

Michigan Law Review

Volume 44 | Issue 6

1946

CONSTITUTIONAL LAW--STATE TAXATION OF INTERSTATE COMMERCE

George Brody S.Ed.
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Constitutional Law Commons](#), and the [Taxation-State and Local Commons](#)

Recommended Citation

George Brody S.Ed., *CONSTITUTIONAL LAW--STATE TAXATION OF INTERSTATE COMMERCE*, 44 MICH. L. REV. 1135 (1946).

Available at: <https://repository.law.umich.edu/mlr/vol44/iss6/13>

This Regular Feature is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

CONSTITUTIONAL LAW—STATE TAXATION OF INTERSTATE COMMERCE—

The city of Richmond by ordinance required all solicitors to pay an annual tax before being permitted to solicit business within the city.¹ Appellant, a representative of a Washington, D.C. firm, was arrested for soliciting without having previously procured the required license.² Appellant was convicted and her conviction was upheld by the Supreme Court of Appeals of Virginia.³ On appeal to the United States Supreme Court she contended that the statute upon which her conviction was based was unconstitutional, inasmuch as it was repugnant to the

¹ Richmond City Code (1939) c. 10, § 23. The ordinance lays an annual license tax in the following terms: “[Upon] . . .—Agents—Solicitors—Persons, Firms or Corporations engaged in business as solicitors . . . \$50.00 and one-half of one percentum of the gross earnings, receipts, fees or commissions for the preceding license year in excess of \$1,000.00. . . .” Quoted by the Court, principal case at 587.

² The firm in question employs solicitors throughout the country selling ladies' garments at \$2.98 each. The solicitor obtains the order and receives a down payment usually sufficient to pay the solicitor's commission. The order is then sent to the home office and is filled through the mails. The record does not show whether appellant would have been compensated by her company had she paid the tax. Yet whether the company does or does not absorb the tax should not affect the result.

³ 183 Va. 689, 33 S.E. (2d) 206 (1945).

Commerce Clause of the Federal Constitution.⁴ *Held*, reversed. Taxes that discriminate against interstate commerce are unconstitutional and the court in each case will look to the practical consequences of such taxes to see if such discrimination is present.⁵ *Nippert v. City of Richmond*, (U.S. 1946) 66 S. Ct. 586.

Until 1938, while the Court was dominated by the belief that interstate commerce should be free from all state taxation, taxes similar in design to the impost sought to be imposed in the principal case were consistently invalidated.⁶ Then in *Western Live Stock v. Bureau of Revenue*,⁷ the Court rejected its formalistic approach to this phase of the commerce question and conceded that interstate commerce could be made to "pay its way" with the added corollary that such commerce should not be exposed to burdens not borne by local business.⁸ This departure was dictated largely by the compelling economic needs of

⁴ Article I, Sec. 8, cl. 3, "Congress shall have the power to regulate commerce . . . among the several States. . . ."

⁵ The statute also required that in applying for the permit, "evidence of the good character of the individual, the members of the firm, or the chief officers of the corporation, as the case may be" had to be produced. The Director of Public Safety was to make a reasonable investigation and if he was satisfied that the applicant was of a good moral character and fit to engage in the proposed business he was to issue the permit.

The appellant, before the United States Supreme Court, argued that this discretionary power given to the director was sufficient to invalidate the measure without respect to the character of the tax. This contention had not been relied upon in the lower court and the court did not consider this question. It does seem, however, that if the power given to the director can be shown to be a reasonable safety measure it would not be open to attack.

⁶ *Robbins v. Shelby County Taxing District*, 120 U.S. 489, 7 S. Ct. 592 (1887), was the first case involving such a tax to come before the Court. There the Court flatly said at p. 497, "Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce. . . ." Since then, and until 1938, nineteen such taxes have been invalidated, culminating with *Real Silk Hosiery Mills v. Portland*, 268 U.S. 325, 45 S. Ct. 529 (1925). For specific references to these cases and an analysis of them in respect to their possible effect upon a sales tax of the type considered in the *Berwind-White* case, see Lockhart, "The Sales Tax in Interstate Commerce," 52 HARV. L. REV. 617 (1939). For bibliographical material on this subject generally see 43 MICH. L. REV. 761 at 774-775, items 47-51 (1945).

⁷ 303 U.S. 250, 58 S. Ct. 546 (1938). Here New Mexico levied a 2 per cent tax on the gross receipts from the sale of advertising by those engaged in the business of publishing newspapers or magazines. The tax was levied upon a firm whose only office was in New Mexico and whose journal had circulation in other states. The Court's reasoning is noteworthy for the tax could have been supported on the basis of orthodox doctrine.

