

DOES THE COMMERCE CLAUSE GIVE POWER TO DOMINATE
ALL INDUSTRY?

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I

"The Now Perhaps Infamous Case of Hammer v. Dagenhart"

I take these words from a striking note in the May issue of the UNIVERSITY OF PENNSYLVANIA LAW REVIEW.¹ "Now perhaps infamous" furnishes not the text but the stimulus for what follows.

Hammer v. Dagenhart,² as all know, sets a limitation to the power of Congress to "regulate commerce". It declares unconstitutional an act³ forbidding the transportation in interstate commerce of commodities, however otherwise unobjectionable, produced in factories where certain categories of minors have been permitted to work, under named conditions, within thirty days prior to the removal of the goods from the factory. Its critics argue or assume that that power, subject to the "vague contours" of the Fifth Amendment, is absolute; and that the absolute power to prohibit necessarily includes the power to lay an embargo upon the shipping in interstate commerce of any kind of material or product. It would seem to follow, subject only to the restraint of the due process clause, that Congress may, by such "regulation", entirely preclude persons guilty of failure to obey prescribed statutes from entering into interstate transactions. The Child Labor Act in effect attempted to close state channels to the products of any factory which, within thirty days before the shipment, failed to comply with standards prescribed by Congress as to hours of work and age of workmen.

To adjudge to Congress absolute power to dominate all the internal affairs of the state, activities purely local, under penalty of federal boycott and commercial non-intercourse, would be a neat and easy solution appealing to devotees of uniformity. If a power thus absolute is exercised, it can scarcely be denied that the police power of the states themselves becomes little more than a travesty. Every code or pandect or decree under NRA, NIRA and their alphabetical sisters must be upheld, not alone because all activities "affect" interstate commerce, but because Congress may fix any price and predetermine any requirement for the privilege of the use of the

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1. Note (1934) 82 U. OF PA. L. REV. 733, 736.
2. 247 U. S. 251 (1918).
3. 39 STAT. 675 (1916).

post, the telegraph, the railways, the highways, the waters and the air—all vital to the transaction of present day business.

It is true that federal and state judges have decided against the validity of federal interference in purely local matters. And after attempting to make the entire 126,000,000 Americans pass *sub jugum*, General Johnson has now eliminated certain intrastate activities from the compulsory scope of the codes. But this was only after fines and imprisonment had been meted out to friendless offenders, in trivial cases involving purely intrastate matters. Indeed the whole program had been bottomed upon *emergency* rather than upon interstate regulation.

Of course it had been held long ago that none of the provisions of the Constitution can be suspended during any of the great exigencies of government.⁴ It was also held in that benighted pre-Roosevelt age that the power of Congress to regulate interstate commerce is not absolute and such regulation is invalid if repugnant to the Fifth Amendment as an invasion of personal liberty or property rights.⁵ But this was before either the New Freedom or the New Deal, and may be regarded by the "forward-looking" as "reactionary" and out-moded. Once concede that the commerce clause confers absolute power, and an appeal to the Fifth Amendment would seem to be illusory, since the exercise of an absolute power may not be questioned, however capricious, arbitrary or oppressive it may be. If the commerce clause confers absolute power, then there is an end to the rights of the states and the people thereof in respect to almost all matters of local concern and policy. Every act of anyone who wishes to ship in interstate commerce or move from state to state may be "regulated" by rigid license provisions or other prerequisites.

II

Mr. Justice Holmes has wisely remarked that a page of history is worth a volume of logic. What has happened since the effort of Congress, under the guise of regulating commerce, to control the labor of young people? The decision in *Hammer v. Dagenhart* was followed by another act, which attempted to reach the same objective through the taxing power. That statute likewise was declared unconstitutional in *Bailey v. Drexel Furniture Company*.⁶ The tax was an excise tax equivalent to 10 *per cent.* of the

4. "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence." *Ex parte Milligan*, 4 Wall. 2, 120 (U. S. 1866).

5. *Adair v. U. S.*, 208 U. S. 161 (1908); *U. S. v. Chicago, etc.*, R. R., 282 U. S. 311 (1931).

