

# Congress's Power to Prohibit Commerce a Crucial Constitutional Issue

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## CONGRESS'S POWER TO PROHIBIT COMMERCE A CRUCIAL CONSTITUTIONAL ISSUE\*

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The striking failure to date of spontaneous recuperative forces to manifest themselves in the field of business and industry has produced a widespread and growing conviction that the National Government must within the immediate future, and for some time to come, take a large hand in social and economic reconstruction. What is the constitutional basis upon which it may operate, whence is it to draw the authority for and the legal sanction of its enactments looking to this end? To an important extent these must be found in Congress's power "to regulate commerce among the states", and in the recognition that this power comprehends the power to prohibit such commerce when in the exercise of a fair legislative judgment Congress deems that prohibition would promote the national welfare.

The National Industrial Recovery Act is a case in point. By its provisions concerns engaging in interstate commerce are given the choice for two years between complying with regulations to be laid down by the President under authority delegated by the act and giving up their interstate business.<sup>1</sup> The Securities Act invokes the same idea; as does also the Farm Relief Act, for although in form a tax measure, the latter is actually a price-fixing measure, and its validity may well depend upon the principle that processors pay the fees exacted by the measure for the privilege of engaging in interstate commerce.<sup>2</sup> Proposals to stabilize oil production, whether by compact among the states with the approval of Congress, or more directly by national legislation, furnish still other illustrations of the same general principle, and hence of the

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<sup>1</sup>New York Times May 11, 1933, at page 3; *ibid.*, May 12th, pp. 1, 4. See also the discussion before the Senate of the now superseded "Thirty-hour-a-Week" Bill, 77 CONG. REC. 1105, 1171, 1241 and 1304 (1933).

<sup>2</sup>77 CONG. REC. 944, 952, 1542, 1635, 1638 (1933).

immediate importance of the subject to be discussed in this paper.<sup>3</sup> It is furthermore a subject of theoretical and historical interest to students of constitutional law and history.

## I

That the power to regulate commerce which is vested in Congress by the Constitution *logically* comprises the power to prohibit it, appears to the point of demonstration from two considerations: First, that when prohibition is for any reason essential it is the regulatory body, in this instance Congress, which must supply it; secondly, that the right to determine when it is requisite to exercise any of its functions is the most fundamental attribute of legislative power. Indeed, a modicum of reflection must suffice to show that any regulation whatsoever of commerce necessarily infers some measure of power to prohibit it, since it is the very nature of regulation to lay down terms on which the activity regulated will be permitted and for non-compliance with which it will not be permitted.

What, then, are the outstanding differences between those prohibitions of commerce which "regulation" of it even in the most mitigated sense of the term necessarily imports and the type of prohibition which is the particular concern of this paper? In answer to this question we may first turn to the national statute book. Within the past forty years Congress has enacted many measures which fulfill the description of "prohibitions of commerce" as that term is here employed: The Wilson Act of 1890, subjecting intoxicants upon their "arrival" in a state to the laws thereof;<sup>4</sup> the Anti-Lottery Act of 1895,<sup>5</sup> closing the channels of interstate transportation to lottery tickets, an earlier act having already banned lottery tickets from the mails;<sup>6</sup> an act passed in 1900 excluding from interstate transportation

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<sup>3</sup>Reference should also be made to the series of proposals introduced in the last Congress by Senator Nye of North Dakota, for the purpose of fostering the trade practice conference. They may be summarized thus: (1) That the Federal Trade Commission be specifically authorized to hold such conferences with various industries; (2) that rules adopted at such conferences and approved by the Commission, be given the force of law; (3) that acts done under the sanction of such rules be not subject to prosecution under the Anti-Trust Acts; (4) that such rules be made binding on all members of an industry regardless of their participation in the conference, through Congress's power to prohibit interstate commerce. Equivalent proposals reappear in the Industry Recovery Act. On the question of oil production, see Marshall and Meyer, *Legal Planning of Petroleum Production: Two Years of Proration*, (1933) 42 Yale L. J. 702.

<sup>4</sup>26 Stats. (c. 728) 313.

<sup>5</sup>28 Stats. 963, 18 U. S. C. A. §387 (1926).

<sup>6</sup>26 Stats. 465, 18 U. S. C. A. §336 (1926).

game slaughtered in violation of state laws;<sup>7</sup> the Pure Food and Drug Act of 1906, barring from interstate transportation foods and drugs not inspected and labelled in accordance with the act;<sup>8</sup> the Commodity Clause of the Hepburn Act of the same year, forbidding interstate carriers to transport in interstate commerce commodities in which they had any interest "direct or indirect";<sup>9</sup> the Mann Act of 1910, forbidding the transporting of women from one state to another for immoral purposes;<sup>10</sup> the Webb-Kenyon Act of 1913, prohibiting the shipment of intoxicants into a state there to be used in violation of its laws;<sup>11</sup> the Child Labor Act of 1916, banning from interstate transportation articles in the production of which child labor of a described type had entered;<sup>12</sup> the Federal Quarantine Act of 1917, forbidding the shipment from infected areas of diseased plants and shrubs;<sup>13</sup> the Read Bone-Dry Amendment of 1918 forbidding the transportation of intoxicants into any state which forbids the manufacture thereof;<sup>14</sup> the Federal Motor Vehicle Act of 1919, prohibiting the transportation of stolen motor vehicles from one state to another and the receiving, concealment, or sale of the same;<sup>15</sup> the Hawes-Cooper Act of 1929, which, upon going into effect January 1, 1934, will subject prison-made goods sent from one state to another, to the laws of the latter state.<sup>16</sup> It may be added that all these acts have been held, *under the construction given them by the Court*, to be within Congress's power under the "commerce" clause except the Federal Game Act of 1900, which has never been before the Court; the Hawes-Cooper Act, which is not yet operative; and the Child Labor Act, which was pronounced void in 1918 in *Hammer v. Dagenhart*.<sup>17</sup> We shall have occasion to consider this case at length later on.

The most evident feature common to these various measures is their exclusion, partial or complete, from the channels of interstate transportation of certain subjects thereof—usually *things*, but in one case *persons*. Such subjects, where their exclusion has been sustained by the Court, have been termed "illicit subjects of commerce". But *why* illicit? In some cases the "illicitness" is the out-

<sup>7</sup>31 Stats. 188; amended by 35 Stat. 1137 (1909), 18 U.S.C.A. §392 (1926).

<sup>8</sup>34 Stats. 768, 21 U. S. C. A. §§1-3 (1926).

<sup>9</sup>34 Stats. 584, 49 U. S. C. A. §1 (8) (1926).

<sup>10</sup>36 Stats. 825, 18 U. S. C. A. §397-404 (1926).

<sup>11</sup>37 Stats. (c. 90) 699.

<sup>12</sup>39 Stats. (c. 432) 675.

<sup>13</sup>39 Stats. 1165, 7 U. S. C. A. §161 (1926).

<sup>14</sup>39 Stats. 1069, 18 U. S. C. A. §340 (1926).

<sup>15</sup>41 Stats. 324, 18 U. S. C. A. §408 (1926).

<sup>16</sup>45 Stats. 1084, 49 U. S. C. A. §65 (1929).

<sup>17</sup>247 U. S. 251, 38 Sup. Ct. 529 (1918).

come primarily of legislative history in the course of which the subjects affected have lost reputation—for instance, lottery tickets and intoxicants, the latter of which were “good articles of commerce” as late as 1890.<sup>18</sup> And in these cases, as well as others, a second source of “illicitness” is discoverable in certain results supposed to follow upon their *use* after the act of transportation is completed. However, the Commodity Clause is obviously not thus explicable, nor is the Federal Motor Vehicle Act—the “illicitness” justifying these measures is an infection from the *source* of the subjects of transportation.

But the aspect of these measures to which the cases invite attention most insistently, is their relation to the reserved powers of the states. Many regulations of commerce among the states not falling within the above category of acts have, to be sure, intruded upon the ordinary field of jurisdiction of the states, but this was because the transactions or relationships which they thus brought under national control were treated by the Court as “local incidents” of interstate commerce itself, or as so intimately related thereto that their control was essential to the effective control of such commerce. It is on this ground, for instance, that the Employers’ Liability Act of 1908 was sustained;<sup>19</sup> and it is on this ground that the authority of the Interstate Commerce Commission, under the Transportation Act of 1920, to regulate intrastate rates of interstate carriers in certain circumstances rests ultimately.<sup>20</sup>

On the other hand, the relation of the type of act in which we are interested to the reserved powers of the states is precisely the inverse of this. The recognizable purpose of these acts is to reach and control matters ordinarily governed by the state police power, sometimes in order to make state policy more effective, sometimes in order to supply a corrective thereto from the point of view of a broader public interest. In other words, while the operation within the ordinary field of state power of the former class of acts is assumed to be *incidental* to the main purpose of those acts to “regulate” commerce, the similar operation of the measures here to be considered is itself held to be their *governing* purpose.

