1919

National Police Power under the Commerce Clause of the Constitution

Robert Eugene Cushman

Follow this and additional works at: https://scholarship.law.umn.edu/mlr
Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/2183

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
THE NATIONAL POLICE POWER
UNDER THE
COMMERCE CLAUSE OF THE CONSTITUTION

To point out to the man in the street that while the Congress of the United States may pass laws to suppress the white slave traffic or the sale of adulterated food, it has no power to prohibit child-labor or to regulate marriage and divorce, does not add much to his understanding of American constitutional law. Too often it merely decreases his respect for the constitution and the courts which construe it. His feeling is one of exasperation that any truly national need should exist, any national problem should cry for solution, and the national legislature should lack the authority to deal with it.

The point of view of the layman emphasizes in striking fashion the completeness with which, as a people, we have been won over more or less unconsciously to the belief that Congress has, or ought to have, authority to pass any salutary law in the interest of the national welfare. Instead of surprise that Congress should have the temerity to penetrate into a new field of legislation, there is impatience to find that there is any such field into which Congress may not penetrate. It is the purpose of this article to restate some fundamental doctrines of our constitutional law and review some of the steps in our constitutional history with a view to making clear the somewhat precarious trial and error process by which Congress has come gradually to legislate in affairs over which it has been supposed to have no jurisdiction.
to assume responsibility for the safety, health, morals, good order, and general welfare of the nation, and thus to exercise what may be called a national police power.

It seems clear that it is entirely proper to use the term "national police power." To borrow a definition of the police power from the authority perhaps most competent to lend,¹ it is that power of government which "aims directly to secure and promote the public welfare" by subjecting to restraint or compulsion the members of the community. It is the power by which the government abridges the freedom of action or the free use of property of the individual in order that the welfare of the state or nation may not be jeopardized. It is obvious, then, that when Congress places a prohibitive tax upon poisonous matches, excludes obscene literature from the mails, or enacts an employers' liability law, it is exercising police power. What is the source and nature of this police power which Congress enjoys and what are the limitations upon it?

**Theory of the National Police Power**

*Principle of Enumerated Powers of Congress*

To understand clearly the nature of the national police power it is necessary to bear in mind one of the a b c's of our constitutional law, namely, that Congress enjoys those powers of legislation, and only those, which are positively given to it by the constitution. Unlike the states, which enjoy all powers which have not been taken away from them, it has only the powers which are delegated to it. The subjects over which it may exercise control are carefully enumerated. It would be useless to argue a point so firmly established. Nothing is clearer than that the purpose of the Convention of 1787 was to confer upon the new Congress a certain group of powers definitely delimited and to leave the other powers of government in the hands of the states. Hamilton's famous argument in the *Federalist*² against the adoption of a bill of rights to the new constitution urged, it will be recalled, that to add to the constitution a list of things which Congress might not do, when Congress had never been given power by the constitution to do them, savored of the dangerous

¹ Freund, Police Power, Sec. 3.
² Federalist, No. 84.
doctrine that Congress enjoyed powers not positively granted to it provided they had not been specifically denied to it. Any such danger was, of course, obviated by the Tenth Amendment declaring that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"; and since that time commentators and courts have joined with complete unanimity in making the doctrine that the powers of Congress are enumerated powers a constitutional axiom.\(^3\)

The effect of this doctrine of enumerated powers upon the right of Congress to exercise a national police power is perfectly plain. The enumeration of congressional powers in the constitution does not include any general grant of authority to pass laws for the protection of the health, morals, or general welfare of the nation.\(^4\) It follows, then, that if Congress is to exercise a police power at all it must do so by a process something akin to indirection; that is, by using the powers which are definitely confided to it, for the purposes of the police power. If it would enter upon an ambitious program to protect public morals or safety or health or to promote good order, it must cloak its good works under its authority to tax, or to regulate commerce, or to control the mails, or the like, and say, "By this authority we pass this law in the interest of the public welfare." In short, Congress exercises a generous police power not because that power is placed directly in its hands but because it has the power to regulate commerce, to lay taxes, and to control the mails, and uses that authority for the broad purposes of the general welfare.\(^5\)

\(^3\) "The constitution was, from its very origin, contemplated to be the frame of a national government, of special and enumerated powers. This is apparent, as will presently be seen from the history of the proceedings of the convention which framed it; and it has formed the admitted basis of all legislative and judicial reasoning upon it ever since it was put in operation, by all who have been its open friends and advocates as well as by all who have been its enemies and opponents." Story, Constitution, 5th ed., I. Sec. 909.

\(^4\) Sec. 8, Art. I, of the constitution reads: "The Congress shall have power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; . . ." It has been generally agreed, however, that this clause does not confer a general police power upon Congress, but merely the power of levying taxes, etc., for the purpose of paying the debts and providing for the common defense and general welfare of the country. For elaborate review of the authorities on this point, see Watson, Constitution, I, p. 390 et seq.

\(^5\) This point is further emphasized and the practice severely criticized in an illuminating article by Judge Charles M. Hough, Covert Legislation
That Congress can exercise police power only in so far as it is possible to utilize one of its enumerated powers for that purpose is not due to accident or inadvertence. The limited nature of that police power has been emphasized and re-emphasized by the unsuccessful efforts of those who from 1787 to the present time have sought to secure its enlargement and invest Congress with a power adequate to deal with any truly national problem. The earliest of these efforts was made in the Convention of 1787. Four resolutions were introduced during the sessions of that body, varying somewhat in phraseology but similar in purpose. That purpose, to quote the language of the one introduced by Mr. Bedford, was to confer upon Congress the power "to legislate in all cases for the general interests of the Union, and also in those to which the States are severally incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation." In defeating these resolutions the Convention passed squarely upon the question whether or not Congress should enjoy a general police power for the protection of the national welfare apart from its specifically enumerated powers and decided that it should not.

There is a difference of opinion among historians and commentators as to whether James Wilson actually held to the doctrine that Congress possessed any general unenumerated powers. Certain utterances of his have, however, been quoted to prove that he held this view; and more than a century later President Roosevelt used him as an authority in support of his famous doctrine of "New Nationalism." In 1785 Wilson referred to the powers of Congress under the Articles of Confederation in the following language: "Though the United States in congress assembled derive from the particular States no power, jurisdiction, or right which is not expressly delegated by the confederation, it does not thence follow that the United States in congress have no other powers, jurisdiction, or rights, than those delegated by the particular states. The United States have general rights, general powers, and general obligations, not derived and the Constitution, (1917) 30 Harv. Law Rev. 801. See also an article by Paul Fuller, Is There a Federal Police Power? (1904) 4 Col. Law Rev. 563.

