

2-6-2013

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Recommended Citation

Barry Cushman, *Carolene Products and Constitutional Structure*, Sup. Ct. Rev. 321 (2012).

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CAROLINE PRODUCTS AND
CONSTITUTIONAL STRUCTURE

Justice Harlan Fiske Stone's opinion for the majority in the U.S. Supreme Court's 1938 decision in *United States v Carolene Products*¹ is well known for its statement of two principles. The first concerns the presumption of constitutionality to be accorded to legislation regulating economic activity when challenged under the Due Process Clauses. "[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional," Stone maintained, "unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."² The second principle emerges from Stone's immediate qualification of the first principle in the famous Footnote Four, where he suggested that such deferential review would not be appropriate "when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific

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AUTHOR'S NOTE: Thanks to A. J. Bellia, Michael Collins, Patty Cushman, John Finnis, Rick Garnett, Joel Goldstein, John Harrison, Fred Konefsky, Daryl Levinson, Caleb Nelson, and James Stern for helpful comments and conversation, and to Patrick Bottini and Ben Pulliam for splendid research assistance.

¹ 304 US 144 (1938).

² *Id* at 152.

when held to be embraced within the Fourteenth.”³ Nor would such a robust presumption of constitutionality be warranted with respect to “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation,” nor with respect to “statutes directed at particular religious,” “national,” “racial,” or other “discrete and insular minorities.”⁴

This understanding of the meaning of *Carolene Products* is now so firmly established⁵ that it is easy to overlook the fact that the decision once was regarded as marking an important step in the development of Commerce Clause jurisprudence. This was so not simply because the Court there upheld an exercise of the commerce power—the Filled Milk Act of 1923⁶—which prohibited the interstate shipment of the substance for which it was named. At a deeper level, it was true because of the vital if often implicit role that Fifth Amendment due process concepts had played in shaping and constraining federal power to prohibit transportation in interstate commerce. The understanding that lawyers once had of this relationship between structural constitutional federalism and individual rights has long been lost to us. It is the ambition of this article to reconstruct that understanding, and to show how Justice Stone’s resolution of that relationship in *Carolene Products* laid the groundwork not only for modern conceptions of judicial review, but also for a conception of federal power that would predominate throughout the remainder of the twentieth century.

Part I of this article charts the development of our modern understanding of the meaning of *Carolene Products*. For the first decade or so following its announcement, we find, the case was treated by the Court and by academics as a significant Commerce Clause precedent. It was only in the years following World War II, when earlier understandings of Commerce Clause jurisprudence began to fade,

³ Id at 152 n 4.

⁴ Id at 152–53 n 4.

⁵ The literature here is vast. Among the more noteworthy contributions are John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard, 1980); David A. Strauss, *Is Carolene Products Obsolete?* 2010 U Ill L Rev 1251 (2010); Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv L Rev 713 (1985); Robert Cover, *The Origins of Judicial Activism in the Protections of Minorities*, 91 Yale L J 1287 (1982).

⁶ An Act to Prohibit the Shipment of Filled Milk in Interstate or Foreign Commerce (“Filled Milk Act”), 42 Stat 1486 (1923).

that the modern understanding began to eclipse its more inclusive predecessor.

Part II provides the doctrinal and analytic framework necessary to appreciate the significance of *Carolene Products*' contribution to Commerce Clause development. This part offers a reinterpretation of the line of cases upholding the constitutionality of federal statutes prohibiting the interstate shipment of such disfavored items as lottery tickets,⁷ adulterated or mislabeled food and drugs,⁸ alcoholic beverages,⁹ and stolen automobiles.¹⁰ These decisions stand in stark contrast to the case of *Hammer v Dagenhart*,¹¹ where the Court invalidated the Keating-Owen Child Labor Act of 1916,¹² which prohibited the interstate shipment of goods made by firms employing children. The apparent inconsistencies in this line of cases have long puzzled and frustrated students of American constitutional history. Part II aims to reconcile this seemingly contradictory body of case law. The key to doing so, I argue, lies in seeing that what we have regarded as "Commerce Clause cases" are in fact best understood as turning on issues of vested rights and substantive due process. More particularly, I maintain that these cases are best understood, as a number of sophisticated contemporary legal observers understood them, as standing for the following proposition: that once a property right in an item had vested under the applicable state law, the Due Process Clauses prohibited either Congress or sister state legislatures from disadvantageously regulating the disposition of that item unless such a disposition threatened the infliction of a cognizable harm within the legislative jurisdiction of the regulating sovereign. In the absence of a threat that such a

⁷ An Act for the Suppression of Lottery Traffic Through National and Interstate Commerce and the Postal Service Subject to the Jurisdiction and Laws of the United States, 28 Stat 963 (1895), upheld in *Champion v Ames (The Lottery Case)*, 188 US 321 (1903).

⁸ An Act for Preventing the Manufacture, Sale, or Transportation of Adulterated or Misbranded or Poisonous or Deleterious Foods, Drugs, Medicines, and Liquors, and for Regulating Traffic Therein, and for Other Purposes ("Pure Food Act"), 34 Stat 768 (1906), upheld in *Hipolite Egg Co. v United States*, 220 US 45 (1910).

⁹ An Act Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases ("Webb-Kenyon Act"), 37 Stat 699 (1913), upheld in *Clark Distilling Co. v Western Maryland Railway Co.*, 242 US 311 (1917).

¹⁰ An Act to Punish the Transportation of Stolen Motor Vehicles in Interstate or Foreign Commerce ("National Motor Vehicle Theft Act"), 41 Stat 324 (1919), upheld in *Brooks v United States*, 267 US 432 (1925).

¹¹ 247 US 251 (1918).

¹² An Act to Prevent Interstate Commerce in the Products of Child Labor, and for Other Purposes ("Keating-Owen Child Labor Act"), 39 Stat 675 (1916).

cognizable harm might be inflicted within Congress's legislative jurisdiction, therefore, a federal prohibition on the interstate shipment of an item deprived its owner of property without due process of law. Equipped with this understanding of the doctrine, we can then see that the decision in *Hammer* is best understood as turning on a distinction between the types of extraterritorial harm that the Court regarded as legally privileged,¹³ and those that the Justices were prepared to recognize as falling outside the protection of the Due Process Clause.

Part III begins the effort to specify the role of *Carolene Products* in transforming this body of doctrine. Here I reconstruct the legislative history of the Filled Milk Act of 1923, demonstrating that the debates over its constitutionality turned on conceptions of harm derived from the Court's due process jurisprudence. Part IV follows the litigation over that act to the Supreme Court. Here we see that Justice Stone accomplished two important tasks. First, he clarified the doctrine by recognizing that in cases involving federal prohibitions on interstate shipment, the due process issue was analytically distinct from the Commerce Clause issue, and was in fact the issue on which the question of constitutionality hinged. Second, and more famously, Justice Stone announced that henceforth, in these and other cases involving challenges to economic regulation under the Due Process Clauses, the Court would accord a broad measure of deference to legislative judgments concerning harm. Part V then examines the contemporary significance of this liberation of the commerce power from its former due process restraints, documenting the important role that it played in the legislative history of the Fair Labor Standards Act of 1938, and in the Court's decision upholding that act and overruling *Hammer* in *United States v Darby Lumber Co.*¹⁴ Part VI reviews the underappreciated role of individual rights in shaping the history and functioning of American constitutional federalism.

I. CAROLENE PRODUCTS IN HISTORICAL MEMORY

It is not surprising that *Carolene Products* is today remembered for the principles of deferential review of economic regulation

¹³ See, for example, Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 Harv L Rev 1 (1894); Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L J 16 (1913).

¹⁴ 312 US 100 (1941).

and heightened review under Footnote Four, because those are the principles for which it is cited in our casebooks on Constitutional Law.¹⁵ This has now been the case for more than half a century. When Professor John Frank of Yale Law School published his casebook in 1950, he included *Carolene Products* as a principal case in the section on due process and economic regulation,¹⁶ and placed a discussion of Footnote Four in the section on speech and reli-

¹⁵ See Jesse H. Choper et al, *Constitutional Law: Cases—Comments—Questions* (West, 11th ed 2011) (due process holding briefly summarized at p 368; every other mention is of Footnote Four, see pp 295, 368, 376, 377, 378, 379, 380, 449, 577, 578, 1361, 1374, 1375, 1425, 1472, 1489, 1490, 1498, 1662); Erwin Chemerinsky, *Constitutional Law* (Aspen, 3d ed 2009) (all references are to Footnote Four, either together with the due process holding, see pp 626–28, 724, or alone, see pp 755, 946); Gregory E. Maggs and Peter J. Smith, *Constitutional Law: A Contemporary Approach* (West, 2d ed 2011) (due process holding briefly summarized at p 526; remaining references are to Footnote Four, see pp 526–27, 634, 811); Kathleen M. Sullivan and Gerald Gunther, *Constitutional Law* (Foundation, 17th ed 2010) (every mention is either to due process and Footnote Four together, see pp 391–92, or to Footnote Four alone, see p 768); Michael Stokes Paulsen et al, *The Constitution of the United States* (Foundation, 2010) (every mention is either to due process, see p 1522, or to due process together with Footnote Four, see p 1527); Calvin Massey, *American Constitutional Law: Powers and Liberties* (Aspen, 2d ed 2005) (every mention is to due process, see p 473, or to Footnote Four, see pp 48, 613, 645, 665, 717, 723); Jerome A. Barron et al, *Constitutional Law: Principles and Policies* (LexisNexis, 7th ed 2006) (every mention is to due process together with Footnote Four, see pp 474–75, or to Footnote Four alone, see pp 663, 910–11); William C. Banks and Rodney A. Smolla, *Constitutional Law: Structure and Rights in Our Federal System* (LexisNexis, 6th ed 2010) (every mention is to Footnote Four, see pp 525–26, 598); William D. Araiza and M. Isabel Medina, *Constitutional Law: Cases, History, and Practice* (LexisNexis, 4th ed 2011) (every mention is either to due process together with Footnote Four, see pp 725–27, or to Footnote Four alone, see pp 754, 755, 970, 1211, 1214, 1245); Daniel A. Farber, William N. Eskridge, Jr., and Phillip P. Frickey, *Cases and Materials on Constitutional Law: Themes for the Constitution's Third Century* (West, 4th ed 2009) (every mention is to due process, see p 497, Footnote Four, see pp 36–38, or the two of them together, see p 35); John E. Nowak and Ronald D. Rotunda, *Constitutional Law* (West, 8th ed 2010) (every mention is to due process together with Footnote Four, see pp 482, 486, 1271–72, or to Footnote Four alone, see pp 392, 494, 499, 750); Geoffrey R. Stone et al, *Constitutional Law* (Aspen, 6th ed 2009) (every mention is to due process, see pp 501, 755, 756, 758, Footnote Four, see pp 147, 523, 524, 684, 687, 688, 692, 764, 766, 852, or the two together, see pp 693, 760, 761); Charles A. Shanor, *American Constitutional Law: Structure and Reconstruction* (West, 3d ed 2006) (every mention is to Footnote Four, see pp 8, 680, 712); Laurence H. Tribe, *American Constitutional Law* (Foundation, 2d ed 1988) (every mention is to Footnote Four, see pp 129, 607, 644, 772, 778, 780, 845, 1320, 1452, 1465, 1515, 1523, 1544, 1588, 1614, 1686, or to Footnote Four together with due process, see p 582). See also Norman Redlich, John Attanasio, and Joel K. Goldstein, *Constitutional Law* (LexisNexis, 5th ed 2008) (citations to Footnote Four at pp 393, 586, 650, 686); Jonathan D. Varat, William Cohen, and Vikram D. Amar, *Constitutional Law: Cases and Materials* (Foundation, 13th ed 2009) (citations to due process and Footnote Four at pp 564–66); Paul Brest et al, *Processes of Constitutional Decisionmaking: Cases and Materials* (Aspen, 4th ed 2000) (citations to due process at p 523, to Footnote Four at pp 99, 618, 897, 948, 1040, 1126, 1280, 1291, 1493, 1500, and to both at pp 428–33, 869); David Crump et al, *Cases and Materials on Constitutional Law* (LexisNexis, 5th ed 2009) (citations to due process and Footnote Four at pp 38, 349, and to Footnote Four alone at p 626).

¹⁶ John P. Frank, *Cases and Materials on Constitutional Law* 671–74 (Callaghan, 1950).

gion.¹⁷ That same year Columbia Professor Noel Dowling published the fourth edition of his casebook, where he featured Footnote Four in the introduction to the section on free speech and press.¹⁸ The presence of Footnote Four in the Dowling text would expand in subsequent editions, after Gerald Gunther joined the casebook.¹⁹ When Harvard's Paul Freund, Arthur Sutherland, Mark De Wolfe Howe, and Ernest Brown published the first edition of their casebook in 1954, every mention of *Carolene Products* was of Footnote Four.²⁰ University of Michigan Professor Paul Kauper's first edition, published the same year, also emphasized Footnote Four,²¹ along with a brief mention in a string cite of economic regulations upheld against due process challenges in the Progressive and New Deal periods.²² By 1959, the lone citation to *Carolene Products* in Tulane Dean Ray Forrester's casebook would be as the origin of the notion that the First Amendment occupied a "preferred status."²³ By the 1960s and 1970s, the understanding of *Carolene Products* that emerges from a review of today's teaching materials had begun to take firm shape.

This presentation of *Carolene Products* in our casebooks mirrors the Supreme Court's treatment of the precedent in the years following World War II. In the 1950s the Justices cited the decision in only four cases, each time for one of the two principles identified above.²⁴ In the 1960s the Court cited the case only a half-dozen times, in equal proportions for deferential review and Footnote

¹⁷ Id at 838.

¹⁸ Noel Dowling, *Cases on Constitutional Law* 925–26 (Foundation, 4th ed 1950).

¹⁹ See Gerald Gunther and Noel Dowling, *Cases and Materials on Constitutional Law* (Foundation, 8th ed 1970) at 755, 838, 1031, 1051, 1102, 1385; Gerald Gunther, *Cases and Materials on Constitutional Law* (Foundation, 9th ed 1975) at 24, 309, 377, 584, 593, 637, 653, 681, 684, 754, 755, 1028, 1041, 1047. Citations to Footnote Four would taper off dramatically in later editions. See, for example, Gerald Gunther, *Cases and Materials on Constitutional Law* (Foundation, 10th ed 1980) at 284, 534, 541, 1106; Gerald Gunther, *Constitutional Law* (Foundation, 12th ed 1991) at 458, 463, 996.

²⁰ Paul A. Freund et al, *Constitutional Law: Cases and Materials* 1350, 1433, 1482 (Little, Brown, 1954).

²¹ Paul Kauper, *Constitutional Law: Cases and Materials* 71, 890 (Prentice-Hall, 1954).

²² Id at 779.

²³ Ray Forrester, *Constitutional Law: Cases and Materials* 717 (West, 1959).

²⁴ *Breard v City of Alexandria*, 341 US 622, 640 n 29 (1951); *Dennis v United States*, 341 US 494, 525–27, 559 (1951); *American Communications Association, CIO v Douds*, 339 US 382, 423 n 1 (1950) (Jackson, J, concurring and dissenting); *Secretary of Agriculture v Central Roig Refining Co.*, 338 US 604, 616 (1950).

Four.²⁵ Citations more than doubled in the 1970s, and here references to Footnote Four began to predominate.²⁶ In the 1980s, following John Hart Ely's elegant elaboration of Footnote Four into a general representation-reinforcement theory of judicial review,²⁷ citations nearly doubled again, with Footnote Four retaining its preeminence.²⁸ In the past two decades the frequency of citation has declined, but Footnote Four remains the principal reason for judicial mention of the decision.²⁹ In our modern constitutional

²⁵ *Katzenbach v Morgan*, 384 US 641, 655 n 15 (1966); *Katzenbach v McClung*, 379 US 294, 304 (1964); *Florida Lime & Avocado Growers, Inc. v Paul*, 373 US 132, 175 (1963) (White, J, dissenting); *Goldblatt v Town of Hempstead*, 369 US 590, 596 (1962); *Braunfeld v Brown*, 366 US 599, 613 (1961) (Brennan, J, dissenting); *Poe v Ullman*, 367 US 497, 544 (1961).

²⁶ *Cannon v University of Chicago*, 441 US 677, 737–38 n 8 (1979) (Powell, J, dissenting); *Vance v Bradley*, 440 US 93, 113, 120 n 6 (1979) (Marshall, J, dissenting); *New Motor Vehicle Board of California v Orrin W. Fox Co.*, 439 US 96, 125 n 28 (1978) (Stevens, J, dissenting); *Regents of University of California v Bakke*, 438 US 265, 288–92, 357 (1978); *Foley v Connelie*, 435 US 291, 294 (1978); *Nyquist v Mauclet*, 432 US 1, 17 (1977) (Rehnquist, J, dissenting); *Usery v Turner Elkborn Mining Co.*, 428 US 1, 24, 44 (1976); *Massachusetts Board of Retirement v Murgia*, 427 US 307, 313 (1976); *Application of Griffiths*, 413 US 717, 721 (1973); *Sugarman v Dougall*, 413 US 634, 642 (1973) (Rehnquist, J, dissenting); *San Antonio Independent School District v Rodriguez*, 411 US 1, 105 (1973) (Marshall, J, dissenting); *United States v Caldwell*, 408 US 665, 719 n 8 (1972); *Graham v Richardson*, 403 US 365, 372 (1971); *Oregon v Mitchell*, 400 US 112, 248, 295 n 14 (1970) (Harlan, J, dissenting).

²⁷ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard, 1980).

