Local-Interstate Commerce and the Power to Prohibit Commerce

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The purpose of this discussion is to observe some of the developments of the national regulatory power. It will greatly simplify our consideration if we can maintain the perspective of observing the issue in terms of adjustments of government to the needs of the governed and thus escape whatever contentiousness might arise on the question of the propriety of expansion of classification for regulatory purposes. (Nor are we particularly concerned with state and national capacity for cooperative action.) Whether or not a particular business or industry has become so affected with the public interest will thus arise only collaterally in our inquiry. It must also be borne in mind that ours is a government intended to endure through the ages with the capacity to meet various crises as they may arise—an efficient, permanent government, with the duty of self-preservation. The concept of government is here used generically and comprehends the form of the American government. Our government is not a single all-powerful government, as for example the British Parliament, but is a bicameral system of two distinct types of sovereigns. While there are thus


1Cf. J. B. Smith, A Child Labor Amendment is Unnecessary, California Law Review (Nov. 1938).

The powers of the national government were granted "in a constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs." McCulloch v. Maryland, 4 Wheaton 316 (1819).

2"Government, federal and state, each in its own sphere owes a duty to the people within its jurisdiction to preserve itself in adequate strength to maintain peace and order and to assure the just enforcement of law." Hamilton v. Regents, etc., 293 U. S. 245, 55 S. Ct. 197 (1934).

3Cf. M. Paul Reynaud, Member of the Chamber of Deputies, former Minister of Justice, Minister of Finance, and Minister of the Colonies, Comparison of French and American Judiciary
necessarily mutually exclusive theaters of operation, if our system is not to be the victim of an hiatus in pattern, the sum of the two must be equal to the occasion. 4

We are particularly concerned with the commerce clause. Perspective for approach to our subject, namely, the scope of the regulatory power of the nation over commercial intercourse, requires that some examination be made of the conditions existent at the time the provisions were written into the fundamental law. Under the Confederacy prior to the creation of our present system, the

Systems, 1 Federal Bar Ass'n. Jour. 28 (Oct. 1932): “You know that under our former regime, when we had Kings, France was divided into provinces and that these provinces had their own laws, just as your States have here.

“Well, the French philosophers of the 18th century, the encyclopedists, said to those provinces: ‘Keep your own styles, your own habits, your old songs, even your own dialects, but there must be only one law for the whole country. What is right is right for everybody. France is a nation. The blood must flow freely in the nation’s body.’

“They added: ‘We know that there are different matrimonial regimes which govern property rights. We know that, in the South, Roman law prevails while in the North the Gallic common law holds good. Well, let us leave things as they are. Let the national law provide those two matrimonial regimes and let the people choose between them.

‘Of course these were revolutionary ideas. As you remember, it took more time, in those days, to go from Paris to Marseilles than it takes today to go from New York to San Francisco even by rail. Moreover, the French spoke various dialects. So the idea of the legal unification of France, at that time, was much bolder than the present idea of the unification of your different laws, here in America. But there must have been something good in those ideas as they won the victory.

‘Only revolutionists could carry them out. The great French revolution did it. Such a reform played a most important part in the formation of the united country that France is today. The architecture of the legal and judiciary systems has not been modified since, so that while you have here 49 legislative bodies, including the Federal Congress, we have one: the French Parliament which is divided into two Houses: the Chamber of Deputies and the Senate.

‘You have 49 judiciary bodies. We have one. The head of this body is our Attorney General or Minister of Justice.

‘You have 49 jurisprudence bodies. We have one, imposed upon all the French tribunals by a Supreme Court, dealing only with the application of the law, our Court of Cassation.”

4 “Nor did the formation of an indestructible Union of indestructible States make impossible cooperation between the States and the States through the exercise of the power of each to the advantage of the people who are citizens of both. We had recent occasion to consider that question in the case of Steward Machine Company v. Davis, supra, in relation to the operation of the Social Security Act of August 14, 1935, 49 Stat. 620, 42 U. S. C. A. §§ 301-1305. The question was raised with special emphasis in relation to section 904 of the statute, 42 U. S. C. A. §§ 1103, complementary thereto, by which the Secretary of the Treasury is authorized to receive and hold in the Unemployment Trust Fund all moneys deposited therein by a state agency for a state unemployment fund and to invest in obligations of the United States such portion of the Fund as is not in his judgment required to meet current withdrawals. The contention was that Alabama in consenting to that deposit had ‘renounced the plenitude of power inherent in her statehood.’ 301 U. S. 548, at pages 595, 596, 57 S. Ct. 883, 895, 81 L. Ed. 1279. We found the contention to be unjust. As the States were at liberty upon obtaining the consent of Congress to make agreements with one another, we saw no room for doubt that they may do the like with Congress if the essence of their statehood is maintained without impairment. And we added that: ‘Nowhere in our scheme of government—in the limitations express or implied of our Federal Constitution—do we find that she (the State) is prohibited from assenting to conditions that will assure a fair and just requital for benefits received’. United States v. Bekins, 58 S. Ct. 811, 816 (1938).

It is quite possible, however, for a state constitution to preclude the state or municipal government from entering specified activities, which so doing would violate no right protected by the national constitution if performed by local government; and which because of their peculiarly local nature they cannot be treated by the general government.
several states bore an international relationship to each other. The Articles themselves recognized that each state was "sovereign" to itself, and that "The States severally enter into a firm league of friendship." The resulting league had no effective national personality. A connotation commonly applied to foreign diplomats was applied to the representatives of the states. The impotence, or more properly the absence of a common government resulted, through practices of the states, in chaotic conditions. These practices were the reflection of provincialism upon international jealousy. Spite was expressed in cumulative discriminations and sanctions in which the vehicles of industry were mired, and war, civil and international, was imminent. In particular, contracts were repudiated, remedy was denied to rights of non-residents, and imports from other states were discriminated against. From these come the clauses which made us a nation—the contract clause, the privileges and immunities clause, the full faith and credit clause, and the commerce clause. But more important in the operating plan than merely defining what jurisdiction it would be well for the common denominator government to have, that government was given the vital force and affirmative duty to serve the common purpose of the whole people. The occasion for national action was left to the determination of the common government. The oversight of this elementary characteristic of the plan is the cause of much confusion. Though the jurisdicational fact, or the factual justification for national action, exists, the initiative to action lies in the congressional discretion. For the misuse of that discretion, within the legislative power, whether by non-action or excessive action, the legislators must answer at the polls and not at the bar.

In an industrial order, turgidity and tone of the economic body are essential to health. The arteries of commerce of the Confederacy were tapped by the leecherous tariffs of the states. The purpose of the commerce clause was to withdraw from the states the capacity for economic isolation, and conversely to give to and impose upon the general government the affirmative duty to flush the channels of commerce among the states and to direct their courses in the common good. Of the great nation-making clauses, the commerce clause was not the least important in 1787. It now exerts the greatest cohesive force in national

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52d Art.
63d Art.
7"The subject is the execution of those great powers on which the welfare of a nation depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave in the power of Congress to adopt any which might be appropriate, and which were conducive to the end." McCulloch v. Maryland, supra note 1.
8"What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation." Baldwin v. Seelig, 294 U. S. 511, 527, 55 S. Ct. 497 (1935).
9"The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government . . ." Gibbons v. Ogden, 9 Wheat. 1, 6. L. Ed. 23 (1824).
integration. The reason for the bicameral system was to give to the central government the problems common to the several states, but those problems not common but peculiar only to the internal affairs of a state were never divested from the several states. So it is with commerce. Differences of opinion were many and some were strong. But the outlined division cannot be denied as the obvious course of a naturally and already unified people in the political genesis from a mere "league of friendship" of the several states to a supreme common executive government in a representative democracy.

It was on the issue of whether to create such a central government that the division lay before the Constitution was adopted. Afterwards it was on its interpretation. The positions of the respective supporters of Virginia and New Jersey plans continued hostile, one finding support in the second clause of the Sixth Article, and the other in the Ninth and Tenth Amendments. In passing, the aggressiveness of the Federalist Party in promoting centralizing legislation and its down-fall in the Alien and Sedition Acts should be noted. Its control for the first twelve years of the new government was followed by some sixty years of control by a party which was hostile to the development of the powers of the central government at the expense of the states. However, one of the last official acts of President Adams was the appointment of Chief Justice Marshall. The inevitable trend was continuous. The exertion of national powers over commerce has always increased in activity. Inevitable because with improved communication and transportation the amount of business among the states increased, and the increase required more and more supervision in the promotion of common welfare. With the trans-state line increase in importance of the problem arises the increasing responsibility of initiative of the national government. When the mal-adjustment exceeds the capacity for correction by

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10"The subject to which the power is next applied, is to commerce among the several States. The word among means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary. Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself." Ibid. (Italics added).