6. 259 U. S. 20 (1922).

entire net profits of the establishment in which the employer permitted work by children under the age of sixteen or during hours other than those prescribed. The opinion was delivered by Mr. Chief Justice Taft, who held that an act of Congress which on its face is designed to penalize and therefore to discourage or suppress conduct, the regulation of which is reserved by the Constitution exclusively to the states, cannot be sustained under the federal taxing power by calling the penalty a tax. The Chief Justice said:

“It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not entrusted to Congress, but left or committed by the supreme law of the land to the control of the States. We cannot avoid the duty even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant or the harm which will come from breaking down recognized standards. In the maintenance of local self government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half.”⁷

And again:

“In the case at the bar, Congress in the name of a tax which on the face of the act is a penalty seeks to do the same thing, and the effort must be equally futile.

“The analogy of the Dagenhart case is clear. The congressional power over interstate commerce is, within its proper scope, just as complete and unlimited as the congressional power to tax, and the legislative motive in its exercise is just as free from judicial suspicion and inquiry. Yet when Congress threatened to stop interstate commerce in ordinary and necessary commodities, unobjectionable as subjects of transportation, and to deny the same to the people of a State in order to coerce them into compliance with Congress’s regulation of interstate concerns, the court said this was not in fact regulation of interstate commerce, but rather that of State concerns and was invalid. So here the so-called tax is a penalty to coerce people of a State to act as Congress wishes them to act in respect of a matter completely the business of the state government under the Federal Constitution.”⁸

The Chief Justice quotes⁹ from the opinion in *Veazie Bank v. Fenno*:¹⁰

“There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse

7. *Id.* at 37.

8. *Id.* at 39.

9. *Id.* at 41.

10. 8 Wall. 533, 541 (U. S. 1869).

of the power if so exercised as to impair the separate existence and independent self-government of the States, or if exercised for ends inconsistent with the limited grants of power in the Constitution.' ”

There was then proposed by Congress an amendment to the Constitution which would have provided:

“The Congress shall have power to limit, regulate and prohibit the labor of all persons under the age of eighteen.”

There was a “concurrent” enforcement clause similar to that made a part of the ill-fated Eighteenth Amendment. The proposed amendment went through Congress with a whoop. Protests received scant and impatient attention, as the writer can personally certify, from appearances before the Judiciary Committee of the House. Behind the proposed amendment were most of those who regarded themselves as “forward looking”. It was said that the amendment was required to “jack up the backward states”. It was urged, without success, that the amendment should not be submitted until after the state elections, so that the subject could be debated before the people, and the legislators informed as to their will. It was urged that the age of eighteen was too high; that the subject matter was distinctly local; and that there had been great expansion in the scope of the state laws.

The advocates of the amendment, including government officials, the scope of whose functions and power would have been enlarged by its adoption, succeeded, however, in preventing any change in its form, although it was pointed out that the words “limit, regulate and prohibit” would give Congress absolute control over the destiny of the nation in a matter purely local. The Congress, as always, was willing and eager to increase the scope of its power. It was even argued by the proponents that this was not a prohibitory amendment; that it did not prohibit the labor of all persons under the age of eighteen, but that it merely gave Congress power so to do, and that, of course, Congress could be relied upon to exercise that power in a wise and beneficent manner.

Then began the effort to ratify the amendment. The campaign was led by government officials and by representatives of various groups presenting the point of view that the subject matter was national in scope, that the states had been delinquent in their duties, and that uniformity was desired. Fortunately Massachusetts had an advisory referendum law, signed by Governor Calvin Coolidge, so that a vote of the people in Massachusetts preceded the action of the legislature. On November 4, 1924, the people of Massachusetts voted 696,119 to 246,221 against the amendment. Of course the legislature declined to ratify the latter.

In Philadelphia, officers of the Bar Association organized among the membership a referendum on the amendment. Proponents of each side distributed circulars, setting forth their positions in detail. The vote for ratification was 143, while 447 members opposed ratifying action.

The legislature of Pennsylvania, on April 16, 1925, rejected the proposed amendment, and then, in December, 1933, proceeded to ratify it. The following states thus far have rejected the amendment: Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, New York, North Carolina, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont and Virginia.

