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The Problems of Yesteryear -- Commerce and Due Process

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THE PROBLEMS OF YESTERYEAR—COMMERCE AND DUE PROCESS

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Less than fifteen years ago, there were constitutional problems important enough to stir the country, to threaten the sanctity of the Supreme Court. These were the culmination of at least three decades of judicial controversy, in which the pressure of events brought criticism of the Court's decisions, both in noteworthy dissenting opinions and outside, to a new height. Fifteen years later, there still are difficult and important constitutional problems, and there still is criticism of the Supreme Court's decisions—though on a relatively minor scale. But the issues which rocked more than the legal world in the 1930's and in the period preceding have disappeared. A glance backwards to see what happened to them may help give perspective to the significance of the problems of the current day.

The crucial issue prior to 1937 was whether the Constitution prohibited government—state and Federal—from interfering with the free play of economic forces (outside of the field of public utilities)—no matter how great the public need. Federal legislation dealing with other phases of national or interstate industry than transportation was on important occasions found to invade the powers reserved to the states.[1] State laws were frequently found invalid because they impinged on the field of interstate commerce committed by the Constitution to the Federal Congress.[2] And the due process clauses of the Fifth and Fourteenth Amendments were held to bar both state and federal governments from regulating such economic factors as prices, wages, and labor relations in businesses "not affected with a public interest."[3]

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1. Carter v. Carter Coal Co., 298 U.S. 238, 56 Sup. Ct. 855, 80 L. Ed. 1160 (1936); United States v. Butler, 297 U.S. 1, 56 Sup. Ct. 312, 80 L. Ed. 477 (1936); Railroad Retirement Board v. Alton R.R., 295 U.S. 330, 55 Sup. Ct. 758, 79 L. Ed. 1468 (1935); Schechter Corp. v. United States, 295 U.S. 495, 55 Sup. Ct. 651, 79 L. Ed. 1570 (1935); United Mine Workers v. Coronado Coal Co., 259 U.S. 344, 42 Sup. Ct. 570, 66 L. Ed. 975 (1922); Hammer v. Dagenhart, 247 U.S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101 (1918); Hopkins v. United States, 171 U.S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290 (1898); United States v. E. C. Knight Co., 156 U.S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325 (1895).

2. *E.g.*, DiSanto v. Pennsylvania, 273 U.S. 34, 47 Sup. Ct. 267, 71 L. Ed. 524 (1927); Leisy v. Hardin, 135 U.S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128 (1890). The cases up to 1932 are collected in GAVIT, THE COMMERCE CLAUSE 551-56, Appendix E (1932).

3. Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 56 Sup. Ct. 918, 80 L. Ed. 1347 (1936); New State Ice Co. v. Liebmann, 285 U.S. 262, 52 Sup. Ct. 371, 76 L. Ed. 747 (1932); Williams v. Standard Oil Co., 278 U.S. 235, 49 Sup. Ct. 115, 73 L. Ed. 287 (1929); Ribnik v. McBride, 277 U.S. 350, 48 Sup. Ct. 545, 72 L. Ed. 913 (1928); Tyson & Brother v. Banton, 273 U.S. 418, 47 Sup. Ct. 426, 71 L. Ed. 718 (1927); Adkins v. Children's Hospital, 261 U.S. 525, 43 Sup. Ct. 394, 67 L. Ed. 785 (1923); Charles Wolff

There were, of course, cases which ran counter to these general trends[4] and which seemed to offer hope that the Court would relax its restrictions. But as late as 1936 the Court was still holding that labor relations in the coal industry only affected interstate commerce "indirectly," and therefore were not subject to the power of Congress,[5] that the amount of cotton produced in the United States was only of local concern and therefore not subject to federal control;[6] and that the fixing of minimum wages for women violated the due process clause.[7] These decisions, and the doctrines for which they stand, now seem antediluvian. Although they hardly can be said to be of great antiquity, they have a much less modern ring and infinitely less authority than *Gibbons v. Ogden*,[8] decided in 1824.

As all who remember the spring of 1937 in the Supreme Court will recall, the great reversal in constitutional adjudication took place prior to any change in the personnel of the Court—shortly after President Roosevelt announced his plan to add six new Justices to the Supreme Court. This is not the occasion to explore the details of that fascinating period, a story which has often been told elsewhere.[9] Suffice it to say that as new Justices began ascending the bench during the following terms, the principles of the 1937 decisions came to be firmly entrenched. The four original dissenters—Justices Van Devanter, Sutherland, Butler, and McReynolds—were quickly reduced to the latter two by voluntary retirement, and then to none. And although the new Court in turn has divided into groups sometimes labeled—accurately or inaccurately—as "conservative" and "liberal," there has seldom been any difference of opinion as to any of the old fighting issues. For a time, cases requiring interpretation of the doctrines finally accepted in 1937 continued to reach the Court. These cases enabled the Court to flesh out the

Packing Co. v. Court of Industrial Relations, 262 U.S. 522, 43 Sup. Ct. 630, 67 L. Ed. 1103 (1923); Adams v. Tanner, 244 U.S. 590, 37 Sup. Ct. 662, 61 L. Ed. 1336 (1917); Coppage v. Kansas, 236 U.S. 1, 35 Sup. Ct. 240, 59 L. Ed. 441 (1915); Adair v. United States, 208 U.S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436 (1908); Lochner v. New York, 198 U.S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937 (1905).

4. *Commerce cases:* Local 167 v. United States, 291 U.S. 293, 54 Sup. Ct. 396, 78 L. Ed. 804 (1934); Coronado Coal Co. v. United Mine Workers, 268 U.S. 295, 45 Sup. Ct. 551, 69 L. Ed. 963 (1925); Chicago Board of Trade v. Olsen, 262 U.S. 1, 43 Sup. Ct. 470, 67 L. Ed. 839 (1923); Stafford v. Wallace, 258 U.S. 495, 42 Sup. Ct. 397, 66 L. Ed. 735 (1922); Standard Oil Co. v. United States, 221 U.S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619 (1911); Swift & Co. v. United States, 196 U.S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518 (1905). *Due process cases:* Nebbia v. New York, 291 U.S. 502, 54 Sup. Ct. 92, 78 L. Ed. 940 (1934); O'Gorman & Young v. Hartford Fire Ins. Co., 282 U.S. 251, 51 Sup. Ct. 130, 75 L. Ed. 324 (1931); Texas & New Orleans R.R. v. Brotherhood of Railway Clerks, 281 U.S. 548, 50 Sup. Ct. 427, 74 L. Ed. 1034 (1930).

5. Carter v. Carter Coal Co., 298 U.S. 238, 56 Sup. Ct. 855, 80 L. Ed. 1160 (1936).

6. United States v. Butler, 297 U.S. 1, 56 Sup. Ct. 312, 80 L. Ed. 477 (1936).

7. Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 56 Sup. Ct. 918, 80 L. Ed. 1347 (1936).

8. 9 Wheat. 1, 6 L. Ed. 23 (1824).

9. *E.g.*, JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941); Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645, 883 (1946).

content of the newly accepted—if not newly invented[10]—doctrines. But in recent years fewer and fewer such cases have been heard by the Court, both because most lawyers have probably realized the futility of waging the useless battle any longer, and because, except in very unusual situations, the Court refuses to hear most such cases when attorneys do attempt to bring them up. Only cases on the periphery of the "new" doctrines are now likely to arouse the interest of the Court.

A brief discussion of the principles which the Court now applies, and of the cases since 1937, will indicate both the extent to which the subjects are no longer regarded as controversial and the locality of the present borderline of uncertainty.

I. SUBSTANTIVE DUE PROCESS

In a series of decisions prior to 1930, the Supreme Court had held that the "liberty" guaranteed by the due process clause included liberty to contract, and that except in "business affected with a public interest," governmental interference with such essential economic relationships as prices and wages was an infringement of that liberty.[11] Since the validity of many restrictions upon the freedom of business men was sustained,[12] the only general rule which could be drawn from the decisions was that types of regulation of which the Court sufficiently disapproved were unconstitutional.

