American Law and the Marketing Structure of the Large Corporation, 1875-90

Charles W. McCurdy
University of Virginia

The "secret" of American economic growth, English legal scholar Sir Henry Maine wrote [33, p. 247] in 1886, lay in

> the [constitutional] prohibition against levying duties on the commodities passing from State to State.... It secures to the producer the command of a free market over an enormous territory of vast natural wealth, and thus it secondarily reconciles the American people to a tariff on foreign importations as oppressive as ever a nation has submitted to.

The debate on the tariff's contribution to industrial development has not been concluded any more satisfactorily by modern scholars than it was by 19th century politicians. But virtually everyone has long agreed that a division of the United States "into a number of smaller market areas separated from each other by tariff walls," as in Europe, would, as Stuart Bruchey stated it [12, pp. 96-97], "have abridged the possibility... of large-scale production." Thus for Bruchey, as for Maine, "of the many contributions to growth made possible by the adoption of the Constitution, perhaps the most fundamental was that it laid the foundations for a national market."

Yet on close inspection the sweeping statements of Maine and Bruchey proved too much. Neither the Philadelphia Convention nor the Supreme Court under Chief Justices John Marshall and Roger Taney had, in fact, deprived the states of all power to interpose obstacles to the movement of products throughout the nation. While the framers of the Constitution proscribed outright tariff barriers, state governments retained ample authority to devise more subtle forms of protection through their occupational licensing and inspection laws. Before the last quarter of the 19th century, moreover, appellate courts routinely sustained such statutes. On the eve of the post-Civil War revolution in the structure of American marketing, there remained a host of barriers to free intercourse among the states.

The purpose of this paper is to describe the late 19th century emergence of the "free trade" doctrine in American commerce law, and to offer some generalizations about economic growth and the dynamics of legal change. Underlying the narrative which follows is an attempt to shed some new light on Alfred D. Chandler's contention [14] that the growth of a national market was the chief prerequisite for the rise of large-scale, vertically integrated corporations in the manufacturing sector. Here it is suggested that if the national market is defined in terms of a free-trade unit, rather than in terms of an integrated transport network, then the post-Civil-War pioneers in business organization were instrumental in the creation of the market. Rather than responding to an existing free market of continental dimensions, producers of sewing machines and dressed beef actually ignored legal barriers devised by state governments and instructed their local marketing agents to invite arrest and conviction. At that point, the companies' headquarters mobilized the substantial financial resources necessary to press the Supreme Court for relief, and hired counsel who succeeded in persuading the court that existing canons of constitutional construction had to be modified in view of the changing structure of business enterprise. Earlier efforts to evoke similar mandates from the judiciary had failed because prior plaintiffs had not been affiliated with big business firms. They had lacked the resources to engage in protracted litigation; moreover, their interest in a free-trade unit had not been sufficiently compelling to induce an innovative response from appellate judges. From the legal historian's perspective, in short, the rise of big business was a prerequisite for the emergence of a national market.

I.

Among the chief motives for calling the Philadelphia Convention in 1787 was the "interfering and unneighborly [state] regulations" that had created "animosity and discord... between different parts of the confederacy" [42, p. 144] under the Articles of Confederation. The power of the several states "to impose duties on imports and tonnage," Justice Levi Woodbury acknowledged in 1849 [38, p. 545], "had caused so much difficulty, both at home and abroad, that it was expressly and entirely taken away from the States." On questions of internal commerce, however, the framers had been "characteristically Delphic" [41, p. 682]. They vested Congress with plenary power over "commerce with foreign nations, and among the several States," and Alexander Hamilton, in particular, viewed that provision as an instrument to facilitate "an unrestrained intercourse between the states" that would "advance the trade of each by an interchange of their respective

productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets" [42, p. 89]. But the permissible scope of state activity in the silence of Congress neither attracted attention nor fomented instructive debate at the Philadelphia Convention [1; 23, pp. 12-13; and 55, pp. 567-89].

