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The Power of Congress to Regulate Production for Interstate Commerce

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THE "NEW DEAL" LEGISLATION IN THIS ISSUE

In this issue of the *LAW REVIEW* the entire number is devoted to consideration of some of the problems, constitutional and administrative, incident to the Recovery Program. Similar emphasis upon the problems of law arising with relation to the "New Deal" will be found in the current numbers of other legal periodicals throughout the country. The discussions in these pages are offered in the hope that they may be of some value in throwing light upon the legal aspects of recent developments of great public concern.

SAMUEL BRECKENRIDGE NOTE PRIZE AWARDS

The Samuel Breckenridge Note Prize Awards for notes appearing in Volume XVII of the *LAW REVIEW* have been announced by the prize committee consisting of Harold S. Cook, Chairman, Jerome A. Gross, and Charles K. Berger. The fifteen-dollar prizes for the best note appearing in each of the four issues have been awarded to: George W. Simpkins for his note in the December, 1932 issue, *Unsettled Problems in State Control of Contracts Between Public Utilities and Affiliated Companies*; Stanley M. Richman for his note in the February, 1933 issue, *Holding Company Regulation Through the Statutory Inhibition Against Stock Acquisition*; Alfred W. Petchaft for his note in the April, 1933 issue, *Enlargement of Life Estates to Fees Simple by the Annexation of a Power*; and Edward Harman for his note in the June, 1933 issue, *Limitations and Development of the Attractive Nuisance Doctrine*. Mr. Simpkins won the additional ten-dollar prize for the best note of the year.

Notes

THE POWER OF CONGRESS TO REGULATE PRODUCTION FOR INTERSTATE COMMERCE

The *laissez faire* theory of economics has prevailed to a varying degree throughout the constitutional development of the United States. For the first time its doctrines are being subjected to governmental attack on a broad front. Economists are coming to believe that the ultimate social good cannot be attained by urging each individual to cultivate and effectuate his own selfish ends.

An organized or planned society is, in the minds of an increasing number, the only permanent solution.¹

The National Industrial Recovery Act,² which carries the trend against *laissez faire* to perhaps its highest point thus far, raises constitutional questions of great breadth.³ Of paramount importance is the authority of Congress, under the commerce

¹ Chase, *A New Deal* (1932); Keynes, *Essays in Persuasion* (1932) p. 312 et seq.; Soule, *A Planned Society* (1932); Corwin, *Social Planning Under the Constitution* (1932) 26 Am. Pol. Sci. Rev. 1.

² 15 U. S. C. A. 701 et seq. The pertinent provisions of the Act are as follows:

"Sec. 1. A national emergency . . . which burdens interstate and foreign commerce . . . is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; . . .

"Sec. 3 (b). . . . Any violation of such standards (those set forth in the agreed or prescribed codes of fair competition) in any transaction in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act, as amended; . . .

"(d). Upon his own motion, or if complaint is made to the President that abuses inimical to the public interest and contrary to the policy herein declared are prevalent in any trade or industry or subdivision thereof, and if no code of fair competition therefor has theretofore been approved by the President, the President, after such public notice and hearing as he shall specify, may prescribe and approve a code of fair competition for such trade or industry or subdivision thereof, which shall have the same effect as a code of fair competition approved by the President under subsection (a) of this section.

"(f). When a code of fair competition has been approved or prescribed by the President under this title, any violation of any provision thereof in any transaction in or affecting interstate or foreign commerce shall be a misdemeanor. . . .

"Sec. 4 (a). The President is authorized to enter into agreement with, and to approve voluntary agreements between and among, persons engaged in a trade or industry, labor organizations, and trade or industrial organizations, associations, or groups, relating to any trade or industry, if in his judgment such agreements will aid in effectuating the policy of this title with respect to transactions in or affecting interstate or foreign commerce, . . .

