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**LABOR AND THE CONFLICT OF FEDERAL COMMERCE
POWER AND STATE POLICE POWER**

BY

MARK JAMES JENNINGS

**A THESIS SUBMITTED IN PARTIAL FULFILLMENT
OF THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF SOCIAL ADMINISTRATION
LOYOLA UNIVERSITY**

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CHAPTER I

INTRODUCTION

The exercise by Congress of the commerce power under Article I, Section 8 of the Constitution and the exercise by the several states of the police power under the residuary clause of the 10th Amendment to the Constitution, did not raise serious questions of conflict in the early history of the United States. However, the situation changed when Congress in 1887 passed the Interstate Commerce Act.

In various legal fields, such as taxation, regulation of food, transportation, and the like, a number of difficult problems arose due to the fact that laws dealing with these topics would or could possibly be based on the federal commerce power and the state police power. The situation became even more confused when the rapid development of American industry compelled the federal government to enter the field of industrial relations under the guise of the commerce power of the Constitution - a field which had traditionally been regarded as coming under the state police power. Immediately a number of cases involving the conflict between those two powers in the field of industrial relations arose. As yet, no satisfactory solution of this conflict problem has been found.

The purpose of this study is to point out the serious problems, as well as, consequences, especially in the field of industrial relations, that are the end products of the conflict between the interstate commerce power of the federal government and the police power of the several states. By way of background and introduction the early history and development of these powers will be given first. The author will then develop the conflict of these powers up to and after the famous Jones-Laughlin Decision¹ to show how the matter was and is now being handled by the Supreme Court of the United States. By way of conclusion, the author will, after having pointed out the serious problems to management and labor created by the conflict, show how he believes the conflict may be resolved with the result of more harmonious labor-management relations.

In the compilation of the materials for this thesis the decisions of the various state and federal courts, as well as numerous law articles, were largely relied upon. Some textbooks were used, but these, as the bibliography shows, were few in number.

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1. Handed down by the Supreme Court of the United States in 1937, 301 U.S. 1 (1937) National Labor Relations Board v Jones-Laughlin Steel Company.

CHAPTER II

THE POLICE POWER OF THE STATES

A. Historical Development and Early Use of the Power

The term "police power" first originated in the case of *Brown v Maryland*² in 1827. It was used by Chief Justice Marshall when he said: "The power to direct the removal of gunpowder is a branch of the police power which unquestionably remains and ought to remain with the states." The authority connotated by the term originated, however, in the Constitutional Conventions. The framers of the Constitution had a peculiar situation. They had the task of uniting thirteen distinct sovereignties into a single nation. The states delegated their common interests to the national government and retained "residual sovereignty".³ It is this residual sovereignty of the states which is referred to in the phrase "police power".

The word "police" comes from a Greek word and means, among other things, public policy or the welfare of the state.⁴ The police power, while not conferred upon the states by the Constitution, nevertheless exists since it is an essential of the sover-

2. 12 Wheat. 419 (U.S. 1827)

3. The Growth and Development of the Police Power of the State, 20 Mich. Law Rev. 173 (1931)

4. Ely, Police Power, p. 207

eighty of the state. It is the element of sovereignty which gives force and effect to the purposes for which the state was created. It is not a new concept. "This phase of the law is as old as government itself. It was mentioned in the Institutes of Justinian and had its counterpart in the early English Common Law ***. As early as 1388, Parliament enacted a law which imposed a penalty for throwing animal filth into rivers and a law enacted in 1489 prohibited the slaughtering of cattle in cities. Auctioneers, millers, innkeepers, drovers, and ferry-keepers were regulated by law many centuries before the terms of this phase of the law became known to our legal system."⁵

This power of the state cannot be precisely defined. Some writers have called it the "dark continent of American jurisprudence", "the convenient repository for which our juristic classification can find no other place", "the indefinite supremacy of the state". It is in any case a positive and far-reaching power. Professor Freud states that it means the power to promote the public welfare by means of compulsion and restraint over the use of liberty and property. Mr. Justice Holmes defined the power as follows: "Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State

5. The Nature and Implications of the Police Power, 6 Kansas City Law Rev. 128 (1938)

in the exercise of these powers ***."6 An oft quoted definition of the power is that of Mr. Chief Justice Shaw: "Rights of property, like other social and conventional rights, are subject to reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power, vested in them by the Constitution, may think necessary and expedient."7 These are usually regarded as satisfactory explanations of the power and it is uniformly conceded that it is subject only to the Due Process Clause of the Fourteenth Amendment.

The power is the constitutional basis of state legislation to promote the health, safety, morals and general welfare of the community. However, such legislative exercise has been of rather recent origin in the United States. One need but look at early American history to discover the reason for this. In this period of our national history the "individualistic" doctrines of Adam Smith and Herbert Spencer dominated political and legal thinking. The populations of the cities were small and the people were generally devoted to agricultural pursuits. The prevailing public opinion was to let every man find his own life, liberty and pro-

6. *Lochner v New York*, 198 U.S. 45, 55 (1905).

7. *Commonwealth v Alger*, 7 Cush. (Mass.) 55, 85 (1851)

erty, and seek protection for them as best he could, with the least interference from the state. They were days of the "hands-off" policy which was conducive to the rapid expansion of business and the exploitation of the national resources. The sentiments of business, "the public be damned", "all the traffic will bear" and "caveat emptor" were met with indifference rather than a call for government regulation. If justice or property couldn't be had in the established society it was an easy matter for the individual to move West where fresh lands begged for cultivation and offered unbounded freedom. The courts reflected this attitude by giving a strict and limited construction to the concept of police power. Thus in *Vanhorne's Lessee v Darrance*⁸ the court remarked: "**** no one can be called upon to surrender or sacrifice his whole property real or personal, for the good of the community without recovering compensation in value."

Conditions slowly began to arise which demanded redress. Business had, due to the over-emphasis of individualism, grown to disregard the public welfare. Redress was sought through the police power since the free lands began to disappear and urban life and factory conditions made protective legislation imperative.⁹

8. 2 Dal. 304, 1 L. Ed. 391 (1795)

9. See: What is Meant by the Police Power?, 12 Neb. Law Rev. 208

However, the use and application of the power was a slow and tedious process. Chief Justice Taney, as the successor of Chief Justice Marshall in the Supreme Court, established the solid ground upon which the police power was to rest. He favored a liberal interpretation of this power of the states, and gave judicial recognition to it in 1837,¹⁰ and again in 1847.¹¹ He defined the power for the state courts. "What are the Police Powers of a State? They are nothing more than the powers of government inherent in every sovereignty to the extent of its dominions, that is to say, the power to govern men and things within the limits of government." The states began to become aware of the need for the exercise of the power as public demand for legislation began to increase. The sale of liquor was one of the first private enterprises to fall under government control in the interests of the public.¹² This power of regulation soon began to extend in other directions.¹³ A New Hampshire statute which delegated the regulation of quasi-nuisances to municipalities was sustained in 1855. The high court of the state in commenting on the police power of the state legislature had this to say:¹⁴ "The legislature may well determine that an instrument which tends to facilitate vicious practices (in this case bowling alleys) is of itself an evil and ought to be prohibited."

10. *Miln v New York*, 11 Pet. 102 (U.S. 1837)

11. *License Cases*, 5 How. 504, (U.S. 1847)

12. *Byers v Olney*, 16 Ill. 35 (1854); *King v Jacksonville*, 2 Seam. 305 (1840)

13. *Commonwealth v Lewisbury*, 11 Met. 55 (Mass. 1848); *Commonwealth v Alger*.

14. *State v Noyes*, 10 Foster 279, (N. H. 1855)

While the scope and application of the power broadened little for the two next decades, its potentialities came to be realized. In 1876, Chief Justice Waite in the Granger Cases¹⁵ laid the foundation of state regulation of business affected with a public interest when he said: "For the protection of abuses by legislatures the people must resort to the polls, not to the courts." This position established the view that the police power of the state had to be used more and more if the health, safety, morals and general welfare of the people were to be protected and maintained. The Chief Justice also laid down the police power as an axiom of constitutional law when he declared: "When one becomes a member of society, he necessarily parts with some rights and privileges which, as an individual unaffected by his relations to others, he might retain***. This does not confer power upon the whole people to control rights which are purely and exclusively private, but it does authorize the establishment of laws requiring each citizen to so conduct himself, and to so use his property, as not unnecessarily to injure another. This is the very essence of the maxim, *sic utere tuo alienum non laedas*. From this source comes the police powers,"¹⁶

This approval by the courts of the exercise of the police power by the state legislatures, for the protection of the general welfare, gave the necessary impetus to the states to act.

15. *Munn v Illinois*, 94 U.S. 113 (1876)

16. *Ibid*, (*Sic utere tuo etc.* - "Enjoy your own property in such a manner as not to injure that of another.")

Public pressure for such action became greater and greater as the rapid industrialization of the country progressed. The new economic and social repercussions of this second industrial revolution created many new problems which demanded legislative action. The courts were forced to interpret the police power of the states more in keeping with the needs of the period, as a result the use of private property became more restricted. Some examples of the application of this power, which have been upheld by the courts, should illustrate the development and extent to which the concept of the police power has grown. It has been held a valid exercise of the police power to provide for the inspection of railroad tank cars;¹⁷ to prohibit smoking in crowded halls in order to preserve pure and fresh air therein;¹⁸ to permit the flooding of lands in order to create a pond for fish culture;¹⁹ to levy an assessment against persons keeping dogs in order to discourage the keeping of these animals;²⁰ to prescribe the weight and quality of loaves of bread;²¹ to limit the height of buildings in order to preserve public safety;²² to require water to be furnished to each floor of every tenement house in order to preserve public health;²³ to regulate the practice of medicine

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17. *Willis v Standard Oil Company*, 50 Minn. 290
 18. *State v Heidenhain*, 42 La. Ann. 483
 19. *Turner v Nye*, 154 Mass. 579
 20. *Wilton v Weston*, 48 Conn. 325
 21. *Chicago v Schmedinger*, 243 Ill. 167
 22. *Welch v Swasey*, 193 Mass. 364
 23. *Health Dept. of N.Y. v Trinity Church*, 145 N.Y. 32

and the training of practitioners;²⁴ to forbid the location of livery stables in thickly populated areas;²⁵ to prohibit the carrying of concealed weapons.²⁶

B. Labor and the Police Power.

We have shown how public opinion demanded that the various state legislatures enact measures designed to meet the economic and social problems created by the rapid expansion of business and the increased growth of the cities and towns. Business in its reaction to the police power legislation enacted to meet these new conditions sought defenses that could be imposed. The most prominent and constitutionally sound limitation was that of the Due Process Clause. This defense came to rest upon solid ground in 1894 in the form of the case of *Reagan v Farmers Loan and Trust Company*.²⁷ The case involved railroad rates and the Supreme Court held that since the rates resulted in unjust discrimination the state statute violated the Due Process Clause and the law was unconstitutional. It was this same defense, but in a more specific sense, that business was to use as a defense against labor laws passed under the state police power.

In considering these labor statutes the discussion will be limited to such employer-employee problems as hours of work,

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- 24. *Dent v West Virginia*, 129 U.S. 114
 - 25. *Reinman v Little Rock*, 273 U.S. 1717
 - 26. *Orriek v Akers*, 109 Mo. App. 662
 - 27. 154 U.S. 362 (1894)

working conditions, minimum wages and methods of payment. While these employer-employee problems are not the only ones that have come in for regulation under the police power, they are, it is believed, the most important ones.

The limitation or hurdle which business caused to be placed before any state legislation dealing with wages, hours or working conditions was the principle of "liberty of contract" which is contained in the Due Process Clause. The courts, for the most part, seemed to share the social and economic ideas of business and accordingly permitted this defense. Dean Pound in his article "Liberty of Contract" written in the Yale Law Journal of 1909 in discussing the laissez faire attitude of the courts of the nineteenth and early twentieth centuries has this to say about the defense of "liberty of contract": "legislation designed to give laborers some measure of practical independence and which, if allowed to operate, would have put them in a position of reasonable equality with their masters, is said by the courts, because it infringes on a theoretical equality, to be insulting to their manhood and degrading, to put them under guardianship, to create a class of statutory laborers, and to stamp them as imbeciles."²⁸ In one of the first cases²⁹ presented to the Supreme Court involving a labor statute the Court clearly enunciated

28. As quoted in "The Police Power in American Constitutional Law".

29. 1 J. Comp. Leg. 160 (1914)

this liberty of contract restriction on the state police power when it declared: "The right to make contracts with relation to his business is part of liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. This includes the right to purchase and sell labor."³⁰

In the discussion that follows it will be well to keep this attitude of the Court in mind.

1. Hours of Work Laws.

The early statutory regulations of hours of work concerned women and children. One of the first of these was the Massachusetts statute of 1876 which limited the employment of women and children, under eighteen, engaged in manufacturing to sixty hours per week. The Massachusetts high court upheld the law.³¹ In the period that followed up to 1910 the treatment given to this problem was a matter of preference for the individual state.³²

In 1910 the question of the constitutionality of such state laws was placed before the Supreme Court in *Muller v Oregon*.³³ The Court brushed aside the liberty of contract argument. It stated that since the physical structure and performance of maternal functions places women at a disadvantage in the struggle

30. *Lochner v New York*, Supra, 45 (1905); See also *Atkins v Children's Hospital*, 261 U.S. 525 (1923)

31. *Commonwealth v Hamilton Mfg. Co.*, 120 Mass. 383 (1876)

32. Upheld: *Winham v State*, 65 Neb. 934 (1902); *State v Buchanan*, 29 Wash. 802 (1902)

Void: *Burcher v People*, 41 Colo. 495 (1907); *People v Williams*, 189 N.Y. 131 (1907)

33. 206 U.S. 412, (1910)

for subsistence that her material well being is an object of public interest and as such is a valid subject of the state police power. The liberty of contract doctrine never presented a serious obstacle to the regulation by the states of the hours of work for women, and the law appears to be settled on the point. The matter of hours of labor for children has always been a valid subject of the police power of the state since it never presented any real constitutional difficulties. Perhaps the best known case on the point is *State v Shorey*³⁴ which involved an Oregon statute. The Oregon Court followed the Common Law attitude toward children and declared: "They are wards of the State and subject to its control. As to them the State stands in position of *parens patriae*, and may exercise unlimited supervision and control over their contracts, occupations, and conduct and the liberty and right of those who assume to deal with them. This is power which inheres in government for its own preservation and for the protection of the life, person and health and morals of its future citizens."

It is in regard to the regulation of the hours of work for adult male workers that the liberty of contract of principle was used most effectively. This old freedom of contract argument was long considered a matter of right in such cases. The Supreme

34. 86 Pac. 881 (1906)

Court in 1898 did, however, help to modify this defense.³⁵ The case involved a Utah statute which limited the hours of work in underground mines to eight per day. The Court declared that the health of the miners was a sufficient social interest to uphold the law. With one exception³⁶ this decision caused the state courts to fall in line.³⁷ However, the liberty of contract doctrine was not dead. In 1905 the Supreme Court held that the hours of labor of bakers in New York state were not subject to police power regulation.³⁸ The state courts were thrown into confusion since it appeared the particular occupation involved must be considered. Fortunately, the Court assumed a more liberal attitude as to the validity of the liberty of contract argument so that in 1917 when the validity of an Oregon statute was challenged, it upheld the statute.³⁹ The Oregon law limited the hours of labor in any mill, factory or manufacturing establishment to ten hours per day. It is now safe to assume that hours of work may be regulated under the police power of the state.