Participants in the pamphlet war generated by the ratification controversy also devoted scant space to the internal commerce question. When commentators did treat the commerce clause, moreover, no indication emerged that the states' police and tax powers would be affected unless Congress occupied the field with its own legislation. Hamilton, for example, flatly promised state governments that "with the sole exception of duties on imports and exports," they would retain their power to tax "in the most absolute and unqualified sense" [42, p. 198]. James Madison, too, evinced a propensity to accord wide policy latitude to state governments. "The regulation of commerce, it is true," he stated in the *Federalist* [42, p. 292-93], "is a new power [of Congress]; but that seems to be an addition which few oppose, and from which no apprehensions are entertained." Indeed, Madison explained, "the powers reserved to the States will extend to all the objects which in the ordinary course of affairs, concern the lives, liberties, and prosperity of the State[s]."

The commercial-policy "object[ives]" of state governments were, in fact, extraordinarily broad. Throughout the 19th century Americans looked primarily to state and local officials to promote internal improvements and regulate commercial traffic, tended to regard "each State as a community of interest... operating in a hostile environment of rival State communities" [44, p. 5], and expected governmental agencies closest at hand to be responsive to their particularistic interests. In an era when constitutional scruples and regional power groupings forestalled vigorous congressional action under the commerce clause, state and local interventions did play an important role in overcoming the physical obstacles which, for generations, had circumscribed interregional trade within narrow limits [25]. The broad concerns of state governments facilitated the expansion of interstate transactions generally, and also protected shippers, passengers, and consumers against negligence or fraud on the part of carriers and merchants [2]. But the state legislatures also spun an effective web of barriers to internal commerce. Measures designed to protect consumers or to promote interregional transactions joggled incongruously with statutes frankly adopted to impede the introduction of out-of-state products on a bargaining parity with local goods. State and local officials prescribed marketing practices, enacted discriminatory schemes of mercantile licensing and taxation, proscribed the entry of unfavored articles of commerce, and devised inspection laws to improve the competitive position of their citizens relative to producers in other states [3]. In short, state

governments acted freely on all matters respecting commercial traffic -- whatever their interstate ramifications -- as if they were unaware, or at least unconcerned, that the commerce clause might have divested them of powers they had exercised under the Articles of Confederation.

Before 1875 the federal courts said nothing that disturbed the states' impulse to intervene on behalf of local interests. In the landmark cases of *Gibbons v. Ogden* [24] and *Brown v. Maryland* [11], the Marshall Court established two principles of profound importance: "Commerce is intercourse" and it includes transportation and traffic, which comprise "its essential ingredients" [24, p. 189; and 11, p. 466]. In both instances, however, the Chief Justice deftly avoided a direct confrontation with the question, as he put it, "whether this [commerce] power... is surrendered by the mere grant to Congress, or is retained [by the states] until Congress shall exercise the power" [24, p. 200]. Although he handed down dicta which looked toward a "dormant" theory of the commerce clause, Marshall preferred to invoke unlikely federal statutes -- a federal coasting-license act in the one case, and national tariff laws on the other. As a result, the court virtually ignored the broad policy issues raised by counsel, and held that the "sole question [was], can a state regulate commerce... while Congress is regulating it" [24, p. 200]. Anchoring his opinions as much upon the supremacy and import-export clauses as upon the commerce clause, Marshall flatly stated that state laws must give way once Congress occupied the field with its own legislation.

However, the legitimacy of state and local commercial interventions in the silence of Congress was too vital an issue to be long suppressed by Marshall's penchant for "esoteric statutory construction" [23, p. 20], and between 1837 and 1851 the Taney Court split into a bewildering array of shifting factional alignments as the Justices attempted to devise a workable canon of constitutional construction. The protracted intracourt controversy over whether the regulation of internal commerce belonged exclusively to Congress or admitted of a concurrent power in the states was ultimately stilled in *Cooley v. Board of Wardens* [20]. Justice Benjamin Curtis there pointed out that commerce embraced a great variety of subjects, some of such a nature as "imperatively" to require a uniform, national rule while others admitted of local control until such time as Congress occupied the field. The *Cooley* rule, the court later noted [21, p. 701], was "as satisfactory a solution as perhaps could be obtained... [on a] question which had so long divided the judges." As an adjudicatory mechanism, however, it was virtually useless. As Kent Newmyer observed [37, p. 1378], "the *Cooley* decision was less a doctrinal clarification than it was an agreement to stop looking for one."