"(b). Whenever the President shall find that destructive wage or price cutting or other activities contrary to the policy of this title are being practiced in any trade or industry or any subdivision thereof, and . . . shall find it essential to license business enterprises in order to make effective a code of fair competition or an agreement under this title or otherwise to effectuate the policy of this title, no person shall, . . . engage in or carry on any business, in or affecting interstate or foreign commerce . . . unless he shall have first obtained a license issued pursuant to such regulations as the President shall prescribe. The President may suspend or revoke any such license, after due notice and opportunity for hearing, for violations of the terms or conditions thereof. . . ."

³ See Dickinson, *Major Issues Presented by the Industrial Recovery Act* (1933) 33 Col. L. Rev. 1095; Handler, *The National Industrial Recovery Act* (1933) 29 A. B. A. J. 440.

clause,⁴ to regulate the productive aspects of businesses by requiring conformity to legally imposed standards, by means of penal sanctions and by prohibiting interstate commerce not carried on in accordance with such requirements.

The cases arising heretofore upon this point have necessarily required a statement of the nature of interstate commerce and the constitutional extent of Congress' power over it.⁵ The first treatment of the question was by Chief Justice Marshall in *Gibbons v. Ogden*.⁶ Since the case was one of first instance the Court was not guided, nor hindered, by previous decisions. The power over foreign and interstate commerce was held to be plenary; it rests in the Federal Congress as absolutely as it would in a unitary government, subject only to the restrictions to be found in the Constitution itself.⁷ This would mean that the commerce power includes not merely the fostering and furthering of foreign and interstate commerce but the absolute prohibition thereof as

⁴ "The Congress shall have power: . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes; . . ." Const. U. S. Art. I, sec. 8.

⁵ ". . . commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business," Mr. Justice Holmes in *Swift & Co. v. United States* (1905) 196 U. S. 375; "The term 'commerce' comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches. . . . This power over commerce among the States, . . . is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the Constitution." *Second Employers' Liability Cases* (1912) 223 U. S. 1. Interstate commerce "comprehends all commercial intercourse between different States and all the component parts of that intercourse." *Dahnke-Walker Co. v. Bondurant* (1921) 257 U. S. 282; *Williams v. Fears* (1900) 179 U. S. 270; *Foster Packing Co. v. Haydel* (1928) 278 U. S. 1.

⁶ (1824) 9 Wheat. 1.

⁷ "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specific objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments." *Gibbons v. Ogden*, supra, l. c. 196.

well.⁸ A particular exercise of the authority does not present a question for judicial review; Congress is responsible only to the electorate. The Supreme Court has accepted Marshall's exposition to the extent of allowing the regulation of instrumentalities of commerce intrastate in character in order to facilitate, and to prevent the obstruction of, interstate commerce.⁹

There are two lines of subsequent cases enunciating, for different purposes, contrary theories of interpretation of the commerce power. One follows a strict interpretation while the other carries forward the view of *Gibbons v. Ogden*.¹⁰ The stricter view states that there is a definite and real distinction between production or manufacture and commerce.¹¹ State statutes taxing or regulating manufacture have been sustained as against the contention of their invalidity on the ground that they obstructed interstate commerce. These decisions have been taken to mean that the constitutional delegation of power to Congress does not include the power to regulate the process of production.¹² The first of these cases was *Coe v. Errol*.¹³ There a tax imposed upon logs in a depot within the state of New Hampshire was held not to interfere with interstate commerce even though the logs were intended to be shipped into another state. The dogma of this and subsequent opinions suggests that the national power is limited, otherwise industries would be nationalized and withdrawn from state control. In *Utah Power Co. v. Pfoest*¹⁴ the Court, speaking through Mr. Justice Sutherland, separated the generation from the transmission of electricity and held that a state tax on the mere generation was not a "burden" upon the

⁸ See *United States v. The William* (D. C. D. Mass. 1808) 28 Fed. Cas. 614, Case No. 16,700; Corwin, Congress' Power to Prohibit Commerce a Crucial Constitutional Issue (1933) 18 Corn. L. Q. 477.

