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Recommended Citation

Louis B. Boudin, *Place of the Anti-Racketeering Act in Our Constitutional Legal System*, 28 Cornell L. Rev. 261 (1943)
Available at: <http://scholarship.law.cornell.edu/clr/vol28/iss3/7>

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THE PLACE OF THE ANTI-RACKETEERING ACT IN OUR CONSTITUTIONAL-LEGAL SYSTEM

LOUIS B. BOUDIN

In *United States v. Local 807 of International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America et al.*,¹ the United States Supreme Court dealt with one problem involved in the construction of the Federal Anti-Racketeering Act:² its applicability to labor disputes. The Court discussed neither the constitutionality³ of the Act nor the amount or kind of interstate commerce necessary before the Act should apply. Both questions were raised, but since the answer to neither was necessary for the disposition of the case, they remained unanswered.

In an earlier case in which the constitutionality of the Act was attacked,

1315 U. S. 521, 62 Sup. Ct. 642 (1942). The defendant Union contracted with out-of-state truck owners to have its drivers operate its trucks while within the limits of the city of New York and to load and unload them at union rates. The contracts were the result of disputes as to the propriety of the Union's demands and persistent rejections of the proffered services. The Union and twenty-six of its members were indicted for conspiracy to violate Section 2 (a, b, c) [see note 3 *infra*] of the Anti-Racketeering Act. This section makes it a felony for any person, who, in any act relating to trade or commerce, by force, violence, intimidation, or threats or force, *etc.*, seeks to obtain money from another; except that acts constituting the payment of wages by a *bona fide* employer to a *bona fide* employee are specifically exempted.

The judge charged the jury substantially that if the truck owners had paid the Union with the intent that such payments were for protection from violence, the Union drivers could not be "*bona fide*" employees and, therefore, not protected by the exception of Section 2 (a). The reversal by the Circuit Court of Appeals for the Second Circuit [118 F. (2d) 684 (1941)] was affirmed by the United States Supreme Court, which held that the intent of the owners in making payments was immaterial to the consideration of an employer-employee status exempt under the Act. A *bona fide* offer of services, though rejected, the majority held, would be sufficient to constitute the defendants employees notwithstanding the owners paid union rates for services which were rejected and never rendered. The majority maintained that the Act was specifically designed to prevent racketeering by criminal gangs and allows labor unions a permissive field of activity in which to realize their lawful ends. Mr. Chief Justice Stone dissented. Noted in (1942) 11 *FORD. L. REV.* 204; (1942) 41 *MICH. L. REV.* 338; (1942) 19 *N. Y. U. L. Q. REV.* 440; (1942) 16 *TEMP. L. Q.* 329; (1942) 90 *U. PA. L. REV.* 972. 248 *STAT.* 979 (1934); 18 *U. S. C. A.* § 420A (Supp. 1942).

³The problem of constitutionality arises with reference to Section 2 (a, b, d) [18 U. S. C. A. § 420A (a, b, d)] which reads as follows:

"Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

"(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a *bona fide* employer to a *bona fide* employee; or

"(b) Obtains the property of another with his consent, induced by wrongful use of force or fear or under color of official rights; . . .

"(d) Shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of \$10,000, or both."

the Supreme Court denied certiorari.⁴ This might indicate that the Supreme Court is satisfied that the Act is constitutional, but for the repeated warnings of the Court that conclusions should not be drawn from a denial of certiorari. It is barely possible that the Court was waiting for a more suitable case. It is more likely, however, that at least provisionally, the members of the Court were of the opinion that the decision as to constitutionality must await the final determination of the general meaning of the Act, since it is upon the meaning that its constitutionality will probably depend.

Counsel for the Teamsters' Union, who had raised the problem of constitutionality, did not contend that the Act was unconstitutional, but merely that it would be unconstitutional if construed in a certain way.⁵

The Anti-Racketeering Act deserves the attention of the legal profession because of its extraordinary features. If construed to mean what it says, it will be a complete novelty in our law. This is rather unlikely, however, since in the only case in which the constitutionality of the Act has been discussed, it was upheld, on demurrer, against an attack based on the broad sweep of its language, by the Court's assumption that this language would be disregarded in its application.⁶

I. FEDERAL POWER OVER CRIME

It is an elementary proposition that the Federal Government has no general power to punish crime. The suppression of crime is an attribute of sovereignty; and in our federal system this function is left with the states, except in situations over which no state has jurisdiction, which ordinarily means no jurisdiction over the place where the crime was committed. To this general limitation upon the power of the Federal Government to punish crime, there must be added certain special limitations, in considering the Anti-Racketeering Act, because of certain special provisions of the Constitution dealing with the subject of violence.

Article I, Section 8, which enumerates the legislative powers of the Federal Government, includes the power:

"6. To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;"⁷

⁴Nick v. United States, 122 F. (2d) 660 (C. C. A. 8th, 1941), *cert. denied*, 314 U. S. 687, 62 Sup. Ct. 302 (1941), *rehearing denied*, 314 U. S. 713, 62 Sup. Ct. 411 (1941).

⁵Petitioner's Brief in Support of Petition for Writ of Certiorari, p. 11, Local 807, *etc.*, *et al.* v. United States, 314 U. S. 596, 62 Sup. Ct. 67 (1941); Brief for the Petitioners, pp. 8-26, Local 807, *etc.*, *et al.* v. United States, 315 U. S. 521, 62 Sup. Ct. 642 (1942).

⁶Nick v. United States, *supra* note 4.

⁷U. S. Const., Art. I, § 8, cl. 6.

"10. To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;"⁸

and,

"17. To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."⁹

Article III, Section 3, provides that

"2. The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."¹⁰

Only these four provisions expressly grant power over crimes to the Federal Government. Two deal with places over which the Federal Government is given exclusive jurisdiction; and the other two, with offenses directed against the Government itself or its functions—the latter having been considerably extended by judicial construction of other powers. The power of the Federal Government to suppress crime has never been held to be coextensive with its power to legislate generally. Stealing from the mails and using the mails to defraud, for example, are now federal offenses because the Post Office is now a governmental function. This power stems from the provision of Article I, Section 8, which empowers Congress "To establish Post Offices and post Roads."¹¹ The power of Congress to punish crime, however, is not as extensive as its power to "establish" under this provision. It could not, for example, punish all crimes committed on Post Roads.¹²

Article IV, Section 4, suggests limitations upon the power of dealing with the crime of violence:

"The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."¹³

⁸U. S. CONST., Art. I, § 8, cl. 10.

⁹U. S. CONST., Art. I, § 8, cl. 17.

¹⁰U. S. CONST., Art. III, § 3, cl. 2.

¹¹U. S. CONST., Art. I, § 8, cl. 7.

¹²This power, as stated by Mr. Justice McLean in *United States v. Railroad Bridge Co.*, 6 McLean 517 (C. C. N. D. Ill. 1855) at p. 525: "has generally been considered as exhausted in the designation of roads on which the mails are to be transported." *But cf.* *Pennsylvania v. Wheeling and B. Bridge Co.*, 18 How. 421 (U. S. 1856).

¹³U. S. CONST., Art. IV, § 4.

