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THE CONSTITUTION: DISCOVERED OR DISCARDED*

As you all know, the purpose to be accomplished by the adoption of the National Labor Relations Act by Congress in 1935 was to promote the amicable adjustment of differences between capital and labor, and avoid resort to the paralyzing effect of strikes. The Act, among other things, guaranteed to labor the right to organize without interference from the employer, and protected that right by prohibiting the employer from engaging in specified labor practices. In short, Congress considered strikes bad in that they interfered with business in general. It was reasoned that if the employee was put on an equal bargaining footing with the employer, then difficulties between them could be peacefully disposed of.

Moreover, it is well known to you that Congress has only those powers which are delegated to it by the Constitution. All powers undelegated are reserved to the state or to the people. Hence, it became necessary for Congress to bring the National Labor Relations Act within one of its delegated

*A paper read before The Round Table, a discussion group in South Bend, Indiana, on the 4th day of December, 1940. Besides court cases, the writer relied heavily on the following material, particularly Stern and Somers for historical background; Fairlie, *The Separation of Powers*, 21 MICH. L. REV. 393; Alvies, *The Commerce Power from Gibbons v. Ogden to the Wagner Act Cases*, 3 OHIO STATE L. J. 307; Phillips, *The Growth and Development of the Federal Commerce Power*, 11 TEMPLE L. Q. 517; Avakian, *the National Labor Relations Decisions*, 25 CAL. L. REV. 593; Giffs and Hepburn, *the Wagner Labor Act cases*, 22 MINN. L. REV. 1; Sawyer, *the Commerce Clause of the Constitution: The Old and the New*, 8 KANS. CITY L. REV. 229; Somers, *the Commerce Clause of the Constitution since the Schechter case*, 8 JOUR. OF THE BAR ASSOC. OF KANSAS 311; Sholley, *the Negative Implications of the Commerce Clause*, 3 U. OF C. L. REV. 556; Willis, *Gibbons v. Ogden, Then and Now*, 28 KY. L. J. 280; Strong, *John Marshall — Hero or Villain*, 6 OHIO ST. L. J. 42, 158; FRANKFURTER, *THE COMMERCE CLAUSE*, 1937; Maras, *Growth and Development of the Commerce Power*, 24 MARQ. L. R. 93; Black, *the Commerce Clause and the New Deal*, 20 CORNELL L. Q. 169; Corwin, *the Schechter Case — Land Mark or What?* 13 N. Y. U. L. Q. REV. 151; Frankfurter, *Taney and the Commerce Clause*, 49 HARV. L. REV. 1286; Jackson, *Back to the Constitution*, September, 1939, A. B. J.; Hogan, *Important Shifts in Constitutional Doctrine*, August, 1939, A. B. J.

powers. As in the case of most, if not all of its regulatory measures in the past, it was sought to bring the Act within what is popularly known as the "Commerce Clause," being clause 3, section 8, article 1 of the Constitution, which reads: "The Congress shall have power to regulate commerce with foreign nations, *and among the several states*, and with the Indian tribes."

There were many who believed that the Act was to have a short life, and that when opportunity presented itself to the Supreme Court, it would be stricken down altogether, or else narrowly interpreted on the ground that it did not fall *within Congress' power to regulate commerce among the states*. Opportunity was not long in coming. On February 9th, 10th and 11th, 1937, the Court listened to arguments in five cases, now known as the *National Labor Relations Act Cases*,¹ in each of which an unfair labor practice on the part of an employer was involved. In these five cases, however, there were three different types of commerce involved: In one, the discharged employee was engaged in repairing buses which crossed state lines; in another, the discharged employee wrote and edited articles sent from a New York office to the country at large, and in the other three cases the discharged employees were employed in plants in which raw materials, received to a large extent from other states, were processed into finished products and consumed for the most part out of the state of manufacture. On April 12th, 1937, the court handed down its decision holding the Act was constitutionally applicable to the transportation line, the news gathering agency and the plant manufacturer, notwithstanding their employees were not themselves engaged in commerce among the states. The constitutional power of Congress to regulate commerce among the states, the Court

¹ National Labor Relations Board v. Jones and Laughlin Steel Corp., 57 Sup. Ct. 615; National Labor Relations Board v. Fruehauf Trailer Co., 57 Sup. Ct. 642; N. L. R. B. v. Friedman — Harry Marks Clothing Co., 57 Sup. Ct. 645; Associated Press v. N. L. R. B., 57 Sup. Ct. 650; Washington, Virginia and Maryland Const. Co. v. N. L. R. B., 57 Sup. Ct. 648.

said, is sufficiently broad to allow that body to regulate the employer-employee relation in an establishment located wholly within a state if its business activities carry across state lines.

Probably no decision of the court has evoked such a profusion of conflicting comment and discussion. Here are a few examples:

The Honorable Robert H. Jackson, in a talk in San Francisco in 1939, said:

"I think we are having something of a constitutional renaissance at the present time — a rediscovery of the constitution. It is as if a painting which had been retouched by successive generations of artists were to have the successive layers of oil removed and the old master itself revealed once again. In the case of the constitution, the result has brought conflicting responses from the critics. Some are quite astonished at the picture, its simplicity and the economy and breadth of its strokes, and they are unwilling to believe that it is really the old master that has been exposed to view. But there it is, the genuine article, and, I for one welcome its restoration. We are really back to our Constitution."

