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Federal Incorporation

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THE course of development which rate regulation in general in this country passed through is well known. It may be briefly stated as follows: in the early cases it was held that when a state legislature prescribed a scale of maximum charges for a business affected with a public interest they substituted their will for the common law rule of reasonableness, and their determinations were held final and conclusive. This view was gradually modified so as to place a limitation upon the power of the law-making body in accordance with the view that the "use and income of property, as well as its title and possession" are protected by the Fifth Amendment and the Fourteenth Amendment against deprivation without due process of law.[1]

Our problem is, more particularly, to trace in this development the changes in the relation of the federal and state control over the subject. What is the sphere of the federal power in this regard and how has it been divided from the state authority? For convenience of treatment we shall number the successive steps in the development of the constitutional law upon this manner of regulation of interstate commerce.

1. The first cases of rate regulation were upon the exercise of that power by a state over public service companies engaged in interstate commerce but operating within one state, or, more properly, situated within a single state. The ruling was that, "Their regulation was a thing of domestic concern, and certainly until Congress acts in reference to their interstate relations the state may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction."[2] This view was then adopted even in regard to transportation companies operating not within the confines of a single state, but across several states.[3] The doctrine of these cases may be summarily stated as follows: that the states may fix rates for carriers on all intrastate shipments and such interstate shipments as any of their citizens are parties to,—on these latter at least until Congress affirmatively intervenes.[4]

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[1] Brown, "Rate Regulation", pp. 193-5.
[2] *Munn* v. *Illinois*, 94 U. S. 135.
[3] *Peik* v *C. & N. W. Ry.*, 94 U. S. 174.
[4] Brown: "Transportation Rates and Their Regulation", pp. 196-7.

2. This position was modified by the decision in *Wabash Railway* v. *Illinois*,[5] in which rate regulation was declared to be within that portion of the field of authority over interstate commerce which demanded uniformity of rule throughout the nation and where consequently the silence of Congress gave no sanction for state control. Whether the action of the state imposes any actual restraint upon that national commerce is immaterial for the subject is beyond its jurisdiction. The following year, however, Congress did actually occupy this portion of the field by the enactment of the Interstate Commerce Act, which among other things laid down certain rules about the making of rates on interstate shipments. Thus state action was constructively precluded.

So far then the modification of the original doctrine had gone no farther than to restrict the control of rate-making by state legislatures to shipments between points in the single state, leaving it supreme within its own boundaries, apparently even to the extent that interstate carriers might be compelled to carry intrastate traffic at rates which, applied generally, might not yield a normal return[6] upon the total capital investment of the system. Incidentally it should be remarked that regulation of rates applies more particularly to the transportation, to the act of exchange across state boundaries, than to the parties who effect the exchange or conduct the transportation. But inasmuch as federal incorporation is essentially a regulation of the participants in the commerce rather than the actual conduct of the interstate trade or the actual movement of objects of that commerce, it is apparent that until the regulation extends beyond the control of rates for the interstate business of carriers to the control of the tariffs of interstate carriers as such the growth of the federal power can have only slight bearing upon our main inquiry. Until the federal regulation of rates so operates as to reach in and deal with the carrier as a business unit, it does not touch our problem so very closely.

3. The next modification in the relation of the state control of rates to the national regulation came as a logical consequence of the doctrine that legislative authority cannot fix rates so low that they do not yield a reasonable return upon the property investment of the carrier,[7] since this rests presumably not only upon the constitutional guarantees of security of private property but also upon the constitutional incapacity of the states to place restraints upon interstate commerce. To the fine precision and nice symmetry of

[5] 118 U. S. 557.

[6] *Ruggles* v. *Illinois*, 108 U. S. 531.

[7] *C. M. & St. P. Ry.* v. *Minnesota*, 134 U. S. 418; *Stone* v. *Farmers' Loan & Trust Co.*, 116 U. S. 306; *Reagan* v. *Mercantile Trust Co.*, 154 U. S. 416.

the previous stage of the law, whereby the state authority fixed rates on all shipments "wholly within the state" entirely exclusive of any federal interference, and the federal authority exercised complete control over rates on all interstate shipments,—to this arrangement there came a disturbing element. The ideal arrangement of "You stay on your side of the fence and I'll stay on mine," brought harmony only by separation. But since the interests were mutual the harmony based on separation could not endure. The disturbance of the balance came about when a state fixed rates reasonable *per se* which yet were inconsistent with federal rates also reasonable *per se,* in such wise that there came a discrimination in favor of state shippers.

That such would be the outcome of a conflict between the rate-making authorities was intimated in the *Minnesota Rate Cases,*[8] where it was said: "This is not to say that the nation may deal with the internal concerns of the state as such, but that the exercise by Congress of its constitutional power to regulate commerce is not limited by the fact that the intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere." Nevertheless these cases were decided in favor of the power of a state commission to make any reasonable schedule of rates it chose to be effective within the state, even though the effect was to support the action of the commission in requiring intrastate rates which amounted to a discrimination in interstate commerce and thus made necessary a revision of interstate schedules.

But in an elaborate opinion justifying the powers exercised by the Minnesota Railroad Commission there is nowhere any implication that when Congress deems the interests of interstate traffic demand it, it may not occupy the entire field of control over interstate carriers in respect to their tariffs. And that this would be no usurpation of state power but only a legitimate exercise of its supreme control over the commercial development of the nation as a unit, becomes apparent when the vast power of the railroad transportation industry in determining the localization of industry and the distribution of industrial resources is considered. It is not difficult to imagine cases where under the law of this decision one section might have its commercial development delayed for years while another section no more favorably endowed with resources and practically equidistant from their common metropolitan market might

[8] 230 U. S. 352.

thrive prosperously. This is especially true so long as the Interstate Commerce Commission remains without power to fix minimum rates except insofar as it may forbid rebates and discriminations.

Finally in the Shreveport case, *Houston and Texas Railway* v. *The United States,*[9] the intimation of the court in the Minnesota rate cases was brought to the test and it was affirmatively decided that Congress acting through its properly constituted agents could require an interstate carrier to disregard maximum intrastate rate schedules fixed by the state and reasonable in themselves when that federal authority determined that such maximum rates were inconsistent with and so worked a discrimination against interstate shipping.[10] In the final decision Justice Hughes, speaking for the Supreme Court, said:

> "Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress and not the state that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field."