For the purposes of the postwar court, the most important aspect of *Cooley* was its unarticulated premise: when Congress

remained silent, the court might supply its voice. In exercising the enormous discretion inherent in the *Cooley* rule, moreover, th court had ample room to resolve disputes on the basis of frankly instrumentalist, extraconstitutional criterion. Between 1851 and 1875 the question of how the court might employ that self-created power, and for what purposes, remained uncertain. Then the revolution in the structure of American marketing generated a period of extraordinary ferment that culminated with the creation and systematic application of the "free trade" doctrine.

II.

Through the first five decades of the 19th century the independent, "sedentary" merchant integrated the American marketplace. Urban-based wholesalers supplied manufacturers with capital for building plants, purchasing equipment, and paying wages; they also managed the flow of finished goods to retailers [40]. Direct contacts between manufacturers and consumers were rare. Indeed, as late as 1860 the word "drummer" -- which later became the popular term for traveling salesmen -- was used to refer to the men wholesalers placed in hotel lobbies to greet the hinterland buyers who made annual visits to eastern marketing centers [26, p. 481]. But changes generated by a swiftly developing new technology, by the expansion and integration of the nation's transport network, and by Civil War financial innovations that created new ties between manufacturers and commercial bankers all contributed to a revolution in the structure of American marketing.

The pioneers were the manufacturers of new, expensive, and technologically complex products such as sewing machines. By 1860 the sewing-machine manufacturers had learned that existing wholesalers were unable to provide consumer credit or provide demonstration and repair services; consequently they quickly move into the wholesaler's domain and created their own distribution networks [30]. Manufacturers of dry goods, liquor, and other com modities soon followed the pioneers. Confronted with increases in plant capacity and falling prices after the Panic of 1873, entrepreneurs resorted to new competitive tactics; more aggressive marketing techniques were generally among the manufacturer's initial responses [15]. Commercial drummers became the industrialists' hirelings, they moved from hotel lobbies to the highways, and their number increased each decade at an astonishing rate [26, p. 482].

But once the postwar pioneers in business organization had created new marketing structures, they were required to make additional investments to transform a potentially huge market into a free-trade unit. As the large-scale firms that pioneered ver-

tical integration set up local agencies from which salesmen peddled wares door-to-door, legal barriers posed immediate problems. Prodded by local merchants and manufacturers whose interests were threatened, state governments not only stepped up enforcement of long-established controls on itinerant peddlers but also enacted new statutes to preserve the competitive position of local businessmen. The protectionist impulse in the states impeded the operations of all large-scale firms. It was the sewing-machine manufacturers, however, that mustered the resources necessary to evoke the Supreme Court's first suggestion that, in the silence of Congress, the Court must presume that it intended commerce to remain "free and untrammelled" [57, p. 282].

By choosing to mount a legal assault on state trade barriers, the sewing-machine manufacturers faced a formidable task. Statutes that required nonresident salesmen to pay higher licensing fees than local merchants violated the privileges and immunities clause of the Constitution; thus they had been subjected to the judicial veto in a long line of cases culminating in 1870 with an authoritative ruling by the Supreme Court [54]. When state and local governments discriminated against out-of-state products, rather than the salesman's domicile, however, tax and licensing laws had been sustained routinely by the courts.

