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CONSTITUTIONAL LAW — FEDERAL CONTROL OVER CRIME —
SCOPE OF POWER TO REGULATE CRIME UNDER THE COMMERCE
CLAUSE — The increase of criminal activities interstate in scope,¹ and

¹ "The interstate character of many forms of crime . . . is a factor of constantly increasing importance. The modern criminal has learned that there is a certain securi-

the growing dissatisfaction with state enforcement of local laws,² have focused attention of late upon the power of Congress to regulate crime under the commerce clause of the Constitution.³ Outstanding among proposals for congressional legislation are the following: making interstate felonies federal offenses;⁴ punishing criminals who flee across state lines after committing a crime;⁵ and restricting the sale and transportation of firearms.⁶ Most, if not all, of this suggested legislation must rest on the commerce clause for its validity. We purpose here to discuss the nature and scope of this power, and, without considering the merits of the proposed laws, to inquire whether they can be brought under it.

I. *Crimes Across State Lines*

To what extent can Congress under the commerce clause prohibit the committing of crimes across state lines? The answer to this question rests largely in the determination of what is commerce, since such offences are assuredly interstate. There is no doubt that courts have given the term "commerce" a meaning broader than that attributed to it by the fathers of the Constitution,⁷ and by Chief Justice Marshall in *Gibbons v. Ogden* when he said, "Commerce undoubtedly is traffic; but it is something more; it is . . . commercial intercourse."⁸ Development of science and invention has necessitated revision of old

ty in the twilight zone between State and Federal jurisdictions. Pressure of necessity is constantly widening the field of Federal activity." Homer S. Cummings, Attorney General of the United States, *United States News*, Nov. 27, 1933, p. 9.

² Writers often assume there is a "breakdown" of local law enforcement, and point to the connection between crime and politics as one of the reasons. David Lawrence, *United States News*, Oct. 7-14, 1933, p. 16. The successful prosecution of Al Capone under federal income tax laws after local authorities demonstrated their inability or unwillingness to prosecute for more serious charges is cited as an example of the more effective methods used by the federal government.

³ Article I, sec. 8, clause 3: "The Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ."

⁴ Oscar G. Olander, Commissioner of Public Safety for Michigan, in *Detroit Free Press*, Oct. 2, 1933, p. 1.

⁵ *Detroit Free Press*, Oct. 4, 1933, p. 1.

⁶ Joseph B. Keenan, Special Assistant to the Attorney General, in *New York Times*, Aug. 20, 1933, sec. 8, p. 1.

⁷ The experience of the thirteen States under the Articles of Confederation pointed to the necessity for unified governmental control over commerce. *THE FEDERALIST*, Nos. 7, 11, 22, and 42. STORY, *CONSTITUTION*, 5th ed., secs. 259-263, 1065, 1066 (1891). To avoid destructive interstate competition, therefore, paramount authority was given to Congress under the new Constitution. Mr. Justice Hughes refers to the origin of this power in the *Shreveport Rate Cases* (*Houston & Texas Ry. v. United States*), 234 U. S. 342 at 350, 34 Sup. Ct. 833 at 836 (1914). See also *Brown v. Maryland*, 12 Wheat. (25 U. S.) 419 at 446 (1827).

⁸ 9 Wheat. (22 U. S.) 1, 189 (1824).

concepts.⁹ Further, Congress has extended its regulatory power in recent years over traffic not commercial in the strict sense,¹⁰ and the courts have recognized the validity of this legislation.

Commerce has come to mean something more than the transportation of tangible things: it includes sending ideas and wishes from one State to another, whether by radio,¹¹ or by telegraph.¹² The means of transportation are unimportant since persons walking across a bridge,¹³ oil pumped through pipe lines,¹⁴ electrical impulses radiating through the ether¹⁵ or along a telegraph wire,¹⁶ sheep driven across a State,¹⁷ and ranging cattle,¹⁸ have all been declared to be "in interstate commerce." Indeed, light rays were, in effect, deemed commerce where the ingenious photographing of a prize fight film across a state line was held tantamount in law to bringing the film itself across the border.¹⁹

⁹ Varying definitions of commerce, none of which is all-inclusive, because made with reference to the particular facts under consideration, can be found in the following cases: *Welton v. Missouri*, 91 U. S. 275 at 280 (1875); *Sherlock v. Alling*, 93 U. S. 99 at 103 (1876); *County of Mobile v. Kimball*, 102 U. S. 691 (1880); *United States v. Slater*, (D. C. Nev. 1903) 123 Fed. 115; *Adair v. United States*, 208 U. S. 161 at 176, 28 Sup. Ct. 277 at 281 (1908); *United States v. Burch*, (E. C. M. D. Cal. 1915) 226 Fed. 974.