2. State Minimum Wage Laws.

The enactment of state minimum wage laws has been restricted

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- 35. Holden v Hardy, 169 U.S. 366 (1898)
 - 36. In re Morgan, 58 Pac. 1071 (1899) (Colorado)
 - 37. Commonwealth v Beattie, 115 Pac. Super 5 (1900); State v Buchanan, 39 Wash. 602 (1902); Wenham v State, 65 Neb. 394 (1902) State v Cantwell, 174 Mo. 245 (1903)
 - 38. Lochner v N. Y., Supra 45 (1905)
 - 39. Bunting v Oregon, 243 U.S. 426 (1917)

to women. To the American mind state regulation of men's wages were repugnant. In regard to the social necessity of such legislation there can be no doubt that the wages a woman receives bear a direct relation to the food she eats, the clothes she wears, the medical attention she receives when sick and in general to her morals and general welfare. The first minimum wage law for women wasn't passed until 1912 and it was a Massachusetts statute. The next year eight other states followed suit.⁴⁰ One of the best arguments favoring such legislation as a police measure was that of the Oregon Supreme Court in 1914:⁴¹ "that the court cannot say, beyond all question that the act is a plain, palpable invasion of rights secure by the fundamental law, and has no real or substantial relation to the protection of public health, the public morals, or public welfare. Every argument put forward to sustain the maximum hours law, or upon which it was established, applies equally in favor of the constitutionality of the minimum wage law as also within the police power of the state and as a regulation tending to guard the public morals and the public health***." This decision of the Oregon Court was appealed to the Federal Supreme Court,⁴² and was in effect upheld since Justice Brandeis did not sit and a 4 to 4 tie resulted. However, six years later the matter came up again before the Court.⁴³

40. Calif, Colo, Minn, Neb, Ore, Utah, Wash, & Wis.

41. Stettler v O'Hara, 69 Ore. 519 (1914)

42. Stettler v O'Hara, 243 U.S. 629, (1917)

43. Atkins v Children's Hospitals, Supra 525 (1923)

This time a minimum wage law for women passed by Congress for the District of Columbia, under its local police power, was involved. The Court while conceding that there was no such thing as absolute freedom of contract stated that nevertheless, freedom of contract is the general rule, and restraint the exception. It then proceeded to declare the statute void on the ground that the ancient inequality of the sexes, other than physical, had decreased to the vanishing point. As to the physical inequality of women, the Court did not much concern itself, but was satisfied to rest its decision on the argument that selling labor is like selling goods, the parties are entitled to the right of freedom of contract. This "liberty of contract" doctrine in the field of minimum wage laws of women persisted until 1936. In that year the Supreme Court had before it a Washington State statute.⁴⁴ The Court abandoned the "liberty of contract" restriction and overruled the Atkins case. Chief Justice Hughes in writing the majority opinion had this to say: "The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. *** The community is not bound to provide what is in effect a subsidy for unconscionable employers."

44. West Coast Hotel v Parrish, 300 U.S. 379 (1936)

As a result of that decision there can be no doubt that minimum wage laws for women are proper subjects of state police power. State statutes covering such laws for children are equally valid as police measures under the theory of *State v Shorey*.⁴⁵

3. Laws Governing Working Conditions and Wage Payment.

There remains to be considered the application of the state police power to the problems of working conditions and methods of wage payment. In the matter of working conditions *Holden v Hardy*⁴⁶ set the precedent for upholding such regulations as valid subjects of the state police power. In addition under the Common Law the employer had the duty of providing a reasonably safe place for his employees to work. As a result such statutes by state legislatures were but legislative declarations that certain practices are per se negligent, with the added sanction of criminal liability.⁴⁷ A few of the cases that came before the Supreme Court and the state courts will give an idea of the nature of such legislation. These statutes were all upheld. An Illinois statute requiring the appointment of inspectors for mines at the owner's expense;⁴⁸ and an Indiana statute requiring properties of coal mines and similar places to install proper washrooms at the re-

45. 86 Pac. 881 (1906)

46. 169 U.S. 366 (1898)

47. Police Power - Legislation for Health and Personal Safety,
42 Harv. L. Rev. 866 (1924)

48. St. Louis Consolidated Coal Co. v Illinois, 185 U.S.
203 (1902)

quest of their employees;⁴⁹ a Michigan law requiring blowers to carry dust from emery wheels;⁵⁰ a Maryland statute prescribing at least four hundred cubic feet of air for each employee in manufacturing plants;⁵¹ a Kentucky statute requiring street car companies to provide stools for motormen.⁵² In the field of railroad transportation the Supreme Court in 1911 upheld the so-called state "full crew laws" requiring a given number of men for the operation of freight trains.⁵³ A 1913 law of Arkansas which required not less than three helpers in switch crews in yards located in cities of the first and second class were similarly upheld by the Court.⁵⁴ Where these laws have a reasonable relationship to the increased safety of railroad operation there has been no question of constitutionality.⁵⁵

The method and time of payment of wages has been a battleground of many a bitter constitutional contest in the courts. The police power of the state as authority for the regulation of such matters has been met with the contention that such regulations are unconstitutional as arbitrary restrictions of "liberty of contract". The problem arose principally in the mining occupation and in the early treatment of this problem the courts were

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- 49. Booth v Indiana, 237 U.S. 391 (1915)
 - 50. People v Smith, 108 Mich. 527 (1896)
 - 51. Maryland v Hyman, 57 Atl. 6 (1904)
 - 52. Silva v Newport, 150 Ky. 781 (1912)
 - 53. C.R.I. & Pac Ry. v State of Arkansas, 219 U.S. 453 (1911)
 - 54. Missouri Pacific R.R. v Norwood, 283 U.S. 249
 - 55. Pennsylvania R.R. Co. v Driscoll, 336 Pa. 310 (1939)

prone to hold such state legislation void. They could not see what there was in the conditions of the laboring man in mines to disqualify him from contracting in regard to the price or mode of determining the price of his toil.⁵⁶ This so-called liberty of the laborer to contract for his services as he saw fit, which liberty the courts sought to protect, was the very thing against which he needed protection. Laws prohibiting payment in store orders,⁵⁷ from selling merchandise and supplies to employees at a greater percentage of profit than to others were accordingly declared void.⁵⁸ The Supreme Court, however, did not share the state courts strict "liberty of contract" view, at least not in respect to state statutes of this type. In 1901 it established the constitutionality of such police power measures. The case⁵⁹ involved a statute of the state of Tennessee which required the redemption in cash of store orders and other evidences of indebtedness issued by employers in payment of wages due employees. The court, citing *Holden v Hardy*⁶⁰ in support, said: "the right to contract is not absolute in respect to every matter, but may be subjected to the restraints demanded by the safety and welfare of the State and its inhabitants***." This decision was followed

56. See *Millett v People*, 117 Ill. 294, 302-303 (1866)

57. *Godcharles v Wegeman*, 113 Pa St. 431 (1886)

58. *State v Coal and Coke Co.*, 33 W. Va. 188

59. *Knoxville Iron Co. v Harbinson*, 183 U.S. 13 (1901)

60. 169 U.S. 366 (1898)

by others upholding anti-script laws,⁶¹ the regulation of time of payment of wages from two to four times monthly and payment on discharge,⁶² anti-screen laws or run-of-the-mine laws⁶³ and laws invalidating assignment of future wages, except under certain conditions.⁶⁴

4. Summary

We have seen from the discussion above how the old notions of absolute protection of liberty of contract have been discarded and facts of an economic and social nature considered in arriving at judicial decisions. How fictions about the invasion of the rights of the working man have been abandoned. The present position of the Supreme Court in regard to the judicial scrutiny to which such police power statutes of the states are now subjected is perhaps best illustrated by a few quotations from recent decisions: "We are not concerned, however, with the wisdom, need or appropriateness of the legislation."⁶⁵; "Nothing can be less helpful than for the courts to go beyond the extremely limited restrictions (of) the constitution***."⁶⁶; "Those matters *** related to questions of policy, to the wisdom of the legislation, and to the appropriateness of the remedy chosen - matters which

61. Johnson Lytle Co. v Spartan Mills, 68 S.C. 339 (1904);

Keokee Coal Co. v Taylor, 234 U.S. 224 (1914)

62. Lawrence v Rutland R.R. Co., Vt. 370 (1917); Arkansas Stove Co. v State, 94 Ark. 27 (1910)

63. McLean v Arkansas, 211 U.S. 539 (1909); Rail Coke Co. v Ohio Ind. Comm., 236 U.S. 338 (1915)

64. Mutual Loan Co. v Martell, 222 U.S. 225 (1911)

65. Wisconsin v J. C. Penny Co., 311 U.S. 435, 445 (1940)

66. Sunshine Anth. Coal Co. v Atkins, 310 U.S. 381, 394 (1940)

are not for our concern."⁶⁷; "All these are questions of policy not for us to judge."⁶⁸; "The wisdom of such a policy - its efficacy to achieve the desired ends - is of course not our concern."⁶⁹ Thus it can be said that the authority of the states to regulate such matters under its police power is no longer the subject of controversy.

67. Osborn v Ozlin, 310 U.S. 53, 66 (1940)

68. Mayo v Lakeland Highlands Canning Co., 309 U.S. 176, 189 (1940)

69. McCarroll v Dixie Greyhound Lines, 309 U.S. 176, 189 (1938); Polk v Glover, 305 U.S. 5, 16 (1938); Indiana v Brand, 303 U.S. 95, 117 (1938)

CHAPTER III

THE COMMERCE POWER

The Tenth Amendment to the Federal Constitution declares that "the powers not delegated to the United States by the Federal Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people". Article I, Section 8 of the Constitution declares the following: "The Congress shall have the power *** to regulate commerce with foreign nations, and among the several States *** and *** to make all laws which shall be necessary and proper for carrying into execution that power ***." It is from these two declarations that the Congress has derived the power to regulate interstate and foreign commerce. This paper is concerned only with commerce of an interstate nature, since it is generally conceded that the power of Congress over foreign commerce is absolute.

The nature, scope and extend of the power of Congress over interstate commerce has long been a topic of lively discussion and speculation. It is not the purpose of this chapter, but, rather the chapters that follow to attempt to show how this power of Congress developed and matured through the years. For the present our concern shall be with the less controversial as-

pects of the interstate commerce power. Accordingly, this chapter shall discuss the use of the power by Congress: to promote and protect interstate commerce; to prohibit the use of the channels of interstate commerce to injurious commodities and illicit transactions; and to prohibit the use of the channels of interstate commerce for the violation of State police regulations.

A. The promotion and Protection of Interstate Commerce.

1. Safety Appliance and Hours of Work Laws.

It is natural that the power of Congress over interstate commerce should be used to pass regulations designed to protect from destruction, loss or damage the lives, limbs and property of persons concerned in the process or transactions of such commerce, whether as passengers, shippers or employees. While as early as 1838 laws were requiring the installation of safety devices upon steam vessels,⁷⁰ it wasn't until 1887 that Congress tackled the problem of regulating land transportation. It was in this year that the Interstate Commerce Act was passed.⁷¹ The Act grew out of the chaotic conditions in interstate railroad transportation then existing and was designed primarily for the protection of the shipper and the public. In 1893 Congress began to enact a comprehensive set of safety regulations applicable to interstate railroads. The first of these acts was the Automatic Coupler

70. Act of 1838, 5 Stat at L. 304; Act of Mar. 1843, *ibid*, 626

71. Act of Feb. 4, 1887, ch. 104, 24 Stat at L. 379

Act,⁷² which has been supplemented by other laws requiring, among other things, the use of ash pans⁷³ on locomotives, the inspection of boilers,⁷⁴ and the use of ladders, handbrakes, draw bars, and similar devices on cars.⁷⁵ To the same general purpose are the statutes requiring railroads to make full reports to the Interstate Commerce Commission regarding all accidents.⁷⁶ We find similar regulations have been passed in respect to motor vehicle carriers on the interstate highways of the nation.⁷⁷ A statute of 1913 protects interstate commerce from another type of loss by making it a criminal offense to unlawfully break the seals of railroad cars containing interstate or foreign shipments.⁷⁸

That these statutes designed to insure the physical safety of interstate commerce are within the power of Congress to regulate that commerce is so obvious that the Supreme Court has never been called upon to decide a case in which it was squarely contended that acts of this kind were not natural and legitimate regulations of commerce. Indeed if the power to regulate commerce does not include the power to make reasonable rules to secure the physical safety of lives and property of travelers, shippers and

72. Act of March 2, 1893, 27 Stat at L. 531.

73. Act of May 30, 1908, 35 Stat at L. 476

74. Act of February 17, 1911, 36 Stat at L. 913 & Mar. 4, 1915, 38 ibid 1192

75. Act of April 14, 1910, 36 Stat at L. 298

76. Act of May 6, 1910, 36 Stat at L. 351

77. Motor Carrier Act of 1935, 49 Stat 543.

78. Act of February 13, 1913, 37 Stat at L. 670. Upheld in *Morris v U.S.* 1916 229 Fed 516

employees, it may well be inquired what conceivable kind of commercial regulations could be regarded as legitimate.

In 1907⁷⁹ Congress stepped in to regulate the hours of work of trainmen engaged in interstate railroad transportation. The purpose of the Act was to reduce railroad accidents caused by the fatigue of long hours of work. It was made unlawful to employ a trainman for a period longer than sixteen consecutive hours and definite rest periods were required in every twenty-four hours. The law also covered train dispatchers and telegraphers with more favorable provisions. It is important to distinguish the Hours of Service Act from the Adamson Act⁸⁰ of 1916. In the former the purpose of the Act was clearly to promote the safety of interstate commerce on railroads while the purpose of the Adamson Act was to avert a national strike on the railroads by granting ten hours pay for eight hours work. The Supreme Court upheld the Adamson Act as emergency legislation.⁸¹ Hence, while the validity of the Hours of Service Act cannot be seriously questioned since it is a safety regulation,⁸² there is some doubt if the Adamson Act is within the Due Process Clause of the Fifth Amendment.

2. Employer Liability Cases and Full Crew Laws.

79. Hours of Service Act, Mar. 4, 1907, 34 Stat at L. 1415.

80. U.S. Laws, 1916 C. 436

81. See *Wilson v New*, 243 U.S. 332 (1917)

82. See *Baltimore & O. R.R. Co. v Int. Com. Comm.* 221 U.S. 612 (1911)

Congress, in attempting to remove the unjust and oppressive burdens which the Common Law doctrines of employers' liability had placed on injured workmen, passed the first Employers' Liability Act in 1906.⁸³ The Supreme Court declared the Act unconstitutional⁸⁴ on the grounds that the Act included employees of interstate carriers even when such employees were not themselves engaged in any of the processes of interstate commerce. Congress remedied this defect in passing a second statute⁸⁵ which was held valid in the Second Employers' Liability Cases.⁸⁶

In the first Employers' Liability Cases the Supreme Court reasoned that the power of Congress to regulate interstate commerce did not include the power to regulate the relations between a master and his servants. In 1908 the Court in *Adair v United States*⁸⁷ had declared unconstitutional a statute which forbade interstate carriers to discharge any employee because he belonged to a labor union. The Court contended: "there is no such connection between interstate commerce and membership in a labor organization as to authorize Congress to pass such a law! Hence, in the Second Employers' Liability Cases the government counsel argued that the purpose of the Act was to promote and protect in-

83. June 11, 1906, 34 Stat. at L. 232

84. *Employer Liability Cases*, 207 U.S. 463 (1908)

85. April 22, 1908, 35 Stat. at L. 65

86. 225 U.S. 1 (1912)

87. 208 U.S. 161 (1908)

terstate commerce. On this basis the Act was upheld.

3. Federal Regulation of Labor Relations in the Railroad Industry.

Congressional legislation during the period had not been directed against specific abuses of railroad companies in their dealing with employees as had been the case in the Employers' Liability Cases. As early as 1888, Congress had enacted a law which attempted to govern labor disputes in the railroad industry. The law was limited to railroad employees of the transportation division. And while the Act provided for voluntary arbitration and strike investigation boards to be appointed by the President, it was not used except for the appointment of a board of investigation by President Cleveland during the Pullman Strike in 1894.

In 1898, as the result of much agitation, Congress passed the Erdman Act. It provided for mediation of railroad labor disputes by the chairman of the Interstate Commerce Commission and by the Federal Commissioner of Labor. Voluntary arbitration was provided for with arbitration awards enforceable by court order, and there was to be no suspension of work for three months after the award was made. In addition it was made illegal for a railroad to discriminate against men for union membership. This latter prohibition was declared unconstitutional.⁸⁸ With the ex-

88. Adair v U.S. 208 U.S. 161 (1908)

ception of this case the Act was little used for the attitude of the Supreme Court caused the unions to refuse to make any import- and use of it. As a result Congress passed the Newlands Act in 1913, which amended the Erdman Act. The new Act was designed to remove the railroad unions objection to arbitration by one man. Arbitration was to be by two neutrals if the parties chose. In addition a permanent mediation board was established. The government took over control of the railroads in 1917 to insure their operation free of labor management controversies. The Railroad Administration ordered that there should be no discrimination against employees for union activity. It also set up three national adjustment boards to settle disputes arising out of the interpretation of agreements and the rules of the Railroad Administration. The boards were equally represented by employer and unions. They handled cases only after negotiations failed. The boards worked so well that the Railroad Administration recommended that they be continued after federal control ended.