²⁸ *City of Richmond v J. A. Croson Co.*, 488 US 469, 495 (1989); *New York State Club Association, Inc. v City of New York*, 487 US 1, 17 (1988); *South Carolina v Baker*, 485 US 505, 513 (1988); *Nollan v California Coastal Commission*, 483 US 825, 844 n 1 (1987) (Brennan, J, dissenting); *Bowen v American Hospital Association*, 476 US 610, 627 (1986); *Wygant v Jackson Bd. of Education*, 476 US 267, 317 n 10 (1986) (Stevens, J, dissenting); *City of Cleburne, Texas v Cleburne Living Center*, 473 US 432, 471–72 (1985) (Marshall, J, concurring and dissenting); *Metropolitan Life Insurance Co. v Ward*, 470 US 869, 881, 887, 893 (1985); *Selective Service System v Minnesota Public Interest Research Group*, 468 US 841, 878 n 21 (1984) (Marshall, J, dissenting); *Hudson v Palmer*, 468 US 517, 557 n 36 (1984) (Stevens, J, concurring and dissenting); *Anderson v Celebrezze*, 460 US 780, 793 n 16 (1983); *Crawford v Board of Education of Los Angeles*, 458 US 527, 547 (1982) (Blackmun, J, concurring); *Washington v Seattle School District No. 1*, 458 US 457, 458, 486 (1982); *Toll v Moreno*, 458 US 1, 23 (1982) (Blackmun, J, concurring); *Plyler v Doe*, 457 US 202, 217 n 14 (1982); *Hodel v Virginia Surface Mining and Reclamation Association, Inc.*, 452 US 264, 280 n 20, 291 (1981); *Western & Southern Life Insurance Co. v State Board of Equalization of California*, 451 US 648, 672–74 (1981); *Pennhurst State School and Hospital v Halderman*, 451 US 1, 19 (1981); *Minnesota v Clover Leaf Creamery Co.*, 449 US 456, 464, 469, 478 n 2 (1981); *Industrial Union Department, AFL-CIO v American Petroleum Institute*, 448 US 607, 695 n 9 (1980) (Marshall, J, dissenting); *Richmond Newspapers, Inc. v Virginia*, 448 US 555, 587 (1980) (Brennan, J, concurring); *Fullilove v Klutznick*, 448 US 448, 518–19 (1980) (Marshall, J, concurring); *Harris v McRae*, 448 US 297, 344 (1980) (Marshall, J, dissenting); *O'Bannon v Town Court Nursing Center*, 447 US 773, 800 n 8 (1980) (Blackmun, J, concurring).

²⁹ *Sorrell v IMS Health Inc.*, 131 S Ct 2653, 2675 (2011) (Breyer, J, dissenting); *McDonald v City of Chicago*, 130 S Ct 3020, 3101, 3116, 3124–25 (2010) (Stevens, J, dissenting) (Breyer, J, dissenting); *District of Columbia v Heller*, 554 US 570, 628 n 27 (2008); *Kelo v*

order, *Carolene Products* has come to stand for differential standards of review applied in cases involving economic regulation, on the one hand, and civil rights and civil liberties on the other.

This was not always the case. For *Carolene Products* involved the question, at the time a subject of considerable vexation, of the power of Congress to prohibit the interstate shipment of disfavored articles under its commerce power. In the first decade or so following its announcement, *Carolene Products* was cited by the Court as a precedent concerning the scope of the commerce power³⁰ as frequently as it was invoked either for its position on the standard of review in cases involving ordinary commercial transactions³¹ or for the heightened scrutiny for civil liberties and minority rights suggested

City of New London, 545 US 469, 521–22 (2005) (Thomas, J., concurring); *Vieth v Jubelirer*, 541 US 267, 312 (2004) (Kennedy, J., concurring); *Washington v Glucksberg*, 521 US 702, 766 (1997) (Souter, J., concurring); *United States v Virginia*, 518 US 515, 575 (1996) (Scalia, J., dissenting); *Miller v Johnson*, 515 US 900, 948 (1995) (Ginsburg, J., dissenting); *Adarand Constructors, Inc. v Peña*, 515 US 200, 218 (1995); *United States v Lopez*, 514 US 549, 604, 606–07, 610 (1995) (Souter, J., dissenting); *Heller v Doe*, 509 US 312, 326 (1993); *Lucas v South Carolina Coastal Council*, 505 US 1003, 1045 (1992) (Blackmun, J., dissenting); *Gregory v Ashcroft*, 501 US 452, 468 (1991); *Air Line Pilots Association, International v O'Neill*, 499 US 65, 75, 78 (1991); *United States v Munoz-Flores*, 495 US 385, 406 (1990) (Stevens, J., concurring).

³⁰ See *Joseph v Carter & Weekes Stevedoring Co.*, 330 US 422, 426 (1947) (“The Commerce Clause bears no limitation of power upon its face and, when the Congress acts under it, interpretation has suggested none, except such as may be prescribed by the Constitution.”); *Morgan v Virginia*, 328 US 373, 380 (1946) (“Congress, within the limits of the Fifth Amendment, has authority to burden commerce if that seems to it a desirable means of accomplishing a permitted end.”); *Roland Electrical Co. v Walling*, 326 US 657, 669 (1946) (“The primary purpose of the [Fair Labor Standards] Act is . . . to prohibit the shipment of goods in interstate commerce if they are produced under substandard labor conditions. Such a prohibition is an appropriate exercise of the power of Congress over interstate commerce.”); *Federal Power Commission v Natural Gas Pipeline of America*, 315 US 575, 582 (1942) (“The sale of natural gas originating in one State and its transportation and delivery to distributors in any other State constitutes interstate commerce, which is subject to regulation by Congress. . . . It is no objection to the exercise of the power of Congress that it is attended by the same incidents which attend the exercise of the police power of a State.”); *United States v Darby*, 312 US 100, 114 (1941) (“It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states.”); *United States v Appalachian Electric Power Co.*, 311 US 377, 427 (1940) (“It is no objection to the terms and to the exertion of the [commerce] power that ‘its exercise is attended by the same incidents which attend the exercise of the police power of the states.’”). See also *Apex Hosiery Co. v Leader*, 310 US 469, 484 n 2 (1940); *Carolene Products Co. v United States*, 323 US 18, 23, 31–32 (1944).

³¹ *Alabama State Federation of Labor v McAdory*, 325 US 450, 466 (1945); *Sage Stores Co. v Kansas*, 323 US 32, 35 (1944); *Carolene Products Co.*, 323 US at 18; *Yakus v United States*, 321 US 414, 466, 484 (1944) (Rutledge, J., dissenting); *West Virginia Board of Education v Barnette*, 319 US 624, 648 (1943) (Frankfurter, J., dissenting); *Federal Security Administrator v Quaker Oats*, 318 US 218, 229 (1943); *United States v Lowden*, 308 US 225, 240 (1939); *Clark v Paul Gray, Inc.*, 306 US 583, 594 (1939).

by Footnote Four.³² This earlier understanding of the case was similarly reflected in the teaching materials of the day. The 1941 edition of University of Chicago political science professor Walter Dodd's casebook treated *Carolene Products* as an important precedent concerning not only due process³³ but also the commerce power,³⁴ and that treatment would persist through his remaining editions up to 1954.³⁵ Professor John Sholley's 1951 casebook similarly recognized *Carolene Products* not only for Footnote Four,³⁶ but also as a significant Commerce Clause precedent.³⁷

Today it is the exceptional casebook that includes *Carolene Products* in its treatment of the commerce power.³⁸ Indeed, a recently published casebook with the title *American Constitutional Structure* does not even mention the decision.³⁹ Again, given the Supreme Court's recent treatment of the precedent, this is not surprising.

³² *Kovacs v Cooper*, 336 US 77, 90–91 (1949) (Frankfurter, J, concurring); *United States v Congress of Industrial Organizations*, 335 US 106, 140 (1948) (Rutledge, J, concurring); *Everson v Board of Education of Ewing*, 330 US 1, 62 n 61 (1947) (Rutledge, J, dissenting); *Thomas v Collins*, 323 US 516, 530 (1945); *Prince v Massachusetts*, 321 US 158, 173 (1944) (Murphy, J, dissenting); *Skinner v Oklahoma*, 316 US 535, 544 (1942) (Stone, CJ, concurring); *American Federation of Liberty v Swing*, 312 US 321, 325 (1941); *Minersville School District v Gobitis*, 310 US 586, 606 (1940) (Stone, J, dissenting); *Thornhill v Alabama*, 310 US 88, 95 (1940).

³³ Walter F. Dodd, *Cases on Constitutional Law* 84 (West, 3d ed 1941).

³⁴ *Id* at 613.

³⁵ Walter F. Dodd, *Cases and Materials on Constitutional Law* 87, 619 (West, 4th ed 1949); Walter F. Dodd, *Cases on Constitutional Law* 81, 595 (5th ed 1954).

³⁶ John B. Sholley, *Cases on Constitutional Law* 1035–36 (Bobbs-Merrill, 1951).

³⁷ *Id* at 514.

³⁸ The following casebooks make no mention of the case in their sections on the commerce power: Choper et al, *Constitutional Law*; Chemerinsky, *Constitutional Law*; Maggs and Smith, *Constitutional Law*; Sullivan and Gunther, *Constitutional Law*; Paulsen et al, *The Constitution of the United States*; Massey, *American Constitutional Law*; Barron et al, *Constitutional Law*; Banks and Smolla, *Constitutional Law*; Araiza and Medina, *Constitutional Law*; Varat, Cohen, and Amar, *Constitutional Law*; Farber, Eskridge, Jr., and Frickey, *Cases and Materials on Constitutional Law*; Nowak and Rotunda, *Constitutional Law*; Stone et al, *Constitutional Law*; Shanor, *American Constitutional Law: Structure and Reconstruction*; and Tribe, *American Constitutional Law* (all cited in note 15). The casebook that best recognizes *Carolene Products* as an important Commerce Clause decision is Redlich, Attansiao, and Goldstein, *Constitutional Law* at 81 (cited in note 15), which includes the case in its discussion of Commerce Clause development. See also Ronald D. Rotunda, *Modern Constitutional Law* 234–35 (West, 9th ed 2009) (*Carolene Products* included in Commerce Clause section, though focusing on due process and Footnote Four); Crump et al, *Materials on Constitutional Law* at 128 (cited in note 15) (*Carolene Products* cited in edited version of *Katzenbach v McClung*); Brest et al, *Processes of Constitutional Decisionmaking* at 523, 618 (cited in note 15) (*Carolene Products* cited in edited version of Justice Souter's dissent in *United States v Lopez*, and in connection with Justice Stone's dormant Commerce Clause opinion in *South Carolina Highway Dept. v Barnwell Bros.*).

³⁹ William Funk, *Introduction to American Constitutional Structure* (West, 2008).

Since 1947, the Court has cited *Carolene Products* only once for a principle of Commerce Clause jurisprudence, and that lone event is now more than three decades past.⁴⁰ But at the time of its decision, *Carolene Products* was regarded as establishing an important principle of constitutional federalism.

II. HAMMER V DAGENHART REVISITED

A. VESTED RIGHTS AND DUE PROCESS

To understand why this was so, we need to recall that *Carolene Products* concerned the constitutionality of a federal statute prohibiting the interstate shipment of filled milk.⁴¹ Prohibition of interstate shipment of disfavored articles had become a common technique of congressional regulation since the 1890s. In 1903, the Court had upheld a federal statute prohibiting interstate shipment of lottery tickets.⁴² On the basis of this precedent, Congress enacted the Pure Food and Drugs Act of 1906,⁴³ which forbade interstate transportation of adulterated or inadequately labeled food and drugs. The Court sustained the statute by a unanimous vote in 1910.⁴⁴ Encouraged by these decisions, Congress in 1916 passed the Keating-Owen Child Labor Act,⁴⁵ which prohibited interstate shipment of goods made by enterprises employing child labor. But in 1918 the Court broke the string of congressional victories, invalidating the statute by a vote of 5–4 in the case of *Hammer v Dagenhart*.⁴⁶

In keeping with long-standing principles of constitutional adjudication, Justice William Day's majority opinion disclaimed any inquiry into the purpose or intent of Congress in enacting the

⁴⁰ *Hodel v Virginia Surface Mining and Reclamation Association, Inc.*, 452 US 264, 291 (1981) ("The Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers. . . . 'it is no objection to the exertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states.'").

⁴¹ Filled Milk Act, 42 Stat at 1486.

⁴² *Champion v Ames (The Lottery Case)*, 188 US 321 (1903).

⁴³ Pure Food Act, 34 Stat at 768.

⁴⁴ *Hipolite Egg Co. v United States*, 220 US 45 (1910).

⁴⁵ Keating-Owen Child Labor Act, 39 Stat at 675.

⁴⁶ 247 US 251 (1918).

statute.⁴⁷ Nevertheless, Day maintained that “[a] statute must be judged by its natural and reasonable effect,”⁴⁸ and concluded, “In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities to regulate the hours of labor of children in factories and mines within the states, a purely state authority.”⁴⁹ Congress could not regulate employment relations in manufacturing directly, and therefore could not do so through the indirection of penalizing the employer by denying him access to interstate markets.

But as Justice Oliver Wendell Holmes pointed out in his dissent, Congress had been granted expressly the power to regulate interstate commerce, and “the exercise of its otherwise constitutional power by Congress” could not “be pronounced unconstitutional because of its possible reaction upon the conduct of the States in a matter upon which . . . they are free from direct control.”⁵⁰ In Holmes’s view, “that matter had been disposed of so fully as to leave no room for doubt.”⁵¹ The Court’s “most conspicuous decisions” had “made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any State.”⁵² For example, the Court had sustained a 10 cent per pound excise tax on the production of colored oleomargarine notwithstanding its probable effect on the manufacture of the product.⁵³ Holmes might also have observed that the necessary effect of a prohibition on interstate shipment of lottery tickets was to reduce the level of production of those items within any given state; and that the necessary effect of a prohibition on the interstate shipment of impure foods and adulterated or mislabeled drugs was to regulate the conditions of their manufacture and production within the states in which they were pro-

⁴⁷ Id at 276 (“We have neither authority nor disposition to question the motives of Congress in enacting this legislation.”); see Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 NYU L Rev 1784 (2008).

⁴⁸ *Hammer*, 247 US at 275.

⁴⁹ Id at 276.

⁵⁰ Id.

⁵¹ Id.

⁵² Id at 278.

⁵³ Id.

duced. Even though direct regulation of manufacturing and production was a power reserved to the states and thus beyond congressional authority, indirect federal regulations of production through the exercise of enumerated powers had been upheld repeatedly.⁵⁴

Justice Day therefore was obliged to draw a distinction between the statutes upheld in the Lottery Act and Pure Food and Drugs Law cases, on the one hand, and the Keating-Owen Child Labor Act on the other. Day's answer was that "[i]n each of these [former] instances the use of interstate transportation was necessary to the accomplishment of harmful results."⁵⁵ Each of these items inflicted a harm outside the state of origin. Lottery tickets corrupted morals and contributed to penury by promoting gambling; impure food and adulterated or mislabeled drugs posed risks to public health and safety. By contrast, goods manufactured by companies employing child labor, Day argued, were "of themselves harmless."⁵⁶ They posed no risk to the health or safety of the consumer of the product.

The principle that emerged from *Hammer v Dagenhart*, then, was that Congress could prohibit the interstate transportation of an item, notwithstanding the significant effects that such a prohibition might have on the levels or conditions of its production in a state, if such a prohibition was necessary to prevent a cognizable harm outside the state of origin. Interstate shipment of harmful items could be forbidden, but such shipment of harmless items could not. Such regulation of interstate shipment might have the collateral effect of reducing harms in the state of manufacture, but the redress of such harms alone was beyond federal authority, and such harms therefore could not provide a warrant for such exercises of the commerce power.

⁵⁴ See Thomas Reed Powell, *Vagaries and Varieties in Constitutional Interpretation* 64 (Columbia, 1956) ("The lottery enterprise then conducted in Louisiana was curtailed by the Anti-Lottery Act sustained by the *Lottery* case. The production of impure foods was curbed when the national Pure Food and Drug Act punished their shipment to sister states."); Thurlow M. Gordon, *The Child Labor Law Case*, 32 Harv L Rev 45, 58 (1918); Thomas Reed Powell, *The Child Labor Law, the Tenth Amendment, and the Commerce Clause*, 3 Southern L Q 175, 182–83, 197 (1918); Thomas Reed Powell, *The Child-Labor Decision*, 106 The Nation 730 (June 22, 1918); Thomas I. Parkinson, *Congressional Prohibitions of Interstate Commerce*, 16 Colum L Rev 367, 377–80 (1916); Thomas I. Parkinson, *The Federal Child-Labor Law: Another View of Its Constitutionality*, 31 Pol Sci Q 531, 531–32 (1916).

⁵⁵ *Hammer*, 247 US at 271.

⁵⁶ *Id* at 272.

This principle was at the time and ever since has been subjected to derisive criticism.⁵⁷ Understandably, commentators often have depicted *Hammer* as inconsistent with the Court's earlier decisions upholding prohibitions on interstate shipment of lottery tickets and adulterated or misbranded food and drugs, and some writers have accused the *Hammer* majority of harboring ulterior motivations. Professor Erwin Chemerinsky, after contrasting the *Lottery Case* with *Hammer*, mildly maintains that "the Court did not consistently define the zone of activities reserved to the states,"⁵⁸ and notes that "[s]ome commentators argue that there is no principled distinction between the cases; that the only distinction is that a conservative court approved regulation of gambling, but not regulation of businesses' employment practices."⁵⁹ Professor Laurence Tribe argues that in *Hammer*, "the Court departed in an unprincipled way from its precedents and confused Commerce Clause jurisprudence by dramatically narrowing its application."⁶⁰ The majority's attempt to distinguish the earlier decisions on the ground that "those cases had involved federal regulation of items whose very shipment could be harmful," Professor Tribe charges, was "transparently unconvincing."⁶¹ Another leading text characterized *Hammer*'s distinction between harmful and harmless goods as "an unconvincing exercise in judicial ingenuity,"⁶² while Professor David Currie concluded that "[i]t is hard to believe that

⁵⁷ See William Carey Jones, *The Child Labor Decision*, 6 Cal L Rev 395, 408–11 (1918); Gordon, 32 Harv L Rev at 48–56 (cited in note 54); Powell, 3 Southern L Q at 189–97 (cited in note 54); Comment, *Constitutional Law—Federal Child Labor Law Invalid*, 27 Yale L J 1092, 1093 (1918); Comment, *Child Labor Law Case—Commerce Power of Congress and Reserved Powers of the States*, 17 Mich L Rev 83, 86–87 (1918); Henry Wolf Bikle, *The Commerce Power and Hammer v. Dagenhart*, 67 U Pa L Rev 21, 29–31 (1919). The criticism continued in the 1920s, see William A. Sutherland, *The Child Labor Cases and the Constitution*, 8 Cornell L Q 338, 341, 343–48 (1923); and the 1930s, see Edward S. Corwin, *Congress's Power to Prohibit Commerce: A Crucial Constitutional Issue*, 18 Cornell L Q 477, 494–96 (1933); John Dickinson, "Defect of Power" in *Constitutional Law*, 9 Temple L Q 388, 395 (1934).

