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THE COMMERCE CLAUSE AND THE NEW DEAL*

FORREST REVERE BLACK

Students of constitutional law recognize that almost from the beginning of the government there has been a gradual expansion of the commerce clause. John Marshall only participated in three commerce clause decisions¹ but he bequeathed to succeeding generations of jurists four perplexing problems: the intricacies of the "original package" doctrine, the proper inferences to be drawn from Congressional silence, the nature and scope of the plenary concept and the query whether Congressional power was immediately exclusive. Since Marshall's day, more than eight hundred cases involving the commerce clause have been decided by the Supreme Court of the United States,² and with the growing complexity and interdependence of the various units in our national business structure, a sort of manifest destiny has justified a continuing expansion of the commerce clause.

The present Administration came into power "confronted with an emergency more serious than war"³ and convinced that "there must be power in the states and the nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs".⁴ If the Administration was to act with courage and effectiveness, it was forced to utilize the commerce clause, for the very good reason that no other constitutional sanction was available⁵ for such basic acts as the N.I.R.A. and the A.A.A. A more

*Address before American Political Science Association, Chicago, December 27, 1934.

¹Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23 (1824); Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678 (1827); Wilson v. The Blackbird Creek Marsh Co., 2 Pet. 245, 7 L. ed. 412 (1829). He participated in the consideration of the case of Mayor of the City of New York v. Miln, 11 Pet. 102, 9 L. ed. 648 (1837) but died before the case was decided. See GAVIT, THE COMMERCE CLAUSE (1932) 10.

²See GAVIT, *op. cit. supra* note 1, Appendix A, at 387-530.

³Brandeis' dissent in New State Ice Co. v. Liebman, 285 U. S. 262, 306, 52 Sup. Ct. 371, 385 (1931).

⁴*Id.* at 311, Sup. Ct. at 386.

⁵Some of the supporters of the Recovery Act professed to find constitutional authority in (1) the preamble; (2) general welfare and (3) the commerce clause. (See Report of Ways and Means Comm., H. R. REP. No. 159, 73rd Cong. 1st Sess. at p. 2). But it is well settled that the preamble is not a source of power. Jacobson v. Massachusetts, 197 U. S. 1, 49 L. ed. 639 (1905); STORY, COMMENT-

timid government would have been nonplussed. The stragetists behind the New Deal believed with Justice Brandeis⁶ that "if we would guide by the light of reason, we must let our minds be bold".

Our most distinguished Prophet of Doom⁷ has reminded us "that in view of the precedents, the Supreme Court will have to swallow the largest dish of crow that any court ever swallowed to uphold the New Deal." In order that we may visualize the elastic interpretation that has been given the commerce clause by the present Administration, let us by way of contrast refer to the well known statement by Mr. Justice Lamar in *Kidd v. Pearson*⁸—a case that is cherished by critics of the New Deal.

"Manufacturing is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. . . . If it be held that the term (commerce) includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the states, with the power to regulate, not only manufacture, but also agriculture, horticulture, stock raising, domestic fisheries, mining;—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate and harvest his crop with an eye on the prices at Liverpool, New York and Chicago?"

Although this statement was uttered in a case involving state power, we assume that it is unnecessary to labor the point that the New Deal conception of the commerce clause is a far cry from the above quoted doctrine of the vintage of 1888 endorsed by a unanimous Supreme Court.

TARIES ON THE CONSTITUTION (5th ed. 1905) §462; Tucker, *The General Welfare* (1921) 8 Va. L. Rev. 167, 170. So the General Welfare clause in Art. I, Section 8 is not a substantive grant of power, but rather a statement of the purposes for which money may be appropriated. 1 WILLOUGHBY, CONSTITUTION OF THE UNITED STATES (2d ed. 1929) §61; Corwin, *The Spending Power of Congress* (1923) 36 HARV. L. REV. 548, 550-552.

⁶*Supra* note 3, at 311, Sup. Ct. at 386.

⁷Hon. James M. Beck, speaking on the floor of the House of Representatives. 77 CONG. REC. 4388, May 26, 1933. So many and so varied are the theories that have been advanced to support the New Deal that one judge said contemptuously that "no one has yet had the temerity to suggest that the original package doctrine will justify them." *United States v. Suburban Motor Service Corp.* 5 F. Supp. 798 (D. C. Ill. 1934).

⁸128 U. S. 1, 32 L. ed. 346 (1888).

It shall be our purpose to indicate generally the chief techniques and the more significant constitutional theories utilized by the government in its attempt to justify the validity of this new legislation under the commerce clause. Because of the complexity and the ramifications of our problem, we are constrained to a general discussion of the New Deal legislation under the commerce clause rather than a specific defense of separate statutes.

