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CONSTITUTIONAL LAW-A FEDERAL COMMERCIAL CODE-SOME POSSIBILITIES UNDER THE CONSTITUTION

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CONSTITUTIONAL LAW—A FEDERAL COMMERCIAL CODE—SOME POSSIBILITIES UNDER THE CONSTITUTION—One of the less desirable results of our federal system of government is the lack of uniformity

of laws, especially laws relating to commercial transactions. Under a system of minute economic integration which knows no state boundaries the confusing maze of forty-nine bodies of commercial law is brought into sharp focus. To meet the need for uniform laws, the National Conference of Commissioners on Uniform State Laws was established in 1890.[1] Although its purpose is admirable and its works learned, for such varied reasons as economic differences among the several states, political struggle for local preference and the sheer weight of inertia, the drafts of the Uniform Commissioners have not met with overwhelming acceptance. Only the Negotiable Instruments Law has been enacted in all the states; the Uniform Sales Act is law in thirty-four states; and the fifty-seven other statutes promulgated by the Uniform Commissioners have in general been accorded much less official recognition.[2] Largely to overcome a lack of uniformity in interpretation of the present act, the Uniform Commissioners in the past few years have substantially completed a thorough revision of the Uniform Sales Act,[3] which in due time will be presented to the several states for such action as they individually may wish to take. The American Law Institute has been working with the Uniform Commissioners in drafting selected sections of a comprehensive revision of American commercial law to achieve simplicity and uniformity.[4]

Most of the great nations of the world have uniform commercial codes applicable to all commercial transactions subject to the jurisdiction of the nation.[5] The Continental guild law of the middle ages[6] and the English law merchant[7] are historical evidences of the commercial world's search and need for uniform rules governing its transactions. In our own country the formation of the Constitution itself is attributable in a large measure to the desire of the Colonial merchants to

[1] 14 A.B.A. REP. 51 and 365-375 (1891); HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 265-267 (1943).

[2] Of the forty-nine uniform acts and the ten model acts actively promulgated by the Uniform Commissioners in 1943, an average of 14.5 jurisdictions (states, territories and the District of Columbia) had adopted each act. This figure of 14.5 jurisdictions per act is, of course, misleading to the extent that additional jurisdictions do continue to adopt recommended acts from time to time. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 309-310 (1943).

[3] HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 161-166 (1943).

[4] Id. 36 and 116; 20 A.L.I. PROC. 38 (1943); for an interesting view against the formulation of new commercial laws, see 19 FLA. L. J. 35 (1945).

[5] WOLFE, COMMERCIAL LAWS OF ENGLAND, SCOTLAND, GERMANY AND FRANCE, U. S. Dept. of Commerce (1915); ESQUIVEL, LATIN-AMERICAN COMMERCIAL LAW (1921).

[6] 1 GROSS, THE GUILD MERCHANT, c. 9 (1890).

[7] BEWES, THE ROMANCE OF THE LAW MERCHANT 12 et seq. (1923); MITCHELL, EARLY HISTORY OF THE LAW MERCHANT 1-21 (1904).

remove intercolonial commerce from the effect of local laws designed to defeat the free movement of goods.[8]

But, for historical reasons and certain constitutional limitations, real or imagined, inherent in the federal system, Congress has done little toward relieving business from the burdens of confusing and conflicting state commercial law. It is the purpose of this comment to examine various possibilities of federal action which would help to bring about unification, simplification and clarification in the field of commercial law. The term "commercial law" has no commonly accepted connotation; it is taken here to include the law of transfers of personal property by commercial methods, of negotiable instruments, of chattel securities, of agency and of business associations; in short, all those fields of law which a Continental lawyer would term "private commercial law."

On the assumption that Congress will be willing to enact a federal commercial code embracing these branches of the law and that the code will be carefully drawn by an expert and impartial body such as the Uniform Commissioners, the American Law Institute or the Federal Trade Commission, the two principal issues considered by this comment are presented. First, how broad a swath might be cut by such a code, that is, what commercial transactions could be subjected to federal legislation. Second, having determined the scope of the code, what general provisions should be included to insure its simple and efficient administration. The first issue is largely one of constitutional law; the second, one of judicial administration. It is not the purpose of this comment to discuss the substantive provisions of a commercial code.

