1919

National Police Power under the Commerce Clause of the Constitution

Robert Eugene Cushman

THE NATIONAL POLICE POWER

UNDER THE

COMMERCE CLAUSE OF THE CONSTITUTION*

II. Regulations Barring the Use of Interstate Commerce As a Conduit for Injurious Commodities and An Aid in Illicit Transactions

Although Congress in its efforts to protect the national health, morals, and general welfare has been compelled to use a process of indirection and has had to do good not merely by stealth but by subterfuge, the result has been that, under its specific grants of power to regulate interstate commerce, to tax, and to maintain a postal system, Congress has succeeded in laying a compelling or restraining hand upon numerous abuses, has wrestled with a considerable variety of economic and social problems, and has, accordingly, exercised a police power that has been real and substantial. By far the greatest number of those acts of Congress, which, even though labeled interstate commerce or tax or postal regulations, are really police enactments in disguise, have been passed under the authority to regulate commerce; a group of these, those passed to protect interstate commerce from danger or obstruction, have been discussed in the previous portion of this article. There remain still to be discussed three main groups of police regulations passed under the sanction of the commerce clause: those forbidding the use of interstate commerce as a channel for transactions that menace the national health, morals, or general welfare; those passed to co-operate with the states by forbidding the use of the facilities of interstate commerce for the purpose of evading or violating state police regulations; and finally the Child-Labor Law, by which Congress sought to deny the privileges of interstate commerce to articles produced under conditions of which Congress did not approve.

---

* Continued from 3 Minnesota Law Review 319.

It has been made clear that Congress has full right under its power "to regulate commerce . . . . . among the several states" to protect that commerce from danger and obstruction; and the Supreme Court has found it possible to uphold the Employers' Liability Act as necessary to protect commerce from railway accidents, and the Adamson Eight-Hour Law as necessary to keep commerce from being obstructed. But if Congress were limited in its power over interstate commerce merely to the protection of that commerce, then a good many abuses and dangers arising from or augmented by interstate commerce would be left unremedied. But Congress has not felt itself so circumscribed. It has regarded as a proper use of its authority over commerce not only the protection of commerce itself but also the protection of the public from the misuse of that commerce. One of the most interesting and important steps in the development of a national police power under the commerce clause has been the enactment of a group of laws by which the channels of interstate commerce have been closed to commodities or transactions which are injurious, not to that commerce or to any of the agencies or facilities thereof, but to the health, morals, safety, and general welfare of the nation. When Congress punishes the man who ships across a state line bottles of colored water declared by their labels to be a cure for cancer, it does so not because those bottles are a whit more dangerous to commerce than would be a consignment of shoes, but because it desires to prevent the facilities of commerce from being used as a means of distributing goods which are a fraud upon the people who buy and use them. When Congress makes it a felony to transport a woman from one state to another for immoral purposes, it does so not because it is more dangerous or injurious to an interstate carrier to carry a prostitute than to carry a clergyman, but because it is undesirable to have interstate carriers used as tools or agencies by those engaged in the white slave traffic.

There ought to be no difficulty in concluding that the authority to pass such laws is reasonably implied from the plenary power of Congress to regulate commerce. When a man is given charge of a gun or an axe he is expected not merely to keep it in repair and protect it from damage; he is expected also to see that it is not placed at the disposal of those who desire to use it in committing murder or in destroying other people's property. Whatever controversy may arise as to the power of Congress to pro-

hibit or restrict under certain circumstances the shipment in interstate commerce of commodities which are legitimate and wholesome and are destined for legitimate and wholesome uses, there ought to be no serious doubt about the congressional authority to keep "the arteries of interstate commerce from being employed as conduits for articles hurtful to the public health, safety, or morals."[1]

The police regulations thus enacted by Congress to prevent the use of commerce for improper purposes may be grouped under three heads: first, those designed to protect the public morals; second, those aimed to protect the public health; third, those intended to protect the public from deception and fraud. Each of these groups may be considered briefly.

1. *Acts Under the Commerce Clause Protecting Public Morals.* (a) *Exclusion of Lottery Tickets:* It would be difficult to point to any problem about which the moral judgment of the American people has changed so radically and in so short a time as it has in respect to lotteries. During the first few decades of our history lotteries were looked upon as perfectly proper forms of private enterprise, and even as useful fiscal agencies for augmenting the revenue of the state and nation.[2] At the present time lotteries are thoroughly and almost universally discredited; and rigorous provisions prohibiting them are to be found on the statute books and even in the constitutions of a great majority of the states.[3] In 1895 Congress lent its aid to the cause of the suppression of lotteries by passing an act which prohibited the introduction or the carriage of lottery tickets in the United States mails or in interstate commerce.[4] This interesting statute was apparently passed with two purposes in view. One purpose was the desire to strike a blow indirectly, through the power of Congress over interstate commerce and the mails, at an evil over which the constitution of the United States gave Congress no direct authority. A second purpose was to prevent the anti-

[1] This apt phrase is borrowed from the brilliant article by Senator Knox on Development of the Federal Power to Regulate Commerce. See 17 Yale Law Jour. 135 (1908).

[2] An elaborate account of this is to be found in an article by A. R. Spofford, Lotteries in American History, Annual Rep. of Amer. Hist. Assoc., 1892.

[3] An exhaustive analysis of these state provisions and the cases construing them is to be found in Horner v. United States, (1893) 147 U. S. 449, 13 S. C. R. 409, 37 L. Ed. 237. At present probably every American state forbids them. 17 R. C. L. 1212.

[4] March 2, 1895, 28 Stat. at L. 963. This now forms Sec. 237 of the criminal code of the United States, March 9, 1909, 35 Stat. at L. 1136.

lottery statutes of the various states from being rendered ineffective by permitting the introduction of lottery tickets into the states through interstate commerce and the mails, channels beyond the reach of the police power of any state legislature.

It was not until 1903 that the Supreme Court of the United States passed upon the constitutionality of the Lottery Act.[5] So important and difficult did the court regard the problems involved that it had the case argued three times before rendering its final decision, and then decided it by a vote of five to four. Some of the most distinguished members of the American bar appeared on the brief attacking the statute. Two distinct questions were raised in this case: first, are lottery tickets commodities or articles of commerce within the meaning of the constitution; second, granted that they are, does the power which Congress possesses to "regulate" commerce include the power to prohibit commerce in such commodities?

The court answered both these questions in the affirmative. It decided, first, that lottery tickets are articles of commerce, and, second, that their exclusion from interstate commerce is a proper exercise of the power to regulate that commerce. While it is unnecessary to the present discussion to comment upon the first of these questions, it will be interesting to examine briefly the reasons which led the majority of the court to this second conclusion. "In the first place," declared the court, speaking through Mr. Justice Harlan, "in determining whether regulation may not under some circumstances properly take the form or have the effect of prohibition, the nature of the interstate traffic which it was sought by the act of March 2, 1895, to suppress, cannot be overlooked." Then follow the views of the court upon the menace of lotteries. Quoting from one of its previous decisions,[6] it asserted that "Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders

[5] The Lottery Case (Champion v. Ames), (1903) 188 U. S. 321, 23 S. C. R. 321, 47 L. Ed. 492. This case involved only the validity of the exclusion of lottery tickets from interstate commerce: their exclusion from the mails had been sustained in earlier decisions. See infra pp. 386-387 and note 7.

