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MAY I express my sincere appreciation for this opportunity of again visiting this great institution of learning to which I am so much indebted and for the privilege of addressing you on this occasion.

In his first Inaugural, President Lincoln said:

> "The maintenance inviolate of the rights of the States, and especially the right of each State to order and control its own domestic institutions according to its own judgment exclusively, is essential to the balance of power on which the perfection and endurance of our political fabric depends."[1]

A half century later that eminent lawyer and statesman, the late Elihu Root, speaking as President of the American Bar Association, said:

> "There will always be danger of developing our law along lines which will break down the carefully adjusted distribution of powers between the national and the state government. Upon the preservation of that balance, not necessarily in detail but in substance, depends, upon the one hand, the maintenance of our national power and, on the other hand, the preservation of that local self-government which in so vast a country is essential to real liberty."[2]

We are living in a day when democracy is receding and the totalitarian state is advancing on many fronts. Three great nations have

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[1] RAYMOND, LIFE AND STATE PAPERS OF ABRAHAM LINCOLN 163 (1865). This was one of the resolutions in the platform upon which Lincoln was elected.

[2] "Address of the President," 41 REP. A. B. A. 355 at 370-371 (1916).

accepted as their governmental system authoritarian collectivism. Under the totalitarian systems, the right of the individual to think freely, to engage in free enterprise, to enjoy personal liberty, and to work out his own destiny is taken away. Instead, there is a regimentation of human beings, where everyone's thought, everyone's time, everyone's labor, and at last everyone's life, are at the disposal of a supreme authority. Of course, such a system means the vesting of tremendous powers in a highly centralized national government.

Because of these developments in the drama of world affairs and because since the days of Lycurgus those learned and expert in the science of government have regarded the maintenance of essential balances in the distribution of the powers of government as the only means that will prevent representative democracy from degenerating into despotism, our dual system, a national government with its powers limited and defined by a written Constitution and sovereign states with reserved powers over their own domestic institutions and affairs, becomes of increasing interest to me. And I trust you will be interested in considering with me, in rather broad outline, certain of those powers which are delegated to the national government and others that are reserved to the states, and their limitations under our constitutional system.

To draw a clear line of demarcation between the powers delegated to the national government and those reserved to the states is not in my opinion possible. We may, however, point out certain limitations and in a general way define what is within the respective ambits of national and state authority.

I

The powers delegated to the Congress are set forth in Section 8 of Article I of the Federal Constitution.

Clause 1 of Section 8 in part reads:

> "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and Provide for the common Defence and general Welfare of the United States."

Throughout our history the meaning of the phrase "to . . . provide for the . . . general welfare of the United States" has engendered much discussion, and divergent views have been expressed from time to time by eminent statesmen and publicists. But it was not until recently that the meaning of the provision granting the taxing power was given authoritative construction by the courts.

In the early days two views were expressed, one by Madison, the other by Hamilton. Madison's view was first set forth in his Article 41 in the Federalist. It was later amplified in his Report on the Virginia Resolutions[3] where he in part said:

> "The true and fair construction of this expression, both in the original and existing federal compacts, appears to the committee too obvious to be mistaken. In both, the Congress is authorized to provide money for the common defence and general welfare. In both is subjoined to this authority an enumeration of the cases to which their powers shall extend. Money cannot be applied to the general welfare, otherwise than by an application of it to some particular measure, conducive to the general welfare. Whenever, therefore, money has been raised by the general authority, and is to be applied to a particular measure, a question arises whether the particular measure be within the enumerated authorities vested in Congress. If it be, the money requisite for it may be applied to it. If it be not, no such application can be made."

On the other hand, Hamilton in his Report on Manufactures,[4] expressed the view that, subject to the qualifications respecting uniformity and proportion, "the power to raise money is plenary and indefinite, and the objects to which it may be appropriated are no less comprehensive than the payment of the public debts, and the providing for the common defence and general welfare."

It is significant that Hamilton in the same document also said:

> "A power *to appropriate money* with this latitude, which is granted, too, in express terms, would not carry a power to do any other thing not authorized in the Constitution either expressly, or by fair implication."

