Interstate Trade Barriers and the Constitution

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The existence of substantial barriers to interstate trade is one of the more surprising aspects of the public policy environment. Barriers to trade are generally familiar to students of public policy from an international perspective, but barriers to international trade are a small part of the trade problem facing the United States. A more serious problem, and one that is entirely within the purview of U.S. policymakers, is the extensive level of trade barriers between states. This paper explores the pattern of interstate trade barriers and illustrates the extent to which they permeate the economy. Given the level of trade barriers that are uncovered, we examine the policy environment that has allowed the Balkanization of national markets to develop. We focus particularly on the Supreme Court, which has failed to protect the national economy from the actions of individual state protectionist policies.

Evidence on the extent to which individual states interfere with trade from other states apparently has eluded the major economic policymakers in the federal government. For example, the 1985 *Economic Report of the President* (p. 115) declares:

> The debilitating effects of . . . protectionism on the States' economies convinced the framers of the U.S. Constitution to forbid individual States from levying tariffs. . . . The constitutional ban on State tariffs was crucial to the development of the U.S. economy not only because it established a free-trade area among the 13 original States, but also because it ensured that the free-trade area would expand automatically as new States joined the Union.

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Our evidence indicates that the economy grew despite the heavy burden states have imposed on trade with each other. The total value of interstate trade in manufacturing alone has been estimated to be almost equal to the U.S. GNP, about 18 times the value of U.S. exports (Rodgers 1973).[1] Because of the magnitude of interstate trade, economic distortions from seemingly small interferences in trade can result in large losses.

In order to assess the effectiveness of the current policy environment, we examine potential motivating factors that would explain the current pattern of interstate trade restrictions. Trade barriers occur primarily because of the federalist structure of the United States, under which each state has autonomous power independent of the federal government. This structure is a source of strength for our nation, as it allows each state to pattern policies to best fit its local situation. It is also possible, however, for federalism to cause problems for the economy, as each state will act to serve what it perceives as its best interest. On some occasions, active pursuit of an individual state's interest is inconsistent with the best interests of the country. Even more important, individual states may pursue policies that benefit a minority of its residents at the expense of the majority. This in-state redistributive behavior, which is only permissible under a federalist system, is severely damaging the national economy by distorting the trade patterns that otherwise would occur.

Whatever the stated purpose for erecting barriers to interstate trade, the primary effect is to protect the home-state markets from out-of-state competition. A reduction in the number of competitors allows in-state suppliers to charge consumers higher prices; thus, the firms receive higher profits. The dominant form of trade barriers is administrative restrictions, such as licensing, prohibition on trade, or costly performance criteria. Except in a small number of industries, import taxes (tariffs) on interstate trade have been declared unconstitutional by the Supreme Court. This restriction on the form of trade barriers is not important to economic efficiency, although the form of trade restrictions (administrative restrictions or tariffs) is important for determining what share of the economic cost is borne by consumers. Unfortunately, the primary focus of 200 years of Supreme Court attention has been on the *form* of interstate trade barriers. As yet, there has been no effort to systematically reduce the degree of economic distortion resulting from interstate barriers to trade.

[1]Interstate trade in manufactures for the year 1963 is estimated to be $580.4 billion, compared to a GNP of $589.2 billion (Rodgers 1973). Manufacturing accounted for 61.5 percent of GNP in that year (see infra, n. 2).

Barriers to trade with other states are ostensibly prohibited by the Commerce Clause of the U.S. Constitution. This clause essentially mandates that no state shall take any action that inhibits trade with any other state. While the clause is clear on the surface, its interpretation has allowed a large number of trade barriers to persist. We explore the cause of the failure of the Commerce Clause and present evidence indicating that the Supreme Court has had difficulty disentangling the issues involved.

Interstate Trade Barriers

Interstate trade is crucial to the healthy operation of the U.S. economy. The central goal of the Commerce Clause is to ensure that the United States is internally a free trade zone, which maximizes the gains from trade to the country as a whole. Despite the existence of substantial barriers to interstate trade, trade between states is an extremely large part of the economy. In an extensive and unique study, Rodgers (1973) determined the size of interstate trade in the manufacturing sector of the economy for the year 1963. To update his estimate to 1980, assume that the same proportion of all manufactured goods crosses state lines in 1980 as in 1963. This yields an estimate of interstate trade in manufactured goods of $2.2 trillion. This estimate is equal to 85 percent of GNP, because much of interstate trade is in intermediate goods in the production process rather than in the final goods that GNP measures. Rodgers's estimate of interstate trade does not include the service sector of the economy; but trade in services, such as in banking, insurance, labor services, and tourism is also important. It is clear that the interstate barriers to trade are central to the overall health of the economy, as they affect trillions of dollars worth of transactions.

