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The Current of Commerce: A Note on the Commerce Clause and the National Industrial Recovery Act

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THE "CURRENT OF COMMERCE:" A NOTE ON THE COMMERCE CLAUSE AND THE NATIONAL INDUSTRIAL RECOVERY ACT.

By F. D. G. RIBBLE*

ANY far reaching and novel legislation necessarily raises numerous constitutional problems. There has been no better illustration in the history of American law than is found in the National Industrial Recovery Act.[1]

A reading of the Act will call to mind familiar principles: the separation of powers, so dear to the framers of the constitution, and the related limitations on delegation of legislative power; the broad guarantees of due process of law, both as to the ideal of "a day in court," and as to reverence for "liberty" and "property" which are to be protected; the powers of the states over their systems of internal police;[2] as well as many other doctrines of constitutional law. The Act might well furnish a starting point for a course of study in the American constitution.

The reader who lays aside the Act and turns to the cases will not find them wholly reassuring. The provisions for minimum wages in the various codes must suggest the unhappy fate of the minimum wage law for women, enacted by Congress for the District of Columbia.[3] The now famous section 7a of the Act recalls, in particular, the failure in *Adair v. The United States*[4] of the effort of Congress to protect from loss of employment those workers in interstate commerce desiring membership in labor unions. Apart from that vast category of enterprises conveniently designated by the term of "businesses affected with a public interest," price fixing has found slight favor in the Supreme Court decisions.[5] But perhaps the most notable of the precedents is found

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[1]Public No. 67—73d Congress, approved June 16, 1933. See Handler, The National Industrial Recovery Act, (1933) 19 Am. B. A. J. 440; note (1933) 47 Harv. L. Rev. 85.

[2]See Marshall in Gibbons v. Ogden, (1824) 9 Wheat. (U.S.) 1, 208, 6 L. Ed. 23.

[3]Adkins v. Children's Hospital, (1923) 261 U. S. 525, 43 Sup. Ct. 394, 67 L. Ed. 785.

[4](1908) 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436.

[5]See Adkins v. Children's Hospital, (1923) 261 U. S. 525, 43 Sup.

in the greatly discussed child labor case.[6] Congress was unable to prohibit the transportation in interstate commerce of goods produced in factories employing child labor. Inevitably it will be asked whether Congress is similarly unable to prohibit the transportation in interstate commerce of goods produced under other conditions of which Congress or the president disapproves. The licensing provisions of the Act contemplate, as a means of its enforcement, that under specified conditions certain persons may be prohibited from engaging in interstate commerce.[7]

The present situation differs so widely from that presented in any of the prior cases, both as to the nature of the statutes involved and as to the economic conditions in relation to which they operate, that those who seek distinguishing features have a wealth of material with which to work. A discussion of that material would far transcend the limits of this paper.

Basically the Act depends upon the power of Congress to regulate commerce. If other constitutional provisions are offended against, it is quite likely that they may be circumvented by changes in the Act without too great a sacrifice to the whole plan. But if Congress has not the necessary power to enact this legislation under the commerce clause, it would seem that the plan in anything like its present form is doomed, so long as the constitution as it is now known survives.

This discussion is directed to the power under the commerce clause. It purports merely to be suggestive of certain topics deemed particularly relevant to the question of the power of Congress to coerce compliance with the National Industrial Recovery Act. The right of a Nation, in its need, to call upon the good will and the voluntary action of its people for the common good is not in question. Nor need there be constitutional question of the inducements offered by way of relaxations of the anti-trust laws.[8]

Ct. 394, 67 L. Ed. 785; Wolff Packing Co. v. Court of Industrial Relations, (1923) 262 U. S. 522, 43 Sup. Ct. 630, 67 L. Ed. 1103; Tyson and Bro. v. Banton, (1927) 273 U. S. 418, 47 Sup. Ct. 426, 71 L. Ed. 718; Ribnik v. McBride, (1928) 277 U. S. 350, 48 Sup. Ct. 545, 72 L. Ed. 913; Williams v. Standard Oil Co., (1929) 278 U. S. 235, 49 Sup. Ct. 115, 73 L. Ed. 287; Finkelstein, From Munn v. Illinois to Tyson v. Banton, (1927) 27 Col. L. Rev. 769; (1933) 32 Mich. L. Rev. 63. Compare People v. Nebbia, (N.Y. 1933) 186 N. E. 694; United States v. Calistan Packers, (D.C. Cal. 1933) 4 F. Supp. 660.

[6]Hammer v. Dagenhart, (1918) 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101.

[7]Sec. 4 (b), National Industrial Recovery Act.

[8]See Dickinson, Major Issues Presented by the Industrial Recovery Act, (1933) 33 Col. L. Rev. 1095.

In dealing with the commerce clause in this connection it will be wise to start with a reference to the oft repeated idea of the existence of emergency powers.

EMERGENCY POWERS

The Act begins by declaring the existence of a national emergency. Discussions in the public press not infrequently assume that an emergency may be made the basis of constitutional power, and intimations of this appear in judicial opinions dealing with the recovery program.[9] In a sense this is true, but the sense needs to be carefully examined. It is not to be suggested here that when the need is deemed great a constitutional method will, in general, be found. Such a statement may be merely a prophecy as to human ingenuity. As such, whether accurate or not, it is beyond the limits of constitutional theory. The statement may be a tribute to the great flexibility of the constitution. As great as that flexibility is, it is but a truism to say that it has pronounced limits.

It cannot be imagined that in emergencies, however dire, the constitution can be legally suspended. To make the contrary statement is to refute it. Such a theory would place all constitutional guarantees in the hands of the person or persons in whom rested the power to determine the existence of the emergency. A frequently quoted statement is that of Mr. Justice Davis in *Ex Parte Milligan.*[10]

"No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism. . . ."