¹⁰ The Mann Act of 1900, 36 Stat. 825 (1910), U. S. C. tit. 18, secs. 397-404 (1926), prohibits transporting women for immoral purposes. The Motor Vehicle Act of 1919, 41 Stat. 324 (1919), U. S. C. tit. 18, sec. 408 (1926), lays its ban upon thieves and upon those who receive or conceal stolen automobiles. The Kidnaping Act of 1932, 47 Stat. 326 (1932), U. S. C. A. tit. 18, sec. 408a (1933 Cum. Supp.), punishes kidnapers who carry their victims across state lines.

¹¹ *Station WBT, Inc. v. Poulnot*, (D. C. E. D. S. C. 1931) 46 F. (2d) 671 (1931).

¹² *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347 at 356, 7 Sup. Ct. 1126 at 1127 (1887): "... the telegraph transports nothing visible and tangible; it carries only ideas, wishes, orders, and intelligence."

¹³ *Covington Bridge Co. v. Kentucky*, 154 U. S. 204, 14 Sup. Ct. 1087 (1894).

¹⁴ *The Pipe Line Cases*, 234 U. S. 548, 34 Sup. Ct. 956 (1913).

¹⁵ See n. 11, *supra*.

¹⁶ *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1 (1877).

¹⁷ *Kelley v. Rhoads*, 188 U. S. 1, 23 Sup. Ct. 259 (1902). In this case sheep were driven from Utah across Wyoming, a distance of 500 miles, to Pine Bluffs station, for shipment into the State of Nebraska.

¹⁸ *Thornton v. United States*, 271 U. S. 414, 46 Sup. Ct. 585 (1926). Noted in 21 ILL. L. REV. 636 (1927). In this case employees of the Department of Agriculture went into Georgia to suppress disease among cattle pursuant to a federal statute. The diseased cattle had been ranging over the border between two States. The court said (p. 425): "We do not think that such passage by ranging can be differentiated from interstate commerce. It is intercourse between states, made possible by the failure of the owners to restrict their ranging and is due, therefore, to the will of the owners."

¹⁹ *United States v. Johnston*, (D. C. N. D. N. Y. 1916) 232 Fed. 970 (1916). The case involved importation of prize fight films from Canada into New York. It is submitted that the result would have been no different if interstate, and not foreign, commerce had been under consideration.

Under the Mann Act,²⁰ the Federal Motor Vehicle Act,²¹ and the Kidnaping Act,²² where the congressional regulation applies to private, non-business transactions,²³ "the mere act of removal" now "constitutes interstate commerce,"²⁴ which, distilled to its essence, is but "a passing to and fro."²⁵

The power to regulate includes the power to prohibit partially or completely.²⁶ The prohibition may be imposed not only to protect per-

²⁰ 36 Stat. 825 (1910), U. S. C. tit. 18, secs. 397-404 (1926).

²¹ 41 Stat. 324 (1919), U. S. C. tit. 18, sec. 408 (1926).

²² 47 Stat. 326 (1932), U. S. C. A. tit. 18, sec. 408a (1933 Cum. Supp.).

²³ In *United States v. Burch*, (D. C. N. D. Cal. 1915) 226 Fed. 974 (1915), the court held that the Mann Act applies where the transportation takes place in a private automobile. The court said (p. 976), "It [interstate commerce] does not necessarily, or indeed at all, involve the idea of a common carrier, or the payment of freight or fare." See also *Gowling v. United States*, (C. C. A. 9th, 1920) 269 Fed. 215; *Sloan v. United States*, (C. C. A. 8th, 1922) 279 Fed. 562; *Wilson v. United States*, 232 U. S. 563, 34 Sup. Ct. 347 (1913). Where the defendant transports a woman for private immoral purposes without any intention of making money by employing the woman as a prostitute, he is guilty under the statute. *Athanasaw's Case*, 227 U. S. 326, 33 Sup. Ct. 285 (1913); *United States v. Bitty*, 208 U. S. 393, 28 Sup. Ct. 396 (1908); *Caminetti v. United States*, 242 U. S. 470, 37 Sup. Ct. 192 (1917), affirming 238 U. S. 636, 35 Sup. Ct. 939 (1914). See also *Hart v. United States*, 273 U. S. 694, 47 Sup. Ct. 92 (1926); *Sloan v. United States*, (C. C. A. 8th, 1923) 287 Fed. 91; *Hays v. United States*, (C. C. A. 8th, 1916) 231 Fed. 106; *Johnson v. United States*, (C. C. A. 7th, 1914) 215 Fed. 679; *United States v. Flaspoller*, (D. C. E. D. La. 1913) 205 Fed. 1006. See also *Hughes v. United States*, (C. C. A. 8th, 1925) 4 F. (2d) 387, under the Federal Motor Vehicle Act.

