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National Police Power under the Commerce Clause of the Constitution

Robert Eugene Cushman

THE NATIONAL POLICE POWER UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION*

IV. Regulations Denying the Privileges of Interstate Commerce to Harmless Goods Produced under Objectionable Conditions—The Federal Child Labor Law

In passing the Keating-Owen Child Labor Law[1] Congress plunged, probably with some misgivings, into what was expected to prove a new field of national police regulation. The act forbade the shipment in interstate commerce of the products of mines and factories in which, within thirty days prior to their shipment in such commerce, child labor had been employed. It was an entirely novel exercise of the power to regulate commerce. Even those who deny that the unique character of the act created any serious constitutional difficulty readily agree that it stands in a class by itself as an exercise of congressional authority. Hitherto Congress had exercised a national police power under the commerce clause in two general ways: first, to protect interstate commerce from injury and obstruction; second, by refusing to allow it to be used to further the distribution of obnoxious commodities or the consummation of injurious designs. Wherever Congress had resorted to prohibitions of interstate commerce the prohibition had been justified upon the harmful nature of the thing excluded; harmful either to commerce itself or harmful in the use to which it was put. The goods excluded by the Child Labor Law, however, were themselves entirely harmless and legitimate in character, and harmless and legitimate also in the use to which they were to be put; their harmfulness consisted in the fact that they were produced under conditions injurious to the public welfare. Like an illegitimate child, they were made to bear the taint of the evil which brought them into existence; the disability which attached to them was created not because Congress in any way objected to having that kind of goods distributed through interstate commerce but

*Continued from 3 Minnesota Law Review 412.

[1] Act of September 1, 1916, 39 Stat. at L. 675, Chap. 432.

because it wished to make it unprofitable to employ children in the manufacture of any kind of goods. The doctrine of the Child Labor Law would have extended enormously the scope of the national police power under the commerce clause by placing within congressional regulation the conditions under which any articles of interstate commerce are produced.

The history of the movement for a federal child labor law shows that movement to have been in the main a trial and error search for constitutionality. The most dangerous opposition to such a law did not come from the friends of child-labor, a group which grows constantly smaller and more silent; nor did it come from the "states rights" advocates, who, on grounds of policy and expediency, objected to the placing of child labor under uniform national control—for few intelligent persons are now prepared to deny that there is small hope for an effective suppression of the child labor curse in the divergent legislation of forty-eight states. On the contrary, the opposition which counted most came from those who, while sympathising with the objects of the law, honestly doubted that there was any sound constitutional basis upon which a child labor law under the commerce clause could rest; who, in the apt phrase of one of their number, could not convince themselves "that 'accroachment of power' is expedient when benevolent, and that, though a child is entitled to protection, the constitution is not."[2] This was apparent from the very outset. The first federal child labor bill was introduced into the Senate in 1906 by Senator Albert J. Beveridge of Indiana. This pioneer bill forbade any interstate carrier to transport the products of any mine or factory in which children under fourteen years of age were employed; and to make the bill effective the management of any establishment desiring to ship goods in interstate commerce was compelled to give the common carrier a statement that no such children were employed in its plant.[3] In a brilliant speech extending over three

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[2] Green, The Child Labor Law and the Constitution, Ill. Law Bul., April, 1917, p. 6.

[3] The portions of this bill which are of interest in this connection are as follows: "Be it enacted . . . That six months from and after the passage of this act no carrier of interstate commerce shall transport or accept for transportation the products of any factory or mine in which children under fourteen years of age are employed or permitted to work, which products are offered to said interstate carrier by the firm, person, or corporation owning or operating said factory or mine, or any officer or

days Senator Beveridge set forth the need for such legislation and defended its constitutionality.[4] The most distinguished legal talent in the Senate was drawn into this debate; and it was plain to see that with but few exceptions their views of its validity ranged from skepticism to the clear conviction that it was unconstitutional.[5] The bill never became law, and the Judiciary Committee of the House of Representatives to which it was referred made a report setting forth its belief that the bill was clearly invalid.[6] With the retirement of Mr. Beveridge from the Senate, the active efforts of congressmen to secure federal legislation upon the problem of child labor for the time being ceased.

The Keating-Owen bill was the successor to the Beveridge bill. As introduced into the House, it forbade the shipment in interstate commerce of goods produced in whole or in part by the labor of children under fourteen years of age. This bill was not wholly satisfactory to the National Child Labor Committee which was sponsoring it, because placing the prohibition merely upon child-made goods narrowed considerably the scope of the act; though there was a belief that a stronger argument could be made for its constitutionality than for one broader in

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agent or servant thereof, for transportaton into any other state or territory than the one in which said factory is located.

"Sec. 2. That no carrier of interstate commerce shall transport or accept for transportation the products of any factory or mine offered it for transportation by any person, firm, or corporation which owns or operates such factory or mine, or any officer, agent, or servant of such person, firm, or corporation, until the president or secretary or general manager of such corporation or a member of such firm or the person owning or operating such factory or mine shall file with said carrier an affidavit to the effect that children under fourteen years of age are not employed in such factory or mine." The full text of this bill may be conveniently found at page 56 of the supplement to vol. XXIX, Annals of the American Academy, etc., (1907).

[4] Cong. Rec. vol. 41, pp. 1552-1557, 1792-1826, 1867-1883.

[5] It was probably doubt as to the constitutionality of the Beveridge bill which led Senator Lodge to introduce a rival bill (S. 6730) on December 5, 1906, which provided: "That the introduction into any state or territory or the District of Columbia, or shipment to any foreign country, of any article in the manufacture or production of which a minor under the age of fourteen years has been engaged is hereby prohibited." The second section applied a similar prohibition to goods made by children between fourteen and sixteen years, except those made by "any minor between the ages of fourteen and sixteen years to whom has been granted a certificate" by various school authorities "testifying to the fact that he or she is able to read and write the English language." This bill was referred to the Committee on Education and Labor, but it seems never to have attracted much notice or discussion.

[6] House Rep. No. 7304, 59th Cong., Second Session. Part of the argument of this committee is quoted in Watson, Constitution, I, pp. 532-534.

scope. When the bill came before the Committee on Interstate Commerce in the Senate it was changed into the form in which it was finally enacted, a form which made it a far more effective law.[7] In this form it forbade not merely child-made goods but the products of any mine or factory in which children were employed. The President signed the bill September 1, 1916, and by its terms it became effective September 1, 1917. Almost immediately a bill was filed in a federal district court in North Carolina by a father on behalf of himself and his two minor sons asking for an injunction against the enforcement of the act. The district court held the act unconstitutional,[8] and an appeal was taken to the Supreme Court of the United States. On June 3, 1918, the Supreme Court handed down a five to four decision invalidating the law.[9]

Few questions have arisen in recent years in our constitutional law upon which the professional opinion of the country has been more evenly divided. Few questions have called forth on both sides abler or more convincing arguments. Discussion of the question had been kept up intermittently during the dozen years between the introduction of the Beveridge bill and the decision of the Supreme Court upon the constitutionality of the Keating-Owen Act; and that decision, rendered as it was by an almost evenly divided court with a vigorous dissenting minority, called

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[7] An account of the legislative history of the bill is found in Pamphlet No. 265 of the National Child Labor Committee (1916).

The relevant portion of this act is as follows: "Be it enacted . . . . That no producer, manufacturer, or dealer shall ship or deliver for shipment in interstate or foreign commerce any article or commodity the product of any mine or quarry, situated in the United States, in which within thirty days prior to the time of the removal of such product therefrom children under the age of sixteen years have been employed or permitted to work, or any article or commodity the product of any mill, cannery, workshop, factory, or manufacturing establishment, situated in the United States, in which within thirty days prior to the removal of such product therefrom children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen years and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock postmeridian, or before the hour of six o'clock antemeridian."