Even so, what of it; why should not Congress be entitled to exercise its power over commerce for any purpose that seems good to it? Prior to the Constitution the states exercised the equivalent power without let or hindrance, and foreign governments do the same today. It may be suggested possibly that the Tenth Amendment interposes

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<sup>18</sup>Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681 (1890).

<sup>19</sup>Second Employers’ Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169 (1912).

<sup>20</sup>R. R. Comm. of Wis. v. C. B. & Q. R. Co., 257 U. S. 563, 42 Sup. Ct. 232 (1922).

a bar; but certainly this is not its literal or logical effect, for the powers which it recognizes as "reserved to the states respectively or to the people" are reserved conditionally on their not having been delegated to the United States. Furthermore, by the "supremacy" clause, if a state in the exercise of its "uncontroverted powers" and Congress in the exercise of any of its powers, come into conflict through an effort to control the same subject-matter simultaneously, it is Congress whose will has the right of way.<sup>21</sup>

We are hence driven to the conclusion that the problem dealt with in this paper does not arise out of the *text* of the Constitution; that, on the contrary, if this *text* be interpreted simply with the aid of the dictionary and the ordinary rules of logical discourse, there can be no doubt whatsoever of the constitutional power of Congress to prohibit commerce among the states as it wills. Our problem arises indeed from a *doctrine*, one which has been deemed to be of such coercive authority and to safeguard such preëminent values as entitle it to control the interpretation of the text of the constitution even to the extent of superseding its logical import. We may term this doctrine "Dual Federalism".

## II

To James Madison has been assigned the paternity of the Constitution, possibly by a fiction akin to the one by which in polyandrous communities the first child born to the family group is credited to the eldest male. The attribution is honorific and intended in a somewhat Pickwickian sense. Madison's responsibility, however, in regard to the notion of Dual Federalism is clear. In this construction of his latter days the Madison of 1787 and the Madison of 1798 found at last a common roof over their heads.

Writing in 1819 in criticism of the decision in *McCulloch v. Maryland*,<sup>22</sup> Madison expressed a fear lest the Court had relinquished "all control on the legislative exercise of unconstitutional power". "In the great system of political economy," he urged, "having for its general object the national welfare, everything is related immediately or remotely to every other thing; and, consequently, a power over any one thing, if not limited by some obvious and precise affinity, may amount to a power over every other." The central vice of the Court's—that is, Marshall's—reasoning was to regard the powers of the general government as "sovereign powers", the tendency of which was "to convert a limited into an unlimited government. There is

<sup>21</sup>Gibbons v. Ogden, 9 Wheat. 1, 210, 211 (U. S. 1824).

<sup>22</sup>4 Wheat. 316 (U. S. 1819).

certainly," he continued, "a reasonable medium between expounding the Constitution with the strictness of a penal law or other ordinary statute and expounding it with a laxity which may vary its essential character, and encroach on the local sovereignties with which it was meant to be reconcilable. The very existence of these local sovereignties is a control on the pleas for a constructive amplification of the powers of the general government."<sup>23</sup>

In 1791, in the debate on Hamilton's bank measure, Madison had said: "Interference with the powers of the states was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws or even the constitution of the states."<sup>24</sup> But in 1819 he offers a very different canon of constitutional interpretation: *the coexistence of the states and their powers is of itself a limitation upon national power.*

And all denial to Congress of the power to prohibit commerce among the states invokes this canon of 1819, pivots upon it.<sup>25</sup> The Constitution, the argument runs, clearly contemplates two spheres of governmental activity, that of the states and that of the United States; and while the latter government is supreme when the two collide with one another in the exercise of their respective powers, yet collision is not contemplated as the rule of life of the system, but the contrary. And since there are these two spheres, by what principle is the line to be drawn between them in a way to secure harmony instead of collision? The answer is, by recognizing that the purposes which the National Government was established to promote are relatively few, while those which the states were retained to advance comprise the principal objectives of good government the world over, the public health, safety, morals and general welfare. The power to promote these ends is, indeed, the very definition of the police

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<sup>23</sup>WRITINGS OF JAMES MADISON (Hunt, ed.), VIII, 447-53; LETTERS AND OTHER WRITINGS OF JAMES MADISON (Phila., 1867), III, 143-7. The latter collection is much fuller for Madison's later writings.

<sup>24</sup>WRITINGS (Hunt), VI, 28.

<sup>25</sup>For the main sources of this and the following section see arguments of counsel and judicial opinions in *Groves v. Slaughter*, 15 Pet. 449 (1841); *In re Rapier*, 143 U. S. 110, 12 Sup. Ct. 374 (1892); *Champion v. Ames*, 188 U. S. 321, 23 Sup. Ct. 321 (1903); *Hoke v. U. S.*, 227 U. S. 308, 33 Sup. Ct. 281 (1913); *Hammer v. Dagenhart*, *supra* note 17. A document of much interest in this connection is the *Argument of Robert J. Walker, Esq. On the Mississippi Slave Question*, in the case of *Groves v. Slaughter*. It does not appear in the official report of the case, but was separately printed in Philadelphia, and runs to eighty-eight closely printed pages. Walker succeeds in anticipating almost every argument that has been made since on either side of the question here under discussion.

power of the states, that power for which all their other powers exist. To impair seriously the police power of the states, or to diminish their authority in its employment, would be, in fact, to remove their reason for being, and so the reason for the Federal System itself.

Among the powers granted to Congress is, to be sure, the argument proceeds, the power to regulate commerce among the states and with foreign nations; but it is promptly added that, while in terms this is a single power and is embraced textually in a single phrase, nevertheless, in the intention of the framers, it comprised two very different powers.<sup>26</sup> In the field of foreign relations the National Government is completely sovereign, and the power to regulate commerce with foreign nations is but a branch of this sovereign power. The power to regulate commerce among the states is, on the other hand, not a sovereign power *except in the field of commercial motive*; in other respects it is confronted at every turn by the police powers of the states, and requires therefore to be defined in relation to the known and frequently reiterated objectives of those powers.

Furthermore, the federal grant, it is asserted, was designed for the *promotion and advancement* of commerce, not a power to strike commerce down in order to advance other purposes and programs. Admit, the advocates of "Dual Federalism" continue, that the power to regulate commerce among the states is the power to prohibit it at the discretion of Congress, and you at once endow Congress with a leverage whereby it may consolidate substantially all power into the hands of the National Government. For if Congress may prohibit at discretion the carrying on of interstate commerce it may work deprivation of the right to engage in interstate commerce in any of its phases, even the right to move from one state to another. It may assert a sanction of ever-increasing efficacy for whatever standards of conduct it may choose to lay down in any field of human action, and, since laws passed by Congress in pursuance of its powers are supreme over conflicting state laws, these standards would supersede the conflicting standards imposed under the police powers of the states. Henceforth, in effect, the police power would exist solely on "leave and license" of Congress; as "the power to govern men and things" it would be at an end.

The first effort at the elaboration of a restrictive argument somewhat along these lines was elicited by Jefferson's Embargo. Inasmuch, however, as the Embargo operated on foreign commerce, those who disputed its constitutionality found little occasion to emphasize

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<sup>26</sup>This idea seems to have originated with Madison; see LETTERS AND OTHER WRITINGS, IV, 14-15. Cf. notes 32, 34, 37, and 63 *infra*.



the police power of the states as a limitation on the national commercial power; nor did they distinguish between the application of this power to foreign commerce on the one hand and to interstate commerce on the other. Their main reliance was on the proposition that the power to regulate commerce was the power "to protect and conserve" it, not the power to annihilate it. The same argument was later renewed by the pro-slavery interest in opposing the suggestion of anti-slavery radicals that Congress could strangulate slavery in the states by prohibiting the interstate slave-trade, as it had already prohibited after 1808 the African slave-trade. Yet this argument was evidently not regarded as entirely satisfactory, for it was supplemented by the contention that the commercial power reached only trade in *articles of property* and that the Constitution, in contradistinction to the laws of the slave states, looked upon slaves as *persons*.<sup>27</sup>

Finally, in recent years the argument that the power to regulate commerce is not the power to interdict it except for non-compliance with conditions designed for *its* greater prosperity and development has received aid and comfort from the Court's interpretation of the "due process" clause of the Fifth Amendment. The faculty of engaging in interstate commerce, it is urged, is not a mere revocable privilege but a constitutional *right*, an element of the liberty of the citizen, an adjunct of his rights of property; and it remains such even when exercised through the artificial agency of a corporation. This faculty Congress may protect and indeed control in a measure, but to abate it by the "arbitrary" assertion of unaccustomed powers is without constitutional warrant.

