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## The Silence of Congress

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## THE SILENCE OF CONGRESS

DOUGLAS HILTON CARLISLE\*

Volumes are filled with the numerous debates, examinations, and discussions of the powers of the American Congress, and legion is the number of articles and works on the relation of the states to the federal government. But generally these are in regard to the actions of Congress, delving into what Congress can do or what it is forbidden to do. There are some powers delegated to Congress by the Constitution which have not yet been exercised; in such instances only the judiciary has been able to say what the powers of Congress are, and perhaps only the judiciary can determine what Congress means when it is silent on a subject. When the States, in absence of Congressional action, have dared to legislate, the court has usually been obliged to determine whether the silence of Congress means that no action, either by the State or by the federal government, shall be taken in that area or whether the action of the State is legal and to be enforced by the Courts. Scholars have generally overlooked the question of the powers of the states on matters where Congress has not passed legislation.

This question was first brought to the attention of scholars and legal thinkers by Mr. Henry W. Bickle of the University of Pennsylvania in 1927.<sup>1</sup> In the case of *Oregon-Washington Railroad Co. v. State of Washington*,<sup>2</sup> it was stated that there are two fields in the relation of the states to the regulation of interstate commerce by Congress: one in which the states cannot regulate at all, even in the silence of Congress, and the other in which the states may regulate under their police power until Congress by affirmative action occupies the field and therefore excludes state action. Mr. Bickle points out that this principle stated and reiterated in subsequent cases, seems to divide the possible subject of regulation into two classes: those national in character, requiring uniform regulation which is exclusively the power of Congress, and those local in character which come into the power of the states concurrently with Congress. He also says that the silence of Congress may mean

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1. 41 HARV. L. REV. 200 (1927).

2. 270 U. S. 87, 46 Sup. Ct. 279, 70 L. Ed. 482 (1925).

either: (1) that Congress considers the matter so diverse in nature that the states can handle the matter best, or (2) that Congress does not care to have any legislation on the subject. Mr. Bickle's article contains seven principles which are summarized as follows: (1) The power of Congress to regulate commerce among the states is granted exclusively to Congress so far as it involves matters of national concern, (2) but the Constitution does not take from it the police powers of the state. (3) Silence of Congress on some matters is interpreted by the Supreme Court as evidence of its will that the matter not be regulated by the states, (4) but Congress may break this silence and permit state police laws to operate where they involve interstate commerce as a matter of national concern. (5) In matters of local concern the powers of Congress are not exclusive, and (6) as to such matters its silence discloses no objection to the operation of state laws. (7) When Congress acts affirmatively in any situation involving interstate commerce a state statute will become inoperative which: (a.) either conflicts with some positive regulation of the federal legislation or (b.) is regarded by the Court as intruding into the field which Congress meant to occupy by its legislation.

Since the time when these principles were formulated, many problems which were formerly wrested with by the states have become matters of national concern. On these the silence of Congress has been broken. But there are several cases which show that these principles are still valid for matters which have not yet received Congressional action. Occasionally, however, two of these principles may prove contradictory in application; for some matters which have become national in importance still retain a sufficiently local character to warrant continued control by the states.<sup>3</sup>

Problems confined to particular states are usually solved by local legislation, and premature action by Congress on such problems would cause confusion and dissatisfaction, even if Congress were acting within its power. It is not unusual that Congress has profited by the experience of the states which have dealt with a matter before it attracted national attention.

The purpose of this paper is to examine recent cases for the practical application of the basic principles which we have noted. Our investigation will incidentally disclose subsidiary principles and, it is hoped, will result in a concrete up-to-date view of the legal possibilities inherent in the silence of Congress.

3. *South Carolina State Highway Commission v. Barnwell Brothers*, 303 U. S. 177, 58 Sup. Ct. 510, 82 L. Ed. 734 (1937).

The exclusive power of Congress to regulate interstate commerce has been generally accepted since the time of *Gibbons v. Ogden*.<sup>4</sup> More recently the Supreme Court has upheld the power of Congress to prohibit from interstate commerce kidnapped persons,<sup>5</sup> women for immoral purposes,<sup>6</sup> and goods made by convict labor.<sup>7</sup> This power was broadly defined in sustaining the power of Congress to prohibit the taking of stolen automobiles into interstate commerce when it said:

Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other states from the state of origin . . . In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce.<sup>8</sup>

And the prohibition may be designed to give effect to the policies of Congress in relation to the instrumentalities of interstate commerce, as in the case of commodities owned by interstate carriers.<sup>9</sup> At the present time there is, then, no doubt that Congress has exclusive jurisdiction to regulate interstate commerce.