⁵⁸ Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 249–50 (Aspen, 2d ed 2002).

⁵⁹ Erwin Chemerinsky, *Constitutional Law* 117 (Aspen, 2001). Another scholar archly surmised that "[i]t turned out that the Court was more interested in suppressing moral deviants than economic malefactors." Lucas Scot Powe, *The Supreme Court and the American Elite 1789–2008* 183 (Harvard, 2009).

⁶⁰ Laurence H. Tribe, 1 *American Constitutional Law* 828 n 10 (Foundation, 3d ed 2000).

⁶¹ Id.

⁶² Alfred Kelly, Winfred A. Harbison, and Herman Belz, 2 *The American Constitution: Its Origins and Development* 447 (W. W. Norton, 7th ed 1991).

the majority found its own distinctions persuasive.”⁶³

Such scholarly disenchantment with this principle proceeds in no small measure, I suggest, from the fact that Justice Day presented it as a principle of federalism that could be derived from the Commerce Clause alone. As Justice Holmes argued persuasively in dissent, it could not. But we should not conclude from this that contemporary lawyers would have agreed that the principle could not be derived from the Constitution. For Justice Day was characterizing as a principle of federalism what was in fact a principle of substantive due process.⁶⁴

I will refine this idea as the discussion progresses, but here is the basic structure of the underlying thought: Proper exercises of a state’s police power that protected public health, safety, or morals did not deprive anyone of a constitutionally protected liberty or property right without due process, because no one had a constitutionally protected right to harm the health, safety, or morals of the public. The same was true of exercises of congressional power prohibiting uses of the channels of interstate commerce that inflicted harm on public health, safety, or morals. But legislation that restricted the use of lawfully acquired property without such an adequate justification grounded in the protection of the public deprived its owner of his property without due process of law. To be sure, an employer in North Carolina, for example, had no constitutionally protected right to employ children—the state legislature could prohibit child labor without violating the Fourteenth Amendment.⁶⁵ But if North Carolina elected to permit the employment of children in its factories, the employer of child labor in that state acquired vested property rights in the product of that labor under the law of his state. And Congress had no power to displace that local law of property with its own law of property. Congress could exercise its commerce power to prevent the interstate shipment of that product if such a prohibition were necessary to prevent harms to interstate commerce itself, or to the inhabitants of other states, because the owner had no constitu-

⁶³ David P. Currie, *The Constitution in the Supreme Court: The Second Century 1888–1986* 98 (Chicago, 1990).

⁶⁴ See Thomas Reed Powell, *Constitutional Law in 1917–1918*, I, 13 Am Pol Sci Rev 47, 48 (1919) (“No fault was found with the statute under the due-process clause of the Fifth Amendment.”).

⁶⁵ *Sturges and Burn Manufacturing Co. v Beauchamp*, 231 US 320 (1913).

tionally protected right to use his lawfully acquired property so as to inflict such harms. As the Lottery and Pure Food and Drugs Cases demonstrated, the fact that such a prohibition had a collateral effect on levels or conditions of production in the sending state did not vitiate the constitutionality of the federal regulation. But Congress could not prohibit such interstate shipment if it were not necessary to prevent such a harm, because to do so would be to deprive the owner of his lawfully acquired property without due process of law. Only if the Due Process Clause were violated would the collateral effect on production be considered problematic; and, indeed, that collateral effect was superfluous so far as constitutional analysis was concerned, because the due process violation alone condemned the statute. In truth, then, the restriction on congressional power to prohibit interstate shipment of products was derived neither from the internal limitations of the Commerce Clause, nor from whatever affirmative limitations the Tenth Amendment might impose, but instead from the limitations of the Due Process Clause of the Fifth Amendment.⁶⁶

This view was articulated with varying degrees of clarity, awareness, and sophistication in a variety of settings well before *Hammer* was decided. Examination of a controversy in the state courts may help us to see the due process issue more clearly. In 1894, in an effort to reduce the competition of goods made by convict labor with those made by free laborers, the voters of New York adopted an amendment to the state constitution adopting the "state-use" system of convict labor. Under the terms of the amendment, the state was forbidden to hire out the labor of its convicts to private parties, and goods made by convicts in state institutions could be disposed of only to the state and its political subdivisions, and not placed on the private market. Goods produced by convicts incarcerated in the prisons of sister states continued to enter New York markets, however, and to compete with goods made by free labor in New York and elsewhere. In 1896 the New York legislature responded by enacting a statute making it a misdemeanor to sell or expose for sale goods made in any prison without attaching to them a label disclosing them to be "convict-made," and revealing

⁶⁶ Thomas Reed Powell did not see the complete structure of the argument clearly, but he did recognize that the majority's position was "built upon a due-process distinction, and then unwarrantably transferred to the commerce clause." Powell, 3 Southern L Q at 194 (cited in note 54).

the name of the prison in which they had been produced. The state regime thus prohibited the sale on the private market of convict-made goods produced in New York, and required the labeling of convict-made goods produced outside the state. A man named Hawkins was charged with violating the statute by offering for sale a scrub brush produced in an Ohio prison without the label required by statute. Hawkins maintained that the statute violated the dormant Commerce Clause and deprived him of property without due process of law. With respect to each issue, the question was whether the New York statute constituted a legitimate exercise of the state's police power to protect public health, safety, morals, and welfare.⁶⁷

Both the Appellate Division and the Court of Appeals held that the statute was not such a legitimate exercise of the state's police power. For the Appellate Division, Judge Putnam observed that it had not been alleged in the indictment "that the brush was not a good one; was not the same, in all regards, as that made by other than convict labor."⁶⁸ Nor was it "claimed to have been an inferior or deceptive article." It was "an ordinary merchantable scrub brush," and not an article "clearly injurious to the lives, health, or welfare of the people."⁶⁹ Judge Dennis O'Brien's opinion for the Court of Appeals agreed that the brush was not of inferior quality, and observed that there was no "pretense that the act was passed to suppress any fraudulent practice, or that any such practice existed with respect to such goods."⁷⁰ O'Brien therefore maintained that the statute violated both the dormant Commerce Clause and the Due Process Clause of the Fourteenth Amendment. "The scrubbing brush in question was beyond all doubt an article of property in which the defendant could lawfully deal," O'Brien insisted. Yet the statute forbade him to sell it "except upon the condition that he shall attach to it a badge of inferiority which

⁶⁷ *People v Hawkins*, 51 NE 257 (NY 1898).

⁶⁸ *People v Hawkins*, 47 NY Supp 56, 57 (NY App Div 1897).

⁶⁹ *Id.* at 60. An advisory opinion issued by the Supreme Judicial Court of Massachusetts on a proposed labeling statute reached the same conclusion. The bill went "beyond a lawful exercise of the police power," the Justices agreed, because there was "nothing wrong in the nature of things in prison-made goods." Such goods were "not unsanitary or so inferior in quality that their sale would constitute a fraud on the public." Were there any differences in the "grade of workmanship," they "would be as apparent without branding as in like products made in private shops." *In re Opinion of the Justices*, 98 NE 334, 335-36 (1912).

⁷⁰ *Hawkins*, 51 NE at 258.

diminishes the value and impairs its selling qualities.”⁷¹ The statute thus interfered with “the right to acquire, possess, and dispose of property,” and the state could not impair the value of such lawfully acquired property “by hostile legislation without a violation of the constitutional guaranties for the protection of property.”⁷²

Thus, the state’s police power was restricted to preventing harms occurring within its own territorial, legislative jurisdiction.⁷³ A state like New York might disagree with the policy of employing prisoners in the production of goods, or of employing children under the age of 16, and it was free to prohibit these activities within its own borders. New York might also believe that the terms and conditions of such employment in sister states inflicted upon those so employed objectionable harms that could be and ought to be stopped. But the Fourteenth Amendment’s Due Process Clause restrained New York from seeking to prevent those harms or to influence the prison and child-labor policies pursued in sister states by forbidding or adversely regulating the sale of the products of that labor, unless those products harmed the health, safety, morals, or welfare of New York’s inhabitants. And as Congressman Steven V. White of New York maintained in reluctantly opposing a federal bill prohibiting the interstate shipment of convict-made goods in 1888, Congress was similarly constrained by the Fifth Amendment from using its commerce power to prevent such employment harms inflicted outside its legislative jurisdiction, and thereby to shape the employment policies pursued in the several states. “The State which properly punishes its criminals can properly employ them at labor, and the product of that labor is property of equal dignity and consideration under the Constitution with any other product of man’s labor,” White argued. The bill was

⁷¹ *Id.*

⁷² *Id.* at 259–60.

⁷³ *Bonaparte v Tax Court*, 104 US 592, 594 (1881); *Allgeyer v Louisiana*, 165 US 578 (1897); *Nielsen v Oregon*, 212 US 315 (1909); *Cobens v Virginia*, 19 US 267, 427–28 (1821); *New York Life Insurance Co. v Head*, 234 US 149, 161 (1914); Westel Woodbury Willoughby, *Constitutional Law of the United States* 254 (Baker Voorhis, 2d ed 1929); Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich L Rev 1865, 1884–91, 1894–95, 1899–1900 (1987); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum L Rev 249, 251, 316–22, 331, 336 (1992); Willis L. M. Reese, *Legislative Jurisdiction*, 78 Colum L Rev 1587, 1587–94 (1978); Michael G. Collins, *October Term, 1896—Embracing Due Process*, 45 Am J Legal Hist 71, 87 (2001); James Y. Stern, *Choice of Law, the Constitution, and Lochner*, 94 Va L Rev 1509, 1514–17 (2008).

therefore unconstitutional “because it takes lawful property from its owner without due process of law.”⁷⁴

Many Progressive Era commentators arrived at the same assessment of congressional bills proposing to prohibit the interstate shipment of goods made by firms employing child labor. Even Thomas Parkinson, a professor of law at Columbia, counsel to the National Child Labor Committee (NCLC), and an energetic defender of the Keating-Owen law, recognized that “[t]he individual has . . . a right to seek an interstate market, and this right Congress cannot take from him, except by due process.”⁷⁵ In 1907, when Senator Albert J. Beveridge of Indiana first introduced a bill to prohibit the interstate shipment of child-made goods, Professor Andrew Alexander Bruce wrote in the *Michigan Law Review* that under the Due Process Clause “[t]he right to liberty and property would certainly include the continuance of the right of interstate traffic in goods which were in themselves harmless and innocent.”⁷⁶ That same year George Talley wrote of the Beveridge bill in the *Chicago Legal News*, “Since the fifth amendment was passed, there is no question but what the commerce clause was limited to the full extent of the amendment.”⁷⁷ “To restrict one man’s goods and allow the sale of others, where they are all equally innocuous, is the deprivation of ‘liberty and property.’”⁷⁸ In 1917 Professor Frederick Green wrote in the *Illinois Law Bulletin* that the Keating-Owen Law “should be held invalid as denying due process of

⁷⁴ 19 Cong Rec 4528 (May 22, 1888).

⁷⁵ Parkinson, 31 Pol Sci Q at 534 (cited in note 54). See also 41 Cong Rec 1870 (January 28, 1907) (remarks of Sen. McCumber). For general recognition that the commerce power was limited by the Fifth Amendment and could not be exercised arbitrarily, see Parkinson, 31 Pol Sci Q at 532, 534, 539–40 (cited in note 54); Powell, 3 Southern L Q at 192–94, 200 (cited in note 54); Gordon, 32 Harv L Rev at 54 (cited in note 54); Bikle, 67 U Pa L Rev at 31, 35 (cited in note 57); Jones, 6 Cal L Rev at 408 (cited in note 57); B. L., Comment, *The Child Labor Law*, 26 Yale L J 242, 244 (1916); Edgar Watkins, *Is the Federal Child Labor Statute Constitutional?* 23 Case & Comm 906, 910 (1917); Jasper Yeates Brinton, *The Constitutionality of a Federal Child Labor Law*, 62 U Pa L Rev 487, 499–502 (1914); Robert B. Troutman, *Constitutionality of a Federal Child Labor Law*, 26 Green Bag 154, 154, 158–59 (1914). See also Parkinson, 16 Colum L Rev at 380–85 (cited in note 54); Philander C. Knox, *The Development of the Federal Power to Regulate Commerce*, 17 Yale L J 139, 146–47 (1908).

⁷⁶ Andrew Alexander Bruce, *The Beveridge Child Labor Bill and the United States as Parens Patriae*, 5 Mich L Rev 627, 636 (1907).

⁷⁷ George A. Talley, *Interstate Commerce and the Police Power*, 40 Chi Legal News 12, 13 (1907).

⁷⁸ *Id.* at 12.

law.”⁷⁹ “To prohibit an employer to ship articles into another state because they were made by children, is to deprive a man, who has done nothing but what he was entitled to do, of liberty to do a harmless, and presumably a beneficial act essential to the ordinary use of his property and the ordinary prosecution of his business.”⁸⁰ That same year Professor D. O. McGovney maintained in the *Iowa Law Bulletin* that “Congress may not absolutely prohibit the carriage in interstate commerce of innocuous commodities, being restrained therefrom by the Fifth Amendment.”⁸¹

Such criticisms also were voiced during the congressional floor debates over the Keating-Owen Act. Representative Samuel J. Nicholls of South Carolina charged that the bill was “unquestionably a violation of that clause of the Constitution which guarantees that no citizen can be deprived of his property without due process of law,” “because of what value would cotton goods be to the manufacturer or to the purchaser who had purchased them for the purpose of selling them if he had absolutely no way to dispose of them?”⁸² Nicholls reminded his colleagues of the principle that Judge O’Brien had articulated in *Hawkins*: “The citizen can not be deprived of his property without due process of law. Any law which annihilates its value, restricts its use, or takes away any of its essential attributes comes within the purview of this limitation.”⁸³ The Keating-Owen bill proposed to deprive the citizen of his property without due process by putting him “in such a position that his property is absolutely worthless to him because he has no way of selling and delivering same.”⁸⁴ Cases upholding the exclusion of articles from interstate commerce all “rested upon the principle that the articles upon which an embargo was laid never had the right to enter commerce or to use its instrumentalities,” explained Representative Walter Allen Watson of Virginia.⁸⁵ Such a principle would not permit Congress to “arbitrarily deny admission to interstate commerce of a bolt of cloth,”

⁷⁹ Frederick Green, *The Child Labor Law and the Constitution*, 1 Ill L Bulletin 3, 7 (1917).

⁸⁰ Id at 6. See also id at 12, 23.

⁸¹ D. O. McGovney, *The Webb-Kenyon Law and Beyond*, 33 Iowa L Bulletin 145, 149 (1917). See also id at 149.

⁸² 53 Cong Rec 1583 (January 26, 1916).

⁸³ Id.

⁸⁴ Id.

⁸⁵ Id at 1589.

“sound in itself, not misbranded, of use and value, and incapable of affecting the peace and morals of those to whom it is consigned,” simply because it had been made by a child in North Carolina.⁸⁶ Asked by Senator William Borah of Idaho whether an employer prohibited from shipping his child-made goods in interstate commerce would have a claim under the Fifth Amendment, Senator Frank B. Brandegee of Connecticut responded, “I claim that absolutely. . . . I think the fifth amendment would protect the property, innocent in itself, in interstate transportation against the prohibitions of this bill.”⁸⁷ To deny such products admission to interstate commerce, Brandegee insisted, “would be the taking of property without compensation.”⁸⁸

Years after the Court decided *Hammer*, scholars and lawyers would continue to translate Justice Day’s confused majority opinion into the appropriate analytic idiom. As Professor William A. Sutherland wrote in the *Cornell Law Quarterly* in 1923, “the real trouble which the court had in mind” in *Hammer*, “which it did not express and which has not been clearly expressed in any of the criticisms of the decision which we have seen, was substantially this: The statute is a regulation of interstate commerce. But the commodity which it seeks to deny the privilege of carriage in interstate commerce is an absolutely harmless commodity. The statute, therefore, arbitrarily deprives the defendant of liberty and property and is in violation of the fifth amendment.”⁸⁹ Sutherland’s analysis was echoed by New York attorney Milward Martin in 1935: “instead of reasoning, as the Court did in the *Child Labor Case*, that the power to regulate interstate commerce does not include power to exclude harmless matter from such commerce, it would seem more accurate to say that the delegated power to regulate interstate commerce gives the Congress sovereign power over such commerce, but that that power is limited by the Bill of Rights; that the Congress may not close the channels of interstate commerce to inherently harmless matter, because to do so would

⁸⁶ *Id.*

⁸⁷ *Id.* at 12283 (August 8, 1916).

⁸⁸ *Id.*

⁸⁹ Sutherland, 8 *Cornell L Q* at 343 (cited in note 57).

be confiscatory hence violative of the due process requirements of the Fifth Amendment.”⁹⁰

Just four years before *Hammer* was decided, Princeton University political science professor Edward S. Corwin published a famous article in the *Michigan Law Review* in which he proclaimed that the “Doctrine of Vested Rights” was “The Basic Doctrine of American Constitutional Law.”⁹¹ That “fundamental” doctrine treated “any law impairing *vested rights*, whatever its intention,” as “void.”⁹² It was that “basic doctrine,” only tacit in the opinion but ubiquitous in the contemporary legal culture, that guided the Justices in the *Hammer* majority.