The railroads were returned to private ownership and agitation arose again for machinery designed for more effective railroad peace. The result was the Transportation Act of 1920, also known as the Esch-Cummings Act, which included all railroad employees. Disputes not settled by agreement were, under the Act, to go to local or regional boards of adjustment which were to be

established by agreement. Appeal was to the Railroad Labor Board which was to have nine members, three from employers, three from unions, and three public members. The Board's decisions were not enforceable. The law failed because the railroads and unions could not get together and set up the adjustment boards. This failure caused the Railroad Labor Board to become bogged down with cases.

The railroads and the unions drew up a new law which was passed in 1926 as the Railway Labor Act. A Board of Mediation was set up. If it failed to settle a dispute it was to urge arbitration. Arbitration was voluntary, but awards were to be binding. If arbitration was refused work was not to be suspended during a thirty day notice period, or for ten days after the last conference, if the board took no action. Disputes which threatened to interrupt commerce were to be recommended to the President who could set up an emergency board of investigation. Suspensions of the status quo were illegal during the investigation and for 30 days after the investigation board had made its recommendations. The Act also prohibited discrimination against workers for union membership and made it the duty of the parties to exert every reasonable effort to reach agreements and settle all disputes in conference. To this end the parties were to designate representatives without interference from the other side.

This anti-discrimination clause was tested by the Railway Clerks union in an action against the Texas and New Orleans Railroad which refused to recognize the union.⁸⁹ The union charged the railroad with interfering with, influencing and coercing the clerical employees in their organization and designation of representatives for the purpose of collective bargaining. The railroad contended this provision of the Act violated the Due Process Clause of the Fifth Amendment, citing *Adair v U.S.*⁹⁰ and *Coppage v Kansas*⁹¹ as authority. The court brushed these cases aside. It went into the historical background of the Act discussing the reasons of Congress for making it a duty of the carriers and their employees to enter into agreements and upheld the power of Congress to prohibit the use of coercion by either party over the self-organization or designation of representatives by the others. The Court's reasoning being that this prohibition of coercion is the "essential of the statutory scheme" so "that agreements satisfactory to both may be reached and the peace essential to the uninterrupted service of the instrumentalities of interstate commerce may be maintained". Thus the right of employees to self-organization was established in the railroad in-

89. Texas and New Orleans R.R. v Brotherhood of Railway Clerks
281 U.S. 548 (1930)

90. 208 U.S. 161 (1908)

91. 236 U.S. 1 (1915)

dustry.

The railroad unions pressed their advantage for more definite rights and, despite management's opposition, got Congress in 1934 to pass an amendment⁹² to the Railroad Labor Act. The revised law not only compelled the creation of a national railroad adjustment board but gave a revamped mediation board power to hold collective bargaining elections, elections which were the death sentences of most company unions. It retained the 1920 and 1926 obligation to bargain collectively; this clause was still without any enforcement provision, but was more definite, for the parties had to agree on the time and place for meeting. Interference with self-organization rated criminal penalties. The law was held constitutional in *Virginia Railway v System Federation No. 40*.⁹³

Summary:

We have briefly traced the history and development of Congressional regulations designed to reduce labor-management difficulties in the railroad industry. The Supreme Court refused in the beginning to hold that such disputes could be alleviated by Congress through its power over interstate commerce. With the *Texas and New Orleans* and the *Virginia Railway* cases the court

92. The Railway Labor Act as Amended in 1934, 44 Stat 577,
48 Stat 1185

93. 300 U.S. 515 (1937)

conceded that labor legislation designed to protect and promote interstate railroad transportation was a valid exercise of the commerce power the same as the safety appliances and the Employers' Liability Act Cases were. There can be no doubt then that such legislation is appropriate for the regulation of interstate railroads.

4. Labor and the Anti-Trust Laws.

Let us turn now to a consideration of the power of Congress to pass regulations designed to prevent physical and economic obstructions or restraints of interstate commerce.

In the field of physical obstructions or interference to commerce the question of authority may be taken for granted. As early as 1833, the Supreme Court settled this point when it declared that "any offense which thus interferes with, obstructs, or prevents such commerce and navigation, though done on land, may be punished by Congress, under its general authority to make all laws necessary and proper to execute their delegated constitutional powers".⁹⁴

Regulations to prevent economic obstructions or restraints of commerce is a little more involved. It may be divided into two parts: combinations by management and combinations by labor.

94. U.S. v Combs, 12 Pit. 72 (U.S. 1833)

In 1890 Congress passed the Sherman Act.⁹⁵ The Act was designed to break up trusts, combinations and conspiracies in restraint of trade and so to protect and maintain the freedom of competition desirable in interstate commerce. In 1914 the Sherman Act was supplemented by the Clayton Act.⁹⁶ These Acts were aimed at business combinations and trusts.

While the litigation which has arisen under these Acts has been rather voluminous, and the courts have spent much time construing and applying them to various concrete situations which have come up, there seems never to have been any serious question raised as to the authority of Congress to pass laws designed to accomplish the results which these acts sought to achieve. Such constitutional objections as have been urged against these acts have been aimed at the details of method and procedure and not at the validity of the legislative object.

While Congress did not in express terms include labor unions within the coverage of the Sherman and Clayton Acts, nevertheless, they are couched in terms broad enough to permit the courts to apply their restraints and prohibitions to combinations of laborers. The Sherman Act makes combinations in restraint of trade or commerce illegal. Section six of the Clayton Act, in attempting

95. Act of July 2, 1890, 26 Stat at L. 207

96. Act of October 15, 1914, 38 Stat at L. 731

to exclude unions from the coverage of the Sherman Act, states that the labor of a human being is not a commodity of commerce.

In the Danbury Hatters case in 1908⁹⁷ the Supreme Court upheld an award of triple damages against the Hatters union for conducting a secondary boycott which ruined their employer's business. The court holding the union's action constituted a conspiracy within the meaning of the Sherman Act. The Clayton Act provided no protection to the unions, though its purpose was to exclude them from coverage under the Sherman Act. In 1921 the Duplex case⁹⁸ ruled that the conduct of the union in conducting a secondary boycott against an employer's presses was a conspiracy within the meaning of the Sherman Act. This case was followed by the Bedford Stone case⁹⁹ which was decided the same way. The trend, however, was towards holding secondary boycotts lawful as reflected in 1939 in Wilson v. Birl.¹⁰⁰ The court said in speaking of the Clayton Act "The language would appear to differentiate labor unions from trade combinations and to exclude them from the operations of the Act". The court then discussed the fact that the decisions had ignored this construction, but that the Norris-LaGuardia Act was adopted to prevent the continuance

97. Loewe & Lawlor, 252 U.S. 522 (1915)

98. Duplex Printing Press Co. v Deering 254 U.S. 443 (1921)

99. Bedford Cut Stone Co. v Journeyman Stone Cutters 274 U.S.
37 (1927)

100. 105 F (2d) 948 (1939)

of such a construction.

The Sherman-Clayton Act was similarly applied against strikes by unions. The Supreme Court in the Second Coronado Case,¹⁰¹ decided the strike of the union had for its primary purpose to restrain interstate commerce and was therefore a violation of Anti-Trust Laws. This matter of strikes being illegal as restraints of interstate commerce was settled in 1940 in the Apex case.¹⁰² The Court held that in order to violate the Sherman Act the combination or conspiracy must in purpose or effect be to control the market of a commodity. In other words unless the union conspired with management to restrain or effect control over a commodity in interstate commerce the union could not be said to have violated the Sherman Act. This case was followed by United States v Hutchinson¹⁰³ which involved the indictment of a union member for violating the Anti-Trust Laws. Since the union had acted alone and in its own interests the indictment was dismissed.

Summary:

It may be said in view of the above decisions that the Sher-

101. 268 U.S. 295 (1925)

102. Apex Hosiery Co. v Leader 310 U.S. 469 (1940)

103. 61 Sup. Ct. 463 (1941); See also Allen-Bradley Co. Etal. v Local Union No. 3, International Brotherhood of Electrical Workers, Etal., 325 U.S. 797 (1944). Where a union conspired with an employer to restrain interstate commerce for the mutual benefit of the parties there has never been any doubt that such a conspiracy violated the Sherman-Clayton Acts. See U.S. v Bruns 272 U.S. 549 (1926)

man Clayton Act does not apply to labor unions except where they conspire or combine with management to restrain or control commodities in interstate commerce.

B. Congressional Restriction of the Channels of Interstate Commerce.

Congress has, under its power to regulate commerce, passed certain acts to exclude from such commerce articles which are harmful to public morals and to public health.

1. Lottery Act & Mann Act.

In 1895 Congress passed a law¹⁰⁴ aimed at the protection of public morals by excluding lottery tickets from interstate commerce. The constitutionality of the Act was passed upon by the Supreme Court in the Lottery case in 1903.¹⁰⁵

The court decided that lottery tickets are articles of commerce, and that their exclusion from interstate commerce is a proper exercise of the power to regulate that commerce. The court went into the menace of lotteries and argued the Congress by virtue of its plenary power to regulate commerce among the states "may provide that such commerce shall not be polluted by the carrying of lottery tickets". In the matter of obscene literature or pictures Congressional exclusion of such matter

104. Act of March 2, 1875, 28 Stat at L. 963

105. Champion v Ames, 188 U.S. 321 (1903)

dates back to 1842.¹⁰⁶ Penalties were enacted in 1897.¹⁰⁷ While the Supreme Court has never passed directly upon the constitutionality of this legislation, it has cited with approval the decision of a lower federal court which held it valid,¹⁰⁸ so that it can be said that the constitutional soundness of such legislation has passed into the realm of settled law. The use of the facilities of interstate commerce for immoral purposes was prohibited in 1910 when Congress enacted the Mann Act.¹⁰⁹ Here again while the Act was not designed to protect the safety and efficiency of interstate commerce the Supreme Court upheld the Act in 1913.¹¹⁰

2. Pure Food Act and Meat Inspection Act.

The enactments of Congress aimed at the exclusion from interstate commerce of instruments harmful to health include adulterated foods and drugs as well as diseased animals and sundry carriers of disease.

In 1906, Congress passed two comprehensive and far reaching statutes known as the Pure Food Act¹¹¹ and the Meat Inspection Act.¹¹² These acts were designed to stop the distribution and

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- 106. Act of August 30, 1842, 5 Stat at L. 562
 - 107. Act of February 8, 1897, 29 Stat at L. 562
 - 108. *Hake v U.S.*, 227 U.S. 308 (1913)
 - 109. Act of June 25, 1910, 36 Stat at L. 825
 - 110. *Hake v U.S.*, 227 U.S. 313 (1913)
 - 111. Act of June 30, 1906, 34 Stat at L. 718
 - 112. Act of June 30, 1906, 34 Stat at L. 674

sale of impure food and drugs insofar as it was within the power of Congress under its commerce power to do so.

The Pure Food & Drug Act was clearly aimed at protecting the health of the nation. The validity of the Act was disposed of by some of the lower Federal Courts by reference to the Lottery Case.¹¹³ The Supreme Court in touching on the Act seems to have assumed its validity rather than to have established it.¹¹⁴

The validity of the Meat Inspection Act has never been questioned before the Supreme Court.

3. Diseased Livestock Act.

In 1884 Congress prohibited the exportation or shipment in interstate commerce of livestock having an infectious disease.¹¹⁵ This Act was followed by one in 1903¹¹⁶ authorizing the Secretary of Agriculture to formulate regulations to prevent the spread of disease in foreign and interstate commerce. A 1905 Act¹¹⁷ authorizes the same official to lay an absolute embargo or quarantine upon all shipments of cattle from one state to another when public necessity demands it. The validity of such Acts, when applied to interstate commerce, has been tacitly assumed.¹¹⁸

113. Shawnee Milling Co. v Temple, 179 Fed 517 (1910; U.S. v 420 Sacks of Flour, 180 Fed 518 (1910); U.S. v 74 Cases of Grape Juice 181 Fed 629 (1910)

114. The Hepolite Egg Co. v U.S., 220 U.S. 45 (1911); McDermott v Wisconsin 228 U.S. 115 (1913)

115. Act of May 29, 1884, 23 Stat at L. 31

116. Act of February 2, 1903, 32 Stat at L. 791

117. Act of March 3, 1905, 33 Stat at L. 1264

118. As in Reid v Colorado, 187 U.S. 137 (1902)

4. Injurious Insect and Pest Act.

A law, similar to the Diseased Livestock Act, and relating to the exclusion from foreign and interstate commerce of certain types of moths, plant lice and other insect pests injurious to plant crops, trees and other vegetation was passed in 1905.¹¹⁹ The law was enlarged in 1912¹²⁰ and 1917.¹²¹ While this legislation had apparently gone unnoticed in the Courts, there can be no doubt as to the Congressional authority to enact it.

Summary:

Congress has, under its power to regulate commerce, the right to exclude from such commerce articles which are harmful to public morals and to public health.

C. Congressional Regulations in Aid of State Laws.

1. Historical Development of Problem - Liquor Cases.

The last phase of this chapter will deal with Congressional regulations enacted to ban the use of interstate commerce for the invasion or violation of State Police Regulations. The laws previously discussed in this chapter which excluded from interstate commerce articles or transactions which were deemed injurious to that commerce were regulations enacted by the Congress itself. The topic to be dealt with now concerns the power of the

119. Act of March 3, 1905, 33 Stat at L. 1269

120. Act of August 20, 1912, 37 Stat at L. 2315

121. Act of March 4, 1912, 39 Stat at L. 1165

States to exclude or regulate articles and transactions in interstate commerce. This topic is much more complicated than those previously discussed. This question arose at the start in connection with the interstate transportation of liquors. Intoxicating liquors and beers had long been regarded as legitimate subjects of interstate commerce.¹²² However, such liquors have long been regarded by some of the states as so harmful as to warrant the complete prohibition of their production, sale and even possession. The problem was a complex one. The states are not empowered to decide what commodities may or may not enter their domain since Congress alone may regulate interstate commerce. Yet the states should be allowed to decide if liquor may be used in the state or not since such is an important exercise of the police power. The steps in the development of this problem and the various efforts which Congress has made to solve it will be taken up in what follows.

The problem began in 1827 in the case of *Brown v Maryland*.¹²³ This case laid down the rule that goods imported from foreign countries do not become subject to the jurisdiction of the individual states as long as they remain in the original packages in which they were shipped and have not been merged in the gen-

122. *Louisville & Nashville R.R. Co. v Cook Brewing Co.*,
223 U.S. 70 (1912)

123. *12 Wheat (U.S.) 1827*

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eral mass of property of the state. In 1847 in the License Cases¹²⁴ the question was presented to the Supreme Court as to whether a state could prohibit or restrain by the requirement of a license the sale in the original package of liquor brought in from other states. The Court decided it could. There was no act of Congress which regulated the goods in question and hence the state statutes did not conflict with a law of Congress. The Court decided that the statutes in question of the States could be invalid only on the theory that the power of Congress to regulate interstate commerce was exclusive and precluded any state regulation on the same subject even though Congress had not yet exercised its power over it.

The question arose again in 1888 and the Supreme Court invalidated an Iowa statute which punished any railroad company for knowingly bringing into the state for any person any intoxicating liquors without a certificate that the consignee was authorized to sell them.¹²⁵ The Court held the statute to be an attempt to exercise "jurisdiction over persons and property within the limits of other states" and that even in the absence of conflicting federal legislation the state had no power to cause a break or interruption in that liberty of trade which Congress as

124. 5 How. 504 (U.S.) 1847

125. *Bowman v Chicago & Northwestern Ry. Co.*, 125 U.S. 465 (1888)

national policy declared to be free from restrictive regulations.