### III

Any rejoinder to the above argument must begin with Marshall's classic opinion in *Gibbons v. Ogden*,<sup>28</sup> the first case under the "commerce" clause to reach the Court. Characteristically Marshall selects for his point of departure an argument of counsel, in effect a reiteration of the Madisonian doctrine that national power should be construed in deference to the co-existence of the states and their powers. The contention rested, Marshall hinted, on "some theory not to be found in the Constitution," and its effect was to "deny to the government those powers which the words of the grant as usually understood, import." Turning accordingly to the "commerce" clause itself, Marshall proceeded to annex to the word "commerce" the connotation of *intercourse*, a *tour de force* in exegesis which enabled

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<sup>27</sup>Groves v. Slaughter, *supra* note 25.

<sup>28</sup>*Supra* note 21.

him to add *navigation*, that is to say *transportation*, to the usual signification of the term as *traffic*. He then put the question: "What is this power?" which he answered as follows:

"It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."<sup>29</sup>

The matter of controlling importance here, obviously, is the proposition that Congress's power over commerce, whether interstate or foreign, was that of a "single", that is to say, a centralized government. It followed thence that the occasions for the exercise by Congress of this power were left as completely to Congress's own discretion as were the occasions for its exercise of its similarly unqualified power to declare war. Furthermore, it was a pivotal conception of Marshall's system of constitutional law that the degree to which any legislative power might be exercised was not a justiciable question. In his own words: "Questions of power do not depend upon the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed."<sup>30</sup> So, whether commerce among the states should be prohibited, and for what reasons, were to Marshall's thinking, it seems clear, questions for Congress to determine, subject only to its political responsibility at the polls.

In more recent days the same general position has been elaborated in greater detail in response to the contrary argument.<sup>31</sup> That the National Government is a government of limited powers the advo-

<sup>29</sup>Wheat. at 196, 197 (U. S. 1824).

<sup>30</sup>Brown v. Md., 12 Wheat. 419, 439 (U. S. 1827).

<sup>31</sup>Supra note 25.

cates of this view concede; but the powers which it uncontroversibly possesses, they urge, it may utilize to promote all good causes, of which fact they assert the Preamble of the Constitution itself is proof. There the objectives of the Constitution and so, presumably, of the government created by it, are stated to be more a perfect union, justice, domestic tranquillity, the common defence, the general welfare, and liberty. It was to forward these broad, general purposes, then, that the commercial power, like its other powers, was bestowed upon the National Government. No doubt it was expected that the states, too, would use the powers still left to them to assist the same purposes, which indeed are those of good government the world over; yet that circumstance, surely, should not operate to withdraw the powers delegated to the National Government from the service of these same ends. The fact, in other words, that the power to govern commerce among the states was bestowed by the Constitution on the National Government should not imply that it thereby became utilizable merely for the purpose of fostering such commerce. It ought, on the contrary, to be applicable, as would be the equivalent power in England or France for instance, in aid and support of all enlightened social programs. As originally possessed by the several states the power to regulate commerce included the power to prohibit it at discretion; on what principle then, it is asked, can it be contended that the power delegated to Congress is not as exhaustive and complete as the power it was designed to supersede?<sup>32</sup>

The truth of the matter is, the protagonists of this view proceed, that if the public health, safety, morals, and general welfare—counting the commercial welfare of the country out of these for the moment—that if these objectives of good government must depend solely upon the police powers of the states, they must in modern conditions

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<sup>32</sup>The argument in this and the preceding sentence is paralleled by Madison's argument in support of Congress's power under the "commerce" clause to enact a protective tariff for the purpose of encouraging manufactures. He denied that Congress's power to regulate foreign commerce was only the power to promote it or that such regulations must operate externally to the states. Answering then the question whether it was within Congress's discretion to impose duties upon commerce among the states "for the purpose of protecting the industry and productions of the states against the competition of each other", he said: "Waiving the constitutional obstacles presented by the communion of rights and privileges among citizens of different states, the difficulties, the inutility, and the odium of such a project would be a sufficient security against it." In other words, Madison did not contend that the power to regulate "commerce among the states" did not, considered by itself, extend so far. See *LETTERS AND OTHER WRITINGS*, II, 571-3, 636 ff., 645 ff.; and also IV, 232-66, especially at pp. 236, 250, 253, 257.

often fail of realization in this country; and this will be more and more the case as the interstate intercourse which the commercial power of Congress is putatively established to promote increases. With goods flowing over state lines in ever increasing quantities, and people in ever increasing numbers, how is it possible to regard the states as water-tight compartments? At least, then, when local legislative programs break down on account of the division of the country into states, it becomes the palpable duty of Congress to adopt supplementary legislation to remedy the situation. In doing so it is not undermining the federal system; it is supporting it, by making it viable in modern conditions. The assemblage of the states into one Union was never intended to put one state at the mercy of another. If, however, well-considered programs of social reform (prohibition for instance, or legislation against child labor, or against lotteries, and the like,) are rendered abortive in any state in consequence of the flow of commerce into it from other states holding less advanced views, then it becomes the duty—certainly it is within the discretion of Congress, which alone can govern commerce among the states—to supply the required relief.

But notwithstanding that the advocates of this expansionist view stress modern conditions, they too, are able to cite discussion contemporaneous with Jefferson's Embargo, and indeed the Embargo itself, as sustaining their position. In the case of the Brigantine *William*,<sup>33</sup> the validity of the Embargo was assailed before the United States District Court of Massachusetts, on the ground that the power to regulate commerce did not embrace the power to prohibit it. Said Judge Davis in answer: "It will be admitted that partial prohibitions are authorized by the expression; and how shall the degree or extent of the prohibition be adjusted but by the discretion of the National Government, to whom the subject appears to have been committed? . . . The power to regulate commerce is not to be confined to the adoption of measures exclusively beneficial to commerce itself, or tending to its advantage; but in our national system, as in all modern sovereignties, it is also to be considered as an instrument for other purposes of general policy and interest. . . . The situation of the United States, in ordinary times, might render legislative interferences relative to commerce less necessary; but the capacity and power of managing and directing it for the advancement of great national purposes seems an important ingredient of sovereignty." And in confirmation of this argument Judge Davis cited the clause of Article I, section 9, of the Constitution interdicting

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<sup>33</sup>28 Fed. Cas. 614 (No. 16, 700) (D. C. Mass. 1808).

a prohibition of the slave trade till 1808. This clause shows, he asserted, that those who framed the Constitution perceived that "under the power to regulate commerce, Congress would be authorized to abridge it in favor of the great principles of humanity and justice."

The Embargo, to be sure, operated on foreign commerce, but that there is any difference between Congress's power in relation to foreign and to interstate commerce the advocates of the doctrine now under consideration deny. The power "to regulate" is the power which belongs to Congress as to the one as well as to the other; and if this comprehends the power to prohibit in the one case, it must equally on acknowledged principles of statutory construction, comprehend it in the other case as well. Nor in fact, the argument continues, does it make any difference, by approved principles of statutory construction, what purposes the framers of the Constitution may have had immediately in mind when they gave Congress the power to regulate commerce among the states; the governing consideration is that they gave Congress the power, to be exercised in accordance with its judgment of what are proper occasions for its use.<sup>34</sup>

Finally, as to the Fifth Amendment, it is conceded that Congress may not make an "arbitrary", that is to say, what the Supreme Court finds to be an *arbitrary* use of any of its powers. That does not signify, however, that an unaccustomed use of power is necessarily arbitrary. Congress is always making an unaccustomed use of its powers. Until 1887 it had never regulated railway rates; and until 1906, it had not attempted to regulate the legal liability of carriers to their employees in interstate commerce, and so on. In any but a static society, governmental power must constantly take on new aspects and undergo new uses; and it was never the intention of the Constitution to freeze things in the legal mould of 1789; and at any rate it has not succeeded in doing so.

So much for a debate that has proceeded with varying degrees of intensity throughout a great part of our Constitutional history. It remains to discover the relative strength of the opposed positions in present-day Constitutional law.

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<sup>34</sup>"The reasons which may have caused the framers to repose the power to regulate interstate commerce in Congress do not, however, affect or limit the extent of the power itself." Justice Peckham, speaking for the Court in *Addyston Pipe and Steel Co. v. U. S.*, 175 U. S. 211, 228, 20 Sup. Ct. 96, 102 (1899). "The legitimate meaning of the Instrument must be derived from the text itself." *LETTERS AND OTHER WRITINGS OF JAMES MADISON, III*, 228.