While the views of Hamilton and Jefferson were usually divergent, on this question Jefferson agreed with Hamilton. In his opinion on the constitutionality of the Bank of the United States, February 15, 1791,[5] Jefferson said:

> "To lay taxes to provide for the general welfare of the United States, that is to say 'to lay taxes for *the purpose* of providing for

[3] 4 ELLIOTT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION, 2d ed., 552 (1937).

[4] 3 HAMILTON, WORKS, Lodge ed., 294 at 371, 372 (1885) (italics added).

[5] JEFFERSON, WRITINGS, Ford ed., 284 at 286 (1895).

> the general welfare.' For the laying of taxes is the *power*, and the general welfare the *purpose* for which the power is to be exercised. Congress are not to lay taxes *ad libitum for any purpose they please;* but only *to pay the debts or provide for the welfare of the Union.* In like manner, they are not *to do any thing they please* to provide for the general welfare, but only to *lay taxes* for that purpose. To consider the latter phrase, not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please, which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless."

In his Veto Message of May 4, 1822,[6] of "An Act for the Preservation and Repair of the Cumberland Road," President Monroe stated that he was formerly inclined to the view that the national government had no right to expend money except in furtherance of acts authorized by the other specific grants, but on further reflection and observation he had changed his views. He then considered the matter elaborately and arrived at a construction in accord with Hamilton's views.

More recently the view has been expressed that the general welfare clause confers upon the Congress an independent and substantive power ceded to it by the states, totally distinct from those conferred in the succeeding clauses of Article I, Section 8.

The latter view is predicated on these asserted facts: In Washington's desk copy of the Constitution printed for use by the members of the Constitutional Convention, the phrase "To lay and collect taxes, duties, imposts, and excises," and the phrase "to pay the debts and provide for the common defence and general welfare" while included in the same paragraph are separated by a semicolon. It was turned over to a copyist for engrossment on parchment. The copyist substituted a comma for the semicolon.[7] Accordingly, it is urged that the members of the Convention intended the welfare clause to be an independent grant of power. This argument overlooks the fact that the engrossed copy which was submitted to the states, not the desk copy, is the Constitution.

[6] 2 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 142 at 162-167 (1896).

[7] 79 CONG. REC. 13557-13558 (1935). In the clause as adopted by the Convention the punctuation was a comma, not a semicolon. 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, pp. 493, 497, 503 (1911). The semicolon was substituted by the committee of style. 2 ibid. 590 at 594. The copyist merely restored

The clause "to pay the debts and provide for the common defence and general welfare of the United States" was first brought forward in connection with the power to lay taxes; it was originally adopted as a qualification or limitation on the objects of that power, and was not discussed as an independent power.[8] Another amendment, which would have given such a general power, was proposed but never finally adopted; it was ultimately abandoned[9] and the powers of Congress specifically enumerated.

The construction last adverted to was adopted in a dissenting opinion in the *Louisville Condemnation Case*.[10]

In the *City of Independence Case*,[11] the Tenth Circuit, following the views of Justice Story in his great work on constitutional law, held that the phrase "to lay and collect taxes, duties, imposts, and excises," was the grant of power, and the phrase "to pay the debts and provide for the common defence and general welfare" a limitation, defining the purposes for which taxes could be levied and the money appropriated. And in its opinion on rehearing[12] the court said:

> "But since the function of the general welfare clause is solely to limit, it grants no power, and when taxes have been laid and collected and the money appropriated, the taxing power is exhausted. Therefore, the Congress may not enact legislation to promote the general welfare, except within the compass of the powers granted expressly, or by necessary implication by the provisions of section 8 of article 1 of the Constitution, which follow

the original punctuation. On June 19, 1798, Albert Gallatin stated in the House of Representatives that "After the limitation had been agreed to, and the Constitution was completed, a member of the Convention [he was one of the members who represented the State of Pennsylvania], being one of a committee of revisal and arrangement, attempted to throw these words into a distinct paragraph, so as to create not a limitation, but a distinct power. The trick, however, was discovered by a member from Connecticut, now deceased, and the words restored as they now stand." 3 ibid. 379.

[8] 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, pp. 408, 414, 493, 497, 503, 569, 594 (1911).

[9] 1 STORY, COMMENTARIES ON THE CONSTITUTION, 5th ed., §§ 928, 929 (1905); Carter v. Carter Coal Co., 298 U. S. 238 at 292, 56 S. Ct. 855 (1936). 1 FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, pp. 20, 47, 53 (1911); 2 ibid. 21, 367; FORMATION OF THE UNION 130, 384, 750 (1927) (U. S. Govt. Printing Office).