Farrand, Records of the Federal Convention of 1787, I. p. 229; II, pp. 25, 26, 367. The first of these was the sixth resolution in the report of the Committee of the Whole; the others were introduced by Sherman, Belford, and Rutledge, respectively.
from any particular state, nor from all the particular states, taken separately; but resulting from the union of the whole. . . . To many purposes the United States are to be considered as one undivided, independent nation; and as possessed of all the rights, and powers, and properties by the law of nations incident to such. Whenever an object occurs, to the direction of which no particular state is competent, the management of it must, of necessity, belong to the United States in congress assembled. There are many objects of this extended nature."7 If such a construction could be placed upon the powers of the congress of the Confederation, powers which were not only delegated but expressly delegated, then surely the same construction could be placed, a fortiori, upon the powers of Congress under the present constitution, which omits the word "expressly." When the federal constitution was before the Pennsylvania convention for ratification Wilson, who was a member of that body, made a speech in which he declared that the framers of the constitution in drawing a line between the powers of the national government and those of the states had acted upon the principle that "Whatever object of government is confined in its operation and effect within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends in its operations or effects beyond the bounds of a particular state, should be considered as belonging to the government of the United States."8 Although this statement might lend support to the view that Congress could deal with national problems because they were national even in the absence of a positive grant of authority to do so, it seems hardly necessary to regard it in any other light than as a simple statement of the object which the Convention tried to attain in the matter of distributing powers between the nation and the states. Without speculating further on the actual significance of the statements quoted, it may be noted that no trace is found of the so-called "Wilson Doctrine" in Wilson's judicial utterances, nor is there other evidence that he ever became an active exponent of that principle.9

8 Ibid., p. 533.
9 In support of the so-called Wilson doctrine, see: L. H. Alexander, James Wilson, Patriot, and the Wilson Doctrine, North Am. Rev. vol. 183, p. 971; Governor Samuel W. Pennypacker, Address at Wilson Memorial
It remained for President Roosevelt to discover or at least to label the neutral or "twilight" zone in our constitutional system—a zone lying between the jurisdictions of the state and the nation, to which lawbreakers of great wealth might repair and be free from punishment or restraint. Large corporations had come to be beyond the reach of the state because they had grown to national dimensions; they were outside the effective control of Congress because the constitution does not confer upon Congress a positive grant of authority to deal with them directly. It was to meet this situation that President Roosevelt urged his doctrine of "New Nationalism," first as a principle of constitutional interpretation, and, failing in that, as a constitutional amendment. That doctrine may be best stated in his own words: "It should be made clear that there are neither vacancies nor interferences between the limits of state and national jurisdictions, and that both jurisdictions together compose only one uniform and comprehensive system of government and laws; that is, whenever the states cannot act, because the need to be met is not one merely of a single locality, then the national government, representing all the people, should have complete power to act."\(^{10}\) In public addresses delivered after 1906 President Roosevelt reverted again and again to this subject, urging always that the federal government should be competent to deal with every truly national problem and expressing his impatience at "the impotence which springs from overdivision of government powers, the impotence which makes it possible for local selfishness or for legal cunning, hired by wealthy special interests, to bring national activities to a deadlock."\(^{11}\)

But if this "New Nationalism" is ever to be incorporated into our constitutional law it will need to be by a constitutional amendment. In the case of *Kansas v. Colorado*, decided in 1907,\(^{12}\) the Supreme Court was invited to adopt that doctrine in construing the powers of Congress, but it declined in no

---


\(^{10}\) From his speech at Ossawatomie, Kansas, August 31, 1910.

\(^{11}\) Idem. The doctrine of "New Nationalism" is discussed and criticized in Willoughby, Constitution, I, pp. 48-66.

uncertain language to do so. It was urged upon the court in that case that Congress had a paramount right to control the whole system of reining arid lands in a state, whether owned by the United States or not, on the theory that "all powers which are national in scope must be found vested in the Congress of the United States." Such a view the court held to be in direct conflict with the general established doctrine that the national government is a government of enumerated powers and also with the specific provisions of the Tenth Amendment. "This amendment," declared the court, "which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the national government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if, in the future, further powers seemed necessary, they should be granted by the people in the manner they had provided for amending that act. It reads: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' The argument of counsel ignores the principal factor in this article, to wit, 'the people.' Its principal purpose was not the distribution of power between the United States and the states, but a reservation to the people of all powers not granted." It would seem from this opinion that President Roosevelt's "twilight zone" is firmly intrenched in our constitutional system and that those who hope to develop a national police power by interpretation or by any method but amendment are doomed to disappointment.  

Principle of Implied Powers

It is perfectly certain that under the doctrine that Congress has no powers which are not enumerated in the constitution it would have been quite impossible to develop a national police

---

13 This doctrine of a general, inherent, unenumerated power of Congress is not to be confused with what Story termed "resulting powers," or those deduced from several or all of the enumerated powers of Congress. See Commentaries, 5th ed., II, Sec. 1256. Among the examples of such "resulting powers" are the power to exercise the right of eminent domain, Kohl v. United States, (1875) 91 U. S. 367, 23 L. Ed. 449; the power to issue legal tender notes, Juilliard v. Greenman, (1884) 110 U. S. 421, 28 L. Ed. 204, 4 S. C. R. 122; and the power to exclude aliens, Fong Yue Ting v. United States, (1893) 149 U. S. 698, 37 L. Ed. 905, 13 S. C. R. 1016. See Willoughby, Constitution, I, Secs. 37, 38.
power were it not for the fact that the scope of congressional authority was vastly increased, and the possibility of ever-multiplying extensions of power opened up, by the establishment upon a firm foundation of the so-called doctrine of implied powers. It will be recalled that under the Articles of Confederation "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States in Congress assembled." \(^{14}\) When the Tenth Amendment was being debated by Congress in 1789 a motion was made to insert there also the word "expressly" before the word "delegated." This motion, however, was rejected.\(^{15}\) The bitter controversy which raged between the Federalists and the anti-Federalists as to whether or not Congress might exercise powers which were not expressly conferred was not settled finally and authoritatively until Marshall's famous opinion in 1819 in the case of *McCulloch v. Maryland*.\(^{16}\) It was in that opinion that Marshall gave his classic statement of the doctrine of implied powers: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but are consistent with the letter and spirit of the Constitution, are constitutional." Thus the ghost of strict construction was laid forever, at least so far as the Supreme Court was concerned; and in 1884 Mr. Justice Miller, by way of giving it a suitable epitaph, took occasion to allude to "the old argument, often heard, often repeated, and in this court never assented to, that when a question of the power of Congress arises the advocate of the power must be able to place his finger on the words which expressly grant it."\(^{17}\)

Thus it will be seen that while the doctrine of enumerated powers imposes upon Congress the necessity of finding among its delegated powers what has been aptly termed "a definite constitutional peg" upon which to hang every exercise of the national police power, the doctrine of implied powers, or the liberal construction of congressional authority, has made it possible to hang upon those " pegs" an enormous amount of salutary legislation in the interest of the national health, safety, and well being. The

\(^{14}\) Art. II. Italics are the author's.

\(^{15}\) Annals of Congress, I, p. 768.

\(^{16}\) (1819) 4 Wheat. (U.S.) 316.

\(^{17}\) Ex parte Yarbrough, (1884) 110 U. S. 651, 658, 28 L. Ed. 274, 4 S. C. R. 152.
“pegs” themselves are few in number, the only important ones being the power to regulate commerce, the power to tax, and the power to establish and run the postal system; but the police legislation which they have been made to support deals with anything from the white slave traffic to speculation in cotton.