Through the mid-1870s, the state judiciaries regularly treated the 1827 case of *Brown v. Maryland* [11] as the Supreme Court's final word on state and local taxation of commercial traffic. There the Marshall Court had invalidated a state law that required wholesalers of foreign merchandise, and only dealers in foreign merchandise, to pay an annual license tax. Speaking through the Chief Justice, the court held that Congress had already forced importers to pay tariff duties on their wares, and had thereby conferred upon them the right to sell in an unfettered market -- a right which abridged by state law would have made the right to import of little value. As Felix Frankfurter later observed [23, p. 36], "the circumstances of the case furnished a ready opportunity for curbing state taxation discriminating against interstate commerce." Nevertheless, Marshall focused most of his discussion on the import-export clause, and he suggested that the states might tax all commodities imported from abroad, or from any of the several states, once the "original package" had been broken and the goods had "become incorporated with the general mass of property" [11, pp. 443-44].

The state judiciaries readily discerned "an immeasurable difference" between the act nullified in *Brown* and discriminatory taxation of goods offered for sale by commercial travelers [7, p. 109]. Statutes of the latter variety, the Indiana court ruled in 1835, did not impede the operation of the federal revenue laws, for the commodities thus taxed had already "become incorporated with the great mass of property in the state." Moreover, the

Indiana court asserted, the power to tax "is inseparable from sovereignty, essential to its existence, and one which all the expounders of the constitution admit to have been reserved" by the states [7, p. 109]. It was an inexorable corollary, an Alabama judge added a generation later, that a state legislature might "tax all merchandise sold within its jurisdiction, whatever its state of origin, while encourag[ing] manufacturers in its [own] borders, by exempting the articles so manufactured from taxation for a time, or altogether" [46, p. 54].

The line of reasoning pioneered in Indiana comported with the particularistic needs of local merchants and manufacturers everywhere, and other state courts quickly adopted a similar position [23, p. 38]. In an often-cited opinion in the *License Cases*, moreover, Justice Woodbury observed [32, p. 622] that

> it is perfectly competent for [the states] to assess a higher tax or excise, by way of license or direct assessment, on articles of foreign rather than domestic growth belonging to her citizens; and it has ever been done, however it may discourage the use of the former.

When Thomas Cooley published the first edition of his *Constitutional Limitations* in 1868, then the principle of unrestricted state taxation of commercial traffic, in the silence of Congress, had already attained the status of a settled rule. "The states may unquestionably tax the subjects of commerce," Cooley wrote in his influential treatise [19, p. 486],

> and no necessary conflict with that complete control which is vested in Congress appears until the power is so exercised as to defeat or embarrass the congressional legislation. Where Congress has not acted at all upon the subject, the state taxation cannot be invalid on this ground.

Despite the weight of precedence, the sewing-machine manufacturers persevered with remarkable success. In the fourth edition of his *Constitutional Limitations*, published in 1878, Cooley had already begun to note exceptions to the rule he had formulated so confidently a decade earlier; when the sixth edition appeared in 1890, the passage on state taxation of commercial traffic had been excised altogether. The leading case in this crucia doctrinal transformation came up from Missouri in 1875. Thirty years earlier the Missouri legislature had enacted a revenue measure [13] that defined peddlers as persons selling commodities "not the growth, produce, or manufacture of th[is] State," and required them to pay a license fee for the privilege of engaging in local business. M. M. Welton, an agent of the Singer Sewing Machine Company, had been convicted under the statute and the law had been sustained by the state's highest court.

On appeal to the Supreme Court, counsel for Missouri simply stood on the precedents in a terse, five-page brief. Singer, on

the other hand, hired two luminaries from the Missouri bar who compiled lengthy briefs that spoke directly to the policy issues involved in the dispute. Stated simply, they argued that existing doctrines were "not practical in this case" [10, p. 9]. Missouri's equation of peddlers with hawkers of out-of-state goods, they contended, was such "linguistic legerdemain" that the legislature might as well have "define[d] a peddler to be one who deals in boots and shoes manufactured in Lynn, or salt produced in Syracuse" [48, p. 5]. In short, counsel emphasized that the statute was simply a protective tariff disguised as a licensing law. Because peddlers of local products were exempt, the Missouri law was "not a tax on the occupation of selling, but a burden on the goods themselves" [10, p. 12]. It followed, counsel concluded, that

> [i]f this is a valid exercise of the taxing power, the legislature may wholly exclude... products of sister states; for a lawful exercise of a power knows no limitation except such as are to be found in the discretion of the lawmakers [10, p. 13].