## IV

The earliest confrontation before the Court of the opposing arguments above set forth occurred in *Champion v. Ames* in 1903.<sup>35</sup> The case grew out of the Act of 1895 "for the Suppression of Lotteries", as it was frankly entitled. An earlier act excluding lottery tickets from the mails had been sustained in the case of *In re Rapier*,<sup>36</sup> on the proposition that Congress clearly had the power to see that the very facilities furnished by it were not converted to bad uses. But in the case of commerce the facilities are not, ordinarily, furnished by the National Government, nor is the right to engage in it a gift of the government. With the preconceptions which it entertained at this period, the Court found the question produced by the Act of 1895, forbidding any person "to bring within the United States or to cause to be carried from one state to another" any lottery ticket, or an equivalent thereof, "for the purpose of disposing of the same", an extremely difficult one. This is shown by the fact that the case was thrice argued before it and that its decision finally sustaining the act was a five to four one. The opinion of the Court, nevertheless, presented by Justice Harlan, marked a wide swing away from "Dual Federalism" notions, and was an almost unqualified triumph at the time for the view that Congress's power to regulate commerce among the states includes the power to prohibit it, especially when it is thus exerted *in supplement and support of state legislation enacted under the police power*.

Early in the opinion extensive quotation is made from Chief Justice Marshall's opinion in *Gibbons v. Ogden*, with special stress upon the definition there given of the phrase "to regulate". Justice Johnson's assertion on the same occasion is also given: "The power of a sovereign state over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure." Further along is quoted with evident approval Justice Bradley's statement in *Brown v. Houston* that "the power to regulate commerce among the several states is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations."<sup>37</sup> Nor did the Tenth Amendment oppose a constitutional barrier to the Act. "Congress," said Justice Harlan, "does not assume to interfere with traffic or commerce in lottery tickets carried on exclusively within the limits of any state, but has only in view commerce of that kind among the

<sup>35</sup>*Supra* note 25.

<sup>36</sup>*Ibid.*

<sup>37</sup>114 U. S. 622, 630, 5 Sup. Ct. 1091, 1095 (1885). So also J. Harlan in *Crutcher v. Ky.*, 141 U. S. 47, 57 11 Sup. Ct. 851, 854 (1891). Cf. J. White in *Buttfield v. Stranahan*, 192 U. S. 470, 492, 24 Sup. Ct. 349, 359 (1904) which seems to be the first appearance of the contrary idea in an opinion for the Court.

several states. It has not assumed to interfere with the completely internal affairs of any state, and has only legislated in respect of a matter which concerns the people of the United States. As a state may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the 'widespread pestilence of lotteries' and to protect the commerce, which concerns all the states, may prohibit the carrying of lottery tickets from one state to another."<sup>38</sup>

Broad, however, as are its possible implications, *Champion v. Ames* was decided by a Court whose thinking was much in the grip of *Laissez Faire* concepts.<sup>39</sup> The consequence is that these implications were not fully accepted, even by justices who supported the actual decision. Especially was this true of Justice White, who was already thoroughly committed at this date to his great enterprise of watering down the Sherman Act with the "rule of reason". Quite logically, he now enlarged his endeavor to include other aspects of the problem of Congress's power over interstate commerce.

The future Chief Justice was the very model of the Constitutional-ist. His youthful studies in the Jesuit schools of Louisiana included, one may confidently assume, mediaeval political thought, which is pervaded with the ecclesiastical conception of secular authority as subordinate and intrinsically limited. No justice ever sat on the Supreme Bench who exercised a more bountiful hand in strewing dicta, queries, and arguendos with intent to garner fresh constitutional restraints; and he it is who more than any one else must be credited with having displaced Marshall's doctrine that questions of power do not depend on the extent of its exercise with an all-pervasive judicial review, in other words, with having transplanted Marshall's doctrine from the legislative to the judicial garden plot!<sup>40</sup>

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<sup>38</sup> The opinion recites the contention in opposition to the act, that if Congress may exclude lottery tickets from interstate commerce, it "may arbitrarily exclude . . . any article, commodity, or thing of whatsoever kind or nature, or however useful or valuable, which it may choose, no matter with what motive, to declare shall not be carried from one state to another." The answer returned by Justice Harlan is ambiguous: if Congress should infringe rights secured by the Constitution or act in a way "hostile to the objects for the accomplishment of which" it was endowed with power over interstate commerce, it would be the duty of the Court to intervene; but the remedy for legislative *abuses* of power was resort to the polls not the courts.

<sup>39</sup> On this point see my article, *Social Planning under the Constitution*, (1932) 26 AM. POL. SCI. REV., 1,7-16.

<sup>40</sup> An excellent statement of White's general theory of political power and of the relation of judicial review thereto is that in the following passage from his opinion

White's initial tilt against Marshall's conception of Congress's powers under the "commerce" clause was his opinion in the *Trans-Missouri Freight Association Case* in 1897.<sup>41</sup> Here he was in the minority, but the next year he spoke for a majority of the Court in *Rhodes v. Iowa*,<sup>42</sup> where, with the required amount of judicial face-pulling, the clear meaning of the earlier *Rahrer Case*<sup>43</sup> was disavowed and the Wilson Act of 1890 eviscerated, with the final result of adding the Eighteenth Amendment to the Constitution. But this rather ironic vindication of the mediaeval doctrine of conditional authority lay far in the future; and in 1904 White, speaking for four judges, protested against the decision in the *Northern Securities Case* as destructive in principle of the federal system, "of the great guaranty of life, liberty and property", and of "every other safeguard upon which organized society depends."<sup>44</sup>

In all these cases the greater constitutional issue was obscured by finesse in statutory construction. It was not until the first *Employers' Liability Cases*<sup>45</sup> of 1908 that Justice White obtained the opportunity to challenge squarely the doctrine that Congress's power under the "commerce" clause is unaffected by the coexistence of the states. Here the Government had argued that though the act under review purported to govern the liability of "every" interstate carrier to "any" of its employees, whether engaged in interstate commerce or not when the liability fell, yet it was none the less valid, "because", in the words of Justice White's opinion, "one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress." "To state the proposition," the opinion continued, in the characteristic White phraseology, "is to refute it. It assumes that, because one engages in interstate commerce, he thereby endows Congress with power

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in the Intermountain Rate Cases: ". . . doctrines which but express the elementary principle that an investiture of a public body with discretion does not imply the right to abuse but on the contrary carries with it as a necessary incident the command that the limits of a sound discretion be not transcended which by necessary implication carries with it the existence of judicial power to correct wrongs done by such excess." *Intermountain Rate Cases*, 234 U. S. 476, 491 34 Sup. Ct. 986, 993 (1914). His opinion in *McCray v. U. S.* 195 U. S. 27, 24 Sup. Ct. 769 (1904) represents a half-way stage toward this doctrine from Marshall's point of view. On the "rule of reason", see my article, *The Anti-Trust Acts and the Constitution* (1932) 18 VA. L. REV., 355-78.

<sup>41</sup>166 U. S. 290, 17 Sup. Ct. 540 (1897).

<sup>42</sup>170 U. S. 412, 18 Sup. Ct. 664 (1898).

<sup>43</sup>140 U. S. 545, 11 Sup. Ct. 865 (1891).

<sup>44</sup>193 U. S. 197, 397, 24 Sup. Ct. 436, 486 (1904).

<sup>45</sup>207 U. S. 463, 28 Sup. Ct. 141 (1908).



not delegated to it by the Constitution; in other words, with the right to legislate concerning matters of purely state concern. . . . It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the states as to all conceivable matters which, from the beginning, have been, and must continue to be, under their control so long as the Constitution endures."<sup>46</sup>

And in the "Commodity Clause" Case<sup>47</sup> the year following the same Justice, once more the Court's mouthpiece, found the same issue involved. The act involved banned any shipment in interstate commerce by a carrier of any article in which it had any interest "direct or indirect". In order to avoid "a grave constitutional issue", the Court held, these words must be construed as not applying to articles produced or owned by a corporation in which the carrier owned stock. So by one and the same stroke the Court curtailed the act and gave its own power of judicial review a new extension, the power of avoiding "grave constitutional issues."<sup>48</sup>

Now, however, ensued a series of adjudications advantageous to Congress's pretensions. In the *Hipolite Egg Case*<sup>49</sup> the validity of the Pure Food and Drug Act was virtually taken for granted, and the authority of national officials under its provisions to pursue and confiscate adulterated articles being sent from one state to another so long as they remained in the original package was sustained. This was in 1911. Six years later, the validity of the Webb-Kenyon Act was likewise upheld, on the general proposition that with respect to the shipment of intoxicants, which the Court a generation before had labelled "good articles of commerce", Congress's power to regulate commerce among the states comprised the power to prohibit it outright, and so necessarily included the lesser power exercised in the act of adapting its regulations to such various local requirements and conditions as might be expressed from time to time in state laws.<sup>50</sup>

And meantime, in sustaining and applying the White Slave Traffic Act of 1910, the Court had been forced to much broader ground than is implied in either of the cases just mentioned. The act was assailed with the contention that it conflicted "with the reserved powers of the

<sup>46</sup>*Supra* note 45, at 499, 502, 503.