[8] No opinion was written. This decision was rendered by the same judge who, according to press reports, has recently declared unconstitutional the clause of the Revenue Act of Feb. 24, 1919, placing a ten per cent excise tax upon the net profits of businesses employing children.

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

forth a new grist of opinion.[10] Even now the layman who approaches the problem without definite preconceptions is greatly in danger of experiencing a painful instability of opinion and of finding himself landed finally on the side of the advocate or critic to whose arguments he last gave ear.

There would be small justification for the writer to add to the already voluminous literature on the subject another argument for or against the validity of the federal Child Labor Law. However, a discussion of the national police power under the commerce clause would hardly be complete without some attempt to classify the precise constitutional issues involved in this attempt to extend that power so radically. An effort will be made, therefore, to set forth as plainly and fairly as possible the arguments which have been advanced, first by those who have believed the act to be unconstitutional and second by those who have regarded it as valid. In each case the reasoning of the majority and minority, respectively, of the Supreme Court will be briefly summarized as fitting conclusions to the briefs.

The Argument Against the Constitutionality of the Law

Inasmuch as the constitutionality of a law is to be presumed until disproved, it will be appropriate to present first the arguments of those who have attacked the validity of the law.[11] These arguments quite naturally differ a great deal in persuasiveness, in thoroughness of reasoning, and in the emphasis placed upon the different points considered. In spite of this diversity it is possible to melt them all together into a brief composed of three major arguments, which will be considered separately. The writer has made no special effort at originality in setting forth

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[10] While there are differences between the provisions of the Beveridge bill and the Keating-Owen Act, these differences are largely in the method used to accomplish the legislative purpose and not differences in constitutional principle. The fundamental issue of constitutionality seems to be the same in both, and the arguments for and against the measures are applicable to both alike.

[11] In addition to the arguments presented in the debate in Congress above referred to (see note 4, supra), the Beveridge bill was criticized on constitutional grounds by the following writers: Bruce, The Beveridge Child Labor Bill and the United States as Parens Patriae, (1907) 5 Mich. Law Rev. 627; Maxey, The Constitutionality of the Beveridge Child Labor Bill, (1907) 19 Green Bag 290; Knox, Development of the Federal Power to Regulate Commerce, (1908) 17 Yale Law Jour. 135; Willoughby, Constitution, II, Sec. 348; Watson, Constitution, I, pp. 523-534. Before the

these arguments, but has attempted to present a sort of composite picture made up of all of them, a picture in which, as in the real composite photograph, the details of each component are lost to view, but in which the common characteristics stand out vividly.

1. *It Is Not a Regulation of Commerce.* It is important to bear in mind that Congress has no power to deal openly and directly with the evil of child labor. It merely has the right to regulate interstate commerce. Therefore, while the federal Child Labor Law was admittedly passed for the purpose of driving child labor out of existence, it was compelled, from the standpoint of constitutional law, to seek justification not as a child labor law but as a regulation of interstate commerce. If it can be shown that the law is not a regulation of interstate commerce, then its constitutional underpinning collapses and it must be regarded as an attempt by Congress to exercise a power which it does not possess under the constitution. Probably without exception the opponents of the law have built their case around this central and vital point, that it is not a regulation of commerce. The arguments advanced in support of this proposition may be set forth as follows:

(a) *Not Every Regulation Dealing with Commerce Is a Regulation of Commerce in the Constitutional Sense*: The fact that the Child Labor Law is entitled "An Act to Prevent Interstate Commerce in the Products of Child Labor, and for Other Purposes," coupled with the fact that the thing which the law punishes is not the employment of children, but the shipment in interstate commerce of certain commodities, raises an initial presumption that it is a regulation of commerce. Constitutional

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Keating-Owen Act was declared invalid, its constitutionality was attacked in the following articles: Green, The Child Labor Law and the Constitution, Ill. Law Bul., April, 1917; Gleick, The Constitutionality of the Child Labor Law, (1918) 24 Case and Com. 801; Hull, The Federal Child Labor Law, (1916) 31 Pol. Sci. Quar. 519; Krum, Child Labor, (1917) 24 Case and Com. 486. See also the general criticism in Hough, Covert Legislation and the Constitution, (1917) 30 Harv. Law Rev. 801. The decision of the Supreme Court in Hammer v. Dagenhart, supra, note 9, was discussed with approval in the following articles: Berry, The Police Power of Congress under Authority to Regulate Commerce, (1918) 87 Cent. Law Jour. 314; Bruce, Interstate Commerce and Child Labor, (1919) 3 MINNESOTA LAW REVIEW 89; Green, Social Justice and Interstate Commerce, (1918) 208 North Amer. Rev. 387; and note, (1919) 2 Ill. Law Bul. 126; Taft, The Power of Congress to Override the States, (July, 1918) 15 Open Shop Rev. 273. See also editorial (1918) in 86 Cent. Law Jour. 441.

phrases must not, however, be construed "with childish literalness." It must not be naïvely assumed that everything which is labeled a regulation of commerce or which in some way affects commerce is a regulation of commerce in the constitutional sense. The extent and nature of the power of Congress over interstate commerce must be interpreted in the light of the purposes for which the power was granted.[12] For instance, the governments of the state and nation enjoy a power of taxation which in "the extent of its exercise is in its very nature unlimited;"[13] yet when the state of Kansas authorized a city to levy a tax for a private and not a public purpose the Supreme Court of the United States declared that the levy was not a tax, merely "because it is done under the forms of law and is called taxation," but was "a decree under legislative forms."[14] In like manner the Child Labor Law is not necessarily a regulation of commerce simply because it is done under the forms of law and is called "a regulation of commerce."

(b) *Power to Regulate Interstate Commerce Was Given to Promote and Not to Destroy Commerce*: If we had no light whatever upon the purposes for which the power to regulate commerce was given to Congress by the framers of the constitution, it would still be reasonable to argue that the power to "regulate" does not include any general power to "destroy" or to "prohibit" commerce. A grant of "the power to regulate necessarily implies the existence of the thing to be regulated."[15] Where power has been given to state legislatures or city councils to "regulate" the liquor traffic the courts have held that no authority was thereby given to "prohibit" such traffic.[16] It is logical to assume that the power to regulate commerce should be thought of as "a power to regulate acts of commerce so as to promote the good or prevent the evil that might flow from those acts."[17] While it might properly include the power to make all necessary rules to protect commerce and promote its efficiency and to pre-

[12] This point is clearly developed by Professor Green, op. cit., Ill. Law Bul., note 11, supra.

[13] *Loan Association* v. *Topeka*, (1874) 20 Wall. (U.S.) 655; 22 L. Ed. 455.

[14] Ibid.

[15] Watson, Constitution, I, p. 532, citing State v. Clark, 54 Mo. 17; State v. McCann, 72 Tenn. [4 Lea] 1.

[16] Watson, op. cit., p. 532.

[17] Green, op. cit., Ill. Law Bul. 13.

vent the injury to the national welfare which might flow from the acts and transactions of commerce, it cannot be held to include the authority to prohibit commerce in innocent and harmless commodities.