[6] Phalen v. Virginia, (1849) 8 How. (U. S.) 163. 168, 12 L. Ed. 1030.

the ignorant and simple." The second step in the court's argument is that Congress by virtue of its plenary power to regulate commerce among the states may "provide that such commerce shall not be polluted by the carrying of lottery tickets" unless some constitutional restriction can be found to stand in the way. "What clause," inquires Mr. Justice Harlan, "can be cited which, in any degree, countenances the suggestion that one may, of right, carry or cause to be carried from one state to another that which will harm the public morals?" The only possible clause of the constitution which might be so invoked is that which forbids the deprivation of any person's liberty without due process of law. "But surely it will not be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the states an element that will be confessedly injurious to the public morals. . . . . It is a kind of traffic which no one can be entitled to pursue as of right." In the third place, the court disposes of the contention that the Lottery Act, by establishing regulations of the internal affairs of the several states, violated the Tenth Amendment, which reserves to the states or to the people all powers not delegated to the United States. The court held, to begin with, that this contention overlooks the fact that the Lottery Act is a regulation of commerce and that the power to regulate commerce is specifically given to Congress by the constitution. But, aside from that, the act does not purport to suppress the traffic in lottery tickets which is carried on entirely within the limits of a state, but only that traffic which is interstate. Furthermore, instead of invading the proper field of police regulation and usurping the powers of control over the morals of the people of the state—

"Congress only supplemented the action of those states—perhaps all of them—which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the states, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce."

After noticing as precedents or analogies some of the other instances in which congressional regulations of commerce have taken the form of prohibition,—namely, the prohibition of the interstate transportation of diseased cattle, the prohibitions comprising the Sherman Anti-Trust Act, and the prohibition resulting from the operation of the Wilson Act of 1890, which subjected to state police control interstate shipments of liquor upon their arrival within the state—the court takes particular pains to make clear the limited scope of this important decision. This case does not at all establish the right of Congress to "exclude from commerce among the states any article, commodity, or thing, of whatever kind or nature, or however useful or valuable, which it may choose, no matter with what motive. . . ." The court will consider such arbitrary exclusions from interstate commerce only when it is necessary to do so. "The whole subject is too important, and the questions suggested by its consideration are too difficult of solution to justify any attempt to lay down a rule for determining in advance the validity of every statute that may be enacted under the commerce clause. We decide nothing more in the present case than that lottery tickets are subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one state to another is therefore interstate commerce; that under its power to regulate commerce among the several states Congress—subject to the limitations imposed by the constitution upon the exercise of the powers granted—has plenary authority over such commerce, and may prohibit the carriage of such tickets from state to state; and that legislation to that end, and of that character, is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress."

The *Lottery Case* was decided by a divided court with four justices dissenting. The dissenting opinion, written by Chief Justice Fuller, was based on the conviction of the minority that lottery tickets were not articles of commerce and that, even if they were, the power to regulate interstate commerce does not carry with it the absolute power to prohibit the transportation of articles of commerce. It was pointed out that when the court held that exclusion of lottery tickets from the mails was a proper exercise of the power of Congress over the postal system it had been expressly said that Congress did not have the power to exclude from transportation in interstate commerce articles which

it might properly exclude from the mails.[7] This dissent is also interesting because it specifically states that Congress does not have as extensive power over interstate commerce as it does over foreign and Indian commerce. "There is no reservation of police power or any other to a foreign nation or to an Indian tribe, and the scope of the power is not the same as that over interstate commerce." Consequently the instances in which Congress has excluded various articles from importation or from traffic with the Indian tribes do not serve as precedents for similar restrictions upon interstate commerce.[8]

The decision in the *Lottery Case* has been discussed at length because it was in a sense a pioneer decision, because it has had a profound influence upon the subsequent development of the national police power, and because, in spite of Mr. Justice Harlan's warning against making unwarranted deductions from it, it has been regarded by many as establishing a doctrine regarding the power of Congress to prohibit various kinds of interstate commerce which is far more revolutionary than it was the expressed purpose of the court to sanction. It is quite as important to keep clearly in mind the things which the *Lottery Case* does not hold as it is to remember the things which it does. In the first place, it does not hold that Congress has the same power to exclude articles from interstate commerce that it has to exclude them from importation in foreign commerce. It already has been suggested that this view was urged upon the court by counsel for the government, but that the decision carefully avoided any expression of opinion regarding it.[9] In the second place, it does not hold that Congress may exclude anything from interstate commerce except those commodities the distribution of which menaces the public health, morals, or safety. Finally, it does not hold that Congress has the power to exclude harmless and legitimate commodities or transactions from interstate commerce merely because such exclusions would result in a needed or desirable protection to the public health, safety, or morals. It does not, therefore, establish a precedent for the recently invalidated Child-Labor Law. It merely upholds the exclusion of such com-

---

[7] In re Rapier, (1892) 143 U. S. 110, 12 S. C. R. 374, 36 L. Ed. 93. Ex parte Jackson, (1877) 96 U. S. 727, 24 L. Ed. 877.

[8] The Lottery Case is severely criticized in an article by W. A. Sutherland, Is Congress a Conservator of the Public Morals? (1904) 38 Amer. Law Rev. 194.

[9] See first section of this article, 3 MINNESOTA LAW REVIEW 301.

modities as are themselves by their nature and effects a menace to the public welfare.

(b) *Exclusion of Obscene Matter:* The use of the power of Congress to regulate commerce for the purpose of suppressing the circulation of obscene literature or pictures dates back to the year 1842.[10] However, this early statute merely forbade the importation of obscene matter into this country from abroad. As time went on the scope of this legislation was expanded to include within its prohibitions not only obscene literature and prints but also contraceptive devices, drugs, and information.[11] But it was not until 1897 that Congress finally penalized the distribution of such literature and articles through the channels of interstate commerce.[12] With some slight modifications, this statute forms a part of the present criminal code of the United States.[13] The act contains the two fairly distinct types of prohibition already in the earlier statutes. In the first place, it makes it a crime to deposit with any common carrier for the purpose of interstate transportation any obscene literature, pictures, images, or articles. In the second place, it excludes from interstate commerce in the same way all articles or drugs designed to prevent conception or to produce illegal abortions and all literature or advertisements containing contraceptive information or telling where the articles or information may be secured.

It is quite clear that the purpose of this legislation was to protect the public morals and not to protect interstate commerce. Certainly that commerce is in no greater danger of destruction, loss, or interference from the transportation of obscene literature than it is from the transportation of Bibles. In passing these laws Congress aimed to prevent interstate commerce from being used as a medium for distributing articles or printed matter which it regarded as morally degrading.

While the Supreme Court of the United States has never passed squarely upon the constitutionality of this legislation, it has cited with approval the decision of a lower federal court which held it valid,[14] so that the constitutional soundness of such

---

[10] Act of August 30, 1842, 5 Stat. at L. 562, Sec. 28.

[11] Acts of March 2, 1857, 11 Stat. at L. 168; March 3, 1873, 17 Stat. at L. 598; March 3, 1883, 22 Stat. at L. 489; October 3, 1913, 38 Stat. at L. 194.

[12] Act of February 8, 1897, 29 Stat. at L. 512.

[13] March 4, 1909; 35 Stat. at L. 1138, Sec. 245.

[14] Hoke v. United States, (1913) 227 U. S. 308, 33 S. C. R. 281, 57 L. Ed. 523.

use of the commerce power may be said to have passed into the realm of settled law. That part of the statute which forbids the transmission through interstate commerce of contraceptive articles or information was the first to be subjected to judicial scrutiny, and its validity was sustained by the United States district court in the case of *United States v. Popper.*[15] The statute was attacked primarily upon the ground that Congress was without constitutional authority to pass it, since it dealt with the internal affairs of the states and invaded, therefore, the field of legislative authority reserved to the states by the Tenth Amendment. The court disposed of the contention with a confident directness and brevity of argument that is in striking contrast to the labored treatment which the principle involved usually received in other cases. The power to regulate commerce "includes power to declare what property or things may be the subjects of commerce." The power of Congress to prohibit commerce in certain commodities with the Indian tribes has long been recognized.[16] In the *License Cases* Chief Justice Taney asserted that the power of Congress to regulate the commerce with foreign nations conferred the authority to "prescribe what articles of merchandise shall be admitted and what excluded," and also declared that the power to regulate interstate commerce was equal in scope to the power to regulate foreign commerce.[17] It follows, therefore, that under its power over interstate commerce Congress has the power to prohibit the transportation of articles designed for immoral use.