Although the *Nebbia* case in 1934,[13] in which Mr. Justice Roberts joined Chief Justice Hughes and Justices Brandeis, Stone, and Cardozo in sustaining a New York statute fixing minimum prices for milk, seemed to presage a departure from this rule, *Morehead v. Tipaldo*,[14] in 1936, saw Mr. Justice Roberts joining the conservative Justices to nullify the New York minimum wage law, on the disputable ground that overruling of *Adkins v. Children's Hospital*[15] had not been specifically requested. In 1937, however, he rejoined the liberal Justices to overrule the *Adkins* case and uphold the validity of the Washington minimum wage legislation in *West Coast Hotel Co. v. Parrish*.[16] On the same day and two weeks later the provisions of the Railway Labor Act and the National Labor Relations Act, requiring employers to bargain exclusively with the representatives chosen by a majority of the employees, were held not to violate the due process clause[17]—decisions clearly incon-

10. Some of the "new" doctrines can be traced back to John Marshall. See p. 462 *infra*.
11. See cases cited in note 3 *supra*.
12. *E.g.*, the antitrust laws, zoning laws, banking and insurance laws, laws relating to conservation, workmen's compensation, health and safety, laws designed to protect the public against deception and fraud.
13. Nebbia v. New York, 291 U.S. 502, 54 Sup. Ct. 505, 78 L. Ed. 940 (1934).
14. 298 U.S. 587, 56 Sup. Ct. 918, 80 L. Ed. 1347 (1936).
15. 261 U.S. 525, 43 Sup. Ct. 394, 67 L. Ed. 785 (1923).
16. 300 U.S. 379, 57 Sup. Ct. 578, 81 L. Ed. 703 (1937).
17. Virginian Ry. v. System Federation No. 40, 300 U.S. 515, 57 Sup. Ct. 592, 81 L. Ed. 789 (1937); National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 Sup. Ct. 615, 81 L. Ed. 893 (1937).

sistent with *Adair v. United States*[18] and *Coppage v. Kansas*[19] decided in 1908 and 1915.

The 1937 decisions declared that regulatory legislation would not be found to violate the due process clause merely because it restricted economic liberty. Only restrictions which were in fact arbitrary, or not reasonably related to a proper legislative purpose, it was suggested, would be held unconstitutional in the future. Subsequently, in the *Carolene Products* case, the Court, through Mr. Justice Stone, stated:

> "[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators. . . .
>
> "[B]y their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it. . . ."[20]

Since it is difficult to conceive of any statute for which some rational basis may not be found, this test means that the due process barrier to substantive legislation as to economic matters has been in effect removed—although it still stands in theory against completely arbitrary legislative action.

As might be expected, under this doctrine no statutes have been held violative of the due process clause on grounds of substantive irrationality since 1937. In 1939 and 1940, the Court sustained federal statutes fixing prices of milk and coal,[21] in 1941 the minimum wage provisions of the Fair Labor Standards Act,[22] and in 1944 the general price and rent provisions of the Emergency Price Control Act.[23] *Olsen v. Nebraska*,[24] which upheld a state law regulating the fees fixed by employment agencies, explicitly repudiated "the philosophy and approach of the majority" of the Court in the pre-*Nebbia* price fixing cases. And *Lincoln Union v. Northwestern Iron Co.*,[25] in sustaining state laws prohibiting the closed shop, made it clear that this principle would be applied to laws restricting the freedom to contract of employees as well as employers. In other cases, the Court has disposed summarily of the contention that statutes were in violation of the due process

18. 236 U.S. 1, 35 Sup. Ct. 240, 59 L. Ed. 441 (1915).

19. 208 U.S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436 (1908).

20. United States v. Carolene Products Co., 304 U.S. 144, 152, 154, 58 Sup. Ct. 778, 82 L. Ed. 1234 (1938).

21. United States v. Rock Royal Co-Op., 307 U.S. 533, 59 Sup. Ct. 993, 83 L. Ed. 1446 (1939); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 60 Sup. Ct. 907, 84 L. Ed. 1263 (1940).

22. United States v. Darby, 312 U.S. 100, 61 Sup. Ct. 451, 85 L. Ed. 609 (1941).

23. Yakus v. United States, 321 U.S. 414, 64 Sup. Ct. 660, 88 L. Ed. 834 (1944); Bowles v. Willingham, 321 U.S. 503, 64 Sup. Ct. 641, 88 L. Ed. 892 (1944).

24. 313 U.S. 236, 61 Sup. Ct. 862, 85 L. Ed. 1305 (1941).

25. 335 U.S. 525, 69 Sup. Ct. 251, 93 L. Ed. 212 (1949).

clause because they interfered with economic freedom or were otherwise unreasonable.[26]

Although there is no longer doubt as to how the Court will decide cases of this sort, it cannot be said that the Court has limited the due process clause to procedural matters and repudiated the concept of due process as a bar to sufficiently arbitrary or irrational substantive legislation—although Mr. Justice Black's opinion in the *Lincoln Union* case looks strongly in that direction. The Court has certainly not so stated in express terms, and the opinions still continue to examine legislation under attack to see whether it has a rational basis or is "substantially related to a legitimate end sought to be attained."[27] But, as the Court recently declared, "a pronounced shift of emphasis . . . has deprived the words 'unreasonable' and 'arbitrary' of the content" which they formerly held.[28] The self-abnegation with which the Court now applies the rationality test may, as a practical matter, make it unnecessary for the Court to decide whether it must reconsider the basic doctrine.

Recent decisions have given the due process clause broad scope in protecting against state action the rights guaranteed by the First Amendment and also other "fundamental" rights contained in the first eight amendments.[29] Certainly the rights to freedom of speech, press, and religion are not "procedural" in the ordinary sense. The due process clause would thus seem still to be interpreted as embodying a restriction which is substantive rather than procedural—but in an orbit entirely different from that of the older cases. Significantly, in the field of civil liberties, the test is not whether there is a rational basis for legislation. Instead, since the due process clause is held to embody the content of the First Amendment, the legislation may be required to sustain the heavier burden imposed upon laws restricting First Amendment freedoms.[30] These problems are beyond the scope of this

26. Cities Service Oil Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 186, 71 Sup. Ct. 215 (1950); Railway Express Agency v. United States, 336 U.S. 106, 109, 69 Sup. Ct. 463, 93 L. Ed. 533 (1949); Sage Stores v. Kansas, 323 U.S. 32, 36, 65 Sup. Ct. 9, 89 L. Ed. 25 (1944); Carolene Products Co. v. United States, 323 U.S. 18, 29, 65 Sup. Ct. 1, 89 L. Ed. 15 (1944); Railroad Commission v. Rowan & Nichols Oil Co., 311 U.S. 570, 61 Sup. Ct. 343, 85 L. Ed. 358 (1941); Railroad Commission v. Rowan & Nichols Oil Co., 310 U.S. 573, 60 Sup. Ct. 613, 84 L. Ed. 1368 (1940), *as amended*, 311 U.S. 614, 61 Sup. Ct. 66, 85 L. Ed. 390 (1940); Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310, 318, 60 Sup. Ct. 517, 84 L. Ed. 774 (1940).

27. *E.g.*, Cities Service Oil Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 186, 71 Sup. Ct. 215 (1950).

28. Daniel v. Family Security Life Ins. Co., 336 U.S. 220, 225, 69 Sup. Ct. 550, 93 L. Ed. 632 (1949).

29. For an apt exposition of this, see FREUND, ON UNDERSTANDING THE SUPREME COURT c.1 (1949).

30. See Nietmotko v. Maryland, 340 U.S. 268, 71 Sup. Ct. 325 (1951); Kunz v. New York, 340 U.S. 290, 71 Sup. Ct. 312 (1951); Feiner v. New York, 340 U.S. 315, 71 Sup. Ct. 303 (1951); Kovacs v. Cooper, 336 U.S. 77, 69 Sup. Ct. 448, 93 L. Ed. 513 (1949); Saia v. New York, 334 U.S. 558, 68 Sup. Ct. 1148, 92 L. Ed. 1574 (1948), 2 VAND. L. REV. 113; Thomas v. Collins, 323 U.S. 516, 65 Sup. Ct. 315, 89 L. Ed. 430 (1945), in which the prior authorities are collected and discussed.

paper. They are suggested here only because of their bearing upon the presently unanswerable question as to the extent to which the due process clauses have been deprived of force as restrictions upon substantive law.

II. State Power to Regulate Interstate Commerce[31]

Since *Gibbons v. Ogden*,[32] and *Cooley v. Board of Wardens*,[33] it has been established that under the commerce clause some subjects of regulation are within the exclusive power of Congress, and that even in the absence of a showing of congressional intention some types of state laws are invalid. This has not meant that the states were deprived by the commerce clause of all power to enact measures affecting, or even directly regulating, interstate commerce. But at some point, when the national, as compared to the local, interest in the subject was sufficiently great, when the practical burden on interstate commerce became sufficiently clear, the Court has always drawn a line beyond which the states could not go.