The case of *Leisy v Hardin*¹²⁶ which is commonly known as the Original Package Case was decided in 1890. This decision overruled the License Cases¹²⁷ by holding that even in the absence of congressional regulation on the subject, the police power of the state could not be exercised to prohibit the bringing of articles of commerce into the state and the selling of those articles in the original packages. An article of interstate commerce, the Court said, does not lose its interstate character until it has either been taken out of the original package or sold in that package and until it ceases to be an article in interstate commerce it is beyond the reach of the state police power.

In order to give the states effective control over the use of intoxicating liquor in their respective domains, Congress in 1890, gave the states the necessary permission to protect themselves against intoxicating liquors. The Wilson Act¹²⁸ provided that "intoxicating liquors *** transported into any state or territory or remaining therein *** shall upon arrival *** be subject to the operation *** of the laws of the state or territory enacted in the exercise of its police power *** in the same manner as though *** produced in such state or territory, and shall

126. 135 U.S. 100 (1890)

127. 5 How. 504 (U.S.) 1847

128. Act of August 8, 1890 11 S.C.R. 365

not be exempt therefrom by reason of being introduced therein in original packages or otherwise". The Supreme Court promptly sustained the constitutionality of the act in *In Re Rahrer*.¹²⁹ However in 1898, the Supreme Court in the case of *Rhodes v Iowa* interpreted the language of the Wilson Act that intoxicating liquors brought into a state shall be subject to the state police power "upon arrival" the word "arrival" means, not arrival at the state line, but arrival in the hands of the one to whom they were consigned, and until such arrival they were exempt from state control or interference.

Congress passed the necessary legislation in 1913 to cure the defect in the Wilson Act. The Webb-Kenyon Act,¹³¹ prohibited the shipment in interstate commerce of intoxicating liquors "intended, by any persons interested therein, to be received, possessed, sold, or in any manner used" in violation of the law of their destination. Thus Congress enabled the states to lawfully exclude intoxicating liquors from their borders by outlawing those shipments from interstate commerce and thereby depriving them of that federal protection from state regulation which articles of interstate commerce enjoy. The Webb-Kenyon Act was

129. 140 U.S. 545 (1891)

130. 170 U.S. 412 (1898)

131. Act of March 1, 1913, 37 Stat at L. 699

held constitutional in *Clark Distilling Co. v Western Md. Ry. Co.*¹³² The Court pointed out that under the doctrine of the *Lottery Case*¹³³ no doubt remained as to the power of Congress to exclude intoxicating liquors from interstate commerce altogether.

2. Other Instances of Federal Aid to State Laws.

The doctrine of congressional consent has been applied to many other situations. In 1902 Congress passed a law which divested oleomargarine of its interstate commerce character.¹³⁴ This law was sustained in *United States v Grien*.¹³⁵ And though the oleomargarine question has not been before the Supreme Court, the theory of the Webb-Kenyon Act surely applies here too, so that the authority of Congress to so legislate cannot be doubted. This congressional consent was extended to cover convict made goods in 1929 in the *Haves-Cooper Act*¹³⁶ and in 1935 in the *Ashurst-Sumners Act*.¹³⁷ These statutes were respectively upheld in *Whitfield v Ohio*¹³⁸ and *Kentucky Whip & Collar Co. v Illinois Central R.R.*¹³⁹ The Supreme Court, using the authority of *In Re Rahrer*¹⁴⁰ and the *Clark Distilling Co.*¹⁴¹ cases. Recently, 1945 Congress in the *McCanan Act*¹⁴² gave its consent to the states in

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- 132. 242 U.S. 311 (1917)
 - 133. *Champion v Ames*, Supra, 321 (1903)
 - 134. 32 Stat at L. 193
 - 135. 137 Fed 179 (1905)
 - 136. 45 Stat at L. 1084 (1929)
 - 137. 49 Stat at L. 494 (1935)
 - 138. 297 U.S. 431 (1936)
 - 139. 279 U.S. 331 (1937)
 - 140. 140 U.S. 545 (1891)
 - 141. 242 U.S. 311 (1917)
 - 142. 59 Stat at L. 33, 34 (1945) 44

the matter of taxing premiums of insurance policies written by foreign, but not domestic corporations. This statute was likewise upheld in Prudential Insurance Co. v Benjamin.¹⁴³

Summary:

Thus we have seen that Congress may, by an enabling statute, permit the states to exercise control over commodities and transactions in interstate commerce which they could not otherwise exercise under their police power. This is done by depriving these commodities or transactions of that federal protection from state regulation which articles and transactions of interstate commerce otherwise enjoy.

143. 66 Supreme Court 1142 (1946)

CHAPTER IV

THE SUPREME COURT, THE CONFLICT BETWEEN THE COMMERCE POWER AND THE POLICE POWER PRIOR TO THE JONES & LAUGHLIN DECISION

A. Early History and Treatment of the Conflict

The first judicial appraisal of the commerce power was made by the Supreme Court in 1824, in *Gibbons & Ogden*,¹⁴⁴ Chief Justice Marshall declared that the Commerce Clause comprehended "that commerce which concerns more states than one ***". The genius and character of the whole government seems to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government". Thus Marshall believed that the power over interstate commerce is not limited by the power over intrastate commerce retained by the states, but instead the powers of the states over intrastate commerce are limited by the power of Congress over interstate commerce, under the doctrine of federal supremacy whenever there is a conflict

¹⁴⁴. 9 Wheat. 1 (U.S. 1824)

between the two powers. Further, that no subject is withdrawn from the delegated powers of the United States by the fact that the same subject matter lies within the reserved powers of the states, or by the fact that the exercise of its power by the federal government may interfere with the power of the states.

Chief Justice Taney, who succeeded Mr. Marshall, as Chief Justice of the Supreme Court, took a much more limited view. He took it to be very clear that the mere grant of commerce power "cannot upon any just principles of construction, be construed to be an absolute prohibition of the exercise of any power of the same subject by the states".¹⁴⁵

Thus we see that the views of Marshall and Taney as to the scope of the Commerce Clause were different. Marshall felt the commerce power was exclusive; while Taney would restrict the commerce power to the exercise of the police power of the states except where state regulations came in conflict with a law of Congress.

The interpretation of the Commerce Clause was further interpreted in 1851 in the case of *Cooley v Board of Port Wardens*.¹⁴⁶ The Supreme Court followed Taney's view in part when it held that there might be a few matters like pilotage over which the police

145. *License Cases* 5 How. 504, 597 (U.S. 1847)

146. 12 How. 299 (U.S. 1851)

power of the states and commerce power of the federal government might be concurrent, yet where a matter was national in scope and needed one uniform method of regulation the commerce power of the federal government was an exclusive power. This continued to be the position of the Supreme Court until 1894. Prior to 1894, the decisions of the court had been of a negative character, that is, that of telling the states what they could not do under their police power.

In 1886 in the case of *Wabash, etc., Ry. v Illinois*¹⁴⁷ the Supreme Court decided that the regulation of the rates of interstate railroads was national in scope and that, therefore, the states had no power thereover even in the silence of Congress in reference to the matter. This marked the passing of the states' power over interstate commerce and came as a result of the nationalization of the United States and a change in the viewpoint of the Supreme Court as to the balance between state and federal power. The decision of *Wabash v Illinois* forced Congress to create the Interstate Commerce Commission.

In 1894, in the case of *Plumley v Massachusetts*,¹⁴⁸ the Supreme Court finally and definitely made another change in the

147. 118 U.S. 557 (1886)

148. 155 U.S. 461 (1894)

constitutional powers of the state and of the federal government over interstate commerce. The theory of Chief Justice Taney in the License cases¹⁴⁹ of the concurrent power of the states and the nation in the small area where this was obtained was not changed nor was the exclusive power of the federal government where the matter was national in scope and needed one uniform method of regulation changed, but it was established that where this exclusive power of the federal government came into conflict with the general police power of the states for the protection of the general social interests of the state, the states might exercise their general police power even though they thereby indirectly and incidentally regulated interstate commerce, provided Congress had not as yet passed any legislation which would supersede such legislation. This rule of *Plumley v Massachusetts* has continued to be the rule on this point up to the present time.¹⁵⁰

However, a more difficult problem was that of the regulation by Congress under the commerce power of purely intrastate activities. The problem first arose in the matter of intrastate railroad rates. In this connection the Supreme Court has decided that where an intrastate transaction is a direct burden upon in-

149. 5 How. 504 (1847)

150. *Kelly v Washington*, 302 U.S. 1 (1937); *Maurer et al v Hamilton*, 309 U. S. 598 (1940)

terstate transportation, the power of Congress to legislate or control such intrastate transactions will be upheld. This is the doctrine of the Shreveport¹⁵¹ and the Minnesota Rate Cases.¹⁵² This federal authority over intrastate carriers may be extended to the regulation of hours of employees of interstate carriers who are engaged in purely intrastate activities¹⁵³ or to interstate employees engaged in intrastate work connected with the movement of interstate trains.¹⁵⁴ Intrastate trains were subject to federal safety appliances legislation because of the danger to interstate traffic on the same rails if they were not.¹⁵⁵ In 1930 it was held that a carrier could be restrained from interfering with the rights even of railway clerks, intrastate employees, to chose their own representatives for collective bargaining.¹⁵⁶ These cases were important because they established the principle that the power to regulate interstate commerce is the power to protect it against injury from any source. But, since they related to railroads they are too easily distinguishable on their facts to be persuasive in cases involving control of non-transportation industries. It is to a consideration of these non-transportation industries and their relation to inter-

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- 151. Houston & Texas Ry. Co. v U.S. 234 U.S. 342 (1914)
 - 152. 230 U.S. 352 (1913)
 - 153. Houston & Texas Ry. Co. v U.S. 234 U.S. 342 (1914)
 - 154. Baltimore & Ohio R.R. V I.C.C. 221 U.S. 612 (1911)
 - 155. Southern Ry. v U.S. 222 U.S. 20 (1911)
 - 156. Texas & New Orleans RR & Brotherhood of Ry. Clerks
281 U.S. 548 (1930)

state commerce that we now turn. These are the cases in which the obstructions to interstate commerce are not direct, as in the railroad cases, but are indirect.

B. "Stream or Flow" of Commerce Doctrine.

This regulation by Congress of non-transportation industries which indirectly obstructed commerce was known in its inception as the "stream" or "flow" of commerce doctrine. It was established by Justice Holmes in 1905 in the case of *Swift & Co v United States*.¹⁵⁷ This case involved a combination of meat packers who sought to control the price of livestock. Against the contention that since the practices took place within a single state and hence not subject to federal regulation, Justice Holmes, writing for the majority of the Court, said: "****commerce among the states is not a technical conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another and when in effect they do, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is but part and incident of such commerce". This case was followed by *Stafford v*

157. 196 U.S. 375 (1905)

Wallace¹⁵⁸ which was decided in 1922 and upheld the Packers & Stockyards Act. The court finding that while the livestock came to rest in the stockyards, such rest was of a temporary nature, or the court said, a "throat" through which the current of commerce flowed and so the transactions which there occurred could not be separated from interstate commerce. The halt was merely to create a change of title and did not stop the flow. Applying the doctrine of *Stafford v Wallace* the court sustained the Grain Futures Act of 1922¹⁵⁹ with respect to transactions on the Chicago Board of Trade, although these transactions were "not in and of themselves interstate commerce". Congress had found that they had become "a constantly recurring burden and obstruction to that commerce".

However, in the matter of the production and manufacture for interstate commerce the Supreme Court took an entirely different view as to whether interference with such a matter constituted an obstruction to the flow of such commerce. As early as 1852 in *Veazie v Moor*¹⁶⁰ the Supreme Court had declared that production for interstate commerce was not subject to congressional regulation. "Nor can it be properly concluded, that because the products of domestic enterprise in agriculture or manufacture,***, may ultimately become the subjects of foreign commerce, that the

158. 258 U.S. 495

159. *Chicago Board of Trade v Olsen*, 262 U.S. 1, 32 (1922)

160. 14 How. 568 (U.S. 1852)

control of the means ***, is legitimately within the import of the phrase foreign commerce, or fairly implied in any investiture of the power to regulate such commerce. A pretension as far reaching as this, would *** control the pursuits of *** the manufacturer, the mechanic, the immense operation of the collieries, and mines and the furnaces of the country; for there is not one of these avocations, the result of which may not become the subjects of foreign commerce ***." This was followed by the case of *In Kidd v Pearson* in 1888. In this case the manufacturer maintained that his intention to ship his products in interstate commerce so distinctly identified his activities, that he should be regarded as engaging in such commerce. But, the Court in almost the same terms as it used in *Veazie v Moor* said: **** the fact that an article was manufactured for export to another state does not of itself make it an article of interstate commerce within the meaning of Section 8, Article 1, of the Constitution, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce." In 1895, in the *Sugar Trust Case*,¹⁶¹ the Supreme Court reiterated this view. The case involved the monopoly that the American Sugar Refining Company had gained over the sugar market. The court denied in effect the nationwide economic

161. *U.S. v E. C. Knight Co.*, 156 U.S. 1 (1895)

repercussions of such a monopoly. "Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not a primary sense, and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it."

This rather lengthy exposition of the view of the Supreme Court has been given in order to understand the Court's interpretation of interstate commerce and what obstructs or affects it. For it was upon the theory of these cases and others¹⁶² of a similar vein that were to govern the employer-employee relations which Congress sought to regulate under the commerce power.

C. First Child Labor Decision.

The first of these acts of social legislation was the Federal Child Labor Act of 1916, which prohibited the shipment by any producer, manufacturer or dealer of "any article or commodity, the products of any mill, cannery, workshop, factory or manufacturing establishment***in which thirty days prior to the removal of such product therefrom children under the age of fourteen years have been employed or permitted to work more than eight

162. Mining is not commerce: *Oliver Iron Mining Co. v Lord* 262 U.S. 172, 178 (1923); nor is production of oil: *Champlain Refining Co. v Corporation Comm.* 286 U.S. 210 (1932); nor generation of electricity: *Utah Power & Light Co. v Pfast*, 286 U.S. 965 (1932)

in any day, or more than six days in any week, or after the hour of 7 o'clock post meridian, or before the hour of 6 o'clock anti meridian." The Supreme Court declared in *Hammer v Dagenhart*¹⁶³ that this Act was unconstitutional. The Court reasoned that since the products of child labor were not inherently evil, nor was their shipment an abuse of interstate commerce to effect an evil, the burden on it was indirect. But, what the Court stressed was the fact that it considered production a local matter. "The control by Congress over interstate commerce cannot authorize the exercise of authority not entrusted to it by the constitution. *Pipe Line Cases*, 243 U.S. 548, 560. The maintenance of this authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the nation by the Federal Constitution."

D. The Schechter Decision

This was the interpretation of the Supreme Court when Congress in 1933 enacted the National Industrial Recovery Act.¹⁶⁴ The Act was the first of President F. D. Roosevelt's experiments in the field of social legislation and was passed to remedy the depression which hung over the nation. The law had as its declaration of policy the aim "to remove obstructions to the free

163. 247 U.S. 251 (1918)

164. Known as N.R.A. 48 Stat at L. 195 (1933)

flow of interstate and foreign commerce which intended to diminish the amount thereof". To this end it undertook the national organization of industries by means of industrial codes. Every code of fair competition had to embody the following conditions: (1) Recognition of the right of employees to organize and bargain collectively, free from employer interference, in self organization, selection of representatives and mutual aid and protection. (2) Compliance by employers with maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President. The duty was placed upon the President to afford employers and employees every opportunity to establish standards of maximum wages, hours of labor and such other conditions as may have been necessary to effectuate the policy of the Act. However, Congress did not leave these matters to voluntary action alone. Where no such mutual agreement had been approved by the President, he was empowered, after investigation into labor practices, policies, wages, hours of labor and conditions of employment, to prescribe a limited code of fair competition. The question as to the constitutionality of the Act was decided in the famous Schechter of "sick chicken" case.¹⁶⁵ The Schechter Corporation was engaged in the live poultry business in New York City. It purchased live chickens in the New York

165. Schechter Poultry Corp. v U.S. 295 U.S. 495 (1935)

City poultry market, brought these chickens to its place of business where the chickens were slaughtered and then sold locally. The Corporation challenged the Act principally on the grounds that it regulated intrastate transactions and violated the Fifth Amendment to the Federal Constitution in that it deprived persons of liberty and property without due process of law. The Supreme Court in declaring the Act unconstitutional said, when the "flow of commerce" doctrine was urged as the basis of the constitutionality of the Act: "*** The mere fact that there may be a constant flow of commodities into a state, that does not mean that the flow continues after the property has arrived and has become co-mingled with the mass of property within the state and is held solely for local disposition and use ***." In other words, once the flow of commerce has come to rest, the commodity was, in the opinion of the Court, necessarily subject to local regulation, and federal control ceased with the flow. The Court also held that the defendant's transactions did not directly affect interstate commerce so as to be subject to federal regulation, and further that the hours and wages had no direct relation to interstate commerce. Any attempt to regulate the labor relations of employers engaged in commerce was then to be considered invalid as an unlawful invasion of the states' reserved rights.

