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THAT WHICH "DIRECTLY" AFFECTS INTERSTATE COMMERCE

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Much has already been written about the case of *Schechter Poultry Corp. v. United States,*[1] and one must perhaps be optimistic to expect further writings thereon to be read patiently. This writer in referring again to that case consoles himself with the thought that this paper concerns itself not so much with the case itself as with a consideration of the origin and subsequent development of what he hopes to show is an illegitimate progeny of that case.

It is a notorious fact that the *Schechter* case in considering how far the commerce clause permits regulation of local matters affecting interstate commerce, stressed at length the difference between matters "directly" affecting commerce, on the one hand, and matters having only an "indirect" effect, on the other. It was indicated that only the former could be a proper subject of federal regulation. One particular sentence in the opinion of Chief Justice Hughes invites attention:

> "In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a *necessary* and *well-established* distinction between direct and indirect effect."[2]

It may be interesting at the very outset, to determine just how (1) necessary and (2) well-established is that distinction. Taking the points conversely, it will be recalled that Chief Justice Hughes cites as authority for the "well-established distinction" *dicta* in *Simpson v. Shepard* (*Minnesota Rate Case*),[3] *Kidd v. Pear-*

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[1] 295 U. S. 495 (1935).
[2] Id. at 546. Italics ours.
[3] 230 U. S. 352, 410 (1912).

son,[4] and *Heisler v. Thomas Colliery Company.*[5] In addition, the Court cites a number of cases involving the application of the Sherman Anti-Trust Act. These latter cases may be at once dismissed, for as the Court itself admitted, "these decisions related to the application of the federal statute and not to its constitutional validity."[6] In other words, the Anti-Trust Act as construed, was not *intended* by Congress to regulate matters affecting commerce only "indirectly". Obviously, to say that because Congress has chosen not to regulate matters "indirectly" affecting interstate commerce, therefore Congress has no power to regulate such matters is a non-sequitur.

The first three cases cited by Chief Justice Hughes merit attention. Each case involved, not a federal, but a state statute which in each case was being attacked as invalid on the ground that the statute affected interstate commerce and therefore *infringed upon federal power.*

There are, of course, hundreds of cases involving state acts whose validity was made to depend by the courts upon whether the statute "directly" or "indirectly" affected interstate commerce. Under the American dual form of government, it has often happened that in the absence of conflicting federal legislation, states have been permitted to regulate economic and social matters touching incidentally upon interstate commerce. For example, in *Sherlock v. Alling,*[7] a state "wrongful death" statute was held applicable to the death of a passenger while in interstate commerce. In the absence of federal regulation, it would have been intolerable that no contractual or tort obligations could attach to matters involving interstate commerce. Accordingly, the Court applied the state law, saying that the statute in the case affected commerce only "indirectly".

So too, for example, in *Southern Railway Company v. King,*[8] a state speed statute was held valid though applied to check the speed of interstate as well as local trains, the Court saying that the act did not "directly" affect interstate commerce.

Such cases, however, are based on the premise that ordinarily the federal government would have at least paramount if not "exclusive" power to regulate the matters involved. Indeed in the *Minnesota Rate Case* from which the Chief Justice liberally quotes, the then Mr. Justice Hughes acknowledges that the federal government could have acted under the facts of the case.[9]

In a word, these cases cited in the *Schechter* decision as distinguishing "direct" from "indirect" effect deal with state statutes. They presume federal power to act, but out of economic or social considerations, have permitted, on occasion,

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[4]128 U. S. 1, 21 (1888).
[5]260 U. S. 245, 259 (1922).
[6]Schechter Poultry Corp. v. U. S., 295 U. S. 495, 548 (1935).
[7]93 U. S. 99 (1876).
[8]217 U. S. 524 (1920).
[9]It was so held in Houston, East & West Texas Railway Co. v. U. S., 234 U. S. 342 (1914) and in Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co., 257 U. S. 563 (1922).

state regulation, in the absence of conflicting federal law. The test of "*in*directness" is there used *to prevent state encroachment upon federal powers.* The *Schechter* case, however, presents the spectacle of the use of the test of "directness" to protect state powers, although the authorities ingeniously cited in support of the test are based upon a premise of superior federal power. Surely, if the test of "directness" as a requisite for federal power, springs from the cases cited, it boasts a parentage of questionable legitimacy. The truth of the matter, of course, is that no valid authority is cited in the *Schechter* case to show that as regards federal power, the distinction between "direct" and "indirect" effect is "well-established."