11Cf. The Daniel Ball, 10 Wall. 557, 19 L. Ed. 999 (1871).
piece-meal treatment by the states, the responsibility of the central government must be translated into action or our federal plan is incompetent to treat where treatment is necessary to the general welfare. In the recent case of *Helvering v. Davis* the Court described the factual transition from local to common aspect as follows: "The problem is plainly national in area and dimensions. Moreover, laws of separate states cannot deal with it effectively. Congress, at least, had a basis for that belief."

It has often been said that the commerce clause was of relatively little importance for the first eighty years of national life. This wholly fails to appreciate the significance of the clause in correlation with the conditions of the times. In the first place the temper of our people for a long period after the Revolution was not one which welcomed governmental interference in any form. It has already been pointed out that the power to prohibit normal interstate commerce was withdrawn from the states by the commerce clause. Thus though Congress remained inactive, the commerce clause automatically became the most powerful catalytic agency in the promotion of national homogeneity. When the conditions preceding and following the adoption of the Constitution are compared this is obvious. The dearth of litigation in the early periods is most instructive. The examination of a law in vacuo without a careful consideration of the purpose of the legislator is a futile thing. That what is said by the legislature must be considered in terms of what was sought to be achieved is an elementary rule of construction. In constitutional provisions in particular the nature of the problem dealt with and the public policy promoted by the fundamental law in terms of the various crises which confront the government are paramount. These we must briefly consider. In the first place it is to Congress, and not to the judiciary, that the Constitution gives the power to regulate commerce with for-

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13"Pending a grant of power to Congress over matters of commerce, the states acted individually. A uniform policy was necessary, and while a pretense was made of acting in unison to achieve a much desired end, it is evident that selfish motives frequently dictated what was done. Any state which enjoyed superior conditions to a neighboring state was only too apt to take advantage of that fact. Some of the states, as James Madison described it, 'having no convenient ports for foreign commerce, were subject to be taxed by their neighbors, through whose ports their commerce was carried on. New Jersey, placed between Philadelphia and New York, was likened to a cask tapped at both ends; and North Carolina, between Virginia and South Carolina, to a patient bleeding at both arms.' The Americans were an agricultural and a trading people. Interference with the arteries of commerce was cutting off the very lifeblood of the nation, and something had to be done. The articles of confederation provided no remedy, and it was evident that amendments to that document, if presented in the ordinary way, were not likely to succeed. Some other method of procedure was necessary." Description of conditions under the Confederacy by MAX FARRAND, THE FRAMING OF THE CONSTITUTION, (1913), page 7. Of course the commerce clause is not the only provision devoted to correction of previous conditions.

14Prior to 1840 there had been only five cases before the Supreme Court, and only forty-eight in the lower federal courts; by 1860, twenty and one hundred and sixty-four; by 1880, seventy-seven; by 1890, one hundred and forty-eight, and eight hundred; by 1900, nearly two hundred, and nearly fifteen hundred. Now nearly every issue invites its application. PRENTICE AND EGAN, THE COMMERCE CLAUSE (1898).
eign nations, and among the several states, and with the Indian tribes. The courts can never take the initiative on this subject. To regulate, in the sense intended, is to foster, protect, control, and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large. It includes the power to prohibit in cases where such prohibition is in aid of the lawful protection of the public. While it has no limitations other than those prescribed in the Constitution, it does not carry with it the right to destroy or impair those limitations and guaranties which appear in the body of the Constitution and in the amendments.

Where no common problem was involved no jurisdiction was intended to be given to the federal government. The power of Congress extends only to external commerce of the states and reaches the interior of a state only so far as may be necessary to protect the products of other states from discrimination by reason of their foreign origin. The power of Congress has no application to commerce which is purely internal. The grant virtually denies the power to interfere in the internal trade and business of the separate states, except as a necessary and proper means of carrying into execution some other power expressly granted. It extends to acts done on land which interfere with the due exercise of the power to regulate commerce, including navigation. The phrase "among the several states" marks the distinction, for the purpose of national governmental regulation, between commerce which concerns two or more states,

15Parkersburg, etc. v. Parkersburg, 107 U. S. 691, 2 S. Ct. 737 (1883).
19The Daniel Ball, supra note 11; Guy v. Baltimore, 100 U. S. 434, 25 L. Ed. 743 (1880).
21Illinois, etc. R. Co. v. McKeendree 203 U. S. 514, 27 S. Ct. 153 (1906).
and commerce which is confined to a single state and does not affect the other
states, the power to regulate the former being conferred upon Congress and the
regulation of the latter remaining unaffected in the states severally. 24

It may be well before going further to notice the difference in the functions
of the national government under the three categories of the commerce clause,
namely, normal internal national commerce, commerce with the Indian tribes, and
international commerce. The last two have a very different measure of jurisdic-
tion than the first. Among the nations of the world the United States must be
able to treat with full equality. That bargaining equivalent would be lacking
if the sovereignty of the United States were incomplete, were divided. In the
commerce within the territory of the United States, the sovereignty is divided,
but that is within the family. Singleness of personality was essential if one
people through a central government were "to assume among the powers of the
earth the separate and equal station to which the Laws of Nature and of Nature's
God entitles them." Failure to recognize this inherent difference in the stature
of the sovereign with authority only to adjust family differences, and the one
incarnated to take no quarter in international affairs has caused needless confusion.
Our only concern here is to note that one is not the measure of the other. Two
recent cases involving the international sovereignty of the United States should be
noted before return to our subject, namely, Burnet v. Brooks, 25 and United
States v. Curtiss-Wright Export Corporation. 26 In the latter case the Court said:
"The two classes of powers are different, both in respect of their origin and their
nature. The broad statement that the federal government can exercise no powers
except those specifically enumerated in the Constitution, and such implied powers
as are necessary and proper to carry into effect the enumerated powers, is cate-
gorically true only in respect of our internal affairs. In that field, the primary
purpose of the Constitution was to carve from the general mass of legislative
powers then possessed by the states such portions as it was thought desirable to
vest in the federal government, leaving those not included in the enumeration
still in the states. That this doctrine applies only to powers which the states
had is self-evident. And since the states severally never possessed international
powers, such powers could not have been carved from the mass of state powers
but obviously were transmitted to the United States from some other source . . .
It results that the investment of the federal government with the powers of
external sovereignty did not depend upon affirmative grants of the Constitution
. . . Not only, as we have shown, is the federal power over external affairs in
origin and essential character different from that over internal affairs, but partici-
pation in the exercise of the power is significantly limited . . . As a result of
the separation from Great Britain by the colonies, acting as a unit, the powers

24 Gibbons v. Ogden, supra note 9; Mondou v. N. Y., N. H., & H. R. Co., supra note 16.
of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America."

The third category of the clause, giving jurisdiction over commerce with the Indian Tribes, as that over international commerce, carries with it powers which make the extent of national control there no test of that control over ordinary internal commerce among the states. The Indians are the wards of the United States. It has special treaty-making powers in addition to practically uncontrolled legislative discretion. These and others are added to the commerce power.

We may now return to the problem immediately before us, the scope of the regulatory power of Congress over internal commerce. In so doing it is necessary to trace briefly the development of the underlying principle. It was vigorously contended after the adoption of the Constitution that the national commerce power was only concurrent and not exclusive anywhere. The issue first came before the Court in Gibbons v. Ogden. The case grew out of a grant by the legislature of New York to Robert L. Livingston and Robert Fulton of the exclusive right of navigation in all the waters within the jurisdiction of the state, with boats by fire and steam, and the authorization of the state courts to enjoin any other person whatever from navigating such waters with boats of this description. The act was assailed by the appellant in the case as unconstitutional, as being in violation of the power of Congress over interstate commerce. The decision of the particular question involved in the case was not a difficult one. In spite of the decision of the highest court of the state, awarding the injunction asked against the infringement of the monopoly by a federal licensee, it was

27Congress has always exercised plenary power in respect to the exclusion of merchandise brought from foreign countries, not only by direction by the enactment of embargo statutes, but indirectly as a necessary result of provisions contained in tariff legislation. It has also in other than tariffs, exerted a police power over foreign commerce by provisions which of themselves amounted to the assertion of the right to exclude merchandise at discretion. Cf. Buttfield v. Stranahan, 192 U. S. 470, 24 S. Ct. 349 (1904) and University of Illinois v. United States, 289 U. S. 48, 53 S. Ct. 509 (1933). See also Brown v. Maryland, 12 Wheaton 419 (1827).

28Cherokee Nation v. Georgia, 5 Peters 1 (1831); Worcester v. Georgia, 6 Peters 515 (1832). United States v. Kagama, 118 U. S. 375 (1886): "From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this Court, whenever the question has arisen . . . . The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

29Supra note 9.