The Honorable Frank J. Hogan, former President of the American Bar Association, in 1939, commented:

"During the last two terms of the Supreme Court, there were several important shifts in constitutional doctrine. Again and again the court turned aside from *what had long been looked upon as established principles of constitutional law* which, to use the Court's own reiterated phrase, had been settled by repeated decisions of this Court. And there was no subtlety about it. Narrow distinctions were not sought; former decisions were not merely silently ignored; cases which had settled constitutional doctrine were given direct treatment. Established principles, which we had come to regard as part of the warp and woof of the nation's fundamental law, were liquidated so effectively that, as the Court said, they cannot survive."

Mr. Justice McReynolds in his dissenting opinion in the National Labor Relations Act cases said:

"Considering the far-reaching import of these decisions, the departure from what we understand has been consistently ruled here, and the extraordinary power confirmed to a board of three, the obligation to present our views becomes plain.

Hendrick, in his "*Bulwark of the Republic*," in speaking of the decisions in the National Labor Relations Act cases, said:

"A small clothing factory in Richmond, Virginia, imports materials from other states, transforms them into wearing apparel, and sells the result in all the forty-eight states. This again is interstate commerce, subject to supervision under the historic phrase. It is not necessary to dissect the already celebrated opinion further — to point out fine metaphysical distinctions that make one commercial transaction a congressional object of attention and leave the other out, and to reconcile the latest definition with previous judicial attempts to explain a controverted sentence. *What may fairly be said is that the five decisions rendered on April 12th, 1937, create a new United States.* The reign of Congress is now so sweeping that the Republic, in matters of industry, perhaps of agriculture, has become an integrated nation."

The conclusions of a former president of the American Bar Association, a Justice of the Supreme Court, an eminent writer, and a United States Attorney General are all entitled to respect and, perhaps, if there was no conflict in these conclusions, we could accept them with little, if any, inquiry. However, a conflict exists and, hence, an independent inquiry is warranted to ascertain if the Supreme Court by its decision in the National Labor Relations Act and recent decisions has *discovered* or *discarded* the Constitution.

This inquiry will, at the outset, require me to refresh your recollections in regard to the historical setting in which the Constitutional Convention met and adopted our Constitution in 1787. Then, we will follow those activities of the Convention, having to do with the adoption of the commerce clause, in order to ascertain what the framers meant by the phrase, "Commerce among the states." Then, we will discuss the more important of those Supreme Court decisions which deal with the extent of Congress' power to regulate "Commerce among the states." We will perhaps then be in a position to evaluate the conflicting positions taken by Mr. Hogan, Mr. Justice McReynolds, Attorney General Robert Jackson and Mr. Hendrick.

All of us, I think, will agree that it was commerce, commerce with foreign nations, and commerce between the

states, with its attendant difficulties, and the lack of commerce with Great Britain, that caused the adoption of the form of government we have today. The United States, as we know it today, and with the form of government it has today, is the proximate result of commerce.

Very few of us who haven't made a specialized study know very much of the period from the close of the Revolutionary War in 1782 until the meeting of the first convention in 1786. It is glossed over in our school histories. Yet, I venture to say, it is one of the most important eras in the formation of our country. Admittedly, it was a dark era. Yet, the events which occurred during those four years caused the formation of the Union and the adoption of the Constitution. Those who know this period will tell us it was a period of chaos, anarchy, repudiation, broken promises, and treachery; it was a period in which the United States almost lost the independence that had just been so costly bought by the successful termination of the Revolutionary War.

In the early part of 1775, when a committee was appointed to draft the Declaration of Independence, there was also appointed a committee to draft articles of agreement between the then thirteen Colonies, establishing a central form of government. This committee's work culminated in the Articles of Confederation, adopted by Congress in 1777. As you all know, these Articles surrendered no power to the central government except that which was absolutely necessary, and not all of that by any means. Powers not enumerated were reserved to the States, and as no power to regulate commerce among the States was given to Congress, each state had that power itself. Each state naturally exercised such a power for its own best interests regardless of the effect of its regulation upon its sister states.

George Bancroft in his "*Constitution of the United States*" at page 185, comments on the foreign commerce situation as follows:

“He that will trace the American policy of that day to its cause must look to British restrictions and British protective duties suddenly applied to Americans as aliens. The people had looked for peace and prosperity to come hand in hand, and when hostilities closed, they ran into debt for British goods, never doubting that their wanted industries would yield them the means of payment as of old. But, excessive importations at low prices crushed domestic manufacturers; trade with the British West Indies was obstructed. Neither rice, tobacco, pitch, turpentine, nor ships could be remitted as heretofore. The whale fishery of Massachusetts had brought its mariners in a year more than eight hundred thousand dollars in specie, the clear gain of their perilous labor. The export of their oil was now obstructed by a duty in England of ninety dollars a ton. Importations from England must be paid for chiefly in cash and bills of exchange. The Americans had chosen to be aliens of England; they could not complain of being taxed like aliens, but they awoke to demand the powers of retaliation.”