These cases are in regard to the power of Congress to make prohibitions; the power of Congress to regulate is more clearly seen for our purpose in *U. S. v. Southeastern Underwriters Ass'n*.<sup>10</sup> Here it was claimed that insurance was not interstate commerce and so not subject to regulation, in this case not subject to the provisions of the Sherman Act. The Supreme Court held that since a substantial part of its business was in interstate commerce the company was engaged in interstate commerce and subject to regulation. Speaking for the Court Justice Black said:

In all cases in which the court has relied upon the proposition that "the business of insurance is not commerce" its attention

4. 22 U. S. 1, 9 Wheat. 1, 6 L. Ed. 23 (1824).

5. *United States v. Wheeler*, 254 U. S. 281, 41 Sup. Ct. 133, 65 L. Ed. 270 (1920).

6. *Hoke v. United States*, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed. 523 (1913); *Caminetti v. United States*, 242 U. S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442 (1917).

7. *Kentucky Whip & Collar Co. v. Ill. Central Railway Co.*, 299 U. S. 334, 57 Sup. Ct. 19, 81 L. Ed. 386 (1936).

8. *Brooks v. United States*, 267 U. S. 432, 436, 45 Sup. Ct. 345, 69 L. Ed. 699 (1925).

9. *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836 (1909).

10. 322 U. S. 533, 64 Sup. Ct. 1162, 88 L. Ed. 1440 (1945).

was focused on the validity of state statutes—the extent to which the Commerce Clause automatically deprived states of the power to regulate the insurance business. Since Congress had at no time attempted to control the insurance business, invalidation of state statutes would practically have been equivalent to granting insurance companies engaged in interstate trade a blanket license to operate without legal restraint.<sup>11</sup>

With this statement it is clear that in the absence of action by Congress the states are allowed to act in some instances, but it should be noticed that the absence of regulation by Congress did not surrender the right to legislate in that field.

However, this is not to be interpreted as meaning that the Constitution takes away the police powers of the state although under such powers a state may accomplish a purpose which to all effects regulates interstate commerce. In *Southern Pacific Railroad Co. v. Arizona*<sup>12</sup> the Court said:

Congress, in enacting legislation within its constitutional authority, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purposes to do so is clearly manifested.

Also in *South Carolina State Highway Commission v. Barnwell Bros.*<sup>13</sup> the question arose as to whether a state could regulate the carrying capacity, size, and number of wheels on motor trucks using the state highways. The Court sustained the regulatory power of the state. Chief Justice Stone in speaking for the Court said:

While constitutional grant to Congress of power to regulate interstate commerce has been held to operate of its own force to curtail state power in some measure, it did not forestall all state action affecting inter-state commerce. Ever since *Wilson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, and *Cooley v. Board of Port Wardens*, 12 How. 299, it has been recognized that these are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of Congressional action has for the most part been left to the states by the decisions of this Court, subject to the other applicable restraints.

11. 322 U. S. 534, 544.

12. 325 U. S. 761, 65 Sup. Ct. 1515, 89 L. Ed. 1915 (1945).

13. 303 U. S. 177, 58 Sup. Ct. 510, 82 L. Ed. 734 (1937).

The commerce clause, by its own force, prohibits discrimination against interstate commerce, whatever its form or method, and the decisions of this Court have recognized that there is scope for its like operation when state legislation nominally of local concern is in point of fact aimed at interstate commerce . . .

But the present case affords no occasion for saying that the bare possession of power by Congress to regulate the interstate traffic forces the state to conform to standards which Congress might, but has not adopted, or curtails their power to take measures to insure safety and conservation of their highways which may be applied to like traffic moving intrastate.

Here the silence of Congress was clearly interpreted as meaning that the state had under its police power the right to regulate such vehicles on its highways in order to insure the proper use of the roads and to protect the safety of its citizens.