The intensive drive for ratification notwithstanding the passage of time since submission is shown by the fact that a number of states—Iowa, Minnesota, New Hampshire and North Dakota—first rejected, then ratified the amendment: these ratifications were all made in 1933 as the result of an intensive drive of high federal officials to secure such action. Their herculean efforts were unsuccessful in a number of states, including New York and Virginia. If a state has once refused to ratify the amendment within a reasonable time, may such action be reversed by a legislature seven or eight years afterward? If so, the dice are loaded in favor of the proposed amendment. The courts have intimated that ratification must take place within a reasonable time, and the recent amendment repealing the Eighteenth Amendment contained a provision that it must be ratified within seven years. That would seem to be a reasonable time, and there is some hope for a ruling that a proposed amendment now so stale as the so-called Child Labor Amendment can not be ratified. If the Secretary of State should proclaim the ratification, this hope of judicial review may prove illusory. Excluding the states which have acted inconsistently, some fourteen additional states have ratified the proposed amendment.

III

So far the pages of history have confirmed the judgments of the Supreme Court and refuted the critics of the child labor cases. The approach of those critics would seem to be romantic and sentimental rather than realistic. That great maker of phrases, Mr. Justice Holmes, referred in his dissent to the "product of ruined lives". That epigram sounds realistic, but on the basis of hard fact it is a flight from reality. Lives are not, and were not, being "ruined". The state laws, with minor exceptions, were adequate and reasonable in the light of the local conditions.

It is possible to state facts or so-called "statistics" in such a way as to mislead and confuse. Thus it was argued that fifteen states do not prohibit the labor of those under sixteen in mines or factories. Those who made the argument did not disclose that in nine of these fifteen states there

are no mines. The fact is that every state prohibits labor of those under sixteen in dangerous or injurious occupations. No one under fourteen may be legally employed in any factory in any state. The proponents of the amendment have compiled a long list of states which have no laws expressly prohibiting those under sixteen from working at certain specified occupations, such as railroads, on scaffolding, and at oiling, wiping or cleaning machinery. There is a double and complete answer to these paper criticisms: those under sixteen are not in fact so employed; and employment in all the occupations which are really undesirable is covered by the general prohibition against any dangerous or injurious occupation.

Any proposal to protect children from "exploitation" comes with a tremendous appeal. It is evident, however, that the men and women of the country are not being swept off their feet, but are giving the question careful consideration upon its merits. Every one concedes that our American plan contemplates the maximum of local self-government consistent with national greatness and interstate freedom. Our fathers were jealous of giving power to government. They were especially opposed to giving power to government from afar. While the world, by reason of greater speed in communication, has shrunk to smaller dimensions, the same principles hold good. Local laws, locally administered, by local officials, locally chosen and responsible to local sentiment, give the best results as to all affairs that are local in their nature. Only once, in the case of the unregretted Eighteenth Amendment, has there been a departure from this principle.

This is not a mere theory worked out in a study. It is a principle which has stood the test of experience. Why is local government best in local matters? The people of the locality are more likely to know their own needs, their own aspirations. They are more likely to obey and respect laws made by and for themselves. There may be a measure of enforcement secured for an unpopular law made and enforced from afar, but the cost is enormous, and the accompanying resentment tends to unsettle respect for all law. It is the judgment of those opposing the proposed Child Labor Amendment that the labor of young persons is a matter for local self-determination and local self-government, with due regard for the rights of parents and the rights and best interests of the young. The question involved is not the merits of child labor legislation in general, but of the distribution of the powers of government in a country of vast territorial extent and enormous growing population, with diverse conditions and with peoples of many races.

The power is now in the legislatures of the states and in the parents in the states. Child labor legislation in the states has made great advances in the last generation. The few states which have not conformed to the more advanced standards of legislation are states in which there is little, if

any, mining or manufacturing and, hence, the problem has not been brought home as such a pressing one.

It is to be observed that the proposed amendment does not relate to labor under contract, but covers all work, whether performed on one's own behalf, or for one's parents or for another. Shall the law be uniform throughout the United States? If so, how can it be drawn so as not to produce incalculable hardships because of varying conditions and the different races to which it must apply? Is it fair to ask the Negroes and Mexicans of the southern states, with their earlier development and possibly lesser capacity for booklearning, to walk in lockstep with the children of other races? Yet it is unthinkable that Congress would ever recognize such differences. If the law were not uniform, but an attempt were made to take into account local conditions, the door would be opened wide for partisan and sectional disputes.