Our imports from England in 1784 were 3,700,000 pounds Sterling; our exports to England were only 750,000 pounds. It was, of course, to England's interest to keep our trade, but it was hard to make her realize it. She seemed to think we could not but choose to trade with her. No one dreamed that thirteen states, acting independently, could cope with the situation. It was a task for the central government and, in 1784, Congress asked the states to grant for fifteen years the right to pass a navigation law. As England had shown no willingness to make a commercial treaty, the power was also asked to exclude from our ports certain goods, the property of citizens of a nation not in treaty with us. The New England States were eager for the measure, the Middle States supported it without enthusiasm, but the South suspected that it would lead to an advantage for the trading class at the expense of the farmers. The net result was that so many restrictions were placed by the states on the exercise of the power that their votes granting it were futile.

Great confusion existed in navigation in 1784. On January 11, 1785, the day Congress established itself in New York, the artificers, tradesmen and mechanics of the city importuned it with these words: “We hope our representa-

tives will coincide with other states in augmenting your power to every exigency of the nation.”

The New York Chamber of Commerce likewise entreated it to make the commerce of the United States one of the first objects of its care and to counter-act the injurious restrictions of foreign nations. The New York Legislature then in session, in order to add its bit to the picture, imposed a double duty on all goods imported in British ships. In March of that year, Pennsylvania considered an act to protect the manufacturers of that state by *Ad Valorem* duties on more than seventy articles, but the citizens of Philadelphia at a town meeting declared that relief from oppressions, under which American trade and manufacture languished, could spring only from a grant to Congress of full constitutional powers over the commerce of the United States. In April of that year Boston residents bound themselves not to buy British goods of resident Boston merchants, and in May instructed its representatives in the State Legislature as follows:

“Peace has not brought prosperity; foreigners monopolize our commerce; the American carrying trade and the American finances are threatened with annihilation; the government should encourage agriculture, protect manufacturers, and establish a public revenue; the Confederacy is inadequate to its purposes; Congress should be invested with power competent to the wants of the country; the Legislature of Massachusetts should request the executive to open a correspondence with the governors of all the states; from national unanimity and national exertion we have derived our freedom; the joint action of the several parts of the Union can alone restore happiness and security.”

Massachusetts, Rhode Island and New Hampshire passed navigation acts forbidding exports from their harbors in British ships and established a discriminatory tonnage duty on foreign vessels, but only as a temporary expedient, until a well guarded power to regulate trade shall be entrusted to Congress. Domestic manufacturers were protected by a more than fourfold increase in duties.

James Monroe, Congressman from Virginia, was willing to invest the Confederation with a perpetual grant of power to regulate commerce, but on condition that the exercise of the grant should be ratified by nine states. Thirteen states would have had to ratify this grant of power under the Articles of Confederation, and the three southernmost states, realizing that Maryland and Delaware, one with a commercial port, Baltimore, and the other noted for its ships, could join with the commercial northern states, who already had taken action, and thus bind the southern states, demurred to this power being granted Congress. So much, then, for foreign commerce.

Interstate commerce was in as much of a muddle. The jealousies of the states worked mutual hardship through tariffs, port duties, and restrictive licenses. New York had established a custom house for the sole benefit of its own treasury. Smuggling existed on the Potomac because of different customs regulations on the opposite shores. The two states concerned, Maryland and Virginia, appointed commissioners to prepare a code of rules. They met in 1785, and had no trouble to agree on the matter in hand, but saw that if Maryland changed her regulations, her northern neighbors would have to do the same thing, or the same difficulty would exist on her northern border. This would necessitate changes in the northern borders of Pennsylvania and Delaware. In other words, the regulation of navigation was a question common to all the states. All the commissioners could do was to suggest that a general convention be called for that purpose.

Madison, one of the commissioners in the Maryland-Virginia controversy, was a member of the Virginia Legislature. There Madison had worked hard to strengthen the hands of Congress. Notwithstanding the opposition of the state sovereignty party, he prevailed upon the Virginia Assembly to call on all the other states to send delegates to a convention to consider commercial regulations. The place

was to be Annapolis. The time of the meeting was to be September 11, 1786. This convention, be it remembered, was to be a creature of the states, to report to them, and was not concerned with the continental Congress.

At the appointed time, delegates assembled from Virginia, Pennsylvania, Delaware, New York and New Jersey. Massachusetts, New Hampshire, Rhode Island and North Carolina named delegates, but they did not attend. The other states, Georgia, South Carolina, Maryland and Connecticut took no notice of the call. More discouraging than these absences was the fact that no real good could be accomplished unless there was a power strong enough to enforce common regulations, if they were made. The convention, therefore, gave up the task before it and issued an address to the states urging them to call a constitutional convention in Philadelphia the second Monday in May, 1787. It was also urged that conventions' actions be binding when approved by Congress and ratified by the states.

The breakdown of commerce and consequent financial difficulties caused the Assembly of the Annapolis Convention. And when the constitutional convention was called for the next spring all knew that one of the powers theretofore retained by the states, namely, regulation of commerce among the states and with foreign nations, would be surrendered to the Central Government. In fact, it was the consensus of opinion that said power must be relinquished by the state if the nation was to endure. So much then for the history of those four years preceding the calling of the Constitutional Convention.