The test applied in drawing this line has been expressed in various ways. In the *Cooley* case, the first authoritative formulation of the accepted doctrine, the Court declared:

> "Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.
>
> "Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."[34]

In some cases, this doctrine is regarded as "predicated upon the implications of the commerce clause itself," in others "upon the presumed intention of Congress, where Congress has not spoken."[35] Whatever the theory, the result is the same.

In the years preceding 1937, the Court, without ever openly abandoning the *Cooley* test, used many other expressions—such as whether the state law was a "burden," or a "substantial" or "undue" burden, on commerce,

31. The related question of the commerce clause as a restriction upon state taxing power is treated in the article by Mr. Barrett on *State Taxation of Interstate Commerce*, p. 496 *infra*.

32. 9 Wheat. 1, 6 L. Ed. 23 (1824).

33. 12 How. 299, 13 L. Ed. 996 (1852).

34. 12 How. at 319.

35. Southern Pacific Co. v. Arizona, 325 U.S. 761, 768, 65 Sup. Ct. 1515, 89 L. Ed. 1915 (1945), citing cases; California v. Zook, 336 U.S. 725, 728, 69 Sup. Ct. 841, 93 L. Ed. 1005 (1949).

whether the effect on commerce was "direct" or "indirect," whether the regulation was or was not imposed "on" interstate commerce itself. It was difficult, if not impossible, to tell—at least with any certainty—whether these expressions merely constituted different methods of stating the *Cooley* doctrine, or whether the Court was applying different tests. The only generalization which could be drawn from the numerous decisions and expressions was, approximately in the words of my mentor on this subject,[36] that the states may regulate interstate commerce some, but not too much. Under this not very definite test, a great many state laws were held invalid.[37]

The principle change since 1937 has not been in the formula but in its application. For a number of years thereafter no nondiscriminatory[38] state regulations fell afoul of the commerce clause. Justice Black expressed the view that the *Cooley* doctrine itself went too far in limiting state power; he preferred the theory of Chief Justice Taney that only Congress, and not the courts, could invalidate state legislation.[39] There was doubt as to whether the Court would find any nondiscriminatory state law in conflict with the commerce clause itself.

Southern Pacific Co. v. Arizona,[40] decided in 1945, and *Morgan v. Virginia,*[41] in 1946, not only resolved the doubt, but marked a definite reassertion of the principle of the *Cooley* case. In doing so, the Court, speaking through Chief Justice Stone and following the thoughts expressed in his earlier opinions,[42] made explicit the considerations which would guide it in applying that principle. The test was a practical one, in which the actual effect upon interstate or national interests was weighed against the local or state interest involved. State laws limiting the number of cars on railroad trains and requiring the segregation of passengers in interstate busses were found to impinge upon commerce in fields in which national uniformity was essential. In the one instance the make-up of trains, and in the other the seating arrangement in busses was subject to disturbance at every state line

36. Professor Thomas Reed Powell of Harvard Law School.

37. See the compilation in Appendix E to GAVIT, THE COMMERCE CLAUSE 550-56 (1932). This tabulation shows that during the decade 1921-1930, 38 state laws (both tax and regulatory) were found invalid under the commerce clause. Between 1941 and 1950 there were ten such decisions, of which five involved state taxes. Of the remaining five cases, three were concerned with statutes which would be regarded as discriminating against interstate commerce (see p. 455 *infra*). The remaining two cases are the *Southern Pacific* and *Morgan* cases, discussed immediately below in the text.

38. As to laws discriminating against interstate commerce, see p. 455 *et seq.*

39. See opinions of Mr. Justice Black, dissenting in Southern Pacific Co. v. Arizona, 325 U.S. 761, 784, 65 Sup. Ct. 1515, 89 L. Ed. 1915 (1945); concurring in Morgan v. Virginia, 328 U.S. 373, 386, 66 Sup. Ct. 1050, 90 L. Ed. 1317 (1946); dissenting in Hood & Sons v. DuMond, 336 U.S. 525, 545, 553, 69 Sup. Ct. 657, 93 L. Ed. 865 (1949). For Taney's views, see FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE, c.2 (1937).

40. 325 U.S. 761, 65 Sup. Ct. 1515, 89 L. Ed. 1915 (1945).

41. 328 U.S. 373, 66 Sup. Ct. 1050, 90 L. Ed. 1317 (1946).

42. *E.g.,* DiSanto v. Pennsylvania, 273 U.S. 34, 44, 47 Sup. Ct. 267, 71 L. Ed. 524 (1927) (dissent).

if differing state regulations were permissible. On the other hand, state laws having a lesser impact upon interstate transportation, such as a requirement that cabooses be placed at the end of freight trains,[43] were upheld. The competing national interest has not been deemed sufficiently clear to prevent the states from fixing prices for natural gas and milk sold within a state for outside consumption, even though the direct effect was to raise prices for extrastate consumers.[44] Whether the decisions last cited would be applied to commodities generally, which did not present the problems peculiar to natural gas and milk, cannot be foretold.

The recent cases seem to integrate the "need for uniformity" principle of the *Cooley* case and the "undue burden" formula appearing in later decisions with the statements requiring the weighing of conflicting local and national interests. In some sentences in the opinions, the first two concepts are stated in the alternative. Thus, in the *Southern Pacific* case, the Court declared that the states lack "authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority."[45] In the *Morgan* case, these two ideas—if they are two—are interwoven in Mr. Justice Reed's statement that "state legislation is invalid if it unduly burdens that commerce in matters where uniformity is necessary."[46] In *California v. Zook*,[47] the balancing of state and national interests is treated as a more accurate statement of the *Cooley* rule: "if a case falls within an area in commerce thought to demand a uniform national rule, state action is struck down. If the activity is one of predominantly local interest, state action is sustained. More accurately, the question is whether the state interest is outweighed by a national interest in the unhampered operation of interstate commerce."[48] These cases—and others[49]—recognize that the Court exercises a practical judgment in balancing the national interest against the local interest in each case.

Most recently, in December 1950, a unanimous Court, speaking through Mr. Justice Clark in *Cities Service Gas Co. v. Peerless Oil & Gas Co.*,[50] restated the governing principle as follows:

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43. Terminal Railroad Ass'n v. Brotherhood of Railroad Trainmen, 318 U.S. 1, 63 Sup. Ct. 420, 87 L. Ed. 571 (1943).

44. Cities Service Oil Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 71 Sup. Ct. 215 (1950); Milk Control Board v. Eisenberg, 306 U.S. 346, 59 Sup. Ct. 528, 83 L. Ed. 752 (1939).

45. 325 U.S. at 767.

46. 328 U.S. at 377.

47. 336 U.S. 725, 69 Sup. Ct. 841, 93 L. Ed. 1005 (1949).

48. 336 U.S. at 728.

49. Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28, 37-40, 68 Sup. Ct. 358, 92 L. Ed. 455 (1948); Union Brokerage Co. v. Jensen, 322 U.S. 202, 211, 64 Sup. Ct. 967, 88 L. Ed. 1227 (1944); Illinois Natural Gas Co. v. Central Ill. Pub. Serv. Co., 314 U.S. 498, 506, 62 Sup. Ct. 384, 86 L. Ed. 371 (1942).

50. 340 U.S. 179, 71 Sup. Ct. 215 (1950).

"It is now well settled that a state may regulate matters of local concern over which federal authority has not been exercised, even though the regulation has some impact on interstate commerce. . . . The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state interest, and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions."[51]

It is likely—though not at all certain—that the Court will apply the same test whether the direct impact of the state law burdening interstate commerce is upon interstate or intrastate transactions. In *Parker v. Brown*,[52] the question presented was whether California regulation of the intrastate marketing of the bulk of the national crop of raisins before they were processed for interstate sale and shipment was prohibited by the commerce clause. The Court, speaking through Mr. Justice Stone, held that whether the proper rule was the "mechanical test" applied in some earlier cases, under which a state law was invalid if it regulated interstate—but not intrastate—commerce, or the balance of interest rule based upon an "accommodation of the competing demands of the state and national interest involved,"[53] the state law was valid. But the reference to the first test as "mechanical" strongly suggests that the Court thought such an approach an artificial one, which it would not favor if forced to a choice. The *Parker* decision cannot properly be appraised without reference to the fact that California's program had been approved and financed by the Secretary of Agriculture pursuant to congressional agricultural policy. The Court has subsequently cast some doubt as to whether, apart from this factor, the decision would have been the same.[54] And indeed, it is certainly arguable that the national commercial interest should prevent a state producing most of a commodity distributed throughout the nation from limiting the quantity produced or marketed in order to raise the price to consumers.[55] But, at least where the state is seeking to conserve a limited national resource, the state's authority seems to be definitely established.[56]