30"It is supported by great names—by names which have all the titles to consideration that virtue, intelligence, and office, can bestow. No tribunal can approach the decision of this question, without feeling a just and real respect for that opinion which is sustained by such authority; but it is the province of this court, while it respects, not to bow to it implicitly; and the Judges must exercise, in the examination of the subject, that understanding which Providence has bestowed
evident that if a state could pass laws of this character, the control of Congress over interstate commerce was a myth. The act was held an unconstitutional intrusion upon the national jurisdiction. But a sweeping generalization was made to the effect that the power of Congress was not only supreme but all-exclusive so that legislation by any state on a subject matter of interstate commerce was prohibited. The decisions soon began to delimit the exclusive area of national power.\textsuperscript{31} The lodestones were established, in the since unquestioned division, by the famous case of \textit{Cooley v. Board of Wardens of the Port}.\textsuperscript{82} The case distinguished between regulations of commerce in which uniformity throughout the United States is desirable and those regulations which, being local in their nature, may properly admit of variations in different places to meet varying local conditions. As to the first class of regulations, the Court affirmed the rule of \textit{Gibbons v. Ogden}; as to the second class, it held that in the absence of federal statutes the different states might legislate for their own territory. The dividing lines were drawn by the following often repeated and since never questioned language: "The diversities of opinion, therefore, which have existed on this subject, have arisen from the different views taken of the nature of this power. But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation."

"Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain."

It must be noted that two divisions of commerce were created by the \textit{Cooley Case}. These are the special concern of this discussion, but before we go on, it must be repeated that there is a field not described in the famous statement above upon them, with that independence which the people of the United States expect from this department of the government ... .

\textsuperscript{81}Wilson v. Blackbird Creek Marsh Company, 2 Peters 245 (1829); New York v. Miln, 11 Peters 102 (1837); The License Cases, 5 Howard 504 (1867).

\textsuperscript{82}12 How. 299, 13 L. Ed. 996 (1851).
quoted. It is the theater of commercial activities having no connection with other states and being conducted exclusively within a state. Even though the commerce clause undergo the broadest possible interpretation the national regulatory power will never extend to all commerce within the territory of the United States. "If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our federal system. I find no authority in that grant (the commerce clause) for the regulation of wages and the hours of labor in the intrastate transactions . . . As to this feature of the case, little can be added to the opinion of the Court. There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce . . . Activities local in their immediacy do not become interstate commerce because of distant repercussions."32 This may not be the wisest statesmanship,33 but as the Court put it, "It is not the province of this Court to consider the economic advantages or disadvantages of such a centralized system. It is sufficient to say that the Federal Constitution does not provide for it . . . Efforts of the federal government must be made in a manner consistent with the authority granted by the Constitution." All commerce can never be entirely among the several states. Every case before the Supreme Court, in addition to those above cited, has emphasized the existence of this line beyond which the nation may not press in. Our survey is to locate this isogonic line and observe how near it lies to the periphery of state personality. "What is near and what is distant may at times be uncertain."34

Returning to the Cooley Case we observe that there are two lines which mark state jurisdiction. It is the oversight of this which has caused confusion in interpreting the cases dealing with the federal boundary line. The second area is not, as often called, a penumbra, but a distinct area as the iris of the eye. There are three areas, not two. Between each of these the shadows shift causing the penumbra cases. The inner circle (as the pupil) is the commerce which is wholly, exclusively, and peculiarly local. The outer (as the sclera), by the same signs, is national and from which the states are wholly excluded.35 Into the iris, however, either or both may enter. Both of the outer circles are, under the Cooley Case, interstate commerce areas, and may be called local-interstate commerce and national-interstate commerce. Both sovereigns have jurisdiction

32Mr. Justice Cardozo concurring in the Schechter Case, infra note 35.
33Cf. supra note 3.
34"The apparent implication (of the government's argument) is that the federal authority under the commerce clause should be deemed to extend to the establishment of rules to govern wages and hours in intrastate trade and industry generally throughout the country, thus overriding the authority of the states to deal with problems arising from labor conditions in their internal commerce." A. L. A. Schechter Poultry Corporation v. United States, 295 U. S. 495, 55 S. Ct. 837 (1935).
35Mr. Justice Cardozo concurring in the Schechter Case, supra, note 35.
in the former, but only the United States can regulate the latter. The exclusive jurisdiction of the states depends upon the factual nature of the transactions involved. The jurisdictional fact is reserved for the approval of the judiciary under the doctrine of judicial review. Congress cannot adjust the line against the fact so as to thrust the national control upon the inner circle exclusively reserved by the Constitution to the states. In the absence of assumption of control by Congress, the states are not materially handicapped by the commerce clause in regulating local-interstate commerce. Congress is privileged to enter and oust the states. But as local-interstate commerce is a subject "imperatively demanding that diversity which alone can meet the local necessities" and Congress has the discretion, the working rule is to require a clear showing of the congressional purpose to exclusively occupy the field. The matter is summed up by the Court in the recent case of Kelly v. State of Washington as follows: "Under our constitutional system, there necessarily remains to the states, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together'.

It must be noted that where the expressions of authority of both sovereigns collide that the national power prevails. "This is not a controversy between equals. The United States is asserting its sovereign power to regulate commerce and to control the navigable waters within its jurisdiction. It has standing . . . not only to remove obstruction to interstate and foreign commerce, but also to carry out treaty obligations . . ." Sanitary District of Chicago v. United States, 266 U. S. 405, 45 S. Ct. 176 (1925).


There the jurisdictional fact is the location of the line between local-interstate and national-interstate commerce.

The state court took the view that Congress had occupied the field and that no room was left for state action in relation to vessels plying on navigable waters within the control of the federal government. 186 Wash. 589, 593, 596, 59 P. (2d) 373. And this is the argument pressed by respondents and the Solicitor General.

"This argument, invoking a familiar principle, would be unnecessary and inapposite if there were a direct conflict with an express regulation of Congress acting within its province. The argument presupposes the absence of a conflict of that character. The argument 'is also unnecessary and inapposite if the subject is one demanding uniformity of regulation so that state action is altogether inadmissible in the absence of federal action. In that class of cases the Constitution itself occupies the field even if there is no federal legislation. The argument is appro-
A thing in motion takes some time and space after speed begins to decrease until it comes to complete rest. Normally when goods come to complete rest the full power of the state attaches. This may be because all federal jurisdiction has ended or because the movement is within the zone of local-interstate commerce. Much of the jurisprudence has developed about where the line is drawn without in any way affecting the principle. The adjustment has been largely due to the modification of the "original package" doctrine. In Leisy v. Hardin the Court held that goods delivered in interstate commerce continued beyond state control while they remained in their original packages. The original package doctrine, if it ever was, is no longer the test of national-interstate commerce. Original packages are evidence of interstate commerce but not the test. "In brief the test of the original package is not an ultimate principle. It is only an illustration of a principle. The consequence of the modification of the original package doctrine is to eliminate the Clark Distilling Co. Case as a holding that the Congress has discretion to return to the states powers vested in it by the Constitution. No modification of the Cooley Case is effected by the Clark Distilling Co. Case. Congress merely made it clear that it had not entered the field of local-interstate commerce to the exclusion of the states. The cooperation of the nation, by the statutes discussed in the cases just cited, merely removed any doubt as to the intention of Congress which might be privately addressed to those cases where States may act in the absence of federal action but where there has been federal action governing the same subject. Prigg v. Pennsylvania, 16 Pet. 539, 617, 618, 10 L. Ed. 1060; Northern Pacific Railway Co. v. Washington, 222 U. S. 370, 379, 32 S. Ct. 160, 56 L. Ed. 237; Erie Railroad Co. v. New York, 233 U. S. 671, 681, 682, 34 S. Ct. 756, 58 L. Ed. 1149, 52 L. R. A. (N.S.) 266, Ann. Cas. 1915D, 138; Southern Railway Co. v. Railroad Commission, 236 U. S. 439, 446, 447, 35 S. Ct. 304, 59 L. Ed. 661; Oregon-Washington R. & N. Co. v. Washington, 270 U. S. 87, 101, 102, 46 S. Ct. 279, 283, 284, 70 L. Ed. 482; Napier v. Atlantic Coast Line R. R. Co., 272 U. S. 605, 612, 613, 47 S. Ct. 207, 209, 210, 71 L. Ed. 432; Gilvay v. Cuyahoga Valley Ry. Co., 292 U. S. 57, 60, 61, 54 S. Ct. 573, 574, 78 L. Ed. 1123."

