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SOME HERETICAL REMARKS ON THE FEDERAL POWER OVER COMMERCE

By Frederick Green*

The Fair Labor Standards Act of 1938 forbids a manufacturer under penalty of fine and imprisonment to ship to another state for or in pursuance of sale goods he has had made for such shipment by workmen paid less than specified hourly wages, or paid for hours worked in any week in excess of forty-four less than fifty per cent more than their ordinary wages. As a means of ensuring compliance, it also penalizes the making of goods at less than the specified wages with intent so to ship them. Its main provisions were held to be valid in United States v. Darby¹ and have been enforced in many later cases. The Fair Labor Practices Bill,² which in the first session of the last Congress was passed in the House, but did not come to a final vote in the Senate, would require employers in selecting workmen, whether to carry on interstate commerce or to make goods they intend to sell in interstate commerce, to act without discriminating against an applicant because of his race or religion. To enforce the duty it provides for a commission to investigate complaints of discrimination and to issue orders to desist from discrimination found to exist. The orders, if duly made, are to be enforceable in a federal court. The far-reaching character of the constitutional questions involved in such measures may perhaps justify, or at least excuse, a consideration on grounds of principle of the extent of the federal power over commerce, and a review of some of the decisions on the subject.

The United States had its origin as a Congress of States in a Confederation to administer matters in which those states had a

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¹ United States v. Darby, 312 U.S. 100, 61 S. Ct. 451, 85 L. Ed. 609
² House Bill No. 2232, 79th Congress, 1st session (1945).
The functions of the United States have always been and are today, in a practical sense, mainly administrative. It maintains an army and navy, a post office, a patent office, and a system of courts to administer justice in cases of specified kinds. It naturalizes aliens. It administers the estates of bankrupts and discharges them from debt. It coins and prints money for the use of the people. And for its own various purposes it collects taxes and borrows, stores and spends money. Almost the only important and substantially legislative power the United States has ever had is the power to regulate commerce with foreign nations and among the several states. It is because the federal government is so limited as to the subject matter of its laws that it often attempts to influence by indirect and even devious methods what it has no power to control directly. It discourages the conduct of lotteries, the showing of prize fight films, and sexual immorality by punishing the relatively innocent acts of carrying across a state line a lottery ticket, a prize fight film or a woman for an immoral purpose; but it has to leave unpunished the acts by which the evils are consummated. It attempts to control the sale of securities by brokers by forbidding the use of the mails for that purpose unless a detailed statement about the securities has been filed with a commission. It induces states to establish pensions for wage earners by imposing heavy taxes on employers in states that do not establish them. It has disposed of money in its treasury as a millionaire might dispose of his money, if his state did not forbid him, by paying farmers not to grow crops. It has built a Boulder Dam largely to supply Los Angeles with water and to irrigate private land under a statute which recites as its primary purpose the improvement of the navigability of the Colorado River. Of similar nature are attempts by Congress to control relations between employer and employed by excluding from interstate commerce goods made under working conditions which Congress disapproves.

Congress gets most of its power from an enumeration in the Constitution of particulars to which the power shall extend. Among those particulars are the provisions that Congress may levy taxes in order to pay the debts and provide for the common defence and general welfare of the United States, and may promote the progress of science and the useful arts by granting exclusive rights to inventors. The specifications of purpose make it plain that the power conferred does not extend to taxing for private benefit or to granting monopoly in the use of a process already known. It is also true
that the enumeration of other subjects on which Congress may make laws, including the regulation of commerce, is intended as an enumeration of purposes for which Congress may act—of needs for which it may provide. It is an enumeration in enlargement of the general power, expressly granted, to make all laws necessary and proper for carrying into execution the powers vested by the other articles of the Constitution in the government of the United States.\(^3\) That is an artificial view which regards Congress as being armed with a series of so-called "powers," as if Congress had a quiverful of separate arrows, each to be shot at any target the particular arrow could reach. Like the executive power vested in the President, and the judicial "power" vested in the courts which "extends" to cases of enumerated kinds, the legislative power of Congress is a single power. It extends to making laws for the accomplishment of enumerated ends, and, on the other hand, it does not extend to the accomplishment of different ends by statutes that are an exercise of granted power only in form.

The tenth amendment expresses the fact that the federal government is a government for the accomplishment of limited purposes by saying that powers not delegated to the United States are reserved. In U. S. v. Darby,\(^4\) the United States Supreme Court said what it had sometimes said before, that the amendment "states but a truism." If a truism, it is a truism stated for a purpose. It is a reminder, sometimes perhaps insufficiently heeded, that the federal powers, legislative, executive and judicial, are conferred for the accomplishment of purposes of specified kinds, and that therefore it is as much the intent of the Constitution that the clauses conferring them be construed so as to restrict them to those purposes, as it is that they be construed so as to enable those purposes to be accomplished in full.

It is the function of law to regulate the acts of men. Under its power to regulate commerce Congress may regulate not only acts of interstate commerce, such as the sale in one state of goods to be delivered in another, and their resulting shipment, carriage and delivery, but also acts which, though not acts of interstate com-

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\(^3\) As to the proposition that the federal legislative power, like the federal judicial power, is more than a succession to functions formerly pertaining to the states, and extends beyond the items of power specifically enumerated, see Juillard v. Greenman, (1884) 110 U. S. 421, 4 S. Ct. 122, 28 L. Ed. 204; Kansas v. Colorado, (1907) 206 U. S. 46, 81-83, 27 S. Ct. 655, 51 L. Ed. 956; U. S. v. Curtis-Wright Co., (1936) 299 U. S. 304, 315-318, 57 S. Ct. 216, 81 L. Ed. 255.

\(^4\) (1941) 312 U. S. 100, 123-124, 61 S. Ct. 451, 85 L. Ed. 609.
merce, may aid or interfere with the conduct of interstate commerce. Thus Congress may provide for dredging a navigable channel in an interstate river, or may prescribe rules for driving all vehicles on highways used for interstate commerce to minimize the risk that vehicles driven only in intrastate transportation may interfere with vehicles in use for interstate commerce. And as Congress may forbid the local obstruction of an interstate highway, so it may regulate local sales on a produce exchange, or local charges for yarding cattle, so far as they may tend, if unregulated, to obstruct interstate commerce in the articles concerned.

The flowing of a river from one state to another—like the blowing of the wind or the transit of clouds—is presumably not what is meant by “commerce among the several states.” If not, Congress may not, as an exercise of power over commerce, for the mere purpose of securing to the inhabitants of a lower state a fair share in the use of the water of an interstate river, pass laws for preventing a diminution in its flow by acts in the upper riparian state. For interference with what is not commerce is not, of itself, interference with commerce. Yet Congress may pass laws to prevent acts in an upper state which would cause inundation of land in a state below, on the same principle on which it might punish murder committed by shooting a bullet across a state line. Similarly, granting that the shining across a state line of the level rays of the setting sun is not interstate commerce, reflecting them across the line with a mirror by way of sending signals would, like sending a telegram, or like communication by radio, be an act of interstate commerce. So, it seems, would be the playing of music or the acting of a play on a stage in one state to an audience seated in another. And as regulating an act which is not an act of commerce may be what is meant by regulating commerce if the act affects commerce, so regulating an act which is an act of commerce may be not what is meant by regulating commerce, if the purpose is solely to attain a non-commercial end. Punishing crime by forbidding criminals to engage in interstate commerce is not what is meant by regulating commerce. If it were, Congress might pass a complete code of law and punish violators by excluding them


from interstate commerce. Power to regulate commerce would be power to regulate everything.8

Judge Holmes9 once said that interstate commerce is not a technical conception.10 Possibly he was thinking rather of what Congress might do to regulate commerce than of interstate commerce itself. For if the words "commerce among the several states" were meant to mean anything, it ought to be possible to know what they were meant to mean, even if the meaning cannot be expressed with scientific precision in a single phrase. Perhaps interstate commerce can be defined as including (1) any human act or course of action which, taking place wholly or partly in one state produces, or is intended to produce, by physical means a positive physical effect in another; (2) making an offer or agreement to perform any such action other than an offer or agreement for hire and service as employer and employee, (3) an act or agreement which, like insuring the safe arrival of goods shipped, though not strictly a part of the interstate commerce because it may not affect what happens in the course of transportation, is a usual concomitant facilitating the conduct of the commerce, as by diminishing its difficulties or risks. Packing goods for carriage may sometimes be such an act. In this attempt at definition, the word positive is used to exclude cases like that of preventing the flow of an interstate river by diverting all its water in an upper riparian state. The word physical is used to exclude cases in which threat or persuasion used in one state causes action in another. An offer or agreement for hire and service as employer and employee in carrying on interstate commerce is excluded from acts which in themselves constitute a part of interstate commerce, because hiring men to carry on inter-

8See First Employers' Liability Cases, (1908) 207 U. S. 463, 503, 28 S. Ct. 141, 52 L. Ed. 297
9I use the title Judge because it is simpler and more accurate that Mr. Justice, and quite as honorable. Mr. Justice is a mode of address appropriate to any justice of the peace. Professor John Chipman Gray once said to me: "It is a strange idea some people have that Mr. Justice is somehow a higher title than Judge. It probably got started because the Judiciary Act spoke of the Justices of the Supreme Court and the Judges of the Circuit and District Courts. I think Congress gave them those names because the Supreme Court corresponded most nearly to the King's Bench, whose judges were called 'Mr. Justice,' and because it was thought that most of the business of the other courts would be in admiralty, and admiralty judges were called 'Judge.'" Since the statutory titles of the Supreme Court judges are Chief Justice and Associate Justice, it would seem that in naming an associate justice the choice is between calling him Judge Blank and calling him Mr. Associate Justice Blank. See Warren, The Supreme Court in United States History, Vol. 1, p. viii.
state commerce, (like building a railroad station or a ship to carry goods, or buying machinery to make goods for interstate sale, or coal for use in locomotives) although it may be a part of the business in which commerce is carried on, seems to be only preparation for commerce but no part of the commerce itself, and hence to be subject to regulation under the commerce power, only in so far as it may affect the subsequent conduct of the commerce. The phrase course of action is used because it seems to be impossible precisely to define those acts which are themselves a part of the commerce as distinguished from acts that affect commerce but are not acts of commerce in themselves. In this respect at least interstate commerce is not a technical conception.