Section 8 of Article I, which contains the enumeration of the powers of Congress, contains a *grant of power* with respect to one phase of domestic violence, *insurrection*. That grant empowers Congress

"15. To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions."¹⁴

The grant of power, significantly, is limited to the suppression of insurrections; the limitation, on the other hand, refers to "domestic violence," which was apparently intended to mean violence of a less serious nature than insurrection. One thing is clear. Where the violence does not amount to insurrection, the Constitution is more concerned with the limitations placed upon the power of the Federal Government to *interfere* with the states, than upon the *protection* to be given to them or their inhabitants. Not only does the right of the Federal Government to interfere depend upon a request for protection, but the state itself can only apply for it through certain designated functionaries, primarily the *Legislature*. The right of the Executive to ask for the interference of the Federal Government is limited to the case where the Legislature is not in session and *cannot be convened*. Clearly, the Founding Fathers were extremely anxious to safeguard the states *against* the attempted exercise of federal power by reason of the existence of violence or under the guise of an attempted suppression thereof.¹⁵

That these fears were justified has been demonstrated by the history of our labor relations. A noteworthy example is the vehement protest of Governor Altgeld against the action of President Cleveland in sending United States troops to Chicago for the purpose of suppressing the Pullman strike.¹⁶ Nor was this an isolated instance.

II. FEDERAL CRIME LEGISLATION, 1789-1934

Until the enactment of the Anti-Racketeering Act, Congress had very carefully limited its legislation with respect to violence to matters within its

¹⁴U. S. CONST., Art. I, § 8, cl. 15.

¹⁵Indeed, one of the Framers took this matter so seriously that he considered even the limited grant of power to the federal government to interfere in the internal affairs of the state by way of suppressing violence upon the request of the Executive alone, a ground for his refusal to approve the Constitution. On September 10, 1787, one week before the adjournment of the Constitutional Convention, Edmund Randolph stated that he might be compelled to withhold his assent to the adoption of the Constitution. As one of the reasons therefore he gave the above-mentioned grant of power. The clause as it then stood, however, did not contain the limiting words, "when the Legislature cannot be convened." It is to be presumed that the limiting words were inserted in order to meet his objection, which may have been shared by others. 2 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION (1911) pp. 560-561, 563-564.

¹⁶BERMAN, LABOR DISPUTES AND THE PRESIDENT OF THE UNITED STATES (1924) pp. 20-34; CLEVELAND, THE GOVERNMENT IN THE CHICAGO STRIKE OF 1894 (1913) pp. 39-45.

exclusive jurisdiction.¹⁷ Prior to the enactment in 1913 of the act directed against larceny on trains moving in interstate commerce, Congress had so limited its legislation with respect to crime generally.

The first Federal Crimes Act¹⁸ dealt with treason, misprision of treason, murder, manslaughter, and similar felonies in forts and arsenals within the exclusive jurisdiction of the United States, piracy and other felonies on the high seas, and related offenses. In addition, it provided for punishment of offenses against functions of the United States Government, such as counterfeiting the securities and coin of the United States, stealing or falsifying its records, perjury in its courts, bribery of its judges, obstruction of process in its courts, suing ambassadors and similar offenses against the Law of Nations.¹⁹

The Crimes Act of 1825²⁰ was drawn along the same lines, although it was more comprehensive than the Crimes Act of 1790. It covered the additional crime of arson in any fort, arsenal, or other place within the exclusive jurisdiction of the United States. With respect to the class of crimes upon the "high seas," the 1825 Act not only made criminal certain acts not covered by the Crimes Act of 1790, but also gave a more comprehensive enumeration of places considered part of the high seas. Having extended the meaning of "high seas," Congress was careful to add that the place where the crime was committed must be "*out of the jurisdiction of any particular State.*" The enactment also added two other types of offenses belonging to the same category: (1) Offenses committed in foreign waters on board ships flying the American flag by a crew member or passenger on a similar person; and (2) The plundering of vessels upon the high seas or castaways, and the causing of a castaway for the purpose of collecting the insurance. In the category of offenses against governmental functions, the statute added *extortion by* a United States officer under color of office and larceny or embezzlement from the United States Bank by an officer or employee thereof.

The addition of the crime of plunder of castaways gave rise to the case of *United States v. Coombs*,²¹ in which it was held, probably for the first

¹⁷37 STAT. 670 (1913), now 18 U. S. C. A. §§ 409-411.

¹⁸1 STAT. 112 (1790), now 18 U. S. C. A. §§ 1, 3, 451, 452, 453, 481; CRIM. CODE §§ 1, 3, 272, 273, 274, 290.

¹⁹1 STAT. 115 (1790), now 18 U. S. C. A. §§ 283, 262, 272, 233, 231, 237, 245; CRIM. CODE §§ 169, 148, 28, 127, 125, 131, 140.

²⁰4 STAT. 115 (1825), now 18 U. S. C. A. §§ 464, 465, 468, 452, 454, 457, 28 U. S. C. A. § 102, 18 U. S. C. A. §§ 489, 490, 467, 488, 486, 465 note, 171, 231, 232, 564, 28 U. S. C. A. § 102, 18 U. S. C. A. §§ 695, 71, 78, 79, 129, 455, 487, 547; CRIM. CODE §§ 285, 286, 289, 273, 275, 278, —, 298, 299, 288, 297, 295, 286, 85, 125, 126, —, —, —, 27, 33, 34, 72, 276, 296, —.

²¹12 Pet. 72 (U. S. 1838).

time, that the admiralty jurisdiction of the United States courts was an independent grant of legislative power to Congress. The inclusion of crimes committed on board United States ships lying in foreign ports led to the adoption of a proviso with respect to double jeopardy.

There has been no general revision of the criminal legislation of the United States since the Crimes Act of 1825, although there have been codifications of existing laws, and, of course, many separate statutes adding greatly to the scope of federal criminal jurisdiction. As already stated, however, there had been no departure in principle from the two early Crimes Acts until the enactment of the Larceny Act of 1913.²² There has been, however, a departure of great practical import when Congress augmented the scope of offenses against governmental functions by its extension to crimes committed with the aid of governmental agencies. Even a greater practical departure was affected when Congress extended its power to regulate interstate commerce so as to include the punishment of *the use of instrumentalities of interstate commerce* for immoral or illegal purposes. Making it an offense to use the mails as an instrumentality of fraud is a principal instance of the former,²³ while the Mann Act²⁴ is a conspicuous example of the latter.

The reason for the enactment of the Larceny Act, as revealed by the debates in Congress,²⁵ was the alleged difficulty of proving the locus of a crime committed on a carrier moving in interstate commerce, and of establishing thereby the jurisdiction of the state court in which the prosecution was attempted. Whether this departure from principle in 1913, as expanded in 1914, was warranted is very questionable.

The Larceny Act involved three departures from the previous course of federal legislation with respect to crime: (1) It made the commission of an ordinary crime, larceny, a federal offense because of its having been committed *in* interstate commerce; (2) It made the ordinary crime of receiving stolen goods a federal offense because the goods had been stolen *while* in interstate commerce; and, (3) It made it a federal offense to use an instrumentality of interstate commerce not in the commission of the crime, but *after* the commission of the crime in the removal or disposition of the proceeds of the crime.²⁶ The last was not, strictly speaking, a departure from

²²37 STAT. 670 (1913), now 18 U. S. C. A. § 409.

²³17 STAT. 323 (1872), now 18 U. S. C. A. § 338; CRIM. CODE § 215.

²⁴36 STAT. 825 (1910), 18 U. S. C. A. §§ 397-404. Congress early prevented the use of governmental functions for immoral purposes by making it a criminal offense to so use such functions. 17 STAT. 598 (1873), now 18 U. S. C. A. § 334; CRIM. CODE § 211, amended (dealing with the mails). The imposition of a similar restriction upon the use of interstate commerce for such purposes was a later innovation. 29 STAT. 512 (1897), now 18 U. S. C. A. § 396; CRIM. CODE § 245, amended.

²⁵78 CONG. REC. pp. 448-452 (1934).