The Supreme Court concurred. Speaking through Justice Stephen Field, the Court readily conceded that under the *Brown* doctrine the Singer machines had lost their interstate character before their sale had become subject to the Missouri licensing law. Nevertheless, Field flatly asserted that Marshall's "guarded language" [57, p. 281] could not be expected to control disputes arising in an integrated national economy. Paraphrasing counsel's brief, Field asserted that it was unnecessary to consult an economist to discern that "where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves" [57, p. 278]. It was equally clear, Field added, that unless the "original package" doctrine were modified, a barrage of interstate tariff wars, like those which had

> depressed [the] condition of commerce and [created] obstacles to its growth previous to the adoption of the Constitution... might follow, and the experience of the last fifteen years shows would follow, from the action of some of the States [57, pp. 280-81].

Due to new developments in the structure of American marketing, he concluded, it had become necessary to extend Marshall's *Brown* doctrine, and "to hold now that the commercial power [of Congress] continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character" [57, p. 281].

The protectionist impulse in the states was not easily curbed, and the Missouri case established only a beachhead for large-scale, vertically integrated firms. As Harry N. Schieber has demonstrated for the antebellum era [44, p. 84], state gov-

ernments were extraordinarily adept at initiating successful "counterthrusts" to the Supreme Court's nationalistic doctrines. After the postwar marketing revolution, however, the ingenuity of local lawmakers rarely went unchallenged. Firms such as Singer whose interests were national in scope were quick to muster test cases in response to each new statutory innovation. Thus in 1880 Singer's counsel was back in Washington to challenge a Virginia law [53] enacted five years earlier.

The measure disputed in *Webber v. Virginia* [56] was apparently designed to compel Singer and all other out-of-state firms to disband their sales forces and deal exclusively with local wholesalers. Under the act, all salesmen who peddled "manufactured articles or machines... of other states or territories" were required to pay the state a license fee of $25 and an additional $10 fee in every county where they did a local business. Only distributors who actually owned products manufactured outside Virginia were exempt. For the Singer Company, whose Richmond agency supervised salesmen working door-to-door in a dozen surrounding counties, the Virginia law had a potentially disastrous effect. Nevertheless, the Virginia Court of Appeals sustained the statute, distinguishing the Missouri case on the ground that there was no discrimination against out-of-state products so long as the manufacturer had the option of distributing his wares through local wholesalers.

The Supreme Court, after having been briefed about Singer's organizational structure, voted unanimously to reverse the decision which follows. Speaking again through Field, the court disposed in a single sentence of the issue emphasized by the Virginia bench. "Sales by manufacturers," Field proclaimed [55, p. 350], "are chiefly effected through their own agents." Once the postwar marketing revolution had been thus ratified, the result flowed inexorably from the principles announced in *Welton v. Missouri*:

> It matters not whether the tax be laid directly upon the articles sold or in the form of licenses for their sale. If by reason of their foreign character the State can impose a tax upon them or upon the person through whom the sales are effected... she may place the tax at so high a figure as to exclude the introduction of the foreign article, and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the Constitution intended to guard, when they vested in Congress the power to regulate commerce among the several States [55, pp. 350-51].

The last sentence of the opinion just quoted merits special attention, for it reveals in disarming fashion the degree to which the sewing-machine manufacturers had succeeded in fomenting a

doctrinal revolution. As Field conceded, the framers of the Constitution had vested Congress -- not the Supreme Court -- with the authority to regulate interstate commerce. Nevertheless, the court believed that the idea of a unitary national market would be nullified if large-scale firms were required to press Congress for relief each time the states disguised protectionist legislation in the form of licensing laws. As Justice Robert Jackson later observed [22, p. 400], "the balkaniz[ing]" policies of state governments were just "too petty, too diversified, and too local to get the attention of a Congress hard pressed with other matters."