**Limitations on the National Police Power**

In the exercise of its police power Congress is subject to three definite constitutional limitations. The first of these limitations has already been outlined: Congress must, in passing police legislation, use an enumerated power; in other words, there must always be a constitutional peg. This would seem on first thought to be entirely obvious. Yet occasionally Congress has tried, always unsuccessfully, to do without the peg. In 1867 Congress forbade the sale of illuminating oils which were below a certain fire test.\(^{18}\) The law was declared invalid because it was entirely unrelated to any of the delegated powers\(^{19}\) of Congress. It was not a regulation of interstate commerce; it was not a tax; and Congress did not pretend that it was. For the same reason the act of 1876 punishing the counterfeiting of trademarks and the sale of counterfeit trademark goods\(^{20}\) was declared unconstitutional.\(^{21}\) The excerpt quoted above\(^{22}\) from the opinion of the court in *Kansas v. Colorado* emphasizes the same point. In all of these cases Congress had tried to pass police regulations without finding a constitutional peg on which to hang them.

The second limitation requires that a real relevancy exist between the police regulation and the peg upon which it is hung. Assuming that Congress in exercising its police power uses one of its delegated powers and labels its act accordingly as a tax law, a regulation of commerce, or the like, the law must then pass the test: is there a reasonable enough connection between the law Congress has passed and the constitutional grant of power on which Congress has relied in passing it to warrant its being regarded as a regulation of commerce, or the mails, or the like? If our courts

---

\(^{18}\) Act of March 2, 1867, Chap. 169 Sec. 29, 14 Stat. at L. 484.

\(^{19}\) United States v. De Witt, (1870) 9 Wall. (U.S.) 41. The title of the act was “An Act to amend existing Laws relating to Internal Revenue, and for other Purposes.” The section involved here must have been one of those passed “for other purposes,” for it made no reference to any tax.

\(^{20}\) Act of August 14, 1876, 19 Stat. at L. 141.

\(^{21}\) Trade-Mark Cases, (1879) 100 U. S. 82, 25 L. Ed. 550.

\(^{22}\) Supra, p. 295.
in determining the validity of legislation took account of the motives of law-makers, these motives would in the main tend to become the test of the validity of the law; but since the courts ignore those motives and take legislation at its face value, the relevancy of the law to its label becomes the test. In other words, it is proper enough for Congress to use its power over interstate commerce as a means of protecting the national health or morals; but Congress must not get so absorbed in the work of protecting the national health or morals that it forgets that it is, after all, supposed to be regulating interstate commerce. When this test was applied to the law passed in 1907 by which Congress made it a felony for any person to harbor an alien prostitute within three years after her entrance into this country, the court found that while the authority of Congress to regulate immigration was undoubted and while the law of which the provision in question was a part was entitled "An Act to Regulate the Immigration of Aliens into the United States," nevertheless that provision did not as a matter of fact regulate immigration. The validity of the provision in question," declared the court, "should be determined from its general effect upon the importation and exclusion of aliens. But it is sufficient to say that the act charged has no significance in either direction." The provision was invalid because it did not bear a sufficiently close relation to anything over which the constitution gives Congress authority to act. In a case which will be discussed at a later point it was held that the provision of the Erdman Act forbidding interstate carriers to discharge employees because of membership in labor organizations was not a legitimate exercise of congressional authority because there was no connection between interstate commerce and membership in a labor union. In the other cases which will be considered in the course of this article it will be seen that no law which Congress has passed in the exercise of a national police power has been upheld unless the court has, after careful scrutiny of this point, 

26 Professor Goodnow takes the view that this part of the opinion is dictum, since the court had already declared the provision under consideration to be a violation of the due process of law clause of the Fifth Amendment. Social Reform and the Constitution, 81 et seq.
been convinced that the law was at the same time a real and sub-
stantial exercise of one of the enumerated powers of Congress.

The third limitation, or set of limitations, upon the national
police power is to be found in the specific prohibitions upon con-
gressional authority contained in the constitution and particularly
in the bill of rights. These restrictions operate in a perfectly
obvious and direct fashion. Congress may use its delegated
powers for the protection of the national welfare; but in so doing
it must not take life, liberty, or property without due process of
law, take private property for public use without just compen-
sation, interfere with religious liberty, or do any of those things
which it is definitely forbidden by the constitution to do. This
third limitation rests upon the well-established principle that the
specific prohibitions of the constitution act as restraints upon the
general grants of powers to Congress.27 The restriction of due
process of law is the one perhaps most commonly enforced against
exercises of the national police power, particularly those passed
under the commerce clause; but in the exercise of the power over
the postal system for the protection of the national morals or
safety the question has sometimes arisen whether or not Congress
has violated the guarantees of freedom of the press, or the guar-
antee against unreasonable searches and seizures.28

In the light of the foregoing constitutional principles and
limitations, it is the purpose of the present article to discuss the
police power which Congress has exercised under the grant of
authority to regulate commerce; and to mark out the scope and
variety of the protection which has been accorded the national
safety, health, morals, and general welfare in this somewhat in-
direct and roundabout way.

**General Nature and Scope of the Commerce Power**

If one were obliged to name the most potent cause leading to
the calling of the Convention of 1787 he would not hesitate in
choosing the need for a national control over foreign and inter-

---

27 Story, Constitution, II, Sec. 1864 et seq. Monongahela Navigation Co.
28 Ex parte Jackson, (1877) 96 U. S. 727, 24 L. Ed. 877; In re Rapier,
(1892) 143 U. S. 110, 36 L. Ed. 93, 12 S. C. R. 374; Lewis Publishing Co.
v. Morgan, (1913) 229 U. S. 288, 57 L. Ed. 1190, 33 S. C. R. 867; Public
789.
state commerce. That there was scant discussion of the problem in the Convention was perhaps due to the unanimity of conviction among the members of that body that the power to regulate commerce should unquestionably rest in the new Congress. Since the adoption of the constitution no small part of the time of Congress has been occupied with the exercise of this power, and no small part of the time of the Supreme Court has been spent in passing upon the constitutionality and meaning of those laws. Considering the wide range of instrumentalities and transactions which have come to be included in the term commerce it is but natural that the authority to regulate it should serve as the constitutional basis for the development of a wide national police power.