But we are not entirely in the dark as to the purposes for which the "fathers" placed the power to regulate commerce in the hands of Congress. While the debates in the Convention of 1787 do not throw much light on the subject, the whole history of the Confederation as well as the contemporary literature of the period would seem to indicate a hope and desire that Congress would bring about freedom of commercial intercourse, freedom which would replace the oppressive and mutually retaliatory obstructions which emanated from the jealousies of the separate states. There was apparently no thought that Congress was being given power by the new constitution to prohibit commerce in legitimate articles because it disapproved of the local conditions under which they were produced. While the Convention of 1787 went out of its way to forbid in express terms any congressional interference with the importation of slaves prior to 1808,[18] yet it made no effort to prevent Congress from excluding from commerce the products of slave-labor,—an exclusion clearly in line with the Child Labor Law—quite as though it assumed that Congress had no such authority. Certainly it can hardly be believed that either the framers of the constitution or the conventions which ratified it had any idea that they had given to Congress any power under the commerce clause to knife the institution of slavery in the back.

It has been forcefully argued that since, prior to the adoption of the constitution, the several states enjoyed full and sovereign power to prohibit commerce with the other states, as any independent nation might prohibit it, and that since the states gave up their power to Congress and made that power of Congress plenary and exclusive, it must therefore follow that Congress received all the power that the states gave up.[19] Otherwise what became of it? The answer is that it went back into the hands of the people, the same "people" who hold all the other powers of government "not delegated to the United States by the Con-

[18] Art. I, Sec. 9. On this point see Green, op. cit., North Amer. Rev., note 11, supra.

[19] Infra, p. 472.

stitution" nor "reserved to the States respectively."[20] Indeed, it is quite within reason to suppose that the framers of the constitution consciously intended to wipe out of existence entirely any power to prohibit interstate commerce in legitimate commodities by withdrawing that power from the individual states which had abused it and by failing to confer it upon Congress which might abuse it.

(c) *In Its Real Purpose and Effect the Law Has Nothing to Do with Interstate Commerce*: The contention that the Child Labor Law is not a regulation of interstate commerce in the constitutional sense has been most frequently and cogently grounded upon the fact that the purpose and effect of the act is to prohibit child labor, something quite remote from the act of shipping commodities in interstate commerce. "Its purpose and effect are to benefit children and not to benefit commerce."[21] Thus the statute is looked upon as somehow fraudulent, or misbranded. This argument is presented in several ways.

It has been urged by some that the Child Labor Law is in effect a denial by Congress of the privileges of interstate commerce as a penalty for doing things of which Congress does not approve but which it has no power to prohibit directly. This has been aptly expressed in this way: "Plainly the reason for the statute must be stated in the first instance in this form: 'The state does not like what you are doing. Therefore it has forbidden you to do something else—ship certain goods—not because that is in the least degree objectionable, but because the state thinks it can in this way make you so uncomfortable that you will quit employing children."[22] In commenting on the case in which the Supreme Court held the law invalid, ex-President Taft said: "The majority of the court decided that this was an attempt by Congress to regulate the use of child labor in the state. Will any man say that this was not its purpose? It was a congressional threat to the state, 'Unless you make your labor laws to suit us we shall prevent your use of interstate commerce for the sale of your goods.' "[23] In short, when Congress uses its power over commerce as a "club for belaboring persons

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[20] Constitution of the United States, Amendment X.

[21] Green, op. cit., Ill. Law Bul., note 11, supra.

[22] Ibid.

[23] Taft, op. cit., note 11, supra.

whose habits it does not approve,"[24] its action ought in reason to be regarded as a regulation not of the club but of the thing or person clubbed.

Others have laid emphasis in this connection on the fact that the statute is in effect a regulation of manufacturing or production. It is then pointed out that manufacturing is antecedent to and wholly separate from commerce and transportation and that the authority of Congress extends only to the latter.[25]

It is further suggested that the purpose and effect of the act is to regulate the relations between employers and employees who are not themselves engaged in the processes of interstate commerce, and to regulate them in respect to a matter that in no way concerns interstate commerce,—namely, the age of the employee. In the *Adair* case[26] Mr. Justice Harlan pointed out that a regulation of the relations between master and servant in respect to the membership of employees in a labor union did not bear sufficiently close connection to interstate commerce to be regarded as a legitimate regulation of that commerce. The regulation imposed upon employers by the Child Labor Law is thought to be still less closely related to interstate commerce.

It is quite natural that those who attack the Child Labor Law on the ground that it is too remote from interstate commerce to be a legitimate regulation of it should be challenged to show that the law is less a regulation of commerce than the Lottery Act, the Pure Food Act, the White Slave Act, and the other statutes by which Congress has prohibited commerce in various commodities. The friends of the law claim that the only possible distinction between the Child Labor Law and these other acts the validity of which is no longer open to question is that in the one case Congress uses its power over interstate commerce to protect the producer and in the other case to protect the consumer. This distinction, it is urged, is wholly irrelevant and immaterial so far as any question of the constitutional limits of

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[24] Green, op. cit., North Amer. Rev., note 11, supra.

[25] The cases usually relied on to support this view are United States v. E. C. Knight Co., (1895) 156 U. S. 1, 39 L. Ed. 325, 15 S. C. R. 249; Kidd v. Pearson, (1888) 128 U. S. 1, 32 L. Ed. 346, 9 S. C. R. 6; In re Greene, (1892) 52 Fed. 104.

[26] Adair v. United States, (1908) 208 U. S. 161, 52 L. Ed. 436, 28 S. C. R. 277, 13 Ann. Cas. 764. Professor Goodnow severely criticizes the use of the Adair case as an authority to prove the Child Labor Law not a regulation of commerce. See Social Reform and the Constitution, 87.

congressional power over commerce is concerned, since there is nothing in the constitution nor in the decisions of the Supreme Court to indicate that the consumer is any more entitled to protection through any exercise of the commerce power than is the producer.[27]

It seems clear that this distinction between regulations which guard the interests of the consumer and those which seek to improve the condition of the producer has been given a prominence by writers on both sides of this controversy which has tended to obscure what the opponents of the law regard as the vital distinction between it and the police regulations which Congress has previously enacted under the commerce clause. This distinction is that in the Lottery and White Slave Acts Congress has used its power over interstate commerce to prevent evils which might be said to result in the sense of actual causation from the acts or processes of interstate commerce. "In all of these cases, the introduction of the thing carried into the state is an act of evil tendency. Introducing it contributes to produce evil; it is a part of a course of action by which evil is consummated."[28] These acts are all "regulations of commerce made with a view to the results that may flow from the commerce regulated; to prevent evils that, unregulated, it might produce, or to promote benefits that, unregulated, it might not produce."[29] But the Child Labor Law does not prevent any evil which can be said to result from the acts or transaction of interstate commerce. The curse of child labor cannot be said to be promoted by the freedom of the employer of children to ship his products in interstate commerce simply because he might cease to employ children if that freedom were denied to him, any more than it can be said that child labor is promoted by free education because those who now employ children might cease to do so if, because of that, they were denied the right to send their children to the public schools. It cannot be said, therefore, that when Congress passed the Child Labor Law it was preventing the use of interstate commerce as a means of promoting a national evil, since the evil in question is not in any reasonable sense promoted by the uninterrupted flow of interstate commerce. This fact makes clear the distinc-

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[27] Infra, p. 475.

[28] Green, op. cit., North Amer. Rev., note 11, supra.

[29] Ibid.

tion between this act and the other instances in which Congress has exercised police power under the commerce clause.