Now, as to those activities in the Constitutional Convention which shed light on the intention of the framers as to the scope and extent of congressional power over commerce among the states:

The Virginia delegation, led by Washington, Madison and Randolph, feeling largely responsible for the calling of the

Convention, prepared a series of resolutions as a basis for discussion. The sixth of these resolutions, proposed by Governor Randolph four days after the Convention assembled, read in part as follows:

“That the national legislature ought to be empowered to enjoy the legislative rights vested in Congress by the Confederation and, moreover, *to legislate in all cases to which the several states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.*”

Though it was complained that this broad power for the division of power between state and nation was indefinite, the Convention approved it on May 31st by a vote of nine states in favor, none against, and one divided. The language of the resolution and the vote upon it indicate a clear intent that the national government was to have power over those matters which could not be effectively regulated by the states.

Shortly afterward, Patterson proposed his New Jersey plan which included a provision that Congress could “pass acts for the regulation of trade and commerce as well with foreign nations as with each other.”

James Wilson, subsequently a Supreme Court Justice, in comparing the two plans said: “The National Legislature is to make laws in all cases at which the several states are incompetent under the Virginia plan; under the New Jersey plan in place of this Congress is to have additional power in a few cases only.” As you know, the New Jersey plan was rejected and the Virginia plan reapproved on June 19th by a vote of seven states to three, one being divided.

After a proposal of amendment by Sherman of Connecticut to Randolph’s resolution had been defeated, a motion to clarify the said resolution was carried. After such clarification, it then read: “RESOLVED, that the National Legislature ought (1) to have the legislative rights vested in Congress by the Confederation; and (2), moreover, to legislate in all cases for the general interests of the Union, and (3)

also in those to which the states are severally incompetent, or (4) in which the harmony of the United States may be interrupted by the exercise of individual legislation.”

With the other resolutions approved by the convention, this resolution was then sent to the Committee of Detail to report the constitution. On August 6th, ten days later, the Committee made its report. It changed the indefinite language of the resolution into an enumeration of the powers of Congress closely resembling Article 1, Section 8 of the Constitution, as it was finally adopted. The Commerce Clause, which was passed unanimously, read: “The Legislature of the United States shall have the power — to regulate commerce with foreign nations and among the several states.

It seems to me highly significant that, at no time, did any member of the Convention challenge the radical change in the form of the provision for the division of powers between state and nation. It accepted without discussion the enumeration of powers made by a Committee which had been directed to prepare a constitution based upon the general proposition that the Federal government was to legislate in all cases for the general interests of the union — and in those to which the states are separately incompetent.

The Convention must have believed that the enumeration conformed to the standard previously approved, and that the powers enumerated comprehended those matters as to which the states were separately incompetent, and in which national legislation was essential. There is no other way of explaining the absence of comment, objection and debate.

Moreover, the Commerce Clause was the only one of the enumerated powers in which Congress was given any broad power to regulate trade or business. The Convention, therefore, must have understood that in that clause it was granting to Congress all the power over trade or business which the national government would need to possess to provide for situations which the states separately would be unable to meet.

There are other incidents which shed some light on whether the Convention intended a wide scope for the commercial power granted to the Federal government. On August 20th, four days after the Commerce Clause had been accepted, Governors Morris and Pinckney, in proposing establishment of a council of state, described the functions of the future secretaries of domestic "affairs" and "commerce and finance" as follows:

"The secretary of domestic affairs shall be appointed by the President and hold his office during pleasure. It shall be his duty to attend to matters of general police, the state of agriculture and manufacture, the opening of roads and navigations, and facilitating communications through the United States.

"The Secretary of Commerce and Finance shall be also appointed by the President during pleasure. It shall be his duty to superintend all matters relating to the public finance, to prepare and report plans of revenue and for the regulation of expenditures and, also, to recommend such things as may in his judgment promote the commercial interests of the United States."

The amendment was never passed, but no objection was raised to the scope of the powers of the cabinet members. The proposal can be taken to demonstrate that several of the leading members of the Convention believed that the Commerce Clause would give the national government power over manufacturers and agriculture where necessary for the general interests of the Union.

Then, on August 18th, Madison suggested that Congress should have power "to regulate affairs with the Indians." Under the Articles of Confederation, Congress had had the power of regulating the trade and managing all affairs with the Indians. The Committee of Detail thereupon added to the end of the Commerce Clause the expression "and with the Indian Tribe." The debates do not show that the Convention regarded the change from "affairs" to "commerce" as in any way narrowing the proposed power to deal with the Indians. Nor would it be sensible to contend that the draftsmen intended "commerce" to have a broad meaning

with relation to the Indians and a narrow one as applied to commerce among the several states.

Moreover, one cannot ignore the fact that the constitutional framers, in the preamble to the Constitution, asserted that one of the reasons that the Constitution was established was to promote the general welfare. Also, in Article 1, Section 8, it is provided, among other things, that Congress shall have power to provide for the general welfare of the United States. It is true that the use of these phrases do and cannot add to the powers of Congress, but the use of these phrases do demonstrate that the Convention thought that the Constitution would serve and should be construed "to promote the general welfare" and not to perpetuate a union of states powerless when power is needed most.

That it was, as well, the clear understanding of the state convention, called to ratify the constitution, that the division of power gave to the national government control of all matters of national, as contrasted with local, concern, is indicated by addresses by both proponents and opponents of ratification.

Hamilton, in the New York convention, urged:

"The powers of the new government are general, and calculated to embrace the aggregate interests of the union, and the general interests of each state, so far as it stands in relation to the whole. The object of the state governments is to provide for their interests, as unconnected with the United States and as composed of minute parts or districts . . ."