⁹ *The Daniel Ball* (1870) 10 Wall. 557; *Interstate Commerce Commission v. Goodrich Transit Co.* (1912) 224 U. S. 194; *U. S. Fidelity & Guaranty Co. v. Kentucky* (1913) 231 U. S. 394; *Houston & Texas Ry. Co. v. United States* (1914) 234 U. S. 342; *Chicago Board of Trade v. United States* (1918) 246 U. S. 231; *Stafford v. Wallace* (1922) 258 U. S. 495; *Wisconsin R. R. Commission v. C. B. and Q. R. Co.* (1922) 257 U. S. 563; *Chicago Board of Trade v. Olsen* (1923) 262 U. S. 1; *Dayton-Goose Creek Ry. Co. v. United States* (1924) 263 U. S. 456.

¹⁰ (1824) 9 Wheat. 1.

¹¹ *Kidd v. Pearson* (1888) 128 U. S. 1; *General Oil Co. v. Crain* (1908) 209 U. S. 211; *Bacon v. Illinois* (1913) 227 U. S. 504; *Susquehanna Coal Co. v. South Amboy* (1913) 223 U. S. 665; *Heisler v. Thomas Colliery Co.* (1922) 260 U. S. 245; *Oliver Iron Co. v. Lord* (1923) 262 U. S. 172; *Champlin Refining Co. v. Corporation Commission of Oklahoma* (1932) 286 U. S. 210.

¹² See Keezer and May, *The Public Control of Business* (1930); Fuchs, *Control of the Petroleum Industry* (1931) 16 St. L. Law Rev. 189, 198.

¹³ (1886) 116 U. S. 517.

¹⁴ (1932) 286 U. S. 165; see Barber, *State Taxation of Electrical Generation for Interstate Transmission* (1933) 3 Idaho L. J. 1.

interstate commerce of transmitting the electrical energy from the power plant to the consumer. Other decisions have followed this view by specifically negating the authority of Congress over matters which were considered to be within the scope of state control.¹⁵

Cases involving labor disputes have also made the distinction between production and commerce. Injunctions against strikers, under the Anti-Trust acts, have been refused on the ground that mere reduction in supply is not sufficient obstruction to interstate commerce, unless the intent or necessary effect is to permit the strikers to maintain a monopoly or otherwise to control the price or discriminate between would-be purchasers.¹⁶

Other cases uphold a broad, inclusive authority of Congress under the commerce clause. One group permits the prohibition of the transportation of certain commodities in interstate commerce. The first of these is *Champion v. Ames*¹⁷ which sustains a statute¹⁸ excluding lottery tickets from interstate commerce. The language of the opinion supports broad Congressional power.¹⁹ Similar statutes have likewise secured judicial sanction. These include the exclusion of game slaughtered in violation of state laws;²⁰ the Pure Food and Drug Act of 1906, requiring prescribed inspection and labeling;²¹ the commodity clause of the Hepburn Act of 1906 excluding commodities in which carriers have an interest "direct or indirect";²² the Mann Act of 1910 against the transportation of women across state lines for immoral purposes;²³ and finally the Federal Motor Vehicle Theft

¹⁵ "Commerce succeeds to manufacture, and is not a part of it." *United States v. E. C. Knight Co.* (1895) 156 U. S. 1; *United States v. Dewitt* (1869) 9 Wall. 41; *The Employers' Liability Case* (1908) 207 U. S. 463; *Delaware, Lackawanna and Western R. R. Co. v. Yurkonis* (1915) 238 U. S. 439.

¹⁶ *United Mine Workers v. Coronado Coal Co.* (1922) 259 U. S. 344; *United Leather Workers v. Herkert & Meisel Trunk Co.* (1924) 265 U. S. 457.

¹⁷ (1903) 188 U. S. 321.

¹⁸ 28 Stat. at L. 963; 18 U. S. C. A. 387.