11 The phrase "course of action" and the word "produces" have an indefiniteness which justifies an explanation of the senses in which they are used. A farmer who plows a field lying partly in one state and partly in another may drive his plow back and forth over the boundary line. His purpose is not to get to the other state but to plow the soil. The course of action which produces an effect in the other state is therefore only the act of crossing the state line. Congress could not regulate the depth to which he should plow, but could require him to take precaution not to carry insect pests from one state into the other. When he has finished plowing and drives to the barn in another state, he engages in a course of action which has in view the taking of the plow to the barn and Congress could therefore require him to drive with due care at every point.

It would seem that on principle the making of a contract for services as an employee in interstate commerce is not an act of interstate commerce and that Congress may regulate it only so far as concerns its effect on the commerce. It might also seem that in performing the services the employee is not engaged in commerce with his employer, and that consequently Congress may regulate the relation between them only so far as the regulation affects the conduct or consequences of the commerce carried on, as for example in limiting the hours of work in the interest of safety (B. & O. R. Co. v. I.C.C., (1911) 221 U. S. 612, 31 S. Ct. 621, 55 L. Ed., 878, Erie R. Co. v. N. Y., (1914) 233 U. S. 671, 34 S. Ct. 756, 58 L. Ed. 1149), or in requiring the use of safety appliances (U. S. v. California, (1936) 297 U. S. 175, 56 S. Ct. 421, 80 L. Ed. 567). On this theory it was held in Adair v. U. S., (1908) 208 U. S. 161, 28 S. Ct. 277, 52 L. Ed. 436, that Congress could not forbid an employer to discharge his employee for joining a labor union, merely as a regulation of the relation of employer and employed. Later cases have reached a different result, though in most instances only on the ground that the prohibition was a regulation of acts not of commerce for the purpose of preventing an interruption of commerce: Wilson v. New, (1917) 243 U. S. 332, 37 S. Ct. 298, 61 L. Ed. 755 (regulation of wages to prevent threatened strike), Texas & N. O. R. Co. v. Brotherhood of R. R. Clerks, (1930) 281 U. S. 546, 570, 50 S. Ct. 427, 74 L. Ed. 1034 (threat to discharge for action in choosing representatives in bargaining), National Labor Relations Board v. Jones & Laughlin Steel Corp., (1937) 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (right to bargain collectively), Phelps Dodge Corp. v. N. L. R. A., (1941) 313 U. S. 177, 182, 187, 61 S. Ct. 845, 85 L. Ed. 1271 (refusal to hire because of membership in union). On the other hand, it may well be urged that though the acts of agreeing to pay and paying wages for conducting commerce are not acts of interstate commerce, power to regulate the conduct of commerce should be understood as power to require that one engaged in commerce deal justly in his relations to the employees through whom he
For instance, it was held in *Virginia Railroad Co. v. System Federation No. 40*,\(^{12}\) that the repairing by a railroad in its own shops of locomotives for its use in interstate carriage was (like filling their tenders with fuel) an act of commerce in itself because it was part of the railroad’s conduct of transportation; and on that ground the court unanimously sustained the validity of the Railway Labor Act in conferring on the workers in the repair shops a right to collective bargaining with their employer as to the conditions under which repairs should be carried on. It might be urged that making goods for sale by their maker in interstate commerce, like repairing vehicles for use by the repainer in interstate commerce, is itself a part of the conduct of the commerce, and that consequently Congress may regulate the making of the goods as fully as the repairing of the vehicles. But in the later case of *National Labor Board v. Jones & Laughlin Steel Corporation*\(^{18}\) the court did not so hold, although if the proposition were true it would have constituted a clear and certain ground for the decision. The five judges who in that case upheld the federal right to collective bargaining on the part of workers making goods for their employers to ship in interstate commerce rested their decision wholly on the ground that although the commerce concerned consisted only in the interstate sale, shipment, carriage and delivery of the goods made, so that the requirement of collective bargaining in manufacture was a regulation of acts which constituted no part of the commerce,\(^{14}\) yet the requirement was valid because (like forbidding

\(^{12}\)(1937) 300 U. S. 515, 556, 557, 57 S. Ct. 592, 81 L. Ed. 789.

\(^{13}\)(1937) 301 U. S. 1, 37-40, 42-43, 57 S. Ct. 615, 81 L. Ed. 893.

\(^{14}\)A state tax on the manufacture of goods for sale by the manufacturer in interstate commerce is not invalid as a tax on the commerce. *Heusler v.*
a trespasser to obstruct an interstate railroad track) it tended to prevent an interruption of commerce which otherwise would be likely to occur, as through a strike by dissatisfied workmen. Moreover four judges dissented from the proposition that power to regulate commerce means power to regulate conditions of manufacture merely to ensure the continued production of goods for commerce.

If an act is itself an act of interstate commerce, Congress may regulate it without regard to its effect on the commerce and solely for its effect on other things. Congress may require interstate railroads to use their bridges over highways that they will be safe for users of the highways. It may require them to compensate any of their employees for accidental bodily harm that conducting interstate commerce causes. Consequently, if manufacture for commerce were itself a part of the commerce, Congress could require those who make goods for interstate shipment to carry on their manufacture, not only to prevent interruption of shipments, but with all the precautions for the safety of workmen and third persons that a state could impose. Thus it seems to follow from the holding in the Virginia Railway case that Congress may make a railroad liable for careless conduct of employees repairing its interstate engines in its shops which causes damage to other employees or to bystanders or passers-by.

The power granted to Congress to make laws on the subject of bankruptcies seems to assume as a condition of its exercise a need of creditors arising from a debtor's inability or unwillingness to pay his debts. So, too, the power to regulate commerce seems to assume a need related to the way commerce is or might be carried on. Probably it has never been suggested that the bankruptcy power includes power to control the scale of wages by providing for throwing into bankruptcy employers who pay wages unreasonably low and distributing their assets among their creditors so far as may be necessary to ensure the immediate payment of their current debts. Similarly it is by no means clear that the commerce power was intended to include power to control the scale of wages in manufacture by throwing out of interstate commerce goods made for such commerce at wages deemed by Congress to be unreason-
ably low. Yet in United States v. Darby16 the Supreme Court of the United States in a far reaching decision so construed the commerce clause. It held without dissent that the Fair Labor Standards Act validly punished the interstate shipment, for or in pursuance of sale, of goods made for such shipment by workmen of the shipper paid wages which, though satisfactory to the workmen, were less than twenty-five cents an hour, a sum fixed as being necessary to maintain the workmen's well being. The act recited that its purpose was to protect workmen in the state of manufacture, and also to protect workmen in the state of destination from the ill effects of inadequate wages. The court pronounced that either purpose was enough to make the statute valid. Speaking by Judge Stone, it said that although "manufacture is not of itself interstate commerce" Congress might validly provide that "interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows."

However the Fair Labor Standards Act does not condition its prohibition on the existence of competition nor do the reports of the case, which came up on demurrer, disclose that the existence of competition was alleged.17 At any rate it is the doctrine of United States v. Darby that when the framers of the Constitution said that Congress should have power to regulate commerce among the states, they thereby manifested an intent to empower Congress to forbid a maker of goods to send them from one state to another for or in pursuance of sale, if he produced them for such sale under conditions such that the state where they were made might reasonably have forbidden producing them under those conditions, as for example, if produced by workers immature, ill-paid or unduly exposed to risk of accident. And Judge Stone's opinion also means that Congress may forbid such shipment, not only to prevent the employment of workmen under such conditions in making goods intended so to be shipped, but also to protect workmen who may in that or any other state make goods likely to be sold in competition with them, by removing from their employers temptation to meet the competition by adopting the same or other undesirable methods of production in order to reduce expenses. Hammer v.

16Supra, note 1. The ban on shipping goods applied also if the shipper had intended, when he made them to ship an unidentified part of them to another state for or in pursuance of sale.
Dagenhart had held to the contrary as to a somewhat similar exclusion from interstate commerce of goods made by children, both as to harm in the states from which and as to harm in the states to which the commerce flowed, and accordingly that case was expressly overruled. Moreover Judge Holmes’ dissenting opinion in that case was approved as “powerful and now classic.”

A critic might suggest that it is a strained construction of the commerce clause which gives Congress power to condition commerce on incidents of manufacture that do not affect the character of the goods or the way in which the commerce in them is carried on, and that the framers of the Constitution did not think of the regulation of commerce in so enlarged a way. For if the statesmen of the South who helped to build the Constitution and who insisted, as a condition of their assent to it, on the insertion of the provision which forbade Congress to prohibit the migration or importation of slaves before the year 1808 (by which time they seem to have expected that the local supply of slaves would be sufficient) had believed that the Constitution they framed empowered the expected Northern majority in Congress to confine cotton and tobacco raised by slaves, and cloth and cigars made from them, to the state of production, they would not have signed the document, nor could it have been ratified by the requisite nine states, since the vote of at least one slave state south of the Mason and Dixon line was necessary to make up that number. A power to regulate wages would

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19 See Madison’s Notes of the Debates in the Federal Convention of 1787.

“August 21. Rutledge. ‘The true question at present is whether or not the Southern States shall or shall not be parties to the Union.’ Pinkney. ‘South Carolina can never receive the plan if it prohibits the slave trade.’

“August 22. General Pinkney declared it to be his firm opinion that if himself and all his colleagues were to sign the Constitution and use their personal influence, it would be of no avail towards obtaining the consent of their constituents.

“Mr. Williamson *** thought the S. States could not be members of the Union if the clause should be rejected.

“Rutledge. ‘If the Convention thinks that N. C., S. C. & Georgia will ever agree to the plan unless their right to import slaves be untouched, the expectation is vain. The people of those States will never be such fools as to give up so important an interest.’