D. Carter Coal Decision

The decision in the Schechter case was followed by the Carter Coal Company case,¹⁶⁶ where the Supreme Court held the Guffey Coal Conservation Act unconstitutional, proceeding on substantially the same grounds involved in the rejection of the N.R.A. The Guffey Act declared the production, distribution, and use of bituminous coal to be affected with a national public interest. It sought to stabilize the coal industry through the regulation of prices, wages, hours, and working conditions. Again the Court held that those wages and hours were beyond the power of Congress to regulate because they were matters of purely local concern and had only an indirect effect on interstate commerce. And no matter how great this effect might be, since it was indirect, Congress could not regulate it. The Court viewed the extraction and shipment of the coal as separate transactions, and the latter interstate, but the former local. In order to bring an activity within the flow of commerce doctrine, the Court said, its effect thereon must be proximate and not mediate. Too many activities intervened between production and shipment to bring the process of extracting within the ambit of Congress. The want of power, the Court decided, was the same before distribution and sale as it was when the goods had come to rest as in the Schechter Case.

166. Carter v Carter Coal Company, 298 U.S. 238 (1936)

Summary:

In this struggle between the commerce power and states' rights to regulate industrial relations within their own borders, under their police power, the Schechter and Carter cases marked the last major stand for the supremacy of that phase of the states' police power. We shall see in the next chapter how the advent of extensive labor legislation, coupled with a changing court personnel, marked the beginning of a new phase in the interpretation of the extend of federal authority over commerce.

CHAPTER V

THE SUPREME COURT AND THE PRESENT "AFFECTING COMMERCE" DOCTRINE

Beginning in 1937 in the case of National Labor Relations Board v Jones & Laughlin Steel Co.,¹⁶⁷ the current of flow doctrine, which was abandoned in the New Deal decisions of Schechter Poultry Corp. v. United States¹⁶⁸ and Carter v Carter Coal Co.,¹⁶⁹ was reverted to and expanded, to an extent undreamed of when the doctrine was first enunciated by Justice Holmes in 1905.¹⁷⁰ We shall see, in what follows, how the supreme Court has established that the Tenth Amendment is not a limitation on either the express or implied power of the federal government's commerce power; that the Tenth Amendment reserves to the states only the nondelegated powers; and that it does not segregate any state powers so that the delegated powers of the federal government may not operate on them under the doctrine of supremacy of the federal power. It will also be shown that the commerce power has been restored to its proper place in our dual form of government, that is, subject only to the Due Process Clause of the Fifth Amendment to the Federal Constitution.

167. 301 U.S. 1 (1937)

168. 295 U.S. 495 (1935)

169. 298 U.S. 238 (1936)

170. Swift & Co. v U.S. 196 U.S. 375 (1905)

A. The National Labor Relations Act

In 1935, Congress enacted the Wagner Act.¹⁷¹ Section 1 sets forth the Findings and Policy of the Act: "The denial by employers of the right of employees to organize and the refusal of employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest which have the intent or necessary effect of burdening or obstructing commerce ***. It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid and protection."

The Act then goes on to set up a Board to administer its provisions and to make findings as to unfair labor practices by employers which affect commerce. This term "affecting commerce" as contained in the Act "means in commerce, or burdening or obstructing commerce, or the free flow of commerce."

The question of the constitutionality of the N.L.R.A. did

171. Also known as the National Labor Relations Act,
Act of July 5, 1935, 49 Stat at L. 449

not come before the Supreme Court until nearly two years after its passage. This was due to the pro-labor decision in *Texas & New Orleans R.R. v Brotherhood of Railway Clerks*.¹⁷² The case involved a suit to enforce the Railway Act, and the Court ordered a railroad to cease opposing an independent union, to disestablish a company union and to reinstate discharged employees with back pay. The basis of the decision has been that collective bargaining between freely chosen representatives of employers and employees, a peaceful means of resolving labor disputes, tended to eliminate strikes and the obstructions caused. The railroad employees involved, while not actually engaged in interstate commerce, were directly connected with it, but little was made of this. As a result of this decision a majority of the lower federal courts denied applications to enjoin the National Labor Relations Board.¹⁷³

However, in *Carter v Carter Coal Co.*,¹⁷⁴ decided in 1936, the Supreme Court had made the cause of the N.L.R.A. look hopeless insofar as it attempted to apply to anyone but employers engaged in interstate commerce.

The Guffey Act had contained substantially the same collect-

172. 281 U.S. 548 (1930)

173. See N.L.R.B., First Ann. Rep. (1936, 46-50, Second Ann. Rep. (1937), 30-31, 36-40, where the cases are cited.

174. 298 U.S. (1936)

ive bargaining provisions as the N.L.R.A. and a labor dispute in the coal industry affected interstate commerce as much or more so than in any other industry.

1. Jones-Laughlin Case

Two events paved the way for the Jones & Laughlin Steel Corporation decision and its companion cases.¹⁷⁵ In November 1936 President F. D. Roosevelt was landslided into office again and in March of 1937 the Supreme Court decided the Virginian Case.¹⁷⁶ It held that the Railway Labor Act could lawfully be applied to back shop employers inasmuch as a strike by such employees "would seriously cripple petitioner's interstate transportation". The opinion also upheld the majority rule provisions of the Railway Labor Act which were substantially the same as those contained in the N.L.R.A. Now to a discussion of the Jones-Laughlin and its companion cases.

The Jones-Laughlin case was decided in April of 1937. The Court was a bit cautious in this first test case of the Labor Act as to the extent and scope necessary for transactions to "affect" interstate commerce. "The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industries regardless of effects on interstate

175. NLRB v Friedman-Harry Marks Clothing Co; 301 U.S. 358

NLRB v Fruehauf Trailer Co; 301 U.S. 49 (1937)

176. Virginian Ry. v System Federation No. 40, 305 U.S. 515 (1937)

or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise within constitutional grounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes."

The extent to which the Court dwelt upon the national aspect of each of the industries as well as the number of employees involved in the Jones & Laughlin and companion test cases indicated the consideration it gave to size and national integration in its deliberations. "In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote ***. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum."¹⁷⁷ The evidence disclosed¹⁷⁸ that the Jones & Laughlin Steel Corporation and its nineteen subsidiaries presented ramifications as broadly extended as the nation itself. It owned ore, coal and limestone properties, lake and river transportation facilities and terminal railroads in var-

177. Jones & Laughlin Steel Corp. v NLRB 301 U.S. 1, 41 (1937)

178. In the Matter of the Jones Laughlin Steel Corp, etc
1 NLRB 503 (1936)

ious parts of the country. In 1934 its consolidated assets were figured at \$181,532,641.36, and in the same year it employed 22,000 persons. The company was the fourth largest producer of steel in the nation.

2. Friedman-Harry Marks Case

In the companion cases, the figures and findings were no less impressive of national aspects. In the Friedman-Harry Marks case,¹⁷⁹ the employer was engaged in an industry which was among the twenty most important manufacturing industries in the United States. The company, in the first ten months of 1935, did a volume of business amounting to \$1,750,000, representing a production of 150,000 units and a payroll of approximately 800 employees. To manufacture its line, the company purchased outside the state 9.9% of the woolen goods used in production and upon completion, shipped to points outside of the state 82% of its finished product. The company was among the fifty largest firms in the industry and among the ten firms in that group paying the lowest average wage.

3. Fruehauf Trailer Case

The Fruehauf Trailer Company,¹⁸⁰ was the largest concern of its kind in the United States, manufacturing and selling commer-

179. In the matter of Friedman-Harry Marks Clothing Co., Inc.
1 NLRB 411 (1936)

180. In the Matter of Fruehauf Trailer Co., etc 1 NLRB 68 (1935)

cial trailers, parts, accessories and chassis. In 1935 more than 50%, by value, of the materials used, were transported to its plant in Michigan from other states. And in the same period sales amounted to \$3,318,000, of which more than 80% was shipped out of Michigan. A pointed finding of the N.L.R.B. was that the product of the Company was used as an instrumentality of commerce between the states.

Summary:

In these cases the facts deduce a number of important identities. These employers are all admittedly engaged in interstate commerce. They make their purchases of raw materials throughout the nation, and their sales follow the same pattern. The result is a stream of commerce flowing across the country without regard to state lines. That the Supreme Court seriously considered this national aspect of these employers and the industries to which they belonged can be found in the Jones & Laughlin opinion. "When industries organize themselves on a national scale, making their relations to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?"¹⁸¹

181. N.L.R.B. v Jones & Laughlin Steel Corp, 301 U.S. 1,
41 (1937)

The Court, in the Jones & Laughlin case, qualified the jurisdiction over industries erected on a national scale by stating that the grant of authority to the board did not extend to all industrial employers and employees. "Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to be within the authority confined upon the board, is left by the statute to be determined as individual cases arise."¹⁸² The Board's authority to exercise its jurisdiction is determined by the relationship of activities to interstate commerce, and the theory follows therefrom, that where such activities directly cause or tend to cause an "obstruction to commerce", the Board may assume jurisdiction.

B. Later Cases Interpreting the National Labor Relations Act

1. Santa Cruz Case

Let us turn now to a discussion of the later cases to see how the theory of direct obstructions upon interstate commerce was developed and extended in cases where the national aspects of the Jones & Laughlin and its companion cases were not present. And how the original "flow of commerce" doctrine of 1905 continued to broaden the stream of commerce. In Santa Cruz Packing Co. v N.L.R.B.¹⁸³ there was no importation into the State of Califor-

^{182.} Ibid, at 32

^{183.} 303 U.S. 453 (1938)

nia where the employer maintained its plant. It operated within that State two canneries, where it engaged in canning, packing, warehousing, and shipping fruits and other agricultural products, the bulk of which were grown in California. Of its total production only 37% was shipped in interstate or foreign commerce.

Exemption from jurisdiction was claimed on the ground that the source of materials exported was entirely within the State, and that there was no evidence of a "stream of commerce". In the Carter case, the Supreme Court declared the Bituminous Coal Conservation Act of 1935 unconstitutional on the grounds that its labor provisions constituted a regulation of production rather than of commerce. The emphasis laid on the "stream of commerce" metaphor in the Jones & Laughlin case was dissolved; "the instances in which that metaphor are used are particular and not exclusive".¹⁸⁴ It was clear that industries at the beginning of the flow of commerce were subject to the Labor Act, since labor disputes in such concerns would undoubtedly obstruct the interstate movement. And further, that the size and national aspect of any employer are not conclusive.

2. Consolidated Edison Case

This departure from size and national aspect of the employer was further developed by the Supreme Court in Consolidated Edison

^{184.} Ibid, at 464

Co. v N.L.R.B.¹⁸⁵ The activities of the Edison Co. were predominantly intrastate, and it was urged that the State of New York through its police power could exercise plenary control over the activities of the Company. Along with its other customers, the Corporation furnished, within the City of New York electrical energy and gas to corporations engaged in interstate commerce, and in addition, to the federal government and its many agencies. That service was but a small part of the entire service rendered by the Company, yet jurisdiction was approved. Speaking of the service so rendered to the federal government, its agencies and to those customers engaged in interstate commerce, the Court said:¹⁸⁶ "In their totality they rise to such a degree of importance that the fact that they involved but a small part of the entire service rendered by the utilities in their extensive business is immaterial in the consideration of the existence of the federal protective power. The effect upon interstate and foreign commerce of an interruption through industrial strife of the service of the petitioning companies was vividly described by the Circuit Court of Appeals in these words: 'Instantly the terminals and trains of these great interstate railroads would cease to operate; interstate communication by telegraph, telephone, and

185. 305 U.S. 197 (1938)

186. Ibid at 221

radio would stop; lights maintained as aid to navigation would go out; and the business of interstate firms and of foreign steamships, whose docks are lighted and operated by electric energy, would be greatly impeded. Such effects we cannot regard as indirect and remote, 95 F (2d) 390, 394.'" The Court said further that "it is the effect upon interstate or foreign commerce, not the source of the injury, which is the criterion."¹⁸⁷

3. Fainblatt Case

The last of the cases in point questioned the applicability of the N.L.R.A. to employers who themselves are not engaged in interstate commerce, but who are engaged in the relatively small business of processing materials which are transmitted to them through channels of interstate commerce. The case of N.L.R.B. v Fainblatt¹⁸⁸ illustrates the Act was drawn to permit the broadest jurisdiction possible. The facts in the case disclose that the employer maintained a small shop in New Jersey, where he employed from 60 to 200 employees. The business consisted in performing certain labor upon materials sent or delivered to Fainblatt by another independent company, which was itself engaged in interstate commerce, and transforming those materials into women's garments. Fainblatt neither called for the materials nor delivered them to its customer outside of the state. But, the materials were delivered to Fainblatt at his shop; he in turn delivered the finished product to his customer at his shop, and he did not con-

¹⁸⁷---Ibid at 221-22
¹⁸⁸. 306 U.S. 601 (1939)

trol the ultimate destination of the finished product which entered interstate commerce.

The question was, therefore, would a labor dispute or strike in Fainblatt's factory so directly affect commerce as to place an undue burden or obstruction upon it. A casual application of the prior cases, especially the Friedman-Harry Mark's case, would seem to indicate that the employer's position in the industry and such other elements as the national aspect of the employer's organization would be determinative in answering the problem. Nevertheless, from a realistic viewpoint, Fainblatt's business represented the nature of the evil which hindered a solution of the labor problem in the garment industry.

The Supreme Court answered the question in the affirmative, thereby giving a new and broader concept to the commerce power. "The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small"¹⁸⁹ As if to make it clear that the emphasis placed on size in the Jones & Laughlin and companion cases should not be overstressed, the Court continued: "In this, as in every other case, the test of the Board's jurisdiction is not the volume of interstate commerce which may be affected, but the existence of a relationship of the employer and his employees to the commerce such as that, to para-

189. Ibid, 606

phrase Section 10(a) in the light of constitutional limitations, unfair labor practices have led or tended to lead to a labor dispute burdening or obstructing commerce".¹⁹⁰

Summary:

We have seen how the commerce clause developed from the interpretation that it did not include production and manufacturing to the interpretation that such activities, no matter how large or how small, whether it was purely intrastate or not were included, the only criterion being that a labor dispute in such an activity would lead to or tend to burden or obstruct commerce.

C. The Fair Labor Standards Act & the Second Child Labor Case

The question remained, however, as to whether the Child Labor Case of 1918 was still law. It will be remembered that that decision held Congress lacked the power to exclude child-made goods from interstate commerce for the purpose of protecting producers and children in the state of destination. The Court had said that such regulation was a local matter for the state under their police power.