¹⁹ "In this connection it must not be forgotten that the power of Congress to regulate commerce among the states is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution." 1. c. 356. ". . . under its power to regulate commerce among the several States Congress—subject to the limitations imposed by the Constitution upon the exercise of the powers granted—has plenary authority over such commerce, and may prohibit the carriage of such tickets from State to State; . . ." 1. c. 363.

²⁰ *Rupert v. United States* (C. C. A. 8, 1910) 181 Fed. 87.

²¹ *Hipolite Egg Co. v. United States* (1911) 220 U. S. 45.

²² *Delaware, Lackawanna and Western R. R. Co. v. United States* (1913) 231 U. S. 363.

²³ *Hoke v. United States* (1925) 227 U. S. 308; see *Caminetti v. United States* (1917) 242 U. S. 470.

Act of 1918 prohibiting the transportation of stolen automobiles in interstate commerce.²⁴

Almost directly analogous to the regulation under the National Industrial Recovery Act are the Anti-Trust acts and those acts regulating commodity exchanges. These were sustained as being legitimate exercises of the commerce power.²⁵ The particular significance of these instances is the fact that the regulation was direct. Exchanges were regulated because they were engaged in practices affecting interstate commerce. No effort was made to get at the internal aspects of the business by the indirect method of controlling the transportation of the commodities in interstate commerce. The result of sustaining these acts is a more inclusive power on the part of Congress; a power more closely approximating that declared by *Gibbons v. Ogden* to exist.

The most formidable obstacle to the constitutionality of the National Industrial Recovery Act is *Hammer v. Dagenhart*.²⁶ By the Act of September 1, 1916,²⁷ Congress excluded from interstate and foreign commerce any article or commodity of a mine or quarry employing children under sixteen years of age, and the product of a mill, cannery, workshop, factory, or manufacturing establishment employing children under fourteen. The Act was declared unconstitutional. The Court concluded that the power thus exercised by Congress was an infringement upon the power of the states over purely local matters. Manufacture and mining are local activities reserved to the control of the states.²⁸ The commerce clause does not confer upon Congress authority to prohibit interstate commerce where the purpose and effect are to encroach upon the sphere of the states. The *Lottery Case*²⁹ and others of that group are distinguished on the ground that there

²⁴ *Brooks v. United States* (1925) 267 U. S. 432.

²⁵ *Northern Securities Co. v. United States* (1904) 193 U. S. 197; *Swift & Co. v. United States* (1905) 196 U. S. 375; *Stafford v. Wallace* (1922) 258 U. S. 495; *Chicago Board of Trade v. Olsen* (1923) 262 U. S. 1; 2 Willoughby, *Constitutional Law* (2d ed. 1929) 864-892, 934-950.

²⁶ (1918) 247 U. S. 251.

²⁷ 39 Stat. at L. 675.

²⁸ "The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed." *Hammer v. Dagenhart*, *supra*, l. c. 276. But do the provisions of the Constitution, aside from judicial interpretation, support this conception? The decisions could be said to be based upon the conclusion of fact that industries are essentially local; since this fact has changed and virtually all industries are now national in scope the reason for the principle of limitation has vanished.

²⁹ (1903) 188 U. S. 321.

the prohibited articles themselves were morally or physically injurious so that the power of prohibition was included in the power of regulation. In answer to the contention that to allow such articles in interstate commerce would result in unfair competition it was said that there is no power in Congress to equalize the economic advantages among the states.³⁰ The commerce clause is not designed for that purpose. Mr. Justice Holmes wrote a vigorous dissenting opinion.

The result in *Hammer v. Dagenhart* is not free from criticism. If the reasoning of *Champion v. Ames*³¹ is accepted it would seem that the power to exclude any article from interstate commerce is vested in Congress subject only to constitutional limitations such as due process.³² Furthermore, there is no logical justification for a distinction between the exclusion of articles which effect harmful consequences *after* their transportation in interstate commerce and those which effect harmful results *before* their transportation has begun.

