THE COMMERCE POWER AND HAMMER v. DAGENHART.

In view of the mass of literature which has accumulated around the Commerce Clause of the Federal Constitution an excuse seems the natural preface to any further discussion of the subject. The excuse which is offered in the present instance is the recent decision of the Supreme Court of the United States in *Hammer* v. *Dagenhart*,[1] holding unconstitutional the Federal Child-Labor Law,[2] a decision which, instead of clarifying the scope of the commerce power seems to perpetuate old doubts, if not indeed to create new ones, as to the law on this subject.

It is to be expected that questions as to the distribution of the commerce power under the Constitution should continue to arise with the changing commercial conditions in the country; but that these questions should involve doubt as to the fundamental scope and character of the Federal power is surprising, particularly, when it is remembered that the Commerce Clause

[1] 247 U. S. 251, decided June 3, 1918. Upon the announcement of the decision in this case, the Solicitor General asked that the issuance of the mandate be stayed thirty days in order to enable the Department of Justice to file a petition for rehearing, should it be so advised. This motion was granted, but previous to the expiration of the thirty days the Solicitor General notified the clerk of the Supreme Court that the Department had determined not to file an application for rehearing.

[2] Chap. 432, 39 Stat. 675. The pertinent section of this Act, the first, reads as follows:

"That no producer, manufacturer, or dealer shall ship or deliver for shipment in interstate or foreign commerce any article or commodity the product of any mine or quarry, situated in the United States, in which within thirty days prior to the time of the removal of such produce therefrom children under the age of sixteen years have been employed or permitted to work, or any article or commodity the product of any mill, cannery, workshop, factory, or manufacturing establishment, situated in the United States, in which within thirty days prior to the removal of such product therefrom children under the age of fourteen years have been employed or permitted to work, or children between the age of fourteen years and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock post meridian, or before the hour of six o'clock ante meridian: Provided, that a prosecution and conviction of a defendant for the shipment or delivery for shipment of any article or commodity under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such article or commodity before the beginning of said prosecution."

has been the subject of critical consideration by the Court for almost a hundred years. And yet there are real doubts (*a*) as to what, essentially, constitutes a regulation of commerce, and (*b*) as to the extent to which the power to regulate commerce may be exerted to prohibit the transportation in interstate commerce of specific commodities—doubts which, to say the least, are not resolved by this decision.

Of these questions the first goes back to the beginning, although in the early stages of judicial interpretation of the Commerce Clause the Court was invariably concerned with the proper classification of state legislation.

At that time the overshadowing question was whether the Federal power over interstate commerce was exclusive and whether the States were competent to the passage of certain legislation, so that the Court came to consider whether this legislation actually constituted, in the specific instances, regulations of commerce. In the solution of this problem the earliest decisions disclose a tendency to apply the principle stated by Chief Justice Marshall in *Gibbons* v. *Ogden*:[3]

"All experience shows that the same measures or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical."[4]

This pregnant sentence indicates clearly that the Chief Justice, in determining the essential character of the legislation under consideration looked beyond the legislation itself to ascertain what he regarded as the specific power exerted by the State in the passage of the law; and it seems to have been his view that the power to regulate commerce among the States was vested exclusively in Congress in the sense that no State could *share* in the exercise of *this* power,[5] but this view of Federal authority did not prevent his sustaining State legislation directly affecting interstate commerce when such legislation might be

[3] 9 Wheaton 1 (1824).
[4] At page 204.
[5] See pages 205 and 209.

attributed to some other power than the power to regulate commerce, as for instance, to the police power.[6]

Manifestly this is to hold that the essential nature of the power exerted is not determined with reference to the field of its operation, but with reference to some other standard. And the case discloses no other standard to determine this essential nature unless it be found in the purpose or motive of the legislation.

Thus in *Gibbons* v. *Ogden* he justifies State inspection laws as follows:[7]

"But the inspection laws are said to be regulations of commerce, and are certainly recognized in the Constitution as being passed in the exercise of a power remaining with the States.

"That inspection laws may have a remote and considerable influence on commerce will not be denied: but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The *object* of inspection laws is to improve the quality of articles produced by the labor of the country, to fit them for exportation, or it may be for domestic use."