45135 U. S. 100, 10 S. Ct. 681 (1890).
46Cf. Sonnewborn Brothers v. Cureton, supra note 43.
48Baldwin v. Seelig, Inc. supra note 47.
50Ribble, National and State Cooperation Under the Commerce Clause, 47 Col. Law. Rev. 43 (1937), contra.
51This seems to be expressed by the Court in Whitfield v. Ohio, supra note 47. The Court said, the 'statute simply permits the jurisdiction of the state to attach immediately upon delivery, whether the importation remains in the original package or not. In other words the importation is relieved from the operation of any rule which recognizes a right of sale in the unbroken package without state interference—a right the existence of which never has been regarded as a fundamental part of the interstate transaction but only as an incident resulting therefrom.' That the Court was aware of the issue is shown by the statement: "If the power of Congress to remove the impediment to state control presented by the unbroken-package doctrine be limited in any way (a question which we do not now find it necessary to consider), it is
raised by Bowman v. Chicago and N. W. Ry. Co., as to whether Congress had excluded the states from local-interstate commerce. A material difference in the judicial attitude toward the question of the occupancy by Congress of the field of local-interstate commerce from that expressed in the Bowman Case is shown in the following statement: "this calls for the well-established principle that Congress may circumscribe its regulation and occupy a limited field, and that the intent to supersede the exercise by the state of its police power as to matters not covered by federal legislation is not to be implied unless the latter fairly interpreted is in conflict with the state law." This adjustment of the presumption of non-exclusive occupancy by Congress was necessary for a working rule to make the federal system complementary. Our inquiry is not, however, to examine the maximum range of projection of state regulatory power. The states' jurisdiction cases have been referred to only for differentiation and analogy. We are concerned only with the national power. Clearly it applies to the outer area to which the states may not extend their laws in any event. It also extends to the iris area in which the states may regulate until the Congress acts. Both are areas of interstate commerce. We are concerned with the national regulatory power within interstate, local-interstate and national-interstate, and with the inner line of the iris area. Transactions, once only local, may expand to national characteristics and transactions national in character may increase their intensity so as to widen the scope of national control. Adjustment of the national power follows the change. The common or national problem is as a beacon the varying intensity of whose light causes the expansion and contraction of the pupil area and varies the length of the shadows cast.

Where, as with us, the people are themselves the sovereign, the function of, or justification for, government is in having available a ready agency to correct mal-adjustments, whether social or economic, for the common good and general welfare. This is the police power or the inherent sovereignty of government. It ranges from the imposition of capital punishment to a reversal of the rule of caveat emptor to venditor emptor. The principle of liberty of contract and of personal action necessarily carries with it a presumption of morality and freedom from governmental interference. Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute;
for governments cannot exist if the citizen may at will use his property to the
detriment of his fellows, or exercise his freedom of contract to work them harm.
Equally fundamental with the private right is that of the public to regulate it
in the common interest. It is by virtue of this power that it legislates; and its
authority to make regulations of commerce is as absolute as its power to pass
health laws, except in so far as it has been restricted by the Constitution of the
United States. Touching the matters committed to it by the Constitution, the
United States possesses the power of regulation as do the states in their sovereign
capacity touching all subjects jurisdiction of which is not surrendered to the
federal government, as shown by the quotations above given.

The Fifth Amendment, in the field of federal activity, and the Fourteenth,
as respects state action, do not prohibit governmental regulation for the public
welfare. They merely condition the exertion of the admitted power, by securing
that the end shall be accomplished by methods consistent with due process. And
the guaranty of due process, as has often been held, demands only that the law
shall not be unreasonable, arbitrary, or capricious, and that the means selected
shall have a real and substantial relation to the object sought to be attained. It
results that a regulation valid for one sort of business, or in given circumstances,
may be invalid for another sort, or for the same business under other circum-
stances, because the reasonableness of each regulation depends upon the relevant
facts. There is governmental power to correct existing economic ills by appro-
priate legislative regulation of business though the indirect result may be a re-
striction of the freedom of contract or a modification of charges for services or
the price of commodities.\footnote{Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 505 (1934).}
While freedom from regulation is the rule, "It is
clear that there is no closed class or category of businesses affected with a public
interest, and the function of courts in the application of the Fifth and Fourteenth
Amendments is to determine in each case whether circumstances vindicate the
challenged regulation as a reasonable exertion of governmental authority or con-
demn it as arbitrary or discriminatory."\footnote{Ibid, p. 536.}
"Whether the free operation of the
normal laws of competition is a wise and wholesome rule for trade and commerce
is an economic question which this court need not consider or
"The Constitution does not secure to any one liberty to conduct his business in
such fashion as to inflict injury upon the public at large, or upon any substantial
group of the people. Price control, like any other form of regulation, is un-
constitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the
policy the Legislature is free to adopt, and hence an unnecessary and unwarranted
interference with individual liberty."\footnote{Nebbia v. New York, supra note 56.} Thus "It may be said in a general way
that the police power extends to all the great public needs. It may be put forth
in aid of that which is sanctioned by usage, or held by the prevailing morality
or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce."\textsuperscript{60} These cases demonstrate the nature, scope, and test of exertions of the police power of government. Each exertion was to regulate the business or transaction affected. The power of Congress "to regulate commerce" is a power which is subject to the same limits in the commerce among the states as is the power of the states to regulate practices within their jurisdiction.\textsuperscript{61} "The incidental effect which such reasonable rules may have, if any . . . does not constitute a taking but is only a reasonable regulation in the exercise of the police power of the national government."\textsuperscript{62} "We have frequently said that in the exercise of its control over interstate commerce, the means employed by Congress may have the quality of police regulations."\textsuperscript{63}

To establish the power to regulate as a grant of general police power (to a limited area) has special significance. Firstly, it promises to bring a symmetry of pattern to cases usually examined segmented and consequently found unconnected. Secondly, and by the same tokens, it gives reason and analogy to the function of regulation. There is a marked tendency, when regulatory power is mentioned, to run to \textit{Munn v. Illinois}\textsuperscript{64} and overlook the effect of constitutional limitations\textsuperscript{65} established by the controlling case of \textit{Smyth v. Ames}\textsuperscript{66} and the integration through the \textit{Tyson Group}\textsuperscript{67} into \textit{Nebbia v. New York}.\textsuperscript{68} But the due process clauses operate similarly as limitations upon their respective governments in the subjection of private industrial activity to governmental supervision. The common principle emphatically established is that freedom from interference is the rule and governmental regulation is the exception. Before the private commercial practice can be subordinated to the compelled standard, the

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\item \textsuperscript{60}\textit{Noble State Bank v. Haskell}, 219 U. S. 104, 31 S. Ct. 186 (1911).
\item \textsuperscript{61}"It is idle, therefore, to debate whether the liberty of contract guaranteed by the Constitution of the United States is more intimately involved in price regulation than in the other forms of regulation as to the validity of which there is no dispute. The order of their enactment certainly cannot be considered an element in their legality. It would be very rudimentary to say that measures of government are determined by circumstances, by the presence or imminence of conditions, and of the legislative judgment of the means or the policy of removing or preventing them. The power to regulate interstate commerce existed for a century before the interstate commerce act was passed, and the commission constituted by it was not given authority to fix rates until some years afterwards . . . . It is often the existence of necessity rather than the prescience of it which dictates legislation." German Alliance Ins. Co. v. Lewis, 235 U. S. 389, 34 S. Ct. 612 (1914). (Italics added).
\item \textsuperscript{62}\textit{Chicago Board of Trade v. Olson}, 262 U. S. 1, 43 S. Ct. 470 (1923).
\item \textsuperscript{63}\textit{Kentucky Whip & Collar Co. v. Illinois Central R. R. Co.}, 299 U. S. 334, 346, 57 S. Ct. 277, 280 (1937).
\item \textsuperscript{64}4 U. S. 113, 24 L. Ed. 77 (1877).
\item \textsuperscript{65}J. B. SMITH, \textit{SOME PHASES OF FAIR VALUE AND INTERSTATE RATES} (1932).
\item \textsuperscript{66}169 U. S. 466, 18 S. Ct. 418 (1898).
\item \textsuperscript{68}\textit{Supra} note 56. Cf. Townsend v. Yeomans, \textit{supra} note 53.
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legislative jurisdictional fact, namely, an overriding public need of legislative correction of the individual's abuse of privilege, must be established. The only justification for legislative meddling with private business is an established public need. The public interest in regulation, however, takes two aspects, (1) a dependency upon a wholesome practice which must be fostered for the good of the community, and (2) a demand that an unwholesome practice shall be discontinued. One nourishes, the other poisons, the social-economic body. Both involve the surrender of otherwise unrestricted action. Each must be justified, though the difficulty of the government in doing so will vary with the virulence of the infection. All police power regulation finds support and justification only when it promotes the welfare of the community and deals with a subject matter within the jurisdiction of the enacting legislature. Particular goods (goods in the broadest sense) then become classified for the purpose of regulation as wholesome or vicious. But looking at the whole of commerce, whichever the classification, the regulation must be for its promotion. The amelioration of the whole can be effected only by the promotion of accepted standards of morality and fairness. If misconduct, (a falling below such standards) is only attached incidentally to the goods, obviously prohibition and contrabanding is not regulation but tyranny. However, if the goods, though themselves harmless, are the means or product of correctable misconduct, then effective regulation may comprehend their exclusion from the channels of commerce. In the exertion of its regulatory power the jurisdiction of Congress must be constantly in mind. It is of the between-states commercial intercourse. This is reemphasized because we must find such commerce and that which adheres to it for potential national interference, and that the congressional legislation promotes that commerce. Promotion is in the generic sense of community health and not of license for piracy.