In 1938 Congress passed the Fair Labor Standards Act¹⁹¹ which prescribes minimum wages and maximum hours for all employees engaged in interstate commerce or in the production of goods for such commerce. It makes it unlawful for any person to transport or sell in commerce any goods in the production of which any

190. Ibid, 608

191. 52 Stat at L. 1060 (1938)

employee was employed in violation of the hours and wages provisions. It likewise makes it unlawful to deliver or sell any such goods with knowledge that they are intended for interstate commerce.¹⁹² Further, it prohibits any producer or manufacturer, or dealer from shipping or delivering for shipment in interstate commerce any goods produced in an establishment within the United States in or about which 30 days prior to their removal therefrom oppressive child labor has been employed.¹⁹³ It defines child labor as oppressive whenever an employee under the age of 16 is employed by an employer (other than a parent) in any occupation in which the Chief of the Children's Bureau of the Department of Labor shall find to be hazardous or detrimental to his health or well being.¹⁹⁴ In addition, it provides for a \$10,000 fine or six months imprisonment for any violation of a prohibited act plus a liability to the employee affected to the amount of unpaid minimum wages or their unpaid overtime compensation as the case may be, and in addition an equal amount as liquidated damages.¹⁹⁵

In February, 1941, the Supreme Court by two sweeping decisions affirmed the constitutionality of the Act.¹⁹⁶ For our

192. Ibid, Section 215

193. Ibid, Section 212 (Child Labor)

194. Ibid, Section 203

195. Ibid, Section 216

196. U.S. v F. W. Darby Lumber Co. 61 Sup. Ct. 451 (1941);
Opp Cotton Mills, Inc. v Administrator, 61 Sup. Ct.
524 (1941)

purposes it will be enough to discuss the Darby case. The Court in discussing the applicability of the Child Labor case of 1918 said: "The conclusion is inescapable that Hamner v Dagenhart was a departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision and that such vitality, as a precedent, as it then had has long been exhausted. It should be and now is overruled." The Court in discussing the restriction of the Act on the production of goods declared that "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce***." The Court, while conceding that "In the absence of Congressional legislation on the subject state laws which are not regulations of the commerce itself or its instrumentalities are not forbidden even though they affect interstate commerce****" went on to say "But it does not follow that Congress may not by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce***."

D. Summary

Thus we find the scope of the commerce power is as Chief

Justice Marshall defined it in 1824 in *Gibbons v Ogden*¹⁹⁷ "The genius and character of the whole government seems to be, that its action (commerce power) is to be applied to all the external concerns of the nation and to those internal concerns which affect the states generally***".

197. 9 Wheat 1 (U.S. 1824)

CHAPTER VI

RESOLVING THE POLICE POWER - COMMERCE POWER CONFLICT

Chief Justice Marshall in *Gibbons v Ogden*¹⁹⁸ and *Brown v Maryland*¹⁹⁹ established as fundamental that the power of Congress over interstate commerce is plenary and is in certain matters exclusive. It is in regard to these "certain matters" insofar as they have and continue to involve conflicts between federal and state regulations that we will concern ourselves in this chapter. An attempt will be made to show how these conflicts have arisen, how the Supreme Court has dealt with them and why such attempts, by the Court to resolve the conflicts has been unsatisfactory. The study will conclude with some suggestions as to how the matter may be better dealt with by Congressional action.

A. Principles Established By the Supreme Court to Resolve the Conflict

The cases of *Willison v Black-Bird Creek Marsh Co.*²⁰⁰ and *Cooley v Board of Wardens*²⁰¹ established the rule that in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect inter-

198. 9 Wheat. 1 (1824)

199. 12 Wheat. 419 (1827)

200. 2 Pet. 245 (U.S. 1829)

201. 12 How. 299 (U.S. 1851)

state commerce or even, to some extent, regulate it.²⁰² The Supreme Court in *Plumley v Massachusetts*²⁰³ clarified this doctrine by recognizing this small area in which state regulation of local matters was permissible even though such action in effect amounted to a regulation of interstate commerce. Thus the states may regulate matters which, because of their number and diversity, may never be adequately dealt with by Congress.²⁰⁴ When the regulation of matters of local concern is local in character and effect, and its impact on interstate commerce does not seriously interfere with its operation, so that the consequent incentive to deal with such matters is slight, it has generally been held that such regulation is within the authority of the state.²⁰⁵

However, ever since *Gibbons v Ogden*²⁰⁶ the states have not been deemed to possess the authority to impede substantially the free flow of commerce among the several states, or to regulate those phases of interstate commerce which, because of the need of

202. *Minnesota Rate Cases* 230 U.S. 352, 399-400 (1913)

203. 155 U.S. 461 (1894)

204. *Cooley v Board of Wardens*, Supra, 113; *South Carolina Highway Dept. v Barnwell Bros.*, 303 U.S. 177, 185 (1937); *California v Thompson*, 313 U.S. 109, 113 (1940); *Duckworth v Arkansas*, 314 U.S. 390, 394; *Parker v Brown*, 317 U.S. 341, 362, 363 (1942).

205. *South Carolina Highway Dept. v Barnwell Bros.*, Supra, 188 and cases cited; *Lone Star Gas Co. v Texas*, 304 U.S. 224, 238 (1938); *Milk Board v Eisenberg Co.*, 306 U.S. 346, 351 (1938); *Maurer v Hamilton*, 309 U.S. 598, 603 (1940); *California v Thompson*, Supra, 113-114 and cases cited.

206. 9 Wheat . (U.S. 1824)

national uniformity, demand that their regulation, if any, must be prescribed by Congress.²⁰⁷ Whether or not this long recognized distribution of power between the federal and state governments is predicated upon the implications of the commerce clause,²⁰⁸ or upon the presumed intention of Congress, where Congress has not spoken,²⁰⁹ the result is the same.

It is in these fields of commerce where uniformity of regulation is not essential because the matter in question is local rather than national in character, that we are concerned with here. In these fields of local concern either the federal government or the state government concerned may act.²¹⁰ However, in such cases if the federal government should legislate completely on the matter the state government is completely excluded. If the federal government legislates only in part to cover the matter, then it has been universally held the state, under its pol-

 207. *Cooley v Board of Wardens*, Supra, 319; *Leisey v Hardin*, 135 U.S. 100, 108, 109 (1890); *Minnesota Rate Cases*, Supra, 399-400; *Edwards v California*, 314 U.S. 160, 176 (1941)

208. *Brown v Maryland*, Supra, 417; *Minnesota Rate Cases*, Supra, 399-400; *Pennsylvania v West Virginia*, 262 U.S. 553, 596 (1922); *Baldwin v Seelig*, 294 U.S. 511, 522 (1934); *South Carolina Highway Dept. v Barnwell Bros.*, Supra, 185

209. *Wilton v Missouri*, 91 U.S. 275, 282 (1875); *Hall v De Guir*, 95 U.S. 485, 490 (1877); *Brown v Houston*, 114 U.S. 622, 631 (1884); *Bowman v Chicago & N.W. RR Co.*, 125 U.S. 465, 481-482 (1888); *Leisey v Hardin*, Supra; *Brennan v Titusville*, 289 U.S. 302 (1932); *In re Rahrer*, 140 U.S. 545, 559, 560 (1891); *Covington & Co. Bridge Co. v Kentucky*, 154 U.S. 204, 212 (1893); *Graves v New York ex rel. O'Keefe*, 306 U.S. 466, 479 (1938); See also *Dowling, Interstate Commerce and State Power*, 27 Va. Law Rev. 1.

210. *California v Thompson*, Supra.

ice power, can act in that part of the field which the federal legislation does not cover.²¹¹ Subsequent federal legislation covering the field occupied by state law would suspend such state action provided the federal legislation is exclusive and the state law conflicts either expressly or impliedly with the federal act.²¹²

The problem, however, is determining when particular state enactments are inconsistent with federal laws and are therefore superseded. The use and application of general principles and rules is of little help in specific cases. The Supreme Court has held that a state statute will not be superseded merely because Congress has acted to regulate a part of the field. The conflict between the enactments must be direct and positive.²¹³ However, the Court has also held in cases where there has been no obvious conflicting provisions a Congressional intent to supersede the state law.²¹⁴ It is the treatment of this problem as reflected

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211. Southern Pacific Co. v Arizona, 325 U.S. 761 (1944); Maurer v Hamilton, Supra, 598; South Carolina Highway Dept. v Barnwell Bros., Supra; Kelly v Washington, 302 U.S. 1 (1937)
212. Illinois National Gas Co. v Central Ill. Public Service Co., 62 Sup. Ct. 384 (1943); Hines v Davidowitz, 312 U.S. 342 (1941); Oregon v Washington RR v Washington, 270 U.S. 587 (1926)
213. Maurer v Hamilton, Supra; Mintz v Baldwin, 289 U.S. 346 (1933); Savage v Jones, 225 U.S. 501 (1912); Sinnot v Davenport, 22 How. 227 (U.S. 1859)
214. Southern Ry. v R.R. Commission of Ind., 236 U.S. 439 (1915); N.Y. Central R.R. v Winfield, 244 U.S. 147 (1917); International Shoe Co. v Pinkus, 278 U.S. 261 (1926).

in recent decisions of the Court that we will now concern ourselves.

B. Renovated Butter Decision

One of the best cases illustrating this conflict and the vacillation of the Supreme Court in attempting to resolve the conflict is that of *Cloverleaf Butter Co. v Patterson*.²¹⁵ The plaintiff in this case manufactured renovated butter for interstate trade. A federal statute²¹⁶ prohibits the interstate shipment of unfit renovated butter. The Secretary of Agriculture is empowered to inspect the premises on which the renovated butter is manufactured, the ingredients used, as well as the processes used and the finished product itself. However, the power to seize and condemn as deleterious to health is limited to the finished product. The statute of Alabama²¹⁷ also provided for the inspection and seizure of adulterated and deleterious renovated butter, however, under the law the state officers were empowered to take action against contaminated ingredients as well as the finished product. The state officials pursuant to the local law seized substantial quantities of packing stock butter, which is an ingredient of renovated butter. The *Cloverleaf Co.* brought an

215. 315 U.S. 148 (1942)

216. Int. Rev. Code, 53 Stat. 352 (1935), 26 U.S.C.A. Sections 2320-2327 (1940)

217. Ala. Code Ann tit 2, Section 495

action to enjoin the state officials on the ground that the federal statute pre-empted the field and rendered invalid the state statute. The Supreme Court upheld the Cloverleaf Company's contention even though there was no apparent conflict between the state and federal laws. The Court sought to distinguish the case of *Savage v Jones*,²¹⁸ which involved an Indiana statute requiring the "disclosure of formulas on foods offered for sale in Indiana while in interstate commerce." The federal law in the field was the Pure Food and Drug Act. And while the product in question conformed to the federal act, the Court upheld the Indiana law which required more exact and detailed information as to the ingredients it contained. The Court also discussed the case of *Wisconsin v McDermott*²¹⁹ which also involved the federal Pure Food and Drug Act. The Wisconsin statute required that all glucose mixtures offered for sale had to be labeled "Glucose flavored with" the flavoring material. Any other "designation or brand" on the package was prohibited. The federal statute again did not require such labeling. However, the Wisconsin statute was declared void. The only apparent difference between the requirements of the state statutes was that the Indiana statute required a more exact statement of the ingredients, while the Wisconsin

218. 225 U.S. 501 (1912)

219. 223 U.S. 115 (1913)

requirement was only a partially exact statement.²²⁰ The Court sought to distinguish the two cases with the statement: "In the Savage case there was no conflict, inconsistency or interference, in the McDermott case there was".²²¹ This explanation, of course is no explanation and it is hard to see how there can be any stare decisis in the Cloverleaf case.

G. Allan Bradley Decision

When we carry this inconsistency over into the field of industrial relations a very serious and difficult situation arises. The field of industrial relations, since it deals in human relations requires, as near as is possible, the establishment of settled doctrines of law to meet any conflicts that may arise between federal and state regulations in this field. Unless the law is clear, industrial unrest is sure to arise since unrest and uncertainty are the inevitable products of confused state and federal regulations. However, such a situation of state and federal conflict does exist.

In Allan Bradley Local No. 1111 et al v Wisconsin Employment Relations Board et al²²² the Supreme Court had before it the Wisconsin Employment Peace Act.²²³ Section 111.06 (2) of the state

220. See Braden, Umpire to the Federal System, 10 Univ of Chicago L. Rev. 26 for an excellent discussion of this problem.

221. Cloverleaf Co. v Patterson, Supra, 159

222. 62 Sup. Ct. 820 (1942)

223. Wis. Stat. (1939) (C.111)

Act provides in part: "It shall be an unfair labor practice for an employee individually or in concert with others: (a) To coerce or intimidate an employee in the enjoyment of his legal rights, *** or to intimidate his family, picket his domicile, or injure the person or property of such employee or his family. *** (f) To hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance." Section 111.07 of the state Act gives the state Employment Relations Board authority on the filing of a complaint to conduct hearings, to make findings of fact, and to issue orders. Orders of the state Board are enforceable by the circuit courts.

The union, Allan Bradley Local No. 1111, had a contract with the Allan Bradley Company governing the terms and conditions of employment. The contract was cancelled by the union. Thereafter the union by secret ballot ordered a strike. The strike lasted about three months during which time the company continued to operate its plant. Differences arose between employees who were on strike and the company and those employees who continued to work. The company thereupon filed a petition with the state Board charging the union and certain of its officers and members

with unfair labor practices. The state Board upon investigation found as conclusions of law that the union and certain of its officers and members were guilty of the following unfair labor practices: mass picketing, threatening employees, who desired to work, with bodily injury and injury to their property, obstructing and interfering with the free use of public ways and picketing the homes of employees. The state Board accordingly issued a cease and desist order against the union and its offending officers and members.

The union denied the jurisdiction of the state Board on the ground that as respects the matters in controversy the company was subject to the provisions of the National Labor Relations Act²²⁴ and to the exclusive jurisdiction of the federal Board. It was this question of jurisdiction which the Supreme Court was called upon, on appeal, to decide.

The Court rejected the argument of conflict with the N.L.R.A. and confined the issue to the precise facts involved, thus by-passing any conflict with other provisions of the state Act not required to support the order before the Court. The union's claim that because under the state Act the strikers lost their status as employees, there was an inconsistency with their status under the N.L.R.A. was likewise rejected. The Court held that

224. 49 Stat. 449 (1935), 29 U.S.C.A. Section 151 et seq.

since the state Board had not denied the strikers their status in its order such was conclusive. The Court found no indications of an intention of Congress to pre-empt the field and make its action exclusive in all respects. Finally, it failed to see how the action of the state officials "impaired, diluted, qualified or in any respect substracted from rights guaranteed by the Wagner Act".²²⁵

Thus the Supreme Court refused to meet the conflict issue squarely, but rather chose to dispose of the matter in the way presenting the least resistance or in the Court's own words: "We deal *** not with the theoretical disputes but with concrete and specific issues raised by actual cases".²²⁶ However, the matter is not so easily resolved. The N.L.R.A. guarantees and protects the right of employees to bargain collectively. Suppose in the furtherance of such bargaining striking employees commit violations which are unfair labor practices under the state Act and as a consequence they are enjoined by an action through the state courts. Any subsequent attempt by the N.L.R.A. to restore the status quo might be useless since in the meantime the union might have been broken. Even if the federal Board were to use its full power to destroy an advantage gained by what could in effect be

225. Allan Bradley Local No. 1111 et al. v Wisconsin Employment Relations Board et al., Supra, 820, 826

226. Ibid, 824

strike breaking by the Wisconsin Board, the time lost and the difficulties involved would clearly constitute interference with the freedom of bargaining protected by the N.L.R.A.²²⁷ The mere fact this instance may be theoretical does not tend to eliminate any of the uncertainty on the part of management and labor as to the disposition of this and other conflicts.

D. The Hill Decision

The Allan Bradley case was followed by Hill v Florida²²⁸ which was decided in 1944. Again a state labor statute²²⁹ and the N.L.R.A. were involved. Section 4 of a Florida statute required the business agent of a labor union to be licensed by a special board upon the agent's showing he had been a citizen of the United States for more than ten years, that he was of good moral character and had never been convicted of a felony. Section 6 of the state Act required every labor union operating in the state to file an annual report disclosing its name, the location of its principal offices, and the names and addresses of its officers and to pay an annual fee of \$1.00 therefor. Violation of the statute by any person or labor organization was made a misdemeanor punishable by fine and imprisonment. The Supreme Court held the statute in conflict with the N.L.R.A. The Court

227. See discussion in article by Bradin, Umpire to the Federal System, *supra*

228. 325 U.S. 538 (1944)

229. Florida Laws of 1943, c. 21968

in discussing Section 4 of the state statute held that it circumscribed the full freedom of choice of employees protected by the N.L.R.A. since it required the business agent to prove to the satisfaction of the state board that he measured up to the state standards. The Court then went on to say: "Thus, the 'full freedom' of employees in collective bargaining which Congress envisioned as essential to protect the free flow of commerce among the states would be, by the Florida statute, shrunk to a greatly limited freedom. No elaboration seems required to demonstrate that Section 4 as applied here 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'"²³⁰ As regards Section 6 the Court held it stood no better. The filing of information and \$1.00 fee requirements were upheld as not conflicting with the federal act. But as to the rest of the Section the Court held that since "for failure to comply, this union has been enjoined from functioning as a labor union. It could not without violating the injunction and also subjecting itself to the possibility of criminal punishment even attempt to bargain to settle a controversy or strike. It is the sanction here imposed, and not the duty to report, which brings about a situation inconsistent with the federally protected process of collective bargaining. *** This is true because if a

²³⁰. Hill v Florida, supra, 541-542

union or its representatives acted as bargaining agents without making the required reports, presumably they would be liable both to punishment for contempt of court and to conviction under the misdemeanor section of the act. Such an obstacle to collective bargaining cannot be created consistently with the Federal Act."²³¹

The difficulty with the decision seems to lie in the stress made by the Court on the misdemeanor provision of the act. It appears that Section 6 is valid except that a violator cannot be punished in this way. This same strange conclusion was reached in a companion case.²³² The way is left open for the levying of small statutory fines against the union or union officials for violating the statute. On the face of it such fines would not seem to be obstacles to collective bargaining. But suppose that fines are levied successively with the cumulative result the union funds are drained and so lacking the necessary financial means it is forced to disband. Such a situation would certainly deny the union members the right of collective bargaining contained in the N.L.R.A.