And so also with respect to State quarantine laws; these he attributes to "the acknowledged power of a State to provide for the health of its citizens." Yet Congress may pass quarantine laws, and when so passed they will undoubtedly be regulations of commerce. The underlying thought of the entire discussion seems to be found in the statement that—

"If a State in passing laws on subjects acknowledged to be within its control, *and with a view to those subjects*,[8] shall adopt a measure of the same character with one which Congress may

[6] Willson v. Blackbird Creek Marsh Co., 2 Pet. 245 (1829). It is significant that in the case of Brown v. Maryland, 12 Wheat. 419 (1827), the validity of a law of the State of Maryland *levying a tax* on importers, was held invalid so far as it involved the constitutional power of Congress to regulate commerce with foreign nations, etc., only as it came in conflict with the Act of Congress authorizing importations. The discussion does not extend to the power of the State to levy such a tax in the absence of any Act of Congress conflicting therewith.

[7] Page 203.

[8] Italics ours. This language seems meaningless unless it refers to the purpose or motive of the legislators.

adopt, it does not derive its authority from the particular power which has been granted [*i. e.*, in this instance the commerce power], but from some other which remains with the State and may be executed by the same means." [9]

In the case before the Court it seemed impossible to attribute the legislation of the State—the grant to Livingston and Fulton of the exclusive privilege to navigate the waters of the State of New York with vessels propelled by fire or steam—to any power other than the power to regulate commerce, and in consequence there follows the elaborate discussion of the exclusiveness of this power. On the other hand, in *Willson* v. *Blackbird Creek Marsh Company*,[10] the same judge sustains in a comparatively short opinion State legislation authorizing the maintenance of a dam constituting a barrier to navigation and commerce—a physical barrier here, while in *Gibbons* v. *Ogden* the barrier was intangible arising out of the attempted exclusive franchise.[11]

Applying this theory the Supreme Court in *Mayor* v. *Milne*,[12] sustained State legislation requiring a report of facts relative to passengers brought into the country, the fundamental basis for the decision being found in the paragraph of the opinion on page 131 of the report. And the determination that the

[9] Page 204. The same idea appears in Mr. Justice Johnson's concurring opinion at page 235. He there says:

"It is no objection to the existence of distinct, substantive powers, that, in their application, they bear upon the same subject. . . . Their different purposes mark the distinction between the powers brought into action; and while frankly exercised, they can produce no serious collision."

And again, on page 239, the following passage is illustrative of the same point:

"Wherever the powers of the respective governments are frankly exercised, with a distinct view to the ends of such powers, they may act upon the same object, or use the same means, and yet the powers be kept perfectly distinct. A resort to the same means, therefore, is no argument to prove the identity of their respective powers."

Apparently this theory was one of those advanced by Mr. Webster in this argument: *v.* pp. 18 and 19.

[10] 2 Pet. 245 (1829).

[11] The Court does not in terms deny to the legislation the characteristic of a regulation of commerce; but the whole opinion is in accord with the view that this was the basis of the decision.

[12] 11 Pet. 102 (1837).

legislation in question should be classified as an exertion of the police power, and not of the power to regulate commerce, seems very clearly to be rested on the assumed purpose or motive of the State legislature. Thus the Court says, at page 132:

"If, as we think, it be a regulation, not of commerce, but police, then it is not taken from the States. To decide this, let us examine its purpose, the end to be attained, and the means of its attainment."

"We shall not enter into any examination of the question whether the power to regulate commerce be or be not exclusive of the States, because the opinion which we have formed renders it unnecessary: in other words, we are of the opinion that the act is not a regulation of commerce, but of police; and that being thus considered it was passed in the exercise of the power which rightfully belonged to the States."

Yet, here again, Congress could undoubtedly establish similar requirements and when so established they would be regulations of commerce.

This theory, which would determine the essential character of State legislation, not with reference to the field of its operation, but with reference to the purpose or motive of its passage, was vigorously criticised by Chief Justice Taney in the License Cases, where he said:[13]

"But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the Constitution of the United States. And when the validity of a State law making regulations of commerce is drawn into question in a judicial

[13] 5 Howard 504 (1847), at page 583.

tribunal, the authority to pass it cannot be made to depend upon the motive that may be supposed to have influenced the legislature, nor can the Court inquire whether it was intended to guard the citizens of the State from pestilence and disease, or to make regulations of commerce for the interest and convenience of trade."