There is no current estimate of the amount of trade that has been prevented due to the existing levels of trade barriers, but an additional barrier in the manufacturing sector of even one-tenth of 1 percent would amount to a tax of $2.2 billion on the economy. As a comparison, Magee (1972) determined that the economic loss to the United States from trade barriers it imposed on international trade is 8.8 percent ($197 billion) of the value of imports.[2] Over 80 percent of the economic loss calculated by Magee is the result of administrative restrictions on trade, also known as nontariff barriers to trade.

[2]This $197 billion loss represents only half of the potential loss, since losses to "foreigners" are also suffered in the United States with interstate trade. It should also be noted that the service sector, now over half of GNP, has been excluded from these loss calculations.

Under current U.S. trade policy, these nontariff barriers are the primary form of trade restriction.

There are two primary types of interstate trade barriers: export taxes and import restrictions. Export taxes are levied on goods and services that are consumed mainly by people who reside outside the state that levies the tax. Import restrictions take two principal forms: taxes and administrative barriers. In general, import taxes at the state level are illegal. Because of this limit on the form of import trade barriers, the main types of interstate trade restrictions are administrative barriers, which are an important source of economic distortions.

Interstate trade barriers are difficult to count, as each state has a large number and variety of restrictions on trade. Nevertheless, we have cataloged trade barriers in many major areas of the economy, including agriculture, professional labor, banking, insurance, and state governmental purchases. These categories help to show how extensive trade barriers are and illustrate the various forms they can take.

Agriculture suffers from a complex array of administrative restrictions. Hillman and Rowell (1952) found over 1,500 laws in only 11 western states that impede efficient agricultural trade between states. Among the products affected are dairy products, oleomargarines, livestock, eggs, general foods, and nursery stock. The form of the laws varies considerably between states; it affects grades, standards, labeling, motor transportation, quarantine, and inspection. From 1925 to 1973, for example, California residents could not purchase Florida-grown avocados. The California law mandated that avocados have at least an 8 percent oil content to be considered mature, and Florida avocados typically contain less oil than that required. Similarly, Texas residents could not purchase Florida-grown grapefruit from 1967 to the mid 1970s because the Florida grapefruit was declared inedible due to insufficient sugar. Agricultural trade restrictions have many purposes, some of which are to restrict the spread of harmful disease and insects and to protect consumers from poor quality. But most legislation does not pursue these goals in a cost-effective manner, primarily because the goal of the legislation is to protect in-state growers by restricting competition within their home markets.

Professional labor certification and licensing are a common form of restricting interstate commerce. Labor certification restricts trade through a monopolization effect, which occurs when entry into a profession is made more difficult and wage rates are driven up due to the lack of competition, and through an effect that arises because state licensing requirements vary among states. Strictly interpreted, it is this second effect that is the interstate trade barrier. But the monopolization effect is also a crucial barrier to trade because a potentially important source of competition to professionals in one state are the practitioners from other states who may move if they perceive the possibility of higher income. As a result, there is substantial incentive for in-state professionals to resist reciprocity of certification among states. It is not clear just how much certification would exist if interstate reciprocity was prevalent; even the monopolization effect may be driven by the desire to restrict the interstate movement of professionals.

In her comprehensive study, Greene (1969) found more than 2,800 different state laws affecting labor by a wide variety of professionals, including doctors, lawyers, dentists, other medical professionals, and teachers. The interstate differences in certification laws sharply restrict the workers in these professions from moving to other states, making it difficult for workers to move to states where their services are most highly rewarded. Several studies have found that certification reduces the competition faced by those in high-income states. Shepard (1978) found that dentists have about 12 percent more income than they would if they operated in a market without restrictions, a condition that cost consumers $700 million in 1970. Over half of the economic loss is directly attributable to interstate variation in certification procedures. Similarly, Benham and Benham (1975) found that legal control over optometrists in some states caused eyeglasses to be 25 to 40 percent more expensive than they were in states with fewer restrictions. While the mobility restrictions do not entirely prohibit interstate movement of professionals, they make such movement more costly. If prices are higher in one state than another, it may indicate that there are greater potential profits in the high-price state. To the extent that there are higher potential profits, professionals in other locations will tend to move to the high-price state, eventually eliminating the price disparity through competition. The importance of migration, although by consumers rather than providers, is shown directly by Benham and Benham (1975). They found that residents living near state lines of less-restrictive states paid lower prices than did other residents of the restrictive states. Presumably, this is due to the greater level of competition provided near the state line by the less-restrictive state.