The essential and fundamental fact[11] to be gathered from the Shreveport case is simply this: that in the natural course of development of regulation of rates on interstate commerce the Congressional control was constrained to go beyond dealing with the intercourse as such, dealing with the rates of interstate commerce *in rem,* and found it necessary to deal directly *in personam* with the carrier.[12]

Here is the large outstanding consideration. It was insufficient and ultimately impossible because contradictory to the attempt to give a dual personality to interstate carriers. Either they are the creatures of many sovereigns, or they are the instrument of the whole.

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[9] 234 U. S. 342.

[10] This case was later followed in the Louisiana Class Rates decision (33 I. C. C. 302); and in *Ill. Cent. RR.* v. *Public Util. Commission,* 38 Sup. Ct. Rep. 170. The decision of the South Dakota Rate Cases is shortly expected.

[11] As it was well put in the decision of the Interstate Commerce Commission in this case (23 I. C. C. 31, 39): "We meet directly the most delicate problem arising under our dual system of government. Congress asserts its exclusive dominion over interstate commerce, the state asserts its absolute control over intrastate commerce * * * the effective exercise of its (the Commission's) power regarding interstate commerce makes necessary the assertion of the supreme authority of the national government. * * * Congress has clearly manifested its purpose to unite our railroads in a national system".

[12] A manner of regulation which some critics have believed to be beyond the power of Congress; and for that reason they have been unable to find a constitutional ground for the further power of incorporation. See Prentice: Supra, 154-155.

The fundamental contradiction in attempting to serve two masters could not be indefinitely suppressed. An arrangement which provided that one power should regulate some functions, and that another power should regulate other functions led to an inevitable conflict.[13] The carrier is after all one carrier and the essence of all regulation comes in the final analysis to control of the carrier rather than the transportation.

In effect the Interstate Commerce Commission finally had to come to say to the interstate carrier: "We are regulating *you*, not one of your functions, or part of your actions. What you do in one situation affects your entire conduct. The rates you charge in intrastate business exercise the profoundest influence upon the course of development of the national commerce and industry. Now the interests of national commerce are supreme; they are not subservient to any local trade. Moreover the authority of the national government where it conflicts with state authority is supreme. Hence your first allegiance, your primary duty is to the federal regulatory power[14] in all your actions whatsoever, wholly within one state or covering several states." The situation obviously contained the potential elements of a uniform central control over the rates of interstate transportation companies. By the passage of the Act of March 1, 1918, that which was potential has become real. The whole subject of the control of interstate carriers has taken on a new aspect. Whether this Act comes under the war power of Congress or the commerce power is not immediately to the point. In a general way it may be stated that the entire subject of rate-making has been transferred to the Federal power.[15] Henceforth an issue may arise between the United States Railroad Administration as an arm of the Executive and the Interstate Commerce Commission as an arm of Congress respecting the exercise of this all-important regulatory power, but it would seem that the issue between the state and national control is dead. General Order Number 28 of the Director General of Railways issued May 25th, 1918, and amended June 12th, 1918, provides a revised tariff and rate schedule which applies to both interstate and intrastate shipments. So far as the writer is aware the validity of this order has not been called in question.

[13] Our belligerent necessities have forced this fact upon our consideration. We have now come to recognize that it is essential to the efficient operation of our railways that they be treated as one system.

[14] See the remarks of even such a conservative critic as Mr. Calvert upon the opinion in *N. Y. C. R. R. Co.* v. *I. C. C.*, 200 U. S. 361 in his "Regulation of Commerce", p. 158.

[15] See special article in the (N. Y.) Journal of Commerce for June 19, 1918, page 6.

By the Act of March 2, 1893,[16] Congress required that automatic couplers should be placed upon all cars and locomotives used in interstate transportation. This was a measure having as its chief object the minimizing of the danger to those engaged in handling trains in interstate traffic. Previous to its enactment the states alone had exercised their police power to protect those engaged in moving railway trains whatever the character of the traffic.[17] The leading cases which arose under the act were *Chicago, Milwaukee and St. Paul Railway Company* v. *Voelker*[18] and *Johnson* v. *Southern Pacific Company*.[19] In both cases it was held that "cars" in actual use in interstate shipment or transportation did not cease to come within the purview of the statute by reason of their temporary stop upon a siding. The court said in the latter case: "Differentiating this from other cases is "the distinction between merchandise which may become an article of interstate commerce or may not, and an instrument regularly used in moving interstate commerce, which has stopped temporarily in making its trip between two points in different states * * * *" It is a manifest inference from the argument of the court that it would have been inclined to regard other cars engaged solely in transporting an intrastate shipment over the same interstate road as beyond the scope of the act.

It became apparent from these and other cases under the act that such a restricted scope for the remedial legislation was bound to defeat its purpose. Much vexatious litigation was bound to arise to determine both the rule and facts in regard to when a car was actually engaged in interstate commerce. For this reason[20] the Act of 1903[21] was passed extending the terms of the previous act so that all interstate railway carriers *ipso facto* were required to equip their cars with automatic couplers which would be so uniform as in no case to require a man to go between the cars to be coupled. It was decided in *Southern Railway Company* v. *The United States*[22] that the requirement of automatic couplers on all cars and brake wheels on all locomotives "of any railroad engaged" in interstate transportation, regardless of the character of the particular traffic of any given train or the shipment in any given car, was a valid regulation by Congress for the promotion of safety in interstate

[16] 27 Statutes 531.

[17] *Thomas* v. *Georgia Railroad and Banking Co.*, 38 Ga. 222; *Njus* v. *Chicago, Milwaukee & St. Paul Railway Co.*, 47 Minn. 92.

[18] 129 Fed. 522.

[19] 196 U. S. 1.

[20] Congressional Record, 57th Cong., Vol. 35, p. 7300; Vol. 36, p. 2268.

[21] 32 Statutes 943.