The necessary corollary to this view was that the Court, having already sustained State legislation operating within the field of interstate commerce, had necessarily conceded the existence of a concurrent power in the States over this subject, and that the description of the Federal power as exclusive was based on an unsubstantial theory, since the classification of legislation cannot be made to depend on its motive or purpose, but must be determined with respect to the field of its operation. It is not easy to meet this criticism of Chief Justice Taney, since all legislation is presumably enacted in the public interest, and there is no such thing as regulation of commerce for the mere sake of regulation. Always there is, ostensibly, a public purpose to be subserved, the public health, safety, morals, economic advantage, *etc.*

Finally the discussion which had developed so many conflicting views in the Supreme Court,[14] found a solution, as is well known, in the case of *Cooley* v. *Board of Wardens*,[15] which conceded to the States concurrent power over commerce among the States in matters of local concern, but denied such power in matters of national concern. This distinction, which constituted a point of departure, has received the continued approval of the Supreme Court and appears even in the latest decisions of that tribunal, although it is now customary to associate with it the principle that the States may not impose a direct burden on interstate commerce, a principle which the Court assimilates to the principle in the Cooley Case.[16]

[14] It seems unnecessary to refer further to the views of the individual judges in the cases cited or in the Passenger Cases, 7 Howard 283 (1848), since enough has been said to bring into clear relief the opposing points of view.

[15] 12 Howard 299 (1851).

[16] See, *e. g.*, The Minnesota Rate Cases, 230 U. S. 352 (1913), at page 400.

It is noteworthy that the case which established this principle and the cases which have applied it have considered the subject from the viewpoint of Chief Justice Taney and have labelled State legislation with reference to the field of its operation and not with reference to its motive or purpose. The best illustrations, perhaps, are found in the State liquor laws which, although clearly intended to effectuate police purposes, have been held to constitute regulations of interstate commerce because of the field of their operation.[17]

In the light of this interpretation of the Commerce Clause as determining the scope of State power it is interesting to note the emergence of what is essentially the same question with respect to Federal power; that is to say, the question whether legislation passed by Congress must be judged with respect to its constitutional validity by reference to the field of its operation or by reference to the purpose or motive of its passage. The leading decision involving this question is, of course, the Lottery Case,[18] in which by a vote of five to four, the Supreme Court declared constitutional an act of Congress which excluded lottery tickets from the channels of interstate commerce although the conceded purpose of the legislation was the suppression of lotteries in the United States. The old distinction reappears in this case, it being argued against the law that the United States Government had no power to pass legislation intended to promote the public morals and that this was essentially such legislation; but the Court, holding that the tickets were subjects of traffic, decided, after a review of previous cases,

[17] Bowman v. Chicago, etc., Ry., 125 U. S. 465 ((1888), at pages 479, 480; Leisy v. Hardin, 135 U. S. 100 (1890), at pages 122-123. In this latter case the Court says, at the pages referred to: "These decisions rest upon the undoubted right of the States of the Union to control their purely internal affairs, in doing which they exercise powers not surrendered to the national government; but *whenever the law of the State amounts essentially to a regulation of commerce with foreign nations or among the States, as it does when it inhibits, directly or indirectly the receipt of an imported commodity or its disposition before it has ceased to become an article of trade between one State and another, or another country and this, it comes in conflict with a power which, in this particular, has been exclusively vested in the general government, and is therefore void.*"

[18] Champion v. Ames, 188 U. S. 321 (1903).

that Congress is entitled to deal with *their carriage from State to State.*[19] Apparently the Court is not concerned with the purpose of motive which influences Congress to deal with this subject matter. In other words, the power to regulate commerce among the States, which is conferred by the Constitution without limitation, is not to be restricted by the Court because of its interpretation of the purpose which Congress may have had in mind in the enactment of the law in question; it being entirely permissible for Congress to deny the facility of interstate transportation to traffic which in its judgment is detrimental to the best interests of the country.[20]

It is significant that the principle of the Lottery Case, although established by a divided Court received the sanction of the unanimous Court in *Hipolite Egg Co.* v. *the United States,*[21] and in *Hoke* v. *United States.*[22] In this latter case, Mr. Justice McKenna clearly described the scope of the Federal power with reference to the field of its operation. Thus he says:[23]

"Commerce among the States, we have said, consists of intercourse, and traffic between their citizens, and includes the transportation of persons and property. There may be, therefore, a movement of persons as well as of property; that is, a person may move or be moved in interstate commerce."