Both the *Southern Pacific* and the *Morgan* cases significantly rejected the contention that a state may avoid the limitations of the general doctrine of the *Cooley* case by "simply invoking the convenient apologetics of the police power,"[57] in the former as a means of preventing accidents, and in the

51. 340 U.S. at 186-87.
52. 317 U.S. 341, 63 Sup. Ct. 307, 87 L. Ed. 315 (1943).
53. 317 U.S. at 362.
54. Hood & Sons v. DuMond, 336 U.S. 525, 537, 69 Sup. Ct. 657, 93 L. Ed. 865 (1949), 3 VAND. L. REV. 113.
55. See p. 455 *infra*.
56. Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 71 Sup. Ct. 215 (1950); Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 52 Sup. Ct. 559, 76 L. Ed. 1062 (1932); see Note, 64 HARV. L. REV. 642 (1951).
57. Southern Pacific case, 325 U.S. at 780; Morgan case, 328 U.S. at 380; quoting from Mr. Justice Holmes in Kansas City Southern Ry. v. Kaw Valley Drainage Dist., 233 U.S. 75, 79, 34 Sup. Ct. 564, 58 L. Ed. 857 (1914).

latter to avert possible friction between races. Although a great many cases have upheld state laws relating to safety, even as applied to interstate transportation,[58] the Court pointed to other safety regulations held invalid when the burden upon interstate commerce became unduly great.[59] State regulation of the weight and width of motor trucks on interstate highways, which concededly "materially interfered with interstate commerce,"[60] was differentiated on the ground that the highways were built, maintained, and policed by the states and were, therefore, of peculiar local concern, or, more accurately, constituted a subject over which "the state has exceptional scope for the exercise of its regulatory power."[61]

The conclusion to be drawn from these recent cases is that the Court has returned to the historical *Cooley* doctrine, but has articulated more candidly than in the older cases what it takes into consideration in applying that principle. It is probably also true that, with respect to most subjects, a heavier burden than formerly is placed upon the party seeking to establish that the state legislation improperly burdens interstate commerce.

The discussion up to this point has assumed that the state legislation involved does not discriminate against interstate commerce. Even Mr. Justice Black seems to agree that a state law imposing greater burdens on interstate commerce than on local commerce is repugnant to the commerce clause.[62] State laws designed to keep a resource or to favor a business within the state, to benefit that state at the expense of other states, have also consistently been held invalid, at least when the injury to other states was substantial.[63] A recent example is the South Carolina statute held invalid in *Toomer v. Witsell*,[64] which required vessels catching shrimp in South Carolina waters to unload, pack and stamp their catch at a South Carolina port before shipment to other states. A California law designed to exclude indigent immigrants from other states would also seem to fall in the same category.[65] Such statutes can be regarded as discriminatory—though

58. See cases collected in *Southern Pacific*, 325 U.S. at 779, and in *Morgan*, 328 U.S. at 378-79.

59. *Ibid.*

60. Southern Pacific Co. v. Arizona, 325 U.S. 761, 783, 65 Sup. Ct. 1515, 89 L. Ed. 1915 (1945).

61. *Ibid.* The leading cases distinguished were South Carolina Highway Dep't v. Barnwell Bros., 303 U.S. 177, 58 Sup. Ct. 510, 82 L. Ed. 734 (1938); and Maurer v. Hamilton, 309 U.S. 598, 60 Sup. Ct. 726, 84 L. Ed. 969 (1940).

62. See his dissent in Hood & Sons v. DuMond, 336 U.S. 525, 549, 556, 69 Sup. Ct. 657, 93 L. Ed. 865 (1949), in which he refers to Best & Co. v. Maxwell, 311 U.S. 454, 61 Sup. Ct. 334, 85 L. Ed. 275 (1940), an opinion in which he joined, and his earlier dissent in Gwin, White & Price v. Henneford, 305 U.S. 434, 446, 455, 59 Sup. Ct. 325, 83 L. Ed. 272 (1939). *But cf.* his dissents in Toomer v. Witsell, 334 U.S. 385, 407, 68 Sup. Ct. 1157, 92 L. Ed. 1460 (1948); and Dean Milk Co. v. Madison, 340 U.S. 349, 357, 71 Sup. Ct. 295 (1951).

63. See cases cited in Hood & Sons v. DuMond, 336 U.S. 535-37, 69 Sup. Ct. 657, 93 L. Ed. 865 (1949).

64. 334 U.S. 385, 403, 68 Sup. Ct. 1157, 92 L. Ed. 1460 (1948).

65. Edwards v. California, 314 U.S. 160, 62 Sup. Ct. 164, 86 L. Ed. 119 (1941).

the results in the cases are also justifiable under the "uniformity" or "undue burden" theories discussed above.

In *Hood & Sons v. Du Mond*,[66] decided in 1949, the Court divided sharply as to whether, in order to prevent depletion of the supply available within the state, and to avoid destructive competition, New York could refuse to permit a Massachusetts local distributor to open an additional receiving plant from which milk could be taken from New York. The majority treated the case as one in which a state was favoring home consumers and competitors against those in other states, and thus condemned the New York regulation as discriminating against, as well as burdening, interstate commerce. The majority opinion of Mr. Justice Jackson declares that the basic historical purpose of the commerce clause was to prevent each state from seeking economic advantage at the expense of the other states.[67] The four dissenting Justices asserted that the Court's decision was a departure from the fundamental principle of the *Cooley* case. Mr. Justice Black thought the decision a reinvigoration of the Court's former tendency improperly to restrict the authority of the states to regulate business.[68] Mr. Justice Frankfurter believed that further inquiry into the facts was essential to determine how the competing state and national interests should be balanced.[69]

It is true that the opinion of Mr. Justice Jackson, for the Court, does no follow the *Colley* approach, or even cite any of the cases in which the doctrine has been approved and applied. But since he himself, along with most of the Justices who joined with him, had joined in the leading opinions accepting the *Cooley* principle, it is doubtful if he, or they, regarded the *Hood* decision as an abandonment of the basic doctrine. It seems much more likely, in view of the language of the opinion and the facts of the case, that the majority believed that the case came within the exceptional category for discriminatory state regulations, and also that such an assertion of state power, from its very nature, imposed a burden on interstate commerce which was necessarily "undue," since it was precisely the type of regulation which the framers meant most clearly to prohibit.[70] Although the case may have

66. 336 U.S. 525, 69 Sup. Ct. 657, 93 L. Ed. 865 (1949), 3 VAND. L. REV. 113.
67. 336 U.S. at 532-39.
68. See *id.* at 562-64, particularly.
69. *Id.* at 576
70. "The material success that has come to inhabitants of the states which make up this federal free trade unit has been the most impressive in the history of commerce, but the established interdependence of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens and repressions. We need only consider the consequences if each of the few states that produce copper, lead, high-grade iron ore, timber, cotton, oil, or gas should decree that industries located in that state shall have priority. What fantastic rivalries and dislocations and reprisals would ensue if such practices were begun! Or suppose that the field of discrimination and retaliation be industry. May Michigan provide that automobiles cannot be taken out of that State until local dealers' demands are fully met? Would she not have every argument in the favor of such a statute that can be offered in support of New York's limiting sales of milk for out-of-state shipment to protect the economic interests of her competing

been a close one on its facts, it seems clear that it was not meant to be the forerunner of any new general doctrine. The subsequent *Cities Service* case, decided in the following year by a unanimous Court, including, of course, Mr. Justice Jackson, reaffirms the *Cooley* doctrine and states:

> "The vice in the regulation invalidated by *Hood* was solely that it denied facilities to a company in interstate commerce on the articulated ground that such facilities would divert milk supplies needed by local consumers; in other words, the *regulation discriminated against interstate commerce.*"[71]

The most recent case on the subject is both interesting and significant. Madison, Wisconsin, required all milk consumed within the city to be pasteurized within five miles of the center of town. This excluded milk from the Dean Milk Company's pasteurization plants in Illinois, 65 and 85 miles away. Although the ordinance doubtless favored local business, its avowed and undenied purpose was to facilitate inspection by the local health department; it was certainly more convenient and economical for Madison not to send its inspectors far afield. In *Dean Milk Co. v. Madison,*[72] decided January 15, 1951, the Court, speaking through Mr. Justice Clark, held the ordinance to be an unlawful discrimination against interstate commerce. The Court assumed that, apart from the discrimination, the subject lay within the sphere of state regulation, despite its effect upon interstate commerce. But it concluded that, "an economic barrier protecting a major local industry against competition from without the state" was not permissible "even in the exercise of [a city's] unquestioned power to protect the health and safety of its people, if reasonable non-discriminatory alternatives, adequate to conserve legitimate local interests, are available."[73] The Court then found that "reasonable and adequate alternatives are available,"[74] since Madison could charge the cost of inspection of distant milk plants to the pasteurizer, or could rely on inspection by local officials in other areas whose standards of inspection were so graded by the United State Public Health Service as to enable Madison to determine whether its own standards were satisfied. Both Madison and Wisconsin health officials had testified in the case that this system gave consumers adequate protection. The Court concluded that to permit Madison

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dealers and local consumers? Could Ohio then pounce upon the rubber-tire industry, on which she has a substantial grip, or retaliate for Michigan's auto monopoly?

"Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality." 336 U.S. at 538-39.

71. Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 188, 71 Sup. Ct. 215 (1950) (italics supplied).

72. 340 U.S. 349, 71 Sup. Ct. 295 (1951).

73. 340 U.S. at 354.

74. *Ibid.*

to adopt a regulation of this sort when "not essential for the protection of local health interests . . . would invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause."[75]

Mr. Justice Black, with Justices Douglas and Minton concurring, dissented on the grounds that a good faith health regulation applicable both to interstate and intrastate pasteurizers was not a discrimination against interstate commerce, and that in any event, the Court should not "strike down local health regulations unless satisfied beyond a reasonable doubt" that the available substitutes "would not lower health standards."[76]

The *Dean Milk* decision, seemingly for the first time, applies to a local law found to discriminate against interstate commerce the technique of balancing the respective local and national interests employed in other cases in which local regulations are said to burden commerce, though with a reversed presumption. In the absence of discrimination, the Court tends to sustain the state action unless interference with commerce is clear and the local interest not very substantial; where there is discrimination, the *Dean* case holds, it must appear that there is no other reasonable method of safeguarding a legitimate local interest.[77] Where a state law has no other purpose than to favor local industry, this balancing of interest approach probably will not be used, inasmuch as the purpose of the state regulation would be illegitimate.

The early cases invalidating state laws requiring local inspection in such a way as to exclude products from distant sources—*Minnesota v. Barber*[78] *and Brimmer v. Rebman*[79]—had adopted a less flexible approach. But where no discriminatory purpose is apparent, and where both interstate and intrastate imports from over five miles away are excluded, it is not too clear whether the regulation can properly be said to "discriminate" against interstate commerce. And even if such a regulation be properly classified as discriminatory for commerce clause purposes, the local need might be so overpowering as to completely outweigh, for the particular situation, the national interest in a market not restricted by states lines.[80] It is thus reasonable in such cases to employ the same practical approach as when a state law interferes with but does not technically discriminate against interstate commerce. The justification for shifting the burden is that

75. *Id.* at 356.
76. *Id.* at 357, 359.
77. See Braden, *Umpire to the Federal System*, 10 U. OF CHI. L. REV. 27, 30 (1942).
78. 136 U.S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455 (1890).
79. 138 U.S. 78, 11 Sup. Ct. 213, 34 L. Ed. 862 (1891)
80. Thus, if pasteurized milk should become unsafe for human consumption in the time necessary to transport it more than a specified distance, the local interest in protecting the health of its people would seem to overbalance, even from the standpoint of the nation as a whole, the advantages of interstate trade in milk from more distant points.

an actual prohibition of all interstate but not of all local trade is, on its face, what the commerce clause was designed to prevent, and therefore to be countenanced only when the local need in the particular case can plainly be shown to be greater than the interest in nation-wide free trade upon which the economy and welfare of this nation largely rest.

Basic to the Court's premise is the view, with which the minority seem to disagree, that a local regulation which prohibited both interstate and intrastate trade—shipments from pasteurization plants more than five miles from the city—discriminated against interstate commerce. With respect to this, the majority merely stated, "It is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moved in interstate commerce. Cf. *Brimmer v. Rebman,* 138 U.S. 78, 82-83 (1891)."[81] *Brimmer v. Rebman* does appear to be directly in point, since the state law there involved prohibited the sale of all meat slaughtered more than one hundred miles from the place of sale, unless locally inspected, while not requiring the inspection of other meat. As a matter of semantics, however, it cannot be said with certainty that a state regulation of this sort is "discriminatory." It excludes some intrastate trade, along with the interstate; on the other hand, it excludes all interstate. Nevertheless, the purpose of the commerce clause would be effectively frustrated by a multitude of municipal trade barriers of this sort, even though they discriminated against some intrastate trade along with the interstate. Accordingly, it seems reasonable for the Court to treat such regulations as discriminatory —or at least to require their proponents to justify them by proof of actual and serious local necessity, as distinct from local economic advantage and convenience.

The principles and cases heretofore discussed have been concerned with the effect of the commerce clause itself upon state laws, in the absence of any federal regulation. Since the Constitution vests the power to regulate interstate commerce in the Congress, there cannot be—or at least there should not be[82]—any doubt as to the overriding authority of Congress to determine what the states may or may not regulate in the field subject to congressional control. The *Southern Pacific* case states in express terms that Congress "may either permit the states to regulate the commerce in a manner which would otherwise not be permissible . . . or exclude state

81. 340 U.S. at 354 n.4.

82. Writers have found logical difficulty in reconciling the conception of the commerce clause as forbidding state action by its own force with the power of Congress to consent to otherwise invalid state regulation. See Biklé, *The Silence of Congress,* 41 HARV. L. REV. 200 (1927); Powell, *The Validity of State Legislation Under the Webb-Kenyon Law,* 2 So. L.Q. 112 (1917); Dowling, *Interstate Commerce and State Power—Revised Version,* 47 COL. L. REV. 547, 552-60 (1947). But "The Supreme Court has not been concerned in its opinions with the theoretical difficulties." RUTLEDGE, A DECLARATION OF LEGAL FAITH 64 n.26 (Univ. of Kan. Press, 1947).

regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce" (citing cases).[83] In 1949, in *California v. Zook*,[84] the Court reiterated that "despite theoretical inconsistency with the rationale of the Commerce Clause as a limitation in its own right, the words of the Clause—a grant of power [to Congress]—admit of no other result."[85] These statements as to the supremacy of the congressional will when Congress breaks its silence were amplified in the exhaustive opinion of Mr. Justice Rutledge, speaking for a unanimous Court, in *Prudential Insurance Co. v. Benjamin*,[86] which sustained the authority of Congress to permit the states to regulate interstate commerce in insurance.

This paper will not deal with the problem of supersedure or "occupancy of the field"—that is, when state regulation is invalidated or superseded by congressional action under the commerce clause (or any other clause). Although this is often regarded as a constitutional question, since there is no doubt as to the supremacy of federal legislation the issue in each case relates to the intention of Congress, actual or presumed. The problem is thus more akin to statutory construction than to the constitutional matters considered in this symposium. In each case the question to be determined is whether a state law is inconsistent with what Congress has said, or with the accomplishment of the purpose of Congress, or with what can be deduced as to what Congress intends when the federal statute is not explicit. It seems sufficient here to cite the leading recent cases on the subject for the reader who might wish to explore the matter further.[87]

III. THE COMMERCE POWER OF CONGRESS

The burning issue of the 1930's was the extent of the regulatory power of Congress under the commerce clause. Long prior to that time, in the *Shreveport Rate* case[88] and many others, the Court had recognized that under the commerce power, Congress could regulate intrastate transactions which were sufficiently related to interstate commerce, which affected it

83. 325 U.S. at 769.
84. 336 U.S. 725, 69 Sup. Ct. 841, 93 L. Ed. 1005 (1949).
85. 336 U.S. at 728.
86. 328 U.S. 408, 66 Sup. Ct. 1142, 90 L. Ed. 1342 (1946).
87. International Union of Automobile Workers v. O'Brien, 339 U.S. 454, 70 Sup. Ct. 781, 94 L. Ed. 978 (1950); United Automobile Workers v. Wisconsin Employment Relations Board, 336 U.S. 245, 69 Sup. Ct. 516, 93 L. Ed. 651 (1949); California v. Zook, 336 U.S. 725, 69 Sup. Ct. 841, 93 L. Ed. 1005 (1949); Bethlehem Steel Co. v. New York State Labor Board, 330 U.S. 767, 67 Sup. Ct. 1026, 91 L. Ed. 1234 (1947); Rice v. Santa Fe Elevator Co., 331 U.S. 218, 67 Sup. Ct. 1146, 91 L. Ed. 1447 (1947); First Iowa Hydro-Electric Co-op v. Federal Power Commission, 328 U.S. 152, 66 Sup. Ct. 906, 90 L. Ed. 1143 (1946). See Note, *"Occupation of the Field" in Commerce Clause Cases, 1936-1946: Ten Years of Federalism*, 60 HARV. L. REV. 262 (1946). And see Amalgamated Ass'n of Street, Elec., Ry., & M.C. Employees v. Wisconsin Employment Relations Board, 340 U.S. 383, 71 Sup. Ct. 359, (1951).
88. Houston, E.&W.T. Ry. v. United States, 234 U.S. 342, 34 Sup. Ct. 833, 58 L. Ed. 1341 (1914).