B. RECONCILING THE PRECEDENTS

Before proceeding further, it is worth pausing to clarify two points. First, the contention here is not that the Justices in the *Hammer* majority and others articulating the “harmful goods” rationale were necessarily thinking explicitly in the vested rights/due process terms that I have outlined. Had they actually expressed themselves more clearly in those terms, there would be little need to offer such an interpretation of their views. I contend only that the terms that I have sketched are those in which the Justices would best have explained what they intuited, had they thought more clearly. That they did not so express themselves may be attributable in part to the fact that the party challenging the Keating-Owen Act’s constitutionality did not brief the case in these terms. But as the sources that I have canvassed demonstrate, there were several sophisticated contemporary legal thinkers who did engage in clear and serious reflection about the doctrine, and expressed the ideas in precisely the terms that I have identified.

The second point, which I will elaborate in future work, is that the vested rights/due process reading of *Hammer* enables us to reconcile the otherwise puzzling line of cases involving federal prohibitions on the interstate transportation of disfavored items. Consider first the case of alcoholic beverages. There was no doubt that, because of the threat that their use posed to public health,

⁹⁰ Milward W. Martin, *Constitutionality of the Securities Exchange Act of 1934*, 21 ABA J 811, 813 (1935).

⁹¹ Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 Mich L Rev 247 (1914).

⁹² *Id.* at 247, 255.

safety, and morals, the sale of intoxicants could be prohibited without depriving their owners of any vested right protected by the Due Process Clause.⁹³ Not all states prohibited their production and sale, however, and in 1890 the Supreme Court held that the dry state of Iowa could not prohibit the sale of beer shipped in from the wet state of Illinois so long as the product remained in its “original package.” While the product was still in transit, or remained in its original package, the Court held, it remained within the exclusive legislative jurisdiction of Congress, and beyond the reach of the destination state’s police power.⁹⁴ This ruling resulted in the opening of a series of “original package saloons” along the Illinois-Iowa and Missouri-Kansas borders, where thirsty Hawkeyes and Jayhawks could purchase their beverages of choice unperturbed by the meddling police powers of their native states.⁹⁵ One reaction of Congress was to enact the Webb-Kenyon Act of 1913, which prohibited the interstate shipment of liquor into a state where it was intended to be received, possessed, or sold in violation of state law.⁹⁶ The Supreme Court upheld the statute against constitutional challenge in 1917, holding that, because of its “exceptional nature,” Congress could absolutely prohibit the interstate shipment of intoxicating liquor.⁹⁷ The owner of liquor acquired in a wet state had no vested right to inflict the harm of its sale in another state.

Similarly, there was no doubt that the sale of lottery tickets could be prohibited by a competent legislature without impairing any vested rights of their owners.⁹⁸ By the time that Congress enacted the Lottery Act in 1895, in fact, lotteries had been outlawed in every state of the Union except for Delaware, which followed suit in 1897.⁹⁹ When the Court decided the *Lottery Case*

⁹³ *Mugler v Kansas*, 123 US 623 (1887); *Boston Beer Co. v Massachusetts*, 97 US 25 (1877).

⁹⁴ *Leisy v Hardin*, 135 US 100 (1890).

⁹⁵ Richard F. Hamm, *Shaping the Eighteenth Amendment: Temperance Reform, Legal Culture, and the Polity, 1880–1920* 70–73 (North Carolina, 1995).

⁹⁶ Webb-Kenyon Act, 37 Stat 699.

⁹⁷ *Clark Distilling Co. v Western Maryland Railway Co.*, 242 US 311, 325–26, 331–32 (1917).

⁹⁸ *Stone v Mississippi*, 101 US 814 (1879).

⁹⁹ See United States Department of Justice, *The Development of the Law of Gambling: 1776–1976* 87, 272–73, 311–14, 337, 396–98 (1977); John Samuel Ezell, *Fortune’s Merry Wheel: The Lottery in America* 241–70 (Harvard, 1960); 26 Cong Rec 4313 (May 2, 1894) (remarks of Sen. Gorman); id at 4314 (remarks of Sen. Hoar); 27 Cong Rec 3013 (March 1, 1895) (remarks of Mr. Broderick).

in 1903, therefore, there was no state in the Union in which one could acquire a vested right in a lottery ticket.¹⁰⁰ But even were one or more states to defect from this policy consensus, the interstate shipment of a lottery ticket acquired in such a state could inflict a harm to morals outside that state's legislative jurisdiction. Indeed, it might inflict that harm if purchased by a person while the ticket remained in actual interstate transit, or it might inflict that harm while it remained in its original package and thus within Congress's legislative jurisdiction.¹⁰¹ As Justice Harlan wrote for the majority, Congress was "the only power competent" to meet and crush "an evil of such an appalling character, carried on through interstate commerce."¹⁰² If a state could exercise its police power so as to suppress lotteries within its own limits, asked Justice Harlan, then "why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one state to another?"¹⁰³ "As a State may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its own limits, so Congress, for the purpose of guarding the people of the United States against the 'widespread pestilence of lotteries' and to protect the commerce which concerns all the States, may prohibit the carrying of lottery tickets from one State to another."¹⁰⁴

Harlan recognized that the power to prohibit interstate transportation "cannot be deemed arbitrary, since it is subject to such limitations or restrictions as are prescribed by the Constitution. This power, therefore, may not be exercised so as to infringe any rights secured or protected by that instrument."¹⁰⁵ But the Lottery Act did not present such a case. For as Harlan observed, "surely it will not be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the States an element that will be confessedly injurious to the public morals."¹⁰⁶ "It is a kind of traffic

¹⁰⁰ See *Champion v Ames*, 188 US at 357.

¹⁰¹ *Leisy*, 135 US at 100; *Schollenberger v Pennsylvania*, 171 US 1 (1898).

¹⁰² *Champion*, 188 US at 357–58.

¹⁰³ *Id* at 356.

¹⁰⁴ *Id* at 357.

¹⁰⁵ *Id* at 362–63.

¹⁰⁶ *Id* at 357.

which no one can be entitled to pursue as of right.”¹⁰⁷ Because no one had a right to inflict such a harm, the interstate transportation of lottery tickets could be forbidden by Congress without depriving anyone of vested rights protected by the Due Process Clause.

A similar analysis applies to the Pure Food and Drugs Act. As one of the measure’s principal supporters observed on the floor of the Senate in 1906, “[n]early every State in the Union already has a pure-food law or a code pertaining to the introduction of pure food.”¹⁰⁸ But even if an outlier state permitted one to acquire a vested right in adulterated or misbranded food or drugs, that vested right did not entail the privilege of inflicting harm to the health of persons outside that state’s jurisdiction, nor of defrauding such persons through deceptive labeling. Congressmen feared that the protection of the original package doctrine would permit purveyors of such items to inflict such harms while the items remained in the federal legislative jurisdiction and thus beyond the regulatory authority of the destination state. “[I]n the construction of the interstate-commerce law,” explained Senator Porter J. McCumber of North Dakota, “it has been declared that the term ‘commerce’ not only covers an article in its transit from one State to another, but it protects and shields that article until it is sold in original packages in the State of its consumption . . . the root of the evil is planted in that territory over which the State has no control and over which Congress has complete control—that is, the jurisdiction over interstate commerce.”¹⁰⁹ Under the original package doctrine, adulterated or mislabeled food and drugs “may be shipped into a State contrary to the laws of the State and may be sold in the original unbroken packages in that State.”¹¹⁰ Accordingly, McCumber concluded, Congress alone could protect the people of destination states from the sale of such goods within the exclusive federal jurisdiction. “The States are helpless under the law. Under the Constitution, as it has been construed by the Supreme Court of the United States, these goods may go from one State to another in unbroken packages, and it is not until the

¹⁰⁷ *Id.* at 358.

¹⁰⁸ 40 Cong Rec 1216 (January 19, 1906) (remarks of Sen. McCumber). See also *id.* at 1415 (January 23, 1906); *id.* at 2655 (February 19, 1906); *id.* at 2761 (February 21, 1906); *id.* at 895 (January 10, 1906) (remarks of Sen. Heyburn).

¹⁰⁹ 40 Cong Rec 1416 (January 23, 1906) (remarks of Sen. McCumber).

¹¹⁰ *Id.* at 1217 (January 19, 1906).

package is broken that the jurisdiction of the State attaches." It was therefore imperative that Congress "afford relief against the impositions that come from one State to another."¹¹¹ The owners of such goods had no vested rights to inflict such impositions, and only Congress could prevent such harms within its own exclusive legislative jurisdiction.

The vested rights/due process account of the doctrine also explains decisions upholding federal statutes prohibiting the interstate transportation of goods acquired in violation of the law of the state of origin. For example, the Lacey Act,¹¹² which was upheld by the Eighth Circuit in *Rupert v United States*,¹¹³ prohibited the interstate shipment of game taken in violation of the law of the state in which the poaching took place. Congressional prohibition of such interstate shipment did not deprive the possessor of the game of any vested right protected by the Due Process Clause, because the manner in which he had taken the game prevented him from acquiring any property in it. As the court put it, "[t]he individual having no ownership in the game . . . it does not become the general subject of commerce free from all inhibitions."¹¹⁴ Similarly, the Connally Act,¹¹⁵ which was repeatedly upheld by the Fifth Circuit¹¹⁶ and assumed to be valid by the Supreme Court of the United States,¹¹⁷ prohibited the interstate transportation of "hot oil," that is, petroleum "produced or withdrawn

¹¹¹ Id at 1417 (January 23, 1906). See also id at 1216 (January 19, 1906); id at 895 (January 10, 1906) (remarks of Sen. Heyburn); id at 2656, 2657 (February 19, 1906) (remarks of Sen. Money); C. C. Regier, *The Struggle for Federal Food and Drugs Legislation*, 1 L. & Contemp. Probs 3, 5 (1933). Whether the principle of *Leisy* in fact extended to the articles regulated by the bill was a matter of debate in the House, see 40 Cong. Rec. 9049-51 (June 23, 1906) (remarks of Mr. Bartlett), and the Senate, see id at 2758-67 (February 21, 1906) (remarks of Sen. Bailey); but the bill ultimately passed the House by a vote of 241-17, id at 9075-76 (June 23, 1906), and the Senate by a similarly lopsided vote of 63-4, id at 2773 (February 21, 1906).

¹¹² An Act to Enlarge the Powers of the Department of Agriculture, Prohibit the Transportation by Interstate Commerce of Game Killed in Violation of Local Laws, and for Other Purposes ("Lacey Act"), 31 Stat. 187 (1900).

¹¹³ 181 F. 87 (8th Cir. 1910).

¹¹⁴ Id at 90.

¹¹⁵ An Act to Regulate Interstate and Foreign Commerce in Petroleum and Its Products by Prohibiting the Shipment in Such Commerce of Petroleum and Its Products Produced in Violation of State Law, and for Other Purposes ("Connally Act"), 49 Stat. 30 (1935).

¹¹⁶ *The President of the United States v. Skeen*, 118 F.2d 58 (5th Cir. 1941); *Hurley v. Federal Tender Board No. 1*, 108 F.2d 574 (5th Cir. 1939); *Griswold v. The President of the United States*, 82 F.2d 922 (5th Cir. 1936).

¹¹⁷ *United States v. Powers*, 307 U.S. 214 (1939).

from storage in excess of the amount permitted . . . by any State law.” The law of the state of Texas, the primary site of the wildcat drilling at which the law was aimed, made such oil contraband, prohibited its acquisition, purchase, sale, or transportation, and made all such unlawful oil forfeit to the state.¹¹⁸ Because the producer of such petroleum had taken possession of the oil in violation of state law and had acquired no right to alienate the product under applicable state law, the prohibition on interstate shipment did not deprive him of any vested right protected by the Due Process Clause.

Finally, the vested rights/due process account also reconciles the Court’s decision in *Brooks v United States*,¹¹⁹ which upheld the Dyer Act of 1919.¹²⁰ That statute made it a federal crime to transport or cause to be transported in interstate commerce “a motor vehicle, knowing the same to be stolen.” Chief Justice Taft’s opinion for a unanimous bench brusquely rejected the constitutional challenge to the act, characterizing the interstate transportation of stolen cars as “a gross misuse of interstate commerce.”¹²¹ “Congress can certainly regulate interstate commerce,” Taft insisted, “to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other States from the State of origin.”¹²²

The contrast between *Brooks* and *Hammer* has long perplexed legal commentators. Professor Robert Post, for example, finds inadequate Taft’s effort to distinguish the Dyer Act from the Child Labor Law on the ground that the latter was “really not a regulation of interstate commerce”¹²³ but instead was “a congressional attempt to regulate labor in the State of origin, by an embargo on its external trade,’ banning from interstate commerce goods that ‘were harmless, and could be properly transported without injuring any person who either bought or used them.’”¹²⁴ As Pro-

¹¹⁸ See *Griswold*, 82 F2d at 923–24.

¹¹⁹ 267 US 432 (1925).

¹²⁰ National Motor Vehicle Theft Act, 41 Stat 324.

¹²¹ *Brooks*, 267 US at 439.

¹²² *Id* at 436.

¹²³ *Id* at 438.

¹²⁴ Robert C. Post, *Federalism in the Taft Court Era: Can It Be Revived?* 51 Duke L J 1513, 1575 (2002), quoting *Brooks*, 267 US at 438.

fessor Post observes, “a similar characterization could be applied to the [Dyer Act], which was a congressional effort to regulate theft in the state of origin by banning from interstate commerce vehicles that were harmless in themselves.”¹²⁵ The Dyer Act “was not,” as Taft suggested, “meant to prevent ‘the spread of any evil or harm to the people of other States from the State of origin,’” Professor Post maintains, but instead, like the Child Labor Law, was designed “to prevent harms within the state of origin.”¹²⁶ Similarly, Professor David Currie noted that Chief Justice Taft “made no effort to show that stolen cars were harmful to anyone in the state to which they were transported. He thus left *Hammer* dangling without visible support and exposed the Court to a serious charge of inconsistency.”¹²⁷ Professor Paul Murphy scored *Brooks* as another example of “constitutional inconsistency,” and criticized the Court for “ignoring the obvious similarity between the measure and the first Child Labor Law,” both of which prohibited interstate transportation of “things not in themselves harmful.”¹²⁸ Professors Melvin Urofsky and Paul Finkelman likewise observe that the Dyer Act “bore a striking resemblance to the Child Labor Law, which had also prohibited the movement of things that were not in themselves harmful.” The contrast between the outcomes in the two cases suggests to these scholars that “[f]ederal authority could thus be extended without regard to legal fine points to achieve a socially desirable end, provided the courts approved of the goal; if they did not, then legal fine points could become significant limits on state and federal power.”¹²⁹

These scholars understandably express frustration with the failure of the Court’s opinion to do a satisfactory job both of distinguishing *Hammer* and of identifying an extraterritorial harm inflicted by interstate auto theft. A private memorandum located in

¹²⁵ Post, 51 Duke L J at 1575 (cited in note 124).

¹²⁶ Id n 222, quoting *Brooks*, 267 US at 436.

¹²⁷ Currie, *The Constitution in the Supreme Court* at 176 (cited in note 63). Professor Currie nevertheless recognized that “there may be more to *Brooks* than a mere judicial conviction that car theft is worse than child labor,” noting that the Dyer Act reinforced state policy rather than undermining state autonomy. Id. Professor Currie also suggested that Taft might have argued “that buyers in the receiving state would be injured by the possibility of having to return the vehicles to their rightful owners without compensation, but he did not.” Id n 34.

¹²⁸ Paul L. Murphy, *The Constitution in Crisis Times 1918–1969* 61–62 (Harper, 1972).

¹²⁹ Melvin I. Urofsky and Paul Finkelman, *2 A March of Liberty: A Constitutional History of the United States* 705 (Oxford, 3d ed 2011).

Taft's papers at the Library of Congress shows him grappling with the issue more frankly than he did in the published opinion. "If the result of interstate transportation will be to spread some harmful matter or product," Taft wrote, "Congress may interfere without violating the Tenth Amendment. The facilities of interstate commerce may be withdrawn from those who are using it to corrupt others physically or morally. But if the transportation is being used to transport something harmless in itself and not calculated to spread evil, like cotton cloth, Congress may not prohibit its interstate transportation, although its inception may have been in some evil which is the legitimate object of the police power, such as child labor." Taft next proceeded to distinguish earlier precedents from *Hammer* on this basis. "[T]he interstate carriage of lottery tickets will communicate the gambling fever, of obscene literature will communicate moral degeneracy, of impure food will endanger health, [and] of diseased cattle will infect local cattle. . . ." In each of these instances, interstate transportation of the item inflicted a harm outside the state of origin. The "justification" for the doctrine, Taft concluded, "must be that Congress can prohibit the interstate spread of an evil thing, although it cannot prohibit the spread of something harmless in itself in order to suppress an evil which is properly the object of state police regulation."¹³⁰

Taft then confronted the question of the doctrine's application to the Dyer Act. "At first I had a little difficulty with stolen automobiles," he confessed, "as the chief evil in connection therewith is the stealing and that of course is over before the machine takes on its character as a stolen automobile. This makes it look something like *Hammer v. Dagenhart*." But the Chief Justice had gotten over that concern, he explained, for "a stolen automobile is a canker. It attracts shady and disreputable individuals and leads to secret and underhanded dealings. Certainly it is not *ultra vires* for Congress to prohibit the interstate communication of this canker."¹³¹

For whatever reasons, these colorful meditations on the similarities between a stolen car and an open sore did not find their way into the Court's published opinion. But a moment's reflection

¹³⁰ *Brooks v. United States*, in Reel 614 *William Howard Taft Papers* 6–7 (Library of Congress).