E. Bethlehem Steel Decision

The case of Bethlehem Steel Co. v New York Labor Board, decided in 1947,²³³ will serve to further illustrate the problem of

231. Ibid. 543

232. Alabama State Federation of Labor v McAdory, 65 Sup. Ct. 1388, 1392 (1945)

233. 330 U.S. 769 (1947)

federal and state labor relations acts in the field of interstate commerce. New York passed a labor relations act similar to the N.L.R.A. except that it is broader in language as regards the provision for the determination of units of representation for bargaining purposes. The state board had always recognized the right of foremen to petition as a class to organize bargaining units. The N.L.R.B. for a time recognized this right. Later for reasons of policy, but without renouncing jurisdiction, it refused to approve foremen organization units. At the time of this case it again supported their right to unionize.²³⁴ The foremen involved here, during the period when the N.L.R.B. refused to approve foremen organization units, filed their applications with the state board, which board permitted them as a class to become a bargaining agent. The issue raised was whether the state had the power to regulate the matter in question where the federal power was not being exercised at the time. The Supreme Court found that the state act conflicted with the federal act and therefore must give way. The Court distinguished this case from the Allan Bradley case by stating that in the Allan Bradley case the pertinent state Act provision related to what could be considered as a separate or distinct segment of the matter covered

234. Packard Motor Car Co. 61 N.L.R.B. 4

by the federal statute and the federal board had not acted on that segment, and hence state action in the absence of such the Court went on to say: "the conclusion must be otherwise where failure of the federal officials affirmatively takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute."²³⁵ Thus since the federal board had never denied its jurisdiction over foremen's bargaining units, it retained its jurisdiction over them so that it remained in it to determine if such units were appropriate for bargaining purposes. It would seem to follow that if the federal board had never expressed an opinion as to the designation of foremen units for bargaining purposes that such designation by the state would be permissible. Hence instead of the N.L.R.B. carrying out the purposes for which it was established we would have a state board assuming part of this function. It seems doubtful that such was the intent of Congress in enacting the National Labor Relations Act.

F. Summary

To sum up these cases then it is apparent from the Cloverleaf case that the Supreme Court has not established any hard and fast rules to care for cases involving conflicts between state and federal laws in the field of commerce; this is especially

²³⁵. Bethlehem Steel Co. v New York Labor Board, supra, 780

true where administrative boards are concerned. The Allan Bradley case seems to indicate that the mental attitude of the Court present at the time of its decision plays an important part as to whether a conflict is to be found. The Hill case found the Court seeking a ground, the misdemeanor provision, on which to resolve the conflict in favor of federal regulation, while in the Bethlehem Steel case it was the so-called exercise of jurisdiction by the N.L.R.B. that barred the state action. It seems clear then from these cases that the Court has failed to meet the conflict issue squarely, and instead has used the case to case method to find a particular ground on which to rest its decision.

CHAPTER VII

CONCLUSION

Having laid the conflict problem out in the open it now remains for a solution to be found. Perhaps the best answer is more clear and specific legislation by Congress. When a federal statute invades the territory of commerce in which state regulation, in the absence of complete regulation by Congress, is permissible the Congress should seek to clarify and set the limits of its regulation so that the Supreme Court need not have to decide each and every instance in which there is room for the contention of conflict. When Congress fails to make its intentions clear conflict is inevitable. Justice Frankfurter when he discussed the matter in his separate opinion in the Bethlehem Steel case²²⁶ had this to say: "This is an old problem (the conflict) and the considerations involved in its solution are commonplace. But results not always harmonious have from time to time been drawn from the same precepts. In law also the emphasis makes the song. It may make a decisive difference what view judges have on the place of the states in our national life when they come to apply the governing principles that for an Act of Congress completely to displace a State law 'the repugnance or conflict should be direct and posi-

²²⁶. Ibid, 780

time, so that the two acts could not be reconciled or consistently stand together'. *Sinnot v Davenport*, 22 How. 227, 243." Then by way of stressing the importance of Congressional action he goes on to say: "Congress can speak so unequivocally as to leave no doubt. But the real controversies arise only when Congress has left the matter in doubt, and then the result depends on whether we require that actual conflict between state and federal action be shown, or whether argumentative conflict suffices." The advantages of clear Congressional action had been recognized as well by Justice Holmes, who said: "When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition".²²⁷

Another possible solution is for Congress to give the Supreme Court original jurisdiction in these conflict cases. The Federal Constitution²²⁸ expressly states: "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction".²²⁹ The grant of original jurisdiction by the Constitution in these specific cases does not, however, limit the Supreme Court to original jurisdiction in these cases and no others.

"There can be no doubt that Congress may create a succession of

227. *Charleston & Western Carolina RR. Co. v Varnville Furniture Co.*, 237 U.S. 597, 604.

228. Art. 3, Sec. 2, Par. 2

229. The Supreme Court is granted appellate jurisdiction in certain other cases with which we are not concerned here.

inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. The judicial power is delegated by the constitution in the most general terms and may, therefore, be exercised by Congress under every variety of form of appellate or original jurisdiction. And there is nothing in the constitution which restrains or limits this power, it must, therefore, in all other cases, subsist in the utmost latitude of which, in its own nature it is susceptible."²³⁰ Hence it would seem that Congress has by the terms of the Constitution the power to grant original jurisdiction in cases other than those which are limited by the Constitution to the Supreme Court to inferior tribunals, to newly created tribunals, or to the Supreme Court itself. Hence it follows Congress can, within the framework of the Constitution, confer original jurisdiction upon the Supreme Court in these conflict cases. Were Congress to provide the Supreme Court with original jurisdiction in these conflict cases the present situation would be greatly alleviated. The long period of time consumed, as well as the great expense incurred, in the lower courts would be eliminated. Most important of all is that much of the anxiety and uncertainty on the part of management and labor during the long period of waiting for the conflict to be finally decided by the Supreme Court would be eliminated.

230. Johnson, Allen "Readings in American Constitutional History" (1913)

The question as to which solution is to be used is not our concern here. We are merely interested in showing that some action must be taken. For it is only when definite rules are established for the treatment of this problem that the attendant confusion resulting can be removed. The conflict is clearly contrary to the philosophy of collective bargaining since the conflict leads to uncertainty and unrest among both management and labor and hence adds to the already numerous but normal obstacles which arise in all matters relating to collective bargaining. If we believe collective bargaining is the democratic solution for labor-management relations then the confusion caused by this conflict of state and federal legislation must be removed.

BIBLIOGRAPHY

LAW REVIEW ARTICLES

A note on the Commerce Clause and the National Industrial Recovery Act the Current of Commerce by F.D.G. Ribble, in Vol. 18 of Minnesota Law Review, page 298 (1933-34).

A Survey of Recent Decisions on the Commerce Clause, by Donald R. Harter, in Vol. 28 of Cornell Law Review, page 484 (1940-41).

Commerce Clause and State's Power Over Intrastate Commerce, in Vol. 9 of Brooklyn Law Review, page 174 (1939-40).

Commerce Clause - Labor Law - Power of State to Enjoin Unfair Labor Practices of Employees in Industries Engaged in Interstate Commerce, in Vol. 39 of Michigan Law Review, page 1231 (1939).

Commerce Clause - Regulation of Renovated Butter Manufacture, in Vol. 40 of Michigan Law Review, page 1099, (1941-42).

Commerce Power - The Status of Concurrent Legislation by State and National Government in the Field of Interstate Commerce, in Vol. 16 of Temple Law Quarterly, page 433 (1942).

Constitutional Law 1919-1920, by Thomas Reed Powell, in Vol. 19 of Michigan Law Review, page 1, 117, 293 (1920-21).

Constitutionality of Federal Legislation concerning Employers and Employees Engaged in Interstate and Foreign Commerce, by Carl V. Wisner, in Vol. 5 of Michigan Law Review, page 839 (1906-07).

Constitutional Prohibition of Interstate Commerce, by Thomas I. Parkinson, in Vol. 16 of Columbia Law Review, page 367 (1916).

Constitutional Theory of National Industrial Recovery Act, by Oliver P. Field, in Vol. 18 of Minnesota Law Review, page 269 (1933-34).

Current Conflicts between Commerce Clause and State Police Power 1922-1927, by Thomas Reed Powell, in Vol. 12 of Minnesota Law Review, page 321, 470, 607 (1927-28).

Delegation of Powers - Intrastate Commerce - National Recovery Act by Melville C. Williams, in Vol. 11 of Wisconsin Law Review, page 88 (1935-36).

Developments in Use of Commerce Clause as Basis For Federal Economic Regulations, in Vol. 24 of Minnesota Law Review, page 940 (1939-40).

Extent of Federal Authority Over Intrastate Activities, by Richard A. Schneider, in Vol. 25 of Illinois Bar Journal, page 376 (1936-37).

Federal Regulation of Manufacturing Under the Interstate Commerce Power, by Louis Maier, in Vol. 24 of Marquette Law Review, page 175 (1939-40).

Federal Safety Appliances Act, by R. D. Wilson, in Vol. 26 of Nebraska Law Review, page 453 (1947).

Bibbons v Ogden Then And Now, by Hugh Evander Willis, in Vol. 28 of Kentucky Law Journal, page 280 (1939-40).

Growth And Development of the Federal Commerce Power, by J. C. Phillips, in Vol. 11 of Temple Law Quarterly, page 517 (1937).

Interstate Commerce And Child Labor, by Andrew A. Bruce, in Vol. 3 of Minnesota Law Review, page 89 (1918-19).

Interstate Commerce And Fair Labor Standards Act, by Richard R. Fricke, in Vol. 31 of Cornell Law Quarterly, page 376 (1946).

Interstate Commerce And State Power, by Noel T. Dowling, in Vol. 27 of Virginia Law Review, page 1 (1939).

Interstate Commerce And State Power - Revised Version, by Noel T. Dowling in Vol. 47 of Columbia Law Review, page 547 (1946).

Interstate Commerce During the Silence of Congress, in Vol. 23 of Dickinson Law Review, pages 78, 107, 139 (1919).

Interstate Commerce - National Transaction, by James D. Barnett, in Vol. 23 of Oregon Law Review, page 184 (1945).

Interstate Commerce - Supersedure of State Law by Federal Regulation, in Vol. 28 of Virginia Law Review, page 822 (1941-42).

Interstate Commerce - Twenty First Amendment - Power of State to Regulate Interstate Transportation of Intoxicating Liquors, in Vol. 18 of Tulane Law Review, page 620 (1941-42).

Interstate Commerce - Validity of Arizona Train Limit Law, in Vol. 31 of Virginia Law Review, page 943 (1944-45).

National Labor Relations Act - Jurisdiction Where Disputes Substantially Affect Interstate Commerce, in Vol. 12 of Tulane Law Review, page 302 (1937-38).

Labor And The Commerce Clause, by Sam L. Devine, in Vol. 14 of Notre Dame Lawyer, page 310 (1938-39).

Labor Law - National Labor Relations Board - Conflicting Jurisdictional Areas of National and State Labor Boards, by Harry M. Nayer, in Vol. 40 of Michigan Law Review, page 1268 (1941-42).

Obstruction to Commerce a Question of Degree Under the National Labor Relations Act, by George Maskowitz, in Vol. 9 Brooklyn Law Review, page 150 (1939-40).

Occupation of Field in Commerce Clause Cases, 1936-45, 10 Years of Federalism, in Vol. 60 of Harvard Law Review, page 262 (1946).

Passing of State Commerce, by Rinehart J. Swenson, in Vol. 8 of Temple Law Quarterly, page 53 (1933-34).

Police Power - Legislation for Health and Personal Safety, in Vol. 42 of Harvard Law Review, page 866 (1924).

Recent Developments in Laws Relating to Interstate Commerce, by Morris M. Cohn, in Vol. 42 of American Law Review, page 686 (1908).

Some Constitutional Aspects of the National Industrial Recovery Act, by John C. Harvey, in Vol. 8 of Temple Law Quarterly, page 3 (1933-34).

Some Constitutional Aspects of the National Industrial Recovery Act and the Agricultural Adjustment Act, by Robert A. Maurer, in Vol. 22 of Georgetown Law Journal, page 207 (1933).

Scope of State Police Power Over Matters Relating to Interstate Commerce, in Vol. 18 of Georgetown Law Journal, page 116 (1927).

State Regulation of Labor Unions, in Vol. 55 of Yale Law Review, Page 440 (1948).

Supreme Court Decisions on Commerce Clause and State Police Power, by Thomas Reed Powell, in Vol. 22 of Columbia Law Review, page 28 (1922).

Supreme Court Decisions on Federal Power Over Commerce, 1910-1914, by Thomas Reed Powell, in Vol. 6 of Minnesota Law Review, pages 1, 135 (1921-22).

Taney and the Commerce Clause, by Felix Frankfurter, in Vol. 49 of Harvard Law Review, page 1236 (1936).

The Commerce Clause and the National Economy, 1933-1946, by Robert L. Stern, in Vol. 59 of Harvard Law Review, page 648 (1946).

The Commerce Clause and the State's Power Over Interstate Commerce in Vol. 9 of Brooklyn Law Review, page 174 (1940).

The Commerce Clause from the Schechter Case, by Perlle P. Fallon, in Vol. 19 of Temple Law Quarterly, page 435 (1946).

The Commerce Clause in the Constitutional Convention and in Contemporary Comment, by Albert S. Abel, in Vol. 25 of Minnesota Law Review, page 432 (1940).

The Commerce Clause and the Constitution - Its History and Development, by George C. Lay, in Vol. 60 of American Law Review, page 161 (1926).

The Commerce Clause - Today, by James H. Neu, in Vol. 17 of Notre Dame Lawyer, page 277 (1941-42).

The Commerce Power - From Gibbons v Oaden to Wagner Cases, by Jane Alvies, in Vol. 3 of Ohio University Law Journal, page 307 (1937).

The Constitutionality of Federal Legislation Concerning Employers and Employees Engaged in Interstate and Foreign Commerce, by Carl V. Wisner, in Vol. 5 of Michigan Law Review, Page 639 (1907).

The Contract Clause of the Federal Constitution, in Vol. 32 of Columbia Law Review, page 476 (1932).

The Development of Law as Illustrated by the Decisions Relating to the Police Power of the State, by W. G. Hastings, in Vol. 39 of Proceedings of the American Philosophical Society, page 528 (June 1900).

The Growth and Development of the Police Power of the State, by Collins Denny Jr., in Vol. 30 of Michigan Law Review, Page 172 (1921).

The National Police Power Under the Commerce Clause of the Constitution, by Robert Eugene Cushman, in Vol. 3 of Minnesota Law Review, page 289 (1919).

The Nature and Implications of the Police Power, in Vol. 6 of Kansas City Law Review, page 128 (1938).

The Police Power in American Constitutional Law, in Vol. 1 of Journal of Comparative Legislation, page 180 (1914).

The Silence of Congress, by Henry Wolf Bikle, in Vol. 41 of Harvard Law Review, page 200 (1927).