“Mr. Sherman said it was better to let the S. States import slaves than to part with them, if they made that a sine qua non. *** He acknowledged that if the power of prohibiting the importation should be given to the Gen’l Government that it would be exercised. He thought it would be its duty to exercise the power.”
not ordinarily import power to punish crimes a wage earner might commit by reducing his wages in proportion to the gravity of his offending. Power to regulate prisons would not import power to fix the periods of incarceration. A power to regulate the carrying on of commerce is not in any ordinary sense of the phrase a power to exclude a man from well conducted commerce in excellent goods, even though he paid low wages to the men who made the goods, and especially not when he is at liberty to carry on the commerce with goods made at wages equally low, if he has bought them from others or has made them himself expecting to sell them for local consumption. It is immaterial that the purpose is benevolent. Congress might also think it desirable for employers to provide their workmen with transportation between their homes and the factory, or with turkeys for their Thanksgiving dinners, as evidences of good will promotive of the production for commerce of abundant and excellent goods. If it is a regulation of commerce to exclude manufacturers from commerce unless they raise wages, it is a regulation of commerce to exclude them unless they make their workmen presents of turkeys for Thanksgiving Day. That the latter requirement might fail of due process has in itself no bearing on the question whether it regulates commerce. The addition of the due process clause a year after the government was established restricted the exercise but could not affect the meaning of regulating commerce.

Power is granted for use as an instrument to accomplish the purposes, express or implied, for which it was given, and for no other purposes. If power to regulate commerce does not include power to enact a code of law on all subjects, and enforce it by forbidding violators to engage in interstate commerce, then it is worth considering whether forbidding the interstate shipment of goods for or in pursuance of sale by one who shall have manufactured them for such shipment unless he was generous to the men who made them, in paying wages or in any other respect, is what is meant by regulating transportation and sale. Even more dubious in theory is the constitutionality of the Fair Labor Practices Bill which would compel men who make goods for buyers in other states to hire workers that Congress thinks they ought to hire, although they do not want to hire them, as where the applicant's race or religion will make his employment distasteful to his fellow workers and perhaps productive of hindrance to the work, or where the employer, moved by sympathy for a class often discriminated against and so in special need of employment, desires to employ only men
of that class. On the theory of that bill, Congress, by way of regul-
ating the interstate sale of goods, may require a factory owner to
set a child in need of wages at work on a machine, though the em-
ployer deems the work harmful to the child, dangerous to his fellow
workers and hazardous to the machinery and to the progress of the
work, and although the state legislature, being of the same opinion,
has forbidden it. And since, according to U S. v Darby, Congress,
in order to ensure a good living to workmen, may exclude from
interstate commerce goods made by a manufacturer who refuses to
pay wages reasonably high, it seems Congress may also exclude
goods made by one who refuses to employ at all an applicant of a
class that Congress deems fit for the work, though the employer
thinks otherwise and the state forbids the employment, as because
of the applicant's youth, or physical or mental defects.

In U S. v. Darby it was said "Whatever their motive or pur-
pose, regulations of commerce which do not infringe some constitu-
tional prohibition are within the plenary power conferred on Con-
gress by the Commerce Clause." The Court has often singled out
the commerce power to call it plenary. Plenary means full, which
is to say, complete. Calling the commerce power plenary means
that like every other power it extends to the full extent to which
it extends. It employs a question begging epithet to bolster up what
purports to be an exercise of the power. Saying that Congress has
power to regulate commerce in full does not help us to know what
regulating commerce means, any more than the statement that if
Congress exceeds its power its act is void, which means empty,
helps us to know the limits of the power. It does not tell where
fullness ends and emptiness begins. The statement that power is
plenary is symptomatic of desire to uphold action not demonstrably
valid.

The Fair Labor Standards Act, though it forbade the inter-
state shipment of desirable goods for sale at reasonable prices
solely because of the rate of wages at which they had been made,
was held to accomplish what the Constitution meant by regulating
commerce for two distinct reasons. First, because a shipment of
goods made at low wages might do harm by causing makers of
goods that competed with them in the market of destination (in
whatever state or country such competing goods were made) to
resort to harmful methods of reducing their own costs, such as re-
ducing the wages of their own workmen. Secondly, because for-
bidding the shipment would do good or prevent harm in the state of
manufacture by causing manufacturers to pay and continue pay-
FEDERAL POWER OVER COMMERCE

...
make goods at low wages, and Congress may forbid the latter to sell in their own state in competition with makers of goods from other states whose scale of wages is satisfactorily high. Moreover, so far as concerns the effect of competition by goods produced at lower cost it makes no difference what the causes of the lower cost may be. It would follow that Congress may require manufacturers to charge so high a price for goods they sell in the markets of their own state that manufacturers in distant states who suffer disadvantages from heavier freight charges in getting their goods to market can maintain competition without being tempted to reduce wages, employ children or resort to other undesirable practices to lessen their costs.

So far as concerns the validity of the Fair Labor Standards Act because it protects competitors in the community to which the goods are destined, the question at issue in U. S. v Darby was in principle whether authorizing Congress to regulate the conduct of commerce means that Congress may deprive the people of the privilege of shipping goods to other states or countries, for or in pursuance of sale, merely because they have availed themselves of exceptional advantages in the production of the goods, such as fertile soil, abundant water power, or a favorable labor market. It is true that domestic or other producers who sell in the state or foreign country to which goods produced under such advantageous conditions are sent may have lesser advantages, and so may perhaps yield to a temptation to meet the competition, not by improving their machinery or methods or the skill of their workmen, or by adopting any other of the desirable methods which give substance to the saying that competition is the life of trade, but by reducing wages, employing children, neglecting to keep factories in safe repair, making deceptive sales by putting the biggest apples at the top of the basket, or by any other means of cutting expenses or increasing sales which their own state deems it expedient to permit, when perhaps they would not have done such things merely to increase their profits if there had been no competition. But if, because of the competitive effect of goods produced at low cost, Congress can exclude a manufacturer from interstate commerce in goods made for such commerce, unless he foregoes the advantage of a favorable labor market by raising wages, it can also exclude a farmer who has the advantage of exceptionally fertile soil from shipping to market in another state a crop he has raised for such shipment unless he has taken precaution to reduce the fertility of his fields, as by putting salt on them, or has used inefficient methods of cultivation. Power
to regulate commerce becomes power to exclude from commerce on the ground of superior fitness to supply the nation’s needs.

It was held in Hammer v. Dagenhart, without expression of dissent, that regulating commerce did not mean forbidding commerce in wholesome goods simply because the conditions, physical or legal, under which they were produced gave the producer an advantage over competitors. The decision on that point was based on the assumption that, in spite of provisions in the act of Congress which indicated that it was aimed at discouraging the employment of children in the community of manufacture, it might also have been a part of its purpose to protect persons in states to which goods made by children should be sent for sale from consequences of such sales. For since the goods had been made by children, they might have been made at low wages per unit of product, and so the total cost of producing them might perhaps have been small. Hence, as in case of goods made at low wages by adults, the goods might perhaps be offered for sale at a price so low as to cause makers of goods offered in competition with them in that market (if any competing goods should be offered there, a condition which the Child Labor Act, like the Fair Labor Standards Act, did not specify) to endeavor to meet the competition by doing within their own state something which their state approved but Congress disapproved, such as employing children whom the children’s state thought old enough to need employment, but Congress thought to be, in some parts of the country at least, too young.

The question was whether, in view of the possibility of some such result, it was what the Constitution means by regulating commerce among the states to forbid the introduction of the goods. It was a part of the broader question whether giving Congress power to regulate such commerce manifests intent to give it power to forbid, as the state if independent might forbid, the bringing of goods into a state for or in pursuance of sale solely because they are more desirable in price or quality than the domestic product and because

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20The statute forbade manufacturers and dealers to ship in interstate commerce any goods thereafter made, however long before the shipment and though wholly made by adult labor, if within thirty days before they left the factory a child under fourteen had been employed anywhere in the same factory, though only to make goods for sale to consumers in the same state, or to sweep a floor; but it permitted even goods made by children to be shipped to other states if, when taken from the factory, no child had been employed there for thirty days. On the same terms it forbade shipment of goods if a child under sixteen had worked before six in the morning or after eight at night. Since the competitive effect of work is no greater because done at night, it is plain that, so far as concerns night work at least, the act was aimed only at protecting children in the state of manufacture.
therefore their introduction may drive local competitors out of business, or may cause them to employ children, discharge workmen, or reduce wages, or may incite the workmen for fear of losing wages to riot to prevent the introduction of the goods. It included the question whether, if the people of a state think that newspapers and books published in a neighboring state are better worth reading than publications of their own state, it is what the Constitution means by regulating commerce for Congress to forbid bringing them in, lest their introduction drive local publishers, authors and editors out of business, or make it necessary for them to lower their prices or the wages they pay, or work hard enough to produce better publications. It includes the question whether Congress may condition the right of a producer in one state to sell in another on charging a price so high, and to ensure his doing so, on paying so high a price for coal, materials or labor that local producers, however great their costs, though they grow oranges in hot houses, will not be driven out of business. Power to regulate commerce among the states does not naturally import power to give preference to the products of one state over the products of another. If Congress thinks that states may need to keep out goods with which their own producers cannot readily compete, the appropriate way to protect the states is for Congress to consent that they may exclude the goods or that they may set up a protective tariff against them. Congress cannot itself set up such a tariff, for federal duties must be uniform throughout the United States. If the commerce clause is thought to imply that a state may not, even with the consent of Congress, so restrict interstate trade, the conclusion should be that the clause implies that interstate trade shall not for such reasons be restricted.