And in the Virginia convention, James Monroe, opposing ratification, declared:

"What are the powers which the Federal government ought to have? I will draw the line between the powers necessary to be given to the federal, and those which ought to be left to the state governments. To the former, I would give control over the national affairs; to the latter, I would leave the call of local interests."

Finally, the dictionary in use in 1787 defined commerce not merely as movement, as we understand it today, but as business, trade, traffic, buying and selling, and exchange of

goods. Movement was merely an aspect of commerce, but not a necessary aspect.

Bearing in mind the fact that the need for centralized commercial regulation was universally recognized as the primary reason for preparing a new constitution, that the actions of the constitutional framers were consistent with giving Congress broad powers over national matters, and the common use of the word "commerce" to denote "business," "trade" and traffic in those days, we must regard it as extremely unlikely that the convention intended the Commerce Clause to have a narrow and restricted meaning.

It is true, of course, that in 1787 the framers and ratifiers did not contemplate either the close-knit economic structure which exists today, or the need for a far-reaching system of national control to preserve that structure from disintegration. However, when they said Congress was to have the power to regulate Commerce among the states, as our discussion so far has shown, they did contemplate that Congress was to have regulatory power over those matters in which the states were incompetent to act by reason of the fact that the matter to be regulated affected more states than one.

A constitutional framer or ratifier, hence, would heartily have agreed with the Supreme Court in the National Labor Relations Act cases when they held that Congress, under the Commerce Clause, had the power to prohibit unfair labor practices between employers and employees so as to promote collective bargaining and avoid paralyzing strikes in industries located within one state. Of course, we would have to explain to the constitutional framers and ratifiers that conditions have changed, that our economic system is now so integrated and closely knit that a shut-down in one state, or sector, immediately affects businesses and trades in another sector or state; that our present system not only transcends but ignores state lines; that, hence, the disturb-

ance from strikes can no longer be confined to the locale, or state, where it occurs; and that there must be uniformity of regulation.

So much, then, as to the powers the constitutional framers intended Congress to have when they said it could regulate commerce among the states.

Now to ascertain what the Supreme Court has said concerning the powers of Congress under the Commerce Clause between the adoption of the constitution and the decision in the National Labor Relations Act cases in 1937. Has the Court given expression to the intent of the framers?

It was not until the year 1824, that it became necessary for the Supreme Court to determine the scope of the congressional power to regulate commerce among the states. In that year, the Court was called upon to decide the celebrated case of *Gibbons v. Ogden*.² The Chief Justice at the time was the great Marshall. The case is one of the great landmarks in United States Constitutional History. In this case, Chief Justice Marshall wrote one of his five greatest opinions, and in his appearance before the Supreme Court, Webster made his greatest argument. And the decision made the constitution legally accomplish what was the moving cause of the adoption of the constitution in the constitutional convention — “to keep the commercial intercourse among the states free from the restraints of the states.”

The facts in this case were: Livingston and Fulton held an exclusive legislative grant from the state of New York to navigate the waters of that state by steamboat. They also procured similar exclusive privileges in the Orleans territory. People in the other states resented the conferment of these privileges and began to retaliate. The New Jersey Legislature authorized any owner, whose boat had been seized under the New York law, to seize the boat of any New York citizen. Connecticut forbade any boat licensed by Living-

² 9 Wheat. 1, (U. S. 1824).

ston and Fulton from entering Connecticut waters. Even other citizens of New York defied the monopoly. Ogden had purchased from Livingston and Fulton the privilege of operating ferry boats from New York to ports in New Jersey. Gibbons, a New Jersey resident, began to run boats between New York and New Jersey in competition with Ogden. Ogden applied for an injunction against Gibbons. Marshall held that the injunction should be denied as the New York statute granting the monopoly was unconstitutional and void, being in conflict with the power granted to Congress to regulate commerce among the states.

The extent and scope of the power of Congress to regulate commerce among the states was defined by Marshall as follows:

"It is not intended to say that these words (commerce among the states) 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.

"Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more states than one — the enumeration of the particular classes of commerce to which the power was to be extended — 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 concern of a state, then, may be considered as reserved for the state itself."

In other words, it was within the constitutional power of Congress to regulate business which concerned or affected more states than one, or to regulate those activities which affected the states generally. Now, no one at the time Marshall wrote this opinion in 1824, questioned its soundness, or doubted that it coincided with the intention of the constitutional framers.

Now I want you to contrast Marshall's statement with the following language from an opinion by Justice Bradley, 62 years later, in the case of *Coe v. Errol*.³ Question presented was whether products of a state, intended for exportation to another state, and deposited at a port for shipment within the state are to be considered in interstate commerce and, therefore, exempt from taxation. In holding the products were not in interstate commerce, the Court said:

"That such goods do not cease to be part of the general mass of property in the state, subject, as such, to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another state or have been started upon such transportation in a continuous route or journey. Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. But this movement does not begin until the articles have been shipped or started for transportation from the one state to another."

Also, I wish you to take note of Justice Lamar's language in an opinion handed down by him in the case of *Kidd v. Pearson*,⁴ as follows:

"No distinction is more popular to the commerce mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation — the fashioning of raw material into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. If it be held that the term includes the regulation of all such manufacturers as are intended to be the subject of transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested to the exclusion of the states with the power to regulate not only manufacture, but, also, agriculture, horticulture, mining — in short, every branch of industry."