A. *Constitutional Considerations*

In considering the possible scope of a federal commercial code sustainable under present notions of Congressional power, several sections of the Constitution might be mentioned. The powers conferred by two of these sections, the commerce clause[9] and the treaty power,[10] will be considered at length and the additional possibilities under other clauses noted briefly.

1. *The Commerce Clause*

The very fact that a commercial code is here considered leads to inquiry as to the possibility of grounding the code upon the power of

[8] THE FEDERALIST, Nos. VII and XI (1787); FARRAND, THE FRAMING OF THE CONSTITUTION 17 and 45 (1913).

[9] U. S. Const., Art. I, § 8, c. 3.

[10] U. S. Const., Art. II, § 2, c. 2.

Congress "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[11] The decisions of the Supreme Court squarely support the proposition that a federal commercial code could be made applicable to all transactions in interstate commerce and to all transactions affecting interstate commerce. But this merely delineates the issues of the present inquiry—what are transactions in and affecting interstate commerce. The commerce clause has been used to sustain the major portion of the so-called New Deal legislation[12] and these decisions in turn have led to drastic revision of concepts of constitutional power. The major changes in the Supreme Court's position in the past decade might well be regarded as changes in its conception of the judicial function. Two of these changes bear particular relation to this discussion.

First, the Supreme Court has adopted a policy of constant re-examination of the Constitution in view of current political and social requirements. Although this policy has been referred to as the interpretation of the Constitution as a living document,[13] it is more accurately a process of emphasizing or minimizing the various sections of a very broad and indefinite document to make that document meet current political and social demands. Because of the generality of the language in which it is cast, a shift of emphasis is entirely possible without doing violence to its terms.

Second, the Court has adopted a hands-off policy with regard to most of the actions of the legislative, administrative and executive divisions of government. This policy, variously termed judicial self-restraint, legislative laissez-faire and leave-it-to-Congress,[14] which found its great exponent in Justice Holmes,[15] has resulted in a countervailing expansion of the power of the other divisions of government. As the Court withdraws its restraining hand, the field is left free for addi-

[11] Supra, note 9.

[12] The term "New Deal legislation" is used here to include the major socio-economic legislation recommended by the Democratic administration and passed by Congress from 1933 to 1945.

[13] "We read its [the Constitution's] words . . . as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government." Stone, C. J. in United States v. Classic, 313 U.S. 299 at 316, 61 S. Ct. 1031 (1941).

[14] Spahr, "The Leave-It-To-Congress Trend in the Constitutional Law of Tax Immunities," 95 UNIV. PA. L. REV. 1 (1946).

[15] "While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all." Holmes, J. dissenting in Otis v. Parker, 187 U.S. 606 at 608, 23 S. Ct. 168 (1903).

tional social and economic experiments. This means added regulation of our private lives, for all present-day social and economic experiments require regulation by the government. One of the most significant corollaries of this hands-off policy is an extremely strong presumption in favor of the validity of any Congressional act—the Congress speaks the public will and unless its action is capricious or arbitrary, the Court will not question it.[16]

The history of the commerce clause has been one of constant expansion accomplished by three more or less distinct lines of development, namely (1) by broadening the conception of commerce which crosses state boundaries, (2) by regulating the instrumentalities of interstate commerce, and (3) by bringing within the commerce clause activities which affect interstate commerce.

a. *Transactions which cross state lines.* The conception of a transaction crossing a state line and thereby becoming interstate commerce subject to control by Congress is the oldest method of invoking the commerce power to sustain a legislative act, being first used in the landmark case of *Gibbons v. Ogden*[17] in 1824. Almost a century later, in 1916, Congress passed the Federal Bills of Lading Act[18] regulating all bills of lading in interstate commerce. The Supreme Court sustained the conviction of a forger of interstate bills under the act. It held that, although a fraudulent bill of lading was not an instrumentality of commerce, it was an obstruction to commerce which Congress might regulate by appropriate legislation.[19] The validity of federal control of interstate bills of lading was assumed. Bills of lading are a part of a transaction which crosses a state line; ergo, they are subject to control by Congress and accordingly within the scope of a federal code. Documents embraced by this aspect of the commerce clause would include bills of exchange, promissory notes, bills of sale, trust receipts, warehouse receipts, pledges, chattel mortgages and contracts, provided that such documents were a part of a transaction which crossed a state line.