The power of Congress to forbid bringing into a state such things as diseased cattle, liquor and lottery tickets presents different considerations. They are not excluded for merely competitive reasons. Their presence or use is deemed to be an evil. Still, in spite of what was said in Leisy v. Hardin,\textsuperscript{21} in holding that a state could not forbid the bringing in of beer, there seems to be no good reason why a state should not be able to exclude anything whose intended use it prohibits as objectionable. And so Congress recognized when by the Wilson Act it made intoxicating liquor subject to the law of the state upon arrival at destination and before delivery. The twenty-first amendment also recognized it by forbidding the importation into any state of liquor for delivery or use in violation of its law. As with beer, so with articles made at low cost, the

\textsuperscript{21} (1890) 135 U. S. 100, 10 S. Ct. 681, 34 L. Ed. 128.
local consequences of their introduction concern the state to which they come. But, unlike beer, goods made at low wages are not harmful in use, and the consequences of bringing them in or of keeping them out depend wholly on local conditions. If the state of destination produces no similar goods, the effect of exclusion is only to deprive the people of the state of their use, or to increase their cost if, to avoid exclusion, the makers raise their workmen's wages. If the state does produce competing goods, it is mere matter of surmise, since wages is only one element in cost and qualities vary, whether the imported goods will be cheaper or in any other way put home producers at a disadvantage. Even if cheaper they may be better, and their introduction desirable even at the cost of driving home producers out of business. If orange growers in the South pay low wages, that does not make it desirable in the interests of the people of the North to restrict them to oranges grown in hot-houses. Whether it is best to give the people of a given state the benefit of cheap goods depends on local considerations. The expedient thing for Congress to do so far as concerns possible damage "to the states * * to which the commerce flows" is to consent that goods made at low cost shall, like intoxicating liquor, be subject on arrival to the law of the state. Then the state, if it saw fit, could fix minimum prices for delivery. These considerations do not go solely to the expediency of the Fair Labor Standards Act. They go to its constitutionality. For it is not in an ordinary sense of the phrase regulating a man's conduct of commerce to exclude him from commerce because of wages he has paid in manufacture. They indicate that for Congress so clumsily to intrude upon the interests of the importing states as, ostensibly in their interest, to forbid the introduction of goods on the ground that they are likely to be well worth their price, is not what the Constitution means by regulating the commerce.

The situation exists because goods are likely to be offered for sale at a low price. What enables the seller to set a low price is immaterial as regards the effect of the low price. It makes no difference in the effect whether it was because he paid inadequate wages, or because his workmen were exceptionally intelligent, skillful, well instructed and provided with favorable working conditions or efficient machinery, or because in the place where the goods were made raw materials or fuel were cheap, water power available, soil fertile, climate mild, taxes low, money available for borrowing at a low rate of interest, or cost of carriage to market low. Each of these elements contributes to determine the cost of production and con-
sequently the price at which the producer can afford to sell, in the ratio it bears to the total cost of getting the goods to market. Similar advantages come from doing business on a large scale as a result of established good will or of abundant capital. If forbidding a man to sell because he has one of these advantages is a regulation of his commerce, forbidding him to sell because he has any of the other advantages is also a regulation of his commerce. Even if it is believed that the Constitution does not contemplate a system of free competition in interstate commerce throughout the United States, subject to uniform duties imposed for revenue only, and that to give protection or monopoly to local industry Congress may enact a code of prohibitive minimum prices for interstate sales, it is a totally different thing to hold that to protect local industry from competition, Congress may, as the opinion in *U. S. v Darby* asserts that it may, exclude altogether products of other states because a single element in their cost of production was low, regardless of their total cost or of the price at which they are offered for sale. That would seem to be no more what was meant by regulating commerce than would be excluding goods from commerce that were made by men named Smith.

Even when a manufacturer, because he pays low wages or has some other advantage, not only has, but exercises, ability to undersell competitors in other states to the advantage of buyers, it goes a long way to construe the vague phrase “power to regulate commerce” so as to authorize forbidding him to make a properly conducted interstate shipment. If the construction is correct, Congress can close the doors of commerce on the very ground of superior fitness to supply the nation’s needs. It may forbid sending corn grown in the Mississippi valley to markets east of the Alleghenies, where because the soil is poorer the cost of production per bushel is higher, and local producers may have to reduce wages in order to compete. It may exclude from interstate commerce an inventor who by a patented process makes better goods at lower costs than others, lest to market their competing goods they may reduce wages.

To whatever extent wages affect price, the effect depends, not on wages per hour, but on wages per unit of product. A New England farmer, unless he has an advantage such as nearness to market to compensate him for the comparative infertility of his fields, must pay lower hourly wages than an Iowa farmer or be undersold. His competition at low wages is in no sense unfair to his competitors. Only in his own state can there be damage because he pays low wages. To exclude him from interstate commerce may diminish
his sales and cause him to dismiss his workers. In such cases only the interests of the producer’s own state are involved. Moreover, the Fair Labor Standards Act forbids not only the interstate shipment to market of goods made for such shipment at substandard wages, but the employment at substandard wages of men to make the goods. As consistency required, U. S. v. Darby held valid this prohibition of preparation for a forbidden shipment. If the decision is sound, Congress may also punish one who, perhaps because his own costs of production are low, sells at a low price materials or fuel to a buyer known to intend to use them in manufacture for interstate commerce. For the effect on the manufacturer’s competitors is the same whether it is the low cost of labor or of materials that may lead him to set a low price on his product. These considerations are relevant to the question whether regulating commerce means regulating conditions of production which affect neither the character of the goods traded in nor the methods by which the trade is conducted.

Further, the competitive effect of offering goods for sale depends on the quality of the goods and the price at which they are offered. And so far as concerns competition price is quality. Cheapness is a quality of excellence, because it gives the buyer a greater value in exchange for every dollar. Two pounds of beefsteak is more nourishing than one pound. In so far as the Fair Labor Standards Act excludes goods from commerce because their “competition is injurious *** to the states *** to which the commerce flows” it excludes them because their attractiveness to buyers, which is to say, their commercial excellence, may cause producers of less attractive goods to resort to undesirable methods of competition. If Congress can exclude Florida oranges from sale in other states provided that those who grew them for such sale paid wages so low that growers in Texas or California will have to employ children or pay inadequate wages in order to compete, then Congress can also exclude Florida oranges if it thinks them so much sweeter or juicier than Texas or California oranges that growers in those states will have to employ children or pay low wages in order to compete. Or Congress may make it a condition that Florida growers impair the quality of their oranges as by putting salt on the soil, or picking them too soon, or that they raise wages above the reasonable wages paid in competing states. So far as the decisions in U. S.

Darby and the cases which have followed it rest on the ground of protection to interests in the states of destination, they rest on a theory that the federal power to regulate commerce includes power to forbid bringing desirable articles into a state simply because the people of the state are likely to prefer them to the home product and thereby to lead home producers to try to make their product equally attractive by methods which the state has power to prohibit if it thinks them harmful and to permit if it thinks them beneficial. The Fair Labor Standards Act, according to its recitals of purpose, and as upheld by the court, attempts to overrule the judgment of the states of destination as to matters local to themselves, and to do so by excluding the states of origin, for purposes of commerce, pro tanto from the Union.23

From the ruling in Hammer v Dagenhart that power to regulate commerce among the states was not power to forbid bringing

23That Congress may forbid the importation from abroad of goods made by workmen poorly paid does not indicate that it may forbid foreign or interstate commerce in goods of a state so made. Congress may prohibit imports from abroad to build up home industry, or admit goods from some countries while it excludes goods from others. It does not follow that Congress may permit some states to import or export in interstate or in foreign commerce what other states may not, or that, though forbidden by the requirement that duties shall be uniform throughout the United States to set up a protective interstate tariff, Congress may accomplish the purpose of protecting the industries of some states from the competition of others by forbidding the introduction of the others' goods. The Constitution assumes a measure of competitive freedom in foreign and interstate commerce as between the states. Congress is forbidden to give preference by any regulation of commerce to the ports of one state over the ports of another. This prevents channeling the commerce of one state through the ports of another. But if it were thought to mean that no preference shall be given to the trade of one state over that of another, and to be what prevents such discrimination between states as Congress in regulating commerce can make between foreign nations, it would seem of itself to prevent Congress from excluding the products of a state from commerce because of the circumstances under which they were lawfully made, whether they are crops grown on fertile soil, or goods made with cheap power or with cheap labor.

It is not suggested that Congress should never be able to prohibit interstate commerce in wholesome goods. If in case of fire or flood there is need to conserve foods for an afflicted locality, it would seem that Congress might put an embargo on exports from that locality to another state or country, preferring the pressing needs of one locality to the desires of another. But Congress is forbidden by the requirement that duties shall be uniform throughout the United States to establish an interstate protective tariff, and to prohibit the carriage of manufactured goods across the Mississippi to the West in order to build up western manufacture, the shipment of bananas to the North to increase the market for apples, or the shipment of meat into New England to build up New England fisheries, as a Protestant Parliament used to forbid eating meat on Friday for the benefit of English fishermen, is not in an ordinary sense to regulate the conduct of trade and transportation. No more so is a prohibition of commerce in goods made at low cost. Much less so a prohibition because a single element in the cost of making goods is low.
goods into a state merely because their attractiveness in quality or price might lead competing sellers there to resort to any methods of competition which that state might permit, there was no dissent. The dissenting judges did not deal with the subject. They agreed with the statement of the majority that the statute aimed "to standardize the ages at which children may be employed" and thus to protect children in the state of manufacture. So regarded, they thought it valid and did not need to consider whether it could be upheld on any other ground. The statement in U. S. v. Darby, that for the protection of workmen in the state of destination Congress may exclude goods likely to be sold to them or to others at a low price because made at low cost, was not necessary to the decision. If that dictum can be deemed to find support in anything in Judge Holmes's dissenting opinion in Hammer v. Dagenhart, Judge Holmes appears from his concurrence in the decision in the Child Labor Tax Case to have changed his mind. That case will be considered below. In later cases under the Fair Labor Standards Act, the decisions seem to be rested on the protection it gives to workmen in the state of manufacture.²⁴

That was also a ground of decision in the Darby case. It was necessary to rest the decision on that ground in order to uphold, as the court did uphold, the provision which required higher wages for overtime work. For the competitive effect of an hour of labor is not increased by the fact that it is labor overtime. Eight men working ten hours a day will produce no more than ten men working eight hours each. In resting its decision on that ground the court necessarily overruled Hammer v. Dagenhart. Yet it seems to have overruled the case without understanding it. For the court said that Hammer v. Dagenhart went on the ground that Congress can prohibit interstate commerce only "in articles which in themselves have some harmful or deleterious property", that its thesis was that a regulation of commerce otherwise valid, may be invalid by reason of its "motive *** or its effect to control *** use or production within the states", and that its doctrine was abandoned in cases like Brooks v. U. S.²⁵ which held that Congress could punish the inter-

state transportation of a stolen automobile. Nothing in Hammer v. Dagenhart indicates that Congress could not punish the interstate transportation of a stolen automobile as appropriately as a state might punish carrying it away even in a course of transportation to a neighboring state. A state that could not punish such a carrying away could not punish the theft, for asportation is a necessary element of larceny. It makes a thief who takes possession in one county of a state also guilty of larceny in any other county to or through which he carries the goods in his flight because of the injurious character of the act of taking them out of their owner's reach. As obtaining goods by the payment of counterfeit money may be punished under appropriate statutes both by the state and by the United States, so too may the interstate transportation of a chattel known by the transporter to have been stolen.