²⁴ *Whitaker v. Hitt*, (App. D. C. 1922) 285 Fed. 797 at 799.

²⁵ *Whitaker v. United States*, (C. C. A. 9th, 1925) 5 F. (2d) 546.

²⁶ Corwin, "Congress's Power to Prohibit Commerce a Crucial Constitutional Issue," 18 CORN. L. Q. 477 at 478 (1933); Parkinson, "Congressional Prohibitions of Interstate Commerce," 16 COL. L. REV. 367 (1916). See also, William A. Sutherland, "Is Congress a Conservator of the Public Morals?," 38 AM. L. REV. 194 (1904); Edward B. Whitney, "The Latest Development of the Interstate Commerce Power," 1 MICH. L. REV. 615 (1903). It has been argued that the power to regulate commerce is only the power to foster and promote commerce, but the Supreme Court has not sustained such a theory. In *Champion v. Ames*, 188 U. S. 321 at 355, 23 Sup. Ct. 321 at 326 (1903), the Court said:

"Are we prepared to say that a provision which is, in effect, a *prohibition* of the carriage of such articles from State to State is not a fit or appropriate mode for the *regulation* of that particular kind of commerce . . . may not Congress for the protection of the people of all of the States, and under the power to regulate interstate commerce, devise such means, within the scope of the Constitution and not prohibited by it, as will drive that traffic out of commerce among the States?"

The Court answered the question in the affirmative. The prohibitory power may take the form of fine or imprisonment imposed upon persons (Mann Act of 1910, 36 Stat. 825 (1910), U. S. C. tit. 18, secs. 397-404 (1926)), or forfeiture of goods transported in violation of law. *Seven Cases v. United States*, 239 U. S. 510, 36 Sup. Ct. 190 (1916); 443 Cans of Eggs v. *United States*, 226 U. S. 172, 33 Sup. Ct. 50 (1912).

sons and things in interstate commerce,²⁷ but it may be invoked against those who use interstate commerce to achieve antisocial ends, provided the illicit object is closely enough related to the interstate transaction.²⁸ If the products of crime can be banned from interstate transportation, the like transportation of instrumentalities of crime can be prohibited. Whether the harm occurs before or after the interstate transaction should make no difference.²⁹

One who searches for limitations might seize upon language in

²⁷ For example, 41 Stat. 1444 (1921), U. S. C. tit. 18, sec. 382 (1926), prohibits carrying explosives on passenger trains.