But the presence of a document is not essential to federal regulation of the legal relations governing interstate commercial transactions. It has been taken as axiomatic in many cases,[20] that all interstate trans-

[16] "The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control." Stone, J. in United States v. Darby, 312 U.S. 100 at 115, 61 S. Ct. 451 (1941).

[17] 9 Wheat. (22 U.S.) 1 (1824).

[18] 49 U.S.C. (1940) §§ 81-124.

[19] United States v. Ferger, 250 U.S. 199, 39 S. Ct. 445 (1919).

[20] Gibbons v. Ogden, 9 Wheat. (22 U.S.) 1 (1824); Champion v. Ames (The Lottery Case), 188 U.S. 321, 23 S. Ct. 321 (1903); Railroad Commission of Louis-

actions are subject to Congressional control, including the power to restrict or enlarge the legal relations of the parties as defined by the laws of the several states, for when state and federal law conflict it is the higher federal law which must prevail.[21]

It would seem that any doubts that Congress can prescribe the rules by which an interstate sale or contract shall be performed would be dispelled by the recent decision in *South-Eastern Underwriters Association v. United States*.[22] This case held that insurance is commerce, thereby overruling a seventy-five year assumption to the contrary.[23] This case left no outstanding decisions controverting the proposition that the tangible evidences of and the intangible legal relations involved in interstate commercial transactions are proper subjects of federal control under the commerce clause.[24]

Even if the code went no farther it would as a practical matter cover a large and important portion of all commercial transactions. Any business transaction whose legal relations were governed by the code and whose performance required the movement of documents and/or goods across a state line would be included. The enactment of such legislation would provide powerful reasons for the states to pass identical legislation applicable to their local commerce. Businessmen, being aware of the possibilities of avoiding the confusion, delay and expense of applying multiple bodies of law to their transactions, would undoubtedly press strongly for state legislation grounded upon the federal code. The recommendation of the National Conference of Commissioners on Uniform State Laws that such legislation be enacted would be strengthened by the national government's "endorsement" of the measure. The federal judiciary's constant interpretation of the code would serve as an added guaranty of a uniform interpretation of the measure in state courts. In short, there is good reason to believe that a federal commercial code drawn to cover only interstate transactions would operate as a model for identical state legislation. Such a line of events would to a large degree achieve the goal of a uniform nationwide system of commercial law.

iana v. Texas & R. Ry. Co., 229 U.S. 336, 33 S. Ct. 837 (1913); Kentucky Whip & Collar Co. v. Illinois Cent. R. Co., 299 U.S. 334, 57 S. Ct. 277 (1937); Freeman v. Hewit, 329 U.S. 249, 67 S. Ct. 274 (1946).

[21] Martin v. Hunter's Lessee, 1 Wheat. (14 U.S.) 304 (1816); McCulloch v. Maryland, 4 Wheat. (17 U.S.) 316 (1819); Ex parte Siebold, 100 U.S. 371 (1880).

[22] 322 U.S. 533, 64 S. Ct. 1162 (1944).

[23] Paul v. Virginia, 8 Wall. (75 U.S.) 168 (1869).

[24] "No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause." Black, J. in United States v. Southeastern Underwriters Association, 322 U.S. 533 at 553, 64 S. Ct. 1162 (1944).

b. *Regulation of instrumentalities of interstate commerce.* However, the outer limits of the conception of a transaction in interstate commerce can be reached and still important areas of the nation's business would lie outside the operation of a federal commercial code until the second line of expansion of the commerce clause is considered, that is, federal regulation of the instrumentalities of interstate commerce.