What Hammer v. Dagenhart held was that a regulation of commerce, as applied to the sale and transportation of goods, means at most a regulation intended to promote good or prevent harm which may result as a consequence of the sale or transportation of the specific goods whose sale or transportation is regulated, that it does not include an attempt to make men desist from conduct that Congress dislikes but cannot forbid, by forbidding them to sell or transport goods unless they do desist, and that it makes no difference whether the conduct that Congress dislikes relates to their personal habits or to the way they equip and operate their factories. This is not to hold that a law which otherwise would be in the sense of the Constitution a regulation of commerce may fall short of being a regulation of commerce because of its "motive or its effect." It is an application of the general principle that in the division of powers between state and nation the powers granted to the nation extended only to their use for the purposes for which they might appropriately be used, and not to their use as a means of coercion in matters over which the United States has no direct control. It

\[26\] Bulwer's Case, 7 Coke 481, 2 Hale, Pleas of the Crown 163, Comm. v. Rand, (Mass. 1844) 7 Met. 475. It is consistent with Hammer v. Dagenhart that Congress may, as Kentucky Whip and Collar Co. v. Ill. Cent. R. Co., (1937) 299 U. S. 334, 57 S. Ct. 277, 81 L. Ed. 270, distinguishing Hammer v. Dagenhart, held that it may, lend its aid in preventing crime by forbidding bringing an article into a state for use in violation of state law, or may forbid interstate commerce to persons who withhold information needed to regulate it (Electric Bond & Share Co. v. Securities Commission, (1938) 303 U. S. 419, 58 S. Ct. 678, 82 L. Ed. 936), or may to prevent flooding the market limit commerce in a particular article (Mulford v. Smith, (1939) 307 U. S. 38, 59 S. Ct. 648, 83 L. Ed. 1092), or may forbid the introduction of an article of food so treated as to create a false belief in its nutritive value (U. S. v. Carolene Products Co., (1938) 304 U. S. 144, 58 S. Ct. 778, 82 L. Ed. 1234)
is to hold that forbidding a person to make interstate sales merely because Congress does not approve of his conduct in manufacture, however effective the prohibition may be in inducing him to alter his conduct, is (like excluding from commerce everyone who shall vote the communist ticket) not what the Constitution means by regulating his commerce.

In the opinion of a majority of the judges (and apparently of the dissenting judges too) the Child Labor Act was a code regulating the employment of children in manufacture to be enforced by excluding their employers from interstate commerce in goods made in the factory where the children worked, if they did not limit their employment to the terms which Congress specified. The decision was based on the principle that the powers of Congress are to be construed, as Professor James Bradley Thayer used to say, not with a "childish literalness" but in the light of the purposes for which they were given and of the division of functions between state and nation. A power to regulate commerce among the states is a power to regulate all the acts which make a part of the commerce as fully as a government with power over all subjects might appropriately regulate them. It is a power to regulate the interstate sale, transportation and delivery of goods as fully as a government with full powers might appropriately regulate sale, transportation and delivery. It does not imply power to make regulations of commerce which a government with power over all subjects could not appropriately make. A state government could not appropriately leave hirers of labor free to pay low wages or to reject applicants for employment because of their race, and then discriminate against goods lawfully made in the exercise of the privilege by forbidding their shipment from one county to another for no other reason than that the privilege had been exercised.

The fact that Congress is limited to specified subjects of legislation cannot reasonably be given the effect of enlarging the scope of those subjects. That would confer on Congress power not granted. For Congress to forbid the interstate transportation of goods made for such transportation under conditions of manufacture which it disapproves but which do not affect the character of the goods, is in principle like a state's forbidding the manufacture of goods intended for interstate transportation under conditions of transportation which the state disapproves. The Constitution of the United States does not provide for a system of law separate from and capable of conflict with the law of the states. The Constitution and the law made in pursuance of it is declared to be the law of the
land which binds the judges in every state. Consequently its provisions are to be read into the constitution and statutes of every state and constitute an integral part of them. Congress is a legislature for every state as if it were separately established by the constitution of every state as a state legislature having the power within the state which the federal Constitution purports to confer on it.\textsuperscript{27}

It follows that the situation as to interstate commerce is logically substantially what it would be as to intrastate commerce if a state constitution set up two legislatures, one to make law on intrastate transportation and sale, and the other to make law on all other subjects, including wages and employment in manufacture. The former legislature might conceivably forbid the intrastate transportation and sale of goods made by children, or at low wages, or by employers who discriminated in hiring on grounds of religion, who were cruel to children of their own, or who were guilty of any other conduct of which that legislature disapproved. But surely such statutes should be held void as beyond the intent expressed by the limited grant of power to make law on the subject of transportation and sale. Such a grant imports law that answers a need of transportation or sale.

It was on the principle that Congress cannot penalize, by excluding its product from commerce, a method of manufacture which it has no power to forbid that the act of Congress involved in Hammer v Dagenhart was held to be unauthorized by the grant of commerce power so far as it was attempted to support it by reason of its protecting children in the state of manufacture. And on exactly the same principle the act of Congress which purported to tax the employment of children was held in the Child Labor Tax case\textsuperscript{28} to be void. The court there interpreted Hammer v Dagenhart as embodying the doctrine that the clauses defining the legislative power of the United States are to be construed as an enumeration of the purposes for which the power is to be used. It was cited as authority, controlling in principle, for the decision that, just as an exclusion of goods from transportation and sale on conditions rational

\textsuperscript{27}It would be interesting, if it were possible, to know what the effect on the development of constitutional doctrine would have been, if the power of Congress over legislation otherwise within state power, instead of being set out in a separate document, had been granted as to each state by an amendment inserted in the state constitution, and if the federal Supreme Court, entrusted with the final decision as to its extent, had sat neither in the federal nor in a state capital, but had remained on neutral ground in Philadelphia, instead of following the President and Congress to Washington to sit in the shadow of the capitol dome.

\textsuperscript{28}Bailey v. Drexel Furniture Co., (1922) 259 U. S. 20, 42 S. Ct. 449, 66 L. Ed. 817
only when the exclusion is regarded as a means of preventing the employment of children to make them, was not what was meant by a regulation of the transportation and sale, so too the imposition upon the employers of children of an obligation to pay money to the United States Treasury, measured in a manner irrational as a raising of revenue because it was the same in amount whether one or a hundred children were employed, and rational only if regarded as an attempt to prevent the employment of children by penalizing their employer, was not what was meant by a tax. In this reasoning and conclusion the whole court concurred, including Judge Holmes who had written the dissenting opinion in Hammer v. Dagenhart and his fellow dissenters in that case, Judges McKenna, Brandeis and Clarke. Now the first part of that dissent had perhaps assumed what the opinion in U. S. v. Darby assumes, that because the statute in question forbade interstate commerce (in goods made under undesirable conditions) and so purported on its face to regulate commerce, it necessarily was what was meant by a regulation of commerce, regardless of its lack of correspondence with any of the purposes for which Congress was given power to regulate commerce. On no other assumption is it relevant to say, as Judge Holmes did say, that no inquiry could be made “into the purpose of an act which apart from that purpose was within the power of Congress”; that since all regulation prohibits something, a regulation of commerce “may prohibit any part of such commerce that Congress sees fit to forbid”, and that no power of Congress can “be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any state.” And as illustrations of those propositions Judge Holmes cited cases which had held that if a so-called tax is in fact a tax, or in other words an act whose provisions are appropriate to the raising of revenue from a class, it is immaterial that the tax is so heavy that it will soon result in the cessation of the activity taxed, and that a desire to cause the cessation was the motive for imposing it.\textsuperscript{29} But some four years later the Child Labor Tax Case, and also Hill v. Wallace\textsuperscript{30} which involved a so-called tax on sales of grain for future delivery, held without dissent that the tax cases cited by Judge Holmes did not decide that an act which is a tax in form is a tax in fact. They held on the contrary that an act the provisions of which are inappropriate to a purpose of raising revenue and are plainly purposed to con-

\textsuperscript{29}Including Vezzie Bank v. Fenno, (1869) 8 Wall. 533, 19 L. Ed. 482; McCray v. U. S., (1904) 195 U. S. 27, 24 S. Ct. 769, 49 L. Ed. 78.

\textsuperscript{30}(1922) 259 U. S. 44, 42 S. Ct. 453, 66 L. Ed. 822.
 contro l an activity that Congress cannot control directly, is not what is meant by a tax, though it requires payments to the treasury of sums assessed on the members of a contributing class. This is to hold that it is not true, in any sense relevant to the issues in Ham- mer v Dagenhart or in U. S. v Darby, that "no inquiry can be made into the purpose of an act which apart from that purpose was within the power of Congress."

It follows that in so far as concerns its effect upon the state of manufacture, neither an exclusion from commerce of manufactur- ers who, in making goods for such commerce employ children or low paid workmen, nor a requirement that manufacture for such commerce shall be carried on at fair wages and without discrimina- tion in hiring on grounds of race or religion, is what is meant by a regulation of the commerce. For in its effect on the state of manu- facture the statute, so far from being aimed at preventing any evil or promoting any benefit accompanying or consequent upon the sale, transportation or delivery of specific goods transported, in which alone the commerce consists, is plainly designed only to influence what Congress has no authority directly to control, the employment of workers to make them. That Judge Holmes and his fellow dissenters in Hammer v Dagenhart concurred in the deci- sions of the Child Labor Tax Case and of Hill v Wallace, proves that they had abandoned so much of their dissent in Hammer v Dagenhart as may have proceeded, if indeed it did proceed, on the ground, which is the thesis of U. S. v Darby, that the statute in question was a regulation of commerce just because on its face it prohibited commerce, though the conditions of the prohibition mani- fested that its purpose was only to prevent employment in manufac- ture under undesirable conditions.