While emergencies cannot be made the basis for the suspension of the constitution, they are not, for that reason, to be dis-

[9]In Southport Petroleum Co. v. Ickes, (D.C. Sup. Ct. 1933) 61 Wash. L. Rep. 577, the Court said: "The rationale of the doctrine of self-protection is that the necessity for it is inherent in the nature of every organism. The idea back of this law is sometimes expressed as 'necessity knows no law,' or as 'self-preservation is the first law of nature.' This principle, at least to some degree, also extends to governments. . . . While the courts hold that the constitution is not suspended or set aside by war or national emergency, it is thought that the constitution and all other laws must be read in the light of and, to some extent, subject to the primal and fundamental concept of the necessity for self-preservation." See also Economy Dairy Co. v. Wallace, (D.C. Sup. Ct. 1933) 61 Wash. L. Rep. 633; comment in (1933) 32 Mich. L. Rev. 63, 68.

[10](1866) 4 Wall. (U.S.) 2, 121, 18 L. Ed. 281.

missed from consideration. They are relevant in ascertaining the extent of constitutional grants and limitations.[10a] It is possible that the word "emergency" has at times an unfortunate connotation, as suggesting the need of extraordinary powers, above constitutional limitations. It may be wise to use the expression "occasional powers" instead, as meaning powers the existence and scope of which are determined by particular occasions. Occasional powers, thus described, are familiar phenomena in constitutional law. Reference to them may not be nearly as disturbing as reference to emergency powers. Obviously, an unusual or important occasion will readily be termed an emergency. It may be comforting to realize that Congress and the state legislatures have been dealing with occasions—or emergencies—since our government began without the need of scrapping or overriding the constitution.

The obvious illustration of an occasional power lies in the war power.[11] Many things may be done in war which cannot be done in peace.[12] It will not be intimated that this is a "war on depression" and accordingly the war powers can be invoked. To do so would be to confuse rhetoric with law. Yet the example readily serves to recall that powers may depend upon the occasion of their exercise.

The war power is expressly an occasional power. Other powers and limitations have occasional features, though not expressly so declared. Illustrations may be readily found in connection with the two due process limitations. The housing legislation in Washington, designed to meet conditions arising out of the war time congestion in that city, furnishes an excellent case in point. This legislation, providing for limitations on rents and evictions, was sustained.[13] Yet it can scarcely be doubted that the same en-

[10a]Home Building and Loan Association v. Blaisdell, (U.S. 1934) 54 Sup. Ct. 231.

[11]United States constitution, art. 1, sec. 8.

[12]See Miller v. United States, (1871) 11 Wall. (U.S.) 268, 20 L. Ed. 135; Abrams v. United States, (1919) 250 U. S. 616, 40 Sup. Ct. 17, 63 L. Ed. 1173; Omnia Commercial Co., Inc. v. United States, (1923) 261 U. S. 502, 43 Sup. Ct. 437, 67 L. Ed. 773; Littlejohn and Co. v. United States, (1926) 270 U. S. 215, 46 Sup. Ct. 244, 70 L. Ed. 520.

[13]Block v. Hirsh, (1921) 256 U. S. 135, 41 Sup. Ct. 458, 65 L. Ed. 865. See also Marcus Brown Holding Co. v. Feldman, (1921) 256 U. S. 170, 41 Sup. Ct. 465, 65 L. Ed. 877; Levy Leasing Co. v. Siegal, (1922) 258 U. S. 242, 42 Sup. Ct. 289, 66 L. Ed. 595; Chastleton Corporation v. Sinclair, (1924) 264 U. S. 543, 44 Sup. Ct. 405, 68 L. Ed. 841; Wickersham, The Police Power and the New York Emergency Rent Laws, (1921) 69 U. of Pa. L. Rev. 301; Burdick, Constitutionality of the New York Rent Laws, (1921) 6 Corn. L. Q. 310.

actment would not have been upheld at certain other times; for example, 1913. In giving the opinion of the Court, Justice Holmes said:

"The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law. Plainly circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern."[14]

Later in the same opinion the justice said:

"The regulation is put and justified only as a temporary measure. A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change."[15]

Accordingly, businesses may be "affected with a public interest" at one time and not at another. For present purposes that statement may be taken as simply another way of saying that the due process clause in the fifth amendment furnishes less restraint on Congress under some conditions than under others. Correlatively it may be said that Congress has greater powers under some conditions than under others. Of course the same result is achieved with reference to the due process clause of the fourteenth amendment and state legislative powers.

The Supreme Court has not been generous in recent years in extending the category of "businesses affected with a public interest."[16] A federal district court, in the late case of *United States v. Calistan Packers*,[17] has indicated a far more liberal trend, due to present conditions. In the case, arising out of conditions in the peach canning industry, the Agricultural Adjustment Act was sustained as an exercise of the commerce power. The court stated, apparently with a touch of local pride, that ninety-nine and nine-tenths per cent of the national production of canned peaches for interstate and foreign commerce was packed in California. That, it must be admitted, is a goodly percentage even for California. After taking judicial notice of the existence of a national emergency and after reviewing the depressed condition of the peach industry, the court declared:

[14]Block v. Hirsh, (1921) 256 U. S. 135, 41 Sup. Ct. 458, 65 L. Ed. 865.

[15]Block v. Hirsh, (1921) 256 U. S. 135, 155, 157, 41 Sup. Ct. 458, 65 L. Ed. 865.

[16]New York State Ice Co. v. Liebmann, (1932) 285 U. S. 262, 52 Sup. Ct. 371, 76 L. Ed. 747; notes (1932) 32 Col. L. Rev. 913, (1932) 17 Corn. L. Q. 662, (1932) 30 Mich. L. Rev. 1277, (1932) 18 Va. L. Rev. 769. See ante note 5 and cases cited.

[17](D.C. Cal. 1933) 4 F. Supp. 660. See ante note 9.

"Under conditions such as these the court is bound to arrive at the conclusion that the peach industry is affected with a national public interest and that the Congress has the constitutional power to adopt appropriate legislation to cure these evils."[18]

This statement was made in meeting an attack under the due process clause of the fifth amendment. Whatever may be thought of its accuracy, it yet furnishes a striking judicial declaration of the effect of an emergency.

This effect is perhaps clearest in cases involving the limitations imposed by the due process clauses. Frequent illustrations have been presented in instances of state legislation challenged under the fourteenth amendment. In such cases the existence of legislative power to curtail earlier concepts of "liberty" and "property" in the interests of a present determination of the public good is thoroughly familiar.[19] The requirements of the public good are, of course, not constant but change with changing conditions, whether or not those changing conditions be dignified by being called emergencies.