[10] United States v. Certain Lands in the City of Louisville, (C. C. A. 6th, 1935) 78 F. (2d) 684 at 688.

[11] Kansas Gas & Electric Co. v. City of Independence, Kansas, (C. C. A. 10th, 1935) 79 F. (2d) 32.

[12] Kansas Gas & Electric Co. v. City of Independence, Kansas, (C. C. A. 10th, 1935) 79 F. (2d) 638 at 639.

the provision giving the power to lay and collect taxes. It may only levy and collect taxes and appropriate the moneys raised to provide for the general welfare."

In the *Hoosac Mills Case*,[13] the Supreme Court, after adopting the views expressed by Justice Story, said:

"The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted. . . . The true construction undoubtedly is that the only thing granted is the power to tax for the purpose of providing funds for payment of the nation's debts and making provision for the general welfare."

Finally, in the *Carter Coal Case*[14] the Court said:

"The proposition, often advanced and as often discredited, that the power of the federal government inherently extends to purposes affecting the nation as a whole with which the states severally cannot deal or cannot adequately deal, and the related notion that Congress, entirely apart from those powers delegated by the Constitution, may enact laws to promote the general welfare, have never been accepted but always definitely rejected by this court."

It follows that the national government has no independent power to legislate for the general welfare and that the authority so to do is found in what is commonly known as the police power reserved to the states.

II

The Supreme Court of the United States has frequently said that the police power from its nature is incapable of any exact definition or limitation.[15] The reason it cannot be defined with precision is that no one can foresee the ever-changing conditions which call for its exercise.[16] While the power is familiarly exercised in regulations to promote the public health, safety and morals, it embraces as well regula-

[13] United States v. Butler, 297 U. S. 1 at 64, 56 S. Ct. 312 (1936). See also, Helvering v. Davis, 301 U. S. 619 at 640, 57 S. Ct. 904 (1937).

[14] Carter v. Carter Coal Co., 298 U. S. 238 at 291, 56 S. Ct. 855 (1936).

[15] Pearsall v. Great Northern Ry., 161 U. S. 646 at 666, 16 S. Ct. 705 (1896).

[16] Eubank v. Richmond, 226 U. S. 137 at 142, 33 S. Ct. 76 (1912); Des Moines v. Manhattan Oil Co., 193 Iowa 1096, 184 N. W. 823, 188 N. W. 921 (1921).

tions to promote public convenience, welfare, and general prosperity.[17] It is subject, however, to the limitations of the Federal Constitution.[18]

While the Fourteenth Amendment does not interfere with, curtail, destroy, or take away from the states the right duly and properly to exercise the police power, the power is limited by the inhibitions of that amendment. As said by Justice Roberts in the *New York Milk Case*:[19]

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

In the *Bank Guarantee Case*,[20] the Supreme Court, speaking through Justice Holmes, said:

> "We must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the States is limited

[17] Eubank v. Richmond, 226 U. S. 137 at 142, 33 S. Ct. 76 (1912); Chicago, B. & Q. Ry. v. Drainage Commrs., 200 U. S. 561 at 592, 26 S. Ct. 341 (1906); Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U. S. 412 at 426-427, 57 S. Ct. 772 (1937).

[18] Louisville & Nashville R. R. v. Melton, 218 U. S. 36 at 52, 30 S. Ct. 676 (1910); Nebbia v. New York, 291 U. S. 502 at 525, 54 S. Ct. 505 (1934); Pacific Gas & Elec. Co. v. Police Court, 251 U. S. 22 at 25, 40 S. Ct. 79 (1919); Cunnius v. Reading School District, 198 U. S. 458 at 469, 25 S. Ct. 721 (1905); Terrace v. Thompson, 263 U. S. 197 at 217, 44 S. Ct. 15 (1923).

[19] Nebbia v. New York, 291 U. S. 502 at 525, 54 S. Ct. 505 (1934).

[20] Noble State Bank v. Haskell, 219 U. S. 104 at 110, 31 S. Ct. 186 (1911).

by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the law-making power."