[22] 222 U. S. 20.

commerce. Finally in *Southern Railway Company* v. *Indiana*[23] an even stronger construction was resorted to in maintaining the paramount power of Congress in the face of state regulations. In this case the car upon which the company had failed to provide secure hand-holds was engaged exclusively in an intrastate haul. There was an Indiana statute providing penalties for failure to have such equipment upon cars used in intrastate transportation. Nevertheless the court held the company was not subject to this police regulation of the state even on such domestic shipments. The Safety Appliance Act was held valid because "the equipment of cars moving on interstate roads was a regulation of interstate commerce." Thus here again, as in the matter of rates, the national authority has found it necessary for an effectual exercise of its control over interstate commerce to go behind the intrastate transactions or operations of the interstate railway company and deal directly with the carrier as a unit, or *in personam.*

The relation of interstate carriers to employees like the relations of employment in most other industries remained outside the concern of the law-making bodies[24] until the grievances of the laboring class became scandalous. Sordid working conditions, long hours, and industrial dependence finally aroused the public conscience,[25] and in the last decade of the last century began a widespread movement for remedial social legislation. Naturally the first action taken in a national way was a bungling attempt to impose and enforce harmony rather than constructively to improve specific conditions. This took the shape of a Congressional regulation of the dealings of interstate carriers with trade unions in the 10th Section of the Act of June 1, 1898, known as the Erdman Act. This Act drawn as a sequel[26] to the Chicago Railroad strike of 1894 had for its object the elimination of friction between employees and employers and the averting of open ruptures on such a scale as might interrupt interstate commerce.

The provisions for arbitration of disputes have been upheld and frequently taken advantage of, but the 10th Section making unlawful any discrimination against an employee because of his membership in a labor organization was declared unconstitutional in

[23] 236 U. S. 439.

[24] "The habit of our people, accentuated by our system of representative government, is not so much in legislation to anticipate problems as it is to deal with them after experience has shown them to exist". Justice Moody in dissenting opinion, Employers' Liability Cases, 207 U. S. 523.

[25] Alger: "The Old Law and the New Order", pp. 237-261.

[26] H. Rep. 454, 55th Congress, 2nd Session.

Adair v. *The United States*.[27] But as the decision went upon an entirely different point from that with which we are concerned, it does not call for specific attention. It cannot be said to have affected either one way or the other the relative extent of the federal and state control over the carrier. For the clear and unmistakable import of the decision was upon the discriminative character of the regulation[28]—not the matter of the regulation as such. The most significant legislation by which Congress has sought to interpose its authority in the relation of employment is the law on employers' liability. The Act of June 11, 1906, was the entering wedge for this sort of regulation. The constitutionality of the act was contested in the cases known as *The Employers' Liability Cases*.[29] It was an unfortunate fact that the cases were poorly argued. Counsel for plaintiff in error practically conceded the chief point in issue when the whole force of their argument was expended in support of that interpretation of the act which would make it apply, in spite of its general wording, only to employees injured while actually engaged in interstate transportation. Their argument was not addressed to the support of the obvious intent of the law, which was clearly the matter which the court was required to adjudicate and of which they were entitled to the benefit of a full argument at the bar.[30] There was slight reference to the virtual necessity of uniformity in order to protect "interstate employees." Unless this pressure of liability upon the employer to guard against accidents to its employees be uniform, however, the object of Congress to provide greater safety in the interstate service will be only imperfectly and unsatisfactorily advanced.

The court held that the act was unconstitutional inasmuch as by its wording it was intended to apply to "any" employees of interstate carriers, as well those engaged in intrastate operations as those engaged in interstate operations. The court took the view that the relations of interstate carriers to the former class of employees was a subject exclusively within the province of state action. And the main ground upon which the court rested its decision must be admitted to have very cogent reasons behind it. The valid reasoning would seem to be that the connection between the safety of interstate transportation operations and also the security of goods

[27] 208 U. S. 160.

[28] See particularly 208 U. S. 179.

[29] 207 U. S. 463.

[30] The argument for plaintiff in error was unduly influenced by the facts of their particular case, where the injured employees were actually engaged in interstate transportation. The brief filed by the Attorney General by permission of the court while arguing the point in issue more fully was far from exhausting the arguments which would appear most powerful for the constitutionality of the law.

which are subject matter of interstate shipments, and the liability which the employer bears to its "intrastate employees" is not sufficiently close or intimate to warrant the regulation by Congress of the latter. This is in full recognition of the principle that in the exercise of its regulatory power over interstate transportation and the carriers engaged therein the action of Congress cannot be obstructed by the indirect and collateral effect upon the intrastate business and relations of such carriers, since in the case presented, it would not operate as a substantial obstruction or impediment to its control over those carriers in their interstate business and relations to deny the application of its regulations beyond this primary field.

Notwithstanding this ruling and the subsequent Act of Congress not inconsistent with it and the opinion stated in the cases[31] where this later Act was upheld, the Supreme Court has been bound by circumstances to go beyond this strictly confined rule. In the case of *Illinois Central Railroad Company* v. *Behrens*[32] the court refused to hold the carrier liable under the federal liability act for the injury to a fireman on a switch engine doing switching work entirely within the city of New Orleans but engaged indiscriminately in the transfer of cars in both interstate and intrastate commerce. At the time of the accident the switch engine was hauling only intrastate cars. But the court took occasion to lay down the following principle, which is significant evidence of the trend of its opinion:

> "Considering the status of the railroad as a highway for both interstate and intrastate commerce, the interdependence of the two classes of traffic in point of movement and safety, the practical difficulty in separating or dividing the work of the switching crew, and the nature and extent of the power confided to Congress by the commerce clause of the Constitution, we entertain no doubt that the liability of the crew in the course of its general work was subject to regulation by Congress whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce."

Finally this rule was actually applied and enforced in *New York Central Railroad* v. *Carr*[33] where the interstate carrier was held liable for the injury to a brakeman on a "pick-up" train running be-

[31] 223 U. S. 1.
[32] 233 U. S. 473.
[33] 238 U. S. 260.

tween two points within a single state and made up of cars in both intrastate and interstate traffic, and although at the time of the injury the brakeman was engaged in cutting off two intrastate cars from the engine on a siding. There is thus a clear trend of decisions modifying the original principle as laid down in the first Employers' Liability Cases, and this trend is evidently in the direction of enlarging the scope of the application of the federal regulation on this subject.