¹³¹ *Id.* at 7.

on the analogy to the Lacey Act might have enabled Taft to see that the distinction he was groping for was grounded in due process. Just as the poacher acquired no “ownership” in game taken in violation of state law, so neither did one who stole a motor vehicle or knowingly took from the thief acquire any vested right in the pilfered automobile.¹³² Congressional prohibition of interstate transportation of a stolen vehicle therefore did not deprive anyone of a property right protected by the Due Process Clause. Indeed, as Taft pointed out in his opinion, the Dyer Act properly punished the interstate transportation of stolen cars “because of its harmful result and its defeat of the property rights of those whose machines against their will are taken into other jurisdictions.”¹³³ Rather than impairing vested rights, the Dyer Act protected them.

Each of these cases, therefore, presented two analytic questions. First, did the party prohibited from transporting the item have a vested property right in the thing to be transported? and, second, would that transportation inflict a cognizable harm outside the state of origin? If the answer to the first question were negative, prohibition of the item’s interstate shipment would be constitutionally unproblematic, for it would not deprive anyone of property without due process. And the same would be true if the answer to the second question were affirmative, for no one had a due process right to use his property in a manner that would be harmful to others. The inquiry into whether a particular good was harmful or harmless was merely a way of formulating the second question. But a fixation on that inquiry could obscure the fact that the first question was analytically anterior.

C. DUE PROCESS AND COMPETITIVE INJURY

The critical question in *Hammer*, then, was whether the interstate shipment of a child-made good in which an owner had acquired a vested right under the law of his state inflicted a cognizable harm outside the legislative jurisdiction of that state. Here again, the convict-made goods analogy is illuminating. In his dissenting opinion in *Hawkins*, Judge Edward T. Bartlett insisted for himself and Judges Albert Haight and Alton B. Parker that convict-

¹³² See Jesse Dukeminier et al, *Property* 162 (Aspen, 7th ed 2010).

¹³³ *Brooks*, 267 US at 439.

made goods were not harmless or innocuous, and that their unrestricted sale in New York did in fact inflict a harm on its inhabitants. The labeling requirement, he maintained, constituted a legitimate exercise of the police power “to promote the public welfare and prosperity” by implementing “the deliberate policy of this state that free labor shall be protected from disastrous competition with the convict system, which pays to the workman no wages, and therefore finds little difficulty in supplanting the wage earner in the public markets.”¹³⁴ Similarly, in *Hammer*, government attorneys insisted that interstate shipment of goods made by employers of child labor, like the interstate shipment of lottery tickets, impure food, and misbranded drugs, was in fact harmful to the inhabitants of destination states.¹³⁵ They argued that interstate shipment of goods made by cheap child labor created “unfair competition”¹³⁶ with competing manufacturers in states where child labor had been “more rigorously restrained.”¹³⁷ Part of the underlying concern was that this competition would create pressure for the more child-protective states to lower their standards, resulting in harm to their juvenile populations.¹³⁸ As the appellant argued, “[t]here is no right to use the channels of interstate commerce to affect injuriously the health of the people in competing states . . . nor in unfair competition.”¹³⁹ And because such a competitive harm might result from the sale of the good in its original package, the harm was inflicted in the federal legislative jurisdiction. Indeed, the dormant Commerce Clause prevented a destination state from regulating the sale of out-of-state child-made goods still in their original packages,¹⁴⁰ and destination states typically would have no reliable way of determining which goods within their borders had been produced elsewhere by children.¹⁴¹

¹³⁴ *Hawkins*, 51 NE at 263.

¹³⁵ Brief for Appellant, *Hammer v Dagenhart*, No 704, *41–42, 44 (US filed Sept 26, 1917) (“*Hammer Brief*”).

¹³⁶ *Hammer*, 247 US at 254, 258, 273; *Hammer Brief* at *16–21, 45–48.

¹³⁷ *Hammer*, 247 US at 273.

¹³⁸ *Id* at 254; *Hammer Brief* at *23–36, 40; Gordon, 32 Harv L Rev at 55 (cited in note 54).

¹³⁹ *Hammer Brief* at *38. See also 53 Cong Rec 1585 (January 26, 1916) (remarks of Mr. Lenroot); *id* at 2011 (February 2, 1916) (remarks of Mr. Reavis).

¹⁴⁰ See *Leisy*, 135 US at 100; *Schollenberger*, 171 US 1; 53 Cong Rec App 227 (January 26, 1916) (extension of remarks of Mr. Keating).

¹⁴¹ 53 Cong Rec App 227 (January 26, 1916) (extension of remarks of Mr. Keating).

The federal government was therefore the only sovereign with effective legislative jurisdiction to prevent the child labor policies of one state from inflicting competitive harm in a neighboring state through the medium of interstate shipment.¹⁴²

Judge O'Brien rejected this argument from competitive harm in *Hawkins*, insisting that the state could not exercise its police power "to enhance the price of labor by suppressing, through the instrumentality of the criminal law, the sale of the products of prison labor."¹⁴³ And that principle, as the court would reaffirm a dozen years later, applied equally where the goods in question had lost their character as interstate commerce and become part of the general merchandise of the state, so that the dormant Commerce Clause was no longer implicated. *Phillips v Raynes*¹⁴⁴ involved a subsequently enacted New York statute requiring anyone displaying convict-made goods for sale to pay an annual license fee of 500 dollars. The *Raynes* court observed that the "obvious purpose" of the statute, "writ so plain that all may read," was "to prohibit by onerous and exasperating restrictions . . . the buying and selling within this state of convict-made goods." But setting this aside and treating the statute "purely as a revenue or tax law," the court found that its classification was "unreasonable and capricious." "That classification is based upon the origin of the goods dealt in, without regard to the quality or character or nature of the goods themselves." "If such classification be valid," the judges reasoned, "and if the purpose of the act, as is claimed, is to protect free labor from prison labor, why in these days of contest between organized and unorganized labor should not an act be passed which provided for such a license for selling all goods made in a shop which did not employ union labor, and then, if the advocates of a free shop were in power, repeal it, and provide for such license for all goods made in shops which employed union labor."¹⁴⁵ As

¹⁴² Id.

¹⁴³ *Hawkins*, 51 NE at 258.

¹⁴⁴ 120 NY Supp 1053, 1056–57 (NY App Div 1910), aff'd per curiam 92 NE 1097 (NY 1910).

¹⁴⁵ Id at 1057–58. Justice Harlan had made clear only two years earlier that such a discrimination between union and nonunion labor violated the Fifth Amendment's Due Process Clause. *Adair v United States*, 208 US 161, 169, 179–80 (1908). See also Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* 752–53 (Callaghan, 1904); Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 BU L Rev 881, 926–28 (2005).

Judge O'Brien concluded in *Hawkins*, "One state may have natural advantages for the production of certain goods by reason of location, climate, or the rate of wages over another state where it costs more to produce them, but the latter cannot by hostile legislation drive the cheaper-made goods out of its markets, even though such legislation would increase the wages of its own workmen."¹⁴⁶

Justice Day similarly rejected the notion that such "possible unfair competition" was a harm that Congress was empowered to prevent.¹⁴⁷ Echoing O'Brien's opinion in *Hawkins*, Day observed that "[m]any causes may co-operate to give one state, by reason of local laws or conditions, an economic advantage over others."¹⁴⁸ But "[t]he commerce clause was not intended to give to Congress a general authority to equalize such conditions."¹⁴⁹ For example, "[i]n some of the states laws have been passed fixing minimum wages for women, in others the local law regulates the hours of labor of women in various employments. Business done in such states may be at an economic disadvantage when compared with states which have no such regulations; surely, this fact does not give Congress the power to deny transportation in interstate commerce to those who carry on business where the hours of labor and the rate of compensation for women have not been fixed by a standard in use in other states and approved by Congress."¹⁵⁰

The difficulty in *Hammer*, therefore, was in the Court's broad construction of the Fifth Amendment limitation on the exercise of the commerce power. Such unfair competition resulting from different labor standards was not a cognizable harm authorizing federal restriction of lawfully acquired property rights. The story of the demise of *Hammer* is thus the story of the relaxation of this

¹⁴⁶ *Hawkins*, 51 NE at 261–62.

¹⁴⁷ *Hammer*, 247 US at 273.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* This view was anticipated by Professor Bruce in 1907: "[I]f we once establish the precedent and grant to Congress the unlimited right to destroy commerce, not as a punishment for crime, or because the thing transported is injurious, but because it enters into competition with other articles, or its method of manufacture, is not approved by the majority in Congress, we place in the hands of the national legislature a power which may prove absolutely subversive of individual liberty and of that freedom of commerce which the Constitution was, above all other things, created to preserve." Bruce, 5 Mich L Rev at 638 (cited in note 76).

Fifth Amendment limitation. And it is to that story that the *Carlene Products* case made a signal contribution.

III. CARLENE PRODUCTS IN CONGRESS

Filled milk, or compound milk, as its producers preferred to call it,¹⁵¹ was a form of condensed or evaporated skimmed milk, with the removed butterfat replaced by vegetable or coconut oil.¹⁵² The resulting product was indistinguishable in taste, odor, color, and consistency from condensed whole milk, and the difference could be detected only by expert chemical analysis.¹⁵³ The extracted butterfat could be sold for approximately 36 cents per pound, while coconut oil cost only about 12 cents per pound.¹⁵⁴ As a result, filled milk could be sold at a unit price considerably below that of name-brand condensed or evaporated milk such as Borden's Eagle brand.¹⁵⁵ Dairy farmers resented this competition from what they denounced as "the Coconut Cow of the South Seas Islands,"¹⁵⁶ and sought relief from state legislators. By 1921, eleven states, mostly in the north and west, had enacted legislation prohibiting or regulating the production and sale of filled milk,¹⁵⁷

¹⁵¹ Geoffrey P. Miller, *The True Story of Carlene Products*, 1987 Supreme Court Review 397, 398 n 10 (1987).

¹⁵² Filled-Milk Legislation, HR Rep No 67-355, 67th Cong, 1st Sess 1-2 (1921); Filled Milk, Hearings on H.R. 6215 Before the House Committee on Agriculture, 67th Cong, 1st Sess 112 (1921) ("House Hearings"); Filled Milk, Hearings on H.R. 8086 Before a Subcommittee of the Senate Committee on Agriculture and Forestry, 67th Cong, 2d Sess 2 (1922) ("Senate Hearings"); Brief for the Carlene Products Co., *United States v Carlene Products*, No 604, *68 (US filed Feb 28, 1938) ("Carlene Brief").

¹⁵³ HR Rep No 67-355 at 2 (cited in note 152); Carlene Brief at *7; see also House Hearings, 67th Cong, 1st Sess at 40-41 (cited in note 152); Senate Hearings, 67th Cong, 1st Sess at 2 (cited in note 152).

¹⁵⁴ 62 Cong Rec 7608 (May 24, 1922) (remarks of Mr. Gerner); see also House Hearings, 67th Cong, 1st Sess at 87-88 (cited in note 152); Senate Hearings, 67th Cong, 1st Sess at 5 (cited in note 152).

¹⁵⁵ HR Rep No 67-355 at 2 (cited in note 152); Filled Milk Legislation, S Rep No 67-987, 67th Cong, 4th Sess 3 (1923); Carlene Brief at *7. See also House Hearings, 67th Cong, 1st Sess at 12, 87-88, 121 (cited in note 152); Senate Hearings, 67th Cong, 1st Sess at 2 (cited in note 152).

¹⁵⁶ Letter from Paul McKee of the Carnation Milk Products Company to Rep. James B. Aswell, dated April 22, 1922, reprinted at 62 Cong Rec 7584 (May 24, 1922). See also HR Rep No 67-355 at 4 (cited in note 152); House Hearings, 67th Cong, 1st Sess at 37-39 (cited in note 152); Senate Hearings, 67th Cong, 1st Sess at 3-5, 241-49 (cited in note 152).

¹⁵⁷ HR Rep No 67-355 at 6 (cited in note 152); S Rep No 67-987 at 6 (cited in note 155) ("Eleven States now have laws either prohibiting entirely the manufacture and sale of filled milk or restricting the business in such a way as to make the commercial ex-

but competition persisted in unregulated markets. So in 1921 a bill to prohibit the interstate shipment of filled milk was introduced in the House of Representatives by Republican Edward Voigt, who perhaps coincidentally represented the good people in and around Sheboygan, Wisconsin.¹⁵⁸

In the committee hearings and floor debates over the bill, discussion focused on precisely the considerations that would inform an adjudication of whether comparable state legislation was a proper exercise of the police power and therefore consistent with the Due Process Clause of the Fourteenth Amendment. Proponents of the bill argued that filled milk was a fraudulent, counterfeit substance palmed off on an unsuspecting public as the genuine article.¹⁵⁹ And though the bill's backers conceded that filled milk was in itself neither unwholesome nor poisonous,¹⁶⁰ they contended that it was nevertheless deleterious to health.¹⁶¹ The vitamin A in butterfat, which was entirely absent from coconut oil, was vital to proper physical development in infants, and its insufficiency in their diet exposed them to a significant risk of rickets, scurvy, beriberi, and diseases of the eye.¹⁶² Opponents of the bill denounced it as "flagrant," "vicious" special interest legislation, designed to destroy a legitimate business for the benefit

plotation impossible. These States are: Utah, Maryland, Florida, California, Colorado, Connecticut, Oregon, Ohio, New York, New Jersey, Wisconsin."); 62 Cong Rec 7583 (May 24, 1922).

¹⁵⁸ 61 Cong Rec 4691 (August 4, 1921). The bill also prohibited manufacture of filled milk in the District of Columbia, the Territories, and the insular possessions, and forbade its shipment in foreign commerce. HR Rep No 67-355 at 1 (cited in note 152). The Pure Food and Drugs Act of 1906 did not apply to the interstate shipment of filled milk because of a proviso stating that an article would not be considered adulterated or misbranded if it was a compound of ingredients offered for sale under its own name and not a imitation of another article. Pure Food Act, 34 Stat at 771; Miller, 1987 Supreme Court Review at 406 (cited in note 151). The bill was originally introduced as an amendment to the Pure Food and Drugs Act, see 62 Cong Rec 7581 (May 24, 1922) (remarks of Mr. Voigt), but was reported out of committee as free-standing legislation.

¹⁵⁹ See HR Rep No 67-355 at 2 (cited in note 152); S Rep No 67-987 at 4 (cited in note 155); House Hearings, 67th Cong, 1st Sess at 11-13, 15, 40 (cited in note 152); Senate Hearings, 67th Cong, 1st Sess at 2 (cited in note 152).

¹⁶⁰ See House Hearings, 67th Cong, 1st Sess at 15 (cited in note 152) (Mr. Voigt); Senate Hearings, 67th Cong, 1st Sess at 2 (cited in note 152).

¹⁶¹ S Rep No 67-987 at 5, 7 (cited in note 155); House Hearings, 67th Cong, 1st Sess at 34-35 (cited in note 152); Senate Hearings, 67th Cong, 1st Sess at 2 (cited in note 152).

¹⁶² See HR Rep No 67-355 at 3-4 (cited in note 152); S Rep No 67-987 at 3-4 (cited in note 155); House Hearings, 67th Cong, 1st Sess at 10, 15 (cited in note 152); Senate Hearings, 67th Cong, 1st Sess at 6 (cited in note 152).

of a grasping competitor and at the expense of the consumer.¹⁶³ They asserted that the skimmed milk in filled milk contained significant amounts of vitamin A, though not as much as in whole milk.¹⁶⁴ Moreover, there were a great many foods that were lacking in vitamin A or improper for infant consumption—turnip greens seems to have been the favored example¹⁶⁵—but that this did not authorize Congress to prohibit *their* interstate shipment.¹⁶⁶ And they observed that the labels placed on cans of filled milk by their producers prominently revealed their contents, recommended that the product be used for cooking and baking, and explicitly stated that it was not to be used in place of milk for infants.¹⁶⁷ Proponents responded that consumers often did not read the labels;¹⁶⁸ that retailers displayed filled milk next to condensed milk and represented it as “the same as” or “as good as” condensed milk;¹⁶⁹ that the less expensive product was often purchased by poor, unlettered, or immigrant consumers;¹⁷⁰ and that the patrons of restaurants, hotels, and boarding houses might unknowingly be served the

¹⁶³ 62 Cong Rec 7583–84 (May 24, 1922); see also HR Rep No 67-355 at 2 (cited in note 152); House Hearings, 67th Cong, 1st Sess at 98 (cited in note 152); Senate Hearings, 67th Cong, 1st Sess at 62–65 (cited in note 152). *Accord*, Miller, 1987 Supreme Court Review at 398–99 (cited in note 151) (denouncing the statute as “an utterly unprincipled example of special interest legislation,” and the justifications offered for its enactment as “patently bogus.” Its consequence “was to expropriate the property of a lawful and beneficial industry; to deprive working and poor people of a healthful, nutritious, and low-cost food; and to impair the health of the nation’s children by encouraging the use as baby food of a sweetened condensed milk product that was 42 percent sugar.”); id at 416.

¹⁶⁴ See, for example, 62 Cong Rec 7585 (May 24, 1922) (remarks of Mr. Aswell).

¹⁶⁵ Id at 7609 (remarks of Mr. Sisson); id at 7614 (remarks of Mr. Echols).

¹⁶⁶ 62 Cong Rec 7614 (May 24, 1922) (remarks of Mr. Echols). See also Senate Hearings, 67th Cong, 1st Sess at 87 (cited in note 152).

¹⁶⁷ HR Rep No 67-355 at 7 (cited in note 152) (Minority Views of J. B. Aswell); House Hearings, 67th Cong, 1st Sess at 39 (cited in note 152); Senate Hearings, 67th Cong, 1st Sess at 85 (cited in note 152). See Miller, 1987 Supreme Court Review at 406, 420–21 (cited in note 151).