But on the other hand silence of Congress is interpreted as meaning that it is the will of Congress that the matter not be regulated by the states. The case of *Baldwin, Commissioner of Agriculture & Markets v. Seelig, Inc.*<sup>14</sup> is ample illustration. In this case New York had prohibited the sale of milk imported from other states unless the price paid the out of state producer was up to the minimum allowed in New York. Although it was carefully shown that Congress had not acted on such a subject, the Court did not sustain the law, on the ground that while the economic security of the dairy-men may have been the basis for affording the community a sure and sanitary supply of milk, a vital product, "this is in any sense a restriction on interstate commerce". Rather than to leave the possibility of the conclusion that the Court follows no principle in distinguishing between this case and the *South Carolina State Highway Commission* case one should remember that in the latter instance all the companies were regulated equally regardless of whether they were engaging in interstate or intrastate commerce. Moreover, in the case of the milk law of New York the business in that state was given an advantage over the business in other states. The tendency of the Court seems to be to dislike such a law if it is allowed to work for the benefit of the domestic business.

There have been times when Congress has broken this silence and permitted the police laws of a state to operate where they involve interstate commerce as a matter of national concern. This has been sustained since it was clearly the intention of Congress to al-

14. 294 U. S. 511, 55 Sup. Ct. 120, 79 L. Ed. 1032 (1935).

low the state to supplement the Act of Congress in order to regulate conditions peculiar to its own circumstances. Although there are other cases on this point,<sup>15</sup> this principle arose clearly in *International Shoe Co. v. Washington*.<sup>16</sup> The state of Washington passed a law establishing a state unemployment fund, part made up from the employer, part taken from the wages of the individual, and the remainder made up by the state. The shoe company claimed that the company and employee were engaged in interstate commerce and therefore was not subject to the tax since Congress had passed legislation on the subject. The law of Congress was such a social welfare act as the one passed by the Washington legislature, but 53 STAT., 1391, 26 U.S.C. § 1606 (a) provided that "no person required under a state law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce". The Court, with this in mind, upheld the Act of the state and even allowed the state courts to bring action for back payments under its law. Thus it is clear that Congress can authorize the exercise of certain powers and as in this case to put a burden on interstate commerce.<sup>17</sup>

But the power of Congress is not always exclusive. South Carolina imposed a tax on insurance companies engaged in interstate commerce, and the tax for the companies engaged in interstate commerce was greater than the tax collected from those within the state. The settlement of this question was made in *Prudential Life Ins. Co. v. Benjamin* when the Court speaking through Justice Rutledge said:

We are not of the opinion that what Congress intended to say in the McCarran-Ferguson Act was that its silence or failure to regulate the commerce business was not to be taken as meaning that the business should be free from all regulation as taxation by the several states . . . . To make its meaning doubly clear Congress provided in § 2(a) "that the business of insurance . . . . shall be subject to laws of the several states

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15. *Perkins v. Commonwealth of Pennsylvania*, 314 U. S. 586, 62 Sup. Ct. 484, 86 L. Ed. 473 (1942); *Hooven and Allison Co. v. Evatt*, 324 U. S. 652, 65 Sup. Ct. 870, 89 L. Ed. 1252 (1945).

16. 326 U. S. 310, 66 Sup. Ct. 154, 90 L. Ed. 95 (1945).

17. The court curtly stated here: "It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose a burden upon it." See also, *Standard Dredging Corp. v. Murphy*, 319 U. S. 306, 63 Sup. Ct. 1067, 87 L. Ed. 1416 (1943); *Kentucky Whip & Collar Co. v. Ill. Central Railway*, 299 U. S. 334, 57 Sup. Ct. 19, 81 L. Ed. 386 (1936); *Southern Pacific Co. v. Arizona*, 249 U. S. 472, 39 Sup. Ct. 313, 63 L. Ed. 713 (1918); *Hooven and Allison Co. v. Evatt*, 325 U. S. 652, 65 Sup. Ct. 870, 89 L. Ed. 1252 (1944).

which regulate to the regulation or taxation of such business," that is regulation and taxation which did neither undue burden on interstate commerce nor discriminate against the interstate business of foreign insurance companies.<sup>18</sup>

Although it may be regulation of interstate commerce, South Carolina was allowed to pass such a tax law since it provides certain services to the company, governmental services which enables it to perform its business. Therefore, while Congress does regulate in some ways the insurance business, this power is not exclusive, and a state under certain conditions can regulate.