There is no need for me to point out to you that the Supreme Court is viewing "commerce among the states" in a different light. Mr. Justice Bradley and Mr. Justice Lamar talk of "movement," "transportation" and "flow;" the

³ 116 U. S. 517.

⁴ 128 U. S. 1.

phrase "interstate commerce" is used instead of "commerce among the states." The carrying of an article from one state to another seems to be the central idea. And, so it is. The conception of commerce among the states, as sanctioned by constitutional framers and advanced by Marshall, has been shrunken until it now constitutes only one aspect of its former self. Commerce among the states has become movement between the states. It no longer means commerce, trade, traffic, business concerning more than one state.

How, you may ask, did this change in the conception of "commerce among the states" happen to take place? That inquiry would call for the writing of another paper. However, I might say there are several theories advanced. The most interesting one, brought forward by a leading legal scholar,⁵ is that Marshall in the *Gibbons* case created what he called a Judicial Vise in which it was expected the states would be squeezed of their taxing and police power, and thereby would pass out of existence, leaving a strong central government in control. One side of the so called Judicial Vise was the liberal construction placed upon the phrase "commerce among the states" to cause it to include trade and business concerning more states than one. Of course, the greater the conception the wider and more extensive were the regulatory powers of Congress. The other side of the Vise consisted of Marshall's conclusion that Congress' power over commerce among the states was exclusive, and the states could not regulate or tax its objects notwithstanding that Congress had not acted. This latter side of the Vise was known as Marshall's dormant power theory. Despite a long struggle by various members of the Supreme Court over a period of fifty years, of which Chief Justice Taney was the principal leader, the dormant power theory was never displaced sufficiently to give the states proper taxing and regulatory breathing space. The result was that the other side of the Vise, namely, the broad conception of commerce among

⁵ Frank R. Strong, Professor of Law, Ohio State University.

the states was "whittled" down until nothing remained of the conception but "movement" or transportation of goods between states. Consequently, of course, with the field of commerce among the states restricted, the states had a larger field and more objects therein from which to procure revenues. Ironically enough, therefore, Marshall's dormant power theory, generally held to be unsound, brought about a distortion of the basically sound conception of commerce among the states as business concerning more states than one.

There is still another theory advanced. Our economic and social system, until about the year 1875, was relatively simple. The only cases with which the Supreme Court was confronted were ones involving transportation which was merely, as we have seen, one aspect of commerce among the states. Hence, the Court got into the habit of thinking of commerce merely as movement or transportation.

A third and final theory advanced is that the period from Marshall's decision in 1824 until 1875, or thereafter, was a period of expansion and growth. Laissez Faire was in full swing; unrestricted competition was the fashion, and regulation was discouraged. The animal was in the process of gorging itself. Both national and state regulation were frowned upon. The concept of commerce among the states was contracted in reference to national regulatory measures. The dormant power theory was applied in connection with regulatory measures of the states. So much then for the various theories of how the Supreme Court came to think of Congress' power over commerce among the states as merely movement.

Seven years later, in 1895, in the *Sugar Trust Cases*,⁶ that commerce which belongs to Congress to control, regulate and protect was definitely narrowed to transportation between states of goods and persons. A manufacturing concern admittedly controlling 98% of the sugar refined in the United

⁶ 156 U. S. 1.

States was held to be engaged in commerce among the states even though the manufacturing concern contemplated sales of the sugar throughout the various states. The Sherman Anti-trust law passed by Congress was held not applicable. The Court said the Sugar monopoly could at the most have only an indirect effect on interstate commerce though it was conceded that effect would be inevitable and extensive. The Court's mental image of commerce among the states has become narrowed to physical movement of goods from one state to another. Moreover, the Court is not only adjudging that Congress can regulate and control only the physical movement of goods between the states, but, also, in this case Congress' regulatory power is restricted to those activities which directly affect interstate commerce.

Three years later, in 1898, this theme of narrow definition of commerce among the states was woven even more tightly into our judicial fabric in the case of *Hopkins v. United States*.⁷ Business of buying and selling live stock at a stock yard, astride two states, held not to be commerce among the states, though most of the purchases and sales were in other states and, hence, Congress had no regulatory power over them.

Just how far the conception of "commerce among the states" had changed is illustrated by these comments from the works of legal writers as to the meaning of that phrase:

Prentice and Egan, *The Commerce Clause of the Federal Constitution* (1898): "Actual transportation, either of person or property, appears to be the characteristic of foreign commerce and commerce among the states. On the other hand, where there has been no transportation, it has been held commerce does not exist. Commerce succeeds manufacture, and begins only when manufacture is complete."

Sutherland, *Notes on the Constitution of the United States* (1904): "Whenever a commodity has begun to move, as an

⁷ 171 U. S. 578.

article of trade, from one state to another, commerce in that commodity has begun.”

Caske, *The Commerce Clause of the Federal Constitution* (1908): “It will appear that commerce, in the sense now considered, does not comprehend traffic at all, or the purchase, sale and exchange of commodities. Commerce essentially consists of transportation.”

Willoughby, *The Constitutional Law of the United States*, (1910) Vol. II: “Transportation is essential to commerce, or rather is commerce itself.”