¹⁶⁸ See House Hearings, 67th Cong, 1st Sess at 19 (cited in note 152); Senate Hearings, 67th Cong, 1st Sess at 6 (cited in note 152); 62 Cong Rec 7582 (May 24, 1922) (remarks of Mr. Voigt); id at 7588 (remarks of Mr. Haugen); id at 7593 (remarks of Mr. Clarke of New York).

¹⁶⁹ See HR Rep No 67-355 at 2 (cited in note 152); S Rep No 67-987 at 3 (cited in note 155); House Hearings, 67th Cong, 1st Sess at 12 (cited in note 152); Senate Hearings, 67th Cong, 1st Sess at 2 (cited in note 152).

¹⁷⁰ See HR Rep No 67-355 at 2–3 (cited in note 152); House Hearings, 67th Cong, 1st Sess at 10, 33–34, 41–42, 49, 50, 154 (cited in note 152); Senate Hearings, 67th Cong, 1st Sess at 2, 6, 9, 14, 16, 19, 26, 44, 46, 50 (cited in note 152); 62 Cong Rec 7582, 7588, 7590, 7590–91, 7592–92, 7596, 7609 (May 24, 1922).

product without ever seeing the label.¹⁷¹ In the end the bill was passed in the House by a vote of 250–40,¹⁷² and in the Senate by a voice vote.¹⁷³

The hearings on the bill were dominated by farmers, manufacturers, and nutritionists, and did not elicit much in the way of constitutional discussion.¹⁷⁴ Nevertheless, the report of the House Committee on Agriculture included a discussion of the bill's constitutionality insisting that there was "nothing new in the proposal that milk products not containing a certain amount of butter fat shall not be transported or sold in interstate or intrastate commerce." Under the Pure Food and Drugs Act, milk and condensed milk could not be shipped in interstate commerce unless they contained a certain percentage of butterfat, and it was certainly "proper to insist upon the same standard in an imitation or substitute article." That act had barred from interstate commerce many drugs and articles of food that did not comply with certain standards, just as Congress had barred obscene literature and lottery tickets.¹⁷⁵ The committee relied upon the precedents upholding the Lottery Act and the Pure Food and Drugs Act for the proposition that exercises of the commerce power "may have the quality of police regulations," and that the commerce power could be used to "to protect the public morals," "the public health," and "the economic welfare of the people." Congress had "full power to bar from the channels" of interstate commerce "illicit and harmful articles," and could "itself determine means appropriate to this purpose." So long as those means did "no violence to the other provisions of the Constitution," Congress

¹⁷¹ See S Rep No 67-987 at 3 (cited in note 155); House Hearings, 67th Cong, 1st Sess at 10, 41 (cited in note 152); Senate Hearings, 67th Cong, 1st Sess at 6, 46 (cited in note 152).

¹⁷² 62 Cong Rec 7669–70 (May 25, 1922). One member voted "present" and 140 did not vote.

¹⁷³ 64 Cong Rec 4986 (March 1, 1923). The House agreed to the Senate amendments and the enrolled bill was signed in the House on March 2, 1923. *Id.* at 5075, 5241 (March 2, 1923). It was presented to the president for his approval and signed by the president the following day. *Id.* at 5554, 5556 (March 3, 1923).

¹⁷⁴ See S Rep No 67-987 at 6 (cited in note 155) ("The question of constitutionality was not seriously pressed before the committee."). The exception came in the testimony J. Wallace Bryan offered in support of the bill's constitutionality at the end of the Senate hearing, and in Mr. Jackman's response. See Senate Hearings, 67th Cong, 1st Sess at 277–81 (cited in note 152).

¹⁷⁵ HR Rep No 67-355 at 5 (cited in note 152).

was “itself the judge of the means to be employed.”¹⁷⁶ The only other provision of the Constitution to which the bill might do violence was the Due Process Clause of the Fifth Amendment, and just a few years earlier the Supreme Court had held that prohibition of the sale of filled milk did not violate the Due Process Clause of the Fourteenth Amendment.¹⁷⁷

The litigation from which this holding emerged had arisen in central Ohio. A series of statutes enacted in the late nineteenth century, well before filled milk had been invented, prohibited the manufacture and sale of condensed skimmed milk.¹⁷⁸ Hebe, the brand name of Carnation’s filled milk, was of course a species of condensed skimmed milk, and the Ohio attorney general rendered an opinion that its sale in the state violated the Ohio General Code.¹⁷⁹ The Chief of the Division of Dairy and Food of the State Board of Agriculture thereupon informed the company and those selling its product that, unless further sales of Hebe in the state were discontinued, prosecutions would follow and the penalties provided for by statute would be inflicted on all who should fail to desist.¹⁸⁰ Hebe responded by seeking injunctive relief against enforcement of the pertinent sections of the code by the state’s officers on the ground that those provisions were unconstitutional.¹⁸¹ The state did not contend that the product, nor that either of its ingredients, was impure or unwholesome.¹⁸² Instead Ohio maintained that Hebe was “regarded by a large percentage of the public as genuine condensed [whole] milk, whereby the public is misled and deceived into its purchase and use.”¹⁸³ Hebe countered that its product was “pure, wholesome, and nutritious,” and “plainly and fairly labeled in a conspicuous manner.”¹⁸⁴ The

¹⁷⁶ Id at 5–6. The report of the Senate Committee on Agriculture and Forestry similarly relied on the Lottery Act and Pure Food and Drugs Act precedents in concluding, “[w]e are thoroughly satisfied that Congress has the power to exclude from interstate and foreign commerce any article which is in the exercise of fair judgment injurious to the public health.” S Rep 67-987 at 6 (cited in note 155).

¹⁷⁷ HR Rep No 67-355 at 5–6 (cited in note 152).

¹⁷⁸ *Hebe Co. v Calvert*, 246 F 711, 715–16 (SD Ohio, 1917).

¹⁷⁹ Id at 713.

¹⁸⁰ Id at 712, 714.

¹⁸¹ Id at 714.

¹⁸² Id.

¹⁸³ Id at 713–14. See also Brief and Argument for Appellees, *Hebe Co. v Shaw*, No 664, *24–39 (US filed Dec 6, 1919) (“Shaw Brief”).

¹⁸⁴ *Hebe Co.*, 246 F at 714–15.

prohibition of its sale therefore deprived the company of liberty and property without due process of law and denied it equal protection of the laws by “arbitrarily, unjustly, unduly, and in a confiscatory manner” discriminating against it.¹⁸⁵

The case was argued on behalf of Hebe before a three-judge panel of the United States District Court for the Southern District of Ohio by Augustus T. Seymour of the Columbus firm of Vorys, Sater, Seymour and Pease.¹⁸⁶ The opinion ruling against Hebe was written by Seymour’s former law partner, Judge John Elbert Sater,¹⁸⁷ and delivered in November of 1917, just months after the United States had declared war on Germany. Judge Sater observed that there was “a conflict in the evidence” as to whether Hebe was “as nutritious and as effective as a growth producer, and therefore as a health promoter and maintainer, as the legally recognized condensed [whole] milk.” As long as that question was “debatable,” the legislature was “entitled to its own judgment,” which could not be “superseded by the court.” “With the wisdom of the exercise of that judgment,” Sater maintained, “the court has no concern; and, unless it clearly appears that the enactments have no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended.”¹⁸⁸

By contrast, there was “substantial and uncontradicted evidence” of deception of consumers in the sale of Hebe.¹⁸⁹ The difference between the prices at which condensed milk and filled milk could be manufactured and sold was such “that the temptation to impose upon the public” had been “too great to be resisted.”¹⁹⁰ It mattered not whether the company intended to deceive the public, nor that it had instructed its representatives to sell the product “for what it really is,” nor that the label informed the consumer of its con-

¹⁸⁵ Id at 715. See also Brief and Argument for Appellants, *Hebe Co. v Shaw*, No 664, *56–71 (US filed Nov 23, 1918) (“Hebe Brief”).

¹⁸⁶ *Hebe Co.*, 246 F at 712.

¹⁸⁷ Id at 713; J. F. Laning, ed, *The New Federal Judge: Hon. John E. Sater*, 52 Ohio L Bulletin 197 (1907).

¹⁸⁸ *Hebe Co.*, 246 F at 717. An earlier decision by the Court of Appeals of Maryland had assumed that a prohibition on the sale of condensed skimmed milk unless packaged and labeled as required by statute was a legitimate health measure. See *Reiter v State*, 71 A 975, 977 (Md Ct App 1909).

¹⁸⁹ *Hebe Co.*, 246 F at 717.

¹⁹⁰ Id.

tents.¹⁹¹ Filled milk did not differ in appearance or taste from condensed whole milk, and the “unwary consumer” could not be blamed for failing to scrutinize the label closely, particularly when an unscrupulous retailer presented it as condensed whole milk.¹⁹² The company manufactured a product that was capable of and was in fact being “used as an instrument of fraud.”¹⁹³ The Constitution of the United States did not “secure to anyone the privilege of manufacturing and selling an article offered in such a manner as to induce purchasers to believe they are buying something which is in fact different from that which is offered for sale.”¹⁹⁴ The statute’s effort “to promote fair dealing” and to “prevent the sale of an adulterated or deceptive article” therefore did not “contravene any provision of the federal Constitution.”¹⁹⁵

The company soon brought a bill in equity, again in the United States District Court for the Southern District of Ohio, to restrain threatened prosecutions for violation of the Ohio statutes.¹⁹⁶ The district judge adopted Judge Sater’s opinion as his own and dismissed the bill.¹⁹⁷ Hebe appealed that ruling to the Supreme Court of the United States, where the company was represented by former Associate Justice Charles Evans Hughes.¹⁹⁸ Justice Holmes wrote the opinion for a 6–3 majority affirming the judgment of the District Court.¹⁹⁹ The addition of coconut oil to condensed skimmed milk, Holmes observed, made “the cheaper and forbidden substance more like the dearer and better one and thus at the same time more available for a fraudulent substitute.”²⁰⁰ It was true that the label on the company’s product was truthful, “but the consumer in many cases never sees it.”²⁰¹ Applying a very deferential standard of review, Holmes concluded that the Ohio statute did not violate the Fourteenth Amendment. “The purposes

¹⁹¹ *Id.* at 717–18.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 718.

¹⁹⁵ *Id.*

¹⁹⁶ See *Hebe Co. v. Shaw*, 248 US 297, 301 (1919).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 298.

¹⁹⁹ *Id.* at 301.

²⁰⁰ *Id.* at 303.

²⁰¹ *Id.*

to secure a certain minimum of nutritive elements and to prevent fraud may be carried out in this way even though condensed skimmed milk and Hebe both should be admitted to be wholesome.”²⁰²

Justice Day, the author of *Hammer*, subjected the statute to more searching scrutiny in a dissenting opinion written on behalf of himself, Justice Willis Van Devanter, and Justice Louis D. Brandeis. Day asserted that Hebe made “no pretense” to being condensed whole milk. Its label disclosed “in unmistakable words in large print” that it was “a food compound consisting in part of condensed skimmed milk.” “The label states with all the emphasis which large type can give that it is a compound made of ‘evaporated skimmed milk and vegetable fat,’” Day observed. “The proportions of the ingredients” were “stated” on the “striking label,” which did not “describe condensed milk, and he who reads it cannot be misled to the belief that he is buying that article.” Moreover, Hebe was “shown to be wholesome and free from impurities.”²⁰³ Day conceded that the public was “entitled to protection from deception as well as from impurity,” and noted that the record disclosed “that in one or more instances” dealers had represented Hebe to be condensed whole milk. “But an act or two of this sort by fraudulent dealers,” Day insisted, “ought not to be the test of the plaintiffs’ right.” “If such were the case, very few food compounds would escape condemnation.” Moreover, “[t]he few instances of deception shown had not the sanction” of the company’s authority. Such acts of deception “did violence to the plain terms” of the printed label. That label “so truly expresses just what the substance is,” Day concluded, that it was “difficult to believe that any purchaser could be deceived into buying the article for something other than it is.”²⁰⁴

In the floor debates on the filled milk bill, opponents predictably invoked the authority of *Hammer*. They argued that filled milk was neither injurious, deleterious, unwholesome, nor harmful to health, nor was it sold fraudulently, and therefore Congress lacked the power to prohibit its interstate shipment.²⁰⁵ To this proponents

²⁰² *Id.*

²⁰³ *Id.* at 306.

²⁰⁴ *Id.* at 307 (Day and Brandeis, JJ, dissenting).

²⁰⁵ 62 Cong Rec 7581, 7584, 7588, 7593–94, 7614 (May 24, 1922). See also Senate Hearings, 67th Cong, 1st Sess at 280–81 (cited in note 152).

responded with citations to *Hebe*.²⁰⁶ Because filled milk was, on their view, “deleterious to health”²⁰⁷ and “a fraudulent article,”²⁰⁸ Congress could prohibit its interstate shipment.²⁰⁹ *Hammer* therefore had “nothing to do” with the question of the bill’s constitutionality.²¹⁰ The bill was instead governed by the precedents upholding the Lottery Act and the Pure Food and Drugs Act.²¹¹

The legislators engaged in this debate did not expressly frame the issue of constitutionality in terms of the Due Process Clause of the Fifth Amendment.²¹² But they shared a tacit premise: if an item was sufficiently deleterious that its sale could be prohibited under the state’s police power consistent with the requirements of the Fourteenth Amendment’s Due Process Clause, then Congress had the power to exclude the article from interstate commerce. The central issue upon which the disputants differed, therefore, was whether the Court had correctly resolved the due process issue in *Hebe*. That was an issue that would soon divide the state courts as well.

IV. CAROLENE PRODUCTS IN COURT

As the agricultural depression of the 1920s deepened, most of the states in the Union passed laws prohibiting the manufacture and/or sale of filled milk. By 1938, thirty-four of the forty-eight states had enacted such statutes, while an additional three subjected the sale to strict regulations.²¹³ Not surprisingly, the Supreme Court of Wisconsin followed *Hebe* in sustaining the state’s filled milk statute as a health and fraud prevention measure in

²⁰⁶ 62 Cong Rec 7581, 7612 (May 24, 1922). See also Senate Hearings, 67th Cong, 1st Sess at 277–78, 281 (cited in note 152).

²⁰⁷ 62 Cong Rec 7588, 7613, 7617 (May 24, 1922); Senate Hearings, 67th Cong, 1st Sess at 278 (cited in note 152).

²⁰⁸ 62 Cong Rec 7590, 7588, 7593, 7596, 7613, 7617 (May 24, 1922); Senate Hearings, 67th Cong, 1st Sess at 278 (cited in note 152).

²⁰⁹ 62 Cong Rec 7590, 7592–93, 7596, 7613, 7617 (May 24, 1922); 64 Cong Rec 3949 (February 19, 1923). See also Senate Hearings, 67th Cong, 1st Sess at 277–78 (cited in note 152).

²¹⁰ 62 Cong Rec 7596 (May 24, 1922) (remarks of Mr. Hersey). See also Senate Hearings, 67th Cong, 1st Sess at 278–79 (cited in note 152).

²¹¹ 62 Cong Rec 7583, 7593 (May 24, 1922).

²¹² By contrast, J. Wallace Bryan did so at the Senate hearings. See Senate Hearings, 67th Cong, 1st Sess at 277–78 (cited in note 152).

²¹³ *Carolene Products*, 304 US at 150–51 n 3.

1922.²¹⁴ In the 1930s, however, the Carolene Products Company began a litigation campaign with the objective of persuading various state courts to hold that their filled milk statutes violated provisions of their own state constitutions. The highest courts of Illinois,²¹⁵ Michigan,²¹⁶ and Nebraska²¹⁷ agreed that there was no significant evidence of fraud in the sale of filled milk, and that the product and its ingredients were wholesome and healthful. Prohibitions on its manufacture and sale therefore exceeded the state's police power. The company also secured injunctions against enforcement of the statutes of Alabama, Iowa, Missouri, Virginia, and West Virginia.²¹⁸ The Illinois Supreme Court's decision established that state as a safe haven for the production of filled milk in 1931,²¹⁹ and the Carolene Products Company continued manufacture of its product there at the Litchfield Creamery south of Springfield.²²⁰

The company's successful campaign in the state courts spurred federal officials to action. In June of 1935, the company was indicted in the United States District Court for the Southern District of Illinois under the federal statute for unlawfully shipping filled milk from Litchfield, Illinois, to the General Grocer Company in St. Louis, Missouri.²²¹ The company immediately filed a motion to quash the indictment,²²² on which the trial court inexplicably sat for over two years before overruling it in July of

²¹⁴ *Carnation Milk Products Co. v Emery*, 189 NW 564 (Wis 1922).

²¹⁵ *People v Carolene Products Co.*, 345 Ill 166, 170 (1931) (distinguishing *Hebe* on the ground that "[i]n the case before us the wholesomeness of the product is admitted, with no question of imitation or deceit involved, so there is no debatable question of fact before the court, as there was in the Ohio case."); *Carolene Products Co. v McLaughlin*, 365 Ill 62 (1936) (following its earlier decision in invalidating revised statute).

²¹⁶ *Carolene Products Co. v Thomson*, 267 NW 608, 612 (Mich 1936) (doubting *Hebe*'s continuing authority, distinguishing details of the Michigan and Ohio statutes, and holding that the Michigan statute violated both the Fourteenth Amendment and the Due Process Clause of the state constitution).

²¹⁷ *Carolene Products Co. v Banning*, 268 NW 313 (Neb 1936) (following the reasoning of *Thomson* in holding that the statute violated both the Fourteenth Amendment and the Due Process Clause of the Nebraska constitution).

²¹⁸ Carolene Brief at *68.

²¹⁹ *Carolene Products Co.*, 345 Ill 166; Miller, 1987 Supreme Court Review at 411 (cited in note 151).

²²⁰ Carolene Brief at *7.

²²¹ Brief for the United States, *United States v Carolene Products*, No 604, *4-5 (US filed Feb 28, 1938) ("United States Brief I").

²²² *Id* at 5.