70 "To regulate in the sense intended, is to foster, protect, control, and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large." Mondou v. N. Y., N. H., & H. R. Co., 273 U. S. 1, 47, 32 S. Ct. 169, 174 (1912).

71 The words meddling and interference are used because they conform to the judicial recognition of freedom of action and private-property concepts about which our order rotates, and not for any approbrious connotation.

72 Here the distinction of national power over international commerce from that over interstate commerce must be reviewed. There the stifling of wholly legitimate commerce may be practiced to effect an unrelated result in the relationship of the United States with other nations. Thus to engage in international commerce is only a privilege to be enjoyed in the discretion of the national government, (Buttfield v. Stranahan, 192 U. S. 470, 24 S. Ct. 349 (1904); Rainey v. United States, 232 U. S. 310, 34 S. Ct. 429 (1914); Alvarez Y. Sanchez v. United States, 216 U. S. 167, 30 S. Ct. 361 (1910); United States v. Curtiss-Wright Export Corporation, supra note 26.) While to engage in interstate commerce is, subject to police-power of regulation, a federal constitutional right. "Persons have a constitutional right to engage in interstate commerce free from burdens imposed by a state tax upon the business which constitutes such commerce, or the privilege of engaging in it or the receipts as such derived from it. Interstate commerce is not an abstraction; it connotes the transactions of those engaged in it, and they enjoy the described immunity in their own right." James v. Dago Contracting Co., 58 S. Ct. 208, 220 (1937).
There must be some underlying correlating factor in cases involving regulation for public welfare. It is submitted that every decided case can be classified under two headings of the police power of regulation, (1) total control, and (2) partial control where there is a factual interdependency to make recognized power effective. Regulation may be promotional or deterrent. In the first the means are deterrent to a healthful practice. In the latter they are usually prohibitory in nature. Practices upon the national highways of commerce which are deleterious to the freedom of movement in a particular industry may be curbed (negatively or positively) to promote the welfare of the industry affected. Transactions in interstate commerce which are deleterious to general moral standards may be wholly prohibited. Practices which are in violation of established moral standards of the states between which they operate may be prohibited. Finally, goods which are characterized as noxious or vicious to the health or morals of individuals or communities or to valid economic and social standards of the states affected may be excluded from the national highways.

Where a commercial transaction sought to be regulated by Congress is itself one involving more than two states, or is a matter having such a close and substantial relation to such interstate commerce that its control is essential or appropriate to secure the freedom of that traffic from interference or unjust discrimination and to promote the national welfare, Congress has power to regulate. But the purpose of that regulation must be able to stand the test of justification as a police method and the means sought must be appropriate. In the choice of means to effect a permissible regulation of commerce Congress must conform to due process, and the quality of the action compelled, and its reasonableness or the lawfulness of the compulsion, must be judged in the light of the conditions which have occasioned the exercise of governmental power. Let us now examine some of the cases which have dealt with attempts to regulate matters because of their relationship to commerce among the states.

We are now dealing with causes in which the matter in interstate commerce was one concededly subject to regulation and are pressing the interdependent relationship, in terms of means of effective regulation, in expansion of local-interstate commerce. Our problem for discussion here does not involve the tests of what constitutes a transaction in interstate commerce but only in how far

72a"Many, even lawyers, are too near-sighted to observe the important implications in many decisions which attract no general attention. The members of the Court are always alive to these implications and watch each case with a critical eye. Cases which the ordinary observer might consider to be relatively unimportant may become important precedents and they require thorough study and discussion. The moulding of the law is a continuous process demanding constant and exceptional vigilance in a court which speaks the last word in harmonizing conflicts and establishing the final interpretation of the public law. The Justices work under the influence of this demand and they are keenly conscious of the advantage which has been found to inhere in their historic method." Address of the Chief Justice of the United States, May 6, 1937, Vol. XIV Proceedings of the American Law Institute, page 36.
Congress can follow such commerce. Monopolistic control is an immoral practice correctable by direct legislative regulation. Promotional regulation was undertaken by Congress in the Sherman Act. There being no question on the constitutional validity of the statute, our concern is with its application. Unless there be a substantial relation factually to the transaction in interstate commerce and the related action sought to be regulated either the Congress has no jurisdiction or the word "interstate" is deleted from the Constitution with the privilege to Congress to absorb all state control. "No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass." If the cost of doing an intrastate business is in itself the permitted object of federal control, the extent of the regulation of cost would be a question of discretion and not of power. But if the power exists to regulate national-interstate commerce it must include capacity to protect that commerce whether the injury comes from within such commerce or from without. It is the effect not the source of the conduct which is "the criterion of congressional power." While this is no bordereau some of the authorities must be traced. Decisions afford a ready invitation to conclude that they commence, whereas in fact, they record established customs. Observation of a power is often indulged before its exercise must be justified. Many early cases carried the suggestion that becomes the basis of decision in perhaps the most important case in our study, Swift Co. v. United States. There the three areas of commerce were fully recognized. Things, which in their separateness would be subject to state control, in motion were caught up in the stream of interstate commerce. When their cumulative effect retarded the flow, their bulk was retained in the national filter.

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74 "The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of caveat emptor should not be relied upon to reward fraud and deception ... practices contrary to decent business standards." Federal Trade Commission v. Standard Education Society, 38 S. Ct. 113, 115 (1917).
76 McCullough v. Maryland, 4 Wheat. 316, 4 L. Ed. 579 (1819).
77 A. L. A. Schechter etc. v. United States, supra note 35.
79 Cf. Gibbons v. Ogden, supra note 9; and The Daniel Ball, supra note 11.
80a This decision involved an alleged monopoly in the purchase and sale of live stock and the sale of dressed meats for the purpose of monopolizing such commerce among the states in violation of the Sherman Act. The defense was that the conduct complained of was local and not subject to national regulation. The Court said: "Although the combination alleged embraces restraint and monopoly of trade within a single state, its effect upon commerce among the states is not accidental, secondary, remote, or merely probable. On the allegations of the bill the latter commerce no less, perhaps even more, than commerce within a single state, is an object of attack. See Leloup v. Port of Mobile, 127 U. S. 640, 647, 32 L. ed. 311, 314, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Crutch v. Kentucky, 141 U. S. 47, 39, 35 L. Ed. 648, 652, 11 Sup.Ct. Rep. 851; Allen v. Pullman's Palace Car Co., 191 U. S. 171, 179, 180, 48 L. Ed. 134, 138, 24 Sup. Ct. Rep. 39. Moreover, it is a direct object; it is that for the sake of which the several
Modern business conditions give unity to primitive segments. It is not that goods in interstate commerce have come from rest or will go to rest in a state that makes conduct in relation to them subject to federal control. The jurisdictional fact for national control is whether there is some confining influence materially tending to prevent their induction into commerce among the states. The impediment may find expression at either end of the journey. The transition of otherwise local commerce to local-interstate commerce, in the inception of between-state movements is perhaps best characterized by the *Coronado Coal Cases* where unlawful control of local production was with the "intent to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets." The action of the conspirators was held to be "a direct violation of the Anti-Trust Act." Where the misconduct restrains the discharge from interstate commerce the test and result are no different. This is illustrated by the application of the Sherman Act to the live poultry industry. Marketmen, teamsters, and slaughterers conspired to burden the movement of live poultry into the metropolitan area of New York. Marketmen organized an association, allocated retail dealers among themselves, and agreed to increase prices. To accomplish their purpose, large amounts of money were raised by levies upon poultry sold, men were hired to obstruct the business of dealers who resisted, wholesalers and retailers were spied upon, and by intimidation were prevented from freely purchasing live poultry. Teamsters refused to handle poultry for marketmen who objected. Members of the slaughterers union refused to slaughter. When the conspiracy to restrain the interstate movement was established it became immaterial whether the state also had jurisdiction. When it was shown that the described conduct operated "substantially and directly to restrain and burden the untrammelled shipment and movement of poultry" in interstate commerce the national law applied to abate the illegal restraint. Unless the nation can follow commerce among the states to remove obstacles whether at inception or termination the channels can be closed. Without that

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capacity there would be no power to regulate. The national power adheres to the goods which have moved in interstate commerce so long as factually necessary to assure the effectiveness of valid regulation of such movement however wide the field of local-interstate commerce may be. Over emphasis is impossible on the distinction between filtering and riprapping the goods and approaches of the between-states conduit and the attempt to artificially attach commerce concealed within the skirts of a state to the foster-federal apron strings. It was such kidnaping that was attempted by the National Industrial Recovery Act. The blue eagle was driven from the domestic poultry yards and restored to range the outer fields for proper subjects of his attention by the decision of the Schechter Case. This decision is in no way a modification of the principle applied in the Swift Case anymore than is the determination of the fact of fault for or against the plaintiff in a negligence case a change of the doctrine of tort liability. The regulation of conduct of passengers on, entering, or leaving, a transcontinental train is a very different thing than an attempt to control the conduct of all persons merely because they have once ridden or may at some future time ride on such a train. The one may be the entelechy of the other but not until the actual relation has succeeded the merely potential can the power of the nation be substituted for that of the state.