But had Congress not acted its silence would not have meant that there was objection to the laws of the state. The *South Carolina Highway Commission v. Barnwell Brothers, Inc.* case is a point along this line. Here the state was allowed to regulate a company engaged in interstate commerce, and merely because Congress had not acted was not evidence that Congress intended that a state's police powers should be restricted when the safety of the people was involved. And especially since there was no design to aid any business within the state, the Court would uphold such a law.<sup>19</sup> The problem of the upkeep of the highways and the regulation of the traffic in the interest of safety of the people is a matter of local concern, and it is obvious that the state could deal with such a matter better than could the federal government. More recently a state has been allowed to place a tax on all aircraft of a company operating in interstate commerce but who returns all planes to the home port, which is located in the state, once each year. The Supreme Court sustained this tax in *Northwest Airlines v. Minnesota*.<sup>20</sup> Where a matter of a peculiar local problem is involved or where the state is sincerely interested in protecting the welfare of the people but when it is not favoring any interest within the state, the Court tends to uphold state regulation in the silence of Congress on the subject.

There are two times when Congress, while acting affirmatively in a situation involving interstate commerce, acts in such a way that the state is precluded from passing legislation in the area, when the state statute conflicts with some positive regulation of the federal government or when the state enters an area which Congress meant, according to the Court, to occupy by its legisla-

18. 328 U. S. 408, 66 Sup. Ct. 1142, 90 L. Ed. 1342 (1945). See Note, 164 A.L.R. 476.

19. Compare, *Western Union Telegraph Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105 (1896).

20. 322 U. S. 292, 64 Sup. Ct. 950, 80 L. Ed. 1283 (1944).



tion. In three instances the Supreme Court has ruled that when, but only when, it is clearly manifest that Congress intended to legislate in a particular field the state statute conflicting with the federal statute must give way to the supremacy of the latter.<sup>21</sup> There are some instances where Congress may have begun legislation in a given field, and it is the intention to regulate commerce in that area. Where such an intention exists although the exact subject has not been directly dealt with, the silence of Congress is interpreted to mean that it is the intention to dominate the field exclusively. Also where the state law, in terms or in practical application, conflicts with the Act of Congress or plainly and palpably infringes on its policy, it must bow to the supremacy of the federal Act.<sup>22</sup>

The case of *Southern Pacific Railway Co. v. Arizona* is definitely along this line. Arizona had limited the length of both passenger and freight trains passing through the state. The court ruled that while the power of the state to regulate the length of trains is not superceded by § 1 of the Interstate Commerce Commission Act of itself nor by any of the other Acts passed regarding the federal regulation of railroads and trains, it was still invalid since it contravened the commerce clause of the Constitution. The Court said that the commerce clause, even without the aid of Congressional legislation, protects against state legislation which is inimical to the national commerce; and in such cases, where Congress has not acted, the Court, and not the state legislature, would be the final arbiter of the competing demands of state and national interests. And in this particular case the law of Arizona was considered as being outside the realm assigned to the powers of the state by the silence of Congress although Congress had acted only generally.

Other activities of states have had an effect on interstate commerce, and in the absence of any legislation by Congress the Supreme Court has decided upon the legality of the action of the states as well as on the intention of Congress. In regard to the sales tax levied by the states on interstate commerce the Court has developed two attitudes,<sup>23</sup> (1) that interstate commerce should pay its just share of the state tax burden and (2) that state taxes mea-

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21. *Reid v. State of Colorado*, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108 (1902); *Welch Co. v. State of New Hampshire*, 306 U. S. 79, 59 Sup. Ct. 438, 83 L. Ed. 500 (1939).

22. *Atchinson Topeka & Santa Fe Railway v. Railroad Commissioner of the State of California*, 283 U. S. 380, 51 Sup. Ct. 553, 75 L. Ed. 1128 (1931); *Townsend v. Yeomans*, 301 U. S. 441, 57 Sup. Ct. 842, 81 L. Ed. 1210 (1937).

23. The sales tax was sustained in the case of *Henneford v. Silas Mason Co.*, 300 U. S. 577, 57 Sup. Ct. 524, 81 L. Ed. 814 (1937). See also *Wiloil Corp. v. Commonwealth of Pennsylvania*, 294 U. S. 169, 55 Sup. Ct. 358, 79 L. Ed. 838 (1935).

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sured by gross receipts from interstate commerce should be sustained when not involving a danger of cumulative burdens not imposed on local commerce. This has allowed the general sales tax as applied to articles in interstate commerce, and it has sustained state taxes on the sales of gasoline and oil used in interstate commerce. This has not been considered a restriction on interstate commerce.