Though possibly not so apparent, the similar effect of an emergency may be discerned in connection with the commerce clause. Congress has the power to remove obstructions from interstate commerce. Without delving here into the intricacies of what is and what is not an "obstruction" within the meaning of this principle, it will be readily apparent that all obstructions are not constant. That which is an actual obstruction, or readily capable of becoming one, at one time may be wholly innocuous at another. To say that Congress may meet the danger when it arises, but cannot regulate matters internal to the states on the basis of fanciful or imaginary difficulties to commerce, is but to say that the commerce power extends to that which may fairly be considered, with due concern for the limits of legislative discretion, to be the practical need. The validity of enactments will then change with the need. Whether the power supporting the particular legislation be described as an occasional power or as an emergency power within the limits of the general power over commerce, or how it be designated is not material. It is material, however, to scotch the notion,

[18](D.C. Cal. 1933) 4 F. Supp. 660, 661.

[19]See Laurel Hill Cemetery v. San Francisco, (1910) 216 U. S. 358, 30 Sup. Ct. 301, 54 L. Ed. 515; Hadacheck v. Los Angeles, (1915) 239 U. S. 394, 36 Sup. Ct. 143, 60 L. Ed. 348; Euclid v. Ambler Realty Co., (1926) 272 U. S. 365, 47 Sup. Ct. 114, 71 L. Ed. 303; Miller v. Schoene, (1928) 276 U. S. 272, 48 Sup. Ct. 246, 72 L. Ed. 568.

which uninformed discussion may breed, that emergency powers are apart from or above the constitution.

The commerce clause has sufficed to meet drastic emergencies in times past. Notable is the case of *Wilson v. New.*[20] Facing the prospect of a general strike among railway employees which would paralyze the transportation facilities of the country, Congress, under the guns, so to speak, passed the Adamson Act. The Act was sustained in the Supreme Court by the small margin of one vote. Here the inability of management and labor to agree threatened to furnish an obstruction which would almost completely dam the flow of commerce. Congress successfully removed the obstruction.

Chief Justice White, for the majority, argued that the power to regulate must involve the power to protect from destruction that which is to be regulated. The analogy between a paralyzing strike and a paralyzing depression as obstructions to the flow of commerce may be of more than passing interest. In the course of his opinion the Chief Justice said:

" . . . although an emergency may not call into life a power which has never lived, nevertheless emergency may furnish a reason for the exertion of a living power already enjoyed. If acts which, if done, would interrupt, if not destroy, interstate commerce may be by anticipation legislatively prevented, by the same token the power to regulate may be exercised to guard against the cessation of interstate commerce threatened by a failure of employers and employees to agree as to the standard of wages, such standard being an essential prerequisite to the uninterrupted flow of interstate commerce."[21]

The quotation is interesting as indicating that in that emergency the standard of wages was the obstruction which Congress could remove. True the standard applied to those engaged in the very core of interstate commerce, actual transportation. Yet it was the effectiveness of the obstruction and not its precise nature which seemed chiefly to impress the court.

The layman may be impatient of such distinctions, with reference to emergency powers. Yet emergency powers under the constitution are manifestly vastly different from such powers apart

[20](1917) 243 U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755. See Powell, The Supreme Court and the Adamson Law, (1917) 65 U. of Pa. L. Rev. 607. An interesting comment on the emergency which brought about the passage of the Adamson Act will be found in Daniels, American Railroads (1932) 83 ff.

[21]Wilson v. New, (1917) 243 U. S. 332, 348, 37 Sup. Ct. 298, 61 L. Ed. 755.

from or above the constitution. The former have limitations, both as to their extent and as to the agencies for their exercise, imposed by and in consequence of the instrument to which they owe their existence. True those limitations are not sharply defined, but they are none the less real. The latter would have no limitations. They are the negation of government under law, and, as declared by Justice Davis, must needs be productive of anarchy and despotism.

THE EXISTENCE OF LIMITATIONS UPON THE POWER OF CONGRESS TO EXCLUDE ARTICLES FROM INTERSTATE COMMERCE

An unlimited power in Congress to stop the movement of goods and persons between the states would obviously be sufficient to supply the means for the enforcement of the National Industrial Recovery Act. It would also provide a means of controlling most of the details of life in the United States. For business enterprises, except small industries of a local nature, the threat of exclusion from markets in other states would be sufficient to compel compliance with any requirement not immediately productive of bankruptcy. For most individuals, the denial of the right to leave the state would be an efficient penalty in coercing compliance with nearly any standard of conduct prescribed, so far as a standard of conduct can ever be coerced by penalties. For a state, the menace of an embargo on its products, or the exclusion of products of other states, would compel a reluctant cooperation with almost any course Congress cared to pursue.

Among the many problems presented by the commerce clause, few have furnished as much discussion as that of the existence or non-existence of limitations on the power of Congress to exclude goods and persons from interstate commerce, and of the nature of such limitations if any exist.[22] At least one such limitation, that of due process of law, has been recognized by the Supreme Court.[23]

[22]A most useful recent treatment is presented in Corwin, Congress's Power to Prohibit Commerce, A Crucial Constitutional Issue, (1933) 18 Corn. L. Q. 477. See also Biklé, The Commerce Power and Hammer v. Dagenhart, (1919) 67 U. of Pa. L. Rev. 21; Bruce, Interstate Commerce and Child Labor, (1919) 3 MINNESOTA LAW REVIEW 89; Cushman, National Police Power under the Constitution, (1919) 3 MINNESOTA LAW REVIEW 289, 381, 452; Powell, The Child Labor Law, the Tenth Amendment and the Commerce Clause, (1918) 3 So. L. Q. 175-202; Gordon, The Child Labor Law Case, (1918) 32 Harv. L. Rev. 45.

[23]Chicago, Rock Island and Pacific Ry. v. United States, (1931) 284 U. S. 80, 52 Sup. Ct. 87, 76 L. Ed. 177. Compare Adair v. United States, (1908) 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436.