The most important application of this development lies in the field of the agencies of transportation and communication. The commercial transactions of the interstate carriers and other agencies of interstate commerce, including railroads, motor trucks and buses, vessels, aircraft, telephone, telegraph and radio, could undoubtedly be subjected to a federal code. All the activities of these agencies of interstate commerce are subject to the plenary control of Congress because of the substantial effect of such activities on interstate commerce regardless of whether the immediate activity is interstate or local.[25]

Moreover, the banking institutions of the nation, whether chartered by the state or federal government, are now regarded as instrumentalities of commerce in the sense that their power to create money and their transactions in money, the "lubricating fluid" of the national economy, make them an integral part of the machinery which carries out the financial policy of the federal government.[26] It is upon this theory that the recent Federal Reserve and Federal Deposit Insurance legislation has been grounded with Constitutional roots in both the commerce and fiscal[27] powers. On this line of reasoning, i.e., by regarding the banking institutions as instrumentalities of commerce, banks could be relieved from the burden of applying multiple bodies of law to their multifarious commercial activities; Congress might require all the activities of banks to be subject to a single federal commercial code.[28]

By stipulating that the commercial transactions of all the agencies

[25] ROTTSCHAEFER, AMERICAN CONSTITUTIONAL LAW, §§ 142-143 (1939) and cases cited therein; Southern Pacific Co. v. Arizona, 325 U.S. 761, 65 S. Ct. 1515 (1945).

[26] Bozant v. Bank of New York, (C.C.A. 2d, 1946) 156 F. (2d) 787; infra, note 42.

[27] U. S. Const., Art. I, § 8, c. 5.

[28] A further measure, not strictly within the operation of the commerce clause but which can best be mentioned here, would be to subject the commercial dealings of all governmental agencies and departments to the code. The business activities of such great governmental agencies as the War Department, the Reconstruction Finance Corporation and the Tennessee Valley Authority, to mention only a few, form no small part of our national business life and such a requirement would serve to bring vast numbers of transactions within the scope of the code.

of interstate commerce, all the banking institutions subject to federal control and all the agencies of the federal government itself be governed by the code, the bulk of negotiable paper, bills of lading, warehouse receipts, chattel securities and large numbers of miscellaneous relationships would be swept within the scope of the legislation.

c. *Activities which affect interstate commerce.* The last decade has witnessed the greatest expansion of the commerce clause by a third method, namely intensive development in the field of regulation of those activities which affect interstate commerce. The major impact of New Deal legislation dealing with labor relations,[29] minimum wages and hours,[30] farm price-fixing,[31] and reorganization of public utility holding companies[32] has fallen upon economic activities at the traditionally intrastate level, yet this legislation has been consistently sustained by the Supreme Court on the ground that these activities affect interstate commerce.

In *N.L.R.B. v. Fainblatt*,[33] the National Labor Relations Act[34] was held applicable to a small processor of women's garments, who did not ship in interstate commerce, but delivered his finished product to a local factory for further processing. The Supreme Court reasoned that a strike in Fainblatt's plant would interfere with the interstate movement of goods and that, therefore, the volume of his business and the immediate point of delivery were immaterial.

The employment practices of a Georgia sawmill operator who shipped a portion of his millwork in interstate commerce were subjected to the requirements of the Fair Labor Standards Act[35] in *United States v. Darby*,[36] despite prior assertions that production was not commerce.[37] The salary paid to the local millworkers was deemed to have an effect upon interstate commerce. The decision expressly overruled *Hammer v. Dagenhart* (*The Child Labor Case*)[38] as inconsistent with this broad view of the commerce power.

The Court in *Wickard v. Filburn*[39] sustained federal control of the production of wheat grown for consumption on the farm. It rea-

[29] 29 U.S.C. (1940) § 151 et seq.
[30] 29 U.S.C. (1940) § 201 et seq.
[31] 7 U.S.C. (1940) § 1281 et seq.
[32] 15 U.S.C. (1940) § 79 et seq.
[33] 306 U.S. 601, 59 S. Ct. 668 (1939).
[34] Supra, note 29.
[35] Supra, note 30.
[36] 312 U.S. 100, 61 S. Ct. 451 (1941).
[37] Kidd v. Pearson, 128 U.S. 1, 9 S. Ct. 6 (1888); Carter v. Carter Coal Co., 298 U.S. 238, 56 S. Ct. 855 (1936).
[38] 247 U.S. 251, 38 S. Ct. 529 (1918).
[39] 317 U.S. 111, 63 S. Ct. 82 (1942).