The banking industry has benefited from state protection since 1956, when the Bank Holding Company Act made cross-state banking illegal without express state permission. Until 1982 only one state, Maine, had allowed interstate banking. Since then, there has been some relaxation, although the issue is by no means settled. Several New England states have instituted inter-regional banking laws, but they still prohibit the entrance of banks from outside the region. One fear about interstate banking is that large, multi-state banks will drive smaller, less cost-effective banks out of business. Recent studies have found that large banks do not appear to have much of a cost advantage, but they also found that profits in a more competitive environment are significantly lower (Whitehead and Luyties 1984). That is, prices to consumers are lower in the more competitive environment. These advantages to local banking consumers have been prevented completely until the recent deregulation and are only beginning to be available.

Interstate trade restrictions have hampered the insurance industry for a number of years. Texas maintained a set of complicated restrictions from 1908 that discriminated against out-of-state insurance companies. These regulations initially prohibited entry by out-of-state firms, although they were gradually eroded until they were repealed in 1963. Unlike most industries, states have been allowed to explicitly levy taxes on insurance firms based out of state while exempting in-state firms from the tax (Benson 1970).[3] As a result, several states have differential premium taxes on out-of-state firms. For example, Michigan currently taxes out-of-state firms 2 percent of the premiums they collect and exempts in-state companies. Again, the focus of these restrictions has been to protect local firms at the cost of increased prices for state residents.

Some state governments have granted special privileges to resident firms that provide goods and services to the state government. These privileges take the form of purchasing preference laws that allow in-state firms to bid a certain percentage (usually 5 percent) over an otherwise equal out-of-state firm and still be awarded a state government contract. A special form of the percentage preference law is a reciprocal preference law, which only grants the preference if the out-of-state firm is located in a state that has its own percentage preference law. We examined these purchasing preference laws extensively in an earlier study (Craig and Sailors 1984) and found that they cause a significant increase in state governmental spending.[4] There are 9 states with percentage preference laws and 11 states with reciprocal preference laws. The average state with a percentage

[3]Benson (1970) showed that insurance was declared not a "good" subject to the Commerce Clause because it is a service industry. It is not clear from a layman's perspective why the distinction between goods and services might matter. Congress later overruled the Supreme Court when the Court reversed itself on this issue.

[4]Purchasing preference laws have the same impetus as national trade barriers, namely, employment protection. For example, during the 1930s 26 states enacted public purchasing preference laws (Melder, n.d.). Also see Massel (1962).

preference law spent $10.13 in real terms per capita more than an otherwise similar state. This amounts to 3 percent of state per capita expenditure in states with these laws and equaled $1.6 billion in 1980 alone. The nine states with the percentage preference laws thus extracted $1.6 billion in 1980 from their taxpayers in order to provide extra payments to firms located in the state. We found that state per capita income would have to rise 32.3 times the extra expenditure to generate enough tax revenue to finance these payments. Thus, any jobs that such measures create come at the expense of other jobs in the state, because the extra expenditure caused by purchasing preferences can only be obtained by higher taxes on other sectors of the in-state economy.

Why Interstate Trade Barriers Are so Pervasive

There are two potential explanations for state governments' motives for erecting trade barriers: first, state governments are attempting to exploit other states; second, state governments are attempting to redistribute income within their own states. These two possibilities are not necessarily mutually exclusive, but a determination of which condition predominates will aid in designing policies to prevent individual state protectionism. The evidence indicates that the primary motive is redistribution of income within the state erecting the trade barrier. The explanation for such behavior is based on a model of rent-seeking behavior by state governments. The model is used to examine three potential sources of impediments to trade barriers: the in-state losers in the redistribution process, the other states that have their markets restricted, and the Supreme Court.