A forceful declaration of broad powers in Congress is found in the notable dissent of Mr. Justice Holmes in the child labor case.[24] In particular, one sentence from that dissent may be quoted: "Regulation means the prohibition of something, and when interstate commerce is the matter to be regulated I cannot doubt that the regulations may prohibit any part of such commerce that Congress sees fit to forbid."[25]

It is clear, and need not be argued today, that the framers of the constitution did not plan to confer a general power on Congress to regulate the minute details of life throughout the United States.[26] If they achieved this result by indirection, they builded differently than they knew. Whether they builded better or not will be a matter on which opinion may well be divided. If the power was granted, the history of this nation has from the first been marked by a singular lack of understanding of the fundamental document of its government. "No political dreamer," declared Marshall, "was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass."[27] Again, the hornbrook assertion that the federal government is one of enumerated powers and that it can exercise only the powers granted to it[28] is thoroughly deceptive, if by direction or indirection it can control all of the details of life within the United States. If, in effect, all powers were delegated, the tenth amendment is a gross delusion.[29]

[24]Hammer v. Dagenhart, (1918) 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101.

[25]Hammer v. Dagenhart, (1918) 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101.

[26]"The constitution was, from its very origin, contemplated to be the frame of a national government, of special and enumerated powers, and not of general and unlimited powers." Story, Commentaries on the Constitution, 5th ed. p. 663. See Kansas v. Colorado, (1907) 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956; Cushman, National Police Power under the Constitution, (1919) 3 MINNESOTA LAW REVIEW 289, 290 ff. Compare Corwin, Congress's Power to Prohibit Commerce, A Crucial Constitutional Issue, (1933) 18 Corn. L. Q. 477, 481 ff.

[27]McCulloch v. Maryland, (1819) 4 Wheat. (U.S.) 316, 403, 4 L. Ed. 579.

[28]"This government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments. . . . That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist." Marshall, C. J., in McCulloch v. Maryland, (1819) 4 Wheat. (U.S.) 316, 405, 4 L. Ed. 579.

[29]Constitution of the United States, tenth amendment. "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

It cannot be doubted that Congress can exclude from commerce that which is immediately dangerous or injurious to such commerce as, for example, dynamite improperly packed.[30] The simplest protection of commerce demands as much. This is quite a different type of exclusion from that relating to certain small bits of cardboard, whose only value depends upon the numbers printed upon them. And this is true even though in an extravagant outburst of righteousness the Court could speak of interstate commerce as being "polluted" by lottery tickets.[31] It is, again, quite a different type of exclusion from that designed to compel some standard of conduct with reference to articles before they are shipped.[32] Further, it differs from exclusion, irrespective of the nature of the thing excluded, as a penalty to render effective any policy desired. It may be urged that these differences relate primarily to the purpose of Congress and that the purpose of Congress in the exercise of its powers is beyond judicial inquiry. If any exclusion is to be held invalid, it will be because of limitations in the constitution. It will not be necessary to inquire into the "purpose" of Congress, except in so far as purpose is used to mean fairly contemplated effect.

The *Lottery Case*[33] and its successors have been so often discussed[34] that one hesitates to pass them in review again. However, their importance is such that a brief reference to them must be made.

The Court was gravely troubled by the *Lottery Case*. The case was argued three times, and the act, prohibiting the sending of lottery tickets through interstate commerce, was finally sustained by a vote of five to four. The majority found that the transmission of lottery tickets from state to state was interstate commerce and that the power to regulate included this prohibition. The Act was further looked upon as being an aid to rather than an invasion of the police powers of the states. It protected states desiring to suppress lotteries from being flooded from without the state. Any state which favored lotteries would doubtless find local enterprise, ready, willing and able to carry them on.

[30]See 14 Stat. at L. 81.

[31]The Lottery Case, (1903) 188 U. S. 321, 356, 23 Sup. Ct. 321, 47 L. Ed. 492.

[32]Hammer v. Dagenhart, (1918) 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101.

[33](1903) 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492.

[34]See supra. n. 22.

Shortly after the passage of the lottery statute, Congress forbade the sending of "obscene" literature through interstate commerce.[35] Subsequently the same prohibition was applied to wild game illegally killed.[36] Both statutes were sustained in the federal courts.[37] The "Pure Food Act" of 1906 denied the facilities of interstate commerce to adulterated or misbranded foods and drugs.[38] With scant question the validity of this act was sustained.[39]

Later the Court upheld the "Mann Act"[40] prohibiting the transportation of women in interstate commerce for purposes of prostitution or for any other immoral purpose.[41] Next the Congressional interdict upon the importation of opium was allowed.[42] By act of 1912, prize fight films and pictures were excluded from interstate and foreign commerce.[43] This statute was attacked with reference to foreign commerce and successfully met the test.[44] In this group of cases there should also be included the Webb Kenyon Act,[45] superseding the earlier Wilson Act,[46] and prohibiting the transportation of intoxicating liquor from one state into another state in violation of any law of the latter state. The act, which was sustained,[47] presents the feature of a prohibition dependent upon and in accord with state law. Subsequently, in the Reed "Bone Dry" Amendment,[48] the prohibition was successfully carried beyond the limits of state law.[49]

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[35]29 Stat. at L. 512.

[36]31 Stat. at L. 188. The test of the legality of the killing was supplied by the game laws of the several states.

[37]United States v. Popper, (D.C. Cal. 1899) 98 Fed. 423 (obscene literature). This decision was cited with approval in Hoke v. United States, (1913) 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed. 523. Rupert v. United States, (C.C.A. 8th Cir. 1910) 181 Fed. 87 (game illegally killed).

[38]34 Stat. at L. 768.

[39]Hippolite Egg Co. v. United States, (1911) 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364.

[40]36 Stat. at L. 825.

[41]Hoke v. United States, (1913) 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed. 523.

[42]Brolan v. United States, (1915) 236 U. S. 216, 35 Sup. Ct. 285, 59 L. Ed. 544.

[43]37 Stat. at L. 240.

[44]Weber v. Freed, (1915) 239 U. S. 325, 36 Sup. Ct. 131, 60 L. Ed. 308; United States v. Johnson, (D.C. N.Y. 1916) 232 Fed. 970.

[45]37 Stat. at L. 699.

[46]26 Stat. at L. 313.

[47]Clark Distilling Co. v. Western Maryland Ry. Co., (1917) 242 U. S. 311, 37 Sup. Ct. 180, 61 L. Ed. 326.

[48]39 Stat. at L. 1058, 1069.