(1) *A realistic jurisprudence insists that it is a question of economics whether a certain activity is subject to the commerce clause.*

The term commerce is not a "word of art" having a precise and static content to be determined in vacuo. As we have become better acquainted with the nature of the judicial process the significance of social and economic interpretations of the due process clause⁹ has become accepted in our legal thinking. The authors of the New Deal insist that any constitutional opinion as to the scope of the commerce clause in a particular situation, must run the gauntlet of an economic justification on the basis of the factual background.¹⁰

Congress in passing the Agricultural Adjustment Act and the National Industrial Recovery Act incorporated into the statutes¹¹ a Declaration of Emergency and a Declaration of Policy that make articulate the vital connection between the economic depression in agriculture and business and the commerce clause. These declaratio n

⁹Cushman, *Social and Economic Interpretation of the 14th Amendment* (1922) 20 MICH. L. REV. 737.

¹⁰As an illustration of a regular practice in the A.A.A., attention is called to a memorandum addressed to all A.A.A. Economists concerning economic data in support of marketing agreements, licenses and codes under date of March 7, 1934 issued by Jerome N. Frank, General Counsel. One excerpt reads: "Economists working on agreements and licenses are, therefore, urged to fully state all the facts bearing on the reasonableness or unreasonableness of licenses and agreements, so that the lawyers, in giving their opinions prior to the execution of agreement and the issuance of a license, may predicate their judgment as to enforceability on as full a knowledge of the facts as it is possible to obtain." See Bikle, *Judicial Determination of Questions of fact affecting the Constitutional Validity of Legislative Action* (1924) HARV. L. REV. 6.

¹¹The Declaration of Policy of the N.I.R.A. declares, "A national emergency, productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce . . . is hereby declared to exist." The Declaration of Emergency in the A.A.A. reads, "That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities . . . it is hereby declared that these conditions in the basic industry of agriculture . . . have burdened and obstructed the normal currents of commerce in such commodities, and render imperative the immediate enactment of Title 1 of this Act."

follow the enacting clause and are an integral part of the statute. Nothing is left to conjecture or implication. This change in legislative technique affords a much more effective device than the old-fashioned preamble.¹²

(2) *Where a factual declaration of emergency is incorporated into an act there is strong contemporaneous authority to the effect that the Supreme Court of the United States will accord every possible presumption in favor of the correctness of the legislative declaration.*

In *Block v. Hirsch*,¹³ the Congressional act regulating rents in the District of Columbia contained a factual declaration of emergency. Mr. Justice Holmes speaking for the court said,

"A declaration by a legislature concerning public conditions that by necessity and duty it must know, is entitled at least to great respect. In this instance Congress stated a publicly notorious and almost world-wide fact: *That the emergency declared by the statute did exist must be assumed. . .*"

In *Nebbia v. People of the State*¹⁴ of New York, the New York Legislature incorporated a declaration of emergency into the Agricultural and Markets Act setting forth the reasons for the enactment. The court declared,

"Times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power. See *McLean v. Arkansas*, 211 U. S. 539, 547, 29 S. Ct. 206, 53 L. Ed. 315; *Tanner v. Little*, 240 U. S. 369, 385, 36 S. Ct. 379, 60 L. Ed. 691; *Green v. Frazier*, 253 U. S. 233, 240, 40 S. Ct. 499, 64 L. Ed. 878; *O'Gorman & Young v. Hartford Ins. Co.*, 282 U. S. 251, 257, 258, 51 S. Ct. 130, 75 L. Ed. 324, 72 A. L. R. 1163; *Gant v. Oklahoma City*, 289 U. S. 98, 102, 53 S. Ct. 530, 77 L. Ed. 1058".

In the Minnesota Moratorium Act, the Minnesota legislature utilized a declaration of emergency in the first section of the Act. The Supreme Court of the United States held this legislation valid in *Home Building and Loan Association v. Blaisdell*,¹⁵ the court said;

"The declarations of the existence of this emergency by the legislature and by the Supreme Court of Minnesota cannot be re-

¹²Preambles are not, properly speaking parts of acts. They do not *ex proprio vigore* make the law and in themselves have no constraining force upon the citizen. (BLACK, INTERPRETATION OF LAWS 254).

¹³256 U. S. 526, 41 Sup. Ct. 458 (1920).

¹⁴281 U. S. 502, 54 Sup. Ct. 505 (1933).

¹⁵290 U.S. 398, 54 Sup. Ct. 231 (1933).

garded as a subterfuge or as lacking in adequate basis. . . The economic emergency which threatened the loss of homes and lands which furnished those in possession the necessary shelter and means of subsistence was a potent cause for the enactment of the statute."