But one of the most important areas in which Congress has remained silent has been that of interstate compacts. While this is definitely forbidden by the Constitution, without the consent of Congress, (Article I, Section 10, paragraph 3), there have been a number of states that have joined hands in certain activities.

There has been a great deal of such interstate relations in New England. The New England Council, an informal arrangement between those states, has been instrumental in promoting and carrying out a joint program for tourist attraction, parks, and recreational activities. This group has even gone so far as to work out tax programs in regard to income, corporation, and estate taxes. One of the great aims of this cooperation at the present time between those states is to keep the industries which have shown a tendency to go to other regions. In this case the Supreme Court has had nothing to say. Actually there has been little opposition to this program even in the press, and, since there has been a silence of the Court as well as of Congress, we may assume that these activities are legal at this time.

There has been one case that has come to the attention of the Courts that provides an interesting attitude in regard to compacts between states without the consent of Congress. Virginia and Tennessee came to an agreement in regard to a decision as to where the boundary would run between the two states. When the matter was contested, the Supreme Court sustained the compact as both states were in accord.<sup>24</sup> It may be concluded then that when both states are in agreement and no injury can be shown and in the silence of Congress such interstate compacts are permitted.

Should the matter of interstate compacts be brought to the attention of Congress, it will have the same difficulty in determining the meaning "compact" as the Court has had. The problem stems from the fact that in most instances the legislation between the states has been reciprocal and the agreement has been a mutual understanding. There have been definite agreements, however, and

<sup>24</sup> State of Virginia v. State of Tennessee, 148 U. S. 503, 13 Sup. Ct. 728, 37 L. Ed. 537 (1893).

in disregard of the constitutional provision. Some of this has been along economic lines designed to promote business within the states of the compact,<sup>25</sup> but mainly the purpose of these agreements have been along the lines of law enforcement, the promotion of a particular enterprise, such as bridge building, or the settlement of a common problem.<sup>26</sup> Kansas, Wyoming, New Mexico, and Colorado entered into an agreement for cooperation in stopping criminal activities in that area,<sup>27</sup> and compacts in regard to the pollution of streams and the care of rivers have occurred in several instances.<sup>28</sup> As a rule these pacts have been welcomed both by the business interests and by the citizens of the states, and in regard to promoting agreements to facilitate the movement of goods among states business interests have been very active.<sup>29</sup> In this area of the relations between states the silence of Congress has allowed the states to legislate so as to develop and promote regionalism in dealing with many problems.

Looking only at the silence of Congress in the area of state power to regulate commerce or to effect it either by action of its own or by action with one or more other states allows one to see that the subject, although narrowed somewhat, is still a broad one. In regard to the action taken by a state legislature alone in regulating or attempting to perform an act that would effect interstate commerce we see that the Supreme Court has interpreted the silence of Congress in such a manner as to allow the state many powers, and perhaps the greatest restriction is when the state favors domestic interests, in its legislation, over the interests in interstate commerce. However, the activity of Congress in a field does not mean that the state can not also act, but this is usually done through permissive action by the Congress or again as long as the state is not trying to burden interstate commerce to the advantage of its own interests.

Where the states have acted jointly we find a large area where the states have not had their action contested, and in the instances

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25. See *COSGO Machinery in Production*, 10 STATE GOVT. 229 (Nov. 1937).

26. The compacts are all listed according to the legal problem dealt with in *Interstate Compacts*, 73 U. S. LAW REV. 75, (Feb. 1939). A complete list of the compacts will be found in *THE BOOK OF THE STATES, 1946-47* (Chicago, 1947).

27. See, *State Cooperation for Crime Repression*, 28 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, 327 (Sept. 1937). See also *Interstate Compact for Probation and Parole*, NATIONAL ASSOCIATION YEARBOOK, (New York, 1938), p. 335.

28. *Ohio River Sanitation Compact*, 12 STATE GOVT. 212 (Nov. 1939). Also, *State v. Federal Government in Case of Connecticut River Compact*, 10 STATE GOVT., 255 (Dec. 1937).

29. *The Fight Against Interstate Barriers*, 17 STATE GOVT. 58 (My. 1944).

where such matters have come before the Courts the general disposition has been to allow them to attempt to solve their own problems and meet regional needs through interstate compacts. The silence of Congress in this matter has opened a new area in the organization of American government which as yet has not been completely developed nor its ultimate possibilities considered.

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