Even the popular conception of the meaning of commerce came to have a more shaded, restricted meaning. It was primarily defined by Webster as an exchange of commodities on a large scale between different places or communities. That it also was the practical equivalent of trade and business had been forgotten.

That Congress had power only over the movement and transportation of goods and persons, and activities which directly affected such movements, was a principle which was solidly in the saddle by 1900. The assertion before the Supreme Court that Congress had power over traffic, trade and business, which concerned more states than one, would have had a hollow ring.

That the latter principle was down, but not completely out, was demonstrated by a decision at the turn of the last century involving anti-trust enforcement.⁸ Manufacturers of cast iron pipes contracted with regard to the sale and transportation interstate of their products, purpose being to control price. Held Congress had the power to prohibit this practice. The Court commented: “Interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and includes not only the transportation of persons and property and the navigation of pub-

⁸ Addyston Pipe and Steel Co. v. U. S., 175 U. S. 211.

lic waters for that purpose, but also the purchase, sale or exchange of commodities." Though no actual transportation or movement across state lines was involved, Congress was adjudged to have the power to regulate contracts for sale of goods where interstate movement was contemplated.

Though no more than the proverbial cry in the wilderness, it did demonstrate that the early liberal conception of commerce among the states was not completely extinct.

Then came the case of *Swift and Co. v. United States*⁹ to the Supreme Court for decision. Slaughterhouse men located in several states combined and agreed not to bid against each other in live stock markets located in different states, to bid up prices so as to induce shipments of live stock to the stock yards, and to fix selling prices. Held Congress had the power to prohibit such a combination under the power to regulate commerce among the states. The Court said: "Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. Where cattle are sent for sale from a place in one state with the expectation that they will end their transit after purchase in another, and when in effect they do so with the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, 'and the purchase of the cattle is a part and incident of such commerce.' In other words, the purchase of cattle at a stockyard within a state which came from and were going to other states was deemed to be commerce among the states, notwithstanding that movement had ended, and not as yet had begun."

Thusly, Marshall's broad concept of commerce rapidly becomes a challenger of the favorite, namely, commerce among the states merely as movement.

⁹ 196 U. S. 375.

From here on, the challenger, as if new blood had been injected into its veins, becomes a strong contender for the crown which the favorite has been wearing.

The Supreme Court, after having adjudicated that Congress had the power to forbid the shipment of harmful foods and drugs, obscene literature, lottery tickets, in interstate commerce, and, also, to forbid the transportation of persons across state lines for immoral purposes, had before it, in 1918, the first of the celebrated *Child Labor Cases*.¹⁰ Congress had forbade the shipment of child made goods in interstate commerce. The Court held Congress did not have the power under the commerce clause of the constitution to forbid shipments of such goods, saying: "Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce is a matter of local regulation." Again the Court is thinking of commerce merely as "transportation" or "movement." The favorite is again in the lead. The holding provoked much bitterness which the partisans of the challenger made no attempt to hide.

Four years later, however, in 1922, the challenger again made its bid for the lead.¹¹ Congress was held to have the power under the Commerce Clause to regulate the activities of stockyard owners who were located wholly within one state. The stockyards and sales of stock that take place there were determined to be commerce among the states. It is true that the Court stated that the stockyard acted merely as the throat through which livestock from the western ranges passed to the eastern consumers, thus giving lip service to the movement theory. However, it also recognized the great changes and development in the business of this vast country, and by its decision drew the dividing line between interstate and intrastate commerce where the early court and the constitutional framers intended it to be.

¹⁰ Hammer v. Dagenhart, 247 U. S. 251.

¹¹ Swift & Co. v. U. S., 196 U. S. 375.

Thusly, neck and neck, the favorite and the challenger came rushing down the final stretch. Twice did the favorite spurt out ahead while the challenger appeared to falter. The Court unanimously agreed in 1935 that the recovery act was unconstitutional, and that Congress had no power to fix maximum hours and minimum wages of employees in a poultry business located within the State of New York, though the poultry was brought in from out of state and, after slaughtering, was sold within the state.¹² The Court commented that neither the slaughtering nor the sales were in interstate commerce. The Court obviously had its eyes riveted on the image of interstate commerce as transportation or movement.

The favorite spurted a second time and the Court, again, was movement-minded, in 1936, when it decided that Congress had no constitutional power to fix maximum hours, minimum wages and provide for collective bargaining, in the bituminous coal mining industry.¹³ To support its holding, the Court harked back to the cases of *Coe v. Errol*, *Kidd v. Pearson*, and those other cases around the opening of the 20th Century, which made commerce and movement one. Production is not commerce, but merely a step in preparation for commerce.

Definitional contraction of interstate commerce which derived from the latter half of the last century seemed in the evolutionary struggle about to triumph.

Thus, it was that when the National Labor Relations Act cases came up for decision in 1937, the favorite was in the lead with only a short distance remaining to be covered to register a coveted win. The favorite backers were confident as they had the right to be in view of the two recent holdings of the court. The lower courts, because of said holdings, had no other alternative but to find the act was not con-

¹² *Schechter Poultry Corp. v. U. S.*, 295 U. S. 495.