(3) *The doctrine of Judicial Notice.*

Even in the absence of a specific declaration of factual background incorporated into the act, the Supreme Court under the doctrine of judicial notice has not only recognized the existence of the present emergency "which dominates contemporary thought"¹⁶ but also the vital connection between the economic depression and the commerce clause. In *Appalachian Coals Inc. v. United States*¹⁷ the court declared,

"The interests of producers and consumers are interlinked. When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrate, the wells of commerce go dry".

Further the court may take judicial notice of economic and statistical data contained in official publications which tend to support the government's theory that there is a vital connection between recovery legislation and the commerce clause.¹⁸

(4) *The legal effect of the emergency.*

The government does not contend that Congress has an "emergency" power over commerce in the sense that constitutional limitations are suspended or that by virtue of the emergency that the federal government has a true police power. The only effect of an "emergency", in the sense that the economic depression is an emergency, is that it presents a situation in which interstate commerce is endangered by activities which in normal times would not seriously affect it.¹⁹ Congress can then reach out and control those activities under its commerce power *because of their effect on interstate commerce*, and for no other reason.

¹⁶*Atchison, Topeka & Santa Fe R. R. v. United States*, 284 U. S. 248, 52 Sup. Ct. 146 (1932).

¹⁷288 U. S. 344, 372, 53 Sup. Ct. 471, 478 (1932).

¹⁸*Jackson v. United States*, 230 U.S. 1, 33 Sup. Ct. 1011 (1912); *Muller v. Oregon*, 208 U. S. 412, 28 Sup. Ct. 324 (1907). A typical illustration of such an official publication is the official government publication: *EZBKIEL AND BEAN, ECONOMIC BASES FOR THE AGRICULTURAL ADJUSTMENT ACT* (1933).

¹⁹As an example consider the Agricultural Adjustment Act. The statute recites that the national flow of interstate commerce has fallen to an alarmingly low level due to a disparity between the prices of agricultural and other products, which disparity has been caused in part by the existence of ruinous surpluses. The Act provides a means for increasing the purchasing power of the farmer and thereby increasing the flow of interstate commerce.

"Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed".²⁰

As the court declared in *In Re Debs*,²¹

"Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation".

(5) *Whether the economic reasoning behind the legislation is sound or unsound is not open to judicial inquiry.*

In *Stafford v. Wallace*²² the Supreme Court said:

"Whatever amounts to more or less constant practice and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. *This Court will certainly not substitute its judgment for that of Congress in such a matter, unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent.*" (Underscoring supplied)

At the time of the adoption of the Anti-Trust Laws, it was the opinion of Congress that free and unrestricted competition was a wise and wholesome situation for all commerce, and that the national prosperity required that such free competition be maintained. The Courts did not then inquire into the soundness of the economic theory thus adopted by Congress but upheld the Anti-Trust Laws as a proper exercise of the commerce power. Thus, in *Northern Securities Co. v. U. S.*,²³ the Court said:

"*Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. Undoubtedly, there are those who think that the general business interests and prosperity of the country will be best promoted if the rule of competition is not applied.* But there are others who believe that such a rule is more necessary in these days of enormous wealth than it ever was in any former period of our history. Be all this as it may, Congress has, in effect, recognized the rule of free competition by declaring illegal every combination or conspiracy in restraint of interstate and international commerce. As in the judgment of Congress the public convenience and the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that must be, for all, the

²⁰*Wilson v. New*, 243 U. S. 332, 37 Sup. Ct. 298 (1917).

²¹158 U. S. 564, 591, 15 Sup. Ct. 900 (1894).

²²258 U. S. 495, 521, 42 Sup. Ct. 397 (1921).

²³193 U. S. 197, 337, 24 Sup. Ct. 436 (1903).

end of the matter, if this is to remain a government of laws, and not of men." (Underscoring supplied.)

Congress has now found that the forces of free competition are, if unrestricted, not in the interest of the national prosperity, but it is not for the court to pass on the wisdom of the economic philosophy underlying the New Deal.

The discussion thus far has been general and by way of background. It remains to consider certain well-established commerce clause doctrines and the *cumulative effect of their application under emergency conditions*. A new concept of commerce power emerges.

(6) *The commerce clause is not limited to the regulation of the movement of commodities or persons or information across state lines, but extends to the regulation of intrastate activities whenever such regulation is necessary for the effective control of interstate activity.*

Situation (1), where intrastate commerce is intermingled with interstate commerce (over which Congress exercises its regulatory power) to such an extent that the effective regulation of the latter requires regulation of the former. In *United States v. New York Central R. R.*²⁴ which held the recapture clause valid though it reduced income from intrastate as well as interstate rates, the court said,

"Where, as here, interstate and intrastate transactions are interwoven, the regulation of the latter is so incidental to and inseparable from the regulation of the former as properly to be deemed included in the authority over interstate commerce".