"directly" but not "indirectly."[89] But the development of this principle was blocked by an opposing doctrine that certain activities, notably those occurring in the process of producing commodities to be shipped in commerce, were "local" by their very nature, and thus exclusively subject to state authority under the Tenth Amendment.[90] The Court reconciled this theory with the "affecting commerce" doctrine by finding that no matter how close the actual factual relationship, production affected commerce only "indirectly." This line of decisions reached its climax, and conclusion, in the *Carter Coal* case in 1936,[91] which held that labor relations in the coal industry only had an indirect effect upon interstate commerce, even though a coal strike might halt not only all interstate shipments of coal but a large proportion of the interstate movement of everything else as well.

The well-known story of how, in the following term, the Court abandoned this approach and has since given full scope to the power of Congress to regulate intrastate activities which in fact had a substantial relationship to interstate commerce has been told elsewhere.[92] There is no occasion for repeating it here.

The test presently applied has been stated in various ways. *Wickard v. Filburn*[93] declared that "even if appellee's activity be local and though it may not be regarded as commerce, it may still whatever its nature, be reached by Congress if it exerts a *substantial economic effect* on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.' "[94] Mr. Justice Jackson's opinion also quotes from the opinion of Mr. Justice Stone in *United States v. Wrightwood Dairy Co.*, that "the reach of that power extends to those intrastate activities which *in a substantial way* interfere with or ob-

89. Local 167 v. United States, 291 U.S. 293, 54 Sup. Ct. 396, 78 L. Ed. 804 (1934); Coronado Coal Co. v. United Mine Workers, 268 U.S. 295, 45 Sup. Ct. 551, 9 L. Ed. 963 (1925); Chicago Board of Trade v. Olsen, 262 U.S. 1, 43 Sup. Ct. 470, 67 L. Ed. 839 (1923); Stafford v. Wallace, 258 U.S. 495, 42 Sup. Ct. 397, 66 L. Ed. 735 (1922); Railroad Comm'n of Wisconsin v . Chicago, B. & Q.R.R., 257 U.S. 563, 42 Sup. Ct. 232, 66 L. Ed. 373 (1922); United States v. Patten, 226 U.S. 525, 33 Sup. Ct. 141, 57 L. Ed. 333 (1913); Southern Ry. v. United States, 222 U.S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72 (1911); Swift & Co. v. United States, 196 U.S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518 (1905).

90. See cases cited in note 1, *supra;* Utah Power & Light Co. v. Pfost, 286 U.S. 165, 52 Sup. Ct. 548, 76 L. Ed. 1038 (1932); Industrial Ass'n v. United States, 268 U.S. 64, 45 Sup. Ct. 403, 69 L. Ed. 849 (1925); Oliver Iron Mining Co. v. Lord, 262 U.S. 172, 43 Sup. Ct. 526, 67 L. Ed. 929 (1923); Heisler v. Thomas Colliery Co., 260 U.S. 245, 43 Sup. Ct. 83, 67 L. Ed. 237 (1922); Kidd v. Pearson, 128 U.S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346 (1888); Veazie v. Moor, 14 How. 567, 14 L. Ed. 545 (1852). Although many of these cases involve state legislation, they were treated as authoritative with respect to the power of Congress during the period in question.

91. Carter v. Carter Coal Co., 298 U.S. 238, 56 Sup. Ct. 855, 80 L. Ed. 1160 (1936).

92. See particularly, the discussion in Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 229-35, 68 Sup. Ct. 996, 92 L. Ed. 1328 (1948); Wickard v. Filburn, 317 U.S. 111, 119-25, 63 Sup. Ct. 82, 87 L. Ed. 122 (1942); Stern, *The Commerce Clause and the National Economy, 1933-1946,* 59 HARV. L. REV. 645, 883 (1946).

93. 317 U.S. 111, 63 Sup. Ct. 82, 87 L. Ed. 122 (1942).

94. 317 U.S. at 125 (italics supplied).

struct the exercise of the granted power."[95] The *Mandeville Farms* case refers to "practical impeding effects" upon commerce,[96] and also declared that: "The essence of the affectation doctrine was that the exact location of this line made no difference, if the forbidden effects flowed across it to the injury of interstate commerce or to the hindrance or defeat of congressional policy regarding it."[97]

These statements still appear to treat the test as one of degree, which does not substantially differ in terms from the former "direct-indirect" formula, except that the standard of judgment is not the same and all non-factual artificial restrictions upon application of the test have been removed. But in these opinions, as well as others, the Court has not relied primarily on these quantitative formulas but has gone back to basic constitutional principles first enunciated by Chief Justice Marshall. In the *Mandeville* case, Mr. Justice Rutledge pointed out that "the 'affectation' approach was actually a revival of Marshall's 'necessary and proper' doctrine,"[98] that is, of the necessary and proper clause of the Constitution itself. The classical expression in *McCulloch v. Maryland,*[99] that "let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional," is plainly the source of the statement by Mr. Justice Stone in the *Darby*[100] and *Wrightwood Dairy* cases,[101] reiterated by Mr. Justice Jackson in *Wickard v. Filburn,*[102] that the commerce power "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce."

Other leading decisions have returned to the language of Chief Justice Marshall in *Gibbons v. Ogden,*[103] and have emphasized the function of the commerce clause as the practical instrument by which multi-state problems, not susceptible of solution by any single state, were to be subjected to the authority of the only governmental agency capable of dealing with them. In the insurance case, *United States v. South-Eastern Underwriters*[104] the

95. *Id.* at 125, quoting from United States v. Wrightwood Dairy Co., 315 U.S. 110, 119, 62 Sup. Ct. 523, 86 L. Ed. 726 (1942) (italics supplied).
96. 334 U.S. 219, 233, 68 Sup. Ct. 996, 92 L. Ed. 1328 (1948).
97. 334 U.S. at 232.
98. *Id.* at 232.
99. 4 Wheat. 316, 421, 4 L. Ed. 579 (1819).
100. United States v. Darby, 312 U.S. 100, 121, 61 Sup. Ct. 451, 85 L. Ed. 609 (1941).
101. United States v. Wrightwood Dairy, 315 U.S. 110, 119, 62 Sup. Ct. 523, 86 L. Ed. 126 (1942).
102. 317 U.S. 111, 124, 63 Sup. Ct. 82, 87 L. Ed. 122 (1942).
103. 9 Wheat. 1, 6 L. Ed. 23 (1824).
104. 322 U.S. 533, 64 Sup. Ct. 1162, 88 L. Ed. 1440 (1944).

Court, speaking through Mr. Justice Black,[105] declared, quoting from *Gibbons v. Ogden,* that "Commerce is interstate, he said, when it 'concerns more States than one.' . . . No decision of this Court has ever questioned this as too comprehensive a description of the subject matter of the Commerce Clause."[106]

In the case sustaining the validity of the so-called death sentence provision for public utility holding companies, *North American Co. v. SEC,*[107] the Court reaffirmed this practical concept, saying—

> "This broad commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy. Rather it is an affirmative power commensurate with the national needs. . . . And in using this great power, Congress is not bound by technical legal conceptions. Commerce itself is an intensely practical matter. *Swift & Co. v. United States,* 196 U.S. 375, 398. . . . To deal with it effectively, Congress must be able to act in terms of economic and financial realities. The commerce clause gives it authority so to act. . . . Once it is established that the evil concerns or affects commerce in more states than one, Congress may act. . . ."[108]

Since the *North American* opinion also states that the commerce "power permits Congress to attack an evil directly at its source provided that the evil bears a *substantial* relationship to interstate commerce,"[109] it is apparent that the Court does not regard the general principle enunciated in that case as inconsistent with the need for determining the question of degree referred to in some of the other recent cases—whether or not the relationship of the intrastate transaction or regulation to interstate commerce is sufficiently substantial. Indeed, no formulation of a test which requires the exercise of judgment in drawing a line can avoid the necessity for determining such questions of degree. But the cases since 1937 demonstrate not only that the Court will examine the question before it pragmatically, but that it will accord the greatest of weight to the congressional determination that the relationship to interstate commerce is sufficiently close.