²⁸ Some of these statutes are: Act of 1884, 23 Stat. 32 (1884), U. S. C. tit. 21, sec. 115 (1926), prohibiting the transportation of diseased cattle in interstate commerce; Wilson Act of 1890, 26 Stat., c. 728, p. 313 (1890), subjecting intoxicants upon their arrival in a State to the laws thereof; the Anti-Lottery Act of 1895, 28 Stat. 963 (1895), U. S. C. tit. 18, sec. 387 (1926), closing interstate commerce to lottery tickets; an act excluding from interstate commerce game slaughtered in violation of state laws, 31 Stat. 188 (1900), amended by 35 Stat. 1137 (1909), U. S. C. tit. 18, sec. 392 (1926); Pure Food and Drug Act of 1906, prohibiting from transportation in interstate commerce foods and drugs not inspected and labelled in accordance with the act, 34 Stat. 768 (1906), U. S. C. tit. 21, secs. 1-3 (1926); Commodity Clause of the Hepburn Act forbidding interstate carriers to transport commodities in which they had a direct or indirect interest, 34 Stat. 584 (1906), U. S. C. tit. 49, sec. 1 (8) (1926); Mann Act of 1910, 36 Stat. 825 (1910), U. S. C. tit. 18, secs. 397-404 (1926), prohibiting the transportation of women in interstate commerce for immoral purposes; Webb-Kenyon Act of 1913, prohibiting shipment of intoxicants into a State in violation of state law, 37 Stat., c. 90, p. 699 (1913); Federal Quarantine Act of 1917, prohibiting shipment of diseased plants and shrubs from infested areas, 39 Stat. 1165 (1917), U. S. C. tit. 7, sec. 161 (1926); Read Bone Dry Amendment of 1918, prohibiting transportation of liquor into any State which forbids the manufacture thereof, 39 Stat. 1069 (1917), U. S. C. tit. 18, sec. 341 (1926); Federal Motor Vehicle Act of 1919, forbidding the transportation of stolen motor vehicles from one State to another, and receiving, concealing or selling the same, 41 Stat. 324 (1919), U. S. C. tit. 18, sec. 408 (1926); Hawes-Cooper Act of 1929, which, upon going into effect Jan. 1, 1934, subjects prison-made goods sent from one State to another to the laws of the latter State, 45 Stat. 1084 (1929), U. S. C. A. tit. 49, sec. 65 (1933 Cum. Supp.); Kidnaping Act of 1932, forbidding the transportation across state lines of abducted persons for the purpose of securing a ransom, 47 Stat. 326 (1932), U. S. C. A. tit. 18, sec. 408a (1933 Cum. Supp.).

²⁹ Prohibiting the transportation of stolen automobiles protects persons from being deprived of their property, usually in the State where the act begins; prohibiting the transportation of diseased cattle protects cattle in the receiving State after the act of transportation has ceased; prohibiting the transportation of lottery tickets prevents their use in the receiving State. See Parkinson, "Congressional Prohibitions of Interstate Commerce," 16 *COL. L. REV.* 367 (1916). Of course *Hammer v. Dagenhart*, 247 U. S. 251, 38 Sup. Ct. 529 (1918), casts some doubt on the general proposition urged. That case, however, appears to be inconsistent in principle with the later case of *Brooks v. United States*, 267 U. S. 432, 45 Sup. Ct. 345 (1925), upholding the Federal Motor Vehicle Act. See Wahrenbrock, "Federal Anti-Trust Law and the National Industrial Recovery Act," 31 *MICH. L. REV.* 1009 at 1052 (1933), notes 202 and 203.

*Hoke v. United States*³⁰ and *Brooks v. United States*³¹ to argue that there must be an organized traffic in the criminal acts prohibited before they can be deemed commerce. It is doubtful whether the Court has consciously adopted such a standard. Moreover, the argument itself is unconvincing since it makes the meaning of commerce depend upon the extent of the evil and the necessity for action, which should be policy-determining factors for Congress alone to consider. This constitutional power cannot be measured by the frequency with which an act is committed.

The general power to punish crime belongs to the States, and it may be argued, therefore, that the suggested federal legislation would violate the Tenth Amendment.³² But the States' power to deal with crime does not preclude the federal government from penalizing acts interstate in character. Indeed, this argument would deny the validity of a host of well-recognized federal crimes, if pushed to its logical conclusion. It is altogether untenable. The power to regulate commerce ". . . is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."³³ The coexistence of the States with their police powers is not itself a limitation.³⁴

What are the implications so far as further legislation is concerned? There would seem to be no question as to the validity of amending the Sherman Anti-Trust Law to enact severe penalties punishing racketeering with reference to goods in interstate commerce. The power of Congress to prohibit combinations in restraint of trade, which has been

³⁰ 227 U. S. 308 at 322, 33 Sup. Ct. 281 at 284 (1913): ". . . the facility of interstate transportation . . . can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and, more insistently, of girls."

³¹ 267 U. S. 432 at 438, 45 Sup. Ct. 345 at 346 (1925): "Elaborately organized conspiracies for the theft of automobiles and the spiriting them away into some other state and their sale or other disposition far away from the owner and his neighborhood have roused Congress to devise some method for defeating the success of these widely spread schemes of larceny."

³² "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." When it was argued in *Hoke v. United States*, 227 U. S. 308, 33 Sup. Ct. 281 (1913), that the Mann Act violated the Tenth Amendment, the Court said (p. 322), "Our dual form of government has its perplexities, State and Nation having different fields of jurisdiction . . . but it must be kept in mind that we are one people; and the powers reserved to the States and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral."

³³ *Gibbons v. Ogden*, 9 Wheat. (22 U. S.) 1 at 196 (1824).