The constitution confers upon Congress the power to regulate three kinds of commerce: first, "with foreign nations," second, "among the several states," and third, "with the Indian tribes."\(^{29}\) The power given in respect to each of these is the same, that is, the power to "regulate"; and there is nothing in the language used to indicate that the framers of the constitution had in mind any distinctions as to the extent of the power of Congress over each type. Congress early utilized its authority over these different classes of commerce, however, in different ways, to meet widely different problems, and apparently without stopping to discuss whether its power over one was greater than over another. It was not until railroad transportation reached a high point of development that Congress, a full century after the framing of the constitution, began to turn its mind seriously to the problems of interstate commerce regulation. But in the meantime the regulations of foreign and Indian commerce had been numerous and rigorous in character. The question has, therefore, become pertinent whether Congress actually does have exactly the same power over interstate commerce that it enjoys over commerce with foreign nations and with the Indian tribes, or whether that power is more restricted. Especially has it been repeatedly urged by those interested in the expansion of a national police power that Congress could exercise every power over interstate commerce which it could exert in controlling foreign commerce.\(^{30}\)

\(^{29}\) Art. I, Sec. 8.
\(^{30}\) This position has been taken, for instance, by those who believe that Congress may restrict child-labor by means of its control over inter-
It is possible to cite several cases in which the Supreme Court has expressed the opinion that there is no difference between the powers of Congress over foreign and interstate commerce.\(^{31}\) Marshall voiced this view in *Gibbons v. Ogden*,\(^{32}\) and in 1888 Mr. Justice Mathews in *Bowman v. Chicago, etc., Ry. Co.* declared, "The power conferred upon Congress to regulate commerce among the States is indeed contained in the same clause of the Constitution which confers upon it power to regulate commerce with foreign nations. The grant is conceived in the same terms, and the two powers are undoubtedly of the same class and character and equally extensive."\(^{33}\) While these statements sound perfectly conclusive and final, the fact remains that in passing upon the validity of several of the congressional police regulations over interstate commerce the court, though urged to do so, has steadily declined to uphold such regulations on the ground that similar police restrictions applicable to foreign commerce have been sustained.\(^{34}\) A substantial body of opinion has grown up in support of the view that there is, after all, a difference between the two powers. It is urged by an eminent authority that "although the three classes of commerce are thus included in the same clause and in the same terms in the enumeration of powers, they are clearly distinguishable in their historic setting and constitutional import, and the laws which are necessary and proper in regulating commercial intercourse with foreign nations and with the Indian tribes may not be necessary and proper in regulating such commercial intercourse between the states."\(^{35}\) Without anticipating the more detailed discussion of this problem appropriate at a later point in this article, it may be suggested that Congress has actually exercised a police power over foreign commerce which there is reason to believe would be regarded as beyond its proper authority if applied to commerce among the several states. And while there is no authoritative judicial pronouncement upon this question, an authority over interstate commerce which does not

---

state commerce. This point will be further considered in a later section of this article.

\(^{31}\) For citation of these cases, with comment, see note by E. B. Whitney, 7 Yale Law Jour. 294.

\(^{32}\) (1824) 9 Wheat. (U.S.) 1, 228, 6 L. Ed. 23.

\(^{33}\) (1888) 125 U. S. 465, 482, 31 L. Ed. 700, 8 S. C. R. 689.

\(^{34}\) This was true both in the Lottery Case and in the recent child-labor case; it will be treated more fully in connection with the latter case.

extend to the exclusion from the channels of that commerce of the products of factories employing child-labor\textsuperscript{36} can hardly be called co-extensive with an authority over foreign commerce which excludes from our shores the products of convict-labor.\textsuperscript{37}

The relationship between the national government and the Indians has always been regarded as anomalous, and it would be unprofitable to enter upon any extended comparison of the power of Congress over interstate commerce with that over commerce with the Indian tribes. Our control over these people has been paternalistic in character.\textsuperscript{38} Because of the importance and delicacy of the problem, Congress has regulated intercourse with the Indians with a rigorous hand. It has forbidden commercial dealings with them in certain commodities, as, for example, intoxicating liquors;\textsuperscript{39} and has even gone to the length of forbidding any one to trade with them without a license issued by the federal government.\textsuperscript{40} It seems probable that restraints have been placed upon commerce with the Indians which could not be imposed upon ordinary trade relations between citizens of the states.

The following discussion of the police power which Congress has come to exercise under the commerce clause may properly be confined, therefore, to the problems relating to interstate commerce. This is appropriate not only because it is in that field of regulation that the national police power has developed in most striking and most varied form, but also because the preceding paragraphs make it clear that if there is any constitutional distinction among the powers of Congress over foreign, interstate, and Indian commerce the power over interstate commerce is the most narrowly restricted; and accordingly whatever police power Congress may exercise over interstate commerce it may exercise over foreign and Indian commerce.


\textsuperscript{37} Act of October 3, 1913, 38 Stat. at L. 195. The validity of this law has never been questioned and would seem, in the light of numerous precedents, to be unquestionable.


\textsuperscript{40} Upheld in United States v. Cisna, (1835) 25 Fed. Cas. 422. See Act of March 3, 1903, 32 Stat. at L. 1009.
While the police regulations which Congress has passed under its authority to regulate interstate commerce have been exceedingly numerous and have dealt with a wide range of topics, from locomotive ashpans to obscene literature, they may all be placed for convenience in four groups, according to the general purpose of their enactment and the constitutional principles upon which they are based. (I) In the first group may be placed those regulations in which Congress has exercised police power for the protection and promotion of interstate commerce itself by the enactment of such laws as the safety appliance acts, the anti-trust acts, and other regulations designed to keep that commerce safe, efficient, and unobstructed. (II) The second group comprises the cases in which the law forbids the use of interstate commerce as a medium or channel for transactions which menace the national health, morals, or welfare. In this class would be placed the Pure Food Act, the White Slave Act, and other statutes by which Congress, instead of protecting commerce itself from danger, protects the nation from the misuse of that commerce. (III) The third group consists of the enactments by which Congress co-operates with the states by forbidding the use of the facilities of interstate commerce for the purpose of evading or violating state police regulations. Here would be found such laws as the Webb-Kenyon Act, excluding from interstate commerce shipments of liquor consigned to dry territory. (IV) In the last group should be placed the Keating-Owen Child-Labor Act of 1916, by which Congress attempted to deny the privileges of interstate commerce to articles produced under conditions which Congress disapproved but which it had no direct power to control. Careful consideration may profitably be given to each of these groups.

I. NATIONAL POLICE POWER FOR PROMOTION AND PROTECTION OF COMMERCE

1. Appliances and Physical Regulations Necessary for Safety. It is but natural that Congress should feel that one of the most obvious and necessary duties imposed upon it by the grant of power to regulate commerce is the duty to pass police regulations to protect from destruction, loss, or damage the lives, limbs, and property of persons concerned in the processes or transactions of interstate commerce, whether as passengers, shippers, or em-
ployees. As early as 1838 laws were passed requiring the installation of safety devices upon steam vessels. But beginning with a statute passed in 1866 Congress has rigorously controlled the transportation on land and water of explosives. But it was not until 1893 that Congress began to enact the comprehensive set of safety appliance acts now applicable to interstate railroads. The first of these acts was the Automatic Coupler Act, which has been supplemented by more recent laws requiring, among other things, the use of ashpans on locomotives, the inspection of boilers, and the use of ladders, hand-brakes, drawbars, and similar devices on cars. To the same general purpose are the statutes requiring railroads to make full reports to the Interstate Commerce Commission regarding all accidents. A statute of 1913 protects interstate commerce from another type of loss by making criminal the unauthorized breaking of the seals of railroad cars containing interstate or foreign shipments.