1937.²²³ The company then filed a demurrer to the indictment, alleging that the federal Filled Milk Act was unconstitutional.²²⁴ That October, some six months after the Supreme Court had upheld the National Labor Relations Act the preceding April,²²⁵ the trial court sustained the company's demurrer on the authority of *Hammer*, following the reasoning of a 1934 opinion by Judge FitzHenry of the United States District Court for the Southern District of Illinois.²²⁶ Judge FitzHenry had reasoned that Carolene's product was "wholesome and plainly labeled," and therefore beyond congressional power to exclude from interstate commerce.²²⁷ Seeking to distinguish *Hebe*, FitzHenry concluded that *Hammer* made it "clear that the Supreme Court recognized a broad discretion in the states in the exercise of their legislative police powers, but denies the exercise of the same power to Congress, under the guise of regulating interstate commerce."²²⁸ The United States then filed an appeal,²²⁹ and the Supreme Court noted probable jurisdiction under the Criminal Appeals Act.²³⁰ On April 25, 1938, the Court announced its decision reversing the trial court and upholding the constitutionality of the Filled Milk Act.²³¹

The first key move in Justice Stone's opinion for the majority was to disentangle the Commerce Clause issue from the due process issue. The power to regulate interstate commerce, which in-

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Labor Board Cases*, 301 US 1 (1937).

²²⁶ United States Brief I at *5. The trial court sustained the demurrer "for the reasons assigned in the opinion of Judge FitzHenry, reported in 7 Fed Supp 500." *Id.*

²²⁷ *United States v Carolene Products*, 7 F Supp at 500, 508 (SD Ill 1934). The government's brief before the Supreme Court explained that Judge FitzHenry's decision "was not appealed by the United States because the case arose on an information, and the sustaining of a demurrer thereto is not appealable under the Criminal Appeals Act." United States Brief I at *9 n 1.

²²⁸ *Carolene Products*, 7 F Supp at 508. FitzHenry appeared to believe that the statute was "a plain attempt on the part of Congress" to "prohibit the manufacture" of filled milk in the several states, *id* at 504, and that this "strick[ing] down [of] a well-known lawful industry" deprived the company of property without due process. *Id* at 507.

²²⁹ United States Brief I at *5.

²³⁰ *Id.*; *Carolene Products*, 304 US at 146.

²³¹ *Carolene Products*, 304 US at 144-45. On January 7, 1938, the Seventh Circuit had upheld the act in a deferential opinion ruling against the Carolene Products Company in an antitrust action the company brought against the Evaporated Milk Association. *Carolene Products Co. v Evaporated Milk Assn.*, 93 F2d 202 (7th Cir 1938). The Supreme Court of Pennsylvania had upheld that state's filled milk act on the authority of *Hebe* on March 2, 1938. *Carolene Products Co. v Harter*, 329 Pa 49 (1938).

cluded the power to prohibit interstate shipment, Stone reminded his readers, was “complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed by the Constitution.”²³² Decisions such as those upholding the Lottery Act and the Pure Food and Drugs Act established that Congress was “free to exclude from interstate commerce articles whose use in the states for which they are destined it may reasonably conceive to be injurious to the public health, morals, or welfare.”²³³ Such regulations were “not prohibited unless by the due process clause of the Fifth Amendment.”²³⁴ “The prohibition of the shipment of filled milk in interstate commerce” was therefore “a permissible regulation of commerce, subject only to the restrictions of the Fifth Amendment.”²³⁵ Stone’s opinion thus established that the power to prohibit interstate shipment was not constrained by any internal limitation on the commerce power, but was instead plenary, and was qualified only by affirmative limitations derived from other applicable provisions of the Constitution—namely, the Due Process Clause.

Having disposed of the commerce power issue, Stone turned to the due process issue, which it was now clear would be dispositive. That issue was properly analyzed separately, employing the categories developed in cases adjudicating Fifth and Fourteenth Amendment challenges to regulatory legislation. Stone remarked that the committee hearings had demonstrated “that the use of filled milk as a substitute for pure milk” was “generally injurious to health and facilitates fraud on the public.”²³⁶ In other words, it fell into two categories under which the Court had sustained state exercises of the police power. Indeed, it was on the basis of such evidence that the Court had upheld the Ohio statute challenged in *Hebe* against a Fourteenth Amendment due process challenge twenty years earlier.²³⁷ That alone would seem to have been sufficient to decide the case.

But here Stone went further. Even without the evidence to which he had referred, “the existence of facts supporting the leg-

²³² *Carolene Products*, 304 US at 147, quoting *Gibbons v Ogden*, 9 Wheat 1, 196 (1824).

²³³ *Carolene Products*, 304 US at 147 (emphasis added).

²³⁴ *Id.*

²³⁵ *Id.* at 148.

²³⁶ *Id.* at 148–49.

²³⁷ *Carolene Products*, 304 US at 148, citing *Hebe Co. v Shaw*, 248 US 297 (1918).

islative judgment” was “to be presumed,” he wrote, “for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”²³⁸ Had the statute contained no findings concerning the dangers filled milk posed to the public, Stone observed, some such findings “would be presumed.”²³⁹ Inquiries into a statute’s compliance with the Due Process Clause, “where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it.”²⁴⁰ That is, as Stone put it, the Court might have decided the due process issue “wholly on the presumption of constitutionality.”²⁴¹ But it was “evident from all the considerations presented to Congress,” Stone continued, “that the question is at least debatable whether commerce in filled milk should be left unregulated, or in some measure restricted, or wholly prohibited.”²⁴² Whether to protect the public through the imposition of a labeling requirement or through a prohibition on shipment “was a matter for the legislative judgment and not that of courts.”²⁴³ “[T]hat decision was for Congress.”²⁴⁴ The prohibition of the interstate shipment of filled milk thus did “not infringe the Fifth Amendment”;²⁴⁵ and therefore, Stone concluded, that prohibition was “a

²³⁸ *Id.* at 152.

²³⁹ *Id.* at 153.

²⁴⁰ *Id.* at 154. Just two months earlier, Stone had anticipated this formulation in announcing that nondiscriminatory state legislation would be subjected to the same standard of review under the dormant Commerce Clause and the Fourteenth Amendment. See *South Carolina Highway Dept. v. Barnwell Bros.*, 303 US 177, 190–91 (1938) (“In the absence of [congressional] legislation the judicial function, under the commerce clause, . . . as well as the Fourteenth Amendment, stops with the inquiry whether the state Legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought. . . . Being a legislative judgment it is presumed to be supported by facts known to the Legislature unless facts judicially known or proved preclude that possibility.”).

²⁴¹ *Carolene Products*, 304 US at 148.

²⁴² *Id.* at 154.

²⁴³ *Id.* at 151.

²⁴⁴ *Id.* at 154.

²⁴⁵ *Id.* at 148.

constitutional exercise of the power to regulate interstate commerce.”²⁴⁶

Two years earlier, in *Whitfield v Ohio*, the Court unanimously had upheld an Ohio statute prohibiting the sale of convict-made goods within the state against a Fourteenth Amendment challenge. Congress had enacted a statute divesting convict-made goods of their interstate character upon their arrival in a destination state, thereby removing the dormant Commerce Clause disability under which the state otherwise would labor by virtue of the original package doctrine. The sole question concerning the state law’s constitutionality thus was whether the Ohio statute deprived the owner of the goods of his property without due process. The Justices agreed that Ohio had “the right and power” to base its legislation upon the “conception” that “the sale of convict-made goods in competition with free labor is an evil.”²⁴⁷ The Court thus rejected Judge O’Brien’s insistence in *Hawkins* that the prevention of such “unfair competition” was not a legitimate police power justification for the regulation of such sales, and some contemporary commentators maintained that this development cast significant doubt on the continuing vitality of *Hammer*.²⁴⁸ Others were more circumspect, suggesting only that Congress could enact a similar divesting statute for child-made goods without calling into question *Hammer*’s continuing authority.²⁴⁹

In January of 1937, the Court unanimously upheld the federal Ashurst-Sumners Act, which prohibited the interstate shipment of convict-made goods into states where their sale was prohibited by

²⁴⁶ Id at 154. Justice Butler concurred in the result. His opinion indicated that he agreed with the majority’s mode of Commerce Clause analysis, but that he differed with its due process views. Butler maintained that at the ensuing trial the Carolene Products Company “may introduce evidence to show that the declaration of the act that the described product is injurious to public health and that the sale of it is a fraud upon the public are without any substantial foundation. . . . If construed to exclude from interstate commerce wholesome food products that demonstrably are neither injurious to health nor calculated to deceive, they are repugnant to the Fifth Amendment.” Id at 155 (Butler, J, concurring).

²⁴⁷ *Whitfield v Ohio*, 297 US 431, 439–40 (1936).

²⁴⁸ See J. A. C. Grant, *State Power to Prohibit Interstate Commerce*, 26 Cal L Rev 34, 67 (1937); Hugh Evander Willis, *Constitution Making in 1935–36*, 22 Wash U L Q 206, 214 (1936); Comment, *Interstate Commerce—Power of Congress—Validity of Hawes-Cooper Act and State Statute Prohibiting Sale of Convict-Made Goods*, 49 Harv L Rev 1007, 1008 (1936).

²⁴⁹ Marvin M. Finder, *Constitutional Law—Divesting Prison-Made Goods of Their Interstate Character—Original Package Doctrine*, 27 J Am Inst Crim L & Criminol 283, 284–85 (1936); Note, *The Power of Congress to Subject Interstate Commerce to State Regulation*, 3 U Chi L Rev 636, 639–40 (1936).

local law.²⁵⁰ Again, a number of sanguine commentators proclaimed the demise of *Hammer*.²⁵¹ Yet the act's cooperative formula differed from the absolute prohibition on interstate shipment imposed by the Keating-Owen Child Labor Act, and Chief Justice Hughes accordingly declined the opportunity to overrule *Hammer*. Instead, he tersely distinguished the precedent, maintaining that the act under review could be sustained without impairing *Hammer*'s vitality.²⁵² Even after that decision, therefore, numerous commentators continued to believe that *Hammer* remained good law.²⁵³ After *Carolene Products* had made clear that the commerce power was subject only to a due process limitation and that that limitation would be interpreted very narrowly, however, such views would dissipate. For if Justice Stone's proclamation of deferential review under the Due Process Clause clarified anything, it was that the traditional understanding of the Doctrine of Vested Rights was no longer the basic doctrine of American constitutional law.

²⁵⁰ *Kentucky Whip & Collar Co. v. Illinois Central Railroad Co.*, 299 US 334 (1937).

²⁵¹ Edward S. Corwin, *National-State Cooperation—Its Present Possibilities*, 46 Yale L J 599, 613–15, 623 (1937); Grant, 26 Cal L Rev at 34, 69–70 (cited in note 248); Anthony Yturri, Note, *Constitutional Law—Interstate Commerce—Convict-Labor Goods—Ashurst-Sumners Act*, 16 Or L Rev 374, 380–82, 384 (1937); Comment, *Constitutional Law—Exclusion of Prison-Made Goods from Interstate Commerce*, 14 Tenn L Rev 538, 539–41 (1937); Comment, *Constitutional Law—Commerce Clause—Validity of Statute Regulating Interstate Transportation of Convict-Made Goods*, 85 U Pa L Rev 529, 530 (1937); E. A. M., Comment, *Constitutional Law—Convict-Made Goods—Interstate Commerce*, 12 Ind L J 430, 431–32 (1937); L. E., Comment, *Constitutional Law—Interstate Commerce—Prison-Made Goods—Power of Federal Government to Prohibit Shipment of Prison-Made Goods Into Any State in Violation of Its Laws*, 6 Brooklyn L Rev 385, 386 (1937).

²⁵² *Kentucky Whip*, 299 US at 350.

²⁵³ See, for example, Joseph H. Mueller, Comment, *Constitutional Law—Interstate Commerce—Validity of Federal Statute Prohibiting Interstate Shipment of Prison-Made Goods*, 35 Mich L Rev 615, 617–20 (1937); John H. Foard, Comment, *Constitutional Law—Interstate Commerce—Federal Control of Child Labor as Suggested by the Recent Convict Labor Cases*, 2 Mo L Rev 341, 342–46 (1937); Marjorie Hanson, Comment, *Constitutional Law—Interstate Commerce—Power of Congress to Protect State Laws*, 3 U Pitt L Rev 233, 235–36 (1937); Milton J. Schloss, Comment, *Child Labor Regulation Under the Kentucky Whip and Collar Co. v. Illinois Central Railroad Case*, 11 U Cin L Rev 357, 358–59 (1937); Comment, *Constitutional Law—Interstate Commerce—Power of Congress to Regulate Interstate Transportation of Prison-Made Goods*, 6 Fordham L Rev 299, 302–03 (1937); J. T. N., Comment, *Constitutional Law—Commerce—Power of Congress to Give Effect to State Law*, 15 Tex L Rev 371, 372 (1937); E. J. H., Jr., Note, *Federal Legislation—Regulation of Child Labor Resurrected*, 25 Geo L J 671, 678, 682, 687 (1937). Still others expressed uncertainty about *Hammer*'s status. See, for example, Osmond K. Fraenkel, *What Can Be Done About the Constitution and the Supreme Court?* 37 Colum L Rev 212, 213, 215 (1937); S. R., Comment, *Constitutional Law—Interstate Commerce—Prohibiting Interstate Shipment of Prison-Made Goods*, 11 Temple L Q 427, 429–30 (1937).

V. THE CONTEMPORARY SIGNIFICANCE OF *CAROLENE PRODUCTS*

To appreciate the impact of *Carolene Products* on Commerce Clause jurisprudence, consider the legislative history of the Fair Labor Standards Act of 1938. In May of 1937, nearly a year before the Court would decide *Carolene Products*, the Senate Committee on Interstate Commerce conducted a series of hearings on five bills concerning child labor.²⁵⁴ Some of the bills, like the statute invalidated in *Hammer*, would have prohibited interstate shipment of goods made by firms employing child labor.²⁵⁵ Others took different approaches that would not directly have called into question *Hammer*'s continuing authority, either divesting child-made goods of their interstate character upon arrival in a destination state, or prohibiting interstate shipment of child-made goods into states prohibiting their sale.²⁵⁶ Even after the Court's dramatic decisions upholding the National Labor Relations Act as an exercise of the commerce power the previous month,²⁵⁷ two liberal New Dealers on the committee expressed doubt that the Court was prepared to overrule *Hammer*. Burton Wheeler of Montana believed that the Court "would probably not" overrule *Hammer*. There was "not very much hope," he opined, "of the Supreme Court reversing itself in this matter."²⁵⁸ Sherman Minton of Indiana agreed: "I do not think we need place much hope on a reversal of the child labor opinion." "I do not think that there is much use of our looking for a reversal of form on the part of the Court."²⁵⁹ Some of the witnesses expressed similar reservations,²⁶⁰

²⁵⁴ To Regulate the Products of Child Labor, Hearings on S 592, S 1976, S 2068, and S 2345 before Senate Committee on Interstate Commerce, 75th Cong, 1st Sess (1937) ("Senate Interstate Commerce Hearings").

²⁵⁵ S 2068, 75th Cong, 1st Sess and S 2345, 75th Cong, 1st Sess, in Senate Interstate Commerce Hearings, 75th Cong, 1st Sess (cited in note 254).

²⁵⁶ S 592, 75th Cong, 1st Sess and S 1976, 75th Cong, 1st Sess, in Senate Interstate Commerce Hearings, 75th Cong, 1st Sess (cited in note 254). S 2226, 75th Cong, 1st Sess, in Senate Interstate Commerce Hearings, 75th Cong, 1st Sess (cited in note 254) combined each of the approaches.

²⁵⁷ See *Labor Board Cases*, 301 US 1 (1937).

²⁵⁸ Senate Interstate Commerce Hearings, 75th Cong, 1st Sess at 12, 13 (cited in note 254).

²⁵⁹ Senate Interstate Commerce Hearings, 75th Cong, 1st Sess at 13 (cited in note 254).

²⁶⁰ Senate Interstate Commerce Hearings, 75th Cong, 1st Sess at 152–58 (cited in note 254) (James A. Emery, National Association of Manufacturers, maintaining that *Hammer* was still good law); id at 133 (Henry Root Stern, of Mudge, Stern, Williams, & Tucker, suggesting that there was an even chance that the Court would overrule *Hammer*).

and on June 14 the committee favorably reported the Wheeler-Johnson bill that combined the Keating-Owen approach with the other methods in the event that the Court reaffirmed *Hammer*.²⁶¹ It was the committee's judgment that "much hope could not be practically entertained that the Supreme Court would overrule the *Hammer v Dagenhart* case at this time."²⁶²

Meanwhile, on May 24 the Administration sent to Congress what would become known as the Black-Connery bill, which ultimately would form the basis for the Fair Labor Standards Act of 1938.²⁶³ At joint hearings held by the Senate Committee on Education and Labor and the House Committee on Labor, several witnesses continued to opine that *Hammer* was still good law,²⁶⁴ but on July 8 the Senate Committee on Education and Labor reported favorably a version of the bill relying entirely on a provision modeled on the Keating-Owen Child Labor Act.²⁶⁵ When the bill reached the floor of the Senate, however, Wheeler argued that it was imprudent to enact a measure "flying directly in the face of the Supreme Court decision in *Hammer v Dagenhart*," and urged his colleagues to substitute the Wheeler-Johnson bill for the child labor provisions of the Black-Connery bill.²⁶⁶ His colleagues apparently agreed with Wheeler's assessment, for they approved the amendment by a vote of 57-28,²⁶⁷ and the bill as amended was passed by a vote of 56-28.²⁶⁸ The House Labor Committee did not agree, however—its reported bill stripped out the Wheeler-Johnson provisions and reinserted the child labor provisions that Wheeler had considered so objectionable.²⁶⁹ The

²⁶¹ Regulating the Products of Child Labor, S Rep No 75-726, 75th Cong, 1st Sess (1937); 81 Cong Rec 5639 (June 14, 1937).