<sup>47</sup>213 U. S. 366, 29 Sup. Ct. 527 (1909).

<sup>48</sup>See also *Addy Co. v. U. S.*, 264 U. S. 239, 44 Sup. Ct. 300 (1924); *U. S. v. LaFrance*, 282 U. S. 568, 51 Sup. Ct. 278 (1931).

<sup>49</sup>220 U. S. 45, 31 Sup. Ct. 364 (1911).

<sup>50</sup>*Clark Distilling Co. v. W. Md. Ry. Co.*, 242 U. S. 311, 37 Sup. Ct. 180 (1917).

states individually to regulate or prohibit prostitution or other immoralities of their citizens". Justice McKenna speaking for the Court said: "Our dual form of government has its perplexities, State and Nation having different fields of jurisdiction, . . . but it must be kept in mind that we are one people; and the powers reserved to the states and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral."<sup>51</sup>

Indeed, the act was later held to apply to the case of a man who had purchased transportation for a woman and accompanied her to another state, not for illicit profit but illicit pleasure,<sup>52</sup> a result which suggests that the United States might punish any crime at all, provided only it followed passage by the criminal from one state to another fairly closely! Yet even in the Lottery Case we find Chief Justice Fuller, for the minority, saying with apparent, but it would now appear with misplaced confidence, "Nobody would pretend that persons could be kept off trains because they were going from one state to another to engage in the lottery business."<sup>53</sup>

In short, despite the apparent success earlier of Justice White's missionary endeavor in behalf of the notion that Congress's power under the "commerce" clause is intrinsically limited, the outcome of the *Child Labor Case* when it reached the Court in 1918 was by no means a foregone conclusion.

## V

In the form in which it was finally passed the Child Labor Act of 1916 forbade the offering of products of child labor for transportation from one state to another. It operated therefore, not on the carrier, but the manufacturer or purchaser of the goods. Mr. Justice Day's opinion for the Court in *Hammer v. Dagenhart*,<sup>54</sup> holding the act void, boils down to three propositions: (1) that the act was *not* a regulation of commerce among the states; (2) that it *was* an invasion of powers reserved to the states; (3) that it was, therefore, inimical to the Federal System which it was the design of the Constitution to set up and maintain.

One evident difficulty here is to determine whether the second proposition should be regarded as dependent on the first or as having independent force of its own sufficient to invalidate the act of Con-

<sup>51</sup>Hoke v. U. S. *supra* note 25, especially at p. 322.

<sup>52</sup>Caminetti v. U. S., 242 U. S. 470, 37 Sup. Ct. 192 (1917).

<sup>53</sup>188 U. S. 321, 374, 23 Sup. Ct. 321, 334 (1903). Could Congress keep people off the trains who are headed for Reno?

<sup>54</sup>*Supra* note 17, pp. 268-77.

gress. Assuming the second possibility, Justice Holmes in his dissenting opinion asserted that a statute "within the power expressly given to Congress if considered only as to its immediate effects" was being held invalid for its collateral effects within the normal field of state power. "I should have thought", said he, "that the most conspicuous decisions of this Court had made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any state",<sup>55</sup> a position which is clearly incontrovertible except on the assumption that Justice Day's third proposition states a transcendental value which rises above and nullifies the express phraseology of the Constitution itself where the two conflict.

Waiving this question for the moment, however, let us turn to Justice Day's first proposition. The ground of it is soon found to be the idea that a prohibition of commerce is not normally a regulation of it, because destructive of it. To be sure, Justice Day admits, there have been cases in which regulation legitimately took the form of prohibition, but, he contends, "In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. . . . This element is wanting in the present case. . . . The goods shipped are in themselves harmless . . . when offered for shipment, and before transportation begins, the labor of production is over, and the mere fact that they were intended for interstate transportation does not make their production subject to federal control under the commerce clause."

Two quite distinct, and indeed conflicting, ideas are here intermingled, or confused: first, the idea that Congress may exclude from interstate transportation only things that are harmful *in themselves*; secondly, the idea that it may exclude objects the *transportation* of which is *followed* by harmful results. And not only are these ideas in conflict with each other, neither is valid as it is here applied.

To say that Congress may exclude from interstate commerce only objects that are harmful in themselves is to invoke the idea that any

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<sup>55</sup>Hammer v. Dagenhart, *supra* note 17, pp. 278-80. In addition to the cases cited by J. Holmes, see the following cases of later date: Hamilton v. Ky. Distils. Co., 251 U. S. 146, 40 Sup. Ct. 106 (1919); Missouri v. Holland, 252 U. S. 416 40 Sup. Ct. 382 (1920); Board of Trustees v. U. S., 53 Sup. Ct. 509, (decided Mar. 20, 1933). In the last mentioned case the doctrine of constitutional tax exemption as applied to state property and agencies received a fresh check. The original extension of the doctrine to such agencies in Collector v. Day, 11 Wall. 113 (1871) represents the most important recognition that the Court has given the concept of Dual Federalism as a judicially enforceable restriction on national power.

regulation of commerce must always be justified by an intention on the part of Congress to *protect* commerce itself, which, for reasons already made clear, cannot be admitted. Nor is this all; for the idea that Congress may exercise an express power given without qualification: only for a certain purpose or certain purposes to be finally determined by the Court, is to endow the Court with the power to invalidate acts of Congress because of Congress's supposed purpose in passing them, something which Justice Day himself says may not be done—even in the act of doing it!

Moreover, Justice Day also admits that interstate transportation may be forbidden if it is followed by "harmful results", which means results *judged by the Court* to be harmful—which again is a palpable invasion of the field of legislative discretion. And it is an act of interstate *transportation* that must be followed by such results. That is to say, "commerce" is conceived of as primarily *transportation*, and Congress's power over it is envisaged as beginning only with an act of transportation from one state to another; and from this it follows that Congress must shut its eyes to all "harmful results" which precede such act of transportation.<sup>56</sup>

The first comment invited is, that granting this conception of commerce, still a "harmful result" that followed transportation from one state to another would be just as much within the jurisdiction of the latter state as a harmful result which preceded the same act of transportation would be within the jurisdiction of the former state. Justice Day's argument therefore logically concedes that the fact that it reaches a subject-matter which is within the normal jurisdiction of a state does not, of itself, suffice to invalidate an act of Congress.<sup>57</sup>

In the second place, the argument is directed to only one aspect of the Child Labor Act, which was intended not merely to repress child labor in certain states, but to prevent its spread through the operation

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<sup>56</sup>In checking state power with the "commerce" clause, the Court has frequently regarded Congress's power as operative before any act of transportation has started. See *Robbins v. Shelby Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592 (1886); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 42 Sup. Ct. 106 (1922).

<sup>57</sup>*Levering and Garrigues Co. v. Morrin*, 53 Sup. Ct. 549 decided Apr. 10th last, is interesting in this connection. Here the Court held that petitioners were not entitled under the Anti-Trust Acts to an injunction against defendants forbidding the latter to conspire to halt local building operations in which materials fabricated or bought in other states were used. "*Use (sic) of the materials,*" said Sutherland, J., for the Court, "was a purely local matter". The Court cited *United Mine Worker v. Coronado Coal Co.*, 259 U. S. 344, 410, 411, 42 Sup. Ct. 587 (1921); *United Leather Workers v. Herkert*, 265 U. S. 457, 44 Sup. Ct. 623 (1923); *Industrial Ass'n. v. U. S.*, 268 U. S. 64, 77-82, 45 Sup. Ct. 403 (1925).

of competition to other states. Justice Day himself recognizes this inadequacy of the argument, and proceeds to supplement it with following contention: "The commerce clause", he asserts, "was not intended to give Congress a general authority to equalize conditions. In some of the states laws have been passed fixing minimum wage laws for women, in others the local law regulates the hours of labor of women in various employments. This fact does not give Congress the power to deny transportation in interstate commerce to those who carry on business where the hours of labor and the rate of compensation for women have not been fixed by a standard in use in other states and approved by Congress."