soned that such production, even though not intended for sale in interstate commerce, overhung the wheat market and had a substantial economic effect upon the government's wheat price-fixing policy.[40]

Congressional power to deny the use of the instrumentalities of commerce to public utility holding companies unless such companies submit to "economic integration" on terms to be dictated by the Securities and Exchange Commission was upheld in *The North American Company v. S.E.C.*[41] The fact that the holding company was primarily a local corporation was not conclusive, because it was found that the company's activities had an effect upon the interstate operations of its subsidiaries.[42]

The decisions lend powerful analogical support to the constitutionality of a broad federal commercial code. If Congress decided such a measure was necessary to aid and protect interstate and foreign commerce and enacted appropriate legislation, such legislation would be accorded an extremely strong presumption of validity. Moreover, Congress would be acting to protect a matter solely within its province; it would have declared such legislation to be in the public interest; it would be acting in an accepted manner by declaring the rights and duties of parties engaged in or affecting commerce; and no considerations of due process[43] could be interposed to counter-balance the strong presumption of validity accorded a Congressional act.[44]

Would any commercial transaction included within the code have less effect on interstate commerce than the effect considered adequate to sustain federal regulation in the *Wickard* case,[45] where a farmer's production of wheat for his own use was deemed to endanger the government's price-fixing policy? Would a supermarket's sale to a local housewife have less relation to the national economy than the wages paid to a Georgia sawmill worker in the *Darby* case?[46] It is believed that both of these questions must be answered in the negative.

[40] 7 U.S.C. (Supp. 1945) § 1340.

[41] 327 U.S. 686, 66 S. Ct. 785 (1946).

[42] This decision also lends strong support to the power of Congress to require all corporations engaged in or whose activities affect interstate commerce to incorporate or be licensed by federal law. The problem of federal incorporation is not separately treated in this comment, but is regarded as a part of the general discussion of commercial law here considered. For articles specifically dealing with the problem which seem to support the position taken in this comment, see Berlack, "Federal Incorporation and Securities Regulation," 49 HARV. L. REV. 396 (1936); Jennings, "Federal Incorporation or Licensing of Interstate Corporate Businesses," 23 MINN. L. REV. 710 (1939).

[43] U.S. Const., Amendments, Art. 5.

[44] 30 COL. L. REV. 360 (1930); 36 COL. L. REV. 283 (1936).

[45] Supra, note 39.

[46] Supra, note 36.

The conclusions of a recent writer upon the implications of the Supreme Court's decisions under the commerce clause since 1937 might well be adopted in summary here:

> "By the end of the decade, every decision which had invalidated a congressional exercise of the commerce power had been disapproved, or distinguished to death. . . . The constitutional grant of power over commerce was now interpreted as enabling Congress to enact all appropriate laws for protection and advancement of commerce among the states, whatever measures Congress might reasonably think adapted to that end, without regard for whether particular acts regulated in themselves were interstate or intrastate."[47]

There are, of course, forceful arguments which can be advanced against the constitutionality of such an all-inclusive code. One of the most significant is to distinguish a federal commercial code from the New Deal legislation which has been sustained by the Court, by showing that a federal commercial code would go much farther than this New Deal legislation in breaking down present notions of our federal system of government.

Under this argument, it might be said that unstable labor relations, sub-standard conditions of employment, ruinous farm prices and the uneconomical operation of public utilities are recognized as undesirable conditions which arise through the operation of the national economy. They cannot be dealt with adequately by state laws, but in no sense could it be said that the state laws caused these economic problems. In contrast with the New Deal legislation designed to meet these economic evils, the suggested commercial code would be directed at an alleged evil directly caused by the operation of the federal system of government, that is, the evil of non-uniformity of state laws. It is, in this sense, a direct attack upon state laws. The federal government would be legislating to prevent the undesirable results flowing from state laws in a field which up to this time had been regarded as reserved to the states.