[49]United States v. Hill, (1919) 248 U. S. 420, 39 Sup. Ct. 143, 63 L. Ed. 337.

These cases of Congressional prohibition of interstate commerce present a record of complete consistency. The Court seemed able to proceed almost mechanically with the general ideas that interstate movement was interstate commerce, that regulation included prohibition, and that the reasons which motivated Congress, at least in the cases presented, were not within the purview of the Court. Yet this smooth course of decision was abruptly interrupted.

The federal statute before the Court in the child labor case prohibited any producer, manufacturer or dealer from shipping in interstate commerce the product of any mine, quarry or factory in which, within thirty days prior to the removal of the product therefrom, children had been employed.[50] By a vote of five to four the statute was held invalid.[51]

The view of the majority, briefly stated, was that the statute in question was a prohibition of commerce and hence not a regulation, and that it was, in effect, a regulation of manufacturing which was internal to the states and not a part of interstate commerce. In distinguishing the preceding cases reliance was had upon ideas which may best be stated in two sentences from the opinion of the Court.

"They [the earlier cases] rest upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national, possessed over them is such that the authority to prohibit is as to them but the assertion of the power to regulate."[52] "In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results."[53]

The Court saw in the instant case a contrast with those preceding it in that the goods were harmless[54] and the evil of child labor on the goods was complete before interstate commerce began.[55]

The first statement intermingles state and federal power at the moment at which the Court was seeking to differentiate them.

[50]39 Stat. at L. 675. The minimum age for employment in a mine or quarry was sixteen years. In a factory the minimum was fourteen years.

[51]Hammer v. Dagenhart, (1918) 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101.

[52]Hammer v. Dagenhart, (1918) 247 U. S. 251, 270, 38 Sup. Ct. 529, 62 L. Ed. 1101.

[53]Hammer v. Dagenhart, (1918) 247 U. S. 251, 271, 38 Sup. Ct. 529, 62 L. Ed. 1101.

[54]Hammer v. Dagenhart, (1918) 247 U. S. 251, 272, 38 Sup. Ct. 529, 62 L. Ed. 1101.

[55]Compare Brooks v. United States, (1925) 267 U. S. 432, 45 Sup. Ct. 345, 69 L. Ed. 699.

It also distinguishes between bad articles and good articles and assumes that the Court is ultimately to determine whether the articles are good or bad. This implies the application of the test of due process of law, as that limitation has been developed in certain instances of state legislation challenged under the fourteenth amendment.

The second basis of distinction fails to give consideration to the rather obvious fact that the extra-state market was in large measure necessary for the continued exploitation of child labor. In this sense, the use of interstate commerce was necessary to the harmful result. However, this harm was in the state of origin of the goods shipped, which state could protect itself from the evil. In other cases the harm was in the state of destination, which was normally unable to exclude the harm-producing goods. The distinction here drawn might be taken to mean, as before, that Congress may exclude "bad" goods from interstate commerce, but with the added idea that "badness" is to be ascertained with reference to the harm likely to ensue in the state or states of destination. Since the states are not allowed to protect themselves from such harm-producing goods, it is only fair that Congress should be able to protect them. The helplessness of the states and the value of federal cooperation are more apparent in cases where the state had acted, as in the case of liquor prohibition. There the state has determined the existence of the evil. While Congress may determine what is evil independently of state decision, its determination is fortified morally, at least, by state concurrence.

In dealing with harm to the states of destination, the Court explicitly refused to consider the effect of competition from child-made goods on industries in states prohibiting child labor. Harm to the state of destination resulting from unfair competition in the state of origin was expressly declared to be beyond the power of Congress to eliminate. It would be useful to have comprehensive figures on which some conclusion might be based as to the extent of this harm. Conceivably, the employment of child labor gave but slight competitive advantage in the markets of other states. If the advantage were so great as to be ruinous or seriously detrimental to competitors, the Court might not have been willing to treat it so lightly.

Since the failure of the child labor statute, Congress has en-

acted measures closing interstate commerce to automobile thieves[56] and to kidnappers.[57] Popular sentiment has applauded the use of the long arm of the federal government in seizing these criminals. Common consent does not connote constitutionality. Yet these statutes, however considered, can scarcely be deemed inconsistent with the principles laid down in the child labor case. That opinion recognized the existence of a power in Congress to forbid the use of interstate commerce as a means in the achievement of harmful or illegal results, at least in the state or states of destination. It refused to include in this power exclusion designed to prevent such harmful results as might flow from "possible unfair competition." This limitation had no bearing on the subsequent statutes. The acts at which they are aimed are detested crimes in all states, and the harm exists in the states of destination as well as in those of origin.

A word may be said by way of conclusion in this phase of the present note. The expression "a regulation of interstate commerce" is used without careful discrimination in what may be termed a factual sense and again as a conclusion of law. It can scarcely be denied that in one sense the statute in the child labor case was a regulation of interstate commerce. It prescribed a rule dealing with such commerce. The minority accordingly saw in the statute such a regulation. On the other hand, the majority could say: "The Act in its effect does not regulate transportation among the states. . . " The conclusion of the majority that the act was not a regulation of interstate commerce within the meaning of the constitution was a determination of law, a statement of result.

The commerce clause is limited by the due process clause of the fifth amendment.[58] It would also seem to be limited by other clauses, such as the guarantee of freedom of speech and of the press, etc. Likewise, constitutional limitations need not stand in the express terms of a specific provision, but may exist by reason of the cumulative effect of several provisions.[59] In groping for

[56]41 Stat. at L. 324. See Brooks v. United States, (1925) 267 U. S. 432, 45 Sup. Ct. 345, 69 L. Ed. 699.

[57]June 22, 1932, 47 Stat. at L. ch. 271. See also Hawes-Cooper Act, 45 Stat. at L. 1084; Davis, The Hawes-Cooper Act is Unconstitutional, (1930) 23 Lawyer and Banker 296.

[58]Supra, n. 23.