It would seem that those who regard the Child Labor Law as just as real and thoroughgoing a regulation of commerce as the Lottery Act or the White Slave Act have trod, perhaps unconsciously, the following steps: (1) By passing these regulations of commerce, the Lottery Act and so forth, Congress has openly intended to protect the public morals, health, and safety, and has exercised a police power. (2) Therefore Congress enjoys a broad police power in the exercise of which it may set up any type of control over interstate commerce which will result in benefit to the public morals, health, and safety. (3) The exclusion of the output of child labor factories from interstate commerce will result in great good to the nation by safeguarding its children. (4) Therefore the Child Labor Law is a proper exercise of this police power of Congress under the commerce clause and should be regarded with no more suspicion or disfavor than the White Slave Act or the Lottery Act, which have also protected the national health, morals, and general welfare. Now the opponents of the Child Labor Law believe that there is a non sequitur between (1) and (2). It does not follow from the authority of the *Lottery Case*[30] and the *Hoke*[31] case that Congress has a police power unlimited in scope and limited only in the means available for its exercise. Congress has police power, but only such as can be exercised within the limits of the domain under congressional control—interstate commerce. This police power extends to the suppression of any evil which threatens interstate commerce or arises from or is being consummated by that commerce. Now the evil of child labor does not exist within the domain of interstate commerce; it exists where the children are employed. "The menace in the case of child labor is over and done with when the product is manufactured. . . . The exercise of the police power in prohibiting the use of interstate transportation for such products will operate of course as a deterrent. But it seems clear that thereby the police power becomes operative outside of the domain of interstate commerce. And beyond the borders of that domain the police power of

[30] (1903) 188 U. S. 321, 47 L. Ed. 492, 23 S. C. R. 321.
[31] (1913) 227 U. S. 308, 57 L. Ed. 523, 33 S. C. R. 281.

Congress, like the king's writ beyond his kingdom, does not run."[32]

This is not a matter of inquiring into congressional motives and invalidating a law because those motives were disingenuous. It is purely a question of power. The act fails as a regulation of commerce not because its purpose and effect are to prohibit child labor but because the child labor prohibited has nothing to do with interstate commerce. If interstate railroads employed children, Congress could doubtless forbid the employment of children in interstate commerce, just as it has prevented cruelty to animals while they are being transported by an interstate carrier.[33] Such a law would deal with an evil which existed within the domain of interstate commerce and not an evil which is over and done with before the commerce the power to regulate which forms the basis of congressional action begins.

The opponents of the Child Labor Law argue further that the extensive and arbitrary power which Congress has used to prohibit foreign commerce in various commodities constitutes no authority for the exercise of a similar power over interstate commerce. The power of Congress over foreign commerce is more extensive than over interstate commerce. Several reasons support this view. In the first place, the commerce clause is not the exclusive source of the power which Congress enjoys over foreign commerce. The power over foreign commerce derived from the commerce clause is supplemented by the power derived from the sovereign authority of the federal government to regulate its relations with other countries.[34] In the second place, assuming that the word "regulate" used in the commerce clause means the same and bestows the same power upon Congress in regard to both interstate and foreign commerce, nevertheless there are certain constitutional limitations which operate as restrictions upon congressional power over interstate commerce which do not apply to foreign commerce in the same way. The dissenting opinion of Chief Justice Fuller in the *Lottery Case*[35] suggests that the power of Congress over interstate commerce is subject to a limitation growing out of the "implied or reserved power in the states" which would not apply to the regulation of

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[32] Hull, op. cit., 524, note 11, supra.
[33] Act of Mar. 3, 1891, 26 Stat. at L. 833.
[34] Willoughby, Constitution, Secs. 64, 66, 374, with cases cited.
[35] Note 30, supra.

interstate commerce. This amounts to invoking indirectly the Tenth Amendment as a restriction on the power over interstate commerce. It has been intimated elsewhere by the court as well as by other authorities that while the complete prohibitions of foreign commerce would not deprive any one of property without due process of law, since no individual has a right to trade with foreign nations,[36] a similar prohibition of interstate commerce might under many circumstances amount to a denial of due process of law by invading the constitutional right of the citizen to engage in such commerce. In the third place, in spite of numerous dicta in early opinions to the effect that the scope of congressional authority over the two kinds of commerce is identical, there is not a single case, out of all that have afforded an opportunity for such a decision, in which the Supreme Court has decided squarely that it is.[37]

In similar manner it is pointed out that the police power which Congress has exercised through its control over the postal system, a power which has been used to exclude from the mails a wide variety of things, does not constitute any authority for the power used to pass the Child Labor Law. In the first place, it is impossible to mention any act by which Congress has actually excluded any commodity from the mails because of the objectionable character of the conditions under which it was produced; and in the second place, the power of Congress over the postal system is broader than over interstate commerce, inasmuch as Congress has explicit authority to "establish post offices and post roads,"[38] while in respect to interstate commerce the power given is not to "establish" but to "regulate." It may very properly be argued that no one is deprived of any property right without due process of law by being denied the enjoyment even somewhat arbitrarily of privileges and facilities which Congress may not

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[36] "As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised. This being true, it results that a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the due process clause of the Constitution." Buttfield v. Stranahan, (1904) 192 U. S. 470, 48 L. Ed. 525, 24 S. C. R. 349.

[37] Senator Knox made this statement during the course of the debate in the Senate on the Beveridge bill. Cong. Rec. vol. 41, p. 1879.

[38] Constitution of the United States, Art. I, Sec. 8.

merely create but may also destroy; whereas he may claim a higher degree of protection for his right to engage in an interstate commerce which was not in the power of Congress to create but merely to "regulate."[39]

The foregoing analysis presents what the writer regards as the more important arguments which have been used to prove that the Child Labor Law is not a regulation of commerce in the constitutional sense. A somewhat extended discussion of the point has seemed desirable, because it is without question the point which has been most hotly debated and which has seemed to the authorities on both sides of the case the most vital issue involved in the whole controversy.

2. *It Violates the Tenth Amendment.* The Tenth Amendment reserves to the states or to the people all powers not delegated to the federal government nor prohibited to the states. It has been alleged that the federal Child Labor Law contravenes this amendment.

Now if the opponents of the law succeed in establishing their contention that the act is not a regulation of commerce, then it would seem to follow as a matter of course that Congress has passed a law which cannot be justified as an exercise of any delegated power, and such a law becomes ipso facto an invasion of the reserved rights of the states. The argument has not always been put, however, in this conservative form. More than one critic of the law has urged as a more or less separate objection to it that in its purpose and effect it invades the reserved rights of the states and therefore violates the spirit if not the letter of the Tenth Amendment. "It was conceded by all," declared ex-President Taft, "that only States could regulate child labor. . . . Can any man fairly say that this was not an effort of Congress, by duress, to control the discretion of the

[39] This distinction is emphasized with clearness by Bruce, op. cit., 3 MINNESOTA LAW REVIEW 96, and also by Willoughby, op. cit., Sec. 349. Both writers rely upon the statement of the court in Ex parte Jackson, (1877) 96 U. S. 727, 24 L. Ed. 877: "We do not think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails. To give efficiency to its regulations and to prevent rival postal systems, it may perhaps prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter, in the sense in which those terms were used when the Constitution was adopted, consisting of letters, and of newspapers and pamphlets when not sent as merchandise; but further than this its power of prohibition cannot extend."