The cases we have been examining of local-interstate commerce have been in regard to source and discharge. The issue is no different where there is a confluence of streams of commerce among the states and redirection through the resultant of forces. A casual sojourner does not make a migration. Generalization from the Swift Case without correlation in fact led to the same mistake by Congress in enacting the Future Trading Act held unconstitutional in Hill v. Wallace that was made in the National Industrial Recovery Act. Where, however, the substantial relationship between the conduct, otherwise local, sought to be regulated by Congress and the free flow of an actual stream of commerce among the states was established in the record, the federal jurisdictional fact existed and the Grain Futures Act was upheld in Chicago Board of Trade v. Olson. Because of the difficulty of establishing that there is only a confluence of continuing currents in interstate commerce and not a termination thereof, it is not uncommon to hear asserted that an additional or new fact must be established in these cases. Actually it is the same fact issue that exists in all cases. Obviously there must be commerce among the states before the conduct, itself not such commerce, sought to be nationally regulated can be a substantial obstacle to inter-

85 This will be developed at more length later.
86 Supra note 35.
87 Supra note 80.
89 Supra note 33.
90 262 U. S. 1, 43 S. Ct. 470 (1923).
state commerce. The difficulty which this analysis, if sound, presents to the commentator is that it dampens the carnival spirit which now seems so popular to join the hue and cry of alleged judicial inconsistency. It does, however, emphasize the need of more carefully considered legislation (certainly this should not be deplored) and extraordinary care and skill in marshaling the jurisdictional facts in its support when the issue is brought before the Supreme Court. No better example of the advocate’s skill can be found than in the recent decision upholding the National Labor Relations Act of 1935.\footnote{91} It is submitted that this is the principal importance of the \textit{Jones \& Laughlin Steel Cases}.\footnote{92} The following summary of the problem was given by the Court.\footnote{93} The government distinguishes these cases.\footnote{94} The various parts of respondent’s enterprise are described as interdependent and as thus involving “a great movement of iron ore, coal and limestone along well-defined paths to the steel mills, thence through them, and thence in the form of steel products into the consuming centers of the country—a definite and well-understood course of business.” It is urged that these activities constitute a “stream” or “flow” of commerce, of which the Alquippa manufacturing plant is the focal point, and that industrial strife at that point would cripple the entire movement. Reference is made to our decision sustaining the Packers and Stockyards Act. Stafford \textit{v.} Wallace, 258 U. S. 495, 42 S. Ct. 397, 66 L. Ed. 735, 23 A. L. R. 229. The Court found that the stockyards were but a “throat” through which the current of commerce flowed and the transactions which there occurred could not be separated from that movement. Hence the sales at the stockyards were not regarded as merely local transactions, for, while they created “a local change of title,” they did not “stop the flow,” but merely changed the private interests in the subject of the current. Distinguishing the cases which upheld the power of the state to impose a nondiscriminatory tax upon property which the owner intended to transport to another state, but which was not in actual transit and was held within the state subject to the disposition of the owner, the Court remarked: “The question, it should be observed, is not with respect to the extent of the power of Congress...\footnote{91} U. S. C. sect. 151 et seq. \footnote{92} National Labor Relations Board \textit{v.} Jones \& Laughlin Steel Corporation, 301 U. S. 1, 57 S. Ct. 615 (1937). \footnote{93} The material between note 92 and note 95 is taken from the opinion of the Supreme Court. \footnote{94} Respondent says that, whatever may be said of employees engaged in interstate commerce, the industrial relations and activities in the manufacturing department of respondent’s enterprise are not subject to federal regulation. The argument rests upon the proposition that manufacturing in itself is not commerce. Kidd \textit{v.} Pearson, 128 U. S. 1, 20, 21, 9 S. Ct. 6, 32 L. Ed. 346; United Mine Workers \textit{v.} Coronado Co., 259 U. S. 344, 407, 408, 42 S. Ct. 570, 581, 582, 66 L. Ed. 975, 27 A. L. R. 762; Oliver Iron Co. \textit{v.} Lord, 262 U. S. 172, 178, 43 S. Ct. 526, 529, 67 L. Ed. 929; United Leather Workers’ International Union \textit{v.} Herkert & Meisel Trunk Co., 265 U. S. 457, 465, 44 S. Ct. 623, 625, 68 L. Ed. 1104, 33 A. L. R. 566; \textit{Industrial Association} \textit{v.} United States, 268 U. S. 64, 82, 45 S. Ct. 403, 407, 69 L. Ed. 849; Coronado Coal Co. \textit{v.} United Mine Workers, 268 U. S. 293, 310, 45 S. Ct. 551, 556, 69 L. Ed. 963; Schechter Corporation \textit{v.} United States, supra, 295 U. S. 495, at page 547, 55 S. Ct. 837, 850, 79 L. Ed. 1570, 97 A. L. R. 947; Carter \textit{v.} Carter Coal Co., 298 U. S. 238, 304, 317, 327, 56 S. Ct. 855, 866, 873, 880, 80 L. Ed. 1160.”
to regulate interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with this paramount authority." Id., 258 U. S. 495, at page 526, 42 S. Ct. 397, 405, 66 L. Ed. 735, 23 A. L. R. 229. See Minnesota v. Blasius, 290 U. S. 1, 8, 54 S. Ct. 34, 36, 78 L. Ed. 131. Applying the doctrine of Stafford v. Wallace, supra, the Court sustained the Grain Futures Act of 1922 with respect to transactions on the Chicago Board of Trade, although these transactions were "not in and of themselves interstate commerce." Congress had found that they had become "a constantly recurring burden and obstruction to that commerce." Board of Trade of City of Chicago v. Olsen, 262 U. S. 1, 32, 43 S. Ct. 470, 476, 67 L. Ed. 839. Compare Hill v. Wallace, 259 U. S. 44, 69, 42 S. Ct. 453, 458, 66 L. Ed. 822. See, also, Tagg Bros. & Moorhead v. United States, 280 U. S. 420, 50 S. Ct. 220, 74 L. Ed. 524. The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact "all appropriate legislation" for its "protection or advancement" (The Daniel Ball, 10 Wall. 557, 564, 19 L. Ed. 999); to adopt measures "to promote its growth and insure its safety" (County of Mobile v. Kimball, 102 U. S. 691, 696, 697, 26 L. Ed. 238); "to foster, protect, control, and restrain." (Second Employers' Liability Cases, supra, 223 U. S. 1, at page 47, 32 S. Ct. 169, 174, 56 L. Ed. 327, 38 L. R. A. [N. S.] 44). See Texas & N. O. R. Co. v. Railway & S. S. Clerks, supra. That power is plenary and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it." Second Employers' Liability Cases, 223 U. S. 1, at page 51, 32 S. Ct. 169, 176, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; Schechter Corporation v. United States, supra. 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. Schechter Corporation v. United States, supra. Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. Id. The question is necessarily one of degree. As the Court said in Board of Trade of City of Chicago v. Olsen, supra, 262 U. S. 1, at page 37, 43 S. Ct. 470, 477, 67 L. Ed. 839, repeating what had been said in Stafford v. Wallace, supra: "Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is
primarily for Congress to consider and decide the fact of the danger and to meet it."

That intrastate activities, by reason of close and intimate relation to interstate commerce, may fall within federal control is demonstrated in the case of carriers who are engaged in both interstate and intrastate transportation. There federal control has been found essential to secure the freedom of interstate traffic from interference or unjust discrimination and to promote the efficiency of the interstate service. The Shreveport Case (Houston, E. & W. T. R. Co. v. United States), 234 U. S. 342, 351, 352, 34 S. Ct. 833, 58 L. Ed. 1341; Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co., 257 U. S. 563, 588, 42 S. Ct. 232, 237, 66 L. Ed. 371, 22 A. L. R. 1086. It is manifest that intrastate rates deal primarily with a local activity. But in rate making they bear such a close relation to interstate rates that effective control of the one must embrace some control over the other. Id. Under the Transportation Act, 1920, Congress went so far as to authorize the Interstate Commerce Commission to establish a statewide level of intrastate rates in order to prevent an unjust discrimination against interstate commerce. Railroad Commission of Wisconsin v. Chicago, B. & Q. R. R. Co., supra; Florida v. United States, 282 U. S. 194, 210, 211, 51 S. Ct. 119, 123, 75 L. Ed. 291. Other illustrations are found in the broad requirements of the Safety Appliance Act (45 U. S. C. A. â€“ 110) and the Hours of Service Act (45 U. S. C. A. â€“ 61-64). Southern Railway Co. v. United States, 222 U. S. 20, 32 S. Ct. 2, 56 L. Ed. 72; Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 31 S. Ct. 621, 55 L. Ed. 878. It is said that this exercise of federal power has relation to the maintenance of adequate instrumentalities of interstate commerce. But the agency is not superior to the commerce which uses it. The protective power extends to the former because it exists as to the latter.