On the one hand, it must be conceded that state laws are not per se evils which can be removed at the pleasure of Congress; on the other hand, when state laws have an adverse effect upon a field delegated to Congress by the Constitution, Congress may legislate to supersede such state laws.[48] Between these two poles lies the field where

[47] Stern, "The Commerce Clause and the National Economy, 1933-1946," 59 HARV. L. REV. 645 at 946 (1946). Mr. Stern's conclusion seems to agree with that reached by Prof. Dowling. See Dowling, "Constitutional Developments in Five War Years," 32 VA. L. REV. 461 (1946).

[48] Supra, note 21.

the final battle as to the advisability of a federal commercial code must be fought. In the final analysis, any debate upon the constitutionality of a given measure must turn upon what line of approach to the problem is emphasized. The Constitution is a broad and sweeping document, and widely varied interpretations of its several sections can be adopted without doing violence to any section. It is submitted that under the present philosophy of the Supreme Court as reflected in its hands-off policy and its willingness to reinterpret the Constitution in the light of the changing needs of the people, a federal commercial code cast in its broadest form could be sustained.[49]

2. *The Treaty Power*

The treaty-making power of the federal government[50] would provide an alternative approach to a broad federal commercial code embracing all commerce, interstate and local. The outer limits of the treaty power have not yet been defined by the Supreme Court, although the problem has been touched upon in a handful of cases.[51] In *Missouri v. Holland*,[52] federal legislation enacted to implement a Canadian-American treaty with respect to migratory waterfowl was held valid, even though a prior federal statute not based on a treaty had been found by a lower federal court to be a violation of states rights.[53] That the treaty-making power might constitutionally supplant a local law in a given field was asserted by Chief Justice Hughes in one of his last opinions, where he stated:

> "The exigencies of local trade and manufacture which prompted the enactment of the statute [enacted by the legislature of Puerto Rico] cannot save it, as the United States in exercising its treaty making power dominates local policy." [54]

[49] If a federal commercial code were cast under the commerce power, it might be advisable to invoke other sections of the Constitution to enlarge or round out the legislative scheme of a broad code. For example, the fiscal powers of Congress could be used to insure federal supremacy in the regulation of banks and banking activities. The taxing power, the power to dispose of federal property and the postal power offer additional possibilities.

[50] U.S. Const., Art. II, § 2, c. 2.

[51] Edye v. Robertson (Head Money Cases), 112 U.S. 580, 5 S. Ct. 247 (1884); Asakura v. Seattle, 265 U.S. 332, 44 S. Ct. 515 (1924); United States v. Belmont, 301 U.S. 324, 57 S. Ct. 758 (1937); United States v. Pink, 315 U.S. 203, 62 S. Ct. 552 (1942); cases cited infra, notes 52 and 54.

[52] 252 U.S. 416, 40 S. Ct. 382, (1920).

[53] United States v. Shauver, (D.C. Ark. 1914) 214 F. 154. The case was appealed to the Supreme Court and then dismissed on motion of the United States without a trial. 248 U.S. 594, 39 S. Ct. 134 (1919).

[54] Bacardi Corp. of America v. Domenech, 311 U.S. 150 at 166, 61 S. Ct. 219 (1940).

Applying this line of reasoning, the United States might enter into a treaty with some nation or nations with which it had a substantial volume of trade and the treaty would provide that, in order to promote trade and commerce and to effectuate uniformity of rules governing trade, each nation would enact specified rules relating to trade. Such rules would be applicable to the internal trade of each nation in order to eliminate confusion and remove the businessmen's burden of being subject to conflicting bodies of commercial law as applied to their domestic and international dealings, respectively.

According to the small but consistent body of authority available on the subject, it appears that the supplementary legislation passed by Congress to carry out the terms of this treaty and embodying an all-inclusive federal commercial code would be within the power of Congress to effectuate a treaty by necessary and proper action. Even though it were conceded that such a code was not ordinarily within the scope of the constitutional power of Congress on domestic affairs, it is submitted that it would be valid under the treaty power, because any limitations on federal authority over domestic affairs would be ineffectual to reduce federal power in the field of foreign affairs so long as the subject of the treaty was a proper subject of international agreement.