In the *Minnesota Rate Cases*,²⁵ the Supreme Court, in discussing the power of the Federal Government to fix intrastate railroad rates, said:

"There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subject committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere." (Underscoring supplied.)

²⁴272 U. S. 457, 464, 47 Sup. Ct. 130 (1926); To like effect: *Southern Railway Co. v. United States*, 222 U. S. 20, 32 Sup. Ct. 2 (1911) (Safety Appliances); *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 32 Sup. Ct. 436 (1911) (System of Accounts).

²⁵230 U. S. 352, 399, 33 Sup. Ct. 729 (1912).

Situation (2), where the regulation of interstate commerce alone would give to intrastate commerce of the same character an unfair competitive advantage.

In the *Houston East & West Texas Railway Co. v. United States*,²⁶ the Supreme Court sustained the power of the Interstate Commerce Commission to fix intrastate rates where it was shown that, unless such power was sustained, interstate shippers would be forced to pay rates disproportionately high as compared with the rates paid by intrastate shippers. In so holding, the Supreme Court said:²⁷

"The power to deal with the relation between the two kinds of rates, as a relation, lies exclusively with Congress. . . It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. . . Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, *it is Congress and not the State, that is entitled to prescribe the final and dominant rule*, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field." (Underscoring supplied.)²⁸

Situation (3), where intrastate commerce affects or burdens interstate commerce. The depression has emphasized that the business of the nation has become a single integrated whole. The prosperity of each basic industry is dependent on every other industry. Before the nation became an economic unit, commercial activities in one state concerned other states only through actual movements of goods across state lines. But by virtue of the unity of our present national business structure, emphasis now is placed not on movement, but on the fact that business in one state does affect business in other states.²⁹ The effort under the New Deal to fix prices, control output, regulate wages and hours, relieve unemployment, define trade practices and increase purchasing power has for its chief object the increasing of the flow of interstate commerce which had reached an alarmingly low level when the present Administration came into power.³⁰

²⁶234 U. S. 342, 34 Sup. Ct. 833 (1913).

²⁷*Id.* at 354.

²⁸To the same effect see *Illinois Central R. R. Co. v. Public Utilities Commission*, 245 U. S. 493, 38 Sup. Ct. 170 (1917); *Wisconsin Railroad Commission v. Chicago, Burlington & Quincy R. R.*, 257 U. S. 563 (1921); *New York v. United States*, 257 U. S. 591, 42 Sup. Ct. 234 (1921).

²⁹A suggestive article developing this point is Stern, *That Commerce which Concerns More States than One* (1934) 47 HARV. L. REV. 1335.

³⁰From an average of 119 for the year 1929 (1923 to 1925-100) industrial production dropped to 63 in February 1933. (U. S. Dept. of Commerce, Bureau of Foreign and Domestic Commerce, *WORLD ECONOMIC REVIEW*, p. 84, from the Federal Reserve Board). Commodity prices fell from 95.3 (1926-100) to 59.8 in

Because of the existence of an interstate market, the idea that purchase and sale are elements thereof was used to sustain comprehensive local regulation of the Chicago Grain Exchange under the commerce clause. The court said,

"The question of price dominates trade between the states. Sales of an article which affect the country wide price of the article directly affect the country wide commerce in it."³¹

The authority of Congress to regulate purely intrastate activities which burden and affect interstate commerce by exerting an adverse influence on the prices of commodities which move in interstate commerce is strikingly illustrated in the cases arising under the Anti Trust Laws. In *United Mine Workers v. Coronado Coal Company*³² the Supreme Court was concerned with the effect of purely local activities of striking coal miners upon interstate commerce. Having conceded that

February 1933. *Id.*, p. 92 (Bureau of Labor Statistics). The number of persons employed in factories fell from 101 in 1929 (1923 to 1925-100) to 59.4 in February 1933. *Id.*, p. 101 (Federal Reserve Board). The total number of persons unemployed is estimated to have been 14,000,000 in 1932. (SEN. DOC. 124 73d CONG. 2d Sess., *Report on National Income, 1929 to 1932*). The total payrolls dropped even further than the total number of persons employed—from 107 in 1929 (1923 to 1925-100) to 40 in February 1933. (WORLD ECONOMIC REVIEW, p. 102). The average weekly earnings of factory employees in 25 selected industries fell from \$28.54 in 1929 to \$16.13 by February 1933. *Id.*, 107 (National Industrial Conference Board). Construction was reduced from 117 for 1929 to 19 in February 1933, and less in the succeeding months. *Id.*, 112 (Federal Reserve Board). The effect of the depression on national income and on wages received was staggering. The national income fell from \$81,136,000,000 in 1929 to \$48,894,000,000 in 1932 (60.3% of the 1929 total), and total wages received in mining, manufacturing, construction, and transportation industries fell from \$17,179,000,000 in 1929 to \$6,840,000,000 in 1932 (39.8% of the 1929 total). (SEN. DOC. 124, 73d CONG., 2d Sess., *Report on National Income, 1929 to 1932*).