In order to determine whether such a distinction is "necessary," the Chief Justice's second point, it is of course essential to agree on precisely what is meant by the term "direct". It is generally recognized that the validity of state statutes such as those in *Sherlock v. Alling* and *Southern Railway Company v. King, supra,* hinge partly upon the fact that such statutes are not discriminatory and partly upon the fact that, weighing benefit against burden, they are deemed reasonable measures. As used in those cases, therefore, the term "indirect" is used as a word of art to describe the legal conclusion that the particular statute is deemed nondiscriminatory and reasonable. Thus, if a "wrongful death" statute sought to single out interstate matters only, such an act would be deemed "direct" because discriminatory, and therefore invalid.

One can readily accept the requirement of "indirectness" as defined in that sense, in view of the basic premise of superior federal power. But the considerations which explain and justify the requirement of "*in*directness" as applied to state acts, are obviously not the same with reference to the requirement of "directness" in the case of federal statutes.

One patent possibility, of course, is to construe the word "direct" in terms of cause and effect, that is to say, the requirement of "directness" might be construed as demanding a cause and effect relationship between the alleged local matter sought to be federally regulated, and interstate commerce. Indeed, the concurring opinion of Justice Cardozo in the *Schechter* case may be viewed as employing the term in that sense for he speaks of "causation" and the importance of its "degree".[10]

However, it will be remembered that the opinion of the Circuit Court of Appeals in the *Schechter* case, showed and approved a finding of fact that the New York chicken business not only exerted an influence, but held "domination"[11] over the entire chicken business of the nation; that prices throughout the nation were fixed absolutely on the basis of New York prices. Furthermore, the Court found that:

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[10]295 U. S. 495, 554 (1935).

[11]76 F. (2d) 617, 618 (1935).

> " . . . demoralization of price structures in the New York market produces a similar situation not only in other markets throughout the country, but also in all poultry farming areas. It reduces the price received by the *interstate* shipper . . . "[12]

It seems fair to suppose from this finding that interstate as well as local sales were controlled by the New York market. This unreversed finding of fact seems to establish not only substantial cause but practically sole cause. Despite, therefore, Justice Cardozo's discussion of causation and its degree, the actual result of the *Schechter* case seems to suggest that the term "direct" envisions considerations apart from, or additional to, cause and effect.

Whatever doubt followed the *Schechter* case, no room for conjecture remained after *Carter v. Carter Coal Company* (*Guffey Coal Act Case*),[13] as to whether cause and effect were to be deemed even partial factors in determining "directness". Justice Sutherland, for the majority said:

> "The distinction between a direct and an indirect effect turns not upon the magnitude of either the cause or effect but *entirely* upon the *manner* in which the effect has been brought about. . . . It is quite true that rules of law are sometimes qualified by considerations of degree, as the government argues. But the matter of degree has no bearing upon the question here. . . ."[14]

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[12]Id. Italics ours.

[13]298 U. S. 238 (1936).