In still another important way Congress has exercised its regulatory power in regard to the relations of employment on interstate railroads. The Act of March 4, 1907, prescribed the maximum working hours per day for which an interstate carrier might employ a person working on interstate traffic. In *Baltimore and Ohio Railroad* v. *Interstate Commerce Commission*[34] this law was upheld. Though in principle it goes no further than the Employers' Liability Cases, in its practical operation it involved a much more extensive interference with the relations of the employer with the employee engaged solely in intrastate traffic. The hours of service which represent the legally permissible maximum in interstate transportation must necessarily to a great degree govern the hours of service in the intrastate business. The standard length of run being worked out, the establishment of division points and large switching and transfer yards, will tend to make the profitable hours of employment those fixed by federal law. In *Erie Railroad* v. *New York*[35] it was held that a telegraph operator of an interstate carrier was subject to the hours-of-service law of Congress and not of the state, even though some of the trains he was engaged in "spacing" and "reporting" were purely intrastate.

There is no extension[36] of the principle of these cases by the much-heralded Adamson Act, September 3, 1916, and the decision of March 19, 1917, upholding it. Only the subject matter of the law, i. e. wages, differs, if indeed that proposition can be firmly established, a point upon which the court itself was not clear. By the express terms of the act it is applicable solely to those "actually engaged in any capacity in the operation of trains used for the transportation of persons or property" in interstate commerce. Thus like the foregoing cases under this head the regulation deals not with the interstate carrier as such, a body corporate engaged in interstate commerce, but only with such phases of a business as are clearly interstate in character.

[34] 221 U. S. 612. Followed in *Northern Pacific Railway* v. *Washington*, 222 U. S. 370.
[35] 233 U. S. 671, followed in *Denver I. Ry. Co.* v. *U. S.*, 236 Fed. 685.
[36] The decision is none the less decidedly important as regards the status in constitutional law of subjects arising under the 5th and 14th Amendments.

Upon the subject of the relations of interstate carriers to shippers the most significant question has been the regulation of the liability of the former for damage to shipments. For many years the railroads upon all phases of their traffic were held subject to the common law rule, that a common carrier was practically an insurer of goods, though this was later modified to the extent that a carrier could by contract exempt himself from certain liabilities not including liability for his own negligence. It was held in *Hart* v. *Pennsylvania*[37] that a fair contract limiting the extent of recovery to an agreed valuation of the property would be enforced. Many states (including New York, Iowa, et al.) hence sought by statute to reaffirm the old common law rule.

It was such a statute which declared that the liability of the railroad company would remain as it was at common law, regardless of any contract whatever, that formed the matter of contention in *Chicago, Milwaukee and St. Paul Railway* v. *Solan*.[38] In that case the court decided that such a state regulation was not only a valid interference with the contracting powers of private parties but was applicable to interstate shipments arising in the state where such law was in force. The court declared:

> "It is in the law of the state that provisions are to be found concerning the rights and duties of common carriers * * * *, and the measures by which injuries resulting from their failure to perform their obligations may be prevented or redressed."

This is an extreme statement of the power of the states to make regulations concerning interstate commerce. There is no mention, even, of a dormant power in Congress to legislate upon such a matter, the court, indeed, going so far as to assert: "It is in no just sense a regulation of commerce."

In *Pennsylvania Railroad Company* v. *Hughes*,[39] however, the court took a more compromising attitude. Upon an interstate shipment originating in New York where a carrier might limit his liability to a stipulated sum it was held that the damage occurring in Pennsylvania where common carriers might not so limit their liabilities rendered the railroad company liable under the law of Pennsylvania to the full extent of the injury. Thus, in spite of the conflicting character of the state laws and the obviously unjust

[37] 112 U. S. 331.
[38] 169 U. S. 133.
[39] 191 U. S. 477.

burden thereby placed upon interstate commerce, the court continued to give effect to state laws governing liability upon interstate shipments. Nevertheless the court took occasion to remark that such features of transactions involving interstate commerce could not be regarded as beyond the regulatory power of Congress when it should choose to exercise it.

Finally, the enactment of the Carmack Amendment to the Hepburn Act in 1906 settled the matter of regulation of liability of carriers of interstate commerce as we have already noticed in connection with telegraph companies. As the court said in *Kansas Southern Railway* v. *Carr*[40]

> "The amendment undoubtedly manifested the purpose of Congress to bring contracts for interstate shipments under one uniform rule of law, and, therefore, withdraw them from the influence of state regulation."[41]

Other questions having to do with the relations of shipper and carrier, have been in regard to supplying facilities for transportation, such as cars and sidings, and charges and penalties for demurrage including failure to give notice to consingee of arrival of freight, as well as failure to dispose of freight reasonably after it has reached its destination. It will be sufficient to mention some of the recent cases covering these matters. In *Chicago, Rock Island and Pacific Railway Company* v. *Hardwick Company*,[42] it was held that the Hepburn Act operated to exclude all state regulations penalizing interstate carriers for failure to furnish cars to shippers for use in interstate traffic. This case was followed and the principle confirmed in *Yazoo and Mississippi Valley Railroad Company* v. *Greenwood*.[43] Similarly in *St. Louis, Iron Mountain* and *Southern Railway* v. *Edwards*[44] an Arkansas statute imposing liability upon carriers for failure to notify a consignee of the arrival of shipments, whether of an interstate or intrastate character, was held unconstitutional. The Hepburn Act said the court, "by its very terms embraces the obligation of a carrier to deliver to the con-

[40] 227 U. S. 639.

[41] Other cases upholding this statute and its exclusive authority are: *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186; *Chicago, etc. Railway* v. *Miller*, 226 U. S. 513; *Galveston, H. etc. Railway Co.* v. *Wallace*, 223 U. S. 481; *Norfolk & Western Railway Co.* v. *Dixie Tobacco Co.*, 228 U. S. 593; *Missouri, Kansas and Texas Railway Co.* v. *Harriman*, 227 U. S. 657; *Missouri, Kansas and Texas Railway Co.* v. *Harris*. 234 U. S. 412, where a state statute providing for an attorney's fee in cases of recoverable contested claims for damages, was sustained, in no way impinges on this rule.