"Freight car loadings—which are probably the most accurate basis of interstate movements, although they include intrastate shipments as well—fell from 106 (1923 to 1925-100) for 1929 to 54 in February 1933. WORLD ECONOMIC REVIEW, 117 (Federal Reserve Board). The actual decrease was from 3,766,000 cars in February 1929 to 1,971,000 in February 1933. *Id.*, 115 (American Railway Association)."

³¹*Chicago Board of Trade v. Olsen*, 262 U. S. 1, 40 (1923). The court (at p. 36) analyzed the issue as follows: "The question is whether the conduct of such sales is subject to constantly recurring abuses which are a burden and obstruction to interstate commerce in grain. And further are they such an incident to that commerce and so intermingled with that commerce, that the burden and obstruction caused therein by them can be said to be direct?" See also *Tagg Bros. v. United States*, 280 U. S. 420, 50 Sup. Ct. 185 (1929); *United States v. Patton*, 226 U. S. 525, 33 Sup. Ct. 141 (1912); *United States v. Thornton*, 271 U. S. 414, 46 Sup. Ct. 586 (1925).

³²259 U. S. 344, 42 Sup. Ct. 570 (1922).

"coal mining is not interstate commerce, and (that) the power of Congress does not extend to its regulation *as such*",³³ the court after citing many cases³⁴ said,

"It is clear from these cases that if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint".

In *Local 167, International Brotherhood of Teamsters v. United States*,³⁵ the court said,

"But we need not decide when interstate commerce ends and that which is intrastate begins. The control of the handling, the sales and the *prices at the place of origin before the interstate journey begins* or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce. *United States v. Brims*, 272 U. S. 549, *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295, 310. *United States v. Swift & Co.*, 122 Fed. 529, 532-533. Cf. *Swift & Co. v. United States*, 196 U. S. 375, 398. The Sherman Act denounces every conspiracy in restraint of trade *including those that are to be carried on by acts constituting intrastate transactions.* * * *

In *Standard Oil Company v. United States*³⁶ the Supreme Court held the Anti Trust Act applicable to the defendants, although the conduct in question related only to the manufacture of gasoline. The court³⁷ said,

"Moreover, *while manufacture is not interstate commerce*, agreements concerning it which tend to limit the supply or to *fix the price of goods entering into interstate commerce*, or which have been executed for that purpose, are within the prohibition of the Act."

In *United States v. Ferger*³⁸ the question at issue was the validity of an Act of Congress punishing the issuance and the utterance of a fictitious bill of lading. It was argued that as there was and could be no

³³*Id.* at 408.

³⁴*Id.* at 408; cases cited were *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276 (1905); *United States v. Patton*, 226 U. S. 527, 33 Sup. Ct. 141 (1912); *United States v. Ferger*, 250 U. S. 199, 39 Sup. Ct. 445 (1918); *Railroad Commission v. Chicago, B. Q. R. R.*, 237 U. S. 220, 35 Sup. Ct. 560 (1914) and *Stafford v. Wallace*, 258 U. S. 495, 42 Sup. Ct. 397 (1921). See also (*The Second Coronado Case*). *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295, 45 Sup. Ct. 551 (1924) where the court said, "But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Acts."

³⁵291 U. S. 293, 54 Sup. Ct. 396 (1933).

³⁶283 U. S. 163, 51 Sup. Ct. 421 (1930).

³⁷*Id.* at 164.

³⁸250 U. S. 199, 203, 205 (1919).

commerce in a fraudulent and fictitious bill of lading, for the reason that there was no actual consignee and no shipment intended, that therefore the power of Congress could not embrace such pretended bill. The court said,

“But this mistakenly assumes that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by relation of that subject to commerce and its effect upon it. . . Nor is the situation helped by saying that as the manufacture and use of the spurious interstate commerce bills of lading were local, therefore the power to deal with them was exclusively local, since the proposition disregards the fact that the spurious bills were in the form of interstate commerce bills, which, in and of themselves, involved the potentiality of fraud as far-reaching and all-embracing as the flow of the channels of interstate commerce in which it was contemplated the fraudulent bills would circulate.”

Since the depression seriously obstructs the flow of commodities in interstate commerce, it follows that measures reasonably calculated to free business from the burdens of the depression are regulations which will protect and foster interstate commerce. It should be remembered that long before the present depression the Supreme Court recognized that under the commerce clause, Congress is empowered to enact “all appropriate legislation” for its “protection and advancement”³⁹ to adopt measures “to promote its growth and insure its safety”⁴⁰ and “to foster, protect, control and restrain”⁴¹ it.

