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Latest Development of the Interstate Commerce Power

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THE LATEST DEVELOPMENT OF THE INTERSTATE COMMERCE POWER

THE litigation under the anti-lottery act of 1895, has for the first time raised the important constitutional question whether congress, under its general power to regulate interstate commerce, can select any particular article and exclude it from interstate commerce altogether—whether the power to regulate involves the power to prohibit. For nearly a century after the foundation of the government no attempt was made by congress to restrict interstate commerce by excluding any article therefrom. Quarantine legislation, however, opened the way, and the anti-lottery act sharply raised the question of power. Lottery tickets in the earliest days of the republic were the subjects of lawful and popular, and even pious traffic. They were among the most universal means of raising money. They built churches, schools and colleges. They were used by the United States government itself as a fiscal agency.[1] Bold would have been the man who would dare predict what has, however, happened—that lottery tickets in a century would be regarded by the great majority of the people as an evil, and would be prohibited by the legislature of almost every state.

Congress first excluded them from the mails, and this, after much litigation, was sustained under the general power to conduct the mails. Congress next, in 1895, took a more radical step and excluded them from interstate commerce altogether. This raised two interesting questions under the power to regulate commerce; first, whether a lottery ticket is an article of commerce at all; and second, whether the power to regulate commerce implies the power to prohibit it.

The constitutionality of the law was first argued in the supreme court in 1896, but the case went off upon a technical point.[2] It was brought up again in *Champion* v. *Ames*,[3] which was argued three

[1] Cohen *v.* Virginia, 6 Wheat. 264.

[2] France *v.* United States, 164 U. S. 676.

[3] 23 Sup. Ct. Rep. 321.

times at three successive terms of the court; and finally on February 23, 1903, the court by the familiar vote of five to four has sustained the constitutionality of the act. The opinion of the majority, however, is so guarded in its language, that the true scope of the decision is already a matter of controversy among lawyers and in the press. The anti-lottery law, of course, is established; but how far the logic of the decision will sustain an extension of the principle of that law to other cases in which the public take at present a greater interest—as, for instance, to the case of articles made by unlawful combinations of manufacturers—is a question which all constitutional lawyers are studying, and which none undertake to answer with entire confidence.

The definition of commerce is a difficult one. Insurance had been excluded by previous decisions of the court, and it was strenuously insisted on behalf of the lottery men that, by like reasoning, their occupation must be excluded also. In this paper, however, it is my intention to confine the discussion to the other and more important branch of the decision. The court not only holds lottery tickets to be articles of commerce, but holds that congress may prohibit commerce in those articles between the states. What is the true theory of this decision? Is the congressional power derived from the fact that the tickets are evils in themselves or deleterious in their effects? Is it to be followed only when the courts shall concur with congress in considering any articles which may in future be prohibited to be similar evils, or has congress a general power to prohibit any article whatever which, in its own unreviewable legislative discretion, it may consider deleterious? Has congress the power to exclude any, and therefore every article, from interstate commerce, and thus put an end to interstate commerce altogether?

I think that the latter is the true analysis and the true scope of the decision, although the conservative language of the court leaves the question to some extent open for further argument. The court found no implied power in congress upon which the legislation could be based. Congress has no general police power. It has no power to supervise the morals of our citizens, to prevent crime, or to restrain extravagance. This lack of general police power, and lack of general power to suppress lotteries is pointed out by the dissenting justices; nor is it claimed by the majority of the court. The decision is squarely based upon one of the express powers of the constitution—the power to regulate commerce. The dissenting jus-

tices maintain that this express power could not be invoked because the power to *regulate* does not include the power to *prohibit*. The majority of the court, while not definitely committing themselves to the proposition that every prohibition is included within the power to regulate, maintains "the proposition that regulation *may* take the form of prohibition," and that whenever the general public opinion of the nation may have come to regard an article of commerce, however once approved and favored, as "grown into disrepute" and "offensive," so that commerce is considered both by the court and by congress as "polluted" by the presence of that article, the removal of that pollution by exclusion of the article is within the legislative authority. The next step forward the court declines to forecast.[1] Statesmen, however, must attempt to forecast it, because they are confronted with the question whether congress may deal with the problem of monopoly by exclusion of monopoly-made articles from transportation between the states.