The Supreme Court. The Commerce Clause and State Legislation, by Vincent M. Barnett, Jr., in Vol. 40 of Michigan Law Review, page 49 (1941).

The Twilight Zone Between the Police Power and the Commerce Clause, by Kenneth F. Burgess, in Vol. 15 of Iowa Law Review, page 162 (1929).

Umpire to the Federal System, by George D. Braden, in Vol 10 of University of Chicago Law Review, page 26 (1942).

Validity of the National Labor Relations Act of 1935, in Vol. 23 of Virginia Law Review, page 946 (1936-37).

Wagner Labor Act Cases, by Nathaniel L. Nathanson, in Vol. 32 of Illinois Law Review, page 196 (1937-38).

BOOKS

Bierly, Willis Reed, Police Power. State and Federal. Philadelphia R. Welch & Company, 1907.

Burgess, John William, Political Science and Comparative Constitutional Law. Boston and London, Ginn & Company, 1890-91.

Daugherty, Carroll R., Labor Problems in American Industry. New York, Houghton Mifflin Company, 1941.

Elt, Police Power.

Frankfurter, Felix, The Commerce Clause Under Marshall, Taney and Waite. Chapel Hill, The University of North Carolina Press, 1937.

Freud, Ernest, The Police Power. Public Policy and Constitutional Rights. Chicago, Callaghan & Company, 1904.

Goodnow, Frank Johnson, Principles of Constitutional Government. New York and London, Harper & Brothers, 1916.

Hastings, W. G., The Development of Law as Illustrated by the Decisions Relating to the Police Power of the State. Proceedings of the American Philosophical Society. Held at Philadelphia for Promoting Useful Knowledge. Vol. 39, Sept. 1900.

Hear, Roger Sherman, Constitutional Conventions. Their Nature, Powers and Limitations. Boston, Little Brown & Company, 1917.

Hoxie, Robert Franklin, Trade Unionism in the United States. New York and London, D. Appleton & Company, 1923.

Jameson, John Alexander, A Treatise on Constitutional Conventions; Their History, Powers, and Modes of Proceeding. Chicago, 1887.

Millis & Montgomery, Organized Labor. New York, McGraw-Hill Book Company, Inc., 1945.

Rauchenbusch & Stein, Labor Cases and Materials. New York, F. S. Craft & Company 1941.

Wambaugh, Eugene, A selection of Cases on Constitutional Law. Cambridge, Howard University Press, 1915.

CASES CITED

- Adair v United States, 208 U.S. 161 (1908), pages 26, 27, 30.
- Alabama State Federation of Labor v McArdry, 65 Sup. Ct. 1388, 1392 (1945), page 88
- Allen Bradley Company et. al v Local Union No. 13, International Brotherhood of Electrical Workers, et. al, 325 U.S. 797 (1944), page 35
- Allen Bradley Local No. 1111 et. al v Wisconsin Employment Relations Board, 62 Sup. Ct. 820 (1942), pages 82, 85
- Apex Hosiery Company v Leader, 310 U.S. 295 (1940), page 35
- Arkansas Stove Company v State, 94 Ark. 27 (1910), page 20
- Atkins v Children's Hospital, 261 U.S. 525 (1923), pages 12, 15
- Baldwin v Seelig, 294 U.S. 511, 522 (1934), page 78
- Baltimore & O. R.R. Company v Int. Com. Comm., 221 U.S. 612 (1911), pages 25, 50
- Bedford Cut Stone Company v Journeymen Stone Cutters, 274 U.S. 37 (1927), page 34
- Bethlehem Steel Company v New York Labor Board, 330 U.S. 769 (1947), pages 88, 90
- Booth v Indiana, 237 U.S. 391 (1915), page 18
- Bowman v Chicago & Northwestern Ry. Company, 125 U.S. 465 (1888), pages 41, 78
- Brennan v Titusville, 289 U.S. 302 (1932), page 78
- Brown v Houston, 114 U.S. 622, 631 (1884), page 78
- Brown v Maryland, 12 Wheat. (U.S.) 419 (1827), pages 3, 76, 78
- Bunting v Oregon, 243 U.S. 426 (1917), page 14

Burcher v People, 41 Colo. 495 (1907), pages 12

Byers v Olney, 16 Ill. 35 (1854), page 7

California v Thompson, 313 U.S. 109, 113 (1940), pages 77, 78

Carter v Carter Coal Company, 298 U.S. 238 (1936), pages 58, 60, 62

Champion v Ames, 188 U.S. 321 (1903), pages 36, 44

Champlain Refining Company v Corporation Comm., 286 U.S. 210 (1932), page 54

Chicago v Schmedinger, 243 Ill. 167 (1927), page 9

Chicago Board of Trade v Olsen, 262 U.S. 1, 32 (1922), page 52

C. R. I. & Pac. Ry. v State of Arkansas, 219 U.S. 453 (1911), page 18

Clark Distilling Company v Western Md. Ry. Company, 242 U.S. 311 (1917), page 44

Cloverleaf Butter Company v Patterson, 315 U.S. 148 (1942), pages 80, 82

Commonwealth v Alger, 7 Cush. (Mass.) 53, 85 (1851), page 5

Commonwealth v Beattie, 115 Pac. Super 5 (1900), page 14

Commonwealth v Hamilton Mfg. Company, 120 Mass. 383 (1876), page 12

Commonwealth v Lewisbury, 11 Met. (Mass.) 55 (1846), page 7

Consolidated Edison Company v National Labor Relations Board, 305 U.S. 197 (1938), pages 69, 70

Cooley v Board of Port Wardens, 12 How. (U.S.) 299 (1851), pages 47, 76, 77, 78

Coppage v Kansas, 236 U.S. 1 (1915), page 30

Covington & C. Bridge Company v Kentucky, 154 U.S. 204, 212 (1893) page 78

Dent v West Virginia, 129 U.S. 114 (1888), page 10

Duckworth v Arkansas, 314 U.S. 390, 394 (1941), page 77

Du Plex Printing Press Company v Deering, 254 U.S. 443 (1921),
page 34

Edwards v California, 314 U.S. 160, 176 (1941), page 78

Employers Liability Cases, 207 U.S. 463 (1908), page 26

Gibbons v Ogden, 9 Wheat. (U.S.) 1 (1824), pages 46, 75, 76

Godcharles v Wegeman, 113 Pa. St. 431 (1886), page 19

Graves v New York ex. rel O'Keefe, 308 U.S. 466, 479 (1938), page
78

Hake v United States, 227 U.S. 308 (1913), page 37

Hall v De Cuir, 95 U.S. 485, 490 (1877), page 78

Hammer v Dagenhart, 247 U.S. 251 (1918), page 55

Health Dept. of N. Y. v Trinity Church, 145 N.Y. 32, page 9

Hill v Florida, 325 U.S. 538 (1944), page 86, 87, 88

Hines v Davidowitz, 312 U.S. 342 (1941), page 79

Holden v Hardy, 169 U.S. 366 (1898), pages 14, 17, 19

Houston & Texas Ry. Company v United States, 234 U.S. 342 (1914)
page 50

Illinois National Gas Company v Centrall Illinois Public Service
Company, 62 Sup. Ct. 384 (1942), page 79

Indiana v Brand, 303 U.S. 95, 117 (1938), page 21

In the Matter of Friedman-Harry Marks Clothing Company, Inc.,
1 N.L.R.B. 411 (1936), page 65

In the Matter of Fruehauf Trailer Company, etc., 1 N.L.R.B. 68
(1935), page 65

In the Matter of the Jones & Laughlin Steel Corp., etc., 1 N.L.R.
B. 503 (1936), page 64

In re Morgan, 58 Pac. 1071 (1891) (Colorado), page 14

In re Rahrer, 140 U.S. 545 (1891), pages 43, 44, 78

International Brotherhood of Electrical Workers, et al, 325 U.S.
797 (1944), page 35

International Shoe Company v Pinkus, 278 U.S. 261 (1926), page 79

Johnson Lytle Company v Spartan Mills, 68 S. C. 339 (1904),
page 20

Kelly v Washington, 302 U.S. 1 (1937), page 49, 79

Kentucky Whip & Collar Company v. Illinois Central R.R., 279 U.S.
331 (1937), page 44

Keekee Coal Company v Taylor, 234 U.S. 224 (1914), page 20

Knoxville Iron Company v Harbinson, 183 U.S. 13 (1901), page 19

Lawrence v Rutland R.R. Company, 80 Vt. 370 (1917), page 20

Leisy v Hardin, 135 U.S. 100 (1890), pages 42, 78

License Cases, 5 How. (U.S.) 504 (1847), pages 7, 41, 42, 47, 49

Lochner v New York, 198 U.S. 45 (1905), pages 5, 12, 14

Loewe v Lawler, 252 U.S. 522 (1915), page 34

Lone Star Gas Company v Texas, 304 U.S. 224, 238 (1933), page 77

Louisville & Nashville R.R. Company v Cook Brewing Company, 223
U.S. 70 (1912), page 40

Maryland v Hyman, 57 Atl. 6 (1904), page 78

Maurer et. al v Hamilton, 309 U.S. 598 (1940) pages 49, 77, 79

Mayo v Lakeland Highlands Canning Company, 309 U.S. 176, 189
(1940), page 21

McCarroll v Dixie Greyhound Lines, 309 U.S. 176, 189 (1940),
page 21

McDermott v Wisconsin, 228 U.S. 115 (1913), page 38

McLean v Arkansas, 211 U.S. 539 (1909), page 20

Milk Board v Eisenberg Company, 306 U.S. 346, 351 (1938), page 77

Millett v People, 117 Ill. 294, 302-303 (1886), pages 19

Miln v New York, 11 Pet. (U.S.) 102 (1837), page 7

Minnesota Rate Cases, 230 U.S. 352, 399, 400 (1913), pages 50,
77, 78

Mintz v Baldwin, 289 U.S. 346 (1933), page 79

Missouri Pacific R.R. v Norwood, 283 U.S. 249 (1930), page 18

Morris v United States, 229 Fed. 516 (1916), page 24

Muller v Oregon, 206 U.S. 412 (1910), page 12

Munn v Illinois, 94 U.S. 113 (1876), page 8

Mutual Loan Company v Martell, 222 U.S. 225 (1911), page 20

National Labor Relations Board v Feinblatt, 306 U.S. 601 (1939)
pages 70, 71, 72

National Labor Relations Board v Friedman-Harry Marks Clothing
Company, 301 U.S. 358 (1937), page 63

National Labor Relations Board v Fruehauf Trailer Company, 301
U.S. 49 (1937), page 63

National Labor Relations Board v Jones & Laughlin Steel Company,
301 U.S. 1 (1937), pages 2, 60, 64, 66, 67

New York Central R.R. v Winfield, 244 U.S. 147 (1917), page 79

Oliver Iron Mining Company v Lord, 262 U.S. 172, 178 (1923),
page 54

Opp Cotton Mills Inc. v Administrator, 61 Sup. Ct. 524 (1941),
 page 73

Oregon & Washington R.R. v Washington, 270 U.S. 587 (1926), page
 79

Orrick v Akers, 109 Mo. App. 662 (1904), page 10

Osborn v Ozlin, 310 U.S. 53, 66 (1940), page 21

Packard Motor Car Company, 61 N.L.R.B. 4, page 89

Parker v Brown, 317 U.S. 341, 362, 363 (1942), page 77

Pennsylvania R.R. Company v Driscoll, 336 Pa. 310 (1939), page 18

Pennsylvania v West Virginia, 262 U.S. 553, 596 (1922), page 78

People v Smith, 108 Mich. 527 (1896), page 18

People v Williams, 189 N.Y. 131 (1907), page 12

Plumley v Massachusetts, 155 U.S. 461 (1894), pages 48, 77

Polk v Glover, 305 U.S. 5, 16 (1933) page 21

Prudential Insurance Company v Benjamin, 66 Sup. Ct. 1142 (1946),
 pages 45

Rail Coke Company v Ohio Ind. Comm., 236 U.S. 338 (1915), page 20

Reagan v Farmers Loan & Trust Company, 154 U.S. 362 (1894), page 10

Reid v Colorado, 187 U.S. 137 (1902), page 38

Reinman v Little Rock, 273 U.S. 1717 (1926), page 10

Rhodes v Iowa, 170 U.S. 412 (1898), page 43

Santa Cruz Packing Company v N.L.R.B., 303 U.S. 453 (1938),
 pages 67, 68

Savage v Jones, 225 U.S. 501 (1912), pages 79, 81

Schechter Poultry Corp. v United States, 295 U.S. 495 (1935)
 pages, 56, 60

Second Coronado Case, 263 U.S. 395 (1925), page 35

Second Employers Liability Cases, 223 U.S. 1 (1912), page 26

Shawnee Milling Company v Temple, 179 Fed. 517 (1910), page 38

Silva v Newport, 150 Ky. 781 (1913), page 18

Sinnot v Davenport, 22 How. (U.S.) 237 (1859), page 79

Southern Pacific Company v Arizona, 325 U.S. 761 (1944), page 79

Southern Ry. v United States, 222 U.S. 20 (1911), page 50, 79

South Carolina Highway Dept. v Barnwell Bros., 303 U.S. 177, 185 (1937), page 77, 78, 79

Stafford v Wallace, 258 U.S. 495 (1921), page 52

St. Louis Consolidated Coal Company v Illinois, 185 U.S. 203 (1902) page 17

State v Buchanan, 39 Wash. 602 (1902), pages 12, 14

State v Cantwell, 174 Mo. 245 (1903), page 14

State v Coal & Coke Company, 33 W. Va. 188 (1889), page 14

State v Heidenhain, 42 La. Ann. 483 (1890), page 9

State v Noyes, 10 Foster, 279 (N.H.) (1855), page 7

State v Shorey, 86 Pac. 881 (1906), pages 13, 17

Stettler v O'Hara, 69 Ore. 519 (1914), page 15

Stettler v O'Hara, 243 U.S. 629 (1917) page 15

Sunshine Anthracite Coal Company v Atkins, 310 U.S. 381, 394 (1940), page 20

Swift & Company v United States, 196 U.S. 375 (1905), pages 51, 60

Texas & New Orleans R.R. v Brotherhood of Railway Clerks, 281 U.S. 548 (1930), pages 30, 50, 62

The Hepolite Egg Company v United States, 220 U.S. 45 (1911),
 page 38

Turner v Nye, 154 Mass. 579 (1891), page 9

United States v Brims, 272 U.S. 549 (1926) page 35

United States v Coombs, 12 Pet. (U.S.) 72 (1838), page 32

United States v Darby Lumber Company, 61 Sup. Ct. 451 (1941),
 page 73

United States v E. C. Knight Company, 156 U.S. 1 (1895), page 53

United States v 420 Sacks of Flour, 180 Fed. 518 (1910), page 38

United States v Orien, 137 Fed. 179 (1905), page 44

United States v Hutchinson, 61 Sup Ct. 463 (1941), page 35

United States v 74 Cases of Grape Juice, 181 Fed. 629 (1910),
 page 38

Utah Power & Light Company v Pfast, 286 U.S. 965 (1932), page 54

Vanhorne's Lessee v Darrance, 2 Dal. 304, 1 L. Ed. 391 (1795),
 page 6

Viazis v Moor, 14 How. (U.S.) 568 (1852), page 52

Virginia Railway v System Federation No. 40, 300 U.S. 515 (1937)
 pages 31, 63

Wabash etc. Ry. v Illinois, 118 U.S. 557 (1886), page 48

Welch v Swasey, 193 Mass. 364 (1907), page 9

West Coast Hotel v Parrish, 300 U.S. 379 (1936), page 16

Whitfield v Ohio, 297 U.S. (1936), page 44

Willis v Standard Oil Company, 50 Minn. 290 (1892), page 9

Willson v Black-Bird Creek Marsh Company, 2 Pet. (U.S.) 245 (1839),
 page 76

Wilson v Birl, 105 Fed (2d) 948 (1939), page 34

Wilson v New, 243 U.S. 332 (1917), page 25

Wilton v Missouri, 91 U.S. 275, 282 (1875), page 9, 78

Winham v State, 65 Neb. 934 (1902), pages 12, 14

Wisconsin v J.C. Penney Company, 311 U.S. 435, 445 (1940), page
20

Wisconsin v McDermott, 228 U.S. 115 (1913), page 81