Theories of Governmental Behavior and Trade Barriers

In one theory, the median voter model represents state governments as behaving "as if" they are individuals. The government's goal in this model is to maximize the well-being of the average or "decisive" individual.[5] In another set of theories, which involve group behavior and the conflicts between groups, one group may "pay" the government to reward it at the expense of other groups within the state. This rent-seeking behavior is unproductive; it is aimed at redistributing income rather than at creating it (see Buchanan et al. 1980). Rent-seeking behavior is not predicted to occur in median voter theories, but it may occur in group conflict models. The existence of interstate barriers to trade seems indicative of rent-seeking behavior.

[5]See Rose-Ackerman (1981) for an application of this model to interstate behavior.

In all cases of administrative import barriers to interstate trade that have been uncovered, a relatively small special interest group receives protection. Labor restrictions, for example, increase the incomes of selected professionals at the expense of individuals purchasing their services. Similarly, the incomes of farmers, insurance companies, banks, and sellers to state governments are bolstered, while the consumers pay the resulting higher prices. In none of these examples is there a net gain to the state; that is, the state as a whole is worse off, even though some narrow groups gain. Prices for in-state consumers rise, and there is no method to compensate them for the loss. If these trade restrictions were subjected to a vote of the population, the losers would greatly outnumber the gainers and the restrictions would be voted down.[6] The explanation for the existence of the restrictions, therefore, is found in rent seeking rather than in the median voter model. When there are trade barriers, one relatively small cohesive group is able to obtain favorable treatment for itself while a large but dispersed group bears the cost. The burden on any individual member of the losing group may not be large, which helps to explain why small groups can be successful with their rent-seeking behavior. Nonetheless, a small transfer from each member of a large group results in a large transfer to each member of a small group. The total amount of money transferred is large and results in significant distortions within the national economy.[7] Given this analysis, policies to restrict interstate trade barriers must seek to control rent-seeking behavior.

There is one way that a state can attempt to make its residents better off than before: by using export taxes.[8] Export taxes may be levied by a state in the belief that residents of other states will pay the bulk of them, resulting in little burden on current state residents. Export taxes, therefore, are ostensibly consistent with the decisive

[6]This is equivalent to saying that a slate of candidates could run and, presumably, win on a platform of removing interstate trade restrictions. Our electoral process is too complicated to generally allow single-issue candidates (and only one issue can win in each election). This is the source of a major problem with representative democracy; we elect candidates, we do not vote on issues. This problem has prompted students of the political process to study rent seeking, a process wherein office holders can take positions that would be unpopular if their position were well known (see Buchanan et al. 1980). Rent seeking is, in part, a formal representation of special interest politics.

[7]This description of in-state redistribution ignores another major cost: the loss of business for firms or producers located in other states. In either motivation for interstate trade barriers, however, the out-of-state producers are losers. Only a rent-seeking motive explains in-state redistribution.

[8]Export taxes have been implicated most often in the past as the source of economic distortion that arises due to federalism (Walker 1969; Posner 1977).

voter model of governmental behavior, as they represent an attempt to make the average resident better off at the expense of residents of other states. An example of this tax is the Montana coal tax, which was recently ruled on by the Supreme Court. The Court ruled that this tax did not violate the Commerce Clause. The argument is that this tax, 30 percent of the value of coal, is mainly paid by residents of other states because most of the coal mined in Montana is used in other states. What is important here is that the tax would appear to benefit Montana residents, because they receive additional public services or lower taxes as a result of the revenue from coal taxes.

There are two problems with this reasoning: first, it is not apparent that residents of other states pay the tax; second, this may still indicate rent-seeking behavior. It is very difficult to determine tax incidence, that is, who ultimately pays a given tax; but in order for the Montana tax to fall on residents of other states, several conditions must be fulfilled. First, Montana coal producers would have to raise the price by the full amount of the tax. If the industry is competitive, producers will not be able to do so because their customers will go elsewhere. If Montana coal producers have some monopoly power, however, the price may rise. But even in this case the price will only rise by a relatively small proportion of the total tax in the long run, as coal customers will eventually find alternative sources of supply. Thus, part, if not all, of the tax falls on Montana coal producers (see McLure 1983). This element of the tax may be ultimately paid by coal workers through lower wages, by the landowners through lower royalties, or by the owners or stockholders through reduced profits. These groups are most likely to include Montana residents. The same analysis would apply to other export taxes. Therefore, a more likely explanation for the export tax is that it represents an opportunity for Montana residents to tax a narrow group, the coal producers.