There are those who think the Court, in its commendable concern for the liberty of the citizen, has not always followed the admonition of the great jurist.

The contract clause does not restrict the proper exercise of its police power by a state, and the authority of the state to enact legislation under the police power cannot be limited or restricted by contractual provision, even in contracts between the state or its political subdivisions and private persons or corporations.[21] While the provisions of contracts must yield to the exercise of the police power, it must be exercised for an end which is in fact public and the means adopted must have a real and substantial relation to the end to be attained and the enactment must not be unreasonable, arbitrary or oppressive.[22]

A state may exercise its police power to make regulations for the protection of the health, the lives, and the property of the people of the state against dangers arising in interstate transportation and commerce concurrent with the laws passed by Congress, and such state laws are valid so long as they do not conflict with the provisions of federal legislation or the Federal Constitution.[23] A state may also enact police regulations which only indirectly or incidentally affect interstate commerce.[24] But a state cannot under cover of exercising its police power do that which amounts essentially to a regulation of interstate commerce, or impose a direct burden upon that commerce.[25]

The line of demarcation between invalid and valid exercise of the police power in the regulation of business may be illustrated by three recent decisions.

In 1925 Oklahoma, and in 1929 Arkansas, enacted statutes making

[21] St. Louis & S. F. Ry. v. Mathews, 165 U. S. 1, 17 S. Ct. 243 (1896); Chicago, B. & Q. R. R. v. Nebraska, 170 U. S. 57, 18 S. Ct. 513 (1898); Manigault v. Springs, 199 U. S. 473, 26 S. Ct. 127 (1905).

[22] Treigle v. Acme Homestead Assn., 297 U. S. 189, 56 S. Ct. 408 (1936).

[23] McLean v. Denver & R. G. R. R., 203 U. S. 38, 27 S. Ct. 1 (1906); Savage v. Jones, 225 U. S. 501, 32 S. Ct. 715 (1912); South Carolina State Highway Dept. v. Barnwell Brothers, Inc., (U. S. 1938) 58 S. Ct. 510.

[24] Silz v. Hesterberg, 211 U. S. 31, 29 S. Ct. 10 (1908); Townsend v. Yeomans, 301 U. S. 441, 57 S. Ct. 842 (1937); Bayside Fish Flour Co. v. Gentry, 297 U. S. 422, 56 S. Ct. 513 (1936). Cf. Foster-Fountain Packing Co. v. Haydel, 278 U. S. 1, 49 S. Ct. 1 (1928).

[25] Savage v. Jones, 225 U. S. 501, 32 S. Ct. 715 (1912); Lemke v. Farmers' Grain Co., 258 U. S. 50, 42 S. Ct. 244 (1921).

a certificate of convenience and necessity a prerequisite to the right to engage in the ice business and vesting in a state administrative body power to regulate the price of ice. The legislation was enacted at the behest of utility companies who had acquired strings of ice manufacturing plants, and was designed to prevent alleged harmful competition. It is significant that after the enactment of the Oklahoma statute the price of ice in that state was substantially higher than in eleven other Southern states, where conditions were comparable with Oklahoma.[26]

The Arkansas statute, in so far as it required a certificate of public convenience and necessity to engage in the ice business, was declared invalid by the state court.[27] The Oklahoma statute was similarly invalidated by the Circuit Court of Appeals for the Tenth Circuit and the United States Supreme Court.[28] In its opinion the Supreme Court said:[29]

> "Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistently with the Fourteenth Amendment. Under that amendment, nothing is more clearly settled than that it is beyond the power of a state, 'under the guise of protecting the public, arbitrarily [to] interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.'. . .
>
> "Stated succinctly, a private corporation here seeks to prevent a competitor from entering the business of making and selling ice. It claims to be endowed with state authority to achieve this exclusion. There is no question now before us of any regulation by the state to protect the consuming public either with respect to conditions of manufacture and distribution or to insure purity of product or to prevent extortion. The control here asserted does not protect against monoply, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it. There is no difference in principle between this case and the attempt of the dairyman under state authority to prevent another from keeping cows and selling milk on the ground that there are enough

[26] Southwest Utility Ice Co. v. Liebmann, (C. C. A. 10th, 1931) 52 F. (2d) 349.

[27] Cap. F. Bourland Ice Co. v. Franklin Utilities Co., 180 Ark. 770, 22 S. W. (2d) 993, 68 A. L. R. 1018 (1929).