The Supreme Court's decisions in the license tax cases also marked a decisive break with prior doctrinal formulations. In *Gibbons* and *Brown*, the Marshall Court had curbed the states in order to protect rights which Congress had conferred on persons engaged in interstate and foreign commerce. Then, during the Taney era, the majority's concerns had shifted from protecting the prerogatives of Congress to maintaining the territorial integrity of the states. Consequently, the Taney Court tended to classify powers -- taxation, police, commercial regulation -- and then assign control of public policy to the proper governmental agencies. The *Cooley* doctrine looked to the subject matter of state policies; since regulation of chattel slaves, prevention of disease or pauperism, and licensing of liquor dealers and steamboat pilots were all "local" matters, the Taney Court had held that they were subject to state laws. Once faced with questions generated by the rise of big business, however, the court began to conceptualize issues in terms of free trade and free markets. In *Welton* and *Webber*, the Supreme Court looked to the incidence of state laws; if barriers had been erected to impede the interregional flow of commodities, revenue measures were held to be invalid despite the fact that the states' power to tax had been "admit[ted] to have been reserved... [by] all the expounders of the Constitution" [7, p. 109]. In effect, then, the sewing-machine manufacturers prompted the court to deduce from the commerce clause a new, fundamentally important constitutional right: the right of American businessmen, even without congressional license, to engage in interstate transactions on terms of equality with local merchants and manufacturers.

As late as 1885, the "free trade" doctrine had been applied only to state tax laws. Eventually, however, the rule formulated in *Welton* spilled over and controlled the Supreme Court's position on inspection laws. Appropriately, the key agents of the latter development were the "Big Four" meatpackers.

III.

The organization of railroad refrigeration exerted a revolutionary impact on the American meat business [31]. For centuries prior to the 1880s, cattle and swine had been driven on the hoof, and later by rail, to highly localized processing plants. When fresh meat was available, consumers knew it had been slaughtered nearby. Beef and pork prepared for interstate and foreign commerce had to be salted and barreled, or canned with preservatives in order to prevent spoilage. The refrigerator car not only extended the potential market for dressed beef but, since unsalable parts of the animal need not be shipped, it also permitted the processor to save up to 35 percent on freight costs [9, pp. 316-20]. By combining refrigeration with mass-processing techniques and a strategic location amidst the Chicago stockyards, the "Big Four" packers were able to ship dressed beef thousands of miles and still undersell local butchers by a substantial margin.

The combination of factors that enabled Chicago packers to obtain a virtual monopoly on the dressed-beef trade is still a matter of some dispute among scholars [4, 5, and 16]. In testimony taken at Saint Louis in 1888, however, a Senate select committee discovered that old-style local butchers believed almost unanimously that the "Big Four" packers had conspired to "freeze out" all competitors[52]. The Chicago packers, the small-scale butchers testified, had extorted from carriers special rates for handling refrigerator cars; they had ordered their wholesale agents to employ predatory pricing tactics in local markets; and they had conspired with the stockmen's commission merchants to ensure that live cattle were sold only by the carload. Witness after witness nevertheless informed the senators that no federal intervention was necessary. A national organization, the Butcher's Protective Association, had been created, they explained, and it intended to seek relief in the several state legislatures. One witness, Detroit butcher John Duff, testified [52, p. 156] as follows:

> Q. What is your remedy for it [collusion among Chicago packers]? --A. Give us a livestock inspection, and when meats are not inspected do not allow them to be sold.
>
> Q. Do you want State or national inspection? --A. Give us State inspection.
>
> Q. Do you think that a State inspection would be all that would be necessary? --A. I think so. I think it would cover the case.
>
> Q. You think that would cover all the evils. --A. Yes, Sir.