²⁶The material provisions of the Larceny Act are as follows:

the previously governing principles of federal criminal legislation, but merely an extension of the principle that the *use* of an instrumentality of interstate commerce in connection with the commission of a crime may be made a federal offense. On the other hand, making an ordinary crime, which was previously cognizable only in a state court, a federal offense merely because the crime was committed in interstate commerce or in connection with an article moving in interstate commerce was a complete departure from the earlier principles of federal criminal legislation, and affected the basic distribution of powers between state and nation.

The crimes of larceny and of receiving stolen goods are, and always have been, crimes under the laws of the states where committed. Whatever the constitutional problem, there can be no question of the fact that this was a practical invasion of a sphere of competence long enjoyed exclusively by the states. On the other hand, there was no such invasion in making the *use* of interstate commerce a federal offense. No state could, under our constitutional system, make the transportation of a stolen article from one state to another a crime. The state within which the larceny had been committed could only punish that act, but not the act of removing the stolen property from the state, while the state into which the article was transported could punish neither the larceny itself, which had taken place in another state, nor the importation of the stolen article into its jurisdiction.

The Larceny Act of 1913 was followed by what has come to be known as the Embezzlement Act of 1914,²⁷ which made the embezzlement by an

"That whoever shall unlawfully break the seal of any railroad car containing interstate or foreign shipments or freight or express, or shall enter any such car with intent, in either case, to commit larceny therein; or whoever shall steal or unlawfully take, carry away, or conceal, or by fraud or deception obtain from any railroad car . . . with intent to convert to his own use any goods or chattels moving as, or which are a part of, or which constitute, an interstate or foreign shipment of freight or express, or shall buy or receive or have in his possession any such goods or chattels, knowing the same to have been stolen; . . . shall in each case be fined not more than \$5,000 or imprisoned not more than ten years, or both. . ." 37 STAT. 670 (1913), now 18 U. S. C. A. § 409.

"That nothing in this Act contained shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof; and a judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts." 37 STAT. 670 (1913), now 18 U. S. C. A. § 410.

²⁷38 STAT. 733-734 (1914) (Section 9 of the Clayton Act), now 18 U. S. C. A. § 412.

"Every president, director, officer, or manager, of any firm, association or corporation engaged in commerce as a common carrier, who embezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property or assets of such firm, association or corporation, arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be fined not less than \$5,000 or confined in the penitentiary not less than one year nor more than ten years, or both, in the discretion of the court. . . .

"That nothing in this section shall be held to take away or impair the jurisdiction of

officer of a common carrier in interstate commerce a federal offense. This offense was already prohibited by state law, and was, therefore, punishable in state courts. The 1914 Act was thus a further extension of the 1913 departure from the principles which had governed earlier congressional action with respect to criminal legislation.

III. "CONCURRENT" JURISDICTION

The care with which Congress had limited its criminal legislation, until 1913, to those spheres which the Constitution had placed within the exclusive jurisdiction of the Federal Government was probably the result of a recognition of the very serious consequences which must inevitably follow any other course. While there is some loose language about "concurrent" jurisdiction in certain domains of our law, particularly in the regulation of commerce, *there is in fact no such thing*. No two governments *can* regulate the same thing, and any attempt to do so would create such confusion as to make efficient regulation impossible. As far back as 1849, Mr. Justice McLean expressed this idea in emphatic language, which is as valid today as it was then:

"A concurrent power in two distinct sovereignties to regulate the same thing is as inconsistent in principle as it is impractical in action. It involves a moral and physical impossibility."²⁸

What was said about regulation applies even more emphatically to the suppression of crime. No two governments can have the power to punish the same crime without creating such confusion as would make proper enforcement impossible. In this country, in addition, there are certain constitutional guarantees with respect to the freedom of the individual which exclude the possibility of our two governments having concurrent jurisdiction to punish the same crime. With some exceptions, our two governments, in their legislative branches, have carefully avoided encroaching upon the other's preserves. The Federal Government, because of its limited powers, attempted to stay within the exclusive domain assigned to it by the Constitution, leaving the general problem of the suppression of crime to the states. When, occasionally, the two governments attempted to punish the same offense, the courts, and ultimately the United States Supreme Court, stepped in to clear away the confusion and relegate each government to its own sphere. The individual judges, or the different courts, did not always agree

the courts of the several States under the laws thereof; and a judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts."

²⁸Passenger Cases, 7 How, 283, 399 (U. S. 1849).

on which government was competent in a particular case to punish the offense involved, *but they all agreed that only one government could do so*. This is well illustrated by the case of *Fox v. Ohio*,²⁹ decided in 1847. The defendant had been convicted in the Ohio courts of the offense of passing counterfeits of the coin of the United States. On a writ of error, the defendant claimed that the state court had no jurisdiction over the offense for which she had been convicted because of the constitutional provision which gave Congress the power to punish the counterfeiting of United States coin. The state based its jurisdiction on the fact that the crime of passing counterfeit coin was *utterly different* from that of counterfeiting the coin of the realm. It was argued that one was directed against the government in the discharge of a governmental function, while the other was a fraud upon the citizen perpetrated through the medium of a worthless coin. The contention was upheld by the Supreme Court, and the conviction sustained over the vigorous objection of Mr. Justice McLean. Mr. Justice Daniel, for the majority, very carefully distinguished between the two offenses, and emphasized that the protection of the citizens against ordinary cheating was particularly within the province of the states, rather than of the Federal Government.³⁰

The case is particularly interesting because *there was no federal statute* punishing the passing of counterfeit coin. The argument on behalf of the defendant was, therefore, based on the mere existence, under the Constitution, of a power in Congress to make such a law. Mr. Justice McLean adopted this argument in his dissenting opinion, and the majority of the Court *did not dispute the principle*.

The majority of the Court did not say that the mere existence of the power in Congress to enact a law punishing the passing of counterfeit coin would not deprive the states of their power to punish that offense so long as that power remained unexercised. On the contrary, the Court assumed that the mere existence of such power would prevent the state from exercising it even in the absence of congressional legislation. It therefore based its decision upon a narrow construction of the constitutional provision in question, which limited the power of Congress to punishing *counterfeiting only, but not the passing of counterfeit coin*.³¹

This construction of the federal power was undoubtedly too narrow, as

²⁹5 How. 410 (U. S. 1847).

³⁰"The punishment of a cheat or a misdemeanor practised within the State and against those whom she is bound to protect, is peculiarly and appropriately within her functions and duties, and *it is difficult to imagine an interference with those duties and functions which would be regular or justifiable.*" *Id.* at 434. (Italics added.)

³¹*Id.* at 433. (Italics added.)

was pointed out in Mr. Justice McLean's able dissenting opinion. The Court was divided with respect to where the power resided and not with respect to the principle that only one government can exercise any given power. The basic principle upon which the entire Court agreed was stated by Mr. Justice McLean:

"Two governments acting independently of each other cannot exercise the same power for the same object."³²

IV. UNFORTUNATE EXPERIENCES UNDER CONCURRENT JURISDICTION

The unfortunate results flowing from a theory which would permit our two governments to legislate on the same subject, or punish the same offense, are shown by two disastrous periods of our history: (1) The controversy over the rendition of fugitive slaves during the decade preceding the Civil War; and, (2) The decade during which the Prohibition Amendment was in force.