It would seem, therefore, to be the settled view of the Supreme Court that in determining whether legislation constitutes a regulation of commerce, its character is to be determined with reference to the field of its operation and not with reference to the purpose or motive of its enactment. If this be the correct principle, Congress should have power to deal with any transportation or traffic between States unless there is some constitutional limitation which restricts the scope of its activity.

[19] Page 354.

[20] There would doubtless be a possible restriction upon Congressional action resulting from the due process clause of the Fifth Amendment—a feature of the situation which will be considered briefly hereafter.

[21] 220 U. S. 45 (1911).

[22] 227 U. S. 308 (1913).

[23] Page 320.

But all these precedents seem to be abandoned by the Court in the Hammer Case, and an apparent reversion to the older and unsatisfactory test of the earlier cases is disclosed in the attempted distinction between the Lottery Case and its companion decisions and this Child-Labor case, when the Court says:

"This element [*i. e.*, 'the use of interstate transportation . . . to the accomplishment of harmful results'] is wanting in the present case. *The thing intended to be accomplished*[24] by this statute is the denial of the facilities of interstate commerce to those manufacturers in the States who employ children within the prohibited ages. The act in its effect does not regulate transportation among the States, but *aims*[24] to standardize the ages at which children may be employed in mining and manufacturing within the States."

It is difficult to understand the justification for an inquiry by the Court into the "intentions" and "aims" of Congress in order to determine the validity of its legislation. But, however this may be, it is interesting to note that the essential principle of this decision seems to disclose a harking back to a point of view which was largely responsible for the uncertainty as to the scope of the commerce power in the early stages of its judicial construction, and which had apparently been discarded ever since the decision in the License Cases. Unfortunately, the present decision, tends to create new uncertainties rather than to dissipate those previously existing.

This brings the discussion to the second of the two questions upon which doubt seems to persist, *viz.*, whether a restrictive limitation results from the use of the word "regulate" in the Commerce Clause, which operates to prevent the passage of laws *prohibiting* the interstate transportation of certain traffic. This argument has been presented to the Court in sundry cases and was discussed at length in the decision with respect to the lottery tickets, but no case, it is believed, specifically condemned the validity of a congressional prohibition, simply because it was a prohibition, prior to the decision in *Hammer* v. *Dagenhart*. It is true, as Mr. Justice Day points

[24] Italics ours.

out in his opinion, that the prohibitions theretofore sustained had been upheld in cases where the use of interstate transportation was necessary to the accomplishment of some harmful result. But, even though this may be true, the discussion in the cases in question, certainly in the Lottery Case, made no distinction of this kind; and, furthermore, it is difficult to discover the legal principle which would permit the exclusion from interstate commerce of articles whose transportation operates to facilitate harmful results at destination, and would forbid the exclusion from interstate commerce of articles whose transportation operates to facilitate the accomplishment of harmful results in the locality of origin. If the facility of interstate transportation can be denied in the one instance it is difficult to see how it may be not denied in the other.

Laying aside the difficulty of reconciling the decision in this respect with the previous decisions of the Court, the opinion of the Court in *Hammer* v. *Dagenhart,* in its consideration of the prohibitory characteristic of the legislation, seems to limit itself to an unduly narrow view of the subject. While the transportation of specific articles in interstate commerce is prohibited, and while it may be contended that this is not a regulation of this specific species of interstate commerce, yet it cannot be denied that all interstate commerce, *i. e.,* interstate commerce in its totality, is regulated by excluding from the channels thereof traffic which Congress desires to exclude. It is the totality of interstate commerce, as well as specific cases, that Congress is given the right to regulate by the provisions of the Federal Constitution.

It is difficult to understand, therefore, why the exclusion from the channels of interstate commerce of certain commodities can be treated otherwise than as the regulation of the totality of such commerce; and whether the articles so excluded be diseased live stock,[25] lottery tickets,[26] adulterated or misbranded food or drugs,[27] immoral women,[28] or articles pro-

[25] Reid v. Colorado, 187 U. S. 137 (1903).
[26] Champion v. Ames, 188 U. S. 321 (1903).
[27] Hipolite Egg Co. v. U. S., 220 U. S. 45 (1911).

duced by the labor of children would seem to have no bearing on the determination of the question whether interstate commerce in its totality is regulated. That this is the view of the dissenting justices in *Hammer* v. *Dagenhart* clearly appears from the dissenting opinion of Mr. Justice Holmes, who says:

"Regulation means the prohibition of something, and when interstate commerce is the matter to be regulated I cannot doubt that the regulation may prohibit *any part of such commerce,*[29] that Congress sees fit to forbid."