The small packers' faith in the efficacy of state action should not be surprising: the Butcher's Protective Association's model

statute prohibited the sale of dressed beef, mutton, or pork unless it had been inspected by state officials 24 hours before slaughter. In short, the B.P.A. proposed to banish the "Big Four" packers from all but the Chicago market.

In 1889 the B.P.A. persuaded lawmakers in Minnesota [35], Indiana [29], and Colorado [18] to enact their panacea for virtual monopoly in the dressed-beef trade. Bills providing for preslaughter inspection failed to pass in a score of other states because, according to one proponent, "of the presence of a powerful lobby representing the most colossal monopoly, perhaps, that any government was ever confronted with" [17, p. 43]. Where lobbying had proved ineffective, however, the "Big Four" had no choice but to ignore the inspection laws; thus their local agents were promptly indicted by state authorities. Within a year the leading case of *Minnesota v. Barber* [36] was on the docket of the Supreme Court. The lawsuit was so vital to the interests of Indiana butchers that the state's attorney general asked for, and received, the court's permission to join his Minnesota counterpart in defending the statutes.

Counsel for Minnesota and Indiana presented compelling arguments. Inspection laws had long been used by the states to improve their producers' competitive position, and the framers of the Constitution had deemed inspection measures to be such great importance to local economies that the states' power to enact them, and to charge fees for their operation, had been expressly recognized in the Constitution. In *Gibbons v. Ogden*, Chief Justice Marshall had accorded further legitimacy to existing practices by observing [24, p. 203] that the states' power to enact inspection laws had "not [been] surrendered to the general government" despite the fact that they "m[ight] have... a considerable influence on commerce." Moreover, counsel argued, as late as 1878 the court had quoted Marshall's language in an opinion [39] that sustained a Kentucky law providing for presale inspection of illuminating oil manufactured in Saint Louis. But in the event long-accepted constitutional construction and the weight of precedent were not enough, counsel for Minnesota and Indiana also implored the court to take judicial notice of what they considered to be a well-established scientific fact. Studies of diseased meat [8], including one cited in the Senate Select Committee's own report to Congress [51, p. 26] demonstrated that

> it is impossible to tell, by an inspection of fresh beef, veal, mutton, lamb or pork... whether or not it came from animals that were diseased when slaughtered; that an inspection on the hoof, within a very short time before the animals are slaughtered is the only mode by which their condition can be ascertained with certainty [34, pp. 30-31].

And science, it was argued, only confirmed what common sense sug-

gested, "The examination of the hind quarter of an ox will not detect tubercles in his lungs or cancerous tumors upon his neck" [17, p. 9].

Counsel for the defendant, an Armour agent, filed a remarkably candid brief. They agreed at the outset that all the inspection cases on the books supported their opponent's position. Having made that concession, however, they urged the court to "bear in mind" its prior decisions in the license-tax cases and to recognize that unless the principles laid down in *Welton* were extended, the idea of a free-trade unit would necessarily be sacrificed at the altar of plenary state inspection power. "If the State [of Minnesota] can prohibit interstate commerce in beef unless the livestock is first inspected [t]here," counsel for Armour contended [43, p. 49],

> it may in fish unless they are first inspected when caught. It may in butter and cheese and milk and leather, unless the cow from which they are drawn is first inspected [t]here. It may in wool and all clothing made from it, unless the sheep is first inspected [t]here. It may in cotton and clothing made from it, unless the cotton and the ground that produces it is inspected in Minnesota before the cotton is picked; and there is no product of the agriculture or manufacture of other States that this State may not thus exclude; none of this State that every other may not exclude.

With the parade of horribles likely to proceed from an affirmative ruling thus laid bare, counsel took up the problem of whether the court ought to take judicial notice of the scientific studies adduced by the states' attorneys general. Counsel's tactics on this issue were extraordinary. Rather than attempting to rebut the contention that only preslaughter inspection was effective, counsel emphasized that "fresh meats consumed by Minnesotans were never inspected on the hoof by State or city inspectors before April, 1889, and yet population has increased and the death rate has been low" [43, p. 48]. It followed, counsel concluded, that the Minnesota statute must have been enacted to protect the competitive position of local butchers rather than to promote the public health.