A. *The Controversy over the Rendition of Fugitive Slaves*

Article IV, Section 2, of the United States Constitution provides that:

"No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."³³

Acting under this provision, Congress, in 1793, enacted a law whereby the owner of a fugitive slave, his agent or attorney, was authorized to seize the slave and take him before a United States judge or state magistrate, make proof that the seized person was a fugitive slave, and thereupon it became "the duty of such judge or magistrate to give a certificate thereof to such claimant, his agent or attorney, which shall be sufficient warrant for removing the said fugitive from labour, to the state or territory from which he or she fled."³⁴

As long as the question of slavery was not seriously agitated, the provisions of this statute seem to have been sufficient to protect the rights of owners of fugitive slaves; and the states seem to have been generally indifferent to the subject. When the agitation over slavery assumed serious proportions, however, some of the states took a hand in the matter by passing laws of their own, designed not only to regulate the rendition of fugitive slaves, but also, and perhaps primarily, to prevent the improper seizure and carrying

³²*Id.* at 436. (Italics added.)

³³U. S. CONST., Art. IV, § 2, cl. 3.

³⁴1 STAT. 302, 304-305 (1793).

off of persons of color into slave states under the pretext that they were fugitive slaves. Among the states which took a hand in the matter was Pennsylvania, which passed "An Act to give effect to the provisions of the Constitution of the United States relative to fugitive slaves from labor, for the protection of free people of color, and to prevent kidnapping."³⁵ This Act provided an elaborate method for rendition of fugitive slaves, and for the punishment of those who carried off persons of color on the claim that they were fugitive slaves without complying with the provisions of the Act. This gave rise to the famous case of *Prigg v. Pennsylvania*,³⁶ in which this act was declared unconstitutional, on the ground that the Constitution placed the subject of slave-rendition within the power of the Federal Government, and, therefore, outside the sphere of state competency.

Divergent as were the views of the members of the Court on some of the problems involved, there was no difference of opinion on the basic principle that no two governments may regulate the same subject or punish the same offense. The Court also was unanimous in the opinion that, generally, the grant of power to Congress to regulate a given subject deprives the states of the power to legislate on the same subject. Some members of the Court, however, seemed to think that the subject of slave-rendition was *sui generis*, and concurrent action was therefore permissible with respect thereto provided that the state action helped the owner recapture his slaves.³⁷

Mr. Justice Story, speaking on behalf of the Court, said of the Federal Act of 1793:

"In a general sense, this act may be truly said to cover the whole ground of the Constitution . . . not because it exhausts the remedies which may be applied by Congress to enforce the rights, if the provisions of the act shall in practice be found not to attain the object of the Constitution; but because it points out fully all the modes of attaining those objects, which Congress, *in their discretion* have as yet deemed expedient or proper to meet the exigencies of the Constitution. If this be so, then it would seem, upon just principles of construction, that the legislation of Congress, if constitutional, *must supersede all State legislation upon the same subject; and by necessary implication prohibit it.* For, if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the State Legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions *for the same purpose.* In such a case, the legislation of Congress, in what

³⁵Act of the General Assembly, March 25, 1826.

³⁶16 Pet. 539 (U. S. 1842).

³⁷See concurring opinions of Mr. Chief Justice Taney (*Id.* at 627), Mr. Justice Thompson (*Id.* at 635), and Mr. Justice Daniel (*Id.* at 652).

it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject matter. *Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it.*"³⁸

Prigg v. Pennsylvania was decided in 1842. Ten years later, when the subject of slavery became more acute, and the Southern point of view more influential with the Supreme Court, *Moore v. Illinois*³⁹ was decided, in which the *sui generis* theory of slave-rendition was accepted. In the face of the opinion in *Prigg v. Pennsylvania*, the Court now declared that it had not decided that state legislation in aid of a slave owner which does not "delay, impede or frustrate" the master in the exercise of his right under the Constitution was unconstitutional.⁴⁰ In this case, one who had apparently helped a negro along the "underground railway" was indicted under an Illinois statute which provided for the punishment of anyone who shall "harbor or secrete any Negro, mulatto or person of color, the same being a slave or servant owing service or labor to any other person . . . or shall in any way hinder or prevent the lawful owner or owners of such slaves or servants from retaking them."⁴¹ By this time, the Court apparently was anxious that the slave owner should have the benefit of both federal and state legislation in his attempt to recapture his fugitive slaves, and the Illinois statute favoring the slave owner was upheld although the Pennsylvania statute favoring the slave had been invalidated in *Prigg v. Pennsylvania*.

The brief opinion on behalf of the majority of the Court by Mr. Justice Grier avoids discussion of any fundamental constitutional problems, even to the extent of any elaboration of Chief Justice Taney's *sui generis* theory. Instead it harks back to the doctrine of *Fox v. Ohio*,⁴² that the offense punished by the state was different from the offense punishable under the federal law. The offense of which the defendant in this case was convicted in the Illinois court was not interference with the rendition of the slave, but "harboring" a slave, an offense against the laws of Illinois, irrespective of the problem of slave-rendition. It is clear, however, that Chief Justice Taney had not given up his opinion of the exceptional position of slave-rendition under the Constitution. But for the acceptance of that theory the decision in this case would probably not have been rendered. It is possible, however, that the Court resorted to the extraordinary statement that the Illinois statute was not an "auxiliary" statute to the federal statute, but an inde-

³⁸*Id.* at pp. 617-618. (Italics added.)

³⁹14 How. 13 (U. S. 1852).

⁴⁰*Id.* at 19.

⁴¹Then ILL. CRIM. CODE § 149.

⁴²*Supra* note 30.

pendent statute punishing "harboring" disconnected from slave-rendition, in order to avoid the adoption of a theory which would permit the two governments to punish the same crime under any circumstances and to evade the constitutional problem of double jeopardy.

B. *The Prohibition Interlude*

The decisions of the Supreme Court on the slave-rendition question were a prelude to the Civil War, and led to a revolt of some of the state courts against the authority of the Supreme Court. A national crisis, however, soon eliminated that question from the domain of constitutional law. More than half a century later, a similar problem arose during the Prohibition interlude. The Prohibition Amendment⁴³ introduced, with respect to the liquor traffic, the theory propounded by Chief Justice Taney with respect to the problem of slave-rendition. There could be no doubt as to the meaning of the Eighteenth Amendment. That Amendment put the problem of the traffic in intoxicating liquors on its own plane; it did not assign the *regulation* of that traffic either to the Federal Government or to the state governments. Instead, it *regulated* the subject itself, by absolutely prohibiting traffic in intoxicating liquor. Having prohibited that traffic, it expressly conferred upon Congress and the several states "concurrent power to enforce" the prohibition.⁴⁴ It formally introduced into our Federal system the revolutionary notion of "concurrent power." Its limitation to the *enforcement* of one constitutional enactment, however, made it a less revolutionary concept of federal relations. The sequel proved the correctness of Mr. Justice McLean's contention that "there ain't no such animal" as "concurrent power," no matter how limited the sphere in which it is designed to operate. Since two governments operating on the same subject, or in the same field, must necessarily clash with each other, the enactment of the Eighteenth Amendment led thoughtful people to speculate as to the consequences.⁴⁵

⁴³U. S. CONST., AMEND. XVIII.

⁴⁴U. S. CONST., AMEND. XVIII, § 2.

⁴⁵Professor Noel T. Dowling wrote:

"Though it has been recognized that this amendment marked a *new departure* in the relationship of the state and federal governments in the enforcement of law, and though the amendment has been before the United States Supreme Court, many of the inferior federal courts, and the courts of almost half the states, there has come from the first-named court no pronouncement of the positive meaning of *concurrent power*, nor have the other courts, federal and state, disclosed a clear and definite agreement in that regard. In fact a justice of the United States Supreme Court has declared that 'it is impossible now to say with fair certainty what construction should be given to the eighteenth amendment', and that 'because of the bewilderment which it creates, a multitude of questions will inevitably arise and demand solution' in that court." (Italics added.)