¹³ *Carter v. Carter Coal Co.*, 298 U. S. 238.

stitutionally applicable to employees engaged in manufacture and production wholly within a state. However, the favorites' backers were stunned when the Court announced its decision, concluding manufacturers and producers were engaged in interstate commerce, and that Congress had the power to enact legislation prohibiting unfair labor practices, and enforcing collective bargaining for the purpose of avoiding strikes. The Court said industrial strikes had a direct derogatory effect on "interstate commerce," but I think we can all agree that commerce was taken to mean by the court business, trade which concerns more states than one, and not merely movement, transportation across state lines. Doubt, if there was any, as to the Court's meaning has been dispelled by later decisions holding the servicing of electric operating companies and the marketing of securities for an integrated national utility system to be activities within the Federal Commerce power.¹⁴

The race, which began at the beginning of this century between definitional narrowness of the concept of interstate commerce and commerce among the states as that which concerns more states than one, is finished. The challenger, old as the constitution, has displaced the comparatively recent favorite.

What, then, are we to conclude? Are we to accept the assertions of Frank J. Hogan, Mr. Hendrick and Mr. Justice McReynolds that the constitution has been discarded, that a new United States has been created, and that judicial precedents have been uprooted? Or are we to agree with Attorney General Jackson that the constitution has been discovered?

When Jackson speaks of the discovery of the constitution, he refers to the Supreme Court's apparent holdings in the National Labor Relations Act,¹⁵ and recent cases, that

¹⁴ Electric Bond and Share Co. v. Securities Commission, 303 U. S. 419.

¹⁵ Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197.

the power of Congress to regulate is to be tested not by interstate commerce as mere movement, but as those commercial and trade activities which concern more states than one, and in which the states are incompetent to act. I think we can agree that the constitutional framers intended Congress to have power over all commercial and business activities concerning more than one state, but we cannot agree with Jackson that the discovery of this intent is quite so recent. As I think we have demonstrated, Marshall it was who first gave expression to what was in the minds of the constitutional framers with regard to commerce among the states. This was in 1824. Jackson's claim of this honor for the present Supreme Court members must, therefore, be rejected.

I think we must also conclude that the other statements are not wholly true. Our discussion here shows, I believe, that the constitution has not been discarded by the apparent adoption by the court of that early concept of interstate commerce as activities concerning more states than one as the measuring rod of congress' power. It may be true that the constitution as known between the years 1875 and 1935 is discarded, but that constitution as formulated by our forefathers, and as interpreted by the great Marshall, Taney and Waite, is now very much in evidence.

Mr. Justice McReynolds' remark that precedents of many years standing have been shattered by the Court's recent rulings, may be dismissed with this observation. The precedents which the Justice had in mind were those in which interstate commerce was viewed narrowly as movement. Such holdings dated, as we have seen, from about 1890. Prior precedents, historical as well as judicial, however, supported the recent rulings wherein interstate commerce was viewed broadly as activities affecting more states than one. Moreover, as we have seen, from the turn of the century until recently, the narrow and the broad concept of "commerce among the states" have continuously sought the favor of the

court, resulting during that period of time in judicial decisions supporting first one concept and then the other. Hence, the cases overruled by the recent decisions fall within a relatively short period of the court's history; moreover, during such period there were as many supporting decisions as there were non-supporting ones of the Court's late holding; and, finally, precedents throughout the remainder of the Court's history, can be considered in accord.

The adoption of the concept by the present court of Marshall, and the constitutional framers, that Congress' power under the commerce clause is to be measured by whether the activity to be prevented or encouraged concerns more than one state in which the states severally are incompetent to act, in, and of itself, did not create a new United States as Hendrick says. But, rather, the adoption of the liberal concept of commerce among the states was a natural result of a change already in existence. Instead, therefore, of the liberal concept creating something new, the something new created the liberal concept.

The change already in existence, of which I spoke, was the country arriving at maturity as an industrial nation in the twenties. The movement which began after the civil war had finally transformed us from a simple, agricultural society to a highly industrial one. Independence and the "Jack of all trades" idea had been replaced by interdependence and specialization. All business and industry, as well as individuals constituted a minute portion of a vast, integrated, closely knit system. A function, inadequately performed in one locale, most probably has a drastic effect in another. As Judge Hand said: "Our society has become an elastic medium which transmits all tremors throughout its territory." The new United States, then, is the closely knit, integrated, interdependent, economic and business system under which we live. Regulation and control thereof, to be effective, must be by an entity who has power over the whole. An increased need for regulation and control there can

be no argument about when the slightest variation, no matter how slight, affects the whole system. Moreover, no regard is had by these new United States for state lines. One business or industry may sprawl across several states. Regulation, of necessity, must reside in Congress, the only entity which can encompass the land, and thus the system. The limiting of the power of Congress merely to movement and transportation of goods and person worked satisfactorily under the old loosely knit system under which local activities had only a local re-action. Then, something actually had to be moved before an out of state effect could be created. Under our present, close knit system disastrous consequences can result out of state by reason of certain activities within a state though there be no movement present.

In conclusion, we thus can say: When the present court, in effect, concluded that Congress had power over those activities concerning more than one state, regardless of movement, it was not a discovery, but at the most a re-discovery of the constitution; it amounted not to a discarding of the constitution, but historically expresses the intent of the constitutional framers and the early members of the Supreme Court; it constituted an overruling of a few precedents in the last 40 years, but amounted to the affirmance of earlier holdings, and, finally, it constituted a proximate, natural result of the creation of a new economy, but, in itself, did not create it.

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