[28] Southwest Utility Ice Co. v. Liebmann, (C. C. A. 10th, 1931) 52 F. (2d) 349; New State Ice Co. v. Liebmann, 285 U. S. 262, 52 S. Ct. 371 (1932).

[29] 285 U. S. at 278-280.

dairymen in the business; or to prevent a shoemaker from making or selling shoes because shoemakers already in that occupation can make and sell all the shoes that are needed. We are not able to see anything peculiar in the business here in question which distinguishes it from ordinary manufacture and production. It is said to be recent; but it is the character of the business and not the date when it began that is determinative. It is not the case of a natural monopoly, or of an enterprise in its nature dependent upon the grant of public privileges. The particular requirement before us was evidently not imposed to prevent a practical monopoly of the business, since its tendency is quite to the contrary. Nor is it a case of the protection of natural resources. There is nothing in the product that we can perceive on which to rest a distinction, in respect of this attempted control, from other products in common use which enter into free competition, subject, of course, to reasonable regulations prescribed for the protection of the public and applied with appropriate impartiality.

"And it is plain that unreasonable or arbitrary interference or restrictions cannot be saved from the condemnation of that Amendment merely by calling them experimental. It is not necessary to challenge the authority of the states to indulge in experimental legislation; but it would be strange and unwarranted doctrine to hold that they may do so by enactments which transcend the limitations imposed upon them by the federal Constitution. The principle is imbedded in our constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments."

In 1932 the legislature of the state of New York created a committee to investigate the milk business. After an investigation covering nearly a year, the committee in April, 1933, made its report. It found these facts: Milk is an essential item of diet. It cannot long be stored and is an excellent medium for the growth of bacteria. It is, therefore, necessary to observe safeguards in its production and handling for human consumption which greatly increase the cost of the business. The failure of producers to receive a reasonable return for their labor and investment threatens a relaxation of vigilance against contamination. The milk business is a paramount industry. Curtailment or destruction thereof would cause a serious economic loss. Periodic increases in the number of cows, prevalent unfair and destructive trade practices in the distribution of milk, costs of transportation and distribution charges, lead to demoralization of prices in metropolitan areas. Under the best practical adjustment of supply to demand the

industry must carry a surplus of about twenty per cent, since demands vary from day to day. Milk, being perishable, cannot be stored. A satisfactory stabilization of prices requires that the burden of surplus milk be shared by all producers and all distributors in the milk shed. The fact that the larger distributors find it necessary to carry large quantities of milk, while the small distributors do not, leads to price cutting and other forms of destructive competition. Smaller distributors who take no responsibility for surplus can undersell the larger distributors. Indulgence in this price cutting often compels the larger distributors to cut the price to their own and the producers' detriment.

In 1933 the state legislature adopted a law to correct the evils which the report of the committee showed could not be expected to right themselves through the ordinary play of the forces of supply and demand, owing to the peculiar and uncontrollable factors affecting the industry.[30] The law created a Milk Control Board with power to supervise and regulate the entire milk industry of the state and to fix minimum and maximum prices and made it unlawful to sell or buy milk at any price less or more than that fixed by the board. The order of the Milk Board fixed the purchase price by a retailer from a dealer at 8 cents per quart and 5 cents per pint and the selling price by a retailer at not less than 9 cents per quart and 6 cents per pint. It did not fix the farmer's or dairyman's price. It fixed selling prices to the consumer at 10 cents per quart for sales by a dealer and 9 cents per quart for sales by a store, thus recognizing the lower costs of the store and endeavoring to establish a fair differential.

In sustaining the validity of the challenged legislation and the orders of the board, in the *New York Milk Case*,[31] the United States Supreme Court said:

> "It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. . . .
>
> "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to

[30] N. Y. Laws (1933), c. 158.

[31] Nebbia v. New York, 291 U. S. 502 at 536, 537, 538, 539, 54 S. Ct. 505 (1934).

promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*. 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.' . . . And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. . . . The Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."