⁸ In the *Western Livestock* case, 303 U.S. 250, 58 S. Ct. 546 (1938), the Court stressed the fact that this was a tax that could not be repeated in other states. (If freedom from cumulative burdens meant only protection against the imposition of the same tax by other taxing authorities it would afford but slight protection. But it seems clear from later cases that the Court is thinking of this freedom in a more inclusive sense.) But where other states would be able to tax the same receipts the tax was condemned. See *Adams Mfg. Co. v. Storen*, 304 U.S. 307, 58 S. Ct. 913 (1938). *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 59 S. Ct. 325 (1939).

Generally, see Traynor, "State Taxation and the Commerce Clause in the Supreme

the states and the belated realization that the commerce clause does not compel complete "immunization" of interstate commerce to state regulation. This "new" approach led to the upholding of a New York⁹ sales tax that applied to interstate as well as local sales since the court could see no possibility of discrimination against interstate commerce.¹⁰ Also an annual fee imposed upon each vehicle used in "peddling" goods brought into the state by an out-of-state vendor has been upheld on the ground that the tax was imposed upon the intrastate activity of "peddling" and not on interstate commerce.¹¹ In the light of this background the court had to examine the contention of the City of Richmond that the tax it now sought to impose was valid since it came within the "rationale" of this "new" approach.¹² The logic of the appellee takes this form; "That the tax was imposed upon events which occurred within the taxing jurisdiction and which are separate and distinct from the transportation or intercourse which is interstate commerce." And appellee concludes that since the local delivery could be made the jurisdictional base for the sales tax in the *Berwind-White* case,¹³ the local activity of solicitation could serve the same purpose here. Since Richmond placed its chief reliance on the *Berwind-White* case, Justice Rutledge, writing the opinion of the Court rejecting this contention, confines his discus-

Court, 1938 Term," 28 CAL. L. REV. 168 (1940); Morrison, "State Taxation of Interstate Commerce," 36 ILL. L. REV. 727 (1942).

However, in *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 64 S. Ct. 950 (1944), the Court did not seem to be worried about the possibility of cumulative burdens. As to whether the Court may distinguish transportation from commercial enterprise in their approach to this problem, see Lockhart, "Gross Receipts on Interstate Transportation and Communication," 57 HARV. L. REV. 40 (1943).

⁹ *McGoldrick v. Berwind-White Coal Co.*, 309 U.S. 33, 60 S. Ct. 388 (1940). This decision has been commonly interpreted to mean that no other state would be able to tax the proceeds taxed by New York. If this were not so then the interstate vendor would be exposed to multiple burdens. It seems therefore that the state of market will be the one permitted to impose this tax. In view of this approach the decision in the *Western Livestock* case cited in notes 7 and 8, *infra*, will have to be reconsidered. The cases can be distinguished in terms of the object taxed, but, whereas formerly the court looked to the object of the tax without considering the effect of the measure of the tax, it seems that its present approach demands that it consider both these factors. For a thorough discussion of gross receipt taxes generally, see Powell, "New Light on Gross Receipt Taxes," 53 HARV. L. REV. 909 (1940).

¹⁰ But see *Best v. Maxwell*, 311 U.S. 454, 61 S. Ct. 334 (1940); *McCarroll v. Dixie Greyhound Lines*, 309 U.S. 176, 60 S. Ct. 504 (1940).

¹¹ *Caskey Baking Co., Inc. v. Virginia*, 313 U.S. 117, 61 S. Ct. 881 (1941). This distinction between "peddling" and solicitation was recognized as early as the *Robbins* case cited in note 6, *supra*. For general material on this subject: WRIGHT, *HAWKERS AND WALKERS IN EARLY AMERICA* (1927).

¹² Some reliance was also placed upon more recent cases such as *International Harvester Co. v. Dept. of Treasury of Indiana*, 322 U. S. 340, 64 S. Ct. 1019 (1944); *General Trading Co. v. State Tax Commission of Iowa*, 322 U. S. 335, 64 S. Ct. 1028 (1944).