It can readily be perceived that two ways³³ of attacking the constitutional problem presented by the National Industrial Recovery Act lie before the Court. On the one hand is the broad principle enunciated by Chief Justice Marshall in *Gibbons v. Ogden*.³⁴ This conception can be reenforced by the opinions allowing Congressional power to exclude articles from interstate commerce in particular instances and to regulate the productive aspects of businesses by requiring conformity to legally imposed standards by means of penal sanctions and by prohibiting interstate commerce not carried on in accordance with such requirements. The Constitution would thus not be conceived as a governmental and economic strait-jacket but an instrument dynamic in nature designed to meet and effectually to solve exigencies which cannot be specifically anticipated. On the other hand is presented the principle of *Hammer v. Dagenhart*³⁵ and its precedents where the emphasis is placed upon state autonomy. The constitution-

³⁰ On the contrary is it not the purpose of the commerce clause to promote the free exchange of commodities between the states unhampered by artificial obstructions?

³¹ (1903) 188 U. S. 321; above, note 19.

³² See contemporary interpretation of the significance of *Champion v. Ames*, Whitney, *The Latest Development of the Interstate Commerce Power* (1903) 1 Mich. L. Rev. 615.

³³ The right to engage in interstate commerce might also be viewed as a distinctly federal right the exercise of which depends upon consent that Congress may confer or withhold at its own discretion. This would give Congress the same authority over interstate commerce it now possesses with regard to the mails. 2 Willoughby, *Constitutional Law* (2d ed. 1929) 993.

³⁴ (1824) 9 Wheat. 1.

³⁵ (1918) 247 U. S. 251.

ality of the National Industrial Recovery Act and, it might be said, of much of the recovery legislation thus depends upon the acceptance by a majority of the Supreme Court of one of these two lines of reasoning.

NORMAN PARKER, '34.

LABOR'S RIGHT TO ORGANIZE UNDER THE N. I. R. A.

Those who professed to be apostles of the faith of fully individualistic enterprise in 1928 are apostates in 1933. The National Industrial Recovery Act contemplates the alignment of American industry into trade-associations, in the hope that the united efforts of industrial leaders can bring business out of the shambles into which the excesses of fully competitive activity have led it.¹ Anti-trust laws, long indicted by industrial spokesmen as the shackles which kept business from setting its disorganized house into order,² are suspended within the area of approved code agreements.³ Industrial organization is encouraged and given the government blessing. The collectivist approach to the solution of economic difficulties is definitely the working theory of the technique of recovery.

This new concert of objective has brought hope into the American economic outlook, but it has raised concomitant problems. If the newly-constituted trade-associations attain any approximation of success in coping with the excesses of unrestricted competition, it seems hardly probable that industry will ever surrender, voluntarily, the advantages which come from a measure of economic planning, through code organization.⁴ The united

¹ "The basic economic diagnosis on which the Recovery Act rests is that there are points at which it may be advantageous to restrain business competition, if our economic system is to function in a vigorous and healthy way, and that the application of some such restraints at the present time will do something towards terminating the economic paralysis, which, until recently, has held the nation in its grip." Asst. Sec. of Commerce Dickinson, *The Major Issues Presented by the Industrial Recovery Act (1933)* 33 Columbia Law Review 1095.

² See, Torbriner and Jaffe, *Revision of the Anti-Trust Laws (1932)* 20 California Law Review 585; Dickinson, *The Anti-Trust Laws and the Self-Regulation of Industry (1932)* 18 American Bar Association Journal 600.

³ P. L. No. 67, 73d Cong., 1st Sess., sec. 5: "While this title is in effect (or in the case of a license while section 4(a) is in effect) and for sixty days thereafter, any code, agreement, or license approved, prescribed, or issued and in effect under this title, and any action complying with the provisions thereof taken during such period shall be exempt from the antitrust laws of the United States."

⁴ "What has really happened is that we have taken another step, declaredly for a limited time only, along the line of public policy that leads from *lais-*