Public Policies Concerning Trade Barriers

The preceding analysis strongly indicates that administrative trade barriers, the most common form of restriction, appear to be stimulated by rent-seeking motives. Understanding this motivation is crucial for an analysis of public policies concerning trade barriers. The primary agency for controlling trade barriers is the Supreme Court, which primarily has been concerned with limiting interstate exploitation rather than in-state redistribution. Unfortunately, this corresponds to attempting to restrict the minor motivation for trade barriers and neglects what appears to be the major motivation. Other potential policy actions are also examined, such as retaliation by other state governments. Not surprisingly, however, they are also inadequate for restraining the level of barriers to interstate trade.

The Commerce Clause is the main limitation on barriers to interstate trade, and the enforcement of this clause has fallen to the Supreme Court. The Court, however, generally has decided Commerce Clause cases on very narrow grounds based on the particulars of each case; it has been unable to deter state governments from enacting further restrictions on interstate trade. Thus, the primary source of power that can limit interstate trade barriers has not been effective. There are other forces that work to limit trade barriers, but they are not very strong compared to the forces that operate to encourage further enactment of trade barriers.

The Supreme Court has a difficult job. It must decide whether a particular state policy actually is designed to limit interstate commerce or legitimately is designed to protect the health and welfare of the residents of the state. In general, the Court will allow almost any administrative barrier, as long as it does not appear to be explicitly aimed at an out-of-state producer. Conversely, the Court almost universally has ruled out differentials in taxes between goods produced within or outside the home state.

There are two notable exceptions to the "no tax" rule, both of which are illustrative of the general problems facing policymakers in the area of interstate barriers to trade. The first exception is insurance. In a well-known case, the Supreme Court ruled that trade in insurance is not commerce in goods, so it is not subject to the Commerce Clause. This peculiar rule allowed states to explicitly tax out-of-state insurance companies while exempting firms located within the state. In 1944, the Court overturned its earlier ruling and declared that insurance industry regulation was subject to Commerce Clause restraints. In 1945, however, Congress passed the McCarran-Ferguson Act that restored the regulation of insurance to the pre-1944 standards. Congressional interference in this instance is puzzling, especially in light of the fact that the Court has frequently requested that Congress legislatively set general guidelines on interstate trade issues. Congress has never provided general guidelines concerning interstate trade to the Court, even though it chose to act in this particular instance.

The other exception to the "no tax" rule is the alcoholic beverage industry. The 21st Amendment, which repealed Prohibition, leaves all regulation of alcohol to individual state governments. This has been interpreted to include differential taxation of in-state and out-of-state producers. Many states, for example, protect home-produced wines via a larger tax on out-of-state wines. States also frequently protect small beer breweries located within their boundaries. It is difficult to justify either of these two exceptions to the only general guideline set down by the Supreme Court (the "no tax" rule), but even this guideline fails as a useful tool for addressing the interstate trade problem.

The Supreme Court has declined to set new legal precedents that broaden restrictions on trade barriers, beyond the simple "no tax" rule, without congressional action. Because of the lack of legislative guidance, the Court has seen a continuous stream of cases, many of which are related. From 1792 to 1932, the Court dealt with 604 Commerce Clause cases, about four per year (Gavitt 1932). During the 1970s, it was still deciding about four cases per year.

The case law that has resulted from all this activity is not particularly useful for restricting trade barriers. There is virtually no economic difference between an administrative restriction and an import tax, except that the import tax creates revenue. The price of the good in question still rises, rent seeking in the form of administrative barriers is unimpeded, but there is no corresponding tax revenue to compensate the losers of the redistributive struggle. The Supreme Court has ensured that consumers lose, without safeguarding the economic interests of either the state that imposes the trade barriers, the other states that have their goods discriminated against, or the economic health of the nation. This situation represents a breakdown in the smooth functioning of the federalist system and arises because Congress has not armed the Supreme Court to control rent-seeking behavior.

Other factors that might operate to limit the extent of barriers to interstate trade can be examined in light of the apparent underlying motivations for trade barriers. One possibility is that some states may attempt to limit the extent to which they are exploited by others. But this possibility generally should not be expected to occur. Instead, the primary motivation for erecting interstate trade barriers appears to be in-state redistribution of income; political forces *within* each state, therefore, will primarily determine the extent of trade barriers. And these barriers will produce both winners and losers, so that any federal policy that hopes to limit trade barriers can do so only if it alters the relative strength of the two groups.