State intended by the Constitution to be free?"[40] Professor Willoughby regards it as "an attempt upon the part of the Federal Government to regulate a matter reserved to the control of the States."[41] The same view is most emphatically expressed by the Judiciary Committee of the House of Representatives in reporting upon the Beveridge bill. They said: "The lives, health, and property of the women and children engaged in labor are exclusively within the power of the States, originally and always belonging to the States, not surrendered by them to Congress. . . . The assertion of such power by Congress would destroy every vestige of State authority, obliterate State lines, nullify the great work of the framers of the Constitution, and leave the State governments mere matters of form, devoid of power, and ought to more than satisfy the fondest dreams of those favoring centralization of power."[42]

While courts have usually refrained from invalidating laws because of their alleged violation of the "spirit" of the constitutional prohibitions in cases where some doubt has existed as to the violation of the letter, attention is called to the fact that one of the important restrictions upon the power of the states and of the federal government to levy taxes has been grounded, not upon any specific clause of the constitution, but upon the essential nature of the federal union. This is the restriction upon the laying by either government of taxes upon the agencies, property, functions, or instrumentalities of the other.[43] While this restriction has not rested upon any alleged violation of the Tenth Amendment, it has been argued that it would not be unreasonable for the Supreme Court to use it as authority by way of analogy for recognizing the existence of certain restrictions upon the exercise by Congress of its power to regulate commerce when by

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[40] Taft, op. cit., p. 273, note 11, supra.
[41] Willoughby, op. cit., II, Sec. 348
[42] Quoted by Watson, op. cit., pp. 532-534.
[43] Willoughby, op. cit., I, Sec. 40. In The Collector v. Day, (1870) 11 Wall. (U.S.) 113, 20 L. Ed. 122. the court said: "It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government." See also Green, op. cit., Ill. Law Bul. 13.

such regulation the essential nature of the federal union in the matter of the distribution of powers is being threatened.

3. *It Takes Liberty and Property Without Due Process of Law.* Even if it be granted, however, that the Child Labor Law is a regulation of commerce in the constitutional sense and that it is not a violation of the Tenth Amendment, it has still been the object of attack as an act which deprives persons of liberty and property without due process of law. It has already been made clear[44] that any exercise of a national police power must be kept within the limits of the specific restrictions of the Bill of Rights, perhaps the most important of which is the due process clause of the Fifth Amendment.[45] The argument that the act is a violation of the guarantee of due process of law has taken two forms.

In the first place, it has been urged that "the right to liberty and property would certainly include the continuance of the right of interstate traffic in goods which were in themselves harmless and innocent."[46] No one can be said to enjoy a property right to ship commodities in interstate commerce when those commodities are harmful or when the shipment itself is an act of evil tendency. But any prohibition placed by Congress upon the right to ship harmless commodities destined for harmless uses constitutes an arbitrary invasion of a property right and is a denial of due process of law.

Now those who deny the validity of the Child Labor Law do not agree among themselves that there is a property right to ship goods in interstate commerce.[47] But even assuming that no such right does exist, it is still urged that the law fails of due process. It is well established that any state may prohibit child labor without depriving any one of his constitutional rights; but it is equally well established that Congress cannot directly prohibit child labor under any power it now possesses. Now it is argued that even if the right to ship harmless goods in interstate commerce is one which Congress under the commerce clause might legitimately take away entirely, it would still be a denial of liberty or property without due process of law for Congress to make the continued enjoyment of the privileges of interstate commerce con-

[44] 3 MINNESOTA LAW REVIEW 299.
[45] Constitution of the United States, Amendment V.
[46] Bruce, op. cit., 5 Mich. Law Rev. 636.
[47] See infra, p. 476.

tingent upon abandoning a course of action which so far as any possible prohibition by Congress is concerned a person has a perfect right to pursue. In other words, Congress cannot withdraw a privilege which can be enjoyed only under its permission, for the purpose of making that withdrawal a punishment for doing something which Congress had no direct authority to forbid. Such an exercise of power by Congress rests upon the same principle as a state statute which, while not directly forbidding child labor, forbids those who employ children "to shave, to ride in an automobile, or to have children of their own."[48] It is one thing to prohibit child labor directly; it is another and far different thing to permit the continuance of child labor only on the condition of the forfeiture of a right or privilege shared by all the other members of the community. In *Western Union Telegraph Company v. Kansas*[49] the Supreme Court held that the plaintiff company had been denied due process of law by a statute which made its admission into the state as a foreign corporation—admission which it was granted the state was under no obligation whatever to allow—contingent upon payment by the company of taxes which the state was without constitutional authority to impose. There are other cases in which a similar principle has been applied.[50] It is in the light of the authority of these cases and the reasoning set forth above that the Child Labor Law is believed to work a denial of due process of law.

4. *The Majority Opinion of the Supreme Court.*[51] It is unnecessary to dwell at length upon the opinion of the majority of the Supreme Court which held the federal Child Labor Law invalid. That opinion was reasoned with a brevity that was entirely surprising considering the importance of the question involved. It does not allude in any way to the contention of the plaintiff that the act works a denial of due process of law. The decision rested upon two points: first, that the Child Labor Law is

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[48] Green, op. cit., Ill. Law Bul. 11. The most effective statement of this argument is found in Professor Green's article.

[49] (1910) 216 U. S. 1, 54 L. Ed. 355, 30 S. C. R. 190.

[50] Herndon v. Chicago, etc., Ry. Co., (1910) 218 U. S. 135, 54 L. Ed. 970, 30 S. C. R. 633; Harrison v. St. Louis, etc., R. Co., (1914) 232 U. S. 318, 58 L. Ed. 621, 34 S. C. R. 333; New York Life Ins. Co. v. Head, (1914) 234 U. S. 149, 58 L. Ed. 332, 34 S. C. R. 879. These cases cited by Green, op. cit., Ill. Law Bul. 18.

[51] Written by Mr. Justice Day and concurred in by Justices White, VanDevanter, Pitney, and McReynolds.

not a regulation of commerce, second, that it violates the Tenth Amendment.

The first of these arguments proceeds along familiar lines. The power to "regulate" commerce is the power to "prescribe the rule by which commerce is to be governed," and does not include the right to "forbid commerce from moving and thus destroying it as to particular commodities." The cases in which Congress has prohibited interstate commerce in certain commodities have all rested "upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national, possessed over them is such that the authority to prohibit is as to them but the exertion of the power to regulate. . . . In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results." The Child Labor Law does not, however, regulate transportation, but aims to standardize child labor. The goods shipped are harmless and the fact that they may be intended for interstate commerce does not make them articles of that commerce at the time they were produced. There is no force in the argument that the law prevents unfair competition between states with child labor laws of different standards. So also there are many conditions which give certain states advantages over others, but Congress has no power to regulate local trade and commerce for such a purpose.

The act violates the Tenth Amendment. "The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution." Under the law Congress "exerts a power as to purely local matters to which the federal authority does not extend. The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed."

The Argument for the Constitutionality of the Law

The constitutionality of the Child Labor Law has probably been discussed more frequently and at greater length by its

friends than by its enemies.[52] An analysis of the arguments in support of the law indicates that they clash squarely at all vital points with the arguments which have just been set forth. They may, therefore, be grouped under the same three headings.

1. *It Is a Regulation of Commerce in the Constitutional Sense.* The friends of the Child Labor Law have bent their efforts with special care to proving that it is a regulation of commerce in the constitutional sense, a task which has of course involved disproving the arguments of their opponents that the law is not such a regulation. This task has been approached in a wide variety of ways and from many different points of view. The writer believes, however, that these arguments may all be subsumed under three major propositions, which if established would prove the point at issue. These will be treated in order.