[42] 226 U. S. 426.

[43] 227 U. S. 1.

[44] 227 U. S. 265.

signee, and therefore by the same token excludes the right of a state to penalize on that subject."

In *Illinois Central Railroad* v. *Mulberry Hill Coal Company*[45] there was, however, a curious reversion from the rule laid down explicitly in the *Hardwick* case above. In this case it was held that the federal regulation as enacted in the Hepburn act was not exclusive but might be supplemented by state statutes fixing liability upon carriers for failure to perform their common law duty of providing cars within a reasonable time. This decision and the one in *Pennsylvania Railroad* v. *Puritan Coal Company*[46] to similar effect are quite inexplicable in view of the trend of the court's decisions upon like points and its previous decision in the *Hardwick* case. In fact the court refused to attempt to reconcile that case, on the ground that the question of the effect of the federal regulation was not brought up in the state courts. But certainly that gives no just basis for refusal to rule where the effect of the decisions in the state courts is to give effect to a statute which is admitted to operate where the state's power of regulation has been held by the Supreme Court itself to be excluded.

We come thus to the conclusion that the regulation of interstate carriers has shown a sustained tendency to devolve more and more vitally upon the federal authority. The trend of decisions of the Supreme Court has been to confine in a more and more limited sphere the power of the states to direct the operations of these instruments of a national commerce. Finally, at least for the duration of the war, the Federal Government has taken unto itself their exclusive control, and in debarring the states from all power to regulate them it has encountered no opposition.

Persons and Business Units

That a state cannot impose discriminative burdens upon the acts of trade within its jurisdiction of citizens of another state has long been the recognized rule.[47] Nor have such decisions rested upon the constitutional inhibition[48] upon the states which prevents them from granting privileges and immunities to citizens of the one state not open to citizens of all the states;[49] rather they rest upon the positive grant of power to Congress to regulate trade among the

[45] 238 U. S. 275.

[46] 237 U. S. 121.

[47] *Welton* v. *Missouri*, 91 U. S. 275; *Walling* v. *Michigan*, 116 U. S. 446; *Robbins* v. *Shelby Company*, 120 U. S. 489; *Fargo* v. *Michigan*, 121 U. S. 230. And it applies even to Congress. Cf. *The Stoutenburgh Case*, 129 U. S. 141.

[48] Article IV, Section 2.

[49] An exception is *Ward* v. *Maryland*, 12 Wall. 418.

states. By a curious inversion of reasoning, however, corporations were denied the protection of this rule, since in cases involving the discrimination against them the court argued not from the exclusive power of Congress to regulate commerce among the states as it had with individuals, but instead from the above-mentioned "comity clause" under which corporations were very justly held not to be "citizens" within the meaning of that section. Hence they have always been and are now admitted to do business in other states than their parent state only by comity. Notwithstanding this fact it has been held[50] beyond the power of a state to discriminate by statute in favor of its own citizens in respect to their legal rights and liabilities toward a foreign corporation to which the state has granted permission there to conduct its business.

But the regulatory power of Congress over commerce came into active exercise in respect to the persons negotiating interstate commerce only by the passage of the Sherman Act of 1890. This act constitutes the most general way in which Congress has exercised its power to regulate the national commerce. It is a complete prohibition of monopolies and combinations in restraint of trade, though considered by many merely an enactment into federal statute of the rules of the common law. It was aimed at the suppression of monopoly over any branch of the commerce moving between the states. The terms of the act were very general and it has thus imposed upon the courts the duty of interpretation and "selective application" to an uncommon degree.

The constitutionality of the act has been repeatedly affirmed,[51] and it only remains to consider briefly the development of the law as an effective instrument of a federal policy for the control of the industrial evolution of the nation. In short, it is not an answer to the question of what forms of monopoly or restraint of trade are covered by the act[52] that we shall seek, but only the question in how large a field does it operate.

Now the very first decision under the act, the Sugar Trust case, held that the law was not applicable to manufacturing combinations, or producing monopolies, but only to "commerce." Such business

[50] *Blake* v. *McClung*, 172 U. S. 239.

[51] The 'stock' cases are: *E. C. Knight Company case*, 156 U. S. 1; *Montague* v. *Lowry*, 193 U. S. 38; *Trans-Mo. Freight Ass'n Case*, 166 U. S. 290; *Joint Traffic Ass'n Case*, 171 U. S. 505; *Hopkins v. U. S.* 171 U. S. 578; *Addystone Pipe Co. Case*, 175 U. S. 211; *Connolly* v. *Union Pipe Co.*, 184 U. S. 540; *Barber Paving Company* v. *Field*, 194 U. S. 618; *Loewe* v. *Lawlor*, 208 U. S. 274; *Northern Securities Case*, 193 U. S. 197; *The Standard Oil Case*, 221 U. S. 1; *The American Tobacco Case*, 221 U. S. 106.

[52] An excellent review and discussion of the law and the facts upon this subject from this point of view will be found in a series of three articles in The Journal of Political Economy, XXIII, 3, 4, 5, by Professor A. A. Young.

dealings and forms and methods of organization as related to manufacture were considered antecedent to interstate commerce, wholly a concern of the state, and subject solely to its control. This distinction has a certain nice logical consistency and would seem on purely *a priori* grounds to be incontestable. Its statement in the opinion of the court has considerable forcefulness, and show of reason, considered as an abstract proposition.

FULLER, C. J., declared:

> "Doubtless the power to control the manufacture of a given thing involves, in a certain sense, the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play it does not control it and affects it only incidentally and indirectly. Commerce succeeds to manufacture and is not a part of it."

But when the facts of modern business are brought into view, as the facts of that very case show, the proposition sounds hollow and meaningless. The combination of the sugar refineries effectuating as the court itself stated "nearly complete control of the manufacture of refined sugar in the United States" operated to "restrain trade" and bring about a monopoly price for sugar all over the United States no less efficaciously because all of the refineries combining happened to be located in Philadelphia, than if each refinery had been located in a separate state.