³⁴ See Corwin, "Congress's Power to Prohibit Commerce a Crucial Constitutional Issue," 18 CORN. L. Q. 477 (1933).

recognized in numerous decisions,³⁵ can constitutionally be exercised to punish the racketeer whose activities obstruct the flow of commerce. There can be no doubt about the power to extend the Federal Motor Vehicle Act to include any kind of stolen property. Broadening the Kidnaping Act to embrace cases where interstate means of communication are used to consummate the crime would be constitutional. A statute placing an interdiction upon the use of interstate radio, telephone, or telegraph for the purpose of perpetrating fraud would be valid. And finally, it might even be possible for Congress to deal by federal act with the case where *A* in State *X* shoots and kills *B* in State *Y*,³⁶ and with similar cases which have raised many nice questions of State jurisdiction³⁷ and extradition.³⁸ If Congress can prohibit transporting stolen automobiles it can prohibit transporting bombs with intent to kill.³⁹ Since the method of conveyance is immaterial a crimi-

³⁵ Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup. Ct. 436 (1904); Swift & Co. v. United States, 196 U. S. 375, 25 Sup. Ct. 276 (1905); Stafford v. Wallace, 258 U. S. 495, 42 Sup. Ct. 397 (1922).

³⁶ This is the case of State v. Hall, 114 N. C. 909, 19 S. E. 602 (1894), where State *X* refused to punish the defendant because it did not have jurisdiction. See also Commonwealth v. Apkins, 148 Ky. 207, 146 S. W. 431 (1912); People v. International Nickel Co., 168 App. Div. 245, 153 N. Y. S. 295 (1915); State v. Gessert, 21 Minn. 369 (1875); Moran v. Territory, 14 Okla. 544, 78 Pac. 111 (1904), rigidly applying the territorial principle of jurisdiction over crime.

³⁷ See Berge, "Criminal Jurisdiction and the Territorial Principle," 30 MICH. L. REV. 238 (1931).

³⁸ The federal Constitution provides for the extradition between States of persons who shall "flee from" justice, (Article IV, sec. 2, clause 2), pursuant to which an interstate rendition statute was passed by Congress, 1 Stat. 302 (1793), 18 U. S. C., sec. 662 (1926). Under this law a "fugitive from justice" has been described as a person who was actually and not constructively within the demanding State at the time when the crime was committed. Hyatt v. People ex rel. Corkan, 188 U. S. 691, 23 Sup. Ct. 456 (1903), discussed in 3 COL. L. REV. 282 (1903); Ex Parte Baird, (Tex. Cr. 1929) 17 S. W. (2d) 1049. Therefore, when *A* in State *X* shoots and kills *B* in State *Y*, the felon could not be extradited under the federal statute. The Uniform Criminal Extradition Act, 9 Uniform Laws Ann. 107 ff. (1932), adopted in seven States, provides in sec. 6 that the governor of the asylum State may surrender a person who, while in the asylum State, does an act "intentionally resulting in a crime" in the demanding State. Under this law the felon who shoots across a state line could be extradited, in the discretion of the governor of the asylum State. See 32 COL. L. REV. 1411 (1932).

³⁹ Under the Mann Act, transporting a woman with intent to debauch her is sufficient to constitute a violation. The immoral act need not be consummated, this merely being evidence of the intent. United States v. Brand, (D. C. S. D. N. Y. 1916) 229 Fed. 847; Rizzo v. United States, (C. C. A. 3d, 1921) 275 Fed. 51. See also Van Pelt v. United States, (C. C. A. 4th, 1917) 240 Fed. 346; Burgess v. United States, (App. D. C. 1924) 294 Fed. 1002. The intent to debauch the woman must have been formed, however, before the defendant reaches the foreign State. Sloan v. United States, (C. C. A. 8th, 1923) 287 Fed. 91.

Corwin, "Congress's Power to Prohibit Commerce a Crucial Constitutional

nal might be said to have transported a bomb in interstate commerce whether he carries or throws it across a state line. And by analogy it is possible to argue that a defendant transports a bullet in interstate commerce when he shoots from one State into another.⁴⁰

2. *Flight of Criminals Across State Lines*

Suppose Congress were to pass the following statute: "Any person who leaves a State in which he has committed a felony, with intent to escape punishment in such State, shall be guilty of a federal offense." Can the passage of persons from one State to another be forbidden under the commerce clause when intent exists to evade punishment? Because of inadequate extradition laws a need arises for quick pursuit and sure punishment of persons who commit crimes and escape into another State.⁴¹ If the act of escaping can be punished, officers will not be balked in their pursuit, and the felon can be tried where he is apprehended without resort to cumbersome extradition machinery.