[59]An excellent illustration of this is to be found in cases dealing with federal taxation directly affecting or burdening the governmental instrumentalities of a state. The power to tax is granted in general terms, yet

constitutional theory, it seems fair to describe the statute in the child labor case as a regulation of interstate commerce, in the sense that it prescribed a rule dealing with such commerce, but to explain its failure on the ground that it was deemed to transcend certain constitutional limitations. The Court patently had in mind two limitations: the due process clause of the fifth amendment, and the principle, variously described, which asserts that the constitution contemplates the continued existence of the states, not simply by the grace of Congress, but by reason of powers not granted to the central government.[60]

It may be argued that in simple logic the latter proposition has no bearing here. The powers not delegated to the United States, nor prohibited to the states, are reserved to the states or to the people. The power to regulate commerce is expressly delegated. Accordingly, it cannot be affected by the invocation of reserved powers. Yet the answer must be equally clear. The power to regulate commerce cannot be so construed that by direction or indirection it swallows all powers which might be left to the states. To allow this is to give that power a broader meaning than could ever have been intended. The method ascribed to simple logic may be deceptive here in that it assumes a certainty and rigidity in the determination of a "regulation of interstate commerce" which cannot be had. It is necessary to consider other parts of the constitution. The same argument might equally well have been used in the tax cases, yet limitations on the power to levy taxes are clear.[61]

limitations on the use of that power so far as it affects the governmental activities of the states are thoroughly established. Collector v. Day, (1870) 11 Wall. (U.S.) 113, 20 L. Ed. 122; Indian Motorcycle Co. v. United States, (1931) 283 U. S. 570, 51 Sup. Ct. 601, 75 L. Ed. 1277. Thus the grant of power to Congress in the sixteenth amendment "to lay and collect taxes on income, from whatever source derived" does not include the power to collect income taxes from regularly employed state governmental officials. Frey v. Woodworth (D.C. Mich. 1924) 2 F. (2d) 725. See Magill, Tax Exemption of State Employees, (1926) 35 Yale L. J. 956; Cohen and Dayton, Federal Taxation of State Activities, (1925) 34 Yale L. J. 807. With reference to this constitutional immunity Chief Justice Hughes has recently said: "It is a principle implied from the necessity of maintaining our dual system of government." Board of Trustees of the University of Illinois v. United States, (1933) 289 U. S. 48, 59, 53 Sup. Ct. 509, 77 L. Ed. 1025.

[60]Supra, n. 59.

[61]Ibid. In Board of Trustees of the University of Illinois v. United States, (1933) 289 U. S. 48, 57, 53 Sup. Ct. 509, 77 L. Ed. 1025, Chief Justice Hughes said: "The principle of duality in our system of government does not touch the authority of Congress in the regulation of foreign commerce." It will be observed that this is limited to foreign commerce. The

A chief justice of the United States has declared: "The constitution, in all of its provisions, looks to an indestructible Union, composed of indestructible states."[62] It surely has never contemplated states whose every act might be controlled and whose very existence as political units might be snuffed out by Congress. Yet these results may be accomplished by an unlimited power to control movement into and out of the states. If the suggestion sounds like the fanciful creation of a hobgoblin, fit only to scare children, it should be answered that this discussion is directed to power and not to probabilities of its abuse.

The Court seems to have felt in the child labor case that a line had to be drawn somewhere shortly, or the dual structure of our government would have been completely changed by the gradual process of legislative and judicial erosion. Whether the Court made a happy choice of a place for drawing the line may be seriously questioned. But the writer does not question the political wisdom of or the constitutional sanction for drawing a line such as will leave, as of right, some substantial autonomy to the states. In other words, he cannot subscribe to the idea that Congress has a blanket authority to prohibit interstate commerce, irrespective of its effect upon state governments.

In the application of this limitation the Court must work out some balance between the value of state autonomy on one side and the value of the elimination of friction caused by the various systems of state law on the other. The latter entails enforced state non-interference in certain instances. The Court may well ask itself two questions. (1) How important is it to the several states that each be allowed to handle this situation within its own borders? (2) How important is it to the several states that no state be allowed to be a free lance in the matter? There must be the further question constantly in mind: What effect is to be given to the fact of Congressional determination?

The query may here be made whether the answer to the two questions stated, so far as economic life is concerned, may not be fairly resolved in terms of interstate commerce. That is to say,

power to regulate foreign commerce cannot possibly present the means of controlling matters internal to the states, such as may be presented by a sweeping construction of the power to regulate interstate commerce. See constitution of the United States, article I, sec. 9: "No preference shall be given by any regulation of commerce or revenue to the parts of one state over those of another."

[62]Chase, C. J., in Texas v. White, (1868) 7 Wall. (U.S.) 700, 725, 19 L. Ed. 227.

any matter as to which independent and uncontrolled action by a state or its people will work serious consequences upon the economic life of other states, out of proportion to the benefits to the states of action, may be said to be interstate commerce or so to affect it as to come within the federal power. Federal power, under this approach, depends upon the idea of "a current of commerce" and not upon any blanket authority in Congress to stop interstate movement whenever it wills.

A wise principle of the division of power between the states and nation was declared in the first of the commerce cases,[63] was rediscovered and stated in altered form in *Cooley v. Board of Wardens,*[64] and has been the constant background of the development of the subject. Powers which "can be most advantageously exercised by the states" are to be left with the states. The cases will not support the idea that what is left to the states is *entirely* due to the forbearance of Congress.

The Current of Commerce

The National Industrial Recovery Act does not require a blanket power in Congress to prohibit interstate commerce. A more substantial basis for the Act may readily be invoked. In turning to the expansive idea of the power of Congress over the current of commerce—the course of trade—it will be well to start with a meaning of the familiar term "interstate commerce." In the light of the opinions of the United States Supreme Court, interstate commerce may be fairly described as movement, subject, at least in part, to human direction or control, which movement starts in one state and continues into another.[65]

[63]Gibbons v. Ogden, (1824) 9 Wheat. (U.S.) 1, 203, 6 L. Ed. 23.

[64](1851) 12 How. (U.S.) 299, 13 L. Ed. 996.