Dowling, *Concurrent Power under the Eighteenth Amendment* (1922) 6 MINN. L.

Fortunately, the United States Constitution contains a solution of the problem of concurrent power, or at least a mitigation of the difficulties arising therefrom, by providing that *real concurrent power is impossible in our Federal system*. This impossibility is decreed by the Supremacy Clause.⁴⁶

It is a settled principle of constitutional law that every power granted by the Constitution is subject to all the limitations contained therein. The power conferred upon the states with respect to the enforcement of the Prohibition Amendment was subject to the Supremacy Clause. The proper meaning of the "concurrent power" conferred upon the state by the Eighteenth Amendment, therefore, was merely that the states had power to enforce the constitutional prohibition of the liquor traffic in subordination to Congress, that is, only as long as Congress did not legislate on the subject. The only alternative to such a reading of the Eighteenth Amendment was the adoption of Taney's *sui generis* theory with respect to slave-rendition, which was the theory ultimately adopted by the courts.⁴⁷ That theory, while minimizing the danger, did not guarantee the avoidance of clashes between federal and state courts, such as appeared during the 1850's as a result of the Supreme Court's attitude on slavery and slave-rendition. Although under this theory the power of the states to enforce the Prohibition Amendment could only be exercised "in aid" of Prohibition, the situation would have become serious, if the states had more zeal than they had in the performance of their constitutional "duties" under the Amendment. Such clashes were, in fact, avoided both by the enactment of the Volstead Act,⁴⁸ which prescribed more stringent regulations and heavier penalties than any state law, and by the states, in effect, abandoning their own attempts at enforcement.

The repeal of the Eighteenth Amendment⁴⁹ terminated this interlude before its dangerous possibilities had a chance to develop. Federal criminal jurisdiction for a brief spell then reverted to what may be called the *normal* state of our constitutional law.⁵⁰

REV. 447, 447. The inner quotation is from the concurring opinion of Mr. Justice McReynolds in the National Prohibition Cases, 253 U. S. 350, 392, 40 Sup. Ct. 486 (1920).

⁴⁶U. S. CONST., Art. VI, cl. 2.

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land."

⁴⁷State v. Hartley, 115 S. C. 524, 106 S. E. 766 (1921); Vigliotti v. Pennsylvania, 258 U. S. 403, 42 Sup. Ct. 330 (1922); McCormick and Co. v. Brown, 286 U. S. 131, 52 Sup. Ct. 522 (1932).

⁴⁸41 STAT. 305 (1919).

⁴⁹U. S. CONST., AMEND. XXI, effective December 5, 1933.

⁵⁰The normal state was described by Professor Willoughby:

"The legislative powers possessed by the Federal Government may be divided into two classes: the one embracing those powers the exercise of which is exclusively vested in the General Government; the other those which, in default of Federal exercise, may

V. THE CITIZEN AND HIS TWO GOVERNMENTS

The problem of concurrent jurisdiction envisaged from the point of view of government involves the possibility of clashes between federal and state government and of confusion resulting from their attempts to regulate the same subject or to operate in the same field. Another aspect of the problem which must be considered is the citizen and his rights. The Fifth Amendment provides, among other things: ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."⁵¹ All state constitutions contain similar provisions.⁵² It is a principle of general law, however, that double jeopardy does not apply to convictions or acquittals in foreign courts;⁵³ and our two sets of courts are supposed to be "foreign" to each other. As a matter of fact, the theory is erroneous, whether applied to true foreign courts, or to the two sets of courts sharing judicial power in the United States. It would be true of American courts only if there actually were concurrent jurisdiction between them. This was one of the reasons urged by Mr. Justice McLean in opposition to the theory of concurrent power between our two governments with respect to slave-rendition.⁵⁴ The bearing of that aspect upon the constitutionality of the Anti-Racketeering Act requires a clear understanding of the legal concepts which underlie the problem of double jeopardy, and its applicability generally where courts of different jurisdictions are involved.

The principle of double jeopardy is a branch of the law of *res judicata*; *viz.*, a matter once litigated between the same parties may not be litigated again. In a criminal case, the litigation is between a government and the individual charged with the commission of the offense. Therefore, when a person has been charged by any government with the commission of an offense against its laws, and the litigation has resulted in a judgment upon the merits, either in his favor or against him, that matter is closed forever. When he is indicted for the same offense by another government, that litigation is not between the same parties, and there has, therefore, been no previous adjudication within the principles of the law of *res judicata*. At first

be employed by the States * * *

"In view of the fact that, as to these so-called concurrent powers, State law must always yield to Federal law, *when one exists*, it is perhaps unfortunate that the term 'concurrent' should have come into existence, since the word indicates an equality of jurisdiction which does not exist."

¹ WILLOUGHBY ON THE CONSTITUTION (2d ed. 1929) 112, § 69. (Italics added.)

⁵¹U. S. CONST., AMEND. V.

⁵²See, for example, N. Y. CONST., Art. I, § 6.

⁵³Ponzi v. Fessenden, 258 U. S. 254, 42 Sup. Ct. 309 (1922); United States v. Lanza, 260 U. S. 377, 43 Sup. Ct. 141 (1922).

⁵⁴See *supra* p. 271.

glance, that would seem to expose a person to prosecution by as many governments as choose to prosecute him for the same offense. Fortunately, care has been taken, here as elsewhere, that "the trees should not grow into the skies." Another principle of the general law of *res judicata* comes into play. In order that the previous adjudication may bar further litigation, whether civil or criminal, the court which rendered the first judgment *must have had jurisdiction. And no two governments can have jurisdiction over the same offense.*

When, therefore, a person is prosecuted for an offense which he claims has been disposed of by a previous judgment—that is to say, he claims double jeopardy—the question, assuming the offense to be the same, resolves itself into an investigation of the problem of the jurisdiction of the first court. If that court did not have jurisdiction, then the plea must fail, as would any other plea of *res judicata* under the same circumstances. If the first court *had* jurisdiction, then the present court *has no jurisdiction*, the plea will be sustained, and the defendant acquitted. While technically, there is no such thing as a plea of double jeopardy because of an adjudication in a foreign court, a conviction or an acquittal in a foreign court which had jurisdiction is nevertheless a perfect defense.⁵⁵

The question of jurisdiction is usually a question of place. The situation is no different with respect to jurisdiction as between the federal and state governments; the jurisdiction of the Federal Government in criminal cases is, generally speaking, a question of the *place of the commission of the offense*.⁵⁶ Ordinarily, therefore, the problem of double jeopardy raises few difficulties on the score of the jurisdiction of the court of first decision, since territorial sovereignty is seldom in dispute. Occasionally, however, such

⁵⁵The result is stated by Wheaton:

"A criminal sentence pronounced under the municipal law of one State can have no direct legal effect in another. . . . But a valid sentence, whether of conviction or acquittal, pronounced in one State, may have certain indirect and collateral in other States. If pronounced under the municipal law in the State where the supposed crime was committed, or to which the supposed offender owed allegiance, the sentence, either of conviction or acquittal, would, of course, be an effectual bar (*exceptio rei judicatae*) to a prosecution in any other State."

WHEATON, INTERNATIONAL LAW (8th ed. 1866) pp. 191-192. The reference by Wheaton to the state "to which the supposed offender owed allegiance" referred to cases of "extra-territoriality."