[14]Id. at 308. Italics ours. John Dickinson has stated to the writer that in the argument of the Carter Coal case before the Supreme Court, in which Mr. Dickinson represented the Government, he advanced the suggestion that the difference between "direct" and "indirect" might be represented as the difference between a cause and effect relationship between local and interstate commerce which is *demonstrable* on the one hand, and a cause and effect relationship which is *conjectural* or *speculative* on the other. Mr. Dickinson argued that the Schechter case was distinguishable from the Carter Coal case in that the argument of the government in the Schechter case, that New York chicken prices controlled interstate prices was not demonstrable but was more or less conjectural, while on the other hand, in the Carter Coal case, the effect of the coal mining business on interstate commerce was not merely conjectural but demonstrable, since coal was admittedly mined in only a few states and necessarily had to be shipped to other states. Mr. Dickinson's interpretation of the words "direct" and "indirect" in terms of demonstrable and conjectural is interesting and plausible. That the relation of the local activity to interstate commerce was more easily "demonstrable" in the Carter Coal case than in the Schechter case is no doubt true. However, quaere whether it is desirable to limit federal activity to cases where the relation between local and interstate commerce is actually demonstrable. In the first place, the difference between a finding of fact which is demonstrable and one which is in part conjectural may be solely a matter of degree and often merely a matter of opinion. Moreover, in the case of complex economic maladjustments as in the case of diseases of the body, it is often almost impossible to assign in advance the causes of the disorder. Doctors, in order to determine causes, often must adopt a policy of experimentation, and follow a process of elimination. The same course may be necessary for Congress in seeking to correct economic evils. Mr. Dickinson's argument, of course, basically challenges the propriety of the findings of the Circuit Court of Appeals in the Schechter case as being too conjectural and unsupported by sufficient evidence. If, however, the finding of facts is accepted, as it seems to have been by the Supreme Court in the Schechter case, then the distinction between that case and the Carter Coal case as advanced by Mr. Dickinson is non-existent, though

Despite the inconsistency with the language of Justice Cardozo in the *Schechter* case, these words of Justice Sutherland are, of course, consistent with the results of that case in so far as they negative the importance of cause and effect. Assuming then, that Justice Sutherland correctly states the Court's position, and that the magnitude of cause and effect is entirely immaterial, let us recur to the second point of Chief Justice Hughes that the distinction between "direct" and "indirect" effects is necessary. Certainly ready justification may be found for requiring that alleged local matters must have a substantial cause and effect relationship with interstate commerce. Perhaps an analogy even to the requirement of "proximate" or "legal" cause, familiar in tort law, is justified. But what possible logical or practical connection exists between the question whether Congress has power to regulate, on the one hand, and the *manner* in which local matters produce their effect upon interstate commerce, on the other? How can the claim of necessity for the test of "directness" be justified if the elements of cause and effect are not to be regarded at least as partial factors in determining what is "directness?" What matters *how* interstate commerce is being affected? If it be conceded that commerce is being paralyzed or seriously impeded because of local maladjustments, should a correcting hand be stayed by the courts, pending metaphysical deliberations as to the *manner* in which the effect has been brought about?

As a matter of fact, although in the *Schechter* case, Chief Justice Hughes cited no decision where the constitutional validity of a federal statute was made to depend upon "directness" or "indirectness" of effect, several earlier cases upholding federal statutes appear to have used, casually, the term "direct" in referring to the relation between local activities sought to be regulated and interstate commerce.[15] However, in all these cases, the term "direct" is definitely used in the sense of cause and effect.

In *Adair v. United States,*[16] involving a federal statute which made it unlawful for interstate carriers to discharge employees for union activities, counsel for the railroads made much of the difference between "direct and indirect effect upon interstate commerce".[17] In a decision in which the act was held invalid by a divided Court, the majority opinion, while adopting the argument of counsel, carefully avoided the use of the terms "direct" and "indirect" and said:

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it must be admitted, in any event, that the relation between local and interstate commerce was more "demonstrable" in the Carter Coal case than in the Schechter case. Even granting that the findings of fact in the Schechter case by the Circuit Court were partly based upon conjecture and that to that extent, the Schechter case could be distinguished from the Carter Coal case, it is submitted that the limiting of federal power to cases involving a demonstrable relationship between local and interstate commerce would be undesirable from the viewpoint of a long-range, standing policy.

[15]Balt. & O. Ry. v. Int. Com. Comm., 221 U. S. 612, 619 (1911).

[16]202 U. S. 161 (1908).

[17]Id. at 188.

> "Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competence of Congress . . . must have some real or substantial relation to or connection with the commerce regulated. But what possible legal or logical connection is there between an employee's membership in a labor organization and the carrying on of interstate commerce?"[18]

Obviously, whatever the merits of the majority's conclusion, counsel's argument as to the "directness" and "indirectness" of effect was viewed only in terms of cause and effect. Likewise, the dissenters in seeking to uphold the act spoke in terms of labor disputes as likely causes of obstructions of interstate commerce.