The only question that might arise in this connection is whether the regulation in question is arbitrary and therefore in violation of the Fifth Amendment.

In view of the foregoing considerations it seems to have been a fair conclusion from the decisions of the Supreme Court, rendered prior to the decision in *Hammer* v. *Dagenhart,* that Congress could legislate with respect to interstate traffic or transportation irrespective of its motive or purpose in so doing, subject, of course, to the limitations of the Fifth Amendment, and that prohibitions of such interstate traffic or transportation were valid regulations of commerce, since, although in one aspect they constitute prohibitions of commerce rather than regulations, they nevertheless are true regulations of interstate commerce in its totality because they exclude from the channels thereof a portion of such commerce deemed by Congress to be detrimental to the public interest. From these principles it would seem to follow that the Federal Child Labor Law would be constitutional even though it might subserve no *commercial* purpose with respect to interstate commerce. But while its validity would apparently be capable of support even if it should be regarded as limited to the accomplishment of a police purpose pure and simple, that is to say, as limited to an indirect effect on the employment of children by the probable consequences which would result from the exclusion of products manufactured by their labor from the channels of interstate commerce,

[28] Hoke v. U. S., 227 U. S. 308 (1913).
[29] Italics ours.

the law, has of course, as has many times been pointed out, a direct commercial purpose and effect in that it is intended to free interstate commerce from the trammels and restrictions which result from the laxity of the laws of certain States with respect to the employment of children.

Thus, if States A and B are seeking to market the same commodity in State C, which adjoins them both, it is obvious that interstate transactions between A and C will be measurably impeded and restricted if State A has hours-of-service laws which increase the cost of production, whereas no such laws prevail in State B. It is true that many other factors enter into the commercial problem and combine with this one to determine the ability of the manufacturer in State A to compete in State C with the manufacturer of State B; but conditions of employment constitute one of these factors, and an important one, and it is difficult to understand why Congress cannot require that the facility of interstate transportation shall be denied to the transportation of products between States A and C, when such transportation may burden or restrict the interstate traffic between States B and C.

Probably the primary purpose in granting to Congress the power to regulate commerce among the States was the desire to avoid the burdensome restrictions which rapidly developed in the period immediately following the Revolution; and while in his dissenting opinion in the Lottery Case, Mr. Chief Justice Fuller says that this power, "was intended to secure equality and freedom in commercial intercourse as between the States, not to permit the creation of impediments to such intercourse," [30] it is noteworthy that, although the Federal Child-Labor Law might operate in a restrictive manner in one direction, as for example, between States B and C in the foregoing illustration, on the other hand, it tends to liberate from the trammels and obstructions arising from the lax labor laws of State B interstate commerce between States A and C.

In principle, this is believed to be the basis upon which

[30] Page 373.

the Supreme Court has sustained the right of Congress to deal with intrastate railroad rates, when such rates are so regulated by a State as to create a restrictive influence upon the movement of interstate traffic. It may be said with equal force in such a situation that the freight rate is only one of the factors which enter into the competitive situation, but none the less the Supreme Court has held that it is so closely related to interstate commerce as to justify Federal regulation.[31] There would seem to be ample justification in the present instance for the application of the same principle.

Moreover, the Court has sustained an hours-of-service law for railroad employees engaged in interstate commerce,[32] the Employes' Liability Law in the same field,[33] the Safety Appliance Law[34] and the Adamson Railroad Wage Law,[35] all on substantially the same ground, *viz.*, that Congress may deal with these matters because of their intimate relation, under the circumstances, to the free and untrammelled movement of interstate commerce. The situation dealt with in the Federal Child-Labor Law differs only in degree, so far as restrictions on interstate commerce are concerned.

Furthermore, the decision of the Supreme Court sustaining the Webb-Kenyon Law,[36] clearly indicates the power of Congress to exert its authority to regulate interstate commerce so as to permit the effective operation of State police laws; and while it is true that in the case of the Webb-Kenyon Law the Federal legislation operated to support generally State police legislation, whereas the legislation involved in the Hammer Case would operate to reinforce the legislation in certain States only, the principle seems to be the same, and it is not perceived why

[31] Houston E. & W. Texas Ry. v. U. S., 234 U. S. 342 (1914); American Express Co. v. Caldwell, 244 U. S. 617 (1917); Illinois Central R. R. Co. v. Illinois, 245 U. S. 493 (1918).