⁵⁶"It is true that the criminal jurisdiction of the United States is in general based on the territorial principle, and criminal statutes of the United States are not by implication given an extra-territorial effect [citing cases]. But that principle has never been thought to be applicable to a merchant vessel, which for purposes of the jurisdiction of the courts of the sovereignty whose flag it flies to punish crimes committed upon it, *is deemed to be a part of the territory of that sovereignty and not to lose that character when in navigable waters within the territorial limits of another sovereignty* [citing cases]. (Italics added.)

United States v. Flores, 289 U. S. 137, 155-156, 53 Sup. Ct. 580, 584-585 (1933).

difficulties do arise. There is, to begin with, that vast area known as the "high seas" over which no government has any exclusive sovereignty. Offenses upon the "high seas," using that term in its strict sense, are of two kinds: crimes committed by one ship upon another, and crimes committed on board ship. The first complex of crimes is known under the generic term of "piracy." By the Law of Nations, which is recognized by the United States Constitution,⁵⁷ the plea of double jeopardy in a piracy case is good even though the court of first decision was that of a foreign country.⁵⁸ A ship is recognized by the same Law of Nations as an extension of the territory of the sovereign under whose flag it sails.

A ship, of course, is not always on the high seas. Occasionally it lies within the territorial waters of another sovereign. When a serious crime is committed while the ship is in such territorial waters, there might arise a problem of disputed jurisdiction, for the two sovereignties, the territorial sovereignty of the waters and the sovereignty of the flag, might each claim jurisdiction. Since there is no common arbiter, each sovereign may decide the question in its own favor. In such cases, the Supreme Court has said, the problem is disposed of on the principle of "comity" between the nations involved, depending upon the nature of the crime.⁵⁹

The question of "comity" ordinarily arises, and is disposed of, before trial. When the matter is disposed of amicably, the nation that yields its jurisdiction to another nation will have, of necessity by that act, recognized the jurisdiction of the courts of that nation, and will not thereafter prosecute the offender in its own courts. The sovereign who has possession of the criminal may, of course, not admit that the case comes within the category of offenses which by the comity of nations should yield to the other sovereign. What then? Is the offender to be exposed to double jeopardy? Such a thing is inconceivable, for the protection against double jeopardy is not only a part of the Law of Nations, but is recognized by every civilized community. A country that did not recognize it could scarcely be considered civilized.

It is this that made Mr. Justice McLean protest so vehemently against the attempt to establish "concurrent jurisdiction" between the federal and state governments. Since the two governments of our federal system are not actually foreign to each other, the Law of Nations does not apply to them, and *its* recognition of the defense of double jeopardy would, therefore,

⁵⁷U. S. CONST., Art. I, § 8, cl. 10:

"[The Congress shall have Power] To define and punish . . . Offences against the Law of Nations."

⁵⁸See the Piracy cases: *United States v. Furlong*, 5 Wheat. 84 (U. S. 1820).

⁵⁹See *United States v. Flores*, 289 U. S. 137, 53 Sup. Ct. 580 (1933).

not be applicable to cases of slave-rendition. The Act of 1793⁶⁰ did not foresee the situation and made no provision for it, rendering the offender defenseless once concurrent jurisdiction was admitted. This was particularly so in a case where the court of "first decision" was a state court.⁶¹ Mr. Justice McLean's argument on this point in *Moore v. Illinois*⁶² has, therefore, a peculiar timeliness and is deserving of particular attention.

His point was a double one: (1) The fact that there could be no protection against double jeopardy was itself proof that there could be no concurrent power; and, (2) The fact that Congress did not provide such protection was proof that it did not think it was dealing with a subject over which it did not have exclusive jurisdiction. The latter position was amply justified by the action of Congress in the only case where it had legislated on a subject of concurrent jurisdiction; namely, the subject of crimes committed on board a ship lying in a foreign port. The Crimes Act of 1790⁶³ made no provision for the punishment of crimes committed on board an American ship while lying in a foreign port. This offense was first provided for by the Crimes Act of 1825.⁶⁴ Section 5 of that Act provided that a conviction or acquittal in the courts of the sovereign of the port in which the ship was at the time of the commission of the crime should entitle the offender to the plea of double jeopardy in any subsequent prosecution in

⁶⁰1 STAT. 302 (1793).

⁶¹*United States v. Lanza*, 260 U. S. 377, 42 Sup. Ct. 141 (1922); *Breed v. Powers*, 263 U. S. 4, 44 Sup. Ct. 8 (1923); *Wyman v. United States*, 263 U. S. 14, 44 Sup. Ct. 10 (1923).

⁶²14 How. 13, 19 (U. S. 1852).

"It is contrary to the nature and genius of our government, to punish an individual twice for the same offense. Where the jurisdiction is clearly vested in the federal government, and an adequate punishment has been provided by it for an offense, no state, it appears to me, can punish for the same act. The assertion of such a power involves the rights of a state to punish all offenses punishable under the Acts of Congress. This would practically disregard, if it did not destroy, this important branch of criminal justice, clearly vested in the federal government. The exercise of such a power by the States would, in effect be a violation of the Constitution of the United States, and the Constitution of the respective states. They all provide against a second punishment for the same act. It is no satisfactory answer to this, to say that the States and federal government constitute different sovereignties, and consequently, may each punish offenders under its own laws.

"It is true, the criminal laws of the federal and state governments emanate from different sovereignties, but they operate upon the same people, and should have the same ends in view. In this respect, the federal government, though sovereign within the limitations of its powers, may, in some sense, be considered as the agent of the States, to provide for the general welfare, by punishing offenses under its own laws within its own jurisdiction. It is believed that no government, regulated by laws, punishes twice criminally the same act. *And I deeply regret that our government should be an exception to a great principle of action, sanctioned by humanity and justice.*" *Id.* at pp. 21-22. (Italics added.)

⁶³*Supra* note 18.

⁶⁴*Supra* note 20.

the courts of the United States. In each of the instances in which Congress has since dealt with a subject within concurrent jurisdiction of the federal and state governments it has provided that a conviction or acquittal in a state court should protect the offender against further prosecution in the federal courts.⁶⁵

VI. SUPERIORITY OF FEDERAL POWER OVER STATE POLICE POWER

The power of Congress to regulate the matters placed by the Constitution within its sphere of competency is superior to the police power of the states. This is true whether the term, "police power," is used in the broad sense given to it by Chief Justice Taney in the *License Cases*⁶⁶ as "the power to govern men and things," or in its narrower sense of providing for the "health, safety, and morals" of the community.⁶⁷ It applies not only to matters expressly within the exclusive power of the Federal Government, but also to those cases in which the Federal Government and the states are said to have "concurrent jurisdiction." As Professor Willoughby has said:

"Though often spoken of as a matter of concurrent jurisdiction, this authority of the States to legislate with reference to matters primarily of local concern, but which incidentally affect interstate commerce, is not in fact a concurrent jurisdiction as to interstate commerce. Laws passed in pursuance of this jurisdiction derive their authority solely from the powers constitutionally reserved to the States, *and the moment they relate directly to interstate commerce they become unconstitutional and void.*"⁶⁸

This quotation is in point since the Anti-Racketeering Act was enacted as a regulation of commerce. A state act, it should be noted, need not itself be a regulation of commerce in order to be void when it clashes with the power of Congress to regulate interstate commerce.⁶⁹ Nor does the state

⁶⁵See, for example, the Larceny Act, sections quoted in note 25 *supra*.

⁶⁶The *License Cases*, 5 How. 504 (U. S. 1847). See particularly the opinion of Mr. Chief Justice Taney, pp. 572, 583.

⁶⁷*Id.* at 585, 591 (opinion of Mr. Justice McLean).

⁶⁸1 WILLOUGHBY ON THE CONSTITUTION (2d ed. 1929) 115, § 69. (Italics added.)