Not "a *general* authority" perhaps, but why not such authority as an otherwise valid exercise of its power to regulate commerce confers upon it? Certainly no words in the Constitution impose any such restriction upon its power over commerce. On the contrary, the "commerce" clause, altogether independently of Congressional legislation under it, has been held by the Court repeatedly to forbid state legislation designed to give the enacting state an advantage in competition with sister states.<sup>58</sup> Why then should not Congress exercise the power which, after all, the Constitution confers upon *it* and not upon the Court, with the same objective in mind, and thereby equalize, if it can, conditions of competition among the states according to *its* views of sound social policy? Justice Day's assertion in denial once again invokes the unallowable assumption that the Court may supervise the purposes of Congress. It is the *sic volo, sic jubeo* of final authority, no less—but also no more.

The whole opinion of Mr. Justice Day rests moreover on the assumption that "commerce" is primarily *transportation*, which, however, is not the case. As the etymology of the word reveals, it means primarily buying and selling, *traffic*, in brief. Indeed, in *Gibbons v. Ogden*, the first case to reach the Court under the clause, the crucial question was whether the term comprehended transportation at all. And indubitably the correct theory of the Child Labor Act is that it was designed to discourage a widespread and pernicious *traffic*, which both supported and was supported by child labor in certain states, and which furnished a constant inducement to its spread to other states. For without the interstate market for its products child labor could not long survive on any considerable scale. The act promised to be effective, in other words, not as a penalty *in terrorem*, as is the White Slave Act, but by *eliminating the substantial cause of the evil it*

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<sup>58</sup>See *Minn. v. Barber* 136 U. S. 313 10 Sup Ct. 862 (1890); *Oklahoma v. Kan. Nat. Gas Co.*, 221 U. S. 229, 31 Sup. Ct. 564 (1911).

*struck at.* The Court's objection, therefore, that specific acts of production precede specific acts of transporting the product becomes frivolous; both these acts are but part and parcel of something much broader, and that something is interstate "commerce" in the original understanding of the term.

We are thus brought to Justice Day's exaltation of the Madisonian conception of Dual Federalism as a super-constitutional value to which even the express language of the Constitution must yield. He says:

"In interpreting the Constitution it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly (*sic*) delegated to the National Government are reserved. *Lane County v. Oregon*, 7 Wall, 71, 76. The power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government. *New York v. Miln*, 11 Pet. 102, 139;<sup>59</sup> *Slaughter House Cases*, 16 Wall. 36, 63; *Kidd v. Pearson, supra*. . . . The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed. . . ."

Thus Justice Day ventures to amend the Tenth Amendment by interpolating in it the word "expressly"! And since Congress admittedly is not vested *expressly* with the power to prohibit the transportation of the products of child labor from one state to another, its attempt to do so becomes an invasion of the reserved powers of the states over "their purely internal affairs." But though the premise were sound, the conclusion would not follow. As Justice Holmes points out in his dissenting opinion for himself and three brethren, admitting the right of the states to control their *purely internal affairs*, "when they seek to send their products across the state line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the States but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States. Instead of being encountered by a

<sup>59</sup>This case, a relic of extreme states' rights days, was substantially overruled in *Henderson v. N. Y.*, 92 U. S. 259 (1875).

prohibitive tariff at her boundaries the State encounters the public policy of the United States which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the nation as a whole. . . . The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking State. It seems to be entirely constitutional for Congress to enforce its understanding by all the means at its command."<sup>60</sup>

In other words, *Hammer v. Dagenhart* denies to Congress power over commerce which originally belonged to the individual states of the Union! As a matter of fact, when read along with certain decisions in which the "commerce" clause has been applied as a restraint on state power, it is found to do something even more remarkable. By the plain logic of the cases today neither Congress nor the states, nor both together, can stop interstate commerce in the products of child labor. Such products being "good articles of commerce", no state can prohibit their entry from another state nor their sale in the original package within its boundaries, since to do so would be to invade the field of Congress's power to regulate interstate commerce.<sup>61</sup> But Congress, nevertheless, we are now informed, may not exercise the power so solicitously guaranteed its exclusive control, since to do so would be to invade the field of power reserved to the states. So the states, which, without challenge, originally possessed this power, have now lost it by virtue of having delegated it to Congress, but Congress has never received it! "Dual Federalism" thus becomes *triple* federalism—inserted between the realm of the National Government and that of the states is one of no-government—a governmental vacuum, a political "no-man's land".

The subject is one that demands some further consideration. Since the Civil War the Court has decided scores of cases in which it has applied the "commerce" clause as a restriction on state power in relation to business interests of various sorts.<sup>62</sup> Such businesses have been thus enabled to spread out over state lines with a minimum of interference from state legislative policies, and to assume national proportions. Yet when the National Government would fain take the same route into the states, it is confronted in the name of the federal principle with a sign of "road closed". The issue raised is spurious. So far as the great proportion of business is concerned the

<sup>60</sup>*Hammer v. Dagenhart*, *supra* note 17, at 281.

<sup>61</sup>*Leisy v. Hardin*, *supra* note 18; *Schollenberger v. Pa.*, 171 U. S. 1, 18, Sup. Ct. 757 (1898).

<sup>62</sup>See WILLOUGHBY CONSTITUTIONAL LAW OF THE U. S. (2nd ed. 1929), II 1004 ff. and 1061 ff.

federal principle is today moribund, and the only question is whether the "commerce" clause is effective to supply a unified political control corresponding to the industrial and commercial unification of which it is the main legal prop. In returning in *Hammer v. Dagenhart* a negative answer to this question the Court assumes that a choice is still open to the people of this country which is in fact closed to them, and so, wittingly or unwittingly, converts the "commerce" clause into a charter of Laissez Fairism of the most extreme nature. At the same time it takes up a position which cannot by any possibility be harmonized with its own repeated assurance that "the Constitution, whilst distributing the preexisting power, preserved it all."<sup>63</sup>

## VI

*Hammer v. Dagenhart* represents high tide in the more recent surges of Madisonian doctrine. What is the standing of this decision now, fifteen years later? Two subsequent holdings directly impair its logic, if indeed that were possible! In *United States v. Hill*,<sup>64</sup> decided within a twelve-month, the Court, speaking by the same Justice, sustained the Read Bone-Dry Amendment to the Post Office Act of May 3, 1917, which prohibited the interstate transportation of intoxicants into states forbidding the manufacture and sale of the same. To the objection that if the provision was applied to liquors intended for personal use merely and not for sale, it conflicted with the laws of certain states, the Court answered: "Congress may exercise this authority over interstate commerce in aid of the policy of the state if it sees fit. It is equally clear that the policy of Congress acting independently of the states may induce legislation without reference to the particular policy or law of any given state. . . The control of Congress over interstate commerce is not to be

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<sup>63</sup>White, J, in *Northern Securities Co. v. U. S.*, *supra* note 44, at 399. See also to the same effect his opinion for the Court in *U. S. v. Bennett*, 232 U. S. 299, 305, 306, 34 Sup. Ct. 433, 437, and the Court's recent approval of this statement in *Burnet v. Brooks*, 53 Sup. Ct. 457 (decided Mar. 13th, 1933). Note also White's sarcastic comment on the argument of the carriers in the Intermountain Rate Cases: "To uphold the proposition it would be necessary to say . . . that the power perished as the result of the act by which it was conferred." Intermountain Rate Cases, *supra* note 38, at 493. "The powers [of the United States and states] taken together, ought to be equal to all of the objects of government, not specially excepted for special reasons, as in the case of duties on exports." *LETTERS AND OTHER WRITINGS OF JAMES MADISON*, IV, 250. "If Congress have not the power, it is annihilated for the nation; a policy without example in any other nation, and not within the reason of the solitary one in our own . . . the prohibition of a tax on exports." *Ibid.*, III, 640. See also *ibid.*, 644 and 654.

<sup>64</sup>248 U. S. 420, 39 Sup. Ct. 143 (1919).



limited by state laws." That is to say, it is no objection to an otherwise valid exercise by Congress of its power to prohibit commerce, that its purpose is to correct state policy rather than to support it.

In 1925, in *Brooks v. United States*,<sup>65</sup> the Court upheld the Motor Vehicle Act of 1919, which makes it a penal offense against the United States to transport in interstate commerce a motor vehicle known to have been stolen, or to "conceal, barter, sell, or dispose" of the same. After what appears to be an entirely irrelevant review of previous cases, the Chief Justice notes "the radical change in transportation" brought about by the automobile, and the rise of "elaborately organized conspiracies for the theft of automobiles . . . and their sale or other deposition" in another police jurisdiction from the owner's. "This," the opinion declares, "is a gross misuse of interstate commerce. Congress may properly punish such interstate transportation by any one with knowledge of the theft because of its harmful result and its defeat of the property rights of those whose machines against their will are taken into another jurisdiction." In short, the act is sustained chiefly as protective of owners of automobiles, that is to say, of interests in "the state of origin", and this result is directly connected with the Court having taken notice of "elaborately organized conspiracies" for the theft and disposal of automobiles across state lines—that is, of a widespread *traffic* in such property.