The purpose of Congress in passing these laws is perfectly plain. Most of them, following the pioneer Safety Appliance Act of 1893, declare specifically that their object is "to promote the safety of employees and travellers upon railroads." The courts have uniformly recognized this purpose. "The Safety Appliance Act," declares one federal judge, "is essentially a police regulation. Its general purpose is humanitarian—the safeguarding of employees from injury and death." In the words of another court, "the object of Congress in passing the safety appliance acts was undoubtedly to safeguard interstate commerce, the life of the passengers, and the life and limb of the employees

---

44 Act of March 2, 1893, 27 Stat. at L. 531.
48 Act of May 6, 1910, 36 Stat. at L. 351; Act of February 17, 1911, ibid., p. 216.
engaged therein." The Supreme Court itself has declared the purpose of this legislation to be "to promote the public welfare by securing the safety of employees and travellers."

That these statutes designed to insure the physical safety of interstate commerce are police regulations falling well within the recognized limits of congressional power is too obvious to call for argument; so obvious, in fact, that the Supreme Court has never been asked to decide a case in which it was squarely contended that acts of this kind were not natural and legitimate regulations of commerce. Moreover, in several cases involving the meaning and application of these statutes, as well as in cases involving analogous exercises of the commerce power, that tribunal has alluded to the safety appliance acts in terms which place the question of their validity in the realm of settled law. And indeed if the power to regulate commerce does not include the power to make reasonable rules to secure the physical safety of the lives and property of travellers, shippers, and employees, it may well be inquired what conceivable kind of commercial regulation could be regarded as legitimate.

2. Regulations of Labor Necessary for Safety of Interstate Commerce. (a) Hours of Service Act: It came at last to be recognized that safety appliances and regulations were not enough in and of themselves to insure the physical safety of interstate commerce. There were plenty of gruesome proofs of the fact that life and property on interstate railroads were as much jeopardized by the deadening fatigue of a locomotive engineer as by the absence of block signals or automatic couplers. Accordingly, in 1907 Congress passed the Hours of Service Act, making it unlawful for any interstate carrier to employ a train-

---

\[53\] The validity of these laws has been passed upon squarely, however, in numerous decisions of the lower federal courts. For extensive citation of cases, see Thornton, The Federal Employers' Liability Act, 3rd ed., p. 334; Richey, Federal Employers' Liability, Safety Appliance, and Hours of Service Acts, 2nd ed., Sec. 215.
\[55\] March 4, 1907, 34 Stat. at L. 1415.
man for a period longer than sixteen consecutive hours and re-
quiring definite rest periods in every twenty-four hours. The
hours of train dispatchers and telegraphers were still further re-
duced, thirteen consecutive hours being the maximum where only
day work was required and nine hours out of twenty-four where
both night and day work was expected.

It is important to bear in mind that such a limitation upon
hours of service as that provided for in the act of 1907 stands in
sharp contrast, both in purpose and in constitutional justification,
to such a statute as the Adamson Law providing for a standard
eight-hour day on interstate railroads. While the employees
affected by the Hours of Service Act would of course benefit by
the relief granted from continuous labor for long hours, such
relief constituted only a secondary motive for the passage of the
act; certainly the legal authorization of a sixteen-hour day does
not indicate a very vigorously humanitarian interest in the welfare
of the workingmen affected. The object of the act was quite
clearly to promote the safety of interstate commerce on railroads;
and the title of the statute specifically declares it to be “An Act
to Promote the Safety of Employees and Travellers upon Rail-
roads by Limiting the Hours of Service of Employees Thereon.”
Viewed thus as a safety regulation, there could be no serious
question as to the validity of the act; and in upholding it as a
valid exercise of the power of Congress to regulate commerce
Mr. Justice Hughes declared: “In its power suitably to provide
for the safety of employees and travelers, Congress was not
limited to the enactment of laws relating to mechanical appliances,
but it was also competent to consider, and to endeavor to reduce,
the dangers incident to the strain of excessive hours of duty on
the part of engineers, conductors, train dispatchers, telegraphers,
and other persons embraced within the clause defined by the
act.”56 At a later point in this article57 it will be made clear that
no such argument as this was applied to the Adamson Law, and
it was sustained by the Supreme Court on widely different
grounds.

(b) Employers’ Liability Statutes: When Congress, after
considerable prodding by an energetic and persistent president,58

56 Baltimore & Ohio R. Co. v. Int. Com. Comm., (1911) 221 U. S. 612,
55 L. Ed. 878, 31 S. C. R. 621.
57 Infra, p. 315.
58 President Roosevelt urged the passage of the act in various mes-
ages to Congress.
finally passed the first Employers' Liability Act in 1906, there is every reason to believe that the members of that body were actuated by a humanitarian interest in the welfare of the workmen on interstate railroads. Like the state legislatures which had passed similar laws, they wished to take away the unjust and oppressive burdens which the common law doctrines of employers' liability had placed upon the shoulders of the injured workman. Senator Dolliver, who was a particularly vigorous proponent of the law, expressed in the senate his belief that there was not a single senator "who does not recognize the equity and justice involved" in such legislation, and added that "there is scarcely an American state in these recent years which has not taken this step forward in industrial justice." The federal employers' liability laws were passed in order to guarantee to the men to whom they applied a reasonably square deal.

It must, therefore, have been something of a surprise to the members of Congress who had fought and voted for this legislation to learn from the Supreme Court that what they had really passed was not an act to secure economic justice in certain relations between employers and employees in interstate commerce, but a safety regulation. It will throw some light upon the nature of the limitations resting upon the police power of Congress to understand why it is that from the standpoint of constitutional law there is no substantial difference between the Employers' Liability Act and the Boiler Inspection Act.

It is not difficult to follow the steps in the chain of reasoning which led the Supreme Court to this somewhat startling result. In the first place, the power under which Congress is purporting to act in passing the Employers' Liability Act is the authority to regulate commerce; Congress has no power to regulate labor as such. It follows, therefore, that only those regulations of the relations between master and servant which are at the same time

---

62 The first Employers' Liability Act was declared unconstitutional by the Supreme Court in the Employers' Liability Cases, (1908) 207 U. S. 463, 52 L. Ed. 297, 28 S. C. R. 141, because its provisions extended to include the employees of interstate carriers even when such employees were not themselves engaged in any of the processes of interstate commerce. Congress remedied this defect in passing the second statute, April 22, 1908, 35 Stat. at L. 65, which was held valid in the Second Employers' Liability Cases, (1912) 223 U. S. 1, 56 L. Ed. 327, 32 S. C. R. 169, 38 L. R. A. (N.S.) 44.
regulations of commerce are within the power of Congress. Only three years before, the court, speaking through Mr. Justice Harlan in the Adair case, had declared that one of the reasons why Congress had exceeded its power when it forbade interstate carriers to discharge any employee because he belonged to a labor union was because "there is no such connection between interstate commerce and membership in a labor organization as to authorize Congress" to pass such a law. Now if the only object and result of the employers' liability statutes was to secure a more equitable incidence of the burden of industrial accidents between the employers and the employees in interstate commerce and thereby to protect the welfare of a certain economic group, then Congress in passing such an act had again exceeded its authority, since it could hardly be shown that the statute really regulated interstate commerce or bore any reasonable relation to it. But if, on the other hand, it could be shown that the act would promote or protect interstate commerce in some definite way, then, of course, it could be upheld. Counsel for the government therefore wisely urged upon the court with great vigor the view that "if the conditions under which the agents or instrumentalities do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical, and less secure." It is a well established principle of constitutional construction that a statute, when possible, should be so construed as to save it; and the court readily adopted the alluring argument which made it possible to sustain the validity of the act. It declared its belief that "the natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines; and as whatever makes for that end tends to promote the safety of the employees and to advance the commerce in which they are engaged, we entertain no doubt that in making those changes Congress acted within the limits of the discretion confided to it by the Constitution." Thus a statute which, viewed merely as a measure to insure economic justice to the employees of interstate carriers,

---

62 Note 25, supra.
64 Ibid., p. 50. For a criticism of this point of view, see L. J. Hall, The Federal Employers' Liability Act, (1910) 20 Yale Law Jour. 122, in which
would doubtless have been invalidated, was enabled to pass the scrutiny of the courts by donning the somewhat transparent disguise of a regulation to prevent railroad accidents.