(a) *The Power to Regulate Interstate Commerce Includes the Power to Prohibit Entirely Shipment in Such Commerce of Specified Persons and Property*: In the first place, the power to prohibit is not incompatible with the power to regulate commerce. Even if it is true that "the power to regulate implies the existence of the thing regulated,"[53] it is equally true that "the power to prescribe the rule by which commerce is carried on does not negative the power to prescribe that certain commerce shall not be carried on."[54] As Mr. Justice Holmes puts it, "Regulation

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[52] Before the Supreme Court annulled the law, the following discussions had appeared supporting its constitutionality: Goodnow, Social Reform and the Constitution, (1911) 80; MacChesney, Constitutionality of a Federal Child Labor Law, (1915) The Child Labor Bul. IV, p. 155; Parkinson, Brief for the Keating-Owen Bill, (1916) The Child Labor Bul., IV, pt. 2, p. 219; Constitutional Prohibitions of Interstate Commerce, (1916) 16 Col. Law Rev. 367; The Federal Child Labor Law, (1916) 31 Pol. Sci. Quar. 531; Precedents for Federal Child Labor Legislation, (1915) The Child Labor Bul., IV, p. 72; Troutman, Constitutionality of a Federal Child Labor Law, (1914) 26 Green Bag 154; see also note, The Use of the Power over Interstate Commerce for Police Purposes, (1917) 30 Harv. Law Rev. 491. Since the decision in Hammer v. Dagenhart, supra, the opinion of the majority has been criticized in the following articles: Gordon, The Child Labor Law Case, (1918) 32 Harv. Law Rev. 45; Jones, The Child Labor Decision, (1918) 6 Cal. Law Rev. 395; Parkinson, The Federal Child Labor Decision, (1918) The Child Labor Bul., (1918) VII, p. 89; Powell, The Child Labor Decision, (1918) The Nation, vol. 107, p. 730; The Child Labor Law, the Tenth Amendment and the Commerce Clause, (1918) 3 So. Law Quar. 175; see also note, (1918) 27 Yale Law Jour. 1092, and (1918) 17 Mich. Law Rev. 83.

[53] Note 15, supra.

[54] Powell, op. cit., So. Law Quar.

means the prohibition of something, and when interstate commerce is the matter to be regulated I cannot doubt that the regulation may prohibit any part of such commerce that Congress sees fit to forbid."[55]

In the second place, there is evidence to indicate that the framers of the constitution intended the power given to Congress to regulate interstate commerce to include the power to prohibit such commerce in certain cases. This is shown, first, by the fact that they intended to give Congress all the power over interstate commerce that the states had previously had and this included the power to prohibit such commerce.[56] It is shown, secondly, that they specifically denied to Congress the right to pass any law prior to 1808 which should prohibit the "migration or importation" of slaves,[57] a denial of power entirely superfluous unless the power to prohibit such commerce existed, in the absence of such denial.

In the third place, the power to regulate foreign commerce has always been held to include the power to place prohibitions upon such commerce,[58] and the commerce clause gives to Congress the same power over interstate as over foreign commerce. The friends of the Child Labor Law do not infer from this that Congress could necessarily impose the same restrictions upon interstate commerce as upon foreign commerce; but they assert that whatever difference there may be exists not because the power exercised is the power to regulate in the one case but not in the other, but because the limitations of due process of law affect the power to regulate in different ways. In other words, although the constitutional restrictions on that power may vary with the kind of commerce, the power to "regulate" remains the same. And since the power to regulate foreign commerce includes the power to prohibit it, it must of necessity follow that the power to regulate interstate commerce also includes the power to impose prohibitions upon it.

Finally, it is only necessary to refer to the Lottery Act, the White Slave Act, and the Pure Food Act to show that there have

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[55] Hammer v. Dagenhart, note 9, supra.

[56] This argument is carefully developed by Mr. Parkinson, op. cit., Col. Law Rev. 370 et seq.

[57] The Constitution of the United States, Art. I, Sec. 9.

[58] For citation of cases in support of this view see Parkinson, op. cit., The Child Labor Bul. 225-228; also note by E. B. Whitney, (1898) 7 Yale Law Jour. 291.

been other cases in which the Supreme Court has viewed with approval the exercise by Congress of the power to prohibit entirely interstate commerce in certain commodities.

(b) *The Power to Regulate Interstate Commerce May Be Used for the Protection of Public Health, Morals, Safety, and Welfare in General*: This point might perhaps be stated in this way: a regulation of commerce does not cease to be such merely because its purpose and effect are to eradicate evils over which Congress has no direct control. It is not the business of the Supreme Court to pry into the motives which prompt Congress to exercise its power to regulate commerce. Whatever restrictions there may be upon the power by reason of alleged violations of due process of law, the power to regulate commerce may properly be used by Congress to remedy any evils which may exist before, during, or after interstate commerce takes place, without making such action any less truly an exercise of the power to regulate such commerce. It is apparent that this view is in conflict with the position of the opponents of the Child Labor Law who argue that, while Congress may exercise a real police power under the commerce clause, that police power is limited to the actual domain of interstate commerce and may only extend to the prohibition of evils existing in or directly promoted by such commerce. The friends of the law, in short, look upon interstate commerce as a means entrusted to Congress to be used in any manner which will promote the public health, morals, and safety; and they find in the Lottery Act, the White Slave Act, and laws of similar character instances in which Congress has used the commerce power, not to protect any particular group of people, not to strike at evils which are limited to any particular locality, but to protect the nation at large from injury or danger. The evils, in other words, do not need to have any particular locus to be within the reach of congressional police power under the commerce clause.

(c) *No Distinctions Exist Between This Law and the Other Police Regulations Based on the Commerce Clause That Would Make It Less a Regulation of Commerce Than They*: Those who believe the Child Labor Law to be constitutional feel that the efforts to distinguish it from the Lottery Act and so forth and to prove that, while those earlier acts were bona fide regulations of commerce, the Child Labor Law is not, are after all merely efforts to set up straw men for the purpose of knocking them down.

They take the position, first, that the alleged distinctions do not in fact exist; and, second, that if they did exist they would not prove the Child Labor Law to be any less a regulation of commerce than the earlier statutes mentioned.

In support of the first point it is contended that the Child Labor Law does not stand alone in excluding from interstate commerce articles in themselves harmless. Lottery tickets are no more harmful in themselves than milk tickets; the goods excluded by the Commodities Clause[59] are in all respects above reproach; the anti-trust statutes forbid the shipment of goods intrinsically indistinguishable from any other articles of commerce. Nor is it true that the Child Labor Law is unique in that it excludes goods when no danger or injury can result from their interstate transportation. The other police regulations passed by Congress under the commerce clause have rested usually on the ground that the forbidden shipments were "acts of evil tendency." So also is the shipment of goods manufactured in a child labor factory an act of evil tendency. It promotes child labor both before and after the actual shipment takes place: before, because a producer could not afford to continue the employment of children if it cut him off from interstate markets; after, because states which may honestly desire to abolish child labor feel a reluctance to place their own industries at the mercy of the competition which results from the shipping in from other states of goods made by children. It is a peculiarly naïve logic which insists that a cause must always chronologically precede an effect, and that interstate commerce cannot cause or promote child labor because the immediate child labor is over before the immediate goods are delivered to the interstate carrier. The manufacture of goods is a continuous process, and its effects control its beginnings quite as much as with lottery tickets. This point has been clearly put in language which is worthy of quotation: "Clearly enough the transportation is a contributing factor to the employment of children, as it is to the consumption of liquor and the purchase of lottery tickets. In terms of physics, the transportation is a pull in the one case, and a push in the others. The matter belongs, however, to the realm, not of physics, but of economics. And in economics the push and the pull are not to be differentiated. In so far, then, as the majority [of the Supreme Court] imply

[59] See note 71, (1919) 3 MINNESOTA LAW REVIEW 311.

that the interstate transportation was not necessary to the harmful results aimed at by the Child Labor Law, they are obviously in error. Unless it were necessary, the law would have been idle and useless, no employer or 'next friend' of children would have objected to it, and it would not have touched, even obliquely, matters reserved to the states."[60] In other words, just as the Mann Act forbids the use of interstate commerce as a facility in carrying on the white slave traffic, so the Child Labor Law prohibits such commerce from being used to promote the evil of child labor, and there is, accordingly, no difference in principle between the two as to their being each a bona fide regulation of interstate commerce.