7. The “current of commerce” doctrine.

The principle of the *Swift*⁴² case has a new significance under present emergency conditions, in expanding the commerce clause. In that case the court declared that “commerce among the states is not a technical legal conception, but a practical one drawn from the course of business. . . The plan may make the parts unlawful” and bring the constituent acts, although not in themselves interstate commerce, within the commerce clause. In 1922, Chief Justice Taft characterized the *Swift* case

“as a milestone in the interpretation of the commerce clause of the Constitution. It recognized the great changes and development in the business of this vast country, and drew again the

³⁹The *Daniel Ball*, 10 Wall. 557, 564, 19 L. ed. 999, 1001 (1871).

⁴⁰*Mobile County Bank v. Kimball*, 102 U. S. 696, 697, 26 L. ed. 238, 239 (1881).

⁴¹*Second Employers Liability Cases*, 223 U. S. 1, 47, 32 Sup. Ct. 169, 174 (1912).

⁴²*Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276 (1905). At 399, J. Holmes developed the conception of the “Current of Commerce.” In *Stafford v. Wallace*, 258 U. S. 495, 516, 42 Sup. Ct. 397, 402 (1921), the court declared, “The stockyards are but the throat through which the current pours . . . The stockyards and sales are necessary factors in the middle of this current.”

dividing line between interstate and intrastate commerce where the Constitution intended it to be. It refused to permit local incidents of great interstate movement, which taken alone were intrastate, to characterize the movement as such. The Swift case merely fitted the commerce clause to the real and practical essence of modern business growth.⁴³

This "current" or "stream of commerce" doctrine looks to the subject of the regulation as a whole, and not to the individual transgressor's separate acts.⁴⁴ In *Stafford v. Wallace*⁴⁵ the court said of the *Swift* case,

"It was the inevitable recognition of the great central fact that such streams of commerce from one part of the country to another which are ever flowing are in their very essence the commerce among the states and with foreign nations which historically it was one of the chief purposes of the Constitution to bring under national protection and control. This court declined to defeat this purpose in respect to such a stream and take it out of complete national regulation by a nice and technical inquiry into the non-interstate character of some of its necessary incidents and facilitates when considered alone and without reference to their association with the movement of which they were an essential but subordinate part."

8. *The acceptance of the Swift Doctrine does not ipso facto destroy state police power.*

It is well established that

"Congress is not to be denied the exercise of its constitutional power over interstate commerce and its power to adopt not only means necessary but convenient to its exercise *merely because these means have the quality of police regulations*".⁴⁶

In the *Swift* case the court said,

"But we do not mean to imply that the rule which marks the point at which state taxation or regulation become permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the states".⁴⁷

There are many transactions that may be subject both to state and federal regulations. Thus intrastate railroad rates may be regulated by the states⁴⁸ but when intrastate rates affect interstate commerce, Congress may regulate them.⁴⁹ Sales of grain on grain exchanges are

⁴³Board of Trade of Chicago v. Olsen, 262 U. S. 1, 35, 43 Sup. Ct. 470 (1922).

⁴⁴The Declaration of Policy of the Agricultural Adjustment Act specifically recognizes the "Current of Commerce" doctrine.

⁴⁵258 U. S. 495, 518-519, 521, 15 Sup. Ct. 900 (1921).

⁴⁶Seven cases of Eckman's alternative v. United States, 239 U. S. 510, 515 (1816).

⁴⁷196 U. S. 375, 400, 49 L. ed. 518, 526 (1905).

⁴⁸Minnesota Rate Cases, 230 U. S. 352, 57 L. ed. 1511 (1913).

⁴⁹The Shreveport Case, 234 U. S. 342 (1914); Railroad Commission of Wisconsin v. Chicago, B. & Q. Railroad, 257 U. S. 563, 66 L. ed. 371 (1922).

intrastate sales. The states may both regulate such sales⁵⁰ and tax the grain which is the subject of sale,⁵¹ and yet detailed regulation by Congress of all transactions on the grain exchange has been upheld.⁵² Similarly a state may tax cattle in the stockyards,⁵³ yet Congress may, at the same time, regulate the stockyards and the sales of cattle therein.⁵⁴ And states may tax mining, which is not interstate commerce,⁵⁵ while Federal legislation may also apply to mining where interstate commerce is burdened.⁵⁶ The states may still exercise their police power over intrastate acts which have an interstate effect so long as their regulations are not inconsistent with those of the Federal government or contrary to the commerce clause. In this connection the statement by Justice Holmes is important:

"It being once admitted, as of course it must be, that not every law that affects commerce among the states is a regulation of it in a constitutional sense, nice distinctions are to be expected. Regulation and commerce among the states both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines."⁵⁷

9. *The case of Hammer v. Dagenhart*⁵⁸ distinguished.