It is interesting to notice that, while the result reached in the *Popper* case has been regarded as correct, the theory upon which the court relied in reaching that result has been tacitly if not openly discredited. That theory is that Congress may exclude things from interstate commerce because it may exclude them from foreign and Indian commerce; and it has already been made clear[18] not only that the Supreme Court in deciding the *Lottery Case* refused to make any use of the argument that the power of Congress over foreign and interstate commerce is the same, but also that a growing body of legal opinion has been won over to the view that the two powers are quite different in scope. No

[15] (1899) 98 Fed. 423.
[16] Citing United States v. Holliday, (1866) 3 Wall. (U. S.) 407, 18 L. Ed. 182.
[17] (1847) 5 How. (U. S.) 577, 12 L. Ed. 256.
[18] Supra, p. 387.

other case has been found in which the reasoning of the court in this case has been followed.

That portion of the act of 1897 relating to the exclusion of obscene literature from interstate commerce was held constitutional in a case in the United States circuit court of appeals in 1914.[19] The opinion in this case does not call for extended comment. The contention that congressional authority does not extend to the prohibition of commodities from interstate commerce was met by the citation of the cases in which the Supreme Court had upheld the power of Congress to prohibit the interstate transportation of lottery tickets, diseased cattle, and women for immoral purposes. The argument that the statute violated the First Amendment by abridging the freedom of the press was disposed of with the succinct remark that "we think that the freedom of the press has enough to answer for without making it a protecting shield for the commission of crime."

(c) *The White Slave Act:* In 1910 Congress enacted the famous Mann Act, which bore the title, "An Act Further to Regulate Interstate and Foreign Commerce by Prohibiting the Transportation Therein for Immoral Purposes of Women and Girls, and for Other Purposes."[20] Here again Congress was not protecting interstate commerce from any dangers, direct or indirect, which menaced that commerce; the safety and efficiency of interstate commerce is not dependent upon the private morality of the passengers on interstate trains. The purpose of the statute was to strike a blow at the white slave traffic by refusing to allow interstate commerce to be used any longer as a means of assisting those who promote the nefarious system of commercialized vice.

The Mann Act was held constitutional by the Supreme Court in 1913 in the case of *Hoke v. United States.*[21] The statute was attacked on the ground that it violated the privileges and immunities of citizens of the United States by denying free right of passage in interstate commerce; that it was a perversion of the power of Congress to regulate interstate commerce by exceeding unduly the proper scope of that power; and on the ground that it contravened the Tenth Amendment by invading the legitimate domain of the police power of the states in an attempt to regulate the private morals of the people.

---

[19] Clark v. United States, (1914) 211 Fed. 916.
[20] June 25, 1910, 36 Stat. at L. 825.
[21] 227 U. S. 308, 35 S. C. R. 281, 57 L. Ed. 523.

In answer to the first objection, the court denied that any person enjoys a constitutionally protected right to use interstate commerce for the furtherance of immoral designs. "The contention confounds things important to be distinguished. It urges a right exercised in morality to sustain a right to be exercised in immorality. . . . It is misleading to say that men and women have rights. Their rights cannot fortify or sanction their wrongs; and if they employ interstate transportation as a facility of their wrongs, it may be forbidden to them to the extent of the act of June 25, 1910, and we need go no further. . . ." The court also disposed of the other contentions by declaring the act to be a proper exercise of the power to regulate commerce. This being the case its effect on the normal scope of state police power is quite irrelevant. The court alluded in rather sweeping terms to the police power which Congress may legitimately exercise through its control over commerce:

"The powers reserved to the states and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral. This is the effect of the decisions; and surely if the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and, more insistently, of girls. . . .

"The principle established by the cases is the simple one, when rid of confusing and distracting considerations, that Congress has power over transportation 'among the several States'; that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations."

While the opinion of Mr. Justice McKenna in the *Hoke* case rests upon the same principle as that upon which the *Lottery Case* was decided, the language used in certain portions above quoted is broad enough in its implications to sanction the doctrine that the power to regulate interstate commerce may take the form of prohibition not merely when such prohibition is necessary to prevent the distribution of commodities or the consummation of transactions in themselves definitely injurious to the public health, morals, or safety, but it may also take the form of prohibition, regardless of the character of the things excluded,

when such prohibition will contribute substantially to the national welfare. It is not surprising, therefore, to find Mr. Justice McKenna one of the four who dissented from the opinion of the majority in the case in which the federal Child-Labor Law was held invalid;[22] for his opinion in the *Hoke* case reflects the view that Congress has broad authority to use the power to regulate interstate commerce in any manner which will "promote the general welfare, material and moral."

(d) *Exclusion of Prize Fight Films:* In 1912 Congress enacted a law excluding from foreign and interstate commerce and the mails all prize fight films or pictures.[23] This was, of course, merely another attempt to keep the postal service and commerce from serving as distributing agencies for goods which Congress regarded as demoralizing in effect.

The only portion of this act which has thus far been attacked in the courts is that which prohibits the importation of the objectionable films from abroad. This was upheld by the United States Supreme Court in 1915 in the case of *Weber v. Freed.*[24] In this case the court contented itself with the briefest possible comment on the argument that Congress had exceeded its delegated powers and had invaded the domain of state police legislation; comment which culminated in the statement, "But in view of the complete power of Congress over foreign commerce and its authority to prohibit the introduction of foreign articles recognized and enforced by many previous decisions of this court, the contentions are so devoid of merit as to cause them to be frivolous." While the court gave no hint of what its attitude would be toward the question of the validity of the provision of the act forbidding the shipment of prize fight films in interstate commerce, the act is so obviously identical in purpose and constitutional principle with the Lottery Act, the Obscene Literature Act, and the White Slave Act, as to leave no doubt whatever regarding its constitutionality.[25]

---

[22] Hammer v. Dagenhart, (1918) 247 U. S. 251, 38 S. C. R. 529, 62 L. Ed. 1101.

[23] Act of July 31, 1912, 37 Stat. at L. 240.

[24] 239 U. S. 325, 36 S. C. R. 131, 60 L. Ed. 308.

[25] In two cases involving the validity of this law, Weber v. Freed, (1915) 224 Fed. 355, United States v. Johnson, (1916) 232 Fed. 970, the lower federal courts argued that Congress could exclude the films from foreign commerce because its power to exclude objectionable articles from interstate commerce had been so frequently sustained. Such an argument leaves little room for doubt as to the views of these courts on the question of the validity of excluding the films from interstate commerce. After the efforts which have been made from time to time to prove that the power of Congress to

2. *Protection to Public Health.* Congress has exercised a national police power by virtue of its authority to regulate interstate commerce nowhere more frequently and nowhere with more general public approval than in the enactment of laws designed to close the channels of commerce to impure, adulterated, or unhealthful products and to the possible breeders and carriers of disease. By far the greater portion of the rather voluminous legislation of this type which has been placed on the federal statute books has provoked neither serious discussion regarding its constitutionality nor actual litigation. And while in a few instances these laws have been squarely attacked in the courts, and decisions sustaining their constitutionality have been rendered, there have been other cases in which the court has found opportunity to give evidence of its approval of such legislation only in some collateral action. It is appropriate to the purpose of this article to consider only the more interesting and important of these laws and the cases construing them, rather than to attempt an exhaustive compilation. It seems natural to allow them to fall into two general classes: first, the acts excluding from interstate commerce impure, unwholesome, or adulterated food or drugs; and, second, the acts to prevent the spread through the channels of interstate commerce of disease, infection, or parasites.

