

In attempting to classify state police statutes, or the decisions of the courts thereon, the first inquiry under the classification herein is whether importing or exporting is affected by the regulation, or both; second, whether the regulating state is that which does the importing or whether it is the exporting state; third, in cases of regulation by importing states, whether the statutory purpose or effect is to erect a tariff barrier against another state; fourth, whether importers or exporters are treated differently from dealers in intrastate commerce; fifth, whether the activity or person directly affected in the regulated export transaction is within or without the regulating state.

Little has been said thus far of the first classification. The most common tariff barrier against the goods of another state is erected through the tax power, rather than the police power; however, some police power statutes have been set aside as having the same economic effect as a tax on imports. No discussion is necessary in the case of an inspection statute, where the inspection fee is sixty times the actual cost of inspection, but there is no objection to a reasonable fee. Other instances of state police regulation, however, have created interesting conflicts with federal jurisdiction. In one case, the state of Kentucky sought to prescribe a rate of bridge toll applicable not only to persons crossing from Kentucky to Ohio, but also from Ohio to Kentucky; the Court properly objected that this "practically nullifies the corresponding right of Ohio to fix tolls from her own state." Perhaps, if an effort had been made to classify the cases it would have been obvious later that this case ruled Baldwin v. Seelig.

The defendant in the Eisenberg case argued vigorously that it was ruled by Baldwin v. Seelig. In comparing the two situations we not only illustrate the first classification, but also the underlying rule of propriety. Both involved milk price regulation. In Baldwin v. Seelig the State of New York attempted to fix the price to be paid by New York dealers not only to New York farmers, but also to Vermont farmers for milk purchased there by such dealers for sale in New York; the regulation was imposed upon the dealer in New York, by prohibiting sale, within the state, of milk purchased elsewhere at less than the

49 Farrand, Records of the Constitutional Convention (1911) 478.
51 Pure Oil Company v. State of Minnesota, 248 U. S. 158 (1918), and the many citations therein.
prescribed price. The sole difference between this and the Eisenberg situation is that in the latter the regulating state is exporting rather than importing. It is submitted that non-discriminatory pricing of an exported commodity is entirely different from pricing an imported commodity; the latter means the equivalent of a tariff, vigorously condemned by the framers of the Constitution and obviously beyond the rule of propriety, an improper type of state regulation which limits the extent to which goods of other states can compete with those of the legislating state. Even though higher milk prices could permit more sanitary milk for consumption by the inhabitants of the legislating state, the statute which fixes milk prices for imports must fall as a tariff barrier, while that which fixes identical prices for exports (as well as milk sold in intrastate commerce, to avoid discrimination) is sustained. However, it should be noted that both cases dealt with the price paid by the milk dealer to the farmer; (and that the price provision sustained in the Eisenberg case applied to the milk which the dealer bought from the farmer in order to export, rather than to the export itself). There seems a wide difference between regulation, the incidents of which are directly borne by persons within the regulating state, and that which affects persons beyond the state line; in Baldwin v. Seelig, the farmers were situate in Vermont rather than New York, the legislating state; in the Eisenberg case, both farmer and dealer were located in Pennsylvania, the legislating state.

Thus, the Covington case and Baldwin v. Seelig are identical: the state attempted to prescribe rates for persons and milk moving into its borders. Basically, as above indicated, the cases are entirely different from the Eisenberg situation; the latter, an exporting case, could not possibly fall within the first classification. Nevertheless, we find even the author of the opinion in Baldwin v. Seelig citing it for the broad principle that "Prices in interstate transactions may not be regulated by the states." This rule is clearly limited by Mr. Justice Roberts in the Eisenberg decision, distinguishing the former as "a tariff barrier set up against milk imported into the enacting state," notwithstanding that in both the regulated transaction constituted interstate commerce.