There appears to be absolutely no authority before the *N. I. R. A.* and *Carter Coal* cases which, though it may have casually used the word "direct" in relation to a federal act, concerned itself with the *manner* of the effect on interstate commerce. Assuming, however, that the requirement of "directness" in the sense of *manner* always existed and like Topsy, "just growed", it is perhaps excusable curiosity to wonder just exactly what factors or circumstances bearing on the *manner* of the effect on interstate commerce are significant. Just what characterizes a proper *manner?*

Fortunately, the *Carter Coal* case is not the last word on this question as to the meaning of the term "direct". Although the language of Justice Sutherland excluding the factor of cause and effect in determining "directness" seems too clear for possible doubt, and although Chief Justice Hughes concurred with the views of Justice Sutherland in respect to the labor provisions of the Guffey Act, in the recent case of *National Labor Relations Board v. Jones & Laughlin,*[19] the Chief Justice states:

> "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. . . . In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic."[20]

While still utilizing the invocatory words, "direct" and "indirect", it is clear that the Chief Justice is thinking only in terms of the magnitude of cause and effect. This is a far cry from the stress put upon *manner* in the *Carter Coal* case. To

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[18]Id. at 178.
[19]301 U. S. 1 (1937).
[20]Id. at

be sure, Chief Justice Hughes attempts to dismiss that case as not controlling in the *Jones & Laughlin* case, on the theory that the Guffey Act was invalidated on grounds other than under the commerce clause. The fact remains, however, that the majority opinion in the *Carter Coal* case did rely heavily on the argument of "indirectness" of effect and the stress put on *manner* to the exclusion of cause and effect is indisputable. Surely it is folly to deny that the Wagner Act cases do place emphasis on the magnitude of cause and effect between local matters and interstate commerce, and make no effort to examine the *manner* of the effect.

Likewise, in *Virginia Railway Company v. System Federation,* [21] the Court in an unanimous opinion shifts from a stress upon *manner* to stress upon the magnitude of cause and effect. Justice Stone, speaking for the Court said:

> "The relation of the backshop to transportation is such that a strike of petitioner's employees there . . . would subject petitioner to the danger, substanital, though possibly indefinable in its extent, of interruption of the transportation service. . . . The effect on commerce cannot be regarded as negligible."[22]

Surely, inconsistency with the words of Justice Sutherland is apparent again.

But conceding as we must, that cause and effect are and should be important in determining "directness", it remains to be established how substantial that cause and effect must be. Furthermore, it remains to be discovered whether there be factors, other than and additional to cause and effect, which are requisite for "directness". Thus, for example, for the Wagner Act to be valid as applied to a particular manufacturer, must the quantity of goods produced by the manufacturer be substantial, or is it important only that a large proportion of the output, however small the total, go into interstate commerce? Judging from the *Wagner Act* decision in the case of the clothing manufacturer,[23] it would seem that the total amount of goods manufactured is not important. However, in all the *Wagner Act* cases, approximately 80 per cent of the finished products passed into interstate commerce. Quaere, suppose only 5 per cent did so?[24] Would the effect upon interstate commerce be deemed sufficiently substantial to satisfy the requirement of "directness"?

In considering just how substantial cause and effect must be, it is evident that great latitude for difference of opinion, and consequent uncertainty, is possible

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[21]300 U. S. 515 (1937) (involving the validity of the federal Railway Labor Act, guaranteeing collective bargaining to employees of interstate railroads, as applied to "backshop" workers).

[22]Id. at

[23]National Labor Relations Board v. Friedman-Harry Marks Clothing Co., 301 U. S. —; 57 Sup. Ct. 645 (1937).