¹³ Although the Court in the *Berwind-White* case does say, "Here the tax is conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption," 309 U.S. 33 at 58, 60 S. Ct. 388, it went on to say, "The effect of the tax, even though measured by the sales price, as has been shown, neither discriminates nor obstructs interstate commerce more than numerous other state taxes which have repeatedly been sustained as involving no prohibited regulation of interstate commerce."

sion largely to those factors which differentiate the present tax and the sales tax in that case. His analysis develops the following differences: (1) The business taxed in the *Berwind-White* case was continuous whereas in the principal case there was no showing that the appellant carried on a regular course of business.¹⁴ (2) The tax levied by New York was proportional to the volume of business carried on while the present tax, since it required the payment of a fixed sum for the privilege of soliciting business, bore no such proportional relationship. (3) The flat tax, since it reached commerce at its incipient stage, would tend to divert it from such channels and this exclusionary effect would be magnified if the tax were raised or if it were adopted by other municipalities within the state. (4) The recognition that the present tax, though professing to apply alike to all solicitors, was in reality directed at out-of-state competition inasmuch as the retail merchants within the state would not ordinarily resort to this type of distribution.¹⁵ This analysis serves effectually to distinguish the cases and is sufficient justification for condemning the Richmond tax. Far from restricting the taxing power of local sovereignties the opinion emphasizes that interstate commerce should bear a "fair share of the cost of local government."¹⁶ It demands only that local governments, in framing taxing legislation, be selective in order to avoid discriminatory results. Undoubtedly this tax, if applied so as to reach only those solicitors regularly engaged in carrying on business within the city, would be

¹⁴ It is rather unfortunate that the Court still gives credence to *McLeod v. Dilworth*, 322 U.S. 327, 64 S. Ct. 1023 (1944). In denying the power of the state of Arkansas to levy a sales tax upon goods shipped by a Tennessee vendor into Arkansas, the Court distinguished the *Berwind-White* case by pointing out that the Tennessee corporation, unlike the Pennsylvania corporation, did not maintain an office in the vendee's state and that the sale in this case was completed in the vendor's state. Since mere solicitation, if regular and continuous, can be considered "doing business," [*International Shoe Co. v. State of Washington*, (U.S. 1946) 66 S. Ct. 154] the distinction in terms of the nature of business done seems no longer to be sound: and since Justice Rutledge concedes that "... the situation is difficult to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax . . .," (*id.* at 589) the distinction in terms of final delivery seems also to be without basis.

¹⁵ Principal case at 595. "... Provincial interests and local power are at their maximum weight in bringing about acceptance of this type of legislation." This is giving expression to Justice Stone's "political representation" doctrine that, while state legislation should be given fullest consideration, the Court should at the same time consider whether such legislation is imposed upon those whose views can be voiced through their representatives. For an expression of this approach, see *South Carolina State Highway Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177 at 184, note 2, 58 S. Ct. 510 (1938) (state police regulation of commerce); *McGoldrick v. Berwind-White*, 309 U.S. 33 at 36, note 2, 60 S. Ct. 388 (1940) (state taxation of interstate commerce); *Thornhill v. Alabama*, 310 U.S. 88 at 95, 60 S. Ct. 736 (1940) (civil liberties); *United States v. Carolene Products Co.*, 304 U.S. 144, 58 S. Ct. 778 (1938) (federal police legislation).

¹⁶ Principal case at 594. "There is no lack of power in the state or municipalities to see that interstate commerce bears with local trade its fair share of the cost of local government. . . ." Then, after stating the Court's position as to discriminatory taxes, Justice Rutledge continues, "other types of taxes are available for reaching both portions which do not involve the forbidden evils or the necessity for putting them upon some commerce in order to reach other."

valid. So applied it would be free from attack as tending to exclude commerce, and the possibility of similar impositions by other municipalities would not be relevant;¹⁷ the only other danger that would have to be guarded against would be that of having the measure construed as an attempt to suppress interstate business under the guise of taxation. Income from sales completed by solicitors who would not come within the concept of doing business might be reached by some kind of gross receipts or net income tax. The varying factors involved in each of the commerce clause cases highlight the difficulty that would face Congress if the Court should accept the view of some of its members that only a measure discriminatory on its face be invalidated and that Congress be given the task of shaping national policy with respect to other local legislation affecting interstate commerce.¹⁸ In the light of these considerations the position taken by the Court that it will continue to decide "single local controversies" probably offers the best solution to this problem. Aside from its assertion that it will continue to invalidate local taxes that are discriminatory and that it will look beyond the face of the statute to evaluate the practical consequences of the legislation involved, the striking part of its decision is the fact that the burden of justifying its levy is made to fall upon the state.¹⁹

George Brody, S.Ed.