Experience teaches that young people differ widely in intelligence, in capacity to continue studies in school, in energy, in ambition and in initiative. As soon as a young person shows lack of capacity to continue to learn out of books, he is far better off working with his hands than remaining in school, not only bored but holding back his fellow pupils, who may be less fit than he is for the actual battle of life, though more apt in acquiring booklearning. Such a boy or girl does not cease to learn on leaving school, but rather begins to learn, through actual experience of life, lessons more important to him and to the community than the pursuit of advanced studies.

Then there is the ambitious boy or girl who wants to begin to work early, who believes that this course is better in his or her case, and who resents any law or any control which keeps him away from work. Such a lad is willing to work before hours and after hours in order to continue his studies. But he wants at the same time to be learning other things and to be earning money. These are among the very best of the youth of our land, and furnish men and women who became leaders in industry: John Wanamaker, who began work at eleven; James B. Duke, at twelve; Dr. Russell H. Conwell, Hon. Edwin S. Stuart, and a host of others who have gained and held the respect of their fellow-men.

All teachers and all workers among the poor are familiar with the hardships inevitably attendant upon any child labor law, no matter how carefully adapted to the local needs of any state. Mrs. H. Gordon McCouch, President of the Board of Trustees of the Widows' Assistance Fund of Philadelphia County, was among those opposed to the amendment because in the 800 families which come under her care she has seen again and again instances of hardship in the case of backward children of poor families where the labor of the young is essential for feeding and clothing

themselves. The poor people especially feel the burden of child labor laws. The law says the boy or girl must not work. The widowed mother must. And her efforts may be insufficient. She and her children must suffer want and privation because boys of fourteen and fifteen, sometimes insufficiently clad or fed, must be continued in school, where they are doing no good and where, on the contrary, they may be learning habits of laziness. And what of the orphans of fifteen, sixteen and seventeen? And the 167,000 married people under the age of eighteen?

If the federal government has the power to "limit, regulate and prohibit the labor of" young persons, then it must round out the job by completing its full duty as *parens patriae* to hundreds of thousands of young people who are "hand-minded" rather than book-minded, who loathe book-learning almost before they are in their 'teens and who would be useful citizens if they were allowed to pursue their natural bent. These, if interfered with, may indeed become "ruined lives". Hundreds of thousands of widows, in their struggle to be self-supporting, have relied upon the earnings of their children to eke out their own earnings and care for the family. If all people were mentally equipped for further booklearning, it would be unfortunate that they should not go on. And perhaps in the ideal state every such case will be carefully considered and the means provided from the taxpayers' pockets. The brilliant fictionist, Upton Sinclair, believes that no one should work until twenty-five, and everyone should stop working at forty-five—with pensions before and pensions after. Russia has nationalized young folk, and has made them all over in the image of Lenin. It is mere common sense and common justice that if the nation or the state deprives a needy parent of the services of her sons and daughters who are eager and willing to help, or deprives the sons and daughters themselves of the right to work and learn and earn, that is, in principle, a taking for public use and there should be just compensation. Thus the federal government would be under a duty to minister completely to the needs and education of all persons under the age of eighteen.

Two years ago such a suggestion would have been regarded as fantastic. But today all things seem possible, if not probable. In defiance, or at least in suave disregard of the very essence of the federal compact and of the fundamental liberties secured thereby, Washington has taken to itself the control of all industry and all labor. Are the parents in the states fit to be trusted with the care of their own children, and with the enactment through their own state legislatures of wise and salutary laws suitable to local needs and conditions? If the states may not be trusted in such matters which affect the home and home life and the family, the true unit of society, then we may well despair.

IV

At least three brilliant and scholarly articles have been published criticizing *Hammer v. Dagenhart*.¹¹ Some arguments are advanced which were not considered in the opinion of the Court, *e. g.*, that unless Congress had the power sought there would be a governmental no man's land, and that hence Congress must be held to have the power. This contention ignores the device employed in the Webb-Kenyon Act,¹² whereby the Congress recognized local prohibition statutes and aided in their enforcement by prohibiting shipments even in original packages to prohibition states. But even if there were such a political no man's land, what of it? Is our ideal that of absolute government or of limited government? Is it within the federal compact, reasonably construed, that absolute power, in respect of this subject matter, should be vested anywhere? The mischief to be remedied was embargoes, tariffs and other interferences hampering commerce among the states. The true construction of the words "regulate commerce" can be reached only in the light of that fact.