The proposed statute would seem to transfer the trial of fugitives from a state to a federal court. It might be argued that such transfer violates the Tenth Amendment which reserves to the States and people all power not expressly delegated to the federal government. It might also be argued that trial in a federal court of another State violates due process⁴² and deprives the defendant of his constitutional right to trial by a jury of the vicinage.⁴³ The easy answer to all these arguments is

Issue," 18 CORN. L. Q. 477, 493 (1933), argues that, as a result of *Hoke v. United States*, 227 U. S. 308, 33 Sup. Ct. 281 (1913), upholding the Mann Act, Congress could punish any crime at all, "provided only it followed passage by the criminal from one state to another fairly closely!"

⁴⁰ The constructive presence doctrine, adopted by some courts to assume jurisdiction over a criminal not present in the State where his crime was consummated, treats the defendant as though he had crossed the line with his "lead messenger" in the above situation. For instance, in *Simpson v. The State*, 92 Ga. 41 at 46, 17 S. E. 984 at 986 (1893), the court said, ". . . the act of the accused did take effect in this state. He started across the river with his lead messenger, and was operating it up to the moment when it ceased to move and was, therefore, in a legal sense, after the ball crossed the state line up to the moment it stopped, in Georgia." See also *Hyde v. United States*, 225 U. S. 347, 32 Sup. Ct. 793 (1912), where the United States Supreme Court applies the doctrine, Mr. Justice Holmes dissenting. However amusing and fantastic we may think the fiction of constructive presence, there is nevertheless judicial language which might be used to argue that the defendant engages in an act of commerce when he shoots over a state boundary.

⁴¹ Heintz, "A Refuge for American Criminals," 18 J. OF CRIM. L. AND CRIMINOL. 331 (1927); Larremore, "Inadequacy of Present Federal Statute Regulating Interstate Rendition," 10 COL. L. REV. 208 (1910); and note 32 COL. L. REV. 1411 (1932). See n. 38, supra.

⁴² See *Interstate Commerce Commission v. Brimson*, 154 U. S. 447 at 479, 14 Sup. Ct. 1125 at 1134 (1894).

⁴³ United States Constitution, Article VI.

that the State offended against retains the power to extradite and punish for the original crime. The federal law penalizes a different act: it forbids and punishes the flight and not the offense against the State.⁴⁴ Due process and right to trial by a jury of the vicinage should raise no greater constitutional objections here than in the case of the thief who drives a stolen motor car across a state boundary.

3. *Regulating Transportation and Sale of Firearms*

Suppose Congress were to prohibit the transportation of firearms in interstate commerce, except for sale and delivery to governmental authorities, or to state and local police, and were to enact licensing and inspection provisions to make enforcement effective.⁴⁵ Strong precedent exists for the validity of prohibiting transportation of dangerous weapons as "outlaws of commerce."⁴⁶ If innocuous goods made in violation of the anti-trust laws can be prohibited⁴⁷ it would seem that the power can be extended to harmful goods which, in the hands of certain persons, are inimical to public safety. It may be argued that the proposed statute really controls production, which is not commerce under the rule of *Hammer v. Dagenhart*,⁴⁸ which held invalid a statute barring the products of child labor from interstate commerce. But that case has been severely criticized.⁴⁹ Even though *Hammer v. Dagenhart* be

⁴⁴ Under the Federal Motor Vehicle Act it would seem that the actual theft can occur any time before the transportation, showing clearly that the state and federal offenses are distinctly different. See 41 Stat. 324 (1919), 18 U. S. C., sec. 408 (1926).

⁴⁵ Such a prohibition would effectively regulate the entire industry. Sixteen of the twenty-one firms manufacturing firearms in 1929 were located in three States. Most of the business, then, would appear to be interstate. Distribution of firearms establishments by States is as follows: Connecticut, 8; Massachusetts, 4; New York, 4; Michigan, 2; Colorado, 1; Oklahoma, 1; Pennsylvania, 1. Fifteenth Census of the United States: Manufactures, Vol. II, pp. 926-928 (1929).