*Hammer v. Dagenhart* is today elbowed into rather narrow quarters.<sup>66</sup> Moreover, it may happen with a legal, as with a military position, which does not yield readily to assault, that it may be turned. Indeed, it has occurred more than once in recent years that the Court by a radical shift of position with reference to a vexed constitutional problem, has thrown the latter into an entirely new

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<sup>65</sup>267 U. S. 432, 45 Sup. Ct. 345 (1925).

<sup>66</sup>In *Bailey v. Drexel Furniture Co.*, 259 U. S. 20, the Court, in 1922, set aside a special tax by Congress upon the net profits of manufacturing concerns employing children under other than stated conditions. The opinion of Chief Justice Taft for the Court relies quite unequivocally on the canon of constitutional interpretation which is disavowed by Justice Day in *Hammer v. Dagenhart* that a measure otherwise within the power of Congress may be invalidated in defense of the Federal System because of the supposed purpose of Congress to govern a matter within the normal control of the states. Indeed, the Chief Justice's explanation of the decision in *Hammer v. Dagenhart*, *supra* note 17, puts it likewise upon the same ground. "When", he says, "Congress threatened to stop interstate commerce in ordinary and necessary commodities, *unobjectionable as subjects of transportation*, and to deny the same to the people of a state in order to coerce them into compliance with Congress's regulation of state concerns, the Court said that this was not in fact regulation of interstate commerce, but rather that of state concerns and was invalid." In short, Congress can prevent children from injuring commerce but cannot prevent commerce from injuring children!

perspective, and with striking results in constitutional interpretation.<sup>67</sup> Why should not something of the same nature take place in the present instance? The truth is that it has, although the transfer of position alluded to is not yet complete.

To continue our military mode of speech, the last-ditch position of the Court in *Hammer v. Dagenhart*, undoubtedly consists in the proposition that "production is local".<sup>68</sup> The difficulty with this proposition is that in modern conditions it is not true in any important sense. Specific acts of production take place in specific places, but many such acts and at different places may be necessary to complete a marketable product. What, however, is of more immediate relevance to our own problem is that, whether considered for the conditions surrounding them or for their possible effect upon future production, few acts of production are today purely local. Even before the World War the principal commercial countries of Europe had found it desirable to enter into agreements with one another with regard to labor conditions;<sup>69</sup> and as to the effect of present production on future, one need only recall conditions in the oil-fields. Furthermore, production is no more "local" in the sense of being within the normal jurisdiction of the police power of the states than is local transportation, which in 1914 was conceded by the Court to be within the power of Congress to regulate when in fact it affects interstate transportation.<sup>70</sup>

And meantime, since *Swift and Co. v. United States*,<sup>71</sup> which was decided early in 1905, the Court had come to recognize in cases arising under the Sherman Act, that commerce is something more than *transportation*, is in fact *traffic*, and that consequently the hard and fast line which it had drawn a decade earlier in the *Sugar Trust Case*<sup>72</sup> between commerce and production was no longer tenable.<sup>73</sup> Then in 1921 and 1922 Congress, building on these results, proceeded to enact the Packers and Stockyards Act and the Grain Futures Act,

<sup>67</sup>By way of illustration, compare *Burdick v. U. S.*, 236 U. S. 79, 35 Sup. Ct. 267 (1914); and *Biddle v. Perovich*, 274 U. S. 480, 47 Sup. Ct. 664 (1926).

<sup>68</sup>*Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6 (1888) is the leading case. Here it was held that the "commerce" clause did not prevent a state from prohibiting the manufacture of intoxicants for shipment in interstate commerce. All the other cases prior to *Hammer v. Dagenhart* assert the proposition in relation to the "commerce" clause as restrictive of state power in the *absence* of regulation by Congress.

<sup>69</sup>See my *DOCTRINE OF JUDICIAL REVIEW* (Princeton, 1914), p. 161.

<sup>70</sup>The *Shreveport Case*, 234 U. S. 342, 34 Sup. Ct. 833 (1914).

<sup>71</sup>196 U. S. 375, 25 Sup. Ct. 276 (1905).

<sup>72</sup>*United States v. E. C. Knight*, 156 U. S. 1, 15 Sup. Ct. 249 (1894).

<sup>73</sup>See my article, *supra* note 40.

which were sustained respectively in *Stafford v. Wallace* and *Board of Trade v. Olsen*.<sup>74</sup>

There can be no question that, from the outlook provided by these cases, *production for the interstate market* has taken on an entirely altered aspect. From being something intrinsically local, it becomes merged in a steady-flowing continuum which knows no state lines; in the phrase of Chief Justice Taft, it is but an "eddy" in the interstate commerce stream; it is a recurrent episode in an established "course of business" essentially interstate; and an intention which is authenticated by such a course of business *can* put goods in interstate commerce.<sup>75</sup> The cases, in short, adumbrate an entirely new concept from the point of view of which "commerce" and "business" become interchangeable terms, and that is the concept of the *Interstate Market*. American business is today dominated by its national characteristics—buying and selling without regard to state lines, transportation without regard to state lines, communication without regard to state lines; but above all, it is dominated by the fact that it looks toward and culminates in, in short, exists for the Interstate Market.<sup>76</sup>

Interstate commerce, or rather interstate business, thus takes on the territorial aspect of a field over which national power must hold sway if its activities are not to take place beyond the reach of a supervisory political judgment. Its articulated structure could indeed be restored to effective local control only to destroy it. As to its state power is actually non-existent—an empty fiction. If it is to be governed at all, it must be by the National Government. Nor does this signify that Congress is entitled to use its power over commerce to bring within its control matters in no wise related to the

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<sup>74</sup>258 U. S. 495, 42 Sup. Ct. 397 (1921); 262 U. S. 1, 43 Sup. Ct. 470 (1922).

<sup>75</sup>*Dahnke-Walker Milling Co. v. Bondurant*, note 54 *supra*; *So. Pac. Terminal Co. v. I. C. C.*, 219 U. S. 498 (1911). Cf. *Kidd v. Pearson*, *supra* n. 68.

<sup>76</sup>This is not to say, of course, that the Interstate Market is *one* market, or yet the same market for different products; it is only to say that it overruns and ignores state lines. The Interstate Market for any particular product is likely, where competitive conditions obtain, to dissolve into a number of regional markets, in accordance with the law stated by Professor Fetter:

"The boundary line between the territories tributary to two geographically competing real markets for like goods is a hyperbolic curve. At each point on this line the difference between freights from the two markets is just equal to the difference between the prevailing market prices, whereas on either side of this line the freight difference and the price difference are unequal. The relation of prices in the two markets determines the location of the boundary line: the lower the price in a market relative to that of a neighboring market, the larger the tributary territory." F. A. FETTER, *THE MASQUERADE OF MONOPOLY*, (1931) p. 283.

Interstate Market, marriage and divorce, for instance. The determinative question is this: Does the Interstate Market serve to capitalize conditions which may reasonably be thought to be destructive of the national prosperity if persisted in, or does it afford the means of deriving private advantage from socially undesirable conditions? If so, Congress is entitled to take corrective action.

And the vital defect of *Hammer v. Dagenhart* against this background is seen at once to have been its sheer anachronism. With commerce among the states conceived as merely transportation from one state to another, any effort by Congress to prohibit it necessarily thrusts into prominence its aspect as an effort to reach subject-matter normally within the power of the states, and this is so whether lottery tickets, intoxicants, stolen automobiles, or child labor products are the things involved.<sup>77</sup> But when "commerce" is properly defined as *traffic*, and the mental picture is formed, not of an isolated journey across a state boundary line, but of an onward coursing stream of business which knows no state lines, which is constantly fed by and as constantly feeds the streams of production, and which debouches into the Interstate Market, then regulation of it by Congress, whether taking the form of a prohibition of certain phases of transportation or some other form, ceases to be open to the charge of an ulterior intention to usurp power, because it operates upon the very subject-matter entrusted to Congress, or at most upon local incidents thereof, the fringe, so to speak, of a nation-spread fabric.