3. Regulations Necessary to Prevent the Obstruction or Suspension of Interstate Commerce. It has been suggested above that perhaps the most important cause for the formation and adoption of our federal constitution was the desire to establish a government with power to regulate foreign and interstate commerce according to a uniform rule and thereby to put an end to the chaos of obstructions, burdens, and inharmonious systems of control affecting that commerce which emanated from the jealousies of thirteen separate commonwealths. The very first case in which the commerce clause of the new constitution came before the Supreme Court for interpretation was a case in which the court refused to allow the state of New York to obstruct the freedom of interstate commerce by granting to one of its citizens an exclusive right to navigate the Hudson River by steamboat. Since that time no small proportion of the judicial attention which the commerce clause has received has been directed to the problem of preventing state interference with interstate commerce. It would seem, therefore, that in exercising its delegated power to regulate commerce Congress could tread on no safer ground, could use its authority in no way more clearly in harmony with the purpose for which it was conferred, than when it passed regulations designed to prevent the obstruction or suspension of commerce.

And while, curiously enough, the positive enactments of this kind to be found in the federal statute books are not quite so numerous nor elaborate as one might expect, yet they present some problems of peculiar interest to those interested in the development of a national police power. They may be conveniently arranged in the following groups, each of which merits some comment.

(a) Regulations to Prevent Physical Obstructions: It is un-

---

it is urged that "it is only by an indirect and unsatisfactory method of reasoning that it can be said that safety in transportation is promoted by increasing the amount of damages which a railroad company must pay for the acts of carelessness of its men in their relations to each other." It will be noted that the article was written before the Second Employers' Liability Cases were decided, but its reasoning is applicable to the doctrine of those cases.

85 Gibbons v. Ogden, (1824) 9 Wheat. (U.S.) 1, 6 L. Ed. 23.
necessary to enlarge upon the fact that Congress has full authority to penalize any act which results in the physical obstruction or interference with commerce. "Any offense," declared Mr. Justice Story in 1838, "which thus interferes with, obstructs, or prevents such commerce and navigation, though done on land, may be punished by Congress, under its general authority to make all laws necessary and proper to execute their delegated constitutional powers." Congress has accordingly enacted a fairly substantial penal code designed to preserve and protect navigable rivers and harbors from obstruction, to regulate the erection of bridges and piers, and in various other ways to keep commerce by water free and untrammelled. There would seem to be no doubt as to the existence of similar congressional authority to afford this kind of protection to the facilities of interstate land commerce; but, with the exception of the Larceny Act of 1913, already mentioned above, and some of the recent war legislation, Congress has, except in emergencies which will be alluded to later, preferred to rely upon the criminal laws of the several states to prevent the physical obstruction of interstate commerce by land.

(b) Regulations to Prevent Economic Obstructions or Restraints of Commerce. (1) By combinations of capital: It would not be relevant to the subject under consideration to launch out upon any extended discussion of the highly interesting and important laws Congress has passed for the purpose of solving the so-called trust problem. The fact that the policy of the federal government toward trusts and monopolies has not always been happy in its conception or successful in its administration has little to do with the fact that the general underlying motives of that policy have always been the same: namely, to keep interstate commerce free from the obstacles and interferences resulting from monopoly and other combinations and conspiracies designed to destroy free competition and restrain trade. It will hardly be

---

67 See U. S. Comp. Stat. 1918 Sec. 9909 et seq.
68 Supra, p. 304, note 49.
69 The War Materials Destruction Act of April 20, 1918. By the provisions of this act the instrumentalities and facilities of interstate commerce, or "war utilities" as they are called, are, along with "war materials" and "war premises," protected from wilful injury and destruction. The act rests, of course, upon the war power of Congress and not on the commerce power.
70 Infra, pp. 314, 315, notes 87, 88.
denied that these acts are police regulations designed for the protection of commerce. The first of these statutes penalized certain specific acts, such as discriminations among shippers and rebating, which Congress deemed destructive to the freedom of competition desirable in interstate commerce. This type of regulation includes the Interstate Commerce Act of 1887 and the various amendments to it passed since that time.\footnote{Act of February 4, 1887, 24 Stat. at L. 379. The text of this act and the amendments thereto are set forth and discussed at length in Judson, Interstate Commerce, 3rd ed. See also, Fuller, The Interstate Commerce Act, (1915). One striking instance of this type of police regulation over interstate commerce is to be found in the commodities clause of the Hepburn Act, June 29, 1906, 34 Stat. at L. 584. The purpose of this act was to compel the interstate railroads to dispose of such interests as they might have in the coal mining business by making it unlawful for them to carry in interstate commerce "any article or commodity other than timber and the manufactured products thereof, manufactured, mined or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have an interest, direct or indirect . . ." The legislative purpose, however, was not effectuated, because the Supreme Court in passing upon the constitutionality of the law construed it in such a way as to permit the railroad to transport coal from its own mines provided such coal had been sold by the railroad before such transportation took place. United States v. Delaware, etc., Co., (1909) 213 U. S. 366, 53 L. Ed. 836, 29 S. C. R. 527. For an excellent discussion of the history, interpretation, and operation of the clause, see Kibler, The Commodities Clause (1916); also Hand, the Commodities Clause and the Fifth Amendment, (1909) 22 Harv. Law Rev. 250.} Federal police regulations making certain acts criminal were soon found to be a very inadequate means of freeing interstate commerce from monopolistic obstructions; and so Congress, convinced that relief could be had by breaking up trusts, combinations, and conspiracies in restraint of trade, enacted the famous Sherman Act of 1890.\footnote{Act of July 2, 1890, 26 Stat. at L. 209.} After two decades of sporadic and more or less ineffectual "trust-busting," Congress supplemented the Sherman Act by legislation designed to make the act more definite in meaning and effective in operation.\footnote{The Clayton Act of October 15, 1914, 38 Stat. at L. 731.} This supplementary anti-trust act, known as the Clayton Act, was accompanied by the passage of the Trade Commission Act.\footnote{Act of September 26, 1914, 38 Stat. at L. 719.} By the passage of this latter act-Congress embarked upon a new policy in respect to combinations of capital—the policy of administrative control. While this act must still be regarded as a federal police regulation for the protection of commerce, the method employed for that purpose was the creation of an administrative commission with power to investigate, advise, and issue
orders based upon definite findings of fact. Combinations of capital formerly in bad odor merely because of their size and importance were to be kept within the law and prevented from interfering with the freedom of commerce by an active governmental supervision and co-operation.