(a) *Exclusion of Impure, Unwholesome, or Adulterated Food or Drugs:* The forerunners of the more recent acts excluding these objectionable commodities from interstate commerce are the laws forbidding the importation of such commodities from abroad. This power Congress has exercised since 1848. In that year it passed an act "to prevent the importation of spurious and adulterated drugs" and to provide a system of inspection to make the prohibition effective.[26] Such legislation guarding against the importation of unhealthfully adulterated food, drugs, or liquor has been on the statute books ever since.[27] In 1887 the importation by Chinese of smoking opium was pro-

---

regulate interstate commerce is as broad as its power over foreign commerce, it is interesting to see the court in the Johnson case arguing the other way and urging that "the constitutional power of Congress over commerce extends, not only to interstate, but to foreign commerce, and what it may do with respect to the one it may do with respect to the other."

[26] Act of June 26, 1848, 9 Stat. at L. 237.

[27] See the following acts: March 1, 1899, 30 Stat. at L. 951; May 25, 1900, 31 Stat. at L. 196; March 2, 1901, 31 Stat. at L. 930; June 3, 1902, 32 Stat. at L. 296; March 3, 1905, 33 Stat. at L. 874; June 30, 1906, 34 Stat. at L. 684.

hibited,[28] and subsequent statutes passed in 1909[29] and 1914[30] made it unlawful for any one to import it. In 1897 Congress forbade the importation of any tea "inferior in purity, quality, and fitness for consumption" as compared to a legal standard.[31] The constitutionality of this provision was attacked in the courts, but the act was sustained by the Supreme Court in an opinion which has become one of the leading cases establishing the power of Congress to prohibit the importation of commodities.[32]

Ultimately Congress began to exclude from interstate commerce also various types of adulterated and unwholesome food and drug products. The earlier laws of this kind were not very comprehensive. In 1891 an act was passed which provided for the inspection of all live cattle destined for slaughter and intended for export or for shipment in interstate commerce, and the inspection of such cattle after slaughter, if that was considered necessary; and cattle or carcasses found to be unsound or diseased were not allowed to be shipped in interstate or foreign commerce.[33] However, the shipment of cattle or meat which had not been inspected at all was not forbidden; a fact which put very obvious limitations upon the scope and effectiveness of the act. In 1902 a statute was passed forbidding interstate commerce in all viruses, serums, toxins, antitoxins, and the like, "applicable to the prevention of the diseases of man," except when

---

[28] Act of February 23, 1887, 24 Stat. at L. 409.

[29] Act of February 9, 1909, 35 Stat. at L. 614.

[30] Act of January 17, 1914, 38 Stat. at L. 275. The Supreme Court upheld this statute in Brolan v. United States, (1915) 236 U. S. 216, 35 S. C. R. 285, 59 L. Ed. 541. The court said: "The entire absence of all ground for the assertion that there was a want of power in Congress for any reason to adopt the provision in question is so conclusively foreclosed by previous decisions as to leave no room for doubt as to the wholly unsubstantial and frivolous character of the constitutional question based on such contention."

[31] Act of March 2, 1897, 29 Stat. at L. 605.

[32] Buttfield v. Stranahan, (1904) 192 U. S. 470, 498, 24 S. C. R. 349, 356, 48 L. Ed. 525, 536. The conclusiveness with which the court settled the case will be apparent from the following excerpt from Mr. Justice White's opinion: "Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power [to regulate commerce], resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by the enactment of embargo statutes, but indirectly as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power over foreign commerce by provisions which in and of themselves amounted to the assertion of the right to exclude merchandise at discretion."

[33] Act of March 3, 1891, 26 Stat. at L. 1089.

such commerce is carried on by persons holding licenses from the Department of Agriculture, and except when the products mentioned conform to standards of purity and effectiveness established by the department.[34] A similar law was passed in 1913, applicable to serums used for domestic animals.[35] However, in 1906, Congress approached in earnest the problem of stopping the distribution and sale of impure food and drugs in so far as its power to regulate interstate commerce gave it authority to do so; and in that year it passed two comprehensive and far-reaching statutes known as the Pure Food Act[36] and the Meat Inspection Act.[37]

It is unnecessary to discuss in detail the provisions of these acts. The Pure Food Act excludes from interstate commerce all adulterated and misbranded food and drugs. Its definitions of the terms "adulterated" and "misbranded" are broad enough to include practically all unwholesome food and drug products and those fraudulently compounded or labeled. It seems clear that Congress had two purposes in mind in passing the Pure Food Act; one was to "protect the health of the people by preventing the sale of normally wholesome articles to which have been added substances poisonous or detrimental to health," the other was to "protect purchasers from injurious deceits by the sale of inferior for superior articles."[38] Without attempting to decide which, if either, of these purposes was paramount in the congressional mind, it is entirely proper to regard the act as one which aims to protect the health of the nation.

After the decision in the *Lottery Case*, it would hardly be expected that the question of the constitutionality of the Pure Food Act would prove difficult of solution. Several of the lower federal courts disposed of the question by reference to the authority of that case,[39] and in the two cases in which the validity of the act was touched upon by the Supreme Court such validity seems to have been assumed rather than established by elaborate

---

[34] Act of July 1, 1902, 32 Stat. at L. 728.
[35] Act of March 4, 1913, 37 Stat. at L. 832.
[36] Act of June 30, 1906, 34 Stat. at L. 768.
[37] Act of June 30, 1906, 34 Stat. at L. 674.
[38] From the opinion of the court in Hall-Baker Grain Co. v. United States, (1912) 198 Fed. 614.
[39] Shawnee Milling Co. v. Temple, (1910) 179 Fed. 517; United States v. 420 Sacks of Flour, (1910) 180 Fed. 518; United States v. Seventy-four Cases of Grape Juice, (1910) 181 Fed. 629. For an elaborate discussion of the purpose and validity of the Act of 1906, with citation of cases, see Thornton, Pure Food and Drugs, (1912) Part II, Ch. II.

argument. In the first of these cases, *The Hipolite Egg Co. v. United States,*[40] the question arose whether the provisions of the act authorized the confiscation of adulterated food after it had reached its destination and was still in the original package. That there was no doubt in the mind of the court as to the validity of the law is evidenced by the language used in upholding the right of confiscation claimed by the government. The court said: "In other words, transportation in interstate commerce is forbidden to them [the adulterated products], and, in a sense, they are made culpable as well as their shipper. It is clearly the purpose of the statute that they shall not be stealthily put into interstate commerce and be stealthily taken out again upon arriving at their destination and be given asylum in the mass of property of the state." In the case of *McDermott v. Wisconsin*[41] the point at issue was whether the provisions of a Wisconsin statute relative to the labeling of food products conflicted with the federal law. While the constitutionality of the Pure Food Act was not squarely attacked, the Supreme Court took occasion to express itself clearly upon that point. It said:

"That Congress has ample power in this connection is no longer open to question. That body has the right not only to pass laws which shall regulate legitimate commerce among the states and with foreign nations, but has full power to keep the channels of such commerce free from the transportation of illicit or harmful articles, to make such as are injurious to the public health outlaws of such commerce and to bar them from the facilities and privileges thereof. . . . The object of the statute is to prevent the misuse of the facilities of interstate commerce in conveying to and placing before the consumer misbranded and adulterated articles of medicine or food."

The Meat Inspection Act, as its name suggests, provides an elaborate system of government inspection of meat before and after slaughter and during the process of packing, as well as of the premises on which these processes are carried on, and forbids the shipment in interstate or foreign commerce of meat or meat products not so inspected. While applicable to a somewhat different set of conditions, it is quite clear that this statute is the same in purpose and rests upon exactly the same constitutional principles as the Pure Food Act. The validity of the act has never been questioned before the United States Supreme Court.

---

[40] (1911) 220 U. S. 45, 30 S. C. R. 364, 55 L. Ed. 364.
[41] (1913) 228 U. S. 115, 33 S. C. R. 431, 57 L. Ed. 754.