[65]As early as Railroad Company v. Husen, (1887) 95 U. S. 465, 470, 24 L. Ed. 527, the Court said: "Transportation is essential to commerce or rather is commerce itself." See also Covington Bridge Co. v. Kentucky, (1893) 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962; International Text Book Co. v. Pigg, (1910) 217 U. S. 91, 107, 30 Sup. Ct. 481, 54 L. Ed. 678; The Pipe Line Cases, (1913) 234 U. S. 548, 34 Sup. Ct. 956, 58 L. Ed. 1459; United States v. Hill, (1919) 248 U. S. 420, 39 Sup. Ct. 143, 63 L. Ed. 337; United States v. Simpson, (1920) 252 U. S. 465, 40 Sup. Ct. 364, 64 L. Ed. 665; (1918) 27 Yale L. J. 808; (1919) 28 Yale L. J. 836; (1919) 17 Mich. L. Rev. 708; (1923) 9 Va. L. Rev. 296.

The human direction or control may be far from complete, as in the case of logs floating down a turbulent stream. Yet human connection with the movement seems to be an essential element. See Thornton v. Wood, (1926) 271 U. S. 414, 425, 46 Sup. Ct. 585, 70 L. Ed. 1013; (1927) 21 Ill. L. Rev. 636.

The type of movement initially considered by the Court was some more or less specific activity of navigation or transportation. The first case involved the operation of steamboats on the waters of New York.[66] But with the industrial development of the Nation, movement was considered as well in a far broader signification, and in this meaning it was still referred to in terms of commerce. Accordingly the expression "a current of commerce" has been used to designate a general course of traffic across the country. Reference was had to a "current of commerce" of meats through the Chicago stockyards,[67] and to a similar current of grain through the great grain elevators.[68] It was naturally conceived that the power to regulate commerce involved the power to deal with this current. The current was but the commerce, broadly viewed, of which the constitution spoke.

The stockyard cases will furnish useful illustrations. The Court has declared that the case of *Swift and Company v. United States*[69] presented "a milestone in the interpretation of the commerce clause."[70] The case is notable for an explicit declaration of the idea here considered and for its application to the facts presented. In giving the opinion of the Court, Justice Holmes said:

"Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business."[71] Continuing from this he referred to the movement of cattle from the plains through the great stockyards and into other states as a "current of commerce among the states." Under the circumstances presented, the purchase and sale of cattle in the stockyards comprised a vital link in a customary and established series of transactions which might fairly be said to have its beginning on the plains of the West and its end in the homes of the East. Thus Congress was allowed to deal with such sales, although, on the surface, they were wholly intra-state matters.

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[66]Gibbons v. Ogden, (1824) 9 Wheat. (U.S.) 1, 208, 6 L. Ed. 23.

[67]Swift and Company v. United States, (1905) 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518. Compare Minnesota v. Blasius, (U.S. 1933) 54 Sup. Ct. 34.

[68]See Lemke v. Farmers' Grain Co., (1922) 258 U. S. 50, 42 Sup. Ct. 244, 66 L. Ed. 458.

[69](1905) 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518.

[70]Chicago Board of Trade v. Olsen, (1923) 262 U. S. 1, 35, 43 Sup. Ct. 470, 67 L. Ed. 839.

[71]Swift and Company v. United States, (1905) 196 U. S. 375, 398, 25 Sup. Ct. 276, 49 L. Ed. 518.

The Court reiterated this view later, with reference to the same subject, saying, in *Stafford v. Wallace*:[72]

"The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incidents to this current from the West to the East, and from one State to another. Such transactions cannot be separated from the movement to which they contribute and necessarily take on its character. . . . The sales are not in this aspect merely local transactions."[73]

The evils dealt with in the stockyard cases were monopolistic and unfair trade and business practices which obstructed the flow of commerce among the states. The cases admitted the existence of the power in Congress to control such practices. And this was true even though the practices, isolated and individually considered, were activities wholly within the boundaries of a state and not parts of the physical process of movement. The extent of this power was well illustrated in a late case.[74] The money element in contracts, and particularly in those contracts relating to personal services, has in times past often been treated as if it had a peculiar sanctity and exemption from legislative interference.[75] Yet the Court sustained the regulation, under an Act of Congress, of commissions charged by live stock brokers for selling stock in a great stockyard, though these brokers employed but little property and their charges were primarily compensation for their individual labors.

The broad power of Congress to foster interstate commerce and to remove obstructions from its course is familiar. The question may be suggested here as to the nature of an obstruction within the meaning of this statement. With the expansion of the idea of commerce to include a course of traffic or trade there must come an expansion of ideas as to what constitutes a clog on such commerce. The more extensive the subject, the greater will be the possible varieties of interference. Since commerce is to be considered as more than any specific act of movement, it is not necessary that an interference relate to any such specific act.

[72](1922) 258 U. S. 495, 515, 516, 42 Sup. Ct. 397, 66 L. Ed. 735.

[73]This is quoted with approval in Chicago Board of Trade v. Olsen, (1923) 262 U. S. 1, 34, 35, 43 Sup. Ct. 470, 67 L. Ed. 839.

[74]Tagg Brothers v. United States, (1930) 280 U. S. 420, 50 Sup. Ct. 220, 74 L. Ed. 524.

[75]Adkins v. Children's Hospital, (1923) 261 U. S. 525, 43 Sup. Ct. 394, 67 L. Ed. 785; Tyson and Bro. v. Banton, (1927) 273 U. S. 418, 47 Sup. Ct. 426, 71 L. Ed. 718; Ribnik v. McBride, (1928) 277 U. S. 350, 48 Sup. Ct. 545, 72 L. Ed. 913.

Thus Congress could punish the forging of bills of lading.[76] To the defense that the bills, being false and representing no goods, were beyond the power of Congress, since the transportation of goods was not involved, it was properly answered that interstate commerce would be weakened by the unrestrained right to fabricate spurious bills of lading. Again in considering what constitutes an obstruction the Court has declared:

"Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent."[77]

As against the broadening stream of commerce it is asserted that certain types of activity, such as production, have been declared not to be interstate commerce. Thus the Court has stated:

"Commerce succeeds to manufacture and is not a part of it."[78] However, since practical considerations are to control, it is clearly dangerous to isolate any activity and to declare that it is not interstate commerce if by that statement it is meant that under no conditions can Congress deal with it. The activity and the regulation in question must be taken together and in the light of the particular conditions. Thus viewed, the regulation may be deemed useful to the flow of commerce. In such case the activity dealt with will be called a part of the current of interstate commerce or intimately connected with it. An effort to determine whether it is properly placed with the former or the latter will be unfruitful so far as federal power is concerned.