While the litigation which has arisen under these acts, or at least under the earlier ones, has been exceedingly voluminous and the courts have spent much time construing and applying them to the concrete problems which have arisen, there seems never to have been any serious question raised as to the authority of Congress to pass laws designed to accomplish the results which these acts sought to achieve. Such constitutional objections as have been urged against these enactments have been aimed at the details of method and procedure rather than at the validity of the legislative object.75

(2) By combinations of labor: While Congress seems never to have passed, under its commerce power, any police legislation which in express terms names labor organizations and forbids them to enter into conspiracies or to commit acts which would obstruct or suspend interstate commerce, several of its enactments are couched in terms broad enough to permit the courts to apply their restraints and prohibitions to combinations of laborers.

This is true, in the first place, of the Interstate Commerce Act of 1887.76 This act makes it unlawful for any common carrier subject to the provisions of the statute "to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage."77 It is specifically made criminal under heavy penalty for "any common carrier subject to the provisions of this act, or, when such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, or lessee, agent, or person acting for or employed by such corporation," to

---

75 Any doubt as to the validity of the Sherman Act was set at rest by the decision in Addyston Pipe and Steel Co. v. United States, (1899) 175 U. S. 211, 44 L. Ed. 136, 20 S. C. R. 96.
76 Note 71, supra.
77 Sec. 3.
do or conspire to do any of the unlawful acts above set forth.\textsuperscript{78} In 1893 Judge Taft held that these provisions were applicable to the officers and members of a brotherhood of locomotive engineers who had induced the railroad for which they worked to join them in a boycott against a railroad which was engaged in a strike because of its refusal to meet certain demands of its men.\textsuperscript{79} As long as the men remained in the employ of the railroad they were subject to injunctions to restrain them from violations of these provisions. Judge Taft also declared that a conspiracy on the part of the employees to violate these sections could be punished under the general provision of the Criminal Code penalizing those who "conspire to commit any offense against the United States."\textsuperscript{80} It is thus clear that the Interstate Commerce Act is not only applicable to common carriers but imposes restraints and obligations for the protection of interstate commerce upon labor organizations as well.\textsuperscript{81}

In like manner the Sherman Act\textsuperscript{82} has been applied to acts of combinations of laborers when the effect of those acts was to interfere with interstate commerce or to restrain trade. It is unnecessary to enter here into a discussion of the question whether or not Congress actually intended to include the activities of labor organizations within the prohibitions of the act.\textsuperscript{83} It is less important that Mr. Gompers and other labor leaders believed that Congress intended that labor unions should be outside the scope of the act than it is that the Supreme Court should have found the words of the statute so broad and inclusive that it could discover no legal basis for exempting labor unions from the operation of the act. The law declares in sweeping terms that "Every contract, or combination in the form of a trust, or otherwise in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal." In

\textsuperscript{78} Sec. 10. Italics are the author's.
\textsuperscript{80} Rev. Stat. Sec. 5440.
\textsuperscript{81} For detailed discussion of this whole point, with citation of cases, see Judson, Interstate Commerce, 3rd ed., Chap. 6 and Secs. 408-417; Martin, The Modern Law of Labor Unions, Chap. 14.
\textsuperscript{82} Note 72, supra.
\textsuperscript{83} A clear statement of both sides of the question is found in Laidler, Boycotts and the Labor Struggle, 170 et seq.
construing that act, the courts, with practical unanimity, have steadily refused to make any distinction between combinations of capital and combinations of labor which were in restraint of trade. In numerous cases injunctions have been issued by the United States courts against such restraints of trade, or against more direct obstructions of commerce by labor organizations, while in the *Danbury Hatters* case the Supreme Court held squarely that the provisions of the Sherman Act were applicable to trade unions so as to permit the recovery from the members of the hatters' union of triple damages by their employers whose business had been injured by a secondary boycott.

During the Pullman strike of 1893 a federal circuit court issued an injunction based upon the provisions of the Sherman Act, restraining Eugene V. Debs and other officers of the American Railway Union from interfering in any way with interstate commerce or the mails. When the case came before the Supreme Court on appeal, however, the court declined to regard the Sherman Act as the necessary source of the authority of the court to issue the injunction (although not denying that it did confer such power), but declared that the broad grant of authority to the national government to regulate interstate commerce was sufficient in itself to warrant the granting by the courts of injunctive relief against those who obstructed or restrained such

---

84 The only exception seems to be United States v. Patterson, (1893) 55 Fed. 605, in which the court took the view that "restraints of trade" must be interpreted in the strict common law sense as meaning efforts to "monopolize or grasp the market."


86 Loewe v. Lawlor, (1908) 208 U. S. 274, 52 L. Ed. 488, 28 S. C. R., 301, 13 Ann. Cas. 815. The result reached in this case would seem to be impossible under the existing law. The Clayton Act of October 15, 1914, specifically declares that the labor of a human being is not to be regarded as a commodity or article of commerce and that "nothing contained in the anti-trust law shall be construed to forbid the existence and operation of labor, agricultural, and horticultural organizations instituted for the purpose of mutual help and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof, nor shall such organizations or members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws." While this act legalizes certain activities of labor organizations before regarded as illegal, it does not, of course, have the effect of permitting any direct and substantial obstructions of interstate commerce.

87 United States v. Debs, (1894) 64 Fed. 724.
commerce. From this decision it would seem, therefore, to follow that specific police legislation by Congress to prevent the obstruction of interstate commerce is unnecessary to enable federal courts sitting in equity to prevent such obstruction.

To classify the Eight-Hour Law, popularly known as the Adamson Law, which was passed by Congress in the autumn of 1916, as a police regulation to protect interstate commerce from obstruction and interference will seem at first a curious perversion of facts. But those who will recall the legislative history of the statute and examine carefully the opinion of the Supreme Court in the case in which the constitutionality of the law was upheld will be convinced that such a classification of the act is accurate from the standpoint both of legislative intention and of constitutional law. It seems perfectly clear that Congress passed the law at the request of President Wilson for the single purpose of averting the nation-wide railroad strike which there was every reason to believe would take place if the law were not passed. It is equally apparent that the Supreme Court upheld the law on the ground that its passage was necessary to accomplish this result and avoid the threatened suspension of interstate commerce. This remarkable decision merits some little comment.