Passing over the many cases which bridge the gap[53] of thirteen years which separated this decision from that of the Danbury Hatters' Case, we come at once to the consideration of the opinion in that important case. The real issue in that case does not seem to the writer to be what it has been generally described as being, namely, whether the Sherman Act was applicable to labor organizations. Or at least, if that was the issue as it was treated by the court, it really involved a larger issue, namely, whether the power of Congress in the regulation of interstate commerce extended beyond the mere action by which goods were put in transit across state lines and reached the transactions leading up to that stage in the process where sale and transportation begin. It seems to me that no other

[53] A good example of an attempted application of the Knight case principle is in *Dueber Watch Company* v. *Howard Watch Company*, 55 Fed. 851, 66 Fed. 637 in the opinions of which one finds several striking anomalies. The contention to the same effect was made the chief defense in the *Addystone Pipe Case* and was most aptly answered by Judge Taft in his opinion, 85 Fed. Rep., 294-99. *In re Debs* (158 U. S. 564) also may be taken as an evidence of the changing mind of the court although in its opinion in that case the court refused to rest its decision upon the Sherman Act.

interpretation can be put upon that decision, relative to our inquiry, than that the force of imperative circumstances had finally come to make the court accede to the validity of the operation of the federal power beyond the rigid limits laid down in the Knight case. If it be the rule of that case that the conditions surrounding and the dealings affecting the manufacture of all goods whatsoever are solely within the competency of the states to countenance or correct no matter what the "incidental and indirect" consequences upon the interstate trade, then certainly that can no longer be said to be the authoritative rule after the decision in *Loewe* v. *Lawlor.*

But, if dealings between employers and employees in regard to the manner in which shops shall be conducted come within the control of Congress simply by virture of the fact that goods produced in those shops eventually reach the channels of interstate commerce it is difficult to understand why the respective rights and powers and equities of shareholders, bondholders, etc., of a corporation conducting such a shop are not also within the competency of Congress to regulate. But leaving aside all analogies and ulterior comparisons for the moment it is indubitable upon any fair consideration of this case that the Supreme Court has determined that the federal law against monopolies and combinations in restraint of trade among the states has a wider scope than it was at first disposed to hold—that in effect it extends to actions which relate to those aspects or stages of industry which ordinarily or at least historically have been deemed within the province of state regulation whenever such actions operate, even though it be *only by their indirect and secondary consequences,* to the material injury or interruption of the commerce which is interstate and of national concern.

The state of the law upon this subject particularly so far as it affects labor organizations has been thrown into considerable confusion by the subsequent legislation of Congress known as the Clayton Act. But the principle which we have pointed out as the essential one for which the Danbury Hatters' case stands would seem not to have been impaired or endangered by any recent decisions.

Substance or Objects

In regard to the substance which forms the basis of interstate transactions, of the commodities the movement of which make up interstate commerce, the field for long remained free and unrestricted. Whatever lawful property was trafficked in by private contract across state lines was deemed a legitimate article of commerce. Private contract rather than public law determined what should be and what should not be the subject matter of interstate

commerce. So clearly was this view established that a state might not even prevent the introduction within its borders of such a commodity as intoxicating liquor[54] of which by a lawful and reasonable exercise of its police power to protect the health and morals of its citizens it had prohibited the manufacture or sale within its borders. In other cases a state law prohibiting the sale within the state of meat from any animals slaughtered without having been inspected and certified by state authorities,[55] and a state-wide prohibition of the manufacture or sale of oleomargarine[56] were held to be unconstitutional interferences with interstate commerce. In short, the pathways of interstate commerce were by rule of construction rather than by positive law kept absolutely open.

It will be apparent thus far that it is settled doctrine that the power to determine what shall be the subject matter of interstate commerce rests exclusively with Congress.[57] The real question is not whether the state may exercise any control over such a subject but of what is the extent of the federal power. Is the federal government confined or restricted in the determination of what shall be the lawful subject matter of interstate commerce to strictly police regulations designed to protect the physical health or moral welfare of the nation? Or does its authority extend to measures having to do with broad principles of public policy? So far it must be admitted the power of Congress has never been exercised beyond the first sphere. A consideration of the extent to which the national regulatory power has gone in making positive police regulations may throw some light on the tendency in this direction. For the remarkable extension of what is legally included under the police

[54] Such was the doctrine of *Bowman* v. *Railway Company*, 125 U. S. 465, and of *Leisy* v. *Hardin*, 135 U. S. 100. The ruling in *Mugler* v. *Kansas* was in nowise inconsistent with this doctrine; see particularly 123 U. S. 674.

[55] *Minnesota* v. *Barber*, 136 U. S. 313.

[56] *Schollenberger* v. *Pennsylvania*, 171 U. S. 1. Respecting the ludicrous contest of powerful interests over the introduction of this innocent commodity it was later held in *McCray* v. *United States* (195 U. S. 27) that an Act of Congress (32 Stat. 93) imposing a prohibitive tax on artificially colored oleomargarine was a valid exercise of its taxing power. But with the development of the law of taxation we are not here concerned.

[57] It should not be overlooked, of course, that the power of the state to require inspection of articles offered for sale in the state whether imported or of domestic production has never been denied. But this is confined to specific articles of a larger class. No class of goods or merchandise which Congress has recognized as articles of interstate commerce may be excluded but only particular specimens in an impure condition likely to have a deleterious effect upon the public health or specimens so made or in such form as to deceive and defraud the public. But even this power may only be exercised relative to goods moving in interstate commerce in the absence of inspection laws by the national government covering the same subject or where uniformity of regulation is imperative. See *Plumley* v. *Mass.*, 155 U. S. 462; *Compagnie Francaise* v. *Bd. of Health*, 186 U. S. 380; *Globe Elevator Co.* v. *Andrew*, 156 Fed. 664; *Train* v. *Disinfecting Co*, 144 Mass. 523; *Neilson* v. *Garza*, Fed. Cases No. 10,091.

power as possessed by the several states is a familiar fact to careful students of law[58] and sociology whose perspective covers the last three-quarters of a century of our development. We shall consider in order the federal laws on liquors, food and drugs, live-stock, lottery tickets and gambling devices, and "white slavery."