⁶⁹Hall v. DeCuir, 95 U. S. 485, 23 L. ed. 547 (1878). A Louisiana statute required common carriers of passengers to render equal accommodations to both white and colored persons. The owner of any vessel aboard which race discrimination was practiced was made subject to an action for damages. In holding the statute unconstitutional, the Court said at p. 490, 549:

"The statute under which this suit was brought, as construed by the State Court, seeks to take away from him [owner of the vessel] that power [to adopt rules for the disposition of passengers on his boat] *so long as he is within Louisiana*; and while recognizing to the fullest extent the principle which sustains a statute, . . . we think this statute to the extent that it requires those engaged in the transportation of passengers among the States to carry colored passengers in Louisiana in the same cabin with whites, is unconstitutional and void. *If the public good requires such legislation, it must come from Congress and not from the States.*" (Italics added.)

law have to clash with an actual *regulation* of Congress. It is sufficient that Congress shall have legislated *on the subject*.⁷⁰ When Congress has so legislated is the problem involved in most cases. It is not necessary for Congress to have legislated on the particular point. Congress had certainly *not* legislated on the particular point involved in *Hall v. DeCuir*.⁷¹ Nor must Congress have legislated on the particular subject so as to *regulate* it. It is sufficient if Congress has legislated on the subject in *some* way. In such a case, it is presumed that Congress having legislated on some phases of the subject, but not on the particular point, intended that the particular point should remain *free from regulation*.⁷²

An examination of all the pertinent decisions leads to the inevitable conclusion that whenever Congress steps into any field in pursuance of its power to regulate interstate commerce, the states are, by that very action, ousted from, and become incompetent to legislate in, that field with relation to any subject whatsoever. The fact that state action does not "interfere" with the congressional legislation but may actually aid it, makes no difference whatever. As stated by Mr. Justice Story in *Prigg v. Pennsylvania*, *the action of Congress is considered the measure of the needed action in that field, and states may therefore neither detract from nor augment the same*.⁷³

Two very recent cases of the Supreme Court are of particular interest. In *Hines v. Davidowitz*,⁷⁴ the Supreme Court declared inoperative a state

⁷⁰N. Y. Central R. R. v. Hudson County, 227 U. S. 248, 33 Sup. Ct. 269 (1913). The passage of the Interstate Commerce Act deprived a New Jersey municipality of its power to regulate rates of a Hudson River ferry belonging to an interstate railroad though the subject of the ferriage was not regulated by the Act or by the Interstate Commerce Commission.

⁷¹See note 69 *supra*.

⁷²N. Y. Central R. R. v. Hudson County, 227 U. S. 248, 264, 33 Sup. Ct. 269, 272-273 (1913), where the Court said:

"But as all business of the ferries between the two states was interstate commerce within the power of Congress to control, and subject in any event to regulation by the state as long only as no action was taken by Congress, *the result of the action by Congress leaves the subject*, that is, the interstate commerce carried on by means of the ferries *free from control by the state*. We think the argument by which it is sought to limit the operation of the interstate commerce embraced in the business of ferriage from state to state is wanting in merit.

"*In the absence of an express exclusion* of some of the elements of interstate commerce entering into the ferriage, *the assertion of power on the part of Congress must be treated as being coterminous with the authority over the subject as to which the purpose of Congress to take control was manifested*. . . . The conception of the operation at one and the same time of both the power of Congress and the power of the states over a matter of interstate commerce is *inconceivable*, since *the exertion of the greater power necessarily takes possession of the field, and leaves nothing upon which the lesser power may operate*. To concede that the right of a state to regulate interstate ferriage exists 'only in the absence of Federal legislation,' and at the same time to assert that the state and Federal power over such subject is *concurrent is a contradiction in terms*." (Italics added.)

⁷³See note 36 *supra*.

⁷⁴312 U. S. 52, 61 Sup. Ct. 399 (1941).

alien registration law,⁷⁵ for alleged conflict with the federal act⁷⁶ on the same subject passed *after* the enactment of the state act, even though there was no actual conflict between the two acts in a practical sense, since both could operate without interfering with the other. In *Cloverleaf Butter Co. v. Patterson*,⁷⁷ an Alabama act,⁷⁸ passed for the avowed purpose of protecting the health of its citizens, and which undoubtedly had that effect, was invalidated for alleged conflict with a federal law on the subject. Concededly, the federal act⁷⁹ did not cover the particular point covered by the state act. Both acts were clearly intended to protect the health of the community—the federal act was passed ostensibly as a regulation of commerce—and both, when viewed in that light, clearly supplemented each other.

VII. APPARENT INTENTION OF CONGRESS

An examination of the history of federal criminal legislation prior to the adoption of the Anti-Racketeering Act, and the circumstances under which that Act was adopted, leads to the conclusion that Congress, in passing that Act, assumed that it would only operate within the sphere of exclusive federal jurisdiction.

The Anti-Racketeering Act, unlike prior enactments involving concurrent jurisdiction, which provided that a conviction or acquittal in a state court should preclude a subsequent trial in the federal courts,⁸⁰ has no provision against double jeopardy. This clearly indicates that Congress believed that it was dealing with a subject over which the Federal Government had exclusive jurisdiction, and that no problem of double jeopardy would arise.

Nor is that all. In the only two cases in which Congress had previously legislated with respect to crime *in* interstate commerce, it not only provided against double jeopardy, *but took care not to oust the states of their juris-*

⁷⁵PA. STAT. ANN. (Purdon, Supp. 1940) tit. 35, §§ 1801-1806.

⁷⁶54 STAT. 673 (1940), 8 U. S. C. A. §§ 451-460.

⁷⁷*Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148, 62 Sup. Ct. 491 (1942).

⁷⁸THE CODE OF ALABAMA (1940) tit. 2, c. 1.

⁷⁹53 STAT. 252 (1939), 26 U. S. C. A. §§ 2023-2027.

⁸⁰The legislation under the Prohibition Amendment furnishes the only exception. It is clear, however, that notwithstanding the fact that the Amendment itself gave the states "concurrent power" with respect to its enforcement, congressional leaders were confident that the Supremacy Clause of the Constitution placed the matter entirely within the sphere of the Federal Government whenever the Federal Government chose to step in. The states were to have *no* power in the domain of prohibition enforcement lest they defeat the purpose of the Amendment by methods similar to those exemplified in the Pennsylvania statute with respect to slave-rendition. To allow the state to legislate within the ambit of federal regulation would result in state legislation ostensibly to enforce prohibition. Under such pretext, the state by assuming jurisdiction would oust the federal government from dealing more severely with violators than the state would be inclined to do.

diction by stepping into the field. To avoid the settled principle that whenever the Federal Government stepped in, the states stepped out, Congress took care, in both the Larceny Act of 1913 and the Embezzlement Act of 1914, to provide *specifically* for the continuance of state jurisdiction:

"Nothing in this act contained shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof."⁸¹

No such provision is contained in the present Act. The omission emphatically suggests that Congress intended to deal with a subject over which it had exclusive jurisdiction, *i.e.*, with cases in which interstate commerce was used as a means of accomplishing the crime or in effectuating its purpose.