The statement in the Darby case that "whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause" is irrelevant to the question what is meant by a regulation of commerce. It is also true that whatever its motive and purpose a levy of taxes which does not infringe some constitutional prohibition is within the power, es- sential to government and hence appropriately placed at the head of the list of subjects to which the power of Congress extends, of levying taxes. But that does not tell us what is meant by the levy of a tax. As a grant of power to make laws on the subject of bank- ruptcy assumes as a condition of its exercise an inability or unwillingness to pay debts, so the grant of power to regulate commerce
FEDERAL POWER OVER COMMERCE

assumes a need of interstate commerce that requires the regulation, and since "manufacture is not of itself interstate commerce" it does not embrace a regulation made merely to induce alteration of a practice of manufacture. As a fine for employing children cannot be converted into a tax by calling it a tax, so a law to prevent or penalize employing workmen to make goods at starvation wages, though it takes the form of an exclusion from commerce, is not a regulation of commerce but only a regulation of wages. And a prohibition of racial discrimination in hiring for manufacture is only a regulation of hiring for manufacture. Though the Child Labor Tax Case and Hill v. Wallace are thus inconsistent in principle with U. S. v. Darby, there was evidently no intention of overruling them,3 or of overruling the only ground on which they could have been decided as they were decided. That ground is that an act of Congress is not an exercise of a granted power if its provisions, though literally they purport to be in execution of it, are irrational as a means of accomplishing the purposes for which the power was granted and are rational only when viewed as an attempt to accomplish a different purpose. This means that no power of Congress is plenary, if by calling it plenary it is meant that any statute which purports to be an exercise of it necessarily falls within the meaning of the grant. It also means that an attempt to enforce some future exclusion from commerce based solely on terms of employment in making goods and unrelated to the character of the goods made must oblige the Supreme Court to choose between the principle of U. S. v. Darby and the principle of the Child Labor Tax Case. It is the principle of the child labor cases that, like all its other powers, the commerce and taxing powers were given to Congress for the accomplishment of purposes for which they were appropriate and not for use merely to make persons who do what Congress disapproves but cannot forbid so uncomfortable as to induce them to stop doing it. If this is not, at least in general, true, or, to say the same thing in different words, if it is true in any relevant sense that, as the court said in U. S. v. Darby, "While manufacture is not of itself interstate commerce, the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of

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the commerce", that "the motive and purpose of a regulation of
interstate commerce are matters for the legislative judgment",
and that "the power of Congress under the commerce clause is
plenary to exclude any article from interstate commerce subject
only to the specific prohibitions of the Constitution," then Congress
may pass a code of law on all subjects as well as on the employ-
ment of labor in manufacture for interstate commerce, and enforce
it by forbidding those who violate the code to ship to other states
goods they make for such shipment, or even to engage in interstate
commerce of any kind. Congress may imprison them in their states,
for any conduct for which their states might imprison them, by
forbidding them to cross the boundaries of their states if they are
guilty of it. For the exclusion of goods made by immature or ill
paid workmen does not proceed from any belief that the goods may
be of poor quality So far as concerns the effect of the exclusion
upon "the states from * * * which the commerce flows," it proceeds
solely from a dislike for what the manufacturer does and a belief
that excluding him from interstate commerce will make him alter
his practice by depriving him of motive to continue it. The state-
ment that the purpose of a regulation of commerce is for the judg-
ment of the legislature assumes the point at issue. The point is
whether (since "manufacture is not of itself interstate commerce"
and since conditions of employment in commerce satisfactory to
the workers which do not affect the quality or quantity of the goods
made have no effect on the commerce) excluding from commerce
goods made by manufacturers who employ children or under paid
workers for the purpose of discouraging such employment is what
is meant by regulating commerce, any more than is excluding goods
made by manufacturers who starve their own children, sell whis-
key, or do anything else that Congress does not like and that their
own state might forbid. And whether compelling employers to
pay fair wages to, or to hire without discrimination as to race,
those they employ to make goods for commerce is a regulation of
the commerce, any more than regulating their hiring of employees
for any other work would be a regulation of their commerce.

In McCulloch v Maryland,32 Chief Justice Marshall said in the
most famous of his opinions, whose language was long accepted as
an utterance from a judicial Mount Sinai, that if the end at which
an act of Congress aims is within the scope of the Constitution, all
means appropriate to that end may validly be used, but that should
Congress "under the pretext of executing its powers, pass laws

32(1819) 4 Wheaton 316, 4 L. Ed. 579.
for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal to say that such an act was not the law of the land." But there is little, if anything, in the opinion of U. S. v. Darby except the assertion, repeated in various forms, that any prohibition of interstate commerce, whatever its object, necessarily falls within the meaning of regulating it.

So far as concerns the interest of its own people, the regulation of wages and working conditions in a state belongs properly to the state. There could be little reason to give it to the federal government unless on the theory that it will know the needs of the people of the state better than the people of the state themselves. What is permissible as to wages and conditions of manufacture in a state should not vary as the goods are intended for buyers within or for buyers without the state. And a uniform rule for the whole country sacrifices local needs, while rules federally fixed for different regions have no advantage over rules fixed by the states. It goes far to hold that power to regulate the conduct of transportation includes power to forbid bringing an article into the state because it is intended for a use which, though approved by the state is disapproved by Congress, such as a ticket printed outside the state for a lottery to be held within the state to raise money for the state treasury or for a charity authorized to hold the lottery. Or such as beer which a state wants its people to have, consequently confining them to an inferior home brew. The slave trade involved the transportation of persons against their will. The framers of the Constitution who suspended for twenty years the power of Congress to abolish it did not conceive of the commerce clause as giving Congress power at once to forbid bringing into a state materials or tools for the work of slaves, or taking out of it the products of slave labor. Congress may aid the legislation of the states by forbidding the importation of goods for a use the states forbid, or by making them subject on arrival to the law of the states, as by the Wilson Act it made intoxicating liquor. It goes much farther (and, it is submitted, too far) to hold that Congress may prohibit the interstate carriage of fit goods in a fit manner for a fit purpose because it disapproves of methods by which they were produced over which it has no other control.33

33If Congress may forbid the interstate shipment of goods made for such shipment by underpaid labor, it may, as an aid to enforcement, forbid the intending shipper to manufacture by underpaid labor goods he intends so to ship. In the Fair Labor Standards Act Congress did forbid such manufacture. On the same principle Congress may, as in the act it did, forbid any. one else to do by underpaid employees any of the work of making such
A state may require that its factories be equipped with the appliances it deems best suited for protecting the health and safety of employees. It may require that cultivation of its fields be con-
goods for the intending shipper. And so it was held in Kirschbaum v. Walling, (1942) 316 U. S. 517, 62 S. Ct. 1116, 86 L. Ed. 1638. In Martino v. Michigan Window Cleaning Co., (1946) 66 Sup. Ct. 379, washers of windows in a fac-
tory employed by one who had contracted with the manufacturer to keep the windows washed were held to be engaged in making goods the factory
produced, so as to warrant the exclusion of the goods from interstate com-
merce if the window washers were underpaid, and hence to validate federal regulation of their wages. In Roland Electric Co. v. Walling, (1946) 66 Sup. Ct. 413, the same conclusion was reached as to workmen of a contractor who installed electric motors in a factory. New Mexico Public Service Co. v. Engel, (C.C.A. 10th 1944) 145 Fed. (2d) 636, held that a supplier of electric current four per cent of which was used in lighting railroad signals, operating a telephone switchboard and lighting an aviation field was a participant in carrying on their commerce and hence bound to pay its workmen wages pre-
scribed for those engaged in interstate commerce. Whether the statute intends to cover such a case is doubtful. See 10 East 40th St. Building v. Call Hus, (1945) 325 U. S. 578, 65 S. Ct. 1227, 89 L. Ed. 1806, Prof. E. Merrick Dodd, "The Supreme Court and Fair Labor Standards, 1941-1945," (1945) 59 Harv. Law Rev. 321, 332-334. As to its constitutionality, it would seem that the supply of electric power should stand on the same basis as the supply of coal. Whether coal is more conveniently supplied to a railroad by delivery into its bins, or into the tenders of its locomotives, or into their fire boxes is immaterial. In neither case does the supplier operate the railroad. Similarly whether electric power is delivered by charging batteries from which it can be released at will or by delivering it when the railroad turns on a switch the moment power is needed, it is only the user, not the supplier, of the power that is engaged in moving the trains or lighting the stations. That less has to be done by the railroad in utilizing electric power than in utilizing power from coal does not show that more is done by the supplier of power.