The relationship between the intrastate transaction and interstate commerce may take a number of forms. The simplest is actual interference with the physical movement of goods interstate, such as may result from a strike caused by an unfair labor practice or a boycott in violation of the Sherman Act.[110] A physical effect may be that of floods in a nonnavigable tributary upon

105. Although this was a 4 to 3 decision, the dissents did not relate to the constitutional issue, or to the constitutional principles set forth in the majority opinion. See Polish National Alliance v. NLRB, 322 U.S. 643, 64 Sup. Ct. 1196, 88 L. Ed. 1509 (1944).
106. 322 U.S. at 551.
107. 327 U.S. 686, 66 Sup. Ct. 784, 90 L. Ed. 945 (1946).
108. 327 U.S. at 705-06.
109. *Id.* at 705.
110. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 221-22, 59 Sup. Ct. 206, 83 L. Ed. 126 (1938); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 Sup. Ct. 615, 81 L. Ed. 893 (1937); Local 167 v. United States, 291 U.S. 293, 54 Sup. Ct. 396, 78 L. Ed. 804 (1934).

navigation, or other commercial activities, downstream.[111] Where there is a physical commingling of interstate and intrastate products and activities, the whole may be regulated.[112] And the same is true of economic commingling in a market in which interstate and intrastate transactions are inseparable.[113] The effect may be upon interstate competition, by diverting the interstate flow from one competitor to another as through unlawful restraint in violation of the antitrust laws,[114] or substandard labor conditions forbidden by the Fair Labor Standards Acts,[115] or where an intrastate price cutter could take business away from an interstate competitor whose prices were fixed.[116] The relationship between the supply of a commodity available for interstate shipment and the amount produced permits regulation of the quantity manufactured or grown, as in the statutes fixing agricultural quotas.[117] Intrastate practices affecting interstate prices, such as the cornering of a market or the control of the intrastate price for raw materials or processes, are proper objects of federal regulation.[118] Intrastate acts which result in interstate shipments of noxious or unsafe articles,[119] or of products which will cause economic or other injury in the state of destination, may be controlled.[120] The Public Utility Holding Company Act is in part justified as a means of preventing evils which are spread and perpetuated through the channels of interstate commerce.[121] More generally, intrastate transactions may be regulated when reasonably necessary to the

111. Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 61 Sup. Ct. 1050, 85 L. Ed. 1487 (1941).

112. Currin v. Wallace, 306 U.S. 1, 59 Sup. Ct. 379, 83 L. Ed. 441 (1939); Mulford v. Smith, 307 U.S. 38, 59 Sup. Ct. 648, 83 L. Ed. 1092 (1939).

113. United States v. Wrightwood Dairy Co., 315 U.S. 110, 62 Sup. Ct. 523, 86 L. Ed. 726 (1942); Houston, E. & W.T. Ry. v. United States, 234 U.S. 342, 34 Sup. Ct. 833, 58 L. Ed. 1341 (1914).

114. Federal Trade Commission v. Morton Salt Co., 334 U.S. 37, 68 Sup. Ct. 822, 92 L. Ed. 1196 (1948); International Salt Co. v. United States, 332 U.S. 392, 68 Sup. Ct. 12, 92 L. Ed. 20 (1947); Local 167 v. United States, 291 U.S. 293, 54 Sup. Ct. 396, 78 L. Ed. 804 (1934).

115. United States v. Darby, 312 U.S. 100, 122, 61 Sup. Ct. 451, 85 L. Ed. 609 (1941).

116. United States v. Wrightwood Dairy Co. 315 U.S. 110, 62 Sup. Ct. 523, 86 L. Ed. 726 (1942).

117. Wickard v. Filburn, 317 U.S. 111, 63 Sup. Ct. 82, 87 L. Ed. 122 (1942).

118. United States v. Women's Sportswear Ass'n, 336 U.S. 460, 69 Sup. Ct. 714, 93 L. Ed. 805 (1949); Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 68 Sup. Ct. 996, 92 L. Ed. 1328 (1948); Chicago Board of Trade v. Olsen, 262 U.S. 1, 43 Sup. Ct. 470, 67 L. Ed. 839 (1923); United States v. Patten, 226 U.S. 525, 33 Sup. Ct. 141, 57 L. Ed. 333 (1913).

119. *E.g.*, Meat Inspection Act, 34 STAT. 1260 (1907), 21 U.S.C.A. §§ 71 *et seq.* (1927).

120. United States v. Darby, 312 U.S. 100, 61 Sup. Ct. 451, 85 L. Ed. 609 (1941); Kentucky Whip & Collar Co. v. Illinois Cent. R.R., 299 U.S. 334, 57 Sup. Ct. 277, 81 L. Ed. 270 (1937).

121. North American Co. v. SEC, 327 U.S. 686, 66 Sup. Ct. 784, 90 L. Ed. 945 (1946); American Power & Light Co. v. SEC, 329 U.S. 90, 67 Sup. Ct. 133, 91 L. Ed. 103 (1946).

control of interstate movements,[122] or to the effectuation of the purpose for which such movements may be controlled.[123]

A brief reference to some of the recent decisions will show how these principles have been applied.

The original Labor Board cases of 1937[124] established the power of Congress to regulate labor relations in factories which receive raw materials and ship the goods they produce into other states. Subsequent cases held the Act applicable to processors of products grown within the state but shipped outside[125] and to a small manufacturer who delivered finished products within the state to their owner for shipment.[126] The Sherman Act has also been held to reach combinations of contractors in a single city who raised prices for manufacturing operations on goods assembled and shipped interstate by local jobbers.[127] It was in this case that Mr. Justice Jackson stated: "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."[128]

The leading case under the Fair Labor Standards Act held it applicable to a manufacturer of a raw material for sale in interstate commerce, both on the ground that the regulation of wages at the factory helped keep goods made under substandard conditions out of commerce and because such conditions in themselves affect interstate competition.[129] The statute was subsequently held to extend to employees in a building tenanted principally by corporations producing for interstate commerce,[130] to watchmen and window cleaners in factories producing for commerce even when employed by an independent contractor,[131] to a contractor who drilled oil wells for others with knowledge that any oil produced would move interstate,[132] to employees of a small newspaper with a regular circulation of 45 copies, or one half of one per cent, outside the state.[133]

122. United States v. Darby, 312 U.S. 100, 61 Sup. Ct. 451, 85 L. Ed. 609 (1941).
123. United States v. Sullivan, 332 U.S. 689, 68 Sup. Ct. 331, 92 L. Ed. 297 (1948); McDermott v. Wisconsin, 228 U.S. 115, 33 Sup. Ct. 431, 57 L. Ed. 754 (1913).
124. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 Sup. Ct. 615, 81 L. Ed. 893 (1937); NLRB v. Fruehauf Trailer Co., 301 U.S. 49, 57 Sup. Ct. 642, 81 L. Ed. 918 (1937); NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58, 57 Sup. Ct. 642, 81 L. Ed. 921 (1937).
125. Santa Cruz Fruit Packing Co. v. NLRB, 303 U.S. 453, 58 Sup. Ct. 656, 82 L. Ed. 954 (1938).
126. NLRB v. Fainblatt, 306 U.S. 601, 59 Sup. Ct. 668, 83 L. Ed. 1014 (1939).
127. United States v. Women's Sportswear Manufacturers Ass'n, 336 U.S. 460, 69 Sup. Ct. 714, 93 L. Ed. 805 (1949).
128. 336 U.S. at 464.
129. United States v. Darby, 312 U.S. 100, 61 Sup. Ct. 451, 85 L. Ed. 609 (1941).
130. Kirschbaum Co. v. Walling, 316 U.S. 517, 62 Sup. Ct. 1116, 86 L. Ed. 1638 (1942).
131. Martino v. Michigan Window Cleaning Co., 327 U.S. 173, 66 Sup. Ct. 379, 90 L. Ed. 603 (1946); Walton v. Southern Package Corp., 320 U.S. 540, 64 Sup. Ct. 320, 88 L. Ed. 298 (1944).
132. Warren-Bradshaw Drilling Co. v. Hall, 317 U.S. 88, 63 Sup. Ct. 125, 87 L. Ed. 83 (1942).
133. Mabee v. White Plains Publishing Co., 327 U.S. 178, 66 Sup. Ct. 511, 90 L. Ed. 607 (1946).