Mr. Gordon's article, while positive in its view, is the least didactic. The fair and temperate character of his article will appear by the following quotation:

"Between the two clear extremes [cases in which there can be *no* doubt about authority, or lack of it] there are many cases as to which there must be reasonable difference of opinion as to whether or not Congress is dealing with genuine interstate matter. Such a case is a Lottery Act, the Pure Food and Drugs Act, the White Slave Act and the Child Labor Act. Statutes forbidding interstate transportation of goods made by African slaves, or by convicts, or by women at night, or of the product of sweat shops, or made by non-union labor, or by women and children employed at less than a minimum wage, may also be put in the arguable class."¹³

And again:

"With these principles in mind, how shall the supposititious cases in the doubtful class be decided? Closing the channels of interstate commerce to the products of non-union labor must be held *ultra vires*, according to *Adair v. United States*, 208 U. S. 161 (1908) and *Coppage v. Kansas*, 236 U. S. 1 (1915). As to products of sweat shops or night work by women, and of work by women and children at less than minimum fixed wages, we may not now have sufficient facts to judge."¹⁴

11. Biklé, *The Commerce Power and Hammer v. Dagenhart* (1919) 67 U. OF PA. L. REV. 21; Gordon, *The Child Labor Law Case* (1918) 32 HARV. L. REV. 45; Corwin, *Congress' Power to Prohibit Commerce a Crucial Constitutional Issue* (1933) 18 CORN. L. Q. 477.

12. 37 STAT. 699 (1913).

13. Gordon, *supra* note 11, at 62.

14. *Id.* at 63.

Yet in the child labor case, even where Congress, blocked in its effort under the interstate clause, attempted to interfere under the guise of a frankly penal tax, the Court held that the purpose clearly appeared on the face of the act, and that the subject matter was local and beyond the power of Congress. Thereafter the minimum wage law was held unconstitutional.¹⁵ And as recently as September 19, 1934, District Judge Chestnut, of Baltimore, held unconstitutional the Frazier-Lemke Act,¹⁶ of 1934, and dismissed a petition to prevent mortgage foreclosure proceedings.¹⁷

The Supreme Court, in the Minnesota mortgage moratorium case *Home Bldg. & Loan Ass'n v. Blaisdell*,¹⁸ and in *W. B. Worthen Co. v. Thomas*,¹⁹ the case which followed it, has negated the proposition that emergency creates power. Both the majority and the dissenting opinions in the *Blaisdell* case were to that effect, and the Court was unanimous in its later pronouncement invalidating an Arkansas statute²⁰ creating an exemption of the proceeds of life insurance policies. It is true that the Court, in *Nebbia v. New York*,²¹ overruling or disregarding numerous decisions to the contrary, upheld milk price-fixing by New York State, a conclusion to be deplored on every ground. There should be no such power anywhere in a free state in time of peace.²²

The price-fixing in the codes is certain to fail. It will either become the machinery for monopoly and oppression or it will be honored in the breach, and if the codes are upheld as valid we shall have another reign of lawlessness and court congestion worse than that which took place under the Eighteenth Amendment. A tailor has been fined for pressing pants for 35 cents instead of 40 cents. But now these service codes have been, or are about to be, abandoned as obviously grotesque and unenforceable. Nevertheless, an invalid mother, who was supporting herself and her children by making artificial flowers at home, is ruthlessly interdicted and put upon the relief roll. The officials of the Richmond Hosiery Mills of Rossville, Georgia, said, "So long as we have orders and hungry people who want to work we are going to run our plant." But Federal Judge Marvin Underwood was not impressed with the necessity of giving hungry people work, and upheld the constitutionality of the National Hosiery Code and permitted indictments to be voted against the mills and five officers. So one Fred Perkins, of West York, Pa., who was asked by the government to

15. *Adkins v. Children's Hospital*, 261 U. S. 525 (1922).