It seems to me that congress will ultimately be held to have the power to exclude any article from interstate commerce, because the power to regulate (which has now been decided to include the power to prohibit), is one of the enumerated powers of the government. There is a radical distinction between the enumerated and the non-enumerated or implied powers. Presumptively a power expressly granted by the constitution is unlimited, unless limitations are implied from another section of the instrument. Such a power was said by Chief Justice Marshall, in 1819, to be "dis-

[1] "It is said, however, that the principle that, in order to suppress lotteries carried on through interstate commerce, congress may exclude lottery tickets from such commerce, leads necessarily to the conclusion that congress may arbitrarily exclude from commerce among the states, any article, commodity or thing, of whatever kind or nature, or however useful or valuable, which it may choose, no matter with what motive, to declare shall not be carried from one state to another. It will be time enough to consider the constitutionality of such legislation when we must do so. . . . . The whole subject is too important, and the questions suggested by its consideration are [too difficult of solution, to justify any attempt to lay down a rule for determining in advance the validity of every statute that may be enacted under the commerce clause. We decide nothing more in the present case than that lottery tickets are subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one state and another is therefore interstate commerce; that under its power to regulate commerce among the several states, congress—subject to the limitations imposed by the constitution upon the exercise of the powers granted—has plenary authority over such commerce, and may prohibit the carriage of such tickets from state to state; and that legislation to that end, and of that character, is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to congress." (Opinion of the court.)

tinct and independent, to be exercised in any case whatever."[1] A few years later, speaking of the power to regulate commerce, he said:—

"This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution."[2]

A few years later, during the great controversy in South Carolina over the constitutionality of prohibitory tariff regulation and of internal improvement appropriations, Thomas S. Grimke, in a speech then famous, and still often quoted, said:—

"It appears to me that there is a clear and marked distinction between the specific grant of a separate, substantive power, and the necessary grant of a portion of the same power, as incidental to another separate, substantive power specifically granted. Thus the power to create corporations would have enabled congress to charter banks all over the Union without regard to the financial department of the government; but the powers to borrow money and to lay and collect taxes and duties, only confer authority to incorporate a bank for the express purpose of 'conducing to the successful conducting of the national finances,' and 'of facilitating the obtaining of loans for the use of the government in sudden emergencies.' A specific power to construct roads and canals, granted substantively and separately, would have authorized their establishment all over the Union, without regard to any of the enumerated powers. But as the clause now stands, no road or canal can be constructed, except as incidental to some one specific power, and with a view to the end or object of that power. If the general power to construct roads and canals had been given separately, the construction of them would have been in the nature of an end, but given as it now is, incidentally, such construction is in the nature of means."

Remarkable instances of the presumptively limitless extent of the enumerated powers have in later times been developed by judicial exposition. Thus, while the Federal government has no power to regulate the descent of real property in the various states, the treaty making power (because it is subject to no express limitation in this respect), permits it, by a series of treaties with all foreign powers, to destroy the alienage laws of every state.[3] If the United States government, like that of the state,[4] "has the power to do an act, its intention, or the reason by which it is influenced in doing it, cannot be inquired into."

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[1] McCulloch *v.* Maryland, 4 Wheat. 316, 421.

[2] Gibbons *v.* Ogden, 9 Wheat. 1, 196.

[3] Hauenstein *v.* Lynham, 100 U. S., 483 and cas. cit.; Geofroy *v.* Riggs, 133 U. S., 258, 266-7.

[4] Doyle *v.* Continental Ins. Co., 94 U. S. 535, 541.

The responsibility for the exercise of any one of these enumerated powers is upon congress. The supreme court cannot review the propriety of its action in making appropriations, or declaring war, or leving duties, unless some express limitation upon its power is transcended. It may make a foolish appropriation, or declare a foolish war, or levy a foolish tax, or impose a foolish prohibition upon commerce, but no remedy is left to the court. The nine men, or the five men who make the final decision in the supreme court, may be wiser and safer than the hundreds of men who decided the vote in the house and senate; but, within the sphere of the enumerated powers of the legislative department of our government, the framers of the constitution decided to entrust our interest to the protection of that department alone. Possibly fear of the consequences of admitting so enormous a power as the power to prohibit interstate commerce has influenced both the decision of the minority judges in *Champion* v. *Ames*, and the conservatism in language of the majority; but we need not fear any very direful result from the admission. There are a great many things which a man can do, but will not do. Congress is elected by the people, and is responsible to the people. The abolition of interstate commerce is the last thing which it will attempt to accomplish.[1]

Whether this important decision of the supreme court will receive professional and public approval depends upon the point of view. In constitutional construction, as in the construction of statutes and other documents, there are two pretty distinct schools of interpretation; and perhaps this is the distinction which underlies most judicial dissents in constitutional cases. One school looks mainly to the language. The other looks mainly to the result. One considers mainly the meaning of the words which are used. The other considers mainly the consequences which will arise from the decision, and weighs considerations which are rather legislative than judicial in their essential character.