[24]Already, lower court judges disagree as to whether a substantial proportion of the finished product must pass in interstate commerce, and if so, as to what is a sufficiently substantial proportion. See "Enforcing N. L. R. B.'s Orders", 4 L. W. 1425, 1445 (Aug. 3, 1937).

if courts seek to distinguish between the various incidents of the local affairs sought to be regulated. Thus for example, although federal regulation of collective bargaining was sanctioned in the *Wagner Act* cases, doubts have been expressed even by staunch friends of labor, as to whether federal regulation of wages and hours under the same circumstances as those involved in the *Wagner Act* cases would be upheld.[25] There is here, of course, the ancillary problem of how far the legislative views on such questions of degree of cause and effect should or would be recognized as controlling by the courts.

So far as the validity of such wage and hour provisions are concerned, it would seem on principle, that a shut-down of a factory because of a dispute over hours and wages is just as capable of obstructing commerce as a shut-down because of a dispute as to collective bargaining. Moreover, it must be remembered that collective bargaining serves no end in itself, but is essentially a means to other ends, including better wages and hours. If under given circumstances, a statute regulating collective bargaining be deemed to affect interstate commerce "directly", a statute regulating hours and wages under those same circumstances, everything else being equal, would seem to bear even a more "direct" relation to interstate commerce.[26] At any rate, whatever the propriety of a distinction as to wage and hour provisions on the one hand and collective bargaining provisions on the other, the disposition of this and other like possible distinctions makes for much future uncertainty.

As for other factors which may be requisite in determining "directness", even the *Wagner Act* cases leave much to be answered. It will be noted that in each of those cases, a large proportion of the raw material was shipped in interstate commerce prior to manufacture and that thereafter a large part of the finished product also moved in interstate commerce. Quaere, the facts of the *Wagner Act* cases being otherwise the same, would there be sufficient "directness" if only the raw material had been in interstate commerce? And conversely, would there be sufficient "directness" if all the raw material were found locally, and only the finished product moved in interstate commerce?

As for the former situation, it would seem that even though finished products were all consumed locally, labor disturbances causing a shut-down of manufacturing operations would have an effect upon interstate commerce at least to the extent that future interstate shipments of raw material would be curtailed.

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[25]Vol. 5, No. 11, International Juridical Association Bulletin (1937) 125, 146. Indeed such a distinction between regulation of collective bargaining on the one hand, and wages and hours on the other, has been suggested as proper by the Circuit Court of Appeals of the Seventh Circuit. See "Distinguishing Labor Act Cases From Schechter and Carter Cases", 4 L. W. 1301 (June 22, 1937).

[26]Compare the problem as to "directness" in the field of labor law, in determining the legality of strikes. Some courts have held that workers have a "direct" interest in hours and wages and that a strike for betterment therein is legal. On the other hand, a strike for unionization has been deemed illegal on the theory that the benefit to employees from unionization is too "indirect." Folsom v. Lewis, 208 Mass. 336, 338 (1911); see Frankfurter & Greene. *The Labor Injunction* (1930) 27, 29 and cases cited.

As for the second situation, it is even more obvious that there, too, interstate commerce would be impeded through curtailments in the quantity of finished products to be shipped to other states. Nevertheless, however clear the effect on interstate commerce in each case, there is the matter of prior authority with which to reckon.

In the *Schechter* case, 96 per cent of the chickens involved came from interstate commerce, and were then disposed of locally.[27] As already indicated the Circuit Court of Appeals stated the unreversed finding of fact that demoralization of the business in New York had national repercussions affecting and controlling the prices received by interstate shippers. Nevertheless, the Supreme Court deemed such an effect only "indirect".

The *Carter Coal* case presented the converse situation. There coal was found to be mined in a very few states, from which the whole nation is supplied. Again the Supreme Court felt that the effect upon interstate commerce was "indirect" and the Guffey Act was therefore invalidated although the lower court in upholding the act as within the commerce clause, had found sufficient "directness" of effect to be the necessary result of the inevitable future shipments of coal after being mined locally, in a very few states.[28]

The *Schechter* and *Carter Coal* cases may seem to suggest therefore that the finding of "directness" in the *Wagner Act* cases was predicated on the fact that both the raw materials as well as the finished product moved in interstate commerce. On the other hand, there is reason to hope that the holding of the *Wagner Act* cases was not intended to be so limited. It is significant, perhaps, that although Chief Justice Hughes might have distinguished readily the *Guffey Act* case on the ground that only the finished product moved in interstate commerce, he failed to do so, choosing instead the less pretentious method of suggesting that the Guffey Act involved violations of other constitutional provisions besides the commerce clause. At any rate, perhaps it is rash to venture a prediction as to the view that may ultimately be expressed by the Court as to whether both raw material and finished product must travel in interstate commerce in order to have "directness".