(b) *Exclusion to Prevent the Spread of Disease, Infection, or Parasites:* Congress has imposed quarantine regulations upon foreign and interstate commerce to prevent the spread of human disease, diseases of livestock, and diseases and pests which attack plant and tree life. The more interesting and important of these acts may be briefly mentioned.

It is hardly within the scope of this article to allude to the numerous statutes whereby Congress has sought to prevent the introduction of human disease into this country through the channels of foreign commerce.[42] During serious epidemics laws have sometimes been passed to prevent the spread of disease from state to state by imposing restrictions upon the freedom of passage in interstate commerce. Thus in 1890 the President was authorized by law to take such measures as might be necessary to prevent the spread of cholera, yellow fever, smallpox, and the plague.[43]

Much more numerous have been the statutes aimed to prevent the spread of animal diseases through the channels of commerce. By the act of 1890 the President was given power to suspend entirely for a limited time the importation of any class of animals when necessary to protect animals in this country from diseases.[44] In 1884 the exportation or shipment in interstate commerce of livestock having any infectious disease was forbidden;[45] in 1903 power was conferred upon the Secretary of Agriculture to establish such regulations to prevent the spread of such diseases through foreign or interstate commerce as he might consider necessary;[46] in 1905 the same official was specifically authorized to lay an absolute embargo or quarantine upon all shipments of cattle from one state to another when the public necessity might demand it.[47] While the Supreme Court has held unconstitutional such federal quarantine regulations of this sort as have been made applicable to intrastate shipments of livestock, on the ground that federal authority

---

[42] For existing regulations see Comp. Stat. 1918, Secs. 9150-9182. See article by Edwin Maxey, Federal Quarantine Laws, (1909) 43 Amer. Law Rev. 382.

[43] Act of March 27, 1890, 26 Stat. at L. 31.

[44] Act of August 30, 1890, 26 Stat. at L. 416.

[45] Act of May 29, 1884, 23 Stat. at L. 31.

[46] Act of February 2, 1903, 32 Stat. at L. 791.

[47] Act of March 3, 1905, 33 Stat. at L. 1264.

extends only to foreign and interstate commerce,[48] the general validity of this type of regulation has been tacitly assumed.[49]

A statute of 1905 forbade the transportation in foreign and interstate commerce and the mails of certain varieties of moths, plant lice, and other insect pests injurious to plant crops, trees, and other vegetation.[50] In 1912 a similar exclusion of diseased nursery stock was made effective,[51] while by the same act, and again by an act of 1917,[52] the Secretary of Agriculture was invested with the same powers of quarantine on interstate commerce for the protection of plant life from disease as those above described for the prevention of the spread of animal disease. All of this legislation has apparently gone unattacked in the courts, but no doubt can possibly exist as to the congressional authority to enact it.

3. *Protection of the Public Against Fraud.* In concluding the treatment of this general type of national police regulation under the commerce clause, some instances may be mentioned in which Congress has excluded commodities from commerce in order to protect the public from fraud and deception. These statutes are included for the sake of logical completeness rather than because they contribute anything new to the constitutional principles already discussed.

There is probably no question that the act of 1902 excluding from commerce food and dairy products falsely branded as to the state in which they were made or produced[53] was designed to prevent frauds upon the consumer rather than to protect him from any menace to his health. Butter made in Ohio does not become unwholesome because its label falsely states that it was made in Illinois; but the statute proceeds on the assumption that the purchaser has a right to know where it really was made.

As has already been suggested, when Congress passed the Pure Food Act of 1906[54] it desired not only to protect the public health but also to protect the public from fraud, by making it possible for persons who receive food or drug products through foreign or interstate commerce to be reasonably sure of knowing

[48] Ill. Cent. R. Co. v. McKendree, (1906) 203 U. S. 514, 27 S. C. R. 153, 51 L. Ed. 298.

[49] As in Reid v. Colorado, (1902) 187 U. S. 137, 23 S. C. R. 92, 47 L. Ed. 108, where the Act of May 29, 1884, supra, was construed and applied.

[50] Act of March 3, 1905, 33 Stat. at L. 1269.

[51] Act of August 20, 1912, 37 Stat. at L. 315.

[52] Act of March 4, 1917, 39 Stat. at L. 1165.

[53] Act of July 1, 1902, 32 Stat. at L. 632.

[54] Supra, note 36.

what they were getting. To this end the statute was made to include detailed provisions regarding the adequate and honest labeling or branding of food or drugs, and adulterations and false markings were forbidden even though the products might be perfectly harmless and healthful. The provisions of the act, aimed at fraudulent brands and labels, were further strengthened by the enactment in 1912 of an important amendment which stipulated that drugs should be held to be "misbranded" if the "package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent."[55] An effective blow was thus struck at the advertising methods of the purveyors of "quack" medicines and nostrums. A still later amendment to the same act struck at a different sort of fraud by requiring that the net weight of the contents be marked on packages of food or drugs.[56]

Various other statutes have been passed to deny the privileges of commerce to other kinds of fraudulent products. Among these may be mentioned the act excluding from commerce "falsely or spuriously stamped articles of merchandise made of gold or silver, or their alloys,"[57] the act excluding adulterated or misbranded insecticides and fungicides,[58] and the recent Grain Standards Act[59] excluding all grain unless inspected and found to be of standard grade. None of this legislation calls for extended comment.

When one considers the wide scope of the police power which Congress has exercised by closing the channels of commerce to commodities and transactions which menace the public morals, health, and welfare, it is quite natural to let the highly important and salutary purposes which Congress has furthered by this legislation obscure the precise—and quite limited—methods by which Congress accomplished these ends. From the fact that Congress has excluded from commerce articles which if distributed and consumed would prove dangerous to the public health, it has been an easy step to conclude that Congress might

[55] Act of August 23, 1912, 37 Stat. at L. 416. This amendment was rendered necessary by the decision in United States v. Johnson, (1911) 221 U. S. 488, 31 S. C. R. 627, 55 L. Ed. 823, which held that the word "misbranded" as used in the Act of 1906 did not apply to false statements as to the curative properties of drugs.

[56] Act of March 3, 1913, 37 Stat. at L. 732.

[57] Act of June 13, 1906. 34 Stat. at L. 260.

[58] Act of April 26, 1910, 36 Stat. at L. 331.

[59] Act of August 11, 1916, 39 Stat. at L. 482.

exclude from commerce anything, regardless of its character or intended use, if by using such exclusion as a club or penalty there might result a still more adequate protection of the public health. Whether or not it is logically possible to infer the existence of this broader national police power from the cases which have thus far been discussed—and this has proved to be a highly controversial question—there is small reason to believe that the courts by which those cases were decided expected or desired any such inferences to be drawn from them. All that it is necessary to infer from the statutes and decisions thus far reviewed is that under its power to regulate interstate commerce Congress may properly be charged with the responsibility of seeing that the commerce so committed to its care is not used as a "conduit" for the distribution of injurious products or as a facility for the consummation of injurious transactions.