Further proof of the intention of Congress to limit the legislation to the sphere indicated is furnished by the circumstances under which the Anti-Racketeering Act was adopted. This Act was not an isolated piece of legislation, but was part of a "Legislative Program," prepared by a special subcommittee of the Senate Committee on Commerce appointed to investigate the existence of, and to recommend legislation to prevent, "crime and racketeering."⁸² All but two of the thirteen bills constituting the "Program" dealt with matters clearly within the exclusive jurisdiction of the Federal Government, the most important of them with cases in which interstate commerce was used as a means of either accomplishing the crime or disposing of its proceeds.⁸³ Of the two which were not by their language clearly confined to matters within the exclusive jurisdiction of the Federal Government, one was the Anti-Racketeering Act; the other was an amplifying amendment to the war-time sabotage law designed to convert it into a peacetime sabotage act.⁸⁴ Of the entire "Legislative Program," most significantly,

⁸¹This provision common to both the Larceny Act and the Embezzlement Act may be found in 37 STAT. 670, c. 50, § 2 (1913) and 38 STAT. 733 (1914), now 18 U. S. C. A. §§ 410, 412. See also 54 STAT. 255 (1940), 18 U. S. C. A. § 412a making it a federal offense to wreck a railroad train in interstate commerce. The statute contains the usual clause preserving state jurisdiction and guaranteeing against double jeopardy.

⁸²S. RES. NO. 196, 73d Cong., 2d Sess. (1934).

⁸³One of these bills dealt with extortion by *means* of the use of interstate telephone, telegraph, and radio. 48 STAT. 781 (1934), as amended, 53 STAT. 743 (1939), 18 U. S. C. A. § 408d. Another dealt with the transportation of stolen securities in interstate commerce. 48 STAT. 794 (1934), 18 U. S. C. A. § 415. One amended the Lindbergh Act, making it a federal offense to transport kidnaped persons in interstate commerce. 47 STAT. 326 (1932), as amended, 48 STAT. 781 (1934), 18 U. S. C. A. § 408a. Another amended the National Motor Vehicle Theft Act so as to convert it into a National Stolen Property Act, punishing the transportation of stolen property in interstate commerce. 48 STAT. 794 (1934), 18 U. S. C. A. §§ 413-419.

⁸⁴The law in question was part of the Espionage Act of June 15, 1917, 40 STAT. 217, 221 (1917), and was limited to sabotage against *exports to foreign countries*—being designed with a view to the existing war situation involving the shipment of supplies and munitions to the A.E.F. and our allies. The amendment made the provisions of that section applicable at all times to all interstate and foreign commerce.

only the latter failed of adoption, another indication that Congress was not prepared to extend its legislation generally into the field of crime *in* interstate commerce, and thereby invade a sphere of concurrent jurisdiction with the states. The action was undoubtedly well advised, not only because of the constitutional difficulties, but also because any such attempt would have brought about the unfortunate conditions which prevailed under the Prohibition Amendment, and would have practically ousted the states from the field. The Prohibition experience demonstrated that such would have been the result even if Congress had expressly preserved the jurisdiction of the states; *a fortiori*, where Congress had not.

VIII. PROPER CONSTRUCTION OF THE ACT

Even if it were not clear that Congress had never intended to step beyond the sphere of exclusive federal jurisdiction, the applicability of the Act must be limited in the manner suggested. Otherwise the Act would, at first, create much greater confusion in the enforcement of our criminal law than existed under the Prohibition Amendment, and, ultimately, oust the states entirely from that large, though vague and indefinite, field of criminal activities usually referred to as "racketeering." The sponsors of the Anti-Racketeering Act,⁸⁵ and government counsel in the recent *Teamsters' Union* case,⁸⁶ referred to the Act as an "extortion" act. "Extortion," however, is no more concrete than "racketeering." The Act is not only "loosely drawn," but its language is so broad as to embrace practically the whole commerce of the country. For the Act is not limited to "extortion" committed *in* interstate commerce, but embraces the obtaining, or the attempt to obtain, of any money, property, or any "other valuable considerations," with or without the consent of the giver, by the "use or threat to use force, violence or coercion, in connection with or in relation to any act *in any way or in any degree affecting* trade or commerce or any article or commodity moving *or about to move* in trade or commerce."⁸⁷ Congress, evidently intent on spreading its net wide, spread it entirely too wide to make the Act workable—at least with that spread. "Trade or commerce" as used in the Act, means, of course, *interstate or foreign trade or commerce*. For constitutional reasons, the comprehensive language used, which, literally taken, would involve *all the trade and commerce of the country*, must be taken as not intended to have that effect. Some trade or commerce is left out because of its

⁸⁵78 CONG. REC. pp. 11402-11403 (1934).

⁸⁶Brief for the United States, Local 807, *etc.*, *et al.* v. United States, 315 U. S. 521, 62 Sup. Ct. 642 (1942).

⁸⁷See note 3 *supra*.

purely *intrastate* character. In the only case in which this question of degree was considered, it was held that the words "in any way or in any degree" must be disregarded, and the statute construed as if those words were equivalent to "substantially affecting."⁸⁸ "Substantially" is one of the vaguest terms in our language; no less is the word "affecting." Every case involving "extortion" would therefore resolve itself into the question as to how "substantially" the "act" "in connection with" or "in relation to" which the money was obtained "affected" interstate or foreign commerce. If the case were tried in a federal court the defendant would contend that the "affecting" was not "substantial"; in a state court, his contention would be the opposite. On appeal not only would the evidence with respect to all of these matters be involved, but also the instructions to the jury with respect thereto. The prospect is most appalling.

Adding to the difficulties is the settled principle that when a person convicted in a state court claims that court to have been without jurisdiction, he is entitled to test the question on *habeas corpus*.⁸⁹ With the two jurisdictions so vaguely defined, every person convicted of any crime falling within the broad definitions of this Act in a state court would apparently have a right to test the question of the jurisdiction of that court in the federal courts by means of a writ of *habeas corpus*. In addition to the usual state appeals, there would be *habeas corpus* proceedings and appeals in the federal courts. Under these circumstances, state attorneys would do well to avoid prosecutions for racketeering, thereby leaving this entire field of criminal law to federal supervision. In a way, that would be a more logical situation than that which exists at present, when no real "racketeer" has ever been prosecuted under the Anti-Racketeering Act.

Such a revolutionary change in the enforcement of our criminal law is neither desirable nor necessary. Such a change was never intended by Congress. The particular class of criminals for whose suppression this legislation was intended was never "affected" by it, "substantially" or otherwise. It is also clear from the "course of prosecution" that the only criminals ever touched by the Act could have been easily and satisfactorily dealt with under state laws.

All indications, therefore, point to one solution: A construction of the Act which would limit its operation to crimes in which interstate or foreign commerce was used in the perpetration of the offense or in achieving its

⁸⁸United States v. Gramlich, 19 F. Supp. 422 (S. D. Ill. 1937).

⁸⁹*In re Neagle*, 135 U. S. 1, 10 Sup. Ct. 658 (1890); HURD ON HABEAS CORPUS (2d ed. 1876) pp. 154-198; Note (1943) 28 CORNELL L. Q. 215.

purpose. This construction would conform to the intention of Congress and be in harmony with the "Legislative Program" of which it was a part.

Perhaps it should be noted, in conclusion, that on a certain celebrated occasion—in the case of the Fourteenth Amendment—the Supreme Court ruled that even so solemn an act as a constitutional amendment may be held not to provide for all that its language purports to say, if a literal reading of its language would effect a revolution not contemplated by the Congress and the people in adopting it.⁹⁰

⁹⁰Slaughter House Case, 16 Wall. 36 (U. S. 1873); Boudin, *Truth and Fiction about the Fourteenth Amendment* (1938) 16 N. Y. U. L. Q. REV. 19.

The Anti-Racketeering Act was passed in the Senate without debate and without division. In the House, there was a "debate" limited to less than a column of the Congressional Record, and consisting of one member's demanding and receiving the assurance that the "labor exemption" was satisfactory to organized labor. 78 Cong. Rec. 11402-11403 (1939).