It is important to note that in the second, or discriminatory, type of statute it is immaterial whether importation or exportation is involved. Thus, a state statute requiring all produce dealers or commission merchants to be bonded is valid in its application to produce imported into the enacting state; similarly, the bonding of all milk or grain dealers, as applied to milk or grain exported from the enacting state. But if the bonding statute is designed solely for exporters or importers it is stricken down. A vivid illustration is found in the

55154 U. S. 204 (1894).
58Milk Control Board of Pennsylvania v. Eisenberg Farm Products, Inc., 59 S. Ct. 528 (1939); and cases supra note 40.
so-called "inspection measures": whether imports or exports, state inspection laws and the permit requirements thereof are sustained where the commodity is reasonably the subject of inspection and is inspected regardless of its source for the prevention of fraud and imposition. But where the law applies solely to imports, the inspection is obviously an excuse to discriminate against competition with other states and therefore not sustainable. The abhorrence of discrimination against dealings with other states applies also to the prohibition of exports, even in the interest of conservation for the welfare of the inhabitants of the enacting state. Non-discriminatory regulation, applied to exports, is obviously different from prohibition, and sustainable.

Further illustrative of the measures stricken down as discriminatory are the so-called peddler statutes, e.g., those imposing penalties or requirements upon persons "not having a regularly licensed house of business in the Taxing District." Cases in direct contrast involve a statute requiring a license and bond of such peddlers alone (held invalid), and a statute requiring persons likewise without an established place of business, i.e., operators of motor carriers, to file a liability insurance policy whether doing business in intrastate or interstate commerce (held valid).

A similar tendency toward discrimination is shown in certain state statutes forbidding use of state courts for enforcing contracts made within the state by persons from other states, except under certain conditions. These cases are, in a sense, beyond the scope of this article; they generally pertain to the exercise of state sovereignty over foreign corporations as distinguished from the exercise of state police power over the general dealings of the person affected. Naturally, the tendency in such cases is to find that the person was dealing in interstate commerce, and that such restriction thereon is invalid. Here the mere fact that interstate commerce is involved is sufficient to condemn application of the statute;

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63 West v. Kansas Natural Gas Co., 221 U. S. 229 (1911); Pennsylvania v. West Virginia, 262 U. S. 553 (1922); Foster-Fountain Packing Co. v. Haydel, 278 U. S. 1 (1928).
65 Robbins v. Taxing District, 120 U. S. 489 (1887).
68 Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282 (1921). The transaction in this case is identical with the other grain cases, except that delivery was made to a common carrier. This alone would seem insufficient to differentiate the Eisenberg case, since in both the interstate commerce was found to exist. The distinction, therefore, is in the nature of the statute; nevertheless, the Dahnke case has been cited indiscriminately in attacking the validity of general police regulations.
on the other hand, as pointed out above, this fact is not sufficient when the statute involved pertains to general dealings subjected to police regulation.

Another type of statute which is beyond the scope of this article is that enacted under the state taxing power as distinguished from the police power. It has been pointed out that state police jurisdiction over dealings in interstate commerce is based upon the necessity that certain subjects in certain localities not remain unregulated unless and until Congress acts. Thus, there is no relation between the constitutional basis of state police regulation and that of state taxation. Notwithstanding this, it is not surprising to find tax cases cited in some decisions under the police power. There is ample authority for the proposition that the Commonwealth of Pennsylvania could have taxed the regulated transaction in the Eisenberg case (although not the transaction of resale or shipment over the state line); but it confuses issues to consider tax cases when weighing the constitutionality of general regulatory statutes. An obvious contrast lies in the fact that a non-discriminatory statute taxing the gross business of persons must fail unless it operates so as to fall only upon the intrastate portion of such business; but the license fee of a reasonable police statute requires no such apportionment.

There is a host of cases wherein the statutes considered operated against a commodity or thing, as distinguished from the course of dealing by persons. These include many "quarantine" statutes, where the main inquiry of the court is the good faith of the state legislating against imports. Where these aid in enforcement of comparable legislation just as stringently affecting intrastate commerce, their validity is clear; otherwise, they could consistently be placed in the second classification, similarly, the many "inspection" statutes designed to prevent frauds or to promote health or safety, and the many prohibitory laws so purposed. Many state laws govern the operation of the vehicles of commerce, such as motor carriers and railroads. The essence of all these cases is, first, that the enactment must be a reasonable exercise of the state police power; second,