III. Regulations Barring the Use of Interstate Commerce For the Evasion or Violation of State Police Regulations

It will be noted that in the statutes discussed in the above section the articles or transactions which were barred out of interstate commerce were those which Congress itself regarded as injurious to the public welfare. A problem which has presented far greater difficulties both for Congress and the courts has been the problem of how to deal with the interstate transportation of commodities, such as intoxicating liquors, which Congress, instead of excluding from interstate commerce, has recognized as legitimate articles of that commerce,[60] but which have, at the same time, been regarded by some of the states as so harmful as to warrant the complete prohibition of their production, sale, and even possession. The problem has taken the form of a dilemma. To allow the individual states at their discretion to exclude from their borders legitimate articles of commerce, or to allow them to decide for themselves what articles of commerce are legitimate and to exclude the others,

---

[60] "By a long line of decisions, beginning even prior to Leisy v. Hardin, (1890) 135 U. S. 100, it has been indisputably determined that beer and other intoxicating liquors are a recognized and legitimate subject of interstate commerce," Louisville & Nashville R. Co. v. Cook Brewing Co., (1912) 223 U. S. 70, 32 S. C. R. 189, 56 L. Ed. 355. See the exhaustive citation of cases in 12 Corpus Juris 20.

would seem to be a reversion to the non-uniform, obstructive, and wholly unsatisfactory system of commercial regulation by the states which it was one of the primary purposes of the framers of the federal constitution to abolish forever. On the other hand, to pour intoxicating liquor through the channels of interstate commerce into a state which is struggling with the already difficult problem of making its prohibition laws effective seems to be very bad policy if not also bad law. It has taxed to the utmost the ingenuity of Congress and, it may be said, of the courts as well, to steer a middle course between the horns of this dilemma; to avoid forcing liquor down the throats of states which do not want it, without sacrificing the vital principle of uniformity in the regulation of interstate transportation of commodities. The steps in the development of this problem and the various efforts which Congress has made to solve it may properly claim some attention, inasmuch as these efforts may be regarded as exercises of a national police power under the commerce clause.

1. *The Original Package Doctrine.*[61] That goods imported from foreign countries do not become subject to the jurisdiction of the individual states so long as they remain in the original packages in which they were shipped and have not been merged in the general mass of the property of the state was settled in 1827.[62] But when twenty years later the question was presented to the Supreme Court in the *License Cases*[63] whether a state could prohibit or restrain by the requirement of a license the sale in the original packages of liquor brought in from other states or from abroad the court answered that it could. There was no act of Congress with which the state statutes in question could be said to conflict, and such regulation of interstate shipments of liquor could be held invalid only on the theory that the grant of power to Congress to regulate interstate commerce was exclusive and precluded any state regulation on the same subject even though Congress had not yet exercised its power over it. The leading opinion, which was written by Chief Justice Taney, definitely rejected this theory.

---

[61] This problem is treated in detail in the first of a valuable series of articles by Lindsay Rogers on Interstate Commerce in Intoxicating Liquors Before the Webb-Kenyon Act, (1916) 4 Va. Law Rev. 174.

[62] Brown v. Maryland, (1827) 12 Wheat. (U. S.) 419, 6 L. Ed. 678.

[63] (1847) 5 How. (U. S.) 504, 12 L. Ed. 256.

"The mere grant of power to the general government [declared the chief justice] cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the states. The controlling and supreme power over commerce with foreign nations and the several states is undoubtedly conferred upon Congress. Yet, in my judgment, the state may, nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbours, and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress."

The decision in the *License Cases* reflects not only the "state's rights" constitutional principles of the Supreme Court as then constituted but the very obvious concern of the court at the prospect that the prohibition laws which a number of states were beginning to enact should be rendered ineffective by a use of interstate commerce which those states were powerless to prevent.[64]

With the abatement of temperance zeal which followed the Civil War, it was more than twenty years before another grist of state laws purporting to restrain or prohibit the bringing of liquor into the state through the channels of interstate commerce claimed the attention of the Supreme Court. In 1888, however, the court threw consternation into the ranks of the prohibitionists by invalidating an Iowa statute which punished any railroad company for knowingly bringing into the state for any other person any intoxicating liquors without a certificate that the consignee was authorized to sell them. This was the case of *Bowman v. Chicago and Northwestern Ry. Co.*[65] It held that the statute was an attempt to exercise "jurisdiction over persons and property within the limits of other states" and, furthermore, "If not in contravention of any positive legislation by Congress, it is nevertheless a breach and interruption of that liberty of trade which Congress ordains as the national policy, by willing that it shall be free from restrictive regulations." The court did not cross any unnecessary bridges in the *Bowman* case, but merely held that even in the absense of conflicting federal legislation a state could not make it a crime to import an article of commerce within its borders.

---

[64] An account of this ante-bellum prohibition movement is given in the Encyclopedia Britannica under Liquor Laws, Vol. XVI, p. 767. See also A. A. Bruce, The Wilson Act and the Constitution, (1909) 21 Green Bag 211.

[65] (1888) 125 U. S. 465, 8 S. C. R. 689, 1062, 31 L. Ed. 700.

While the friends of prohibition in Congress were still endeavoring to enact some sort of statute which would patch up the havoc wrought by the *Bowman* case,[66] a still greater calamity befell them in the decision of the Supreme Court early in 1890 in the case of *Leisy v. Hardin*.[67] This case, popularly known as the *Original Package Case*, overruled the decision in the *License Cases*[68] and held in substance that, even in the absence of congressional regulation of the subject, the police power of the state could not be exercised to prohibit the bringing of articles of commerce into the state and the selling of those articles in the original packages. An article of interstate commerce does not cease to be such until it has either been taken out of the original package or sold in that package; and until it ceases to be an article of interstate commerce it is beyond the reach of the state police power.

"Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles [said the court] we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character. . . . To concede to a state the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a state, represented in the state legislature, the power to regulate commercial intercourse between the states, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect Union which the Constitution was adopted to create."

Now it is perfectly clear that if a state cannot forbid the shipping in of intoxicating liquors from other states and cannot forbid the sale of those liquors in their original packages after they have been shipped in, then state prohibition becomes more or less of a farce. But close scrutiny of the opinion of Chief Justice Fuller in *Leisy v. Hardin* indicated to the friends of prohibition that there might still be a method of bettering this unfortunate plight of the prohibition states. Although it was unnecessary to the decision of the case, the Chief Justice had definitely

---

[66] These efforts are described by Lindsay Rogers, op. cit., second article, 4 Va. Law Rev. 294.

[67] (1890) 135 U. S. 100, 10 S. C. R. 681, 34 L. Ed. 128.

[68] Supra, note 63.

suggested at several points in his opinion that this incapacity of the states to protect themselves against interstate shipments of liquor was due to the fact that Congress had not given the states permission to exert any authority over such shipments.[69] The inference from these dicta was perfectly plain: i. e., Congress might pass an act bestowing upon the states the power to pass the police regulations applicable to interstate consignments of liquor, which, in the absence of such permission, the court had held them powerless to enact. Congress, under pressure from the temperance forces, proceeded to give the states the desired permission, and the Wilson Act[70] became law within a year after the decision in *Leisy v. Hardin.*

2. *Congressional Permission to States to Protect Themselves from Certain Types of Interstate Commerce.* The Wilson Act provided that "intoxicating liquors . . . . transported into any State or Territory or remaining therein . . . . shall upon arrival . . . . be subject to the operation . . . . of the laws of such State or Territory enacted in the exercise of its police power . . . . in the same manner as though . . . . produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." The Supreme Court promptly sustained the constitutionality of the act in the case of *In re Rahrer.*[71] It is impossible to enter upon an extended discussion of the highly

---

[69] 135 U. S. at page 109: "Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, *or allowing the states so to do,* it thereby indicates its will that such commerce shall be free and untrammelled."

At page 110: "If the importation cannot be prohibited *without the consent of Congress,* when does property imported from abroad, or from a sister state, so become part of the common mass of property within a state as to be subject to its unimpeded control?"

At page 114: "It cannot, *without the consent of Congress,* express or implied, regulate commerce between its people and those of the other States of the Union in order to effect its end, however desirable such a regulation might be."

At page 119: ". . . . the states cannot exercise that power [to regulate commerce among the states] *without the assent of Congress.* . . . ."

At page 123: " . . . . the responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, *to remove the restriction upon the State* in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action."

The italics are the author's.

[70] Act of August 8, 1890, 26 Stat. at L. 313.