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Within recent months the Supreme Court has taken pains on two occasions to assert: "Primitive conditions have passed; business is now transacted on a national scale."<sup>78</sup> This was said, it is true, in both instances, in support of decisions restrictive of the state taxing power. The burden of this paper is that the same fact must be given its proper weight in delimiting national power over business. The constitutional difficulty that stands in the way of the Court's doing so is the concept of "Dual Federalism" which has no support in the *text* of the Constitution, and which represents an entire inversion of Chief Justice Marshall's system of constitutional interpreta-

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<sup>77</sup>It is not meant of course to suggest that Congress's ulterior motives properly afford a ground of judicial review. Even if "commerce" be defined simply as *transportation*, the decision in *Hammer v. Dagenhart*, *supra* note 17, still remains an act of unwarrantable intrusion by the Court upon Congress's legislative discretion.

<sup>78</sup>*Farmers' Loan & T. Co., v. Minn.*, 280 U. S. 204, 211, 50 Sup. Ct. 98 (1930) 212; *Burnet v. Brooks*, *supra* note 63.

tion.<sup>79</sup> And whatever validity "Dual Federalism" may once have had as a canon of constitutional construction it has since lost, both because of its logical irreconcilability with a host of modern decisions and because of its actual unworkability in the presence of modern business conditions. The Constitution sets up as its foremost objective "a more perfect Union." Technologically, industrially, commercially, the perfect union has been achieved. As usually happens, legal and governmental development has lagged behind. But our present situation is a sharp reminder that there are times when law and government must quicken their pace if permanent disaster is to be avoided.<sup>80</sup>

Madison's and White's views are outmoded by times and conditions which vindicate Marshall's prophetic vision.<sup>81</sup>

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<sup>79</sup>Thus Marshall regarded *traffic* as "one of the most ordinary ingredients" of commerce; subsequently this most ordinary ingredient became entirely subordinated to "commerce" considered as *transportation*—a purely derived concept. Again Marshall defined the power to "regulate" commerce as the power "to prescribe the rule by which commerce is to be governed," which in certain circumstances meant, naturally, the power to "foster and promote" it; and once more the enemies of the Congressional power to "prohibit" commerce urge a purely secondary definition as the sole and exclusive one. Again, Marshall regarded the Constitution as having for its primary purpose the creation of a sovereign national authority with respect to a designated subject-matter, while the concept of Dual Federalism makes state power, to some indefinite extent to be determined from time to time by judicial review, an independent limitation on national power.

<sup>80</sup>Just how difficult it can be at times to distinguish production and commerce even verbally is illustrated by the recent case of *Utah Power and Light Co. v. Pfost*, 286 U. S. 165 (1932). The issue here was the validity of an Idaho statute imposing a license tax on the generation of electricity in the state. The company, which sent most of its power out of the state, contended that the process of generation was "simultaneous and interdependent with that of transmission and use", and that "because of their inseparability the whole" was interstate commerce. The state urged, to the contrary, that the process of conversion was "completed before the pulses of energy leave the generator in their flow to the transformer."

Mr. Justice Sutherland for the Court: "*While conversion and transmission are substantially instantaneous, they are, we are convinced, essentially separable and distinct operations.*"

It would, of course, be quite unfair to assume that Justice Sutherland thought he was here making a contribution to scientific knowledge. Rather he was throwing verbal straws to a drowning theory of federalism—which he leaves balancing on the imaginary line that separates the imaginary final pulsation of an electric current in an induction coil from its imaginary first pulsation in a transmission wire! I am told, in fact, that if the separation suggested by Justice Sutherland were really attempted the result would be the disappearance of the generating plant in flames.

<sup>81</sup>The debate in the Senate on Senator Black's "Thirty-Hour-a-Week" Bill (Apr. 3rd to 5th) elicited some interesting expressions of opinion concerning the obligation of a Senator, under his oath to support the Constitution, toward de-

cisions of the Supreme Court interpretative of the Constitution. Referring to *Hammer v. Dagenhart*, Senator Black himself said: "I assert the same right with reference to that opinion of the Court as has been asserted here with reference to other opinions, namely, that we are governed by the Constitution of the United States in the final analysis, and not by the prepossessions of a certain number of judges who may write an opinion on a particular matter." 77 CONG. REC. 1112, *supra* note 1 Senator Long reminded the Senate that "Our Constitution simply provides for the 'creation' of the Supreme Court. It is possible for Congress to enlarge it, diminish it, or to make itself a part of the Court. The time might come in America when Congress itself would be in the same position in which the House of Parliament in England is, particularly if the Supreme Court were out of touch with what was necessary for the public at the time." *Ibid.*, 1118. Senator Borah thought the fact that the decision in *Hammer v. Dagenhart* was a 5-to-4 decision made a difference, but Senator Barkley disagreed: "It is a perfectly legal and binding decision, just as a law passed by the Senate and the House by a majority of one is just as binding on the people as if it had been passed unanimously. . . ; and under our theory of the rule of the majority (*sic!*), I think the Court is just as much justified in having its decision by a majority of one respected as we would be justified in having the people respect our statutes which are passed by a majority of one." Senator Borah agreed in part: "The Senator from Kentucky. . . has very properly said that a 5-to-4 decision is binding upon the litigants [in fact the Senator from Kentucky said nothing about "litigants"]. It is the law of the land; but we are here making laws, we are establishing policies. Therefore, following the example of Abraham Lincoln, I have always felt that it is a justifiable position to take that when a proposition seems unsettled, [Lincoln, however, was talking about the 7-to-2 decision in the *Dred Scott* Case], legislators, who make laws and establish policies, ought to have some freedom of judgment in the matter." *Ibid.*, 1178-9. A little later the following interesting colloquy developed among the Senators from Texas, Washington, and Idaho:

Mr. Connally: Whenever we vote for these measures, does not each individual have to determine for himself whether they are constitutional or not?

Mr. Dill: Yes; I think that is true.

Mr. Connally: The Senator from Idaho (Mr. Borah), a moment ago, was talking about the desirability of passing the bill so that the Supreme Court could pass on it. When I vote for the measure it will not be for that reason.

Mr. Dill: I take the position that where a question is of doubtful constitutionality, because there are no cases that apply in all respects, I want to resolve the doubt in favor of the legislation which I believe is so highly desirable and leave it to the Court to decide the doubt in the question.

Mr. Connally: Senators will stand on this floor, and I dare say the Senator from Idaho has done it repeatedly, and declaim against the encroachment of the courts on the legislative power. Yet Senators stand on the floor from time to time and "pass the buck", as it were, over to the Supreme Court by saying, "Well, we will let the Court pass on it." We are encouraging the very encroachment against which Senators declaim.

Mr. Borah: Mr. President, will the Senator from Washington yield to me?

Mr. Dill: I yield.

Mr. Borah: May I say to the Senator from Texas that I do think it is the duty of this body to pass upon the constitutionality of an act, and I am not willing to be bound in my view as to its constitutionality by a 5-to-4 decision.

Mr. Connally: Mr. President, I congratulate the Senator. I was sure that was

his attitude; but there was some suggestion that the Senator wanted the bill passed so that it could go up to the Court and the question be decided...." *Ibid.*, 1180.

The most conservative position developed was that of Senator Logan of Kentucky—unless he was indulging in irony:

"It may be that my training throughout the years has caused me to think along lines from which I cannot easily depart. I cannot agree with the Senator from Louisiana that we have the right to place our own construction on the Constitution when the Supreme Court of the United States, which is solely vested with the authority to tell us what the Constitution means, has determined a particular question. It may be that we could say that we disagree with its opinion, but however much we may disagree with the opinion of the Supreme Court, that opinion is right. It may not have been right 5 minutes before the opinion was delivered; it may not have been right during the entire history of the Nation up to that time; but the very moment that that opinion is handed down and goes into the law books, when it becomes final, then the Constitution means and must mean exactly what the Supreme Court says it means. I can place no other construction on it." *Ibid.*, 1257.

Most people will find it difficult to believe that the past decisions of the Court interpretative of the Constitution are entitled to greater respect from Congress than they are apt to receive from the Court itself. First and last the Court has overruled, in whole or in part, such decisions of its own on more than thirty occasions. See dissenting opinion of Justice Brandeis in *Burnet v. Coronado Oil and Gas Co.*, 285 U. S. 393, 407-10, 52 Sup. Ct. 443, notes 2 and 4 (1932). As is there pointed out, *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. 277 (1903), which was overruled in the recent case of *Farmers' L. and T. Co. v. Minn.*, *supra*, note 78, had been cited with approval by the Court some fifteen times in the twenty-seven years between the two cases. Shortly following the *Burnet* Case, the Court overruled another constitutional decision, that in *Long v. Rockwood*, 277 U. S. 142, 48 Sup. Ct. 463 (1928). This happened in *Fox Film Co. v. Doyal*, 286 U. S. 123, 131, 52 Sup. Ct. 546 (1932).