The Supreme Court concurred with Armour's counsel. The propositions Justice Field had formulated in *Welton*, rather than previous cases involving inspection laws, controlled its decision We cannot "shut our eyes," Justice John Marshall Harlan declared for a unanimous Court, "to the fact that the act, by its necessary operation... directly tends to restrict the slaughtering of animals... to those engaged in such business in that State" [36, pp. 322-23]. Moreover, Harlan observed, there was "no real analogy" between the preslaughter inspection laws and the Kentucky

inspection statute the court had sustained 12 years earlier. Presale inspection of illuminating oil was "neither unusual or unreasonable," nor did implementation of that law ineluctably discriminate against commodities "because of the locality of production." As for the "alleged" necessity for preslaughter inspection, the court concluded disingenuously, "we are not aware that such is the view universally, or even generally entertained" [36, pp. 327-28 and 321]. If government had a duty to protect consumers against the dangers of unwholesome meat, as counsel for Minnesota and Indiana had indicated, another strategy would have to be pursued.

The obvious remedy for otherwise legitimate concerns about public health was, of course, the creation of a federal inspection force; but in *Barber*, as in the license tax cases, the court correctly perceived that unless the federal judiciary supplied the voice of Congress, federal lawmakers would not move with dispatch, if at all, to displace discriminatory state regulations with a uniform rule. The report of the Senate Select Committee [51], which appeared two weeks before *Barber* was decided, looked to state action for protection of American consumers and recommended federal inspection only of meat products prepared for export [50, pp. 3056-58, and 5928-31]. Not until five weeks after the court had spoken did Congress appropriate the meat inspection provisions of a comprehensive pure food bill destined to die [6] and tack them on to the Select Committee's bill [50, pp. 5674, 6415, and 10191]. The court, in short, forced Congress to apply the same solution for state barriers against "Big Four" meat that the Select Committee had prepared already for European barriers against all American meat. The Federal Meat Inspection Service, established in 1891, was thus authorized to conduct preslaughter and postmortem inspections of meat products produced for interstate and foreign commerce alike.

IV.

The Supreme Court's commerce clause decisions of the 1875-90 period, for all their immediate importance to large-scale manufacturers, had a more enduring influence on American economic growth, for they firmly established the Supreme Court's role as the umpire of the nation's free-trade network. Even Justice Oliver Wendell Holmes, a persistent critic of many late-19th-century decisions, ardently believed that review of state commercial regulations was an essential judicial function. "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void," he announced in 1913.

> [But] I do think the Union would be imperiled if we could not make that declaration as to the laws of the

> several States. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the commerce clause was meant to end [27, pp. 295-96].

Holmes's suggestion that the commerce clause was "meant to end" discriminatory state policies was, as we have seen, correct only so far as the Constitution empowered Congress to intervene. Before the Supreme Court could establish fully its claim to monitor the free-trade unit in the silence of Congress, two prerequisites had to be fulfilled. First, the court had to be apprised by skillful counsel of the growth-eroding potential of state laws, and it had to be persuaded that new juridical principles must be forged to preserve free trade among the states. Second, the legitimacy of protectionist state legislation had to be challenged by litigants with sufficient resources to finance scores of lawsuits in order both to secure initial favorable decisions and to combat the tendency of state governments to mobilize "counterthrusts" against the Supreme Court's nationalistic doctrines. For students of the NAACP's operations in the 20th century, neither of these caveats are apt to be startling. But their implications for the development of a national market supervised by appellate courts were simply enormous. What the NAACP legal defense fund accomplished for black Americans under the 14th Amendment in the 20th century, the legal defense war chests of the Singer Company and the "Big Four" meatpackers accomplished for vertically integrated corporations under the commerce clause between 1875 and 1890.

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