[71] (1891) 140 U. S. 545, 11 S. C. R. 865, 35 L. Ed. 572.

controversial questions which came up in this case.[72] The statute was attacked primarily on the grounds, first, that in passing it Congress had delegated to the states a portion of its authority over interstate commerce; and second, that it established a regulation of that commerce which was non-uniform in character. The court denied that the states had been given by the act any power to regulate interstate commerce. "Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part," and it is entirely proper for Congress to "provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case." The court also denied that the act established a non-uniform regulation of commerce. Congress has "taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws in dealing with such property."

There is every reason to suppose that Congress in passing the Wilson Act believed that it was giving the states adequate authority to protect themselves from interstate shipments of liquor. It was not until the case of *Rhodes v. Iowa*[73] was decided in 1898 that it became clear that the enactment of that statute and the decision of the Supreme Court sustaining its validity were but empty victories for the prohibition cause. In that case the Supreme Court decided that when the Wilson Act provides that intoxicating liquors brought into a state shall be subject to the state police power "upon arrival," the word "arrival" means, not arrival at the state line, but arrival in the hands of the one to whom they were consigned; and until such arrival they are exempt from state control or interference.[74] Under this

[72] See the second article by Lindsay Rogers, op. cit., 4 Va. Law Rev. 288; also A. A. Bruce, op. cit., note 64. The article by Judge Bruce is a vigorous criticism of the Rahrer case.

[73] (1898) 170 U. S. 412, 18 S. C. R. 664, 42 L. Ed. 1088. This case reversed the decision of the Iowa supreme court in State v. Rhodes, (1894) 90 Iowa 496, 58 N. W. 887, 24 L. R. A. 245, which held that under the Wilson Act shipments of liquor from other states became subject to the police power of the state as soon as they crossed the boundary line of the state.

[74] The decision in Rhodes v. Iowa had been foreshadowed by the case of Scott v. Donald (1897) 165 U. S. 58, 17 S. C. R. 265, 41 L. Ed. 632,—see also Vance v. Vandercook Co., (1898) 170 U. S. 438, 18 S. C. R. 674, 42 L. Ed. 1100,—which held that the South Carolina dispensary system could not ex-

construction it is apparent that the Wilson Act, instead of giving the states the virtual right to prohibit the importation of liquor by allowing them to confiscate it as soon as it reached the state line, merely gave them the right to forbid the disposition or sale of the liquor after the interstate carrier had actually delivered it to the consignee. By such a limitation on the scope of the prohibitive laws of the state so many opportunities for the evasion of those laws were opened up as to render the Wilson Act a very inconsequential gain to the temperance cause.

It may be noted in passing that in 1902 a statute practically identical in its terms with the Wilson Act was passed subjecting to the police legislation of the states, upon their arrival therein, interstate shipments of oleomargarine and other imitations of butter.[75] This statute has never attracted much attention and it presents no new constitutional problem.

3. *Making Articles Shipped in Interstate Commerce with Intention to Violate State Laws Outlaws of That Commerce.* (a) *The Webb-Kenyon Act:* No sooner had the Wilson Act been emasculated by the decision in *Rhodes v. Iowa* than agitation was begun in Congress for legislation which would actually give the prohibition states the protection against interstate shipments of liquor which that measure had been vainly supposed to provide. The problem, however, was growing increasingly difficult. Grave doubts were raised regarding the constitutionality of the various proposals for such legislation, but after considerable use of the trial and error method the Webb-Kenyon Bill was passed by Congress in 1913.[76] It was vetoed by President Taft on the advice of Attorney-General Wickersham, on the ground that it was unconstitutional;[77] but it was promptly passed over his veto. The title of the statute described it as "An Act Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases," and it proceeded to do this by prohibiting (without attaching any penalty) the shipment in interstate commerce of intoxicating liquors "intended, by any persons interested therein, to be received, possessed, sold, or in any manner used" in violation of

tend its monopolistic control of the liquor traffic in that state to the total exclusion of liquor from other states. See the third article by Lindsay Rogers, op. cit., 4 Va. Law Rev. 355, dealing with The Narrowing of the Wilson Act.

[75] Act of May 9, 1902, 32 Stat. at L. 193. The steps leading up to the passage of this act are set forth in the second article by Lindsay Rogers, op. cit., 4 Va. Law Rev. 288.

[76] Act of March 1, 1913, 37 Stat. at L. 699.

[77] The veto message and the opinion of the attorney-general are found in Sen. Doc. 103, 63rd Congress, 1st Session.

the law of the state of their destination. Hitherto the states had been unable to exclude shipments of liquor from other states because such action amounted to an unconstitutional prohibition of interstate commerce; under the Webb-Kenyon Act the exclusion of such liquors was made lawful by outlawing those shipments from interstate commerce and thereby depriving them of that federal protection from state regulation which articles of interstate commerce enjoy.

The Webb-Kenyon Act was held constitutional by the Supreme Court in 1917 in the case of *Clark Distilling Co. v. Western Maryland Ry. Co.*[78] The court pointed out that under the doctrine of the *Lottery Case* [79] *and Hoke v. United States*[80] no doubt remained as to the power of Congress to exclude intoxicating liquor from interstate commerce altogether. The objection raised to the act was not, therefore, "an absence of authority to accomplish in substance a more extended result than that brought about by the Webb-Kenyon Law, but . . . . a want of power to reach the result accomplished because of the method resorted to." This method was not unconstitutional on the ground that it delegated power to the state to prohibit interstate commerce in intoxicating liquors (the argument on which President Taft's veto was based) and thereby permitted the non-uniform regulation of such commerce; the court declared that the argument as to the delegation of power to the states rested upon a misconception: ". . . the will which causes the prohibitions to be applicable is that of Congress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply." In regard to the alleged non-uniformity of commercial regulation the court declared: " . . . . there is no question that the act uniformly applies to the conditions which call its provisions into play—that its provisions apply to all the states—so that the question really is a complaint as to the want of uniform existence of things to which the act applies, and not to an absence of uniformity in the act itself." Having disposed of these objections the court could "see no reason for saying that although Congress, in view of the nature and character of intoxicants had power to forbid their movement in interstate commerce, it had not the authority so to deal with the subject as to establish a regulation (which is what was done by

[78] (1917) 242 U. S. 311, 37 S. C. R. 180, 61 L. Ed. 326.
[79] Supra, p. 386.
[80] Supra, p. 390.

the Webb-Kenyon Law) making it impossible for one state to violate the prohibitions of the laws of another through the channels of interstate commerce."[81]

(b) *The Lacey Act:* In 1900 Congress passed a statute making it unlawful to ship from one state or territory to another state or territory any animals or birds killed in violation of the laws of the state.[82] It is quite clear that Congress was here using its power over interstate commerce for the purpose of co-operating with the states in the protection of wild game and birds. In fact, the first section of the statute declared frankly that its purpose was to "aid in the restoration of such birds in those parts of the United States adapted thereto where the same have become scarce or extinct." It should be noticed that this act differs in theory from the Webb-Kenyon Act, because the articles which are here outlawed from interstate commerce are not articles which when distributed through that commerce will menace the public welfare. They are outlawed because of their illegal origin and possession and because Congress desires to prevent interstate commerce from being used as an outlet or place of refuge for such illegal commodities. By passing the Webb-Kenyon Act Congress refused to allow itself to become an accessory before the fact, by declining to place the facilities of interstate commerce at the disposal of those who are about to violate the prohibition laws of the states; by passing the Lacey Act Congress refused to become an accessory after the fact, by declining to place those facilities at the disposal of those who have just violated the state law by affording them a means of disposing of their unlawful possessions. This difference, however, should have no bearing upon the question of congressional power to pass the Lacey Act, and the only court which has passed upon its validity has held it constitutional on the authority of the *Rahrer* case upholding the Wilson Act.[83]

---

[81] The Webb-Kenyon Act and the Clark Distilling Co. case have been widely discussed in the legal periodical literature. The following articles may be mentioned here: D. O. McGovney, The Webb-Kenyon Law and Beyond, 3 Iowa Law Bul. 145; S. P. Orth, The Webb-Kenyon Law Decision, 2 Corn. Law Quar. 283; T. R. Powell, The Validity of State Legislation Under the Webb-Kenyon Law, 2 So. Law Quar. 112; Lindsay Rogers, The Webb-Kenyon Decision, 4 Va. Law Rev. 558. Other articles are cited in the notes to Decisions of the Supreme Court of the United States on Constitutional Questions, T. R. Powell, 12 Amer. Polit. Science Rev. 19 et seq.