Spurred by the unpopularity of the decision in *Leisy* v. *Hardin* Congress on August 8, 1890, passed the Wilson Act by which it voluntarily relinquished its protection of the free movement of intoxicating liquors in interstate commerce. Thereafter it was held[59] unlawful to manufacture liquors within a state having a prohibition law even entirely for sale without the state as well as to bring such liquors within the state for resale even in original packages. So rested the law until the passage of the Webb-Kenyon Act of March 1, 1913. By that act it was made unlawful to ship across state boundaries any intoxicating liquor intended for use in the state in which it is received in violation of any laws there subsisting. Congress has thus absolutely forbidden the shipment in interstate commerce under certain circumstances of an article which the Supreme Court had judicially determined to be a lawful article[60] of commerce. And in upholding the law[61] the Court went even further, stating. "It is not * * * * disputed that if Congress had prohibited the shipment of all intoxicants in the channels of interstate commerce * * * such action would have been lawful."

The basis of the regulation and inspection of the production of food and drugs to be shipped in interstate commerce is the Act of June 30th, 1906. There have been noteworthy amendments in 1907, 1908 and 1912. In the *Hippolite Egg* case,[62] the first important decision under the act, it was held that any "adulterated" article shipped in the channels of interstate commerce whether intended for sale or whether intended for use only as a raw material in another and consumable product was subject to seizure and condemnation in original unbroken packages by federal authority. But the case of *Savage* v. *Jones*[63] appears to have settled the doctrine that the power of Congress in making regulations to prevent the movement in interstate commerce of impure and unhealthful com-

[58] Ely, "Property and Contract, etc.", Pt. II, Chap. V and Append. IV. Orth, "The Relation of Govt. to Property and Industry", various articles, pp. 49-178; Freund, "Constitutional Limitations and Labor Legislation", and articles by others in Proceedings of the Third Annual Meeting of the American Ass'n for Labor Legislation (1909).

[59] *In re Rahrer*, 140 U. S. 545.

[60] *Leisy* v. *Hardin*, 135 U. S. 100.

[61] *Clark Distilling Co.* v. *Railway Co.*, 37 Sup. Ct. Rep. 180.

[62] 220 U. S. 45.

[63] 225 U. S. 501.

modities does not exclude similar action by the states[64] upon the same goods even before they have become inextricably commingled with the common property of the state. In that instance, however, the Act only forbade misbranding so that the statute which required the affixing of the exact formula to the article was really supplemental to the federal regulation. The provisions of the law requiring brands and labels to be placed upon the packages intended to reach the purchaser were upheld in a subsequent decision[65] invalidating a state law forbidding all labels other than the one it prescribed. It appears then to be the settled doctrine that while the Pure Food and Drugs Act is not exclusive of state regulations upon the same subject nevertheless these latter must not interfere with the enforcement of the federal regulations[66] which presumably might be made so complete that additional regulation by a state would constitute a burden upon interstate commerce and so be precluded altogether.

The federal government has taken action to enforce its pure food laws by inspection during the process of production in a single industry, meat packing. The validity of this regulation[67] has not, I believe, been questioned before the Supreme Court. The federal police regulation covering the interstate commerce in live stock had its inception in the Animal Industry Act of May 29, 1884. Previous to the enactment of this act as a measure of protection to the stock-raising industry of the state the Legislature of Missouri had passed a law forbidding the bringing into the state of any cattle from the Southwest between March and November of any year. This statute being held invalid[68] as a prohibition during eight months of every year of interstate commerce in cattle regardless of their condition, a profitable and legitimate industry was left without adequate police protection. The ruling was distinctly favorable to the national authority, but it brought manifest responsibilities. It was for the discharge of these that the Bureau of Animal Industry was established. Its findings, however in regard to the means of guarding against disease and its spread among domestic animals were little more than recommendations to state authorities. The Act

[64] To the same effect is *Sligh* v. *Kirkwood,* 237 U. S. 52.

[65] *McDermott* v. *Wisconsin,* 228 U. S. 115.

[66] The Shirley Amendment of August 23, 1912, passed after the decision in *United States* v. *Johnson* which construed the "misbranding" forbidden to apply only to statements of contents may be referred to as evidencing the extension of the national regulations. The Amendment making it illegal to misrepresent the curative effect of drugs was upheld in *Seven Cases* v. *United States,* 239 U. S. 510.

[67] In *U. S.* v. *Lewis* (235 U. S. 282) the penalty provided for effacement of a label of the government inspector was enforced.

[68] *Railroad Co.* v. *Husen,* 95 U. S. 465.

forbade the transportation between states of any live stock known to be infected with a communicable disease; but the principal service rendered was in providing that the Bureau ascertain through its agents the existence of contagious disease in any locality and notify thereof shippers and transportation companies.

Nevertheless the state authorities were not bound to recognize the findings of the Bureau or act in conformity with its recommendations.[69] Moreover state laws providing additional police protection[70] against the introduction of diseased cattle were held not to be excluded by the federal regulations. In order to facilitate the interstate traffic in live-stock which was becoming seriously hampered by these divergent state regulations, Congress on February 2, 1903, passed an act providing that a certificate from an inspector of the Bureau of Animal Industry to the effect that specified live stock had been found free from communicable disease entitled the owner to ship them into any state without further inspection.

In *Asbell* v. *Kansas*[71] a conviction under a state law requiring inspection by an agent of the federal Bureau or in the alternative by a state official was sustained. So long as Congress refrains from passing an act requiring inspection of all cattle transported or driven across state lines from sections from which communicable or other diseases are likely to be carried into other sections or refrains from requiring inspection even of all cattle transported in interstate commerce during certain periods of the year, neither of which is inconceivable,[72] so long will such state regulations as that of Kansas be upheld. Meanwhile it is sufficient for our purpose to note that the federal regulation is supreme and the state requirements so far as they affect interstate movement of stock are only provisionally valid.