Interstate retaliation presumes that the underlying motivation for trade is exploitation of other states. One of the few retaliatory cases occurred in Pennsylvania. The state began to vigorously enforce a law that provided for a total embargo of state purchases from states that discriminated against goods produced in Pennsylvania. This enforcement is credited for forcing several eastern states to repeal their state government purchasing preference laws (Jordan 1978). Such cases, however, are rare because direct costs on outside parties are difficult to identify. Moreover, the harmed out-of-state interest must be of sufficient strength to obtain the aid of its state government.

Policymaking in interstate trade has failed because no policy instrument has been directed toward reducing the forces that motivate the erection of trade barriers. We have attempted to demonstrate that interstate barriers to trade mainly arise out of attempts to redistribute income within the state. Because this is not the motivation to which current policy instruments have been directed, they have not impeded the flow of trade barriers. Neither the natural forces of the injured parties nor federal action is equipped to deal with this problem. A new set of policy machinery or a major redirection of current policy instruments is needed to protect the national economic interest.

Potential Policies to Limit Interstate Trade Barriers

The effect of the Supreme Court's interpretation of the Commerce Clause has been to limit the ability of state governments to directly exploit the citizens of other states. That was, no doubt, one of the intentions of the framers of the Constitution. What the Supreme Court has failed to do, however, is to protect the general citizens of a state from policies that economically protect narrow groups, that is, from rent-seeking behavior by state governments. Briefly restated, administrative trade barriers that do not benefit a state appear to be motivated by rent seeking, with the result of protecting narrow economic interests at the expense of the general public. An additional, although perhaps unintended, result of interstate trade barriers is that producers in other states now have more restricted markets. In sum, the economic distortions caused by interstate trade barriers consist of higher consumer prices and less total output in the protected state. There is also less production and lower profits in other states. The economic restrictions that result from interstate trade barriers are severe in the aggregate because they are so pervasive. Federal policymaking currently neglects this important source of economic inefficiency.

The primary agency for restoring economic order is the Supreme Court. Perhaps the most important reason the Court has been unable to stop the proliferation of barriers to interstate trade is that it has not had the desire to impose broad restrictions. Such restrictions would reverse 200 years of case-by-case determination. An indication that the Court recognizes that a policy problem exists is in its systematic advocacy for congressional action concerning public policy in this area. The reasons for congressional inaction may well be the same as those for the Supreme Court's refusal to act.

There are several conflicting issues that defy solution by sweeping generalization. In particular, the law itself appears to be in conflict, as was seen in the use of the 21st Amendment versus the Commerce Clause. Even more broadly, however, determining whether state actions harm the national interest or harm the national interest more than the value of permitting independent state action presents a host of conflicting and hard to balance issues.

It is difficult for any administrative body to decide whether a particular state policy has been imposed to protect a special economic interest or if the policy may be justified on other grounds. There are several types of legitimate concerns that should generate latitude for state governments passing laws that differentiate over state lines. Some examples illustrate situations where it has been difficult to determine how much latitude is appropriate for state governments.

In New Hampshire, a commuter tax was imposed on people who work in the state but who reside outside New Hampshire. Many cities have similar taxes for people who reside in the suburbs. When the tax was challenged before the Supreme Court on the grounds that it was distortionary, however, the Court upheld the tax. The Court argued that a tax is not distortionary if the state is compensated for services provided to out-of-state residents. This distinction, however, may be difficult to determine in practice.

In Maryland, the state initiated a bounty program to encourage junk dealers to remove abandoned cars from the streets. In 1974, however, the state changed the documentation required to collect the bounty to prevent junk dealers in West Virginia from participating. There is no reason why Maryland residents should pay to remove junk from West Virginia. One of the important features of our federalist system of government is that it allows states to pursue potentially innovative policies. In this case, the Supreme Court apparently concurred with this view and overturned a lower court ruling to uphold the Maryland law.

Certain agricultural trade restrictions may be justified as necessary to prevent the spread of disease, but this justification could be inappropriately used to protect home-state growers. The Texas law prohibiting Florida grapefruit defined mature grapefruit as containing 9.0 parts sugar to 1.0 part acid; Florida grapefruit usually contains 7.5 parts sugar to 1.0 part acid, making it immature and inedible under Texas law. A Florida newsman reported that "local officials expressed the belief the Texas legislation was passed completely as a protective measure for Texas growers." The law was later repealed without any noticeable health deterioration of the local population.