B. *Administration of a Federal Code*

Private commercial law has always furnished a large part of the business presented to any judicial system. It cannot be doubted that a federal commercial code embracing all transactions in and effecting commerce, as this term is now regarded, would cover a substantial portion of the business of the courts which administered it. For example, of the 6,273 cases between private parties commenced in the United States district courts during the fiscal year 1946 by reason of diversity of citizenship, 2,466 or 39.3 per cent were contract actions which would probably fall within the terms of a federal commercial code.[55] A large share of present day controversies involving private commercial law are adjudicated in the inferior state courts—justices of the peace, municipal courts and the like—while most of the larger controversies are decided in the state courts of record. Only a relatively small number of cases are begun in or removed to the federal courts on the ground of a federal question or a diversity of citizenship.[56] It would seem unwise to require litigants to bear the expense and time required to bring all cases involving private commercial law in the

[55] ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Table C 2, p. 89 (1946).

[56] Access to the federal district courts is regulated entirely by statute. 28 U.S.C. (1940) §§ 41 and 371.

federal courts. Many litigants would be foreclosed of an effective remedy because the smallness of their claim could not bear the expense required to bring the case in a federal court. In short, the state systems of courts are by and large more conveniently organized than the federal judiciary to handle the great bulk of private commercial law actions.

To meet this situation, it is suggested that the federal code contain a provision permitting litigants access to state courts in the enforcement of claims arising under the code, and once an action had been brought in a state court it could not be removed to a federal court for any reason. Such a provision would be entirely within the powers of Congress;[57] in fact an identical provision has been successfully used in the administration of the Employer's Liability Act[58] to prevent a flood of litigation in the federal courts.

Under such a provision state courts would continue to handle the bulk of cases arising under the commercial law. Cases could be appealed to the highest state courts and then, to achieve the desired result of uniformity, the United States Supreme Court would have ultimate jurisdiction by way of appeal or certiorari, as in analogous cases where the construction of federal law is involved.[59] By judicious use of its power to review on certiorari, the United States Supreme Court would be able to dispel doubt and prevent the rise of conflicting lines of authority under the federal code, whereas doubt and conflict are inherent objections to the solution of the problem of uniformity through uniform state laws.

One further provision might be included within a federal code to insure simplicity and uniformity in its administration. In order to prevent the cumbersome process of obtaining a judgment in one court system and then suing on that judgment to enforce it in another jurisdiction, the code might provide that a judgment grounded on the code obtained in any court could be directly enforced in any state or territory subject to the jurisdiction of the United States. Such a provision would, of course, be grounded upon the full faith and credit clause of the federal Constitution.[60] Although no Congressional legislation or Supreme Court decision has tested the extent of power granted by this section of the Constitution, it has been convincingly argued that the clause could be used to require direct enforcement by one state of

[57] Second Employers' Liability Cases, 223 U.S. 1, 32 S. Ct. 169 (1912); BREWSTER, FEDERAL PROCEDURE, § 93 (1940).

[58] 45 U.S.C. (1940) § 56.

[59] 28 U.S.C. (1940) § 344; BREWSTER, FEDERAL PROCEDURE, §§ 38-43 (1940).

[60] U.S. Const., Art. IV, § 1.

judgments obtained in another state.[61] The inclusion of such a measure in a federal code would insure simplicity and speed in the enforcement of judgments founded on commercial law, where simplicity and speed are most necessary.

Disregarding the usual initial demand for interpretation encountered by every new statute, there is no reason to believe that a comprehensive federal commercial code would require any major revision of our present federal and state court systems. In Continental nations there is often a special court system which deals with the commercial law,[62] but no tendency towards specialization of this type is evident in this country. Our judicial system as it stands is well adapted to the handling of private commercial law. It is submitted that a federal commercial code, as herein suggested, would provide a system of commercial law which would have all the advantages of the Continental codes without encroaching upon the fundamental nature of our federal system of government.

Merrill N. Johnson

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[61] Cook, "The Powers of Congress Under the Full Faith and Credit Clause," 28 YALE L. J. 421 (1919). See also, Jackson, "Full Faith and Credit—The Lawyer's Clause of the Constitution," 45 COL. L. REV. 1 (1945).

[62] Supra, note 5.