[82] Act of May 25, 1900, 31 Stat. at L. 188.

[83] Rupert v. United States, (1910) 181 Fed. 87.

4. *The Reed "Bone-Dry" Amendment.* The introduction for discussion at this point of the Reed Amendment by its popular title rather than by a caption indicating the principle on which it is based is a confession by the author of his inability to discover what that principle is, if there be any. This act was passed as an amendment to the Postoffice Appropriation Act of 1917.[84] The pertinent provision reads as follows: "Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any state or territory the laws of which state or territory prohibit the *manufacture or sale* therein of intoxicating liquors for beverage purposes shall be punished as aforesaid."[85]

A casual reading of this statute might lead one to assume that Congress had merely supplemented the Webb-Kenyon Act by punishing those who make interstate shipments of liquor which, in order to divest them of their interstate character, that act had prohibited without attaching a penalty. What the Reed Amendment really does is to impose, under penalty of the federal law, a "bone-dry" policy in the matter of shipments of liquor from other states upon any state which prohibits merely the manufacture and sale of intoxicants for beverage purposes. In other words, the amendment forbids the shipment of liquor even for personal use into a state which may permit the personal use of liquor but forbids its manufacture and sale.

The Supreme Court recently upheld the validity of the Reed Amendment in the case of *United States v. Hill.*[86] It was urged

---

[84] Act of March 3, 1917, 39 Stat. at L. 1069. The same act also prohibited sending liquor advertisements through the mails into states which forbade such advertising. See J. K. Graves, The Reed "Bone Dry" Amendment, 4 Va. Law Rev. 634.

[85] Italics are the author's.

[86] (1919) 248 U. S. 420, 39 S. C. R. 143. In McAdams v. Wells Fargo & Co. Express, (1918) 249 Fed. 175, the law was enforced against the carrier and the court said: "It is quite evident that Congress, in adopting said act, intended to aid the states in the enforcement of their prohibition laws. . . . . It may be that Congress builded better than it knew in passing the Act of March 3, 1917; but there is no doubt that it prohibits the shipment of liquor in interstate commerce for beverage purposes into the dry parts of the state of Texas wherein the sale of liquor is prohibited by the state law, though intended only for personal use." In United States v. Mitchell, (1917) 245 Fed. 601, the court, while not declaring the Reed Amendment unconstitutional, held that the transportation of liquor for personal use in one's own baggage is not "commerce" and does not therefore fall within the prohibitions of the act. The view is, of course, in conflict with the decision of the Supreme Court in the Hill case.

upon the court, and the lower court so held, that the prohibition of the act should be construed to apply only to such shipments of liquor as were in violation of the law of the state into which they went. But the Supreme Court refused to narrow the meaning of the act in this way. The illegality of the forbidden shipments of liquor does not depend upon the law of the state, as it does in the case of the Webb-Kenyon Act, but upon the law of Congress. While Congress may exercise its authority over interstate commerce "in aid of the policy of the state, if it wishes to do so, it is equally clear that the policy of Congress acting independently of the states may induce legislation without reference to the particular policy or law of any given state." It is well established that in certain cases congressional regulation of commerce may take the form of prohibition, and this is an appropriate case for the exercise of that power. "That the state saw fit to permit the introduction of liquor for personal use in limited quantity in no wise interferes with the authority of Congress, acting under its plenary power over interstate commerce, to make the prohibition against interstate shipment contained in this act. It may exert its authority, as in the Wilson and Webb-Kenyon Acts, having in view the laws of the state, but it has a power of its own, which in this instance it has exerted in accordance with its view of public policy."

A brief but vigorous dissenting opinion was written by Mr. Justice McReynolds. He expressed his conviction that the Reed Amendment "in no proper sense regulates interstate commerce, but it is direct intermeddling with the states' internal affairs. . . . . to hold otherwise opens possibilities for partial and sectional legislation which may destroy proper control of their own affairs by the separate states . . . . If Congress may deny liquor to those who live in a state simply because its manufacture is not permitted there, why may not this be done for any suggested reason—e. g., because the roads are bad or men are hanged for murder or coals are dug? Where is the limit? . . . . The Reed Amendment as now construed is a congressional fiat imposing more complete prohibition wherever the state has assumed to prevent manufacture and sale of intoxicants."

There is nothing in the majority opinion in the Hill case to throw any light upon Mr. Justice McReynolds' question, "Where is the limit?" The law classifies the states and prohibits the shipment of liquor for beverage purposes into the states comprising

one of the classes. But there is nothing to indicate that the court regarded the constitutionality of the law as in any way contingent upon the intrinsic reasonableness of that classification. Emphasis is laid upon the fact that Congress could exclude all liquor from interstate commerce, and the suggestion that the Reed Amendment depends for its prohibitive force upon the existence of any particular type of state law relating to liquor is repudiated. The court does suggest that Congress apparently thought it would be a good thing to impose the "bone-dry" rule upon all states having more moderate prohibition laws, but this is far from saying that the statute would not have been an equally legitimate exercise of the commerce power if the purpose of Congress had been something quite remote from the suppression of the liquor traffic. If Congress has full power to stop all interstate traffic in liquor, but is under no constitutional obligation to prohibit the shipment of liquor into all states merely because it prohibits such shipments into some, being free to make the application of that prohibition depend upon the existence or non-existence of certain conditions in the states, then may not Congress by turning the interstate spigot on or off, as the needs of the case may demand, exert a pressure on the states which will lead them to comply with the congressional wishes in matters over which Congress has no direct authority? It is not impossible that Congress has stumbled inadvertently into an unexplored field of police regulation, although there is small probability that such an indirect method of exerting police power would ever prove particularly alluring.

Whatever may be the constitutional implications of the Reed Amendment and the case upholding it, it is impossible to classify it with any of the types of national police regulation which have been thus far discussed. It is not an exclusion from interstate commerce of a commodity which Congress regards as injurious to the national health or morals, because Congress does not exclude all liquor from such commerce, but only that destined for certain states. Nor is it an act designed to co-operate with the states in the adequate enforcement of their police regulations relating to the liquor traffic, because it overrides the wishes of many of those states and imposes on them a more rigorous prohibition than they desire. It embodies neither the principle of positive national control over the interstate shipments of liquor nor the principle of local option or state home rule embodied

in the Wilson and Webb-Kenyon Acts. It proceeds upon the somewhat curious theory that Congress ought to impose its own brand of prohibition not upon all the states but only upon those states which have seen fit to adopt another sort of prohibition.

From the ground thus far covered it is apparent that the police power which Congress may exercise in protecting and promoting interstate commerce, substantial as that power has been shown to be, has been overshadowed by the police power resulting from the efforts of Congress to keep that commerce from being used to distribute objectionable commodities or to promote objectionable transactions. The goods or transactions which may thus be excluded from interstate commerce may be objectionable either because they are dangerous to the public morals, health, or welfare, or because they are to be used in violation of the legitimate police regulations of the state. The question which remains for consideration is whether or not a still more extensive national police power may properly be derived from the commerce clause by allowing Congress to deny the privileges of interstate commerce to commodities which are harmless in their nature and the use to which they are to be put, but which are produced under conditions which Congress deems objectionable. This problem will be dealt with in the concluding section of this article.

(To be concluded.)

ROBERT EUGENE CUSHMAN.

UNIVERSITY OF ILLINOIS,
URBANA, ILLINOIS.