Illinois passed a law that mandated that trucks operating in the state use a type of mudguard that was different from that customarily used and required by other states. The law imposed a significant burden on interstate truckers, who had to stop at the state line to install the Illinois-specific mudguards. The Supreme Court eventually declared this law unconstitutional (Thorpe 1977). On the other hand, the Court upheld a statute that allows different states to limit the maximum allowable width for trucks, even though this width varies among states. The rationale for such a law is that the width requirements change to account for variation in the conditions for safe operation. It is difficult to differentiate between these two laws, because the second does mean that certain trucks cannot operate in all states.

These examples illustrate why the Supreme Court has been reluctant to pass sweeping judgments; some interstate barriers seem worth the price of economic distortion, and others do not. There are two conflicting issues here: first, federalism allows each state to tailor laws to its particular situation, such as truck widths; second, this possibility may tempt state governments into using federalism to pass laws redistributing in-state income. Determining the consequences resulting from an interstate trade barrier requires a significant degree of economic expertise. The trade-off between the economic gain from allowing local law to vary must be balanced against the economic loss from restricted trade opportunities. Further, while there are many reasons to suspect that state governments themselves do not correctly value these trade-offs, it is certain that states generally do not value costs borne by residents of other states. Neither the Supreme Court nor Congress has the economic expertise to determine the level and distribution of economic costs on a case-by-case basis.

Black (1981) proposed that an administrative division within the Federal Trade Commission or a similar agency be empowered to differentiate economically valid state policies from barriers to interstate trade. The division would adjudicate potential infractions of the Commerce Clause. An infraction would be judged to occur when the costs of the interstate trade barrier outweighed the benefits, irrespective of whether or not those costs accrued to residents of the state. A federal agency would not be subject to the same pressure groups as would a state government, and so it should be relatively immune from arguments to redistribute income within the state. This would appear to remove the major cause of interstate trade barriers.

There are also some disadvantages of giving oversight to Black's proposed administrative division. It is not clear that administrative agencies can fulfill their stated objectives without causing a new set of problems. A more fundamental problem is that a federal agency that would rule on state laws potentially poses a threat to the delicate balance between state and federal governmental rights. In addition, approval of a barrier by a federal agency for one state might be expected to produce 49 similar barriers in others.[9]

Alternatively, Congress could provide the Supreme Court with stricter guidelines for limiting interstate trade barriers. Despite the difficulties in constructing such guidelines, there is substantial room for improvement over the current situation. It has already been shown that eliminating import taxes without limiting administrative import restrictions ensures that consumers lose the rent-seeking struggle being played out in state legislatures. Guidelines for the Supreme Court that would also eliminate administrative import barriers would provide substantial aid to the free functioning of our economy. For example, Congress could require that any trade restriction with an equivalent effect on interstate trade as a tax on goods produced out of state should be treated like a tax and declared unconstitutional.

The real question is whether or not the current system is fulfilling the needs of the country. No estimate of the damage done to the economy because of interstate trade barriers is available. What evidence there is, however, indicates that the damage is substantial, one "guesstimate" being $397 billion annually in lost output. Economic losses approaching this magnitude would appear to be sufficient to inspire the federal government to take some policy steps to restore the lost output resulting from this self-destructive behavior.

Conclusion

The federalist system of government has served the nation relatively well, allowing local tastes to be expressed independently of the federal government. The system does have drawbacks, however, one of which is that states will be tempted to act as if they are separate national governments; that is, they will enact policies designed to enrich their own residents at the expense of residents of other states. Even worse, state governments may use out-of-state residents as pawns in a struggle to redistribute income within the state. Barriers

[9]This appears already to be the case. As soon as one state-imposed trade barrier passes a Supreme Court test, other states are ready to imitate the barrier. The purpose of the agency would be to erect one further step and, therefore, raise the cost of erecting these destructive trade barriers.

to interstate trade, where in-state income redistribution appears to be the major motivating factor, impose substantial costs on the economy through reduced opportunities to trade for the best available goods. These are the type of costs the framers of the Constitution attempted to prevent through the Commerce Clause. After 200 years, perhaps it is not surprising that this portion of the governmental system is in need of repair.

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