⁴⁶ *Hipolite Egg Co. v. United States*, 220 U. S. 45, 31 Sup. Ct. 364 (1910). See statutes designed to promote public health, morals, and safety, cited in note 28, *supra*.

⁴⁷ Section 6 of the Sherman Anti-Trust Act, 26 Stat. 210 (1890), 15 U. S. C., sec. 6, p. 145. The Act provides that the property of an organization coming under the Act, ". . . being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned. . . ." Although this is a penalty and not a prohibition, the effect would appear to be the same.

⁴⁸ 247 U. S. 251, 38 Sup. Ct. 529 (1918). The majority in this case made a distinction between production and commerce, and limited the control of Congress to commerce.

⁴⁹ See Bates, comment 17 MICH. L. REV. 83 (1918); Gordon, "The Child Labor Law Case," 32 HARV. L. REV. 45 (1918); Jones, "The Child Labor Decision," 6 CAL. L. REV. 395 (1918); Biklé, "The Commerce Power and *Hammer v. Dagenhart*," 67 UNIV. PA. L. REV. 21 (1919); Powell, "The Child Labor Law, the Tenth Amendment, and the Commerce Clause," 3 SOUTHERN L. Q. 175 (1918).

considered good law today it is submitted that the control of firearms can be distinguished: here the articles produced are inherently dangerous, while the products of child labor are not; here the prohibition is not directed at conditions of production but at transportation and sale, which is commerce even under the child labor case.

The licensing and inspection provisions of the contemplated act would be valid even though they extended to intrastate shipments, since such supervision would be necessary to detect violations. Courts have sustained federal control over intrastate commerce when it closely affected interstate commerce. Regulation of intrastate railroad rates,⁵⁰ of live stock commission men's rates,⁵¹ of grain futures,⁵² and of safety appliances on vehicles in intrastate commerce⁵³ are all examples of such control. The supervisory machinery of the suggested statute could be similar to that of the Pure Foods and Drugs Act,⁵⁴ the validity of which is unquestioned.

L. E. H.

⁵⁰ The federal government does not permit one State to lower its intrastate rates for carriers if the action will prejudice the return of interstate carriers or will work injustice to localities in another State. *Louisiana Public Service Comm. v. Texas & New Orleans R. R.*, 284 U. S. 125, 52 Sup. Ct. 74 (1931); *The Shreveport Case (Houston, E. & W. T. Ry. v. United States)*, 234 U. S. 342, 34 Sup. Ct. 833 (1914). See also: *Railroad Comm. of Wisconsin v. C. B. & O. R. R.*, 257 U. S. 563, 42 Sup. Ct. 232, 22 A. L. R. 1086 (1922), upholding the Transportation Act of 1920, 41 Stat. 456 (1920), 45 U. S. C. A., secs. 71 ff. (1926); *American Express Co. v. South Dakota ex rel. Caldwell*, 244 U. S. 617, 37 Sup. Ct. 656 (1917); *Illinois Cent. R. R. v. Public Utilities Comm. of Ill.*, 245 U. S. 493, 38 Sup. Ct. 170 (1918); *New York v. United States*, 257 U. S. 591, 42 Sup. Ct. 239 (1922); *Florida v. United States*, 282 U. S. 194, 51 Sup. Ct. 119 (1930).

⁵¹ *Stafford v. Wallace*, 258 U. S. 495, 42 Sup. Ct. 397 (1922); *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420, 50 Sup. Ct. 220 (1930).

⁵² *Board of Trade of City of Chicago v. Olsen*, 262 U. S. 1, 43 Sup. Ct. 470 (1923), upholding the Grain Futures Act, 42 Stat. 998 (1922), 7 U. S. C., secs. 1-17 (1926).

⁵³ *Southern Ry. v. United States*, 222 U. S. 20, 32 Sup. Ct. 2 (1911), upholding the Safety Appliance Acts, 27 Stat. 531 (1893), 45 U. S. C., secs. 1-7 (1926), as amended by 32 Stat. 943 (1903), 45 U. S. C., secs. 8-10 (1926).

⁵⁴ 34 Stat. 1260 (1907), 21 U. S. C., sec. 71 (1926); 34 Stat. 1260 (1907), 21 U. S. C., sec. 74 (1926). See also *Packers and Stockyards Act*, 42 Stat. 163 (1921), 7 U. S. C., sec. 203 (1926), provision for registration of stockyard dealers; 42 Stat. 168 (1928), 7 U. S. C., sec. 221 (1926), provision for keeping records and accounts.