61E. g., the majority opinion in the DiSanto case.
65See Pure Oil Company v. State of Minnesota, 248 U. S. 158 (1918). As a matter of comity, however, such apportionment may be provided. Sec. 410, Act of April 28, 1937, P. L. 417.
66Mintz v. Baldwin, 289 U. S. 346 (1933), and cases cited therein.
70Gladsen v. Minnesota, 166 U. S. 427 (1897); cf. Missouri, etc. R. Co. v. Texas, 245 U. S. 484 (1918).
that it operate in a manner tending not to discriminate against interstate commerce by imposing upon it restrictions of which intrastate commerce is left free.\textsuperscript{80}

In fact, the \textit{sine qua non} of state police regulation embracing interstate commerce is that the regulation be a valid exercise of the state police power—valid under the constitution of the state, and under provisions of the Constitution of the United States other than the commerce clause. Only if such validity is established does the question of interstate commerce arise; then, unless the statute falls within the above three patterns, state authority attaches in the absence of federal authority in the field.

If it were not desirable to classify the cases in an effort to seek the trend of decision, one could rest upon the following principle:\textsuperscript{81}

"In the absence of such [federal] legislation the judicial function under the commerce clause as well as the Fourteenth Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought."

It simply is not within the "province" of a state directly or indirectly to levy tariffs against sister states, even if a similar levy is imposed upon its own commerce for a legitimate police purpose; such purpose must be achieved differently, or by federal action.\textsuperscript{82} Similarly, it is not within the "province" of a state to let the incidents of regulation fall directly upon persons located in sister states.\textsuperscript{83} Legislation of such kind has an extra-jurisdictional effect, "which practically nullifies the corresponding right"\textsuperscript{84} of other states to legislate; this accounts for the first and third classifications above. As for the second, it is clear that it is within the province of a state to promote the welfare of its own citizens, but that regulation which does so only by means of reaching interstate commerce is not "reasonably adapted to the end sought" if the citizens remain the prey of intrastate commerce;\textsuperscript{85} it is otherwise if there is no intrastate commerce in the particular subject which affects the public.\textsuperscript{86}

Such frank limitation of the judicial function to the inquiry of whether the statute is a lawful exercise of the state police power\textsuperscript{87} shows the extent to which

\textsuperscript{80}In connection with general regulatory statutes, no attention has here been given to liquor dealings, because these are anomalous, especially since the 21st Amendment; Indianapolis Brewing Co. \textit{v.} Liquor Commission, 305 U. S. 391 (1939).

\textsuperscript{81}South Carolina \textit{v.} Barnwell Bros., 303 U. S. 177 (1938).

\textsuperscript{82}See also Constitution of the United States, Art. \textit{L}, Sec. 10. E. g., Baldwin \textit{v.} Seelig, 294 U. S. 511 (1935).

\textsuperscript{83}E. g., Covington \& Cinc. Bridge Co. \textit{v.} Kentucky, 154 U. S. 204 (1894).

\textsuperscript{84}Covington \& Cinc. Bridge Co. \textit{v.} Kentucky, 154 U. S. 204 (1894).


\textsuperscript{86}Townsend \textit{v.} Yeomans, 301 U. S. 447 (1937). It has not been contended herein that each class is always and necessarily exclusive of the others.

\textsuperscript{87}South Carolina \textit{v.} Barnwell Bros., 303 U. S. 177 (1938).
the Court now has departed from the philosophy (if not the actual holding, under the classifications herein) of some opinions of the recent past. The best element of business has long since decided that honesty should govern competitive enterprises, and that consideration of the health and welfare of others requires adherence to certain standards. The courts, in accepting the logic of realities, recognize that persons or industries cannot be regulated by states if an area without law can be created merely by ultimately shipping products to another state. Such "no man's land" would hurt interstate commerce, by encouraging unfair or unhealthful dealings therein, until such time as the federal government saw fit to act; furthermore, it would drive the federal government into local activities even beyond its present functions. The rule of propriety, on the other hand, permits state regulation within the police power, unshackled by "using labels to describe a result rather than any trustworthy formula by which it is reached." The three patterns of invalid state business regulations, described herein, of course are not presented as an infallible formula but as an aid in recognizing certain legislation deemed beyond the scope of propriety.

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88 That an evil required remedy appeared of little concern to the majority in the DiSanto case.