However, in the *Ten Eyck Case*[32] the Court struck down an amendment to the Milk Control Act making it lawful for a milk dealer continuously engaged since April 10, 1933, in the business of purchasing and handling milk not having a well advertised trade name, to sell milk at a price not more than 1 cent per quart below the selling price of milk sold under a well advertised trade name, and making it unlawful for such a dealer so to do who had not been continuously engaged in the business of dealing in milk since April 10, 1933. Referring to the amendment the Court said:[33]

"on its face, it is not a regulation of a business or an activity in the interest of, or for the protection of, the public, but an attempt to give an economic advantage to those engaged in a given business at an arbitrary date as against all those who enter the industry after that date. The appellees do not intimate that the classification bears any relation to the public health or welfare generally;

[32] Mayflower Farms v. Ten Eyck, 297 U. S. 266, 56 S. Ct. 457 (1936).
[33] 297 U. S. at 274.

that the provision will discourage monopoly; or that it was aimed at any abuse, cognizable by law, in the milk business. In the absence of any such showing, we have no right to conjure up possible situations which might justify the discrimination. The classification is arbitrary and unreasonable and denies the appellant the equal protection of the law."

No doubt the greatest source of federal regulatory power is found in the commerce clause.

When intrastate transactions directly affect interstate commerce they are subject to federal control. On the other hand, where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain exclusively within the domain of state power. No precise line can be drawn between what is direct and what is indirect, but the applicable principle is well established. It is obvious that if the commerce clause were construed to embrace enterprises which have but an indirect effect on interstate commerce, federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only at the sufferance of the federal government.[34]

While the Supreme Court has many times held that the production and manufacture of commodities are not commerce, even though intended for sale and transportation in interstate commerce,[35] as said by Chief Justice Hughes in the *Jones & Laughlin Case*:[36]

"The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement' . . . to adopt measures 'to promote its growth and insure its safety' . . . 'to foster, protect, control and restrain.' . . . That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.' . . . Although activities may be intrastate in character when

[34] Schechter Poultry Corp. v. United States, 295 U. S. 495 at 546, 55 S. Ct. 837 (1935).

[35] Carter v. Carter Coal Co., 298 U. S. 238 at 299, 303, 56 S. Ct. 855 (1936), and authorities there reviewed.

[36] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 at 36-37, 57 S. Ct. 615 (1937).

separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. . . . Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree."

While adhering to the principle that direct and indirect effect marks the line between state and federal power, the Supreme Court in sustaining the National Labor Relations Act and the orders made by the National Labor Relations Board thereunder extended the concept of direct effect farther than any previous decision.[37]

In holding the act applicable to employees engaged solely in manufacture and production on the ground that the stoppage of those operations by industrial strife would have a direct effect on interstate commerce, the Court in the *Jones & Laughlin Case* said: [38]

"Giving full weight to respondent's contention with respect to a break in the complete continuity of the 'stream of commerce' by reason of respondent's manufacturing operations, the fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to inter-

[37] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615 (1937); National Labor Relations Board v. Fruehauf Trailer Co., 301 U. S. 49, 57 S. Ct. 642 (1937); National Labor Relations Board v. Friedman-Harry Marks Clothing Co., 301 U. S. 58, 57 S. Ct. 615, 630, 645 (1937). See also, Santa Cruz Fruit Packing Co. v. National Labor Relations Board, (U. S. 1938) 58 S. Ct. 656.

[38] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 at 41, 57 S. Ct. 615 (1937).

> state commerce as to make the presence of industrial strife a matter of the most urgent national concern. When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?"

There are many other important phases of state and national power under our constitutional system, but to extend this discussion further would unduly trespass upon your time. Enough has been said to show that under our system we have a federal government with adequate power to exercise authority over those matters essentially national in character, and state governments with authority to order and control their own domestic institutions and affairs, each limited by constitutional provisions essential to safeguard the liberties of our citizens.

This latter characteristic of our plan of government is calculated to preserve local self-government, which in a nation so vast as ours is essential to the liberties of our people. It is an important factor in the balancing of governmental powers, on which the perfection and endurance of our political system and the preservation of our free institutions in a large measure depend.

Because of your training and experience, you as members and future members of the legal profession possess a peculiar understanding and appreciation of the importance of this balancing of state and federal authority. And so there comes to your profession and mine an ever urgent call to man the citadels of American liberty and to do sentry duty on the watchtowers of American freedom to the end that our system and the individual rights and individual liberties which it fosters and protects may be preserved.