[1] "But, as often said, the possible abuse of a power is not an argument against its existence. There is probably no governmental power that may not be exerted to the injury of the public. If what is done by congress is manifestly in excess of the powers granted to it, then upon the courts will rest the duty of adjudging that its action is neither legal nor binding upon the people. But if what congress does is within the limits of its power, and is simply unwise or injurious, the remedy is that suggested by Chief Justice Marshall in Gibbons *v.* Ogden, when he said: 'The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.'" (Opinion of the court).

The decision of the majority of the court in *Champion* v. *Ames*, however dangerous may be its implications, is in accordance with the language of the constitution as the meaning of that language is settled by historical evidence and by judicial decision. There is no distinction in the constitution betweeen power to regulate interstate commerce and power to regulate commerce with foreign nations or with the Indian tribes. This has frequently been pointed out by most eminent judges, and until within a few years past has never apparently been questioned.[1] Chief Justice Taney said:—

"The power to regulate commerce among the several states is granted to congress in the same clause, and by the same words, as the power to regulate commerce with foreign nations, and is coextensive with it."[2]

Mr. Justice Matthews said:—

"The grant is conceived in the same terms, and the two powers are undoubtedly of the same class and character, and equally extensive."[3]

Mr. Justice Bradley said:—

"It has frequently been laid down by this court that the power of congress over interstate commerce is as absolute as it is over foreign commerce."[4]

Mr. Justice Field said:—

"The power to regulate commerce among the several states was granted to congress in terms as absolute as is the power to regulate commerce with foreign nations."[5]

The attempted distinction is directly in conflict with the language of the constitution, and based on speculations as to the intent of the framers.[6]

That the power to regulate involves a power to prohibit has been judicially decided in the case of commerce with the Indian tribes.[7] That it involves a right to prohibit in the realm of foreign commerce has never been seriously questioned. When the constitution was framed, and for many years thereafter, one of the most familiar legislative weapons was the embargo—a weapon used against famine

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[1] Mr. James C. Carter on the first argument against the Anti-Lottery Act did not seriously question that the power over interstate commerce was equal to that over foreign commerce, or that it included the power to prohibit. The attempted distinction was brought out and urged with great ability by William D. Guthrie in the later arguments.

[2] License Cases, 5 How. 504, 578.

[3] Bowman *v.* Chicago & Northwestern Ry. Co. 125 U. S. 465, 482.

[4] Crutcher *v.* Kentucky, 141 U. S, 47, 57.

[5] Pittsburg & Southern Coal Co. *v.* Bates, 156 U. S. 577, 587.

[6] The power is "to regulate commerce with foreign nations and among the several states and with the Indian tribes." Constitution, Article I, sec. 8.

[7] U. S. *v.* Holliday, 3 Wall. 407, 416-18; U. S. *v.* Forty Gallons of Whiskey, 108 U. S. 491.

as well as for commercial retaliation.[1] These embargoes were avowedly based upon the right to regulate commerce. Their constitutionality was judicially sustained,[2] and they were enforced without constitutional question by many decisions of the supreme court.[3] In the great debates in the early history of our government upon the right to levy prohibitory tariff duties which could not be based upon the taxing power because they resulted in no revenue,[4] their defenders unanimously sustained them under the power to regulate commerce. The generation which framed the constitution considered all tariffs as regulations of commerce, and knew no constitutional distinction between a prohibitory duty and an absolute prohibition. Benjamin Franklin testified at the bar of the house of commons on February 3,1766, that in the opinion of the Americans, parliament had no constitutional right to tax them, but that "the payment of duties laid by an act of parliament as regulations of commerce was never disputed."[5] John Dickinson in 1768, in the letters which then exercised such wide influence, took the same distinction.[6] He regarded the constitutionality of those duties as dependent entirely upon their prohibitory effect, saying: "Never did the British parliament, till the period above mentioned, think of imposing duties in America for the purpose of raising a revenue."[7] Pitt in the house of commons, in his reply to Grenville, said:—

"There is a plain distinction between taxes levied for the purpose of raising a revenue and duties imposed for the regulation of trade for the accommodation of the subject, although in the consequences some revenue might incidentally arise from the latter."[8]

The continental congress in its resolutions of October 4, 1774, and the house of commons in its resolution of February 20, 1775, as reported to congress, took the same distinction.[9] The discussions immediately prior to the constitutional convention of 1787

[1] First Constitution of Maryland, 33; 9 Hening's Virginia Statutes (1778) p. 530; 11 id. (1783) p. 259.

[2] The William (1808) 28 Fed. Cas. 614, 621.

[3] See 2 Stat. 451-2; Gibbons *v.* Ogden, 9 Wheat. 1, 192-3.