The close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local. This has been abundantly illustrated in the application of the Federal Anti-Trust Act (15 U. S. C. A. â€“ 1-7, 15 note). In the Standard Oil and American Tobacco Cases (Standard Oil Co. v. United States), 221 U. S. 1, 31 S. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; (United States v. American Tobacco Co.), 221 U. S. 106, 31 S. Ct. 632, Cas 55 L. Ed. 663), that statute was applied to combinations of employers engaged in productive industry.98

Thus the Wagner Act Cases98 present no innovation, startling or otherwise, in our constitutional jurisprudence. In the first place the decisions in the Asso-

98Ibid, page 34, 35.
rienced Press Case and the Coach Company Case may be left to one side in an appraisal of the effect of the series of decisions as a whole. In the former the division of opinion impinged only as to the question of the freedom of the press, and in the latter (a unanimous decision) it was conceded that the company was an instrumentality of interstate commerce. The decisions in the other three cases, involving corporations manufacturing steel, automobile trailers, and men's clothing, are the ones that invite particular attention. The minority in each of the production cases felt that the majority departed from the principles set forth in the Schechter Case and the Carter Case, namely, that working conditions and the bargaining in respect thereto in a manufacturing establishment do not constitute intercourse for the purpose of trade and hence cannot be regulated under the commerce clause; furthermore, that such transactions affect interstate commerce, if at all, only indirectly, and hence are beyond the reach of the federal power. The Court, however, felt that the Schechter and Carter cases were not controlling for the reason that in the former the acts of the poultry company in its Brooklyn slaughterhouse, after the interstate journey had ended and was not to be resumed, affected interstate commerce too remotely to warrant federal regulation—intrastate transactions being subject to national control only when they directly obstruct such commerce. As to the Carter Case the Court in the Wagner Act Cases pointed out that the provisions of the Guffey Act relating to production had been held invalid upon several grounds, one of which was improper delegation of legislative power. Thus, in the Carter Case, where the coal had not yet started on its interstate movement, the statutory provisions as to wages and hours, collective bargaining, etc., affected commerce only remotely. The Court went on to point out that in the Wagner Act Cases, the raw materials came from State A into State B for processing and thereafter the product passed into State C. The interstate journey was thus likened to the “stream of commerce” conception voiced in the well-known Stockyards and Chicago Board of Trade Cases. Wholly apart, however, from such conception, the Court found that the Wagner Act sought only to compel the physical meeting of the two sides in a labor dispute which threatened to disrupt interstate commerce. It then found that in the particular cases at bar the acts complained of by the labor unions did in fact threaten to obstruct commerce and hence on familiar principles were subject to prohibition by Congress. The Wagner Act decisions did not touch on the matter of the regulation of wages and hours of employees in a manufacturing concern. There is a marked difference between a statute merely requiring a meeting of employer and employee with nothing compelled as to the subject matter of the agreement, and a statute affirmatively regulating wages and hours. Federal jurisdiction under the Wagner Act does not ultimately depend upon any distinction between commerce passing through three or more states with manu-

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97 Supra note 35.
99 Cf. Adair v. United States, infra note 100.
facture in the middle state, and commerce involving two states with manufacture at one end. The vital question in all instances will be the degree to which the interstate movement is obstructed by the transactions sought to be controlled. It is one thing, however, to approach the matter negatively with the object of encouraging the parties to make an uncoerced agreement removing the obstruction, and another thing to impose the hand of affirmative regulation upon wages, hours, and working conditions in a manufacturing plant. This emphasizes that the commerce power is as much dependent upon the type of regulation as its subject matter. In the Employers' Liability Cases it was thought that the failure to compensate workers who had suffered injury in the course of their employment in railroad repair shops was beyond the power to regulate commerce. When, however, Congress found that the failure of the parties to the employment to settle by peaceful means their grievances with respect to rates of pay, rules or working conditions and that this imposed a substantial burden on interstate commerce, it had power as a regulation of commerce to compel the employers to treat with the same back-shop employees for the purpose of negotiating a labor dispute.

Pauses at the top of the federal commerce arch as well as those at its bases are properly called local-interstate commerce. In the Blasius Case the relationships were of the same nature as those involved in Stafford v. Wallace and Swift & Co. v. United States. In the cases arising under the Sherman Anti-Trust Act and the Packers and Stockyards Act the goods and associated practices were found to be so related to a current of commerce among the states as to be subject to the power of regulation vested in Congress. The state court mistakenly assumed that there was no state jurisdiction to impose a property tax at the situs of the goods while held in the South St. Paul Stockyards because of the applicability of the federal regulatory statutes. "But because there is a flow of interstate commerce which is subject to the regulating power of Congress, it does not necessarily follow that, in the absence of conflict with the exercise of that power, a state may not lay a non-discriminatory tax on property which although connected with that flow as a general course of business, has come to rest and has acquired a situs within the state . . . There was no federal right to immunity from the tax."

We now turn from promotional regulation to regulation by prohibition.

The term prohibition is misleading. Bearing in mind that regulation is but an expression of the government for the common good, all regulation to be

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101207 U. S. 463, 28 S. Ct. 141 (1908).
104Supra note 93.
105Supra note 80.
106187 Minn. 426, 245 N. W. 612 (1933).
107Supra note 103 at page 36, 37.
justifiable must be in the promotion of the general welfare. In addition the commerce clause purpose was to emphasize promotion of the whole commerce by giving adequate power to a single government of that part which was beyond the immediate concern or reach of the individual state. Thus valid prohibition of the use of the interstate highway to a particular traffic is no more destructive in general effect than is the prohibition of a particular practice in connection with a favored movement or approved goods. Each to be valid must be an appropriate exercise of the police power. Where honest practices are furthered commerce is promoted.108 Honest practices are promoted when unwholesome trafficking is regulated even though such regulation goes to the extreme of prohibition. It is submitted that this analysis gives symmetry of pattern to the decided cases and that the decisions upholding regulation as distinguished from those declaring such attempts invalid establish a consistent policy and are not mere fortuitism. It is the oversight of this controlling principle, applied in every exertion of regulatory power whether state or national, that has misled more important men than the author,109 and causes many to contend that the opinion in *Hammer v. Dagenhart*110 must be wholly wrong. Much is made of the comments injected into several early cases by Chief Justice Marshall of which one example will suffice. It was said that the national commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than those prescribed by the Constitution," and "If it may be exercised at all, it may be exercised at the will of those in whose hands it is placed."111 There has been no departure from these principles by the Court. It is the inclination to find what the individual wants to find in them112 that has produced the supposed basis for criticism. It has been elsewhere pointed out113 that when these cases were decided the extent of the "limitations prescribed by the Constitution" were not appreciated. Even as late as 1877114 the Court was unaware of the scope of the limitations and said that "for protection against abuse (by regulation) by legislatures the people must resort to the polls, not to the courts." In fact the limitation of the due process clause upon the power to regulate was not fully understood and applied until 1890.115 There is no longer any question that all of the great substantive powers for internal regulation, whether expressly granted or otherwise, are subject to the due process clause of the Fifth Amendment.116 It is thus elementary that the regulation attempted must be of a nature

108 Cf. *supra* note 74.
110 247 U. S. 251, 38 S. Ct. 529 (1918).
111 *Gibbons v. Ogden*, *supra* note 9, at page 196.
112 Cf. *supra* note 72a.
which is a proper expression of the police power, and, secondly, that it applies to a subject matter of interstate commerce. These are limitations prescribed by the Constitution. Both are jurisdictional facts of national power subject to the concurrence by the Court under the doctrine of judicial review. This is why Congress is not entitled to exercise control over commerce "for any purpose that seems good to it."\(^{117}\)

What are some of the so-called prohibition cases? Cases dealing with the Congressional declaration of non-occupancy of the concurrent field of local-interstate commerce, previously discussed, must be put to one side. These include the Wilson Act of 1890 and the Webb-Kenyon Act of 1913, upheld in *Clark Distilling Co. v. Western Maryland R. Co.*,\(^{118}\) and the more recent Hawes-Cooper Act of 1929, upheld in *Whitfield v. Ohio*.\(^{119}\)

The power to prohibit interstate transportation has been upheld in relation to diseased live-stock;\(^{120}\) lottery tickets;\(^{121}\) commodities owned by the interstate carrier transporting them, except such as may be required in the conduct of its business as a common carrier steam railroad;\(^{122}\) adulterated and misbranded articles, under the Pure Food and Drug Act;\(^{123}\) women for immoral purposes;\(^{124}\) prize fight films;\(^{125}\) obscene literature;\(^{126}\) wild game killed illegally;\(^{127}\) stolen automobiles;\(^{128}\) kidnapped persons;\(^{129}\) intoxicating liquors;\(^{130}\) diseased plants;\(^{131}\) petroleum produced in violation of a state law;\(^{132}\) goods manufactured by convict labor into any state where the goods are intended to be received, possessed, sold, or used in violation of its laws;\(^{133}\) and other examples to be mentioned later.\(^{134a}\)