Perhaps the most sweeping of all the cases holding activity in the field of production subject to the commerce power is *Wickard v. Filburn*,[134] which sustained the allocation of wheat quotas even to farmers who consumed their own crops in the form of food, livestock feed and seed. More recently, the Sherman Act was held to reach a scheme by manufacturers in a single state to fix the prices paid farmers in the same state for their beets, on the ground that the prices so fixed would inevitably affect the interstate price of refined sugar.[135]

All of these cases involved transactions occurring before commerce began. The Court has also held that the federal power extends to intrastate acts after commerce has ceased. When, in *United States v. Sullivan*,[136] a retail druggist was prosecuted for selling improperly labeled pills which, though previously shipped in interstate commerce, had been purchased by him within the state and held for nine months, the Court disposed of the commerce question summarily by reference to the early case of *McDermott v. Wisconsin*.[137] That case had barred Wisconsin from substituting for the federal interstate label its own label for use by the retail store, on the ground that the purpose of the regulation of interstate labeling would be frustrated if the label were removed before the product reached the ultimate consumer. The National Labor Relations Act has also been held to reach large retail stores;[138] for reasons of policy the Board has refrained from bringing cases against smaller retail outlets.[139] At the time this was written, the Supreme Court has before it the application of the Taft-Hartley Act to union restraints in local building operations where some of the building materials have come from without the state.[140] The antitrust laws have also been held to reach a scheme to fix retail prices when the means adopted reach beyond state boundaries.[141]

The courts have also recognized the inseparability of interstate industry by sustaining regulatory provisions which in isolation seem to have little to

134. 317 U.S. 111, 63 Sup. Ct. 82, 87 L. Ed. 122 (1942).

135. Mandeville Island Farms Co. v. American Crystal Sugar Co., 334 U.S. 219, 68 Sup. Ct. 996, 92 L. Ed. 1328 (1948).

136. 332 U.S. 689, 68 Sup. Ct. 331, 92 L. Ed. 297 (1948).

137. 228 U.S. 115, 33 Sup. Ct. 431, 57 L. Ed. 754 (1913).

138. Loveman, Joseph & Loeb v. NLRB, 146 F.2d 769 (5th Cir. 1945); J.L. Brandeis & Sons v. NLRB, 142 F.2d 977 (8th Cir. 1944), *cert. denied*, 323 U.S. 751 (1944); NLRB v. M.E. Blatt Co., 143 F.2d 268 (3d Cir. 1943), *cert. denied*, 323 U.S. 774 (1944); NLRB v. J.L. Hudson Co., 135 F.2d 380 (6th Cir. 1943), *cert. denied*, 320 U.S. 740 (1943); NLRB v. Kudile, 130 F.2d 615 (3d Cir. 1942), *cert. denied*, 317 U.S. 694 (1943); NLRB v. Suburban Lumber Co., 121 F.2d 829 (3d Cir. 1941), *cert. denied*, 314 U.S. 693 (1941).

139. See NLRB announcement, October 3, 1950, 19 U.S.L. WEEK 2147 (1950).

140. NLRB v. Local 74, 181 F.2d 126 (6th Cir. 1950), *cert. granted*, 340 U.S. 902 (1950); International Brotherhood of Electrical Workers v. NLRB, 181 F.2d 34 (2d Cir. 1950), *cert. granted*, 340 U.S. 902 (1950); NLRB v. Denver Building & Construction Trades Council, 186 F.2d 326 (D.C. Cir. 1950), *cert. granted*, 340 U.S. 902 (1950). All of these cases were argued on February 26 and 27, 1951.

141. United States v. Frankfort Distilleries, 324 U.S. 293, 65 Sup. Ct. 661, 89 L. Ed. 951 (1945).

do with interstate commerce. An extreme example is *Egan v. United States*,[142] which upheld the provision of the Public Utility Holding Company Act prohibiting registered holding companies (by which is meant companies engaged in interstate commerce, *inter alia*) from making contributions to persons running for state or local political office. The court of appeals reasoned that Congress could rationally conclude that such expenditures might affect or burden interstate commerce through their impact upon rates, and might also demonstrate a lack of economy in management and operation which would be injurious to investors and consumers;[143] the Supreme Court denied certiorari.[144] The Court has also removed the pre-existing barrier—or at least what many persons thought was a barrier—to the exercise of the commerce power over the world of finance by holding that insurance companies were engaged in interstate commerce.[145]

These cases, which indicate roughly the present scope of the power of Congress under the commerce clause, justify two general observations. Industry organized on a national scale, all the operations of which are inevitably economically interrelated, will not be compartmentalized into interstate and local segments, the former subject exclusively to federal control and the latter exclusively to state regulation. The Court no longer construes the Constitution as requiring a division for governmental purposes of what is in fact inseparable.[146]

The cases also demonstrate that it is unnecessary to judge merely the effect on commerce of the individual transaction or person involved in the particular case. The amount of wheat produced by a single farmer, or a single sale of drugs by a retailer, obviously would not affect interstate commerce substantially, or even noticeably. But Congress is entitled to take into account the total effect of many small transactions. "The total effect of the competition of many small producers may be great."[147] In *Wickard v. Filburn*,[148] the Court noted: "That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."

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142. 137 F.2d 369 (8th Cir. 1943), *cert. denied*, 320 U.S. 788 (1943).
143. *Id.* at 374-75.
144. 320 U.S. 788 (1943).
145. United States v. South-Eastern Underwriters, 322 U.S. 533, 64 Sup. Ct. 1162, 88 L. Ed. 1440 (1944); Polish National Alliance v. NLRB, 322 U.S. 643, 64 Sup. Ct. 1196, 88 L. Ed. 1509 (1944).
146. See particularly, Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 68 Sup. Ct. 996, 92 L. Ed. 1328 (1948); Wickard v. Filburn, 317 U.S. 111, 63 Sup. Ct. 82, 87 L. Ed. 122 (1942).
147. United States v. Darby, 312 U.S. 100, 123, 61 Sup. Ct. 451, 85 L. Ed. 609 (1941).
148. 317 U.S. 111, 127-28, 63 Sup. Ct. 82, 87 L. Ed. 122 (1942). See also Polish National Alliance v. NLRB, 322 U.S. 643, 648, 64 Sup. Ct. 1196, 88 L. Ed. 1509 (1944); North American Co. v. SEC, 327 U.S. 686, 710, 66 Sup. Ct. 784, 90 L. Ed. 945 (1946).

It may be true that the application of the principles now approved by the Supreme Court may leave only minor aspects of our economy free from the regulatory power of Congress. The reason for this, however, is not legal but economic. If, in fact, the interstate and intrastate features of American business are inseparable, it would be crippling to require an artificial separation for purposes of governmental control. This was the vice of the older, now discarded, authorities.

The expansion of the power of Congress does not mean that there is nothing left for the states to regulate. Congress need not exercise its authority over all aspects of our national economy, and, of course, it has not done so. Some of its legislation is in aid of the authority of the states. It is not at all unlikely—if a guess may be ventured—that the amount of state commerce regulation has expanded along with the federal, rather than the reverse. For along with the growth of federal power has come a greater reluctance to find state legislation in conflict with the commerce clause. In his lectures before the University of Kansas in 1947, Mr. Justice Rutledge concluded:

> "[J]ust as in recent years the permissible scope for congressional commerce action has broadened, returning to Marshall's conception, the prohibitive effect of the clause has been progressively narrowed. The trend has been toward sustaining state regulation formerly regarded as inconsistent with Congress' unexercised power of commerce. . . .
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> "Nevertheless, the general problem of adjustment remains. It has only been transferred to a level more tolerant of both state and federal legislative action. On this level a new or renewed emphasis on facts and practical considerations has been allowed to work. . . .
>
> "But the scope of judicial intervention has been narrowed by the more recent trends, affecting both the affirmative and the prohibitive workings of the clause. Greater leeway and deference are given for legislative judgments, national and state, formally expressed. Larger emphasis is put on scrutiny of particular facts and concrete consequences, with an eye on their practical bearing for creating the evils the commerce clause was designed to outlaw. Correspondingly, less stress . . . is placed upon large generalizations and dogmatisms inherited from levels of debate time has lowered. More and more the controlling considerations of policy implicit in thinking, judgment, and decision are brought into the open."[149]

These principles have also governed the application of the due process clause to the regulation of economic relationships. It is because of the greater leeway given legislative judgments that the commerce and due process clauses have ceased to arouse as much controversy as formerly. There are, of course, and presumably always will be, peripheral issues, some of undoubted importance, for the courts to decide. But, apart from these, in this vital field of constitutional adjudication, there is seldom any longer much doubt as to what the Court will do. As a consequence, many of the problems of yesteryear are hardly problems today.

149. RUTLEDGE, A DECLARATION OF LEGAL FAITH 68-70 (Univ. of Kan. Press, 1947).