16. P. L. No. 486, 73d Cong. (1934) § 75 (s).

17. *In re Bradford*, District Court of Maryland, Sept. 19, 1934.

18. 290 U. S. 398 (1934).

19. 292 U. S. 426 (1934).

20. Ark. Acts 1933, No. 102, p. 321.

21. 291 U. S. 502 (1934).

22. The power had been upheld in time of war. *Highland v. Russel Car & Snow Plow Co.*, 279 U. S. 253 (1929).

conform to a code, when conforming would ruin his business, asked for a special allowance from NIRA, which was refused. Then not only his Blue Eagle was taken away, but he was held in \$5000 bail and imprisoned until some public-spirited Quaker gave bond.

All these things and scores like them happen under legislation which can be sustained, if at all, only under the power of Congress to "regulate commerce". But if the criticisms of *Hammer v. Dagenhart* and the *Bailey* case are sound, there is no fantastic provision of any code, past, present or future, which should not be sustained as a valid exercise of the power to "regulate commerce".

The Report of the Committee on Federal Law, of the Pennsylvania Bar Association, contains the following sentences:

"Constitutional guaranties are the safeguards of freedom. In their enthusiastic devotion, the pioneer fathers, believing in inalienable rights, sought to reserve certain powers in the people. Elected and appointed officers are always subject to the limitations imposed by the organic law. To disregard these boundaries for whatever reasons of temporary expediency or supposed benefit may deprive minorities of their rights, render all subservient to an all-powerful Congress or executive, and pull down the pillars of our great free state. It is especially the duty of the Bar to oppose every such subversive action.

"'A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way.' Holmes, J., in *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 416. Higher than any obligation the lawyer owes to some supposed immediate public welfare, is his duty to sustain the charter of our liberties." ²³

Mr. Gordon points out the possible severability of interstate and intrastate transactions in respect of the power of Congress, as attempted to be exercised in the act held unconstitutional in *Hammer v. Dagenhart*. Suppose all the products of the same factory are not shipped in interstate commerce. There is no power to interfere with the intrastate transactions. It is a far-fetched application of the *Shreveport* case ²⁴ to say that the power, if it exists, to regulate the manner of production of goods for shipment in interstate commerce necessarily extends to the right to regulate the method of production of goods to be shipped in intrastate commerce, when both kinds of transactions take place in the same establishment. In the *Shreveport* case the subject matter was transportation, intrastate transportation as necessarily affecting interstate transportation. Here the subject matter is production, distinctively local in its nature.

Mr. Gordon also refers to the presumption of constitutionality. This should play no part in the discussion. Is the presumption of constitution-

23. PA. BAR ASS'N Q., June 1934, 13, 38.

24. *Houston & Texas Ry. v. United States*, 234 U. S. 342 (1914).

ality of an act of Congress greater than the presumption of constitutionality of the legislature of a state? The "presumptions", if they exist, conflict; indeed every questioning of the action of Congress taken under the commerce clause necessitates a conflict. If the action is in excess of the power of Congress to regulate commerce, it violates the Tenth Amendment. The rights of the states or the people thereof to demand that Congress shall not overstep the limits set by the Constitution are just as sacred as any right embodied in the Constitution itself. Indeed, as was recently pointed out in the admirable address by Commander Hays of the American Legion at Carpenter's Hall on Constitution Day, 1934, the Bill of Rights was adopted later and was intended to limit the powers granted by the Constitution. Hence, if it is not a case of an irresistible force and an immovable object, at least the matter is *in equilibrio*, and the so-called "presumption" cannot be indulged either in respect of an act of Congress or an act of a legislature.

VI

Professor Corwin attacks the subject in his inimitable way;²⁵ he cites the numerous instances in which acts of Congress have been upheld as within the power to "regulate commerce"; takes a fall out of Madison's notion of Dual Federalism; finds the thinking of the Court much in the grip of "*Laissez Faire* concepts", and treats with contumely the *Employers' Liability Cases*.²⁶

Notwithstanding Professor Corwin's criticisms, the following quotation from the opinion of Mr. Justice White in the *Employers' Liability Cases* is unanswerable:

"It remains only to consider the contention which we have previously quoted, that the act is constitutional, although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution, in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the

25. Corwin, *supra* note II, at 481-493.

26. 207 U. S. 463 (1908).