In the *Dagenhart* case, the Supreme Court by a five to four decision, looked behind an act of Congress prohibiting interstate commerce in the products of child labor and held that the *real purpose* and effect of the act was "to regulate the hours of labor of children in factories and mines within the states, a purely state authority". Under a proper doctrine of stare decisis and in the light of the decisions discussed above the *Dagenhart* case is today "elbowed into rather narrow quarters".⁵⁹ The doctrine of that case is inapplicable to New Deal legislation for the following reasons: (A) The primary and ultimate purpose of the N.I.R.A. was not the regulation of labor; it was the promotion of interstate commerce through the economic rehabilitation of the business of the nation. This purpose is not left to implica-

⁵⁰Dixon v. Uhlmann Grain Co., 288 U. S. 188, 198, 77 L. ed. 691, 697 (1933).

⁵¹Bacon v. Illinois, 227 U. S. 504, 57 L. ed. 615 (1913).

⁵²Board of Trade v. Olsen, 262 U. S. 1, 67 L. ed. 839 (1923).

⁵³Minnesota v. Blasius, 290 U. S. 1, 78 L. ed. 131 (1933).

⁵⁴Stafford v. Wallace, 258 U. S. 495, 66 L. ed. 735 (1922); Tagg Bros. & Morehead v. United States, 280 U. S. 420, 74 L. ed. 524 (1930).

⁵⁵Oliver Iron Mining Co. v. Lord, 262 U. S. 172, 67 L. ed. 929 (1923); Heisler v. Thomas Colliery Co., 260 U. S. 245, 67 L. ed. 237 (1922).

⁵⁶Coronado Coal Co. v. United Mine Workers, 268 U. S. 295 (1925).

⁵⁷Galveston, Harrisburg & San Antonio R. R. Co. v. Texas, 210 U. S. 217, 225, 52 L. ed. 1031, 1036 (1908).

⁵⁸247 U. S. 251, 62 L. ed. 1101 (1918).

⁵⁹Corwin, *Congress's Power to Prohibit Commerce* (1933) 18 CORNELL LAW QUARTERLY 477, 503.

tion or conjecture; it is expressly stated in the Declaration of Policy in Title 1 of the Act. The history of the New Deal will not permit the inference that the statute and the regulations thereunder were but a subterfuge under the guise of which, Congress and the administrative officers were carrying out some ulterior purpose of their own which purpose had nothing to do with interstate commerce. In the Agricultural Adjustment Act, the quota and allotment principle has a real and logical relation to interstate commerce. Its purpose is to prevent ruinous surpluses, which surpluses have depressed the prices of agricultural products and caused a disparity between the returns which farmers get for their products and the prices which they must pay for industrial products. This disparity in turn has broken down and made impossible an orderly exchange of commodities and has burdened "the normal currents of commerce". The statute recognizes that the amount of interstate commerce has fallen to an alarmingly low level and it declares that it is the purpose of Congress by enacting this legislation to increase the national interstate commerce for the benefit of the whole Nation as well as the farmer. Restrictions of agricultural production was compelled only because low prices to farmers and overproduction were stopping the flow of interstate and foreign commerce. The statutory provisions are directed to the single purpose of removing those obstructions. On the contrary, the whole history of the statute held invalid in the *Dagenhart* case demonstrates that the principal purpose was to aim at a social evil existing in the various states.⁶⁰

"Nowhere in the opinions or in the argument of counsel (in the *Dagenhart* case) is it suggested that the employment of child labor by the factories has any substantial effect upon interstate commerce in the articles so manufactured * * * There is no suggestion here that [this] unfair competition [resulting from the employment of child labor in some States] burdened, obstructed, or diminished the free flow of interstate commerce in goods of the character involved. Counsel for the Government, after enumerating the economic and social reasons in support of the law, summed up their contention by the conclusion that the shipment in interstate commerce of the goods made with the aid of child labor operated to deter other states from enacting laws they would otherwise enact for the protection of their own children; but counsel did not suggest that the admission to interstate commerce of articles made with the aid of child labor would affect interstate commerce in any degree."⁶¹

(B) The very existence of the depression has rendered the national business structure more sensitive to conditions in the various states,

⁶⁰See (1933) 47 HARV. L. REV. 84, 89.

⁶¹*Victor v. Ickes*, (1933, Sup. Ct., D. C.) 61 Wash. L. Rep. 870, 875.

so that interstate commerce is affected more directly by local conditions than when the Child Labor Act was passed.⁶² When the basis of a constitutional decision is factual, the court should feel free to revise its position as conditions change or experience sheds new light on them.⁶³ Today it requires no fiction to establish the close causal connection between interstate commerce and manufacturing and agricultural conditions.