But in the second place, even if it be admitted that there are important distinctions between the Child Labor Law and the other regulations enacted under the commerce clause, those differences do not have any bearing whatever upon the question whether the Child Labor Law is or is not a regulation of commerce. The distinction, for example, that the Child Labor Law benefits the producer, while the Lottery Act and similar statutes protect the consumer, is an entirely artificial and worthless distinction. The enemies of the law are challenged to show anything in the commerce clause itself, the acts of Congress passed in pursuance thereof, and the decisions of the United States Supreme Court, which in any way suggest that a prohibition of interstate commerce loses its character as a regulation of that commerce in the constitutional sense because it is the consumer of goods shipped, rather than the producer, who receives the benefit therefrom. To hold otherwise is to inject into the constitution something which the framers did not put there. "Proponents [of this distinction] are standing on their political ideas of what ought to be in the Constitution rather than on what the Supreme Court has said is there."[61] In like manner, even if it is admitted for the sake of argument that the Child Labor Law excludes harmless commodities from interstate commerce, or even admitting that the exclusion established is arbitrary and unreasonable, this would not prove that the law is not a regulation of commerce. It would merely prove that Congress had regulated commerce in such a way as to deprive persons of

[60] Powell, op. cit., So. Law Quar. 197.
[61] Parkinson, op. cit., 31 Pol. Sci. Quar. 537.

liberty or property without due process of law. In the *Lottery Case* and in *Clark Distilling Co. v. Western Maryland Ry. Co.*[62] the Supreme Court plainly intimated that power to exclude commodities from interstate commerce might be held to be limited so as to preclude its exercise in a manner palpably arbitrary, but in each of these cases the implication is very plain that any such limitation would arise from the due process of law clause and not at all from any implied narrowing of the meaning of the word "regulate" as used in the commerce clause. What the critics of the law have done in using the distinctions mentioned to prove that the Child Labor Law is not a regulation of commerce is to employ an argument "built upon a due process distinction and then unwarrantably transferred to the commerce clause."[63]

2. *The Child Labor Law Does Not Work a Denial of Due Process of Law.* When Senator Beveridge was defending the constitutionality of his child labor bill in 1906 he took the position that the power of Congress over interstate commerce was absolute, and that while Congress would naturally be restrained by considerations of policy and expediency from any arbitrary and unreasonable exercise of that power, the power itself was subject to no constitutional restrictions of any kind.[64] This means, of course, that Congress in the exercise of its commerce power is not restricted by any limitations arising from the due process of law clause of the Fifth Amendment.

A writer on the subject who regards the law as unconstitutional upon other grounds takes the position that there is no property right to ship products in interstate commerce. That even if there were such a right it would be a "right to engage in interstate commerce lawfully regulated. So, if the regulation be lawful, the property right has existed subject to the regulation. And to assail the validity of the regulation by the due process clause is to argue in a circle."[65]

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[62] (1917) 242 U. S. 311, 61 L. Ed. 326, 37 S. C. R. 180.

[63] Powell, op. cit., 3 So. Law Quar. 194.

[64] In the course of the debate the senator said: "Will you ask me whether or not I think we have power to prohibit the transportation in interstate commerce of the milk of a cow milked by a young lady eighteen years old? Undoubtedly we have the power, but undoubtedly we would not do it. We have the power to prohibit the transportation through interstate commerce of any article." Cong. Rec., vol. 41, p. 1826.

[65] Hull, op. cit., 31 Pol. Sci. Quar. 529.

With these two exceptions, there would seem to be no disagreement among friends and critics of the Child Labor Law that the validity of any congressional prohibitions of interstate commerce must be subject to due process of law; and this view is supported by decisions of the Supreme Court.[66] The proponents of the law, however, deny that it deprives any person of property or liberty without due process of law and they advance the following arguments in support of their view.

At the outset attention is called to the fact that "the due process does not protect things, but persons. Goods made by child labor have no constitutional immunities."[67] Therefore the law does not fail of due process merely because the goods shipped are harmless.

Compliance with the test of due process does not depend, therefore, upon the character of the goods excluded but upon the effect of that exclusion upon the rights and immunities of those who are forbidden to ship the goods. Now a constitutional right to ship in interstate commerce the products of factories employing children must of necessity rest upon a constitutional right to employ children; just as the constitutional right to ship lottery tickets in interstate commerce depends upon the existence of a constitutional right to conduct or engage in a lottery enterprise. The question then reduces itself to this: is there a right to employ children, of such a nature that an interference with it constitutes a denial of due proces of law? Now the tests of due process of law are not very definite, and the cases in which acts of Congress have been invalidated for violation of the due process clause of the Fifth Amendment are relatively rare and throw little or no light on this particular problem. However, it has been held that the requirement of due process of law imposed on the federal government by the Fifth Amendment is the same in principle as the requirement of due process of law imposed upon the states by the Fourteenth Amendment.[68] And since it has long been established not only by the state courts[69]

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[66] As, for instance, in Adair v. United States, note 26, supra. See also 3 MINNESOTA LAW REVIEW 299.

[67] Powell, op. cit., 3 So. Law Quar. 194.

[68] Parkinson, op. cit., The Child Labor Bul. v. IV, pt. 2, p. 245, citing Slaughter House Cases, (1872) 16 Wall. (U.S.) 26, 19 L. Ed. 915; Tonawanda v. Lyon, (1901) 181 U. S. 389, 45 L. Ed. 908, 21 S. C. R. 609; Twining v. New Jersey, (1908) 211 U. S. 78, 53 L. Ed. 97, 29 S. C. R. 14.

[69] See 16 R. C. L. 477 and cases cited.

but also by the Supreme Court[70] that a state may forbid or regulate the employment of children without depriving anyone of liberty or property without due process of law, it must follow that Congress does not violate due process by interfering in a similar or analogous manner with the employment of children.

It does not, however, follow from this argument that Congress can deny the privileges of interstate commerce to one who pursues any line of conduct that the state can interfere with without a violation on its part of due process of law. "So Congress could not prescribe that a man should not ship goods across a state line in case he violated his marriage vows. There would be no nexus between the infidelity and the transportation. But there is a nexus between making goods and shipping them. Evil in the making grows by the transportation it feeds on. Transportation increases child labor. It aids an evil which is a menace to the attainment of national objects. Congress cannot obliterate the evil. But it should be allowed to lessen it by denying it aid from the enjoyment of the highways under national control. If it ever should go further and seek to apply its commerce power to evils in no way dependent upon the commerce subject to its control, then the Supreme Court may with wisdom declare that it has failed to make a legitimate connection between its prohibition of transportation and the circumstances on which the prohibition is conditioned. But the court did not need to annul the Child Labor Law in order be free to deal with such cases if ever they should arise."[71]

3. *It Does Not Violate the Tenth Amendment.* Those who defend the Child Labor Law regard the contention that the law violates the Tenth Amendment with less respect than any of the other arguments directed against its constitutionality. They point out three weaknesses in it which convince them of its lack of merit. In the first place, the Child Labor Law takes away from the states no right reserved to them by the constitution. The law forbids the shipment of certain commodities across state lines; it does not forbid the employment of children. No state at any time during its history has ever had the power to compel any other state to admit its products; and during the Confederation the states freely exercised the power to set up embargoes

[70] Sturges & Burn Mfg. Co. v. Beauchamp, (1913) 231 U. S. 320, 58 L. Ed. 245, 34 S. C. R. 60.