In Warren-Bradshaw Drilling Co. v. Hall, (1942) 317 U. S. 88, 63 S. Ct. 125, 87 L. Ed. 83, it was held that a contractor drilling wells for an oil company which expected to ship part of the oil in interstate commerce was himself "engaged in the production of goods for" interstate commerce and bound to pay his employees at the statutory rate. Such cases suggest the question, reminiscent of the nursery rhymes about the House that Jack Built, whether Congress, if it sees fit to do so, can also fix the wages to be paid by those who make machinery to be sold for use in making goods for interstate commerce, of those who dig the coal to be used in making the machinery, and of those who make tools for digging the coal. It is the prospective use of the end product that "encourages" all these activities, and even if the employers do not know of the intended use in interstate commerce they are chargeable with notice of the likelihood, like one who sells the first glass of liquor to a known drunkard. A similar question arises as to the power to exclude from interstate commerce a manufacturer who has notice that the miner of his coal employed labor poorly paid. Such questions under the Anti-Trust Act were avoided by a narrow construction of the statute. Levering & Guarrigues Co. v. Morrin, (1933) 289 U. S. 103, 53 S. Ct. 549, 77 L. Ed. 1072. It is hard to see how Congress as an aid to the enforcement of the ban on shipping to another state goods made for such shipment by workmen inadequately paid (which is the sole source of the power of Congress on the subject) can confer on the workmen of an employer who intends such a shipment a right to adequate wages. Yet the provisions of the statute which purport to do so were held valid in Armour & Co. v. Wantock, (1944) 323 U. S. 126, 65 S. Ct. 165, 89 L. Ed. 118. And see Walling v. Helmersch & Payne, (1944) 323 U. S. 37, 65 S. Ct. 11, 89 L. Ed. 29; and Gemsco, Inc. v. Walling, (1945) 324 U. S. 244, 65 S. Ct. 605, 89 L. Ed. 921.
ducted in a manner it thinks adapted to prevent exhaustion of the soil. It may, to assure employment to those who need it, require employers to hire indigent children of 15 who ask for employment, without discrimination against them solely because of their youth as distinguished from their competence. So far as is consistent with due process (and at any rate before the fourteenth amendment was adopted) a state might prescribe a maximum wage for factory hands. Congress may think that all such measures of the state are ill advised and destructive of the objects they aim at promoting. But power to regulate commerce, which imports only regulating the conduct of commerce, was surely not meant to be power to authorize the production for commerce of goods whose production a state forbids or the use of methods of production which it prohibits. Otherwise Congress might have authorized the use in production for commerce of slave labor brought into a free state, the cultivation of opium to be sold to the people of other states like tobacco, the printing of indecent books, and other activities in which a state could not in the interest of the physical and moral welfare of its people permit them to engage.34 The question is

34Yet it was decided in Cloverleaf Butter Co. v. Patterson, (1942) 315 U. S. 148, 62 S. Ct. 491, 86 L. Ed. 754, that the United States may authorize making goods for interstate shipment from materials which it finds in fact to be wholesome, though the state forbids the manufacture on the ground that the materials are unwholesome and that the goods will consequently be dangerous to the consumer. That case held that where federal officers, authorized by Act of Congress to do so, had inspected materials to be used in making "renovated butter" for interstate sale, and had licensed their use on a finding that they were wholesome in fact, a state could not authorize its officers to seize and destroy the materials held for such manufacture on a contrary finding.

It seems then that if liquor is being distilled or books printed for shipment to another state for sale, federal authority may determine conclusively whether the liquor is intoxicating or the books obscene, so far as concerns their effect upon the community of destination. Yet if the state is unwilling to have its people engage in manufacture which it believes demoralizing to them, though only because the articles will be injurious to others, it should be able to prohibit the manufacture as if it were physically dangerous to the workers, to determine the facts for itself, and to enforce the prohibition in any appropriate way. Seizure of objectionable materials seems to be appropriate. If Congress may authorize making for interstate commerce articles found by federal authority to be wholesome, then it may authorize making whiskey, opium, or confessedly immoral books, though the state is unwilling to have them produced within its borders even for use outside. The argument by which the court upheld the power of Congress to authorize manufacture which the state forbids seems to have been this. United States v. Darby, (1941) 312 U. S. 100, 61 S. Ct. 451, 85 L. Ed. 609, held that the power of Congress to prohibit selling objectionable goods in interstate commerce includes power to forbid making such goods for the purpose of selling them in interstate commerce, because that is a means of preventing the objectionable sale. Hence power to authorize selling in interstate commerce existing goods, such as whiskey, though they are objectionable, includes power to authorize distilling whiskey for the purpose of selling it in interstate commerce, because
not whether power is likely to be abused, but where it rests. If a state can forbid production unless under prescribed conditions, and Congress, as the Darby case holds, forbid production for interstate commerce unless under different conditions, and each exerts its power, interstate commerce in the products of the state must cease, other states go without its products and its manufacturers must very likely have to close their factories. The alternative is for the state to acquiesce in what it deems the ill advised conditions imposed by Congress and abandon its attempt to protect its people and its soil. If the provisions of the Fair Labor Practices Bill are valid which compel the hiring of workmen to make goods for interstate commerce without discrimination as to race, Congress may require hiring them without discrimination as to age though the state forbids the employment of children so young, and may prescribe the way in which factories must be equipped for the safety of the workmen, though the state forbids it as unsafe. But such laws are hardly regulations of interstate sale, shipment, carriage or delivery which is all there is to interstate commerce in goods.

A division of functions between independent governments in the same territory may produce in some areas a vacuum of power, lest one government interfere with the operations of the other. It has been thought that for this reason a state may not by taxing a bond of the United States require its owner to contribute to the state treasury. Neither can the United States require him to contribute to the state treasury. But it cannot have been intended in dividing

that is a means of enabling it to be sold." It seems from this reasoning that a license to sell whiskey if you have it, is a license to distill whiskey for sale if you don't have it.

It has been suggested that power is not lost by apportioning it between state and nation, and that since a state, though it may in general forbid making desirable goods under undesirable conditions, cannot exclude them from interstate commerce once they are made, it follows that Congress can exclude them. See Stone, C. J. in U. S. v. Underwriters Assn., (1944) 322 U. S. 533, 580, lines 9-13, 64 S. Ct. 1162, 88 L. Ed. 1440. The suggestion seems unsound. Some power of separate action is necessarily lost by division, for to avoid friction between moving objects some space must be left between them. Neither the United States nor a state can forbid persons who have received ordinary letters from the post office to read them. Or exclude a foreign corporation from domestic business for removing a case from a state to a federal court. Terral v. Burke Construction Co., (1922) 257 U. S. 529, 532, 42 S. Ct. 188, 66 L. Ed. 352. Or require removal of federal labels from imported drugs placed on retail sale. See McDermott v. Wisconsin, (1913) 228 U. S. 115, 33 S. Ct. 431, 57 L. Ed. 754. But if consistent with due process, a state should be able with the consent of Congress to do all these things. See In re Rahrer, (1891) 140 U. S. 545, 11 S. Ct. 565, 35 L. Ed. 572. If power ought not to be lost by division, the proper conclusion is that anything which Congress cannot do a state with the consent of Congress may do. It is hard to see anything in the language of the Constitution which precludes the states from forbidding, with the consent of Congress, a harmful act of interstate commerce done within their borders which Congress does not care to make a federal offense.
power between two governments to authorize one to veto an enterprise because it is carried on under conditions which the other is authorized to require. The question is not peculiar to the relation of employer and employee. It may arise when a scientist at the risk of his health experiments with poisons in making a medicine to be sent in safe packages out of the state for diseases prevalent elsewhere. A power to regulate commerce becomes power to prohibit scientific investigation dangerous to the investigator.

The question is whether Congress, which admittedly cannot discourage the evil of being cruel to children by forbidding persons guilty of it to engage in interstate commerce, can discourage the evil of employing children to make goods for interstate commerce by forbidding persons guilty of it to engage in interstate commerce in the goods the children make. Since neither cruelty to children nor their employment in manufacture constitutes interstate commerce, the only difference is that cruelty to children is discouraged by supplying a motive to desist from it, and the employment of children is discouraged by removing the motive to persist in it. If forbidding the transportation and sale of goods made by children or low paid workers is within a power to make laws about transportation and sale because it takes away the motive for employing such workers, then forbidding divorce to a person who breaks a speed law in his hurry to reach the divorce court is within a power to make laws on the subject of grounds for divorce, because by taking away the motive to drive speedily it makes the streets safer.

Congress has been given power to regulate interstate sales of goods in order that it may promote benefits and prevent evils that might arise from the sales regulated. To hold that Congress, which cannot regulate conditions of manufacture merely to secure better conditions of manufacture, may for the mere purpose of securing better conditions of manufacture forbid the sale of goods made by bad methods, though the sale in the same manner of goods identical in character made by different methods is permitted, is nothing but to hold that Congress may forbid a person whose conduct it disapproves to engage in interstate commerce.

Judge Holmes did not rest his dissent in Hammer v Dagenhart on the ground that the statute there in question was a regulation of commerce merely because it prohibited commerce. He rested it on the wholly different ground that there was a connection between the employment of children and the transportation of the goods the children made, which connection was enough to make forbidding the transportation in order to take away the motive for
employment the sort of thing meant by regulating the transportation. "It is enough," he said, "that in the opinion of Congress the transportation encourages the evil." No doubt there may be a transportation that encourages an evil, as when a man carries on commerce in milk to get money with which to get drunk on whiskey. But it does not follow that it is what is meant by regulating the conduct of commerce for Congress to forbid interstate commerce in milk because the seller intends to do with his profits something that Congress dislikes but cannot forbid. It is consistent with due process to forbid as an evil the marriage of first cousins. It does not follow that it is what is meant by regulating commerce to forbid travel to a state for the purpose of marrying a first cousin who lives there. Or to forbid moving to a state to acquire a home there in order to get a divorce permitted by its law but disapproved by Congress. Or for the purpose of opening a restaurant and serving intoxicating liquor. Those are examples of commerce that does encourage an evil in the sense of being necessary to and carried on for the purpose of producing the evil. But as to hiring children, workmen insufficiently paid, or persons unjustly selected because of their race or religion to make goods for interstate transportation and sale, it is not true that the transportation encourages the evil. To say so is to use a deceptive figure of speech. The evil employment in manufacture is over before the prohibited transportation begins. It is not any act of transportation that makes possible, impels to, or "encourages" the setting of the children at work. It is only the hope of profit from a future transportation of goods, and the consequent desire to make them that encourages the employment. It might as well be said of a man whose desire to prosper in commerce had led him to murder a competitor, that the commerce he afterwards engaged in was commerce that incited to murder and that it was regulating a commerce dangerous to life to forbid him to carry it on. A power to regulate commerce is not a power to regulate conduct that an expectation of commerce produces.