By the Act of March 2, 1895, the interstate carriage of lottery tickets was prohibited and by the act of February 8, 1897, that of obscene literature and articles designed to prevent conception was also forbidden. The contention was made in the case testing the first of these acts, The *Lottery Case*,[73] that the regulatory power of Congress did not extend to the prohibition of commerce in any line. This contention was also made in *United States* v. *Popper*,[74] a case arising under the latter act. But the answer of the court given in the *Lottery Case* was: "We should hesitate long before adjudg-

[69] *Reid* v. *Colorado*, 187 U. S. 137.
[70] *Kimmish* v. *Ball*, 129 U. S. 217; *M. K. & T. Ry.* v. *Haber*, 169 U. S. 613.
[71] 209 U. S. 251.
[72] See Calvert: Op. cit., p. 149.
[73] 188 U. S. 321.
[74] 98 Fed. 423.

ing that an evil of such appalling character carried on through interstate commerce cannot be met and crushed by the only power competent to that end. We say competent to that end because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce."

Finally, for the suppression of prostitution Congress has exercised its power to regulate interstate commerce by police measures, and this in a drastic way. After the adverse decision of *Keller* v. *The United States*[75] upon the 3rd Section of the Act of February 20, 1907, which related solely to aliens, Congress again asserted its power by the Act of June 25, 1910, commonly known as the Mann Act. This is noteworthy for our particular purpose, also, because it deals directly with persons as such. In a way it sets up certain standards and prescribes certain qualifications for those who secure interstate transportation services. It demands inquiry into the motives and conduct of those who engage interstate transportation a matter quite distinct from the inspection and regulation of the subject matter of such transportation.

The constitutionality of the act was first questioned in a prosecution before a United States District Court—*United States* v. *Westman.*[76] It was there upheld. It was examined at greater length in *United States* v. *Hoke.*[77] The manner in which the court phrased its question makes the opinion of special value, in connection with our own inquiry. It was as follows: "Has Congress under its regulatory powers the right in any case to prohibit commerce between the states?" The answer was that it had.[78] Upon appeal before the Supreme Court[79] it was urged that it was a right and privilege of a person to move freely between states. Moreover it was contended that the motive or intention of those engaging interstate transportation did not constitute a matter within the regulatory power of Congress over interstate commerce, but the court upholding the law replied to this: "It urges a right exercised in morality to sustain a right to be exercised in immorality * * * * This constitutes the supreme fallacy. * * * * The States may

[75] 213 U. S. 138. See, however, the dissenting opinion by Mr. Justice Holmes for a clear presentation of the comprehensiveness of the Congressional authority.

[76] 182 Fed. 1017.

[77] 187 Fed. 992.

[78] The statement has been made by a justice of the Court: "I had supposed the Constitution of the United States had established absolute free trade among the states of the Union". (Mr. Justice Harlan in a dissenting opinion, *New York* v. *Roberts,* 171 U. S. 658, 680); but it has never been so held. The Constitution nowhere inhibits Congress from placing restraints upon interstate commerce, whenever in its discretion such restrictions are deemed expedient, providing they are not inconsistent with other constitutional provisions, e. eg., Art. V of Amend.

[79] 227 U. S. 308.

control the immoralities of its citizens; but there is a domain which the states cannot reach and over which Congress alone has power; and if such power be exerted to control what the states cannot it is an argument for—not against—its validity." Finally, in *Caminetti* v. *United States*,[80] the act was given an even broader and more vital interpretation. In that case it was held that the procuring of transportation even when unaccompanied by expectation of pecuniary gain was condemned by the act.

It is the manifest contribution of the few decisions under this act that they emphasize the principle that upon the subjects falling within the sphere of its constitutional powers the police power of the national government is not to be distinguished from the police power of the states. It has the same source—it is inherent in the idea of sovereignty over a designated field of action. It is limited by substantially the same constitutional principles, and extended by the same forces of an expanding social and industrial life. The fact that as yet the federal power of police regulation has not been pushed to the application of such broad principles of public policy, has not become the servant of so modern a social philosophy,—that fact has nothing to say upon the existence of the latent authority, which the Supreme Court in each succeeding case seems to recognize more definitely.

What then are the conclusions to be drawn from this comprehensive though necessarily cursory review of the development of the commerce power of Congress? As a broad generalization, I take it there can be no objection to stating that there has been an expansion of the national regulating power fitting to the expansion of the national commerce and the widening of the markets. Our constitutional system has on the whole proven itself capable of spontaneous adaptation[81] to the economic growth of the nation, and worthy of our continuing confidence. This conclusion furnishes a basis for our judgment concerning the constitutional validity of a national incorporation law; that if the enactment of such a law is backed by a fair proportion of the business community (and there seems every reason to believe that it would even now have the support of a representative group of men[82] in business and professional

[80] 37 Sup. Court, Rep. 192.

[81] Alger: "The Old Law and the New Order", pp. 149-179.

[82] Morawitz: "The Power of Congress to Enact Incorporation Laws, etc.", Harvard Law Review, June, 1913. The Journal of Accountancy manifested the interest of the accounting profession in such legislation by printing in its issue of February, 1910, the full text of the law then proposed by the Administration, and by devoting its editorial columns to the discussion thereof.

American Bar Association: Report of Committee on Commercial Law, 1887, pp. 12-13.

Commercial Law League of America: Proceedings at West Baden, Indiana, 1904.

life), and if Congress by its first action evidences a disposition to promote the interstate trade, rather than to harry and retard it, the Supreme Court would be diligent to find its way clear to uphold it. And as I trust to have shown it would not need to make any radical departure from the letter and spirit of its adjudication of past cases in justifying such an exertion of power by Congress.

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Allyn A. Young: op. cit. pp. 435, 436. Numerous articles upon the subject, of which those up to 1905 are listed by H. L. Wilgus, op. cit., pp. 1 and 2, notes.

A. C. MacLaughlin, "The Courts, The Constitution, and The People", pp. 285-7.

Report of Committee on Interstate Commerce of the National Association of Manufacturers, in New York Times, May 15, 1917.

F. E. Horack: "The Organization and Control of Industrial Corporations", pp. 168-173.