Constitution, and would destroy the authority of the States as to all conceivable matters which from the beginning have been, and must continue to be, under their control so long as the Constitution endures." 27

Of the dissenting justices in that case, Mr. Justice Harlan and Mr. Justice McKenna thought that the act should be interpreted as applying only to cases of interstate commerce and to employees who, at the time of the particular wrong or injury complained of, are engaged in such commerce, and not to domestic commerce or commerce completely internal to the state in which the wrong or injury occurred. Mr. Justice Holmes thought there were strong reasons in favor of the interpretation of the statute adopted by a majority of the Court, but thought the phrase "every common carrier engaged in trade or commerce" may be construed to mean "while engaged in trade or commerce", and that thus limited the statute was a valid regulation of commerce.

In an amusing note, Professor Corwin refers to the unanimous decision of the Supreme Court in *Utah Power and Light Co. v. Pfof*,²⁸ as illustrating the difficulty of distinguishing between production and commerce. The issue there was the validity of an Idaho statute imposing a license tax on the generation of electricity in the state. The company contended, as to the power sent out of the state, that the process of generation was "simultaneous and interdependent with that of transmission and use" and that "because of their inseparability the whole" was interstate commerce. The state urged that the process of conversion was "completed before the pulses of energy leave the generator in their flow to the transformer". The Court held, "While conversion and transmission are substantially instantaneous, they are, we are convinced, essentially separable and distinct operations." Professor Corwin said:

"It would, of course, be quite unfair to assume that Justice Sutherland thought he was here making a contribution to scientific knowledge. Rather he was throwing verbal straws to a drowning theory of federalism—which he leaves balancing on the imaginary line that separates the imaginary final pulsation of an electric current in an induction coil from its imaginary first pulsation in a transmission wire! I am told, in fact, that if the separation suggested by Justice Sutherland were really attempted the result would be the disappearance of the generating plant in flames."²⁹

The foregoing is enlightening as to Professor Corwin's fundamental theory and method of approach. His slogan is "*A bas, Federalism*". "This is not a union of states! The states are negligible pawns to be moved about

27. *Id.* at 502.

28. 286 U. S. 165 (1932).

29. Corwin, *supra* note 11, at 504, n. 80.

at will by an omnipotent Congress!" As to the *Pfost* case, it may be dismissed as just "another one of those tax cases". Undoubtedly, electricity was produced, and if there is a power in the state, to tax the production of electricity, the fact that it is immediately or instantaneously sent across a state line, from the standpoint of the court in considering a tax case, becomes negligible. In contemplation of law where the tax can only be sustained by imagining separability, separability is imagined; *per contra*, when the tax can only be sustained by imagining inseparability, inseparability is imagined.

VII

Of course, if all interstate movement is commerce, and there is an absolute power to prohibit all interstate movement or to permit it subject to such conditions precedent as Congress may fix, then a universal licensing system may be set up by Congress and no one may ship goods across state lines without having obtained such a license. And, of course, the conditions for such licensing may be as multifarious as all the existing provisions of all the codes and any other provisions which may be imagined. The whole of one's method of life may be controlled by Congress under the guise of the power to regulate commerce.

At the moment there seems to be no length to which Congress is unwilling to go at the behest of the executive. Where is the power to control securities exchanges, or the issuance of securities? It may reside, if at all, in the power to regulate commerce. Yet it has been held that the sending of policies of life insurance from state to state did not constitute commerce.³⁰ Heretofore the regulation of securities and exchanges has properly been regarded as purely local. Even the power to refuse the use of the mails should not be dragged in to buttress this wholly vicious and unconstitutional invasion of the rights of the states.

The truth of the matter is that this country is not exempt from the present tendency, nearly world wide, to make a religion out of the power of the state as such. In this country the federal government is supposed to be a more effective instrument for working the wills of those who come to control its machinery than are the governments of the states; hence the pressure to widen the scope of what is called Congressional authority.

If there is any belief that history has shown to be a delusion, it is the belief that giving power to the state as such can produce a millennium.

30. *Paul v. Virginia*, 8 Wall. 168 (U. S. 1868).