In considering the validity of the Adamson Law, which was questioned in the case of Wilson v. New, it was necessary for the court to apply the same tests which it has always applied to regulations of commerce enacted for police purposes. In the first place, is the act a bona fide regulation of commerce; in the second place, assuming that it is, does it deprive any person of life, liberty, or property without due process of law? The court accordingly addressed itself to the question whether Congress was really regulating interstate commerce when it established an eight-hour day for trainmen on interstate railroads. The answer of the court to this question was that the act was a regulation of interstate commerce because its passage was necessary in order to prevent the complete suspension of that commerce. It alluded to the long list of acts, many of which have already been discussed in this article, by which Congress had sought to make interstate commerce safe and efficient. It mentioned par-

---

91 Supra, p. 297 et seq.
ticularly the Hours of Service Act, the Safety Appliance Acts, and the Employers' Liability Act, in all of which the power to regulate commerce had been used to control various relations between employers and employees. It then pointed out "how completely the purpose intended to be accomplished by the regulations which had been adopted in the past would be rendered unavailing or their enactment inexplicable if the power was not possessed to meet a situation like the one with which this statute [the Adamson Law] dealt. What would be the value of the right to a reasonable rate if all movement in interstate commerce could be stopped as the result of a mere dispute between the parties or their failure to exert a primary right concerning a matter of interstate commerce? Again, what purpose would be subserved by all the regulations established to secure the enjoyment by the public of an efficient and reasonable service if there was no power in government to prevent all service from being destroyed . . . ? And finally, to what derision would it not reduce the proposition that government had power to enforce the duty of operation if that power did not extend to doing that which was essential to prevent operation from being completely stopped . . . ?"

The question whether the statute was in violation of the due process of law clause of the Fifth Amendment was considered by the court in a portion of the opinion which need not be treated in detail here. It is sufficient to say that the abridgment of the freedom of contract which the act entailed upon employers and employees was found constitutionally permissible because both were engaged in a business charged with a public interest and therefore subject to types of congressional regulation which could not be imposed upon any business except public utilities.

It is important to notice that the opinion of Chief Justice White marks out an entirely new boundary line for the exercise by Congress of its police power over interstate commerce for the purpose of protecting that commerce from obstruction or suspension. In the earlier cases in which the court had been obliged to decide whether or not a statute purporting to regulate commerce actually did so, it was the subject matter of the regulation which was examined. If the provisions of the statute bore a reasonable and direct relationship to interstate commerce, then, in the absence of other constitutional defects, it was held a valid regulation of commerce; if not, it was held invalid. It will be recalled that
Mr. Justice Harlan in the majority opinion in the *Adair* case\(^9^2\) expressed the view that the provisions of the Erdman Act which made it a penal offense for an interstate carrier to discharge an employee because of his membership in a labor organization did not have a sufficiently close relationship to interstate commerce to make it a valid regulation thereof. Various other attempts of Congress to regulate commerce have suffered the same fate.\(^9^3\) But in considering whether or not the Adamson Act was a bona fide regulation of commerce the court paid practically no attention to what the law was about. The mind of the court was fixed upon what would happen if the law was not passed. It was urged upon the court that the law was, in effect, a regulation of wages and as such did not fall properly within the scope of the commerce power. The court disposed of this objection by declaring that “if it be conceded that the power to enact the statute was in effect the exercise of the right to fix wages where, by reason of the dispute, there had been a failure to fix by agreement, it would simply serve to show the nature and character of the regulation essential to protect the public right and safeguard the movement of interstate commerce, not involving any denial of the authority to adopt it.” In short, it is difficult to escape the conclusion that the Supreme Court regarded the Adamson Law as a regulation of interstate commerce, not because it dealt with the wages or hours of labor of railroad employees, but because its passage was demanded by an organization which was in a position to bring about a total cessation of interstate commerce if its demand was not acceded to. If this is true, then it would seem to follow that any legislation which forms the subject matter of the demands of a body of individuals possessing the power to bring interstate commerce to a standstill if those demands are not granted, must be regarded as a legitimate exercise of the power of Congress to regulate commerce, provided such legislation does not violate the due process of law clause or any other specific constitutional prohibition. This startling doctrine without doubt opens up some rather interesting possibilities in the way of broadening the scope of the national police power under the commerce clause.

The majority opinion in *Wilson v. New* is also interesting

\(^9^2\) Note 25, supra.

\(^9^3\) Supra, p. 298.
because it asserts unequivocally that Congress could, without exceeding its constitutional powers, enact a new type of police regulation under the commerce clause: namely, a law providing for the compulsory arbitration of disputes between interstate carriers and their employees. In fact, Chief Justice White took the point of view that the Adamson Act was in effect the award of a tribunal before which the railroads and the brotherhoods had been compelled to arbitrate their differences. Instead of creating special machinery for such arbitration, Congress itself served as the arbitral tribunal and enacted its award into law. "We are of opinion," declared the chief justice, "that . . . the act which is before us was clearly within the legislative power of Congress to adopt, and that, in substance and effect, it amounted to an exercise of its authority under the circumstances disclosed to compulsorily arbitrate the dispute between the parties by establishing as to the subject matter of that dispute a legislative standard of wages operative and binding as a matter of law upon the parties,—a power none the less efficaciously exerted because exercised by direct legislative act instead of by the enactment of other and appropriate means providing for the bringing about of such result." While it was unnecessary to the decision of the case for the court to state whether or not it would regard the general scheme of compulsory arbitration applicable to interstate carriers constitutional, the dictum was couched in such language and the underlying principle of the whole case is such as to leave little room for doubt that the court would regard such a system as a legitimate exercise of the power to regulate commerce. Congress has enacted several laws aimed to provide facilities for the arbitration of labor disputes affecting interstate commerce,94 but it has never made it obligatory upon the parties to such disputes to arbitrate; these laws providing for mediation, conciliation, and voluntary arbitration are not, therefore, police regulations in the sense in which that term is used in this article, since they subject no one to restraint or compulsion. It seems clear, however, in light of the utterances of the court in Wilson v. New, that the continuance of the voluntary system of arbitration is a matter to be settled by legislative discretion alone, and that as soon as Congress deems it expedient an effective system of

compulsory arbitration could be put into force without violating any provision of the constitution.

By way of summary of the ground covered thus far, it is apparent that no insignificant amount of legislation, social and economic in character, legislation which may properly be called national police legislation, has been passed by Congress in pursuance of its authority to protect and promote interstate commerce. In order to protect the lives, limbs, and property of those who are concerned with interstate commerce as passengers, shippers, or employees, Congress has enacted a most elaborate series of provisions relating to the physical appliances and regulations necessary to insure such safety. For the same purpose Congress has regulated in various ways the conditions under which the employees engaged in interstate commerce shall do their work. And the courts have taken a rather generous view of the amount of such welfare legislation which may be justified constitutionally upon the theory that it promotes the safety, reliability, and efficiency of interstate commerce. Finally, in order to prevent the obstruction of interstate commerce, Congress has been forced to deal with the complex problem of monopolies and combinations in restraint of trade, has imposed restrictions upon the freedom of action of organized labor, and, where collective bargaining has broken down, has assumed the role of an arbiter in disputes between labor and capital. In short, congressional responsibility for the safe, free, uninterrupted flow of commerce between the states carries with it the constitutional authority to legislate upon a wide range of problems, not commonly regarded as commercial in character, which vitally affect the national safety and welfare.

(To be continued.)

ROBERT EUGENE CUSHMAN.

UNIVERSITY OF ILLINOIS,
URBANA, ILLINOIS.