One other factor may suggest itself as important in establishing "directness", namely, that the regulations must be reasonable. It has been suggested that the test of reasonableness in cases involving the validity of *state* acts affecting interstate commerce, requires more than compliance merely with the due process clause of the Fourteenth Amendment.[29] The theory is that the due process clause "contemplates the relation between the state and the individual. In the commerce clause,

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[27]Schechter Poultry Corp. v. U. S., 295 U. S. 495, 520 (1935).
[28]Tway Coal Co. et al. v. Glenn et al., 12 F. Supp. 570 (1935).
[29]Ribble, *State and National Power Over Commerce* (1937) 98, 99.

there is involved the additional element of the relation between the state and the nation."[30]

A similar rationale, in converse, might justify counting reasonableness a factor on the issue of federal power vel non, under the commerce clause, quite apart from its significance on the issue of due process. The chief objection to stressing reasonableness in establishing "directness" lies of course in the necessary consequence of ingrafting another implied due process clause within the commerce clause. The presence of even two express due process clauses has too often been cursed, because of their breadth of contour, their reversion to theories of natural law, and their omnivorous susceptibilities. Moreover the prospect of distinguishing between a due process clause in favor of individuals and a due process clause in favor of states makes for even more uncertainty. Perhaps as regards federal statutes, the test of reasonableness had better be left to the due process clause of the Fifth Amendment. As far as past decisions of the Supreme Court go, if it has weighed the reasonableness of given federal statutes in determining "directness", it has done so subconsciously and has failed to indicate that reasonableness was essential under the commerce clause, apart from the due process clause.

Surveying roughly then, the history and effect of the theory distinguishing "direct" from "indirect" effect as applied to federal statutes, these observations may be garnered. The use of these terms has been firmly entrenched since the *Schechter* case. That case was the first to stress those terms as decisive of constitutional validity and the semblance of prior authority was attained by the ingenious prostitution of cases involving the validity of state statutes. After considerable waivering by the Court, the latest indications are that magnitude of cause and effect is a factor to be considered in establishing "directness". However, doubts remain as to how substantial a cause and effect relationship is essential between local and interstate matters, and as to whether there are additional factors that are determinative. Of course, these words "direct" and "indirect" are merely invocatory terms, labels which describe the result already reached in the particular case, rather than expressing the underlying reasons for the result. These words in themselves give scant clue to the legally operative facts which are essentially responsible for the results attained. Unfortunately, to date, the substance of judicial effort to define the term is more impressive from the viewpoint of rhetoric than from the viewpoint of clarification.

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[30]Id. *Sed quaere.* In the last analysis, the validity of a state statute under the commerce clause involves the relationship of the state and *individuals* who allege that they are engaged in interstate commerce. The relationship of the state and the federal government, both as sovereign entities, would rarely be involved. It will be recalled that the Supreme Court made very little use of the due process clause of the Fourteenth Amendment for a considerable time after its adoption. The fact that the problem of the effect of the commerce clause upon the extent of state power received recognition before the Court had fully grasped the potentialities of the due process clause, perhaps helps to explain why the test of reasonableness in such cases came to be regarded as part and parcel of the problem of state power vel non.

It may be quite unreasonable to require a judicial definition of "direct" and "indirect" which will permit mechanical determination of the validity of any federal statute, just as it may be unreasonable to ask for a definition of "proximate" or "legal" cause which carries on its face the solution to all problems. If, however legislatures of the future are to be obliged to reckon with the matter of "directness" in order to be certain of conformity with the commerce clause, it is not unreasonable to require a pointing out of basic considerations or factors which the courts choose to deem important in establishing "directness". Surely, this is but a fair price for the privilege of devising and using new invocatory incantations.

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