The broad sweep of the current of commerce may be admitted without implying that the current is all-inclusive. Though the boundaries are vague, and though they fluctuate, it does not follow that they are nonexistent. It may prove convenient to classify businesses in three groups: (1) those which are engaged in interstate commerce; (2) those which are engaged in intra-

[76]United States v. Ferger, (1919) 250 U. S. 199, 39 Sup. Ct. 445, 63 L. Ed. 936.

[77]Stafford v. Wallace, (1922) 258 U. S. 495, 521, 42 Sup. Ct. 397, 66 L. Ed. 735.

[78]United States v. E. C. Knight Co., (1895) 156 U. S. 1, 12, 15 Sup. Ct. 249, 39 L. Ed. 325. See Kidd v. Pearson, (1888) 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346; Interstate Commerce Commission v. Goodrich Transit Co. (1912) 224 U. S. 194, 216, 32 Sup. Ct. 436, 56 L. Ed. 729.

state commerce but which materially affect interstate commerce; and (3) those which are engaged in intrastate commerce without materially affecting interstate commerce.[79]

Where Congress regulates that which is apparently an intrastate activity, the regulation may find justification under the commerce clause on one of two grounds: (1) that under the circumstances in question the activity is in fact a part of the current of commerce, in which case it would properly fall within the first group mentioned; or, (2) that the activity though intrastate furnishes an obstruction to interstate commerce. Differentiation between the two will often be difficult. In view of the fact that the test of federal power over the activity regulated is the existence of a material relation between the activity and interstate commerce, the differentiation is, of course, not determinative of that power. However, the classification will prove convenient in examining the basis of the federal power.

Local enterprises will often be in direct competition with those engaged in interstate commerce. Where the latter are subject to stringent regulations, from which the former are exempt, interstate commerce manifestly may suffer. If a burden is thereby created, Congress may remove it by subjecting the intrastate competitor to similar regulations. This result seems to be well within the decided cases.[80]

It is hard to conceive of an industry or activity which does not in some way affect interstate commerce. If a man plants a patch of potatoes in his back yard, he may feel reasonably assured that he is engaged in a purely local enterprise. Yet the more food produced locally, the less will be brought into and the more sent out of the state. The patch of potatoes has an influence—slight, it is true—on the movement of food supplies. If every activity which bears any discernible relation to interstate commerce is subject to federal control, the commerce power has become all-embracing. Congress could require a federal license for the planting of a patch of potatoes.

The determining factor must be said to lie in the materiality

[79]See (1933) 47 Harv. L. Rev. 90.

[80]See Houston, E. and W. Texas Ry. v. United States, (1914) 234 U. S. 342, 34 Sup. Ct. 833, 58 L. Ed. 1341; Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co., (1922) 257 U. S. 563, 42 Sup. Ct. 232, 66 L. Ed. 371; Alabama v. United States, (1929) 279 U. S. 229, 49 Sup. Ct. 266, 73 L. Ed. 675; Coleman, The Evolution of Federal Regulation of Intrastate Rates: The Shreveport Rate Cases, (1914) 28 Harv. L. Rev. 34.

of the relation between the activity regulated and interstate movement and not merely in the fact that there is some discernible connection.[81] Accordingly it would appear, in the light of past decisions,[82] that certain local businesses can not be brought within the compulsory features of the National Industrial Recovery Act. These businesses will be of a small and restricted nature. Some obvious examples may be named, such as the barber shop, the bootblacking establishment, the pressing shop, etc. Quite recently a Federal court has refused to apply the Act to a cleaning and dyeing establishment.[83]

One further observation should be made. It may be argued that regulations which increase employment—even in such small matters as causing two bootblacks to work where one worked before—increase prosperity and promote interstate commerce and accordingly come within the scope of federal action. It must be answered, however, that under such a construction the commerce clause has ceased to hold its former meaning as a specific grant of power. Congress would have the power to pass any laws which it believed conducive to the public good. It is, of course, possible that the nation would be better off. Yet it is suggested that it would be a wiser policy, as it would certainly be a fairer use of language, to accomplish this change by a constitutional amendment rather than by reading the commerce clause as if it were written: "Congress shall have power to provide for the general welfare."

In conclusion it may be said that the commerce power of Congress has been fairly and wisely construed to extend to the broad course of traffic among the states and with foreign nations. Congress may foster and protect this "current of commerce" and prohibit those activities which obstruct or interfere with it. This has been done even to the point of fixing the return for personal

[81]See United States v. DeWitt, (1870) 9 Wall. (U.S.) 41, 19 L. Ed. 545; Trade Mark Cases, (1879) 100 U. S. 82, 25 L. Ed. 550; Illinois Central R. v. McKendree, (1906) 203 U. S. 514, 27 Sup. Ct. 153, 51 L. Ed. 298; The Employers Liability Cases, (1908) 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297; Adair v. United States, (1908) 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436; Keller v. United States, (1909) 213 U. S. 138, 29 Sup. Ct. 470, 53 L. Ed. 737; Hammer v. Dagenhart, (1918) 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101; Florida v. United States, (1931) 282 U. S. 194, 51 Sup. Ct. 119, 75 L. Ed. 291; Levering and Garrique Co. v. Morrin, (1933) 289 U. S. 103, 53 Sup. Ct. 549, 77 L. Ed. 1062.

[82](1933) 47 Harv. L. Rev. 90.

[83]Purvis v. Bazemore, (D.C. Fla. Dec. 2, 1933). Compare Victor v. Ickes, (D.C. Sup. Ct. Dec. 1, 1933); Stevens v. Black and White Cleaners and Dyers Corp., (N.J. Ch. 1933).

services. The whole commerce of this country consists of a number of these currents, intermingled in a myriad of ways. Here the whole is at least equal to the sum of its parts, and so far as federal power is concerned it may appear to be greater. Lest this observation invite the ridicule of those who insist upon the rules of addition, it should be explained that a unified and comprehensive scheme of regulation may meet the test of constitutionality, even though certain specific provisions in the scheme, if taken alone, would fail. And finally, though the current is vast, there are some local enterprises which can scarcely be included within its limits. These, however, can have but small influence on the effectiveness of the National Industrial Recovery Act.