Congress was given power over commerce among the states to promote the general welfare by police measures. Proof of the fact is dispensed with when the noxious character of the thing is obvious to all. Surely none can question that goods which will contaminate all that comes in contact with them are not

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\(^{117}\) Cf. *supra* note 109, at page 480.
\(^{118}\) 242 U. S. 311, 36 S. Ct. 180 (1917).
\(^{120}\) 307 U. S. 137, 23 S. Ct. 92 (1902).
\(^{122}\) 213 U. S. 361, 29 S. Ct. 527 (1909).
\(^{123}\) 297 U. S. 301, 36 S. Ct. 190 (1916).
\(^{125}\) 239 U. S. 325, 36 S. Ct. 131 (1915).
\(^{126}\) 98 Fed. 423 (1899).
\(^{127}\) 161 Fed. 87 (1910).
\(^{128}\) 267 U. S. 432, 45 S. Ct. 345 (1925).
\(^{129}\) 297 U. S. 124, 26 S. Ct. 399 (1916).
\(^{130}\) 248 U. S. 420, 39 S. Ct. 143 (1919).
\(^{131}\) 270 U. S. 87, 46 S. Ct. 279 (1926).
\(^{132}\) 82 Fed. 2nd. 922 (1936).
\(^{133}\) 57 S. Ct. 277 (1937).
subjects as to which there can be any right to have them moved and delivered in interstate commerce. The pernicious effect may be upon the health of the people, or upon their morals. Thus gambling devices,\textsuperscript{134} poisons,\textsuperscript{136} and obscene literature, there being no longer any doubt of their liability to suppression, can be barred from interstate commerce. Things which by their noxious nature will destroy property or commerce itself are equally subject to suppression. Thus diseased live stock (this would also fit in the previous classification) and diseased plants may similarly be excluded from commerce among the states. If anything is elementary it is that in giving the power of exclusive control of such commerce to Congress it was not the purpose of the people to create a sanctuary for illegal practices within such movement or to make the immunity from state jurisdiction an uncontrollable syringe for the injection of infection into any state. Surely such would not be for the good of the states, singly or collectively. The commodities clause\textsuperscript{136} was designed to prevent illegal practices in interstate commerce itself by preventing monopolistic control of the coal fields and discriminations between competing shippers in interstate commerce. The Mann Act\textsuperscript{137} and the Lindbergh Law\textsuperscript{138} were directed at both. Prohibition of prize-fight films was also a prophylactic to social infection and disorder. If immunity from state control because of interstate commerce classification carries with it immunity from federal control, the commerce clause would not have a nation-making effect but would have quite the opposite consequence. We have already noted\textsuperscript{139} the difference between the regulation of conduct in commerce among states and an attempt to extend that power to transactions outside of that classification. If Congress can at pleasure enter the latter field, there are no States. If Congress cannot prevent the use of the channels of interstate commerce as a means of defeating the valid internal policy of either the shipping or receiving state, there is no nation. It is the oversight of this seemingly elementary relationship in our federal system that gives *Hammer v. Dagenhart* its distorted appearance and the misconceived complex of "Dual Federalism."\textsuperscript{140} In prohibiting the transportation in interstate commerce of wild game, stolen motor vehicles and petroleum, taken or produced in violation of valid police laws of the state from which they were exported, Congress in no sense entered the state for the purpose of its internal police. In prohibiting importation by the use of the interstate highways to goods manufactured by convict labor where the goods were to be employed in violation of the laws of the receiving state, Congress did not define the moral standard of internal control. Both involve no more on the part of the United States than that by maintaining a moral plain no lower than that of

\textsuperscript{134}\textit{Supra} note 121.
\textsuperscript{136}\textit{Supra} note 123, and note 130.
\textsuperscript{137}\textit{Supra} note 122.
\textsuperscript{138}\textit{Supra} note 124.
\textsuperscript{139}\textit{Supra} note 129.
\textsuperscript{140}\textit{Supra} note 85.
the connecting state (or states) it refused to give asylum to state criminals or to permit its facilities to be used to destroy the states instead of protecting them. In *Hammer v. Dagenhart* quite the opposite was done. Congress itself entered the field of purely local production and imposed thereon its own police standard, a prohibition of child labor in local production. Then goods produced in violation of the local police regulation attempted by Congress were excluded from interstate commerce. The primary regulation was imposed on manufacture uncorrelated factually with any interstate movement. It was thus properly held to be an invasion of the area exclusively reserved to the states and not a regulation of commerce. "There is no power vested in Congress to require the states to exercise their police power so as to prevent possible unfair competition."142

There is a broader ground for regulation than that of matching state minimum standards of morality or illegality. Much is made of the statement by the Court in *Hammer v. Dagenhart*: "The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States. The goods are themselves harmless." It is the last sentence which has brought what I believe to be misconceived criticism. In the first place, within a few months the Court in *United States v. Hill* emphatically reiterated the doctrine of the earlier prohibition-from-interstate-commerce cases. Those cases involved vicious as distinguished from harmless goods. But what causes goods or conduct to be classed as vicious? It is the prevailing mores and preponderant opinion of the time.144 Because of changes therein a business once immune may become subject to governmental regulation. Goods once legitimate may later be classed as noxious. When a practice becomes so cankerous that effective control requires control also of its by-products, those products as a consequence thereof also become tainted and cease to be legitimate articles of commerce. This is demonstrated in the Ashurst-Sumners Act, and the Federal Game Act of 1900 and the Connally Act of 1935. In each case the Court found before it a prohibition from the channels of interstate commerce of goods tainted with illegality because involved in the violation of valid state police measures. These noxious goods as any

141 247 U. S. 251, 38 S. Ct. 529 (1918).
142 Ibid.
143 Supra note 130.
144 Cf. supra note 60.
146 Supra note 133.
147 Supra note 127.
148 Supra note 132.
149 The Kentucky Whip Case does not overrule the effect of *Hammer v. Dagenhart*. It must be recalled that in the latter, the act of Congress prohibited the interstate shipment of any article in the production of which children under a certain age had been employed. Thus Congress was held directly to have usurped the police power of the States. In the convict-goods case, on the other hand, valid state legislation must precede the application of the federal statute. Commerce in the goods may continue so long as the state of destination has not limited or prohibited the sale of goods in question. Until it does no taint of illegitimacy stigmatizes the
other of the same class may be excluded. This element was wholly missing from the record in *Hammer v. Dagenhart*. The search for it is a factor which supports the child labor provisions of the Fair Labor Standards Act of 1938. It was wholly missing because there was no power in the legislature which asserted jurisdiction to mark the production as illegal. In the *Kentucky Whip Case* the Court said: “The contention is inadmissible that the Act of Congress is invalid merely because the horse collars and harness which petitioner manufactures and sells are useful and harmless articles. The motor vehicles, which are the subject of the transportation prohibited in the National Motor Vehicle Theft Act are in themselves useful and proper subjects of commerce, but their transportation by one who knows they have been stolen is ‘a gross misuse of interstate commerce’ and the Congress may properly punish it ‘because of its harmful result and its defeat of the property rights of those whose machines against their will are taken into other jurisdictions.’ Similarly, the object of the Federal Kidnapping Act is to aid in the protection of the personal liberty of one who has been unlawfully seized or carried away.”

The Congress has power to impose the prohibition either when the anticipated evil or harm may proceed from something inherent in the subject of transportation as in the case of noxious articles, which are unfit for commerce; or when the evil lies in the purpose of the transportation. The exertions of the power to date are only examples and not the measure of its scope. There is no more “dual federalism” here than in any other instance where an individual or an administrator has a defined mission in a limited field.

The subject of the prohibited traffic may be different, the effects of the traffic may vary, but the underlying principle is the same. If the subject of commerce is one as to which the power of the state may constitutionally be exerted and has been exerted, by restriction or prohibition in order to prevent harmful consequences, Congress may regulate interstate commerce so as to prevent that commerce from being used to impede the carrying out of the state policy.

*Lawrence, Kansas*  
*James Barclay Smith*  
*September, 1938.*

Moreover, the Court expressly found that Congress “has not acted on the assumption of a power enlarged by virtue of state action.” Congress did not take the initiative of dictation to the states in respect of their internal policy, but merely sought to supplement the position previously adopted by the states with respect to the sale of goods manufactured by convicts.

150 Act. No. 718, 75th Cong. Cf. Minority in H. R. No. 2182. However, the underlying theory of that act is based upon the expansion of the doctrine of local-interstate commerce.

161 *Supra* note 133, at page 347.