Judge Holmes seems to have meant by a transportation that encourages an evil a hope of future transportation that furnishes a motive for an evil. That is a transportation that exists only in imagination. On the theory that Congress may forbid interstate transportation if a desire to engage in it leads to evil doing it results that if Congress forbids the interstate shipment of goods made for such shipment by a factory owner who lays violent hands on his workmen engaged in making them, the law is valid as, but
only as, applied to a battery committed not wholly out of ill temper at their slowness, but in part at least with a purpose of speeding their work. In the latter case the prohibition operates by taking away a motive for the beating. If the beating is wholly out of ill temper, it operates by providing a motive not to beat. In either case Congress seeks to regulate an act not of commerce, nor of anticipated adverse effect on interstate commerce, nor produced by any act of interstate commerce, nor between parties to an act of interstate commerce; and to regulate it by an alteration of motive which discourages conduct that Congress disapproves but has no right or power to forbid. In both cases, Congress uses power given it over acts of commerce and over acts that may interfere with commerce as a club to control by threat of exclusion from commerce acts which are not acts of commerce and have no tendency to interfere with commerce.

The theory advanced by Judge Holmes in *Hammer v. Dagenhart* and apparently accepted in *U. S. v. Darby* means that if a man is about to do something that Congress disapproves but cannot forbid, such as employing factory hands at starvation wages, burning coal whose smoke annoys the neighbors, operating a factory whose fire escapes, prescribed by the state, Congress thinks dangerous, buying coal from one known to employ children to dig it, or, to borrow the striking illustration of Professor W A. Sutherland,56 slaughtering children to make articles for sale from their bones, and if his motive for doing it is a desire to carry on interstate commerce, it is what the Constitution means by regulating his commerce for Congress to take away his motive for such an act by forbidding him to carry on the commerce if he does it. It means that although, as Judge Stone said in *U. S. v. Darby*, the power of Congress to regulate interstate commerce cannot depend on the motive which leads Congress to exercise such power as it has, yet that power may depend on the motive on which they act who are subject to the power. On this theory the power of Congress to exclude from interstate commerce a man who beats his wife depends on whether his reason for beating her is to make her desist from interfering with his conduct of that interstate commerce, in which case he may be excluded because it was his desire to carry on the commerce that caused the beating, or whether it was only a desire to improve her cooking. If it was a desire to make her cook better, the question then is whether his motive was

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solely to please his palate, or was in part a desire to help an indigestion which lessened his ability to carry on the interstate commerce. Only in the latter case can Congress, because of a hope for a commerce existing in his imagination, which hope encouraged the evil, exclude him from an actual commerce which did not encourage an evil because the evil was over before the commerce began. Such an exclusion from commerce is not a regulation of that commerce in any ordinary sense. No more so is the exclusion from commerce of a manufacturer who employs children or ill-paid but willing workmen in the hope of future commerce in the goods they shall make. In such a case Congress seeks to deter a man from conduct which affects only the interests of his own state, which his own state is at liberty to permit, and may approve and desire to encourage, and which Congress cannot forbid, by shutting the doors of commerce in his face, and by so disabling him to induce him to desist. It penalizes him for doing what he has a right to do, not by taking from him money that he has, but by forbidding him to earn more. It is solely a deterrent, though it operates, not as most deterrents do by supplying him with a motive to desist, but by depriving him of motive to persevere. It takes from him a privilege of sale because Congress does not approve of an act of manufacture. Once the goods are made it does no harm to transport them. It is fallacious to call the transportation "an instrument of harm." The only reason for prohibiting the transportation of goods made under conditions deemed evil, is that the prohibition will deter from manufacture under those conditions. There is equal reason to prohibit the transportation of any other goods if the prohibition will deter from any other evil. In either case Congress tries to induce abstention from a practice which Congress has no power to forbid for its intrinsic evil, to control by indirection what it has no right to control directly, and to affect that control by means inappropriate for a government with full powers to employ, and hence to make an inappropriate use of its power such as the Child Labor Tax Case held to be invalid.

So far as concerns the interest of the state of production, there can be no reason why the framers of the Constitution should have wanted to give Congress control over conditions of production when and only when the product was to be sent into another state. There was abundance of reason for withholding such power. The people of the state presumably know their own interests best and the principles of self government require that they shall have power to protect them. The age at which children need to earn money, the cost of living and the effect of climate on hours of
work vary from state to state. The Fair Labor Standards Act penalizes employers who do not raise wages beyond a minimum fixed by the state as best suited to its needs. The proposed Fair Labor Practices Act deprives employers of a liberty in hiring workmen which the laws of their state reserve to them. Each attempts to overrule the decision of the people of a state as to what their best interests require in a matter of local concern. Neither the Southern framers of the Constitution who refused to give Congress power to regulate commerce unless power to prohibit the slave trade were withheld until all needed slaves might be imported, nor the Northerners who consented to the withholding, used the phrase “power to regulate commerce” in a sense so sophisticated as to empower Congress to destroy slavery at once by forbidding interstate and foreign commerce in the cotton and tobacco for growing which it was the main purpose of the slave trade to supply the human tools.

As to refusing because of his race or religion to employ an applicant for work in making goods for interstate commerce, it is not true that “the transportation encourages the evil” because without the expectation of the transportation they would not be employed at all. It is not desire to engage in commerce that encourages the discrimination, but only reluctance to employ the men discriminated against.

So far as concerns exclusion from commerce for paying less than a federally fixed minimum wage in manufacture it may seem that the water has run under the bridge. But there is water upstream yet to come down. In constitutional doctrine the tide sometimes turns. In Erie Railroad v. Tompkins the precedents of a century were upset by holding that the inveterate practice in federal courts of disregarding state decisions on points of commercial common law was contrary to the implications of the Constitution. In U. S. v South-Eastern Underwriters Association

37 (1938) 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.
38 Still there is room for the maxim communis error facit jus. If it were discovered that the Constitution contained a provision, accidentally omitted in all copies, that no state formed west of the Mississippi should be admitted to the Union, and that any act of admitting it should be void of effect, it would not alter the fact that a federal government exists which exercises an authority valid by acquisitance over all parts of the present United States. There may be a question whether the abdication on confession of inveterate error in Erie Railroad v. Tompkins was necessary, but it did not invalidate earlier judgments. It only held them to have been erroneous. Though the court should be convinced in future that it should not have upheld the acts of Congress that made paper money legal tender and established the national banks, it would seem that it well might hold valid de facto what it thinks it ought originally to have held void.

39 (1944) 322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440.
a bare majority of the court overruled well considered decisions which had been accepted for a hundred years as settling the law, and held that an agreement fixing premiums made between insurers who, acting by local agents in states other than that of the insurer's domicile, promised to make local payments to local residents in case of death or loss by fire occurring locally, was an agreement in restraint of interstate commerce because communications between the agents and their principals were interstate. In this case it is hard to see that the new doctrine is an improvement on the old. Even if the policies included agreements that in case of loss the money should be sent in a box from the insurer in one state to the insured in another, it would seem that all Congress could regulate would be that which concerned the transportation of the box. Alexander Hamilton had said that power to regulate foreign commerce included power to regulate insuring the safety of ships and cargoes on foreign voyages. His statement was applicable to persons who resided and contracted in the same state. But it was treated as if it were authority for the proposition that a contract to pay a sum equal to the value of a building if the building burned down, unlike a contract to pay the same sum for a conveyance of title to the building, was a contract for interstate commerce, provided that one party lived in one state and the other party in another.

Since an insurer of lives domiciled in one state, who promises to pay money on death to the representative or beneficiary of a person domiciled in another, is now held to engage in interstate commerce, it may some day be held that a resident of one state who bequeathes money to be paid on his own death to a resident of another state engages in a transaction of interstate commerce, and that Congress may fix the number of witnesses necessary to make the bequest valid. It may be doubted that the doctrine of the insurance cases, even if it lasts as to insurance, will be applied to chain stores. Many corporations and individuals domiciled in one state operate a retail store in another. They engage in interstate commerce by sending supplies to their stores, by sending letters of instruction to those who tend the stores and by the transmission to themselves of money received. The owners might by interstate correspondence restrict competition in the local sales by agreeing on minimum prices. It would be strange to hold that the fact that their dealings with their employees and with each other were transactions of interstate commerce made sales over the counter by their agents sales in interstate commerce, and that the agreement
for minimum prices in local sales was consequently an agreement in restraint of interstate trade. But that is in principle what was held in the insurance case.

In holding void state statutes which burdened the privilege of buying goods with intent to take them out of the state, it has been seriously said that such a purchase is an act of interstate commerce. On this theory, if a man who buys a necktie over the counter makes it known that he intends to send it as a present to a friend in another state, he and the seller engage in interstate commerce, or if the seller knows he intends to wear it on a trip abroad, they are engaged in commerce with all the countries that the buyer intends to visit. It was said in Whitfield v. Ohio that such a doctrine "is more artificial than sound." The real ground of the decisions was that the state statutes in obstructing the purchase of goods for export unduly obstructed their export. A notable instance of recurrence with public approbation to a constitutional doctrine long denounced and believed to have been abandoned is furnished by the decisions in the Insular Cases. They revived and enforced as to native Filipinos principles which the Dred Scott Case, supposedly overruled by war and constitutional amendment, had applied to free negroes, in holding that, though they owed allegiance to the United States and were subject to its laws, lived and perhaps were born under the stars and stripes, they were not citizens of the United States and were not entitled to rights which its Constitution secures to citizens.

It is undesirable and anomalous that conditions of employment of those who make goods for interstate commerce should be regulated by federal law, while conditions as to those who work beside them may be differently regulated by the laws of the state. It may make it necessary to carry on parts of a single business in separate factories or even as separate businesses. It might be better to give Congress legislative power over all subjects, leaving to its judgment what had better be left to the states. Many things which Congress might regulate it has preferred to leave to the states. To prevent physical obstruction to interstate commerce by fire or theft, Congress might set up fire and police departments wherever

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43 Dred Scott v. Sandford, (1856) 19 How. 393, 15 L. Ed. 691.
such commerce goes on. The confusion that might result as to whether state or federal agents should take charge of a given fire or riot may be the reason why Congress has confined its efforts of that sort largely to setting up a federal bureau of investigation which generously lends assistance to the state police.

Whatever the ultimate solution may be, whether by constitutional amendment, change in judicial decision or otherwise, we need a modern Jonathan Swift to write a new version of Gulliver's voyage to Laputa, and fitly satirize our indirect and piecemeal methods of dealing by divided authority with matters which, if regulated at all, need regulation within a single state that shall be consistent, systematic and direct, and that shall proceed from a single source.