[32] B. & O. R. R. v. I. C. C., 221 U. S. 612 (1911).

[33] Employers' Liability Cases, 207 U. S. 463 (1908); Second Employers' Liability Cases, 223 U. S. 1 (1912).

[34] Southern Railway v. U. S., 222 U. S. 20 (1911).

[35] Wilson v. New, 243 U. S. 332 (1917).

[36] Clark Distilling Co. v. W. M. R. R., 242 U. S. 631 (1917).

Congress, through the medium of its power over interstate commerce should not be able to lend support to one as against another of conflicting State policies. This is essentially what it has done in the case of the Webb-Kenyon Law, putting its prohibitory legislation back of the States seeking to enforce strict liquor laws and necessarily opposing as a consequence the policy of the States which continue to permit the traffic.

Obviously, from the broader point of view, it is desirable that Congress should be competent to deal with the situation which arises when the States pursue differing policies which have a direct bearing upon commercial transactions between the States. The Webb-Kenyon Law is an illustration of such action, and the Federal Child-Labor Law is substantially the same class of legislation.

That the Federal Child-Labor Law is within the legislative power of Congress would seem to follow, therefore, from the facts (*a*) that it finds its operation within the field of interstate traffic and transportation, (*b*) that although it *prohibits* the transportation of certain traffic, it *regulates* the totality of interstate commerce by excluding from its channels the prohibited articles, (*c*) that it has a justifiable commercial purpose in that it tends to free transactions between States from the trammels and restrictions which result from lax child-labor laws existing in some States, and (*d*) that it has an appropriate purpose in that while relating directly to interstate traffic and transportation it is intended to facilitate the solution of the problem which results from conflicting State policies which have an important effect on commercial transactions between States, a consideration closely associated with (*c*).[37]

[37] Whether legislation to prevent child labor might be justified under the War Power is a question which does not come within the purview of this discussion. In view, however, of the importance of conserving the manpower of the nation—a consideration which has been made emphatically evident during the past few years—there would seem to be substantial warrant for Congressional action under this power. And it is not believed that the connection would be held too remote, notwithstanding what was said in Lochner v. New York, 198 U. S. 45 (1905), at pages 60-61. See Muller v. Oregon, 208 U. S. 412 (1908), at pages 421-422; Miller v. Wilson, 236 U. S. 373 (1915); Bosley v. McLaughlin, 208 U. S. 385 (1915).

Clearly such legislation is not arbitrary and consequently it could not be invalidated as in conflict with the Fifth Amendment. In this amendment would be found, of course, a safeguard against any prohibitions of interstate commerce which subserved no purpose of public advantage whatsoever—a consideration which would seem readily to dispose of any difficulties which might be suggested with reference to the powers of Congress to prohibit the transportation interstate of commodities harmless in themselves, and producing by their transportation no collateral public detriment either in the locality of their origin or the locality of their destination.

And if it is a regulation of commerce, the Tenth Amendment would furnish no ground upon which to attack it, since that amendment retains to the States such powers only as have not been granted to the Federal Government. The power to regulate commerce among the States has been so granted.

And yet when the opinion of the Supreme Court is analyzed, the real reason for the decision seems to be a fear that to sustain the law might disturb the proper distribution of power between the Nation and the States, and might constitute "an invasion of the powers of the States." But such a conclusion should, of course, be rested on the specific provisions of the Constitution establishing the respective provinces of State and Federal activity, and not upon any general consideration of their proper authority. And if the legislation deals with interstate commerce and subserves the public interest, so as to avoid the prohibitions of the Fifth Amendment, it would seem immaterial that, collaterally—and even though this is its prime purpose—it has an effect upon matters customarily dealt with by the States.

That the power to regulate commerce is sought to be exerted in new ways naturally invites discussion, particularly since the exertion of such authority is bound to have a material influence upon matters which heretofore have been dealt with by the States. But this is believed to be merely one more indication of the increasing commercial unity of the country. And

if such legislation should prove to be contrary to the public interest there is always the opportunity for the repeal of the law.[37]

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