[4] Of course the constitutionality of those duties has never come up for judicial decision. It could only come up through some actual importation, and the court cannot judicially know, or learn from any competent evidence, that the duty was not laid for revenue, and therefore within constitutional power. That does not relieve congress from responsibility, however; and in early days it felt the responsibility, and considered the constitutional questions.

[5] 1 Bigelow's Life of Franklin, pp. 478-9.

[6] Letters from a Farmer, pp. 18-9, 37-42, 60-1.

[7] Id. p. 15.

[8] Id. p. 43, note.

[9] 1 Journals of Congress, 28, 175-6.

showed that "restrictions or duties," [1] "prohibitions or high duties," [2] came alike under the power to regulate commerce; and that its potent weapon was considered to be that afforded by "restrictions and prohibitions," "prohibitory regulations." [3] The distinction between duties for revenue and duties for regulation of commerce (and duties are ineffective for the latter purpose except so far as they are prohibitory in effect) was recognized among the younger generation by Marshall; [4] and, in the great tariff and nullification controversy, prohibitory duties were based by their defenders solely upon the power to regulate commerce. [5]

That the constitutional convention of 1787 recognized its own work in trusting to congress the right to prohibit commerce, is shown by the fact that it inserted an express exception to that power, as pointed out by Mr. Beck in his able argument for the government in *Champion* v. *Ames*. The constitution could not have been adopted at all but for the insertion of a clause permitting the importation of slaves until the year 1808; a permission which would have been unnecessary had the power to regulate commerce not implied a power to prohibit.

If the interpretation which I have given to this last decision is correct, and if I am correct in the position that it is supported by historical investigation as well as by the natural meaning of the words of the constitution and by their past judicial exposition, the question naturally arises whether the framers of that instrument intended that congress should have the power of levying duties on articles transported from state to state. I think that they did not so intend; that they saw that by the general grant of power to regulate commerce they had made such duties a possibility, and that they inserted in the constitution an express limitation for the purpose of preventing it—a limitation which has somewhat recently been lost through judicial construction. I refer to the prohibition against the taxation of articles exported from any state. The applicability of this clause to interstate exportation was originally conceded by most eminent

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[1] New Hampshire Resolutions of June 23, 1785 (11 Journals of Congress 189).

[2] Adams' letter to Jay, July 19, 1775 (Life and works of John Adams, vol. 8, pp. 282-3.)

[3] Madison's letter to Cabell (Writings of James Madison, vol. 3, p. 636).

[4] Marshall's Life of Washington, 1st ed., vol. 3, pp. 76-7, 81; Gibbons *v.* Ogden, 9 Wheat. 1 202.

[5] Clay's Reply to Barbour. Annals of Congress, March 31, 1824, p. 1994; Speech of Thomas Smith Grimke, Charleston, 1829. pp. 51, 62; Verplanck's Letter to Col. William Drayton of South Carolina, 1831, pp. 21-24: 1 Story on the Constitution, sec. 963; 2 Id. secs. 1080 et seq.

counsel and assumed by an unanimous court.[1] A contrary decision was afterwards made[2] and has been followed, though perhaps not always with entire confidence in its reasoning.[3] I have previously stated my reasons for believing that the original decision was correct[4] and the four dissenting justices in *Champion* v. *Ames* evidently entertain the same view. If so inconceivable an event should happen as that congress should attempt to levy an export or import tax on articles transmitted from one state to another, it is quite possible that the original decision would be re-established.

Congress is forbidden to give preferences by any regulation of commerce or revenue to the ports of one state over those of another. It is thus impossible to levy an interstate duty at any point without levying a similar duty at every other point as well; and duties, imposts and excises must be uniform throughout the United States. "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."[5]

The dissenting justices in *Champion* v. *Ames*, quoting the majority opinion in a former famous case[6] show that this clause is in all probability taken from the fourth article of confederation, in which to the similar provision are added the words:—"And the people of each state shall have free ingress and egress to and from any other state, and shall enjoy therein all the privileges of trade and commerce," words probably afterwards omitted as superfluous. Under the present decision a citizen will have free right to move from one state to another, but he will not be able to take every kind of property with him. He must leave behind him any property which congress considers detrimental to the interests of the whole people.

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[1] Almy *v.* California, 24 How. 169.

[2] Woodruff *v.* Parham, 8 Wall. 123.

[3] Coe *v.* Errol, 116 U. S. at pp. 525-6; Dooley *v.* United States, 183 U. S. 151.

[4] "The Insular Decisions of December 1901." Columbia Law Review, February, 1902. It is understood that the questions involved in the Dooley case just above cited will be again presented to the United States supreme court.

[5] Constitution, Article IV, Section 2.

[6] Slaughter House Cases, 16 Wall. 36, 75, by Mr. Justice Miller.