[71] Powell, op. cit., 3 So. Law Quar. 201.

and restrictions on goods from neighboring states. Therefore when the Child Labor Law takes from the individual states the right to impose the products of their industry upon other states through the channels of interstate commerce it takes away no right which the states ever had and therefore no right which could have been reserved to them by the federal constitution.

In the second place, it is held that it is unsound to declare the law void as an invasion of the reserved powers of the states because of its indirect or incidental effects. Never before has the exercise by Congress of an admitted power been held unconstitutional because of such incidental effects upon the authority of the states. Although there have been plenty of instances in which congressional authority over interstate commerce has been so exercised as to impair seriously the freedom of action of the states in matters within their jurisdiction, these have always been regarded as the inevitable results of our federal form of government.[72] Thus the Lottery Act, the Pure Food Act, the Meat Inspection Act, all in precisely the same way discourage the production of the commodities excluded from interstate commerce. To invalidate one law because of its indirect invasion of the power of the states and not to treat in the same way other acts which also invade that power leaves upon the shoulders of the court the burden of determining when the indirect effects of a law are a sufficiently serious interference with state authority to warrant the interposition of the judicial ban; and we have thus opened up another fertile field for the production of judge-made law.

Finally, the argument based on the Tenth Amendment is superfluous. "If the Child Labor Law was a proper exercise of power to regulate interstate commerce, it was by the explicit terms of the Tenth Amendment not an exercise of a power reserved to the states. If it was not a proper exercise of the power to regulate interstate commerce, it was unconstitutional, and nothing more need be said about it."[73]

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[72] An extreme example of this is the "Shreveport Case," Houston, etc., Ry. Co. v. United States, (1914) 234 U. S. 342, 58 L. Ed. 1341, 34 S. C. R. 833, in which railroads were compelled to raise their intrastate freight rates which had been fixed by a state railroad commission, because those rates produced discrimination against competing shipments in interstate commerce which were being made at rates held reasonable by the Interstate Commerce Commission.

[73] Powell, op. cit., So. Law Quar.

4. *The Dissenting Opinion of Mr. Justice Holmes.*[74] The dissenting opinion of Mr. Justice Holmes is not an attempt to build up a constructive argument in support of the Child Labor Law, but is rather a pungent criticism of the reasoning of the majority. Since the majority opinion did not take up at all the due process of law argument, the justice confined the batteries of his criticism in general to a single concise attack upon the remaining two points of difference.

He protests most vigorously against invalidating an exercise by Congress of one of its admitted powers because of the collateral effect of such regulation upon matters reserved to state control. "I should have thought," declared the justice, "that the most conspicuous decisions of this court had made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any state." He then proceeds to comment on some of these "conspicuous decisions" in which the indirect effect upon state authority of congressional acts has been held quite irrelevant to the question of their validity. Furthermore, some of the acts already sustained have excluded from commerce commodities intrinsically harmless, and the Supreme Court in the *Hoke* case[75] has specifically put itself on record as upholding the use of the commerce power for police purposes. In these cases "it does not matter whether the supposed evil precedes or follows the transportation. It is enough that in the opinion of Congress the transportation encourages the evil."[76]

It is no longer open to dispute that the power to regulate commerce includes the power to prohibit it in some cases. Mr. Justice Holmes denies strenuously the propriety of upholding or invalidating the exercise of this power to prohibit commerce in accordance with judicial views of the morality or immorality of the transactions prohibited. But if this were permissible, there is no denying that child labor is an evil which ought to be dealt with as readily as any other. "I should have thought that if we were to introduce our own moral conceptions where in my opinion they do not belong, this was pre-eminently a case for upholding the exercise of all its powers by the United States."

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[74] Justices Brandeis, McKenna, and Clark concurred in the dissent.
[75] Note 31, supra.
[76] Mr. Justice Holmes, dissenting opinion, 247 U. S. at p. 279.

And finally, the law does not interfere with any power reserved to the states. "They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights. . . . The public policy of the United States is shaped with a view to the benefit of the nation as a whole. . . . The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking state. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command."

Conclusion

In the foregoing analysis of the arguments for and against the constitutionality of the Child Labor Law, the effort has been to make clear the exact issues involved in that controversy. It should also make clear that the advocates and opponents of the law disagreed not only upon the question of its validity but also upon the question of just what the actual result would be of a decision sustaining the law. Clearly it would advance the national police power far beyond its old limits. To what extent would it be expanded? Would there be any real limits upon that expansion?

The opponents of the law have felt that to uphold its constitutionality would be to open wide the door to congressional interference in any and every matter now confided to state control. In fact, they have pretty unanimously been seized with an irresistible impulse to lapse into reductio ad absurdum and paint in the most lurid colors the constitutional havoc wrought upon state authority and state institutions by such a doctrine. They argue that, if a man can be denied the privileges of interstate commerce because he employs children, he can be denied those privileges because of any other line of conduct which a majority in Congress view with disapproval; the line which now exists between the police power of the state and the regulatory power of Congress would be obliterated, and the only difference between the authority of the two governments to regulate the conduct of its citizens would be that one could act directly and the other by a process of indirection.

It seems clear that some at least who have taken this extreme view of the results of the Child Labor Law in expanding the scope of the national police power have lost sight of the fact that any exercise of that power must be kept within due process of law. But, even if this were not the case, it should be borne in mind that a court which has expressed its contempt for those who show a tendency to push the application of constitutional principles to a "drily logical extreme" is not apt to permit itself to be browbeaten by the requirements of absolute consistency into upholding any law which is a manifestly ridiculous or dangerous application of even the most harmless principle.

But if the Supreme Court had been willing to sustain the Child Labor Law on the basis of the argument advanced by its friends in its behalf, it is apparent that, while the national police power would have been strikingly enlarged, that expansion would not have been unlimited but would have been confined to well defined boundaries. Under this interpretation, the power of Congress to exclude commodities from the channels of interstate commerce could be used, not to strike at any evil which Congress might succeed by this method in bringing within its reach, but to strike at only those evils which could be said to be promoted by interstate commerce or motivated by the expectation or necessity of enjoying the privileges of such commerce. Concretely, those evils would be those connected with the processes of manufacturing the products destined for interstate markets. Congress would doubtless have gained the authority to regulate the conditions of labor in any industry dependent on interstate commerce for its markets, and this of course includes every industry of importance in the country; it is not clear that it would have gained much more.

But if the scope of the national police power under the commerce clause was not enlarged by the decision invalidating the Child Labor Law, neither was it narrowed. Congress still retains full authority to deal with any evil which threatens to injure, destroy, or obstruct interstate commerce. There still remains the authority to protect the national health, morals, safety, and general welfare from such evils as depend upon the physical agency of interstate commerce facilities for the transportation of commodities or persons. But evils which feed on interstate commerce only in the sense that they would dwindle

away if the right of those responsible for them to engage in interstate commerce were withdrawn are still beyond the reach of congressional power as conferred by the commerce clause. Congress may exercise a police power to protect interstate commerce, and to protect the nation from the actual misuse of that commerce; it may not, however, protect the nation from all the other equally dangerous and much more numerous evils which would die of discouragement if the interstate commerce they thrive on were prohibited.

ROBERT EUGENE CUSHMAN.

UNIVERSITY OF ILLINOIS,
URBANA, ILLINOIS.