10. *The Randolph Resolution and the Commerce Power.*

Many critics of the New Deal are unaware of the existence or the significance of the Randolph Resolution, twice adopted by the Constitutional Convention⁶⁴ as expressing the consensus of opinion of the framers as to the proper division of power between the states and the nation.⁶⁵ The Randolph Resolution read:

"Resolved, that the National Legislature ought to possess the legislative rights vested in Congress by the Confederation; and moreover to legislate in all cases for the general interest of the Union, and also in those (situations) wherein the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."

This Resolution, twice endorsed by the Convention, constituted a statement of guiding principles. It was sent to the "Committee of

⁶²See Government's brief in *Sley System's Garage v. United States*, at p. 42-45, October Term (1934 C. C. A., 3d Circuit) prepared by Henry Edgerton, Special Assistant to the Attorney-General.

⁶³(1924) 38 HARV. L. REV. 6; (1933) 47 HARV. L. REV. 84, 89; in *Chasselton Corporation v. Sinclair*, 264 U. S. 543, 44 Sup. Ct. 405 (1924) the court said, "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed." On December 3, 1934, the Supreme Court recognized the significance of the factual background in the case of *Borden's Farm Products Co. v. Baldwin*, (1934) 2 U. S. L. WEEK. No. 14; Index p. 283, in these words, "with the notable expansion of the scope of governmental regulation, and the consequent assertion of violation of constitutional rights, it is increasingly important that when it becomes necessary for the court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence, so that conclusions shall not be reached without adequate factual support."

⁶⁴The Resolution was adopted on May 31, 1787 by a vote of 9 states in favor, 1 divided, and none against. On July 17, 1787 the Resolution, with slight modification was again accepted, this time by a vote of 8 states to 2. (Madison's Debates in the Federal Convention, as reported in H. R. Doc. No. 398, 69th Cong. First Sess. (1927) p. 117, 388, 466, entitled "*Documents Illustrative of the Formation of the Union of American States.*")

⁶⁵The reader is referred to the admirable article by Stern, *That Commerce Which Concerns More States Than One* (1934) 47 HARV. L. REV. 1335 for a detailed discussion of the Randolph Resolution.

Detail" to transform the broad language of the Resolution into an enumeration of Congressional powers, among these the commerce clause. The Committee of Detail had no authority to change the substance or content of the reported document. The commerce clause was the only clear power granted to Congress to regulate trade or business. The Convention accepted the formulation of the commerce clause by the Committee of Detail without debate and the fair inference is that the framers believed that this power was based upon the general proposition that the federal government was "to legislate in all cases for the general interests of the Union. . . and in those to which the states are separately incompetent." Further in view of the fact that the need for centralized commercial regulation was recognized as one of the chief reasons for preparing a new Constitution, it is unlikely that the Convention intended the commerce clause to have a narrow or restricted meaning.⁶⁶ The government's position in regard to the Randolph Resolution should not be confused with the contention rejected by the Supreme Court⁶⁷ that *independently* of the enumerated powers Congress has power to act for the national well-being when the several states are impotent. Rather it is our contention that the power to control "commerce among the several states" should be construed to include the regulation of commercial matters involving the nation as a whole, because that was the purpose of the framers. No hiatus was contemplated. In the present crisis, Congress under the commerce clause should have ample power to combat the play of destructive economic forces,⁶⁸ that "have broken down the orderly exchange of commodities"⁶⁹ or have affected, burdened or obstructed the "normal currents of commerce".

⁶⁶Madison's notes on the Constitutional Convention were not published until after his death in 1836 and it is fair to assume that John Marshall did not know of the vote of endorsement of the Randolph Resolution. However in the first case involved in the commerce clause, Marshall did formulate a *plenary* conception of the commerce clause. In *Gibbons v. Ogden*, 9 Wheat. 1, 197, 6 L. ed. 23 (1824) he said, "If, as has always been understood, the sovereignty of Congress, though limited to specified objects is plenary, the power over commerce . . . is vested in Congress as *absolutely as it would be in a single government.*"

⁶⁷*Kansas v. Colorado*, 206 U. S. 46, 27 Sup. Ct. 655 (1907); for a detailed discussion of various extra-constitutional theories of construction, that are clearly distinguishable from our present contention see the author's, *The United States War Power and Limited Government* (1928) 16 Ky. L. J. 108.

⁶⁸We have intentionally omitted any consideration of the doctrine that the power to "regulate" includes the power to "prohibit". This problem is discussed in the excellent article Corwin, *A Crucial Constitutional Problem—Congress's Power to Prohibit under the Commerce Clause* (1933) 18 CORNELL LAW QUARTERLY 477.

⁶⁹The language of the Declaration of Emergency of the Agricultural Adjustment Act.