²⁶² S Rep No 75-726 at 2-3 (cited in note 261).

²⁶³ Message from the President of the United States, H Doc 225, 75th Cong, 1st Sess (May 24, 1937); 81 Cong Rec 4954 (May 24, 1937) (referencing S 2475, 75th Cong, 1st Sess introduced by Mr. Black); id at 4998 (referencing HR 7200, 75th Cong, 1st Sess introduced by Mr. Connery).

²⁶⁴ Fair Labor Standards Act of 1937, Hearings on S. 2475 and H.R. 7200 before the Senate Committee on Education and Labor, and House Committee on Labor, 75th Cong, 1st Sess 626-27 (1937) ("Joint Hearings"); id at 681-82, 855-59.

²⁶⁵ Fair Labor Standards Act, S Rep No 75-884, 75th Cong, 1st Sess (1937); 81 Cong Rec 6894 (July 8, 1937).

²⁶⁶ 81 Cong Rec 7667 (July 27, 1937); id at 7666; id at 7930-32 (July 31, 1937); id at 7949.

²⁶⁷ 81 Cong Rec 7949-51 (July 31, 1937).

²⁶⁸ Id at 7957.

²⁶⁹ Fair Labor Standards Act, HR Rep No 1452, 75th Cong, 1st Sess 20 (1937).

House Rules Committee refused to allow the Labor Committee's bill to come to the floor,²⁷⁰ so on August 19 Wheeler urged his Senate colleagues to pass the Wheeler-Johnson bill as a separate piece of legislation,²⁷¹ which they did without a record vote.²⁷²

When the Black-Connery bill was finally brought to the House floor in November through the use of a discharge petition,²⁷³ Representative John Martin of Colorado followed Wheeler in cautioning his colleagues not to rely on the hope that the Court would overrule *Hammer*. Instead, he urged his fellow Democrats to replace the bill's child labor provisions with those of the Wheeler-Johnson bill.²⁷⁴ The bill was recommitted to the House Labor Committee on December 17,²⁷⁵ and the committee did not report it back until April 21.²⁷⁶ When the bill was debated on the floor of the House in May of 1938, however, Martin's lengthy speech opposing the measure no longer expressed concerns about the constitutionality of a prohibition on interstate shipment of goods made by firms employing children.²⁷⁷ Now no one in the House debate objected to the bill on the ground that *Hammer* was still good law. The House passed the bill relying on the assumption that *Hammer* would be overruled,²⁷⁸ and the conference committee accepted the House bill's child labor provisions.²⁷⁹ Senator Elbert Duncan Thomas of Utah explained to his colleagues that "[t]he conference committee felt that in view of the trend of decisions in the Supreme Court this was safe procedure," and no one con-

²⁷⁰ See William Lasser, *Benjamin V. Cohen: Architect of the New Deal* 180 (Yale, 2002); John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 Law & Contemp Probs 464, 470 (1939); Paul H. Douglas and Joseph Hackman, *The Fair Labor Standards Act of 1938, Part I*, 53 Pol Sci Q 491, 507–08 (1938).

²⁷¹ 81 Cong Rec 9318 (August 19, 1937).

²⁷² Id at 9318–20.

²⁷³ 82 Cong Rec 1386, 1389–90 (December 13, 1937); Forsythe, *Legislative History* at 471 (cited in note 270); Douglas and Hackman, 53 Pol Sci Q at 509 (cited in note 270); Frances Perkins, *The Roosevelt I Knew* 260 (Viking, 1946); *Rally Democrats Behind Wage Bill*, New York Times 9 (Nov 30, 1937); *218 Sign Petition*, New York Times 1 (Dec 3, 1937).

²⁷⁴ 82 Cong Rec 1412–23 (December 13, 1937); id at 1579–99 (December 15, 1937); id at 1780–83 (December 17, 1937); id at 1829–30.

²⁷⁵ Id at 1834–35 (December 17, 1937).

²⁷⁶ Fair Labor Standards Act of 1938, HR Rep No 2182, 75th Cong, 3d Sess (1938); 83 Cong Rec 5680 (April 21, 1938).

²⁷⁷ See 83 Cong Rec 7398–7400 (May 24, 1938).

²⁷⁸ Id at 7449–50.

²⁷⁹ Id at 9161, 9164 (June 14, 1938) (remarks of Sen. Thomas).

tradicted him.²⁸⁰ Senator Thomas did not cite the decisions upon which he was relying, but the Court had decided only two pertinent cases since *Wheeler*, *Minton*, *Martin*, and others had evinced their concerns that *Hammer* was still good law. One was a decision upholding portions of the New Deal securities law program;²⁸¹ the other was *Carolene Products*.

Two commentators anticipating a favorable Court ruling on the constitutionality of the Fair Labor Standards Act noted in 1938 that *Carolene Products* had recognized "the power of Congress to prohibit interstate shipments of products harmful to the health, morals, or welfare of the public," and insisted that "[e]conomic evil or harm as well as harm to the human body is within the police power of Congress to control by prohibitory regulation of interstate commerce."²⁸² Another observer cautioned that, after *Carolene Products*, "serious thought must be given to the possibility of revolutionary expansion in Congress' exercise of the commerce power." It was now conceivable, he argued, that the Court would soon adopt the view expressed by Justice Holmes in his dissent in *Hammer*: that Congress may by the regulation of interstate commerce "prohibit any part of such commerce that Congress sees fit to forbid."²⁸³

When the Fair Labor Standards Act was challenged before the Supreme Court in *United States v Darby Lumber*, the brief for the United States repeatedly cited *Carolene Products* in support of the central claims of its argument.²⁸⁴ The act's prohibition on interstate shipment was a regulation of interstate commerce,²⁸⁵ and the Court had often "proclaimed that the power of Congress to regulate commerce 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are pre-

²⁸⁰ Id at 9164 (1938). The House approved the conference report by a vote of 291-89, and the Senate followed suit without a record vote. 83 Cong Rec 9178, 9266-67 (June 14, 1938).

²⁸¹ *Electric Bond & Share Co. v SEC*, 303 US 419 (1938).

²⁸² Alexander Feller and Jacob Hurwitz, *How to Operate Under the Wage-Hour Law* 142-43 (Alexander, 1938).

²⁸³ Recent Decision, *Constitutional Law—Power to Prohibit Wholesome Synthetic Food from Interstate Commerce*, 17 NYU L Q Rev 118, 121 (1939).

²⁸⁴ See Brief for the United States, *United States v Darby*, No 82, *41, 63, 65, 101 (US filed Sep 23, 1940) ("United States Brief II").

²⁸⁵ Id at 61.

scribed in the constitution,”²⁸⁶ the government argued. “Congress possesses, therefore, the same unlimited authority as do the states within their field to exercise ‘the police power, for the benefit of the public, within the field of interstate commerce.’”²⁸⁷ The public benefit to be secured here, as the United States contended at length, was the prevention of the spread of substandard labor conditions through unfair competition carried on through the channels of interstate commerce.²⁸⁸ “The determination of what practices are against public policy” was “obviously a legislative matter,” the government asserted.²⁸⁹ It was “for Congress to decide whether low labor standards” were “as harmful” as the acts prohibited by the antitrust laws and the Federal Trade Commission Act.²⁹⁰ The employer could “rely upon no fact in the record,” and had “as yet presented none which is subject to judicial notice, to show that the legislation” was “arbitrary.”²⁹¹ As *Carolene Products* had established, “[t]he burden of supporting the charge of unconstitutionality” was “on the assailant of the statute. In the absence of facts demonstrating its invalidity the constitutionality of the law must be presumed.”²⁹²

When Chief Justice Hughes brought the case before the conference, his doctrinal analysis was a virtual facsimile of Stone’s in *Carolene Products*. Hughes regarded the branch of the case concerning the prohibition of interstate shipment as utterly unproblematic. “Congress’s interstate commerce power knows no limitation except as in the Constitution itself,” Hughes argued.²⁹³ The

²⁸⁶ *Id.* at 63.

²⁸⁷ *Id.* at 64–65. Similarly, in a proposed model opinion upholding the Fair Labor Standards Act, Robert Stern relied upon *Carolene Products* for the proposition that “an exercise of federal power is not invalid because of its effect upon transactions which might lie outside the sphere of federal regulation.” Robert L. Stern, *An Opinion Holding the Act Constitutional*, in *How the Supreme Court May View the Fair Labor Standards Act*, 6 *Law & Contemp Probs* 431, 434 (1939).

²⁸⁸ United States Brief II at *9, 20–43, 59–60.

²⁸⁹ United States Brief II at *77.

²⁹⁰ *Id.*

²⁹¹ *Id.* at 101.

²⁹² *Id.* The appellee by contrast maintained that under *Carolene Products* the presumption of constitutionality attached only to the means selected for exercising an enumerated power. Whether Congress was in fact exercising an enumerated power, that is, whether a statute was within the commerce power, remained a question for judicial determination. Brief for the Appellee, *United States v Darby*, No 82, *23–25 (US filed Dec 12, 1940) (“Darby Brief”).

²⁹³ Del Dickson, ed, *The Supreme Court in Conference (1940–1985)* 217 (Oxford, 2001).

Chief therefore rejected the authority of *Hammer v Dagenbart*. "Transportation is an act in commerce, and unless due process is involved, Congress can do as it wants. Congress must not impinge on the constitutional qualifications of its power, and this qualification is in the due process provision. Unless the Fifth Amendment intervenes, Congress can use its power for any purpose it sees fit."²⁹⁴ But here, Hughes concluded, there was "no deprivation of property in a due process sense."²⁹⁵

Justice Stone's opinion for a unanimous Court also clearly followed the template that he had established in *Carolene Products*. While manufacture was "not of itself interstate commerce," the interstate shipment of manufactured goods was, and "the prohibition of such shipment by Congress" was "indubitably a regulation" of that commerce.²⁹⁶ The power of Congress over interstate commerce was "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed by the constitution."²⁹⁷ "Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce," was "free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use."²⁹⁸ And then, with a citation to *Carolene Products*, Stone asserted, "Such regulation . . . is not prohibited unless by other Constitutional provisions. It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states."²⁹⁹ "Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause."³⁰⁰ In *Hammer*, "it was held by a bare majority of the Court over the powerful and now classic dissent of Mr. Justice Holmes," "that Congress was without power to exclude

²⁹⁴ Id.

²⁹⁵ Id at 218.

²⁹⁶ *Darby*, 312 US at 113.

²⁹⁷ Id at 114.

²⁹⁸ Id.

²⁹⁹ Id.

³⁰⁰ Id at 115.

the products of child labor from interstate commerce. The reasoning and conclusion of the Court's opinion there cannot be reconciled with the conclusion which we have reached, that the power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution."³⁰¹

The only specific prohibition to be addressed was the Due Process Clause of the Fifth Amendment. And Stone regarded it as obvious that the interstate shipment of goods made under substandard labor conditions caused a harm that it was within congressional power to prevent. A purpose of the act, Stone explained, was "to prevent the use of interstate commerce as the means of competition in the distribution of goods" produced "under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being," "and as the means of spreading and perpetuating such substandard labor conditions among the workers of the several states."³⁰² The motive and purpose of the act were "plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition" was "injurious" to the states "to which the commerce flows."³⁰³ "[T]he evils aimed at by the Act" were "the spread of substandard labor conditions through the use of the facilities of interstate commerce" through the competition of goods produced under substandard labor conditions with goods produced under fair labor standards, and the "impairment or destruction of local businesses by competition made effective through interstate commerce."³⁰⁴ The act was thus, like the Ohio convict-made goods statute upheld in *Whitfield*, "directed at the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as 'unfair.'"³⁰⁵ In short, the Court was now explicitly broadening the category of harms that could be redressed by the commerce power without violating the Due Process Clause, recognizing as a federally remediable

³⁰¹ Id at 115–16.

³⁰² Id at 109–10.

³⁰³ Id at 115.

³⁰⁴ Id at 122.

³⁰⁵ Id.

harm in destination states the very sort of unfair competition resulting from differential labor standards that the Court had refused to countenance in *Hammer*. Thus, it did not matter whether the goods to be shipped in interstate commerce had been made under conditions permitted by the law of the state of production. The producer might have acquired a vested property interest in the goods under that state's law, but he had not thereby acquired any right to inflict the harm of unfair competition outside the legislative jurisdiction of that state. Because the statute did not violate the Due Process Clause, the Court concluded "that the prohibition of the shipment interstate of goods produced under the forbidden substandard labor conditions" was "within the constitutional authority of Congress."³⁰⁶

Legal commentators remarking upon the *Darby* decision clearly saw its roots in Stone's 1938 opinion. With a citation to *Carolene Products*, an observer writing in the *University of Pennsylvania Law Review* opined now that "[t]he weight of authority is that Congress can prohibit goods from interstate commerce regardless of their nature, or regardless of the motive of Congress in so enacting."³⁰⁷ With another citation to *Carolene Products*, an editor of the *Tennessee Law Review* astutely noted, "Thus the separate regulatory power of the states, once so jealously guarded, is made to rest squarely on whatever due process restrictions the fifth amendment imposes on Congress."³⁰⁸ That, of course, is precisely what *Carolene Products* had clarified; and it had further made clear that those restrictions were few indeed.

³⁰⁶ Id at 115. For a discussion of developments in the constitutional law of competitive injury that anticipated *Darby*, see Barry Cushman, *Ambiguities of Free Labor Revisited: The Convict-Labor Question in Progressive-Era New York*, in R. B. Bernstein and Daniel J. Hulsebosch, eds, *Making Legal History: Essays on the Interpretation of Legal History in Honor of William E. Nelson* (NYU Press, forthcoming 2013) (on file with author).

³⁰⁷ Recent Case, *Constitutional Law—Power of Congress to Regulate Wages and Hours in Industries Producing for and Shipping in Interstate Commerce*, 89 U Pa L Rev 819, 820 n 4 (1941). Other commentators on *Darby* also saw *Carolene Products* as a supportive Commerce Clause precedent. See John A. Wright, Case Note, *Fair Labor Standards Act: Regulation of Wages and Hours in Production of Goods for Interstate Commerce Held Constitutional—Requirement of Keeping Records Upheld—Validity of Minimum Wage Order Sustained*, 6 John Marshall L Q 451, 452 (1941); M. W. M., Note, *Constitutional Law—Power of Congress to Prohibit Interstate Transportation of Products Made Under Substandard Conditions—Fair Labor Standards Act of 1938*, 15 Tulane L Rev 609, 611 (1941).

³⁰⁸ A. D. B., Jr., Recent Case, *Commerce—Regulation Under Fair Labor Standards Act*, 16 Tenn L Rev 987, 988 (1941).

VI. CONCLUSION: CAROLENE PRODUCTS AND CONSTITUTIONAL STRUCTURE

Darby would become the canonical case standing for the proposition that congressional power to prohibit interstate shipment is virtually plenary. It was the seminal case upholding the Fair Labor Standards Act—a much more important statute than the Filled Milk Act of 1923—and it was the case that overruled *Hammer v Dagenhart*. But the doctrinal analysis on which the Court relied in *Darby* was already fully developed by Stone's opinion in *Carolene Products*. *Carolene Products* untangled the confusions created by *Hammer's* conflation of Fifth and Tenth Amendment limitations, making it clear that the restraint on Congress's power to prohibit interstate shipment had always been the Due Process Clause rather than a principle of constitutional federalism. Through the limits that it had placed on federal regulatory authority and the protection it had afforded to vested property rights, the Due Process Clause had licensed interjurisdictional regulatory competition and underwritten policy heterogeneity among the states.³⁰⁹ It was the relaxation of that due process limitation by an announced standard of deferential review that cleared the way for national policies implemented through prohibitions on interstate shipment.

We have grown understandably accustomed to dividing our courses in and our conversations about Constitutional Law into the categories of Constitutional Structure and Constitutional Rights. But we shouldn't allow that often convenient conceptual division to obscure the deep and important relationships that often have obtained between these two domains of constitutional doctrine. The idea that constitutional federalism acts to preserve individual rights and liberties by diffusing government power has become familiar.³¹⁰ Less often appreciated is the fact that individual

³⁰⁹ The role played by the Due Process Clause in this line of Commerce Clause cases also serves further to underscore the centrality of vested rights concepts to substantive due process jurisprudence in the early twentieth century. Substantive due process often is associated with the sorts of liberty claims implicated in decisions such as *Lochner v New York*, 198 US 45 (1905), and *Meyer v Nebraska*, 262 US 390 (1923). Yet a review of all of the cases in which the *Lochner*-era Court invalidated a law on the ground that it violated one of the Due Process Clauses reveals that decisions safeguarding vested property rights far outnumbered those vindicating such unenumerated liberty rights. See Cushman, 85 BU L Rev at 883–924, 941–44, 958–80, 998–99 (cited in note 145).

³¹⁰ See, for example, *New York v United States*, 505 US 144, 181 (1992) (“[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.”),

rights, particularly economic rights protected by the Due Process Clause, themselves operated as structural mechanisms. Such rights did not merely mark the boundaries between individual liberty and sovereign authority. They also functioned to allocate power among the state and federal governments. Just as structural mechanisms could have consequences for rights, so rights could have significant consequences for constitutional structure.³¹¹ Because of its role in illuminating such an important dimension of this phenomenon, Justice Stone's opinion in *Carolene Products* is, if anything, even richer and more rewarding than we have recognized.

quoting *Coleman v Thompson*, 501 US 722, 759 (1991) (Blackmun, J, dissenting); Harry N. Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 U Toledo L Rev 619 (1978); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 Supreme Court Review 341, 385–86, 388–89 (1986).

³¹¹ For discussions of other contexts in which the Fifth Amendment's Due Process Clause played an important role in the allocation of regulatory authority among the state and federal governments, see Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* 139–225 (Oxford, 1998); Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U Chi L Rev 1089, 1126–37 (2000); Barry Cushman, *The Structure of Classical Public Law*, 75 U Chi L Rev 1917, 1936–47 (2008).

