Congress, The States and Commerce

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In the 1870's the National Grange with a membership of over one and one-half million persons interested in agriculture sought to defend its members and the public against greatly feared power of monopolies, particularly against excessive rates exacted by railroads and grain elevators. Its political power was so extensive that it induced a number of state legislatures to enact statutes limiting the rates to be charged by these businesses. It was almost unbelievable in the economic climate of the time that government could regulate the price at which private property or its services were sold. In 1876 operators of grain elevators in the Chicago area challenged the Illinois statute. They claimed that the statutes constituted a deprivation of private property without due process of law. Secondarily they asserted that the commerce clause gave exclusive regulation to Congress. In a series of cases sometimes known as the Granger Cases and sometimes by the name of the spearhead case, Munn v. Illinois, the Supreme Court upheld the validity of the Illinois statute. Chief Justice Waite wrote for the majority and concentrated on the due process argument. This case has been said to belong among the dozen or so most important cases in our constitutional history. It gave constitutional warrant to economic regulation of private property and opened new vistas to legislative majorities. Although a misuse of Waite's inept expression "business clothed with a public interest" was for a time turned to restrict rather than permit regulation of business enterprise, the main doctrine of that case is firmly established in the constitutional law of state and nation.

Seventy years later, in 1947, this same Illinois statute regulating rates of grain elevators was again in the United States Supreme Court. The elevator operators again were objecting to the Illinois statute but they did not claim to be free of regulation; nor did they claim as they did in 1876 that the dormant Commerce clause excluded State regulation. They claimed that the United States Warehouse Act which admittedly regulated them in some respects had superseded the authority of the Illinois Commerce Commission to regulate the commercial matters in question. The Supreme Court of the United States, speaking through Mr. Justice Douglas, upheld this contention and affirmed a decree enjoining a proceeding before the Illinois Commission under this venerable and famous statute. Rice v. Santa Fe Elevator Corporation thus buried the first major statutory regulation of private industry in the United States. This remarkable sequence aptly makes the point of the major area of constitutional controversy outside of the personal liberty field. Today we seldom ask, can government regulate; we ask a little more often, can a state government regulate interstate commerce; we ask almost every day, has federal legislation superseded state legislation in any particular field.

The legislative and administrative history of the United States Warehouse Act is also indicative of the developing problem and it indicates that current constitutional controversy is also ancient controversy. The first United States regulation of warehouses came in 1916 as a part of a rash of regulations of the Wilsonian era. That act carefully provided that it should in no way be construed to conflict with or limit state acts. In 1931 the Secretary of Agriculture asked Congress to amend the act so that the federal act should be "exclusive" with respect to all persons securing a federal license. Presumably in 1931 no one knew what this really meant or that it meant anything more than the supremacy of the federal act wherever there was a direct conflict with a state act. But after 1940 this older statute was challenged as one among many state statutes alleged to have been displaced by federal law.

This summary history of warehouse legislation contains the elements of my subject—the power of the states to regulate economic activity of persons where the transaction touches more than one state. A dispute which starts as a question whether any government may regulate private property in Munn v. Illinois must of necessity become a question, once an affirmative answer has been given, which government may regulate. The answer to the question of which government may regulate is controlled or shaped by the entire constitutional history of this country. To understand this we should recall that the Constitution neither refers to "interstate commerce" nor does it prohibit the states from doing anything with respect to "commerce" (a term which is used) except laying imposts or duties on imports or exports. All that the Commerce Clause says is that Congress has the power "To regulate Commerce with foreign nations, and among the several states and with the Indian tribes."
As an original proposition concerning this clause it could be argued as my colleague Professor Crosskey argues in his monumental history of the constitutional convention and times, that this clause gave to Congress complete power over regulations of commerce, whether inter- or intra-state. It could likewise be argued as Chief Justice Taney urged in his opinion in the License Cases in 1847 that "the mere grant of power to the general government cannot ... be construed to be an absolute prohibition on the exercise of any power over the same subject by the States ... (I)n my judgment, the State may ... make regulations of commerce ... unless they come in conflict with a law of Congress."\(^{14}\)

Neither Professor Crosskey's theory nor Chief Justice Taney's has ever been successfully urged in the Supreme Court, although they have been asserted from time to time since Cooley v. Board of Wardens\(^{15}\) established a different or third proposition. All modern cases say something similar to Chief Justice Stone's statement in Southern Pacific Co. v. Arizona in 1945:

"Ever since ... Cooley v. Board of Wardens, 12 How. 299 it has been recognized 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 interstate commerce or even, to some extent regulate it ... But ever since Gibbons v. Ogden, 9 Wheat. 1, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority."\(^{16}\)

Chief Justice Stone continued:

"For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court and not the state legislature is under the commerce clause, the final arbiter between competing demands of state and national interests. ..."\(^{17}\)

Mr. Justice Black has from time to time attempted to revive the Taney view that there is no negative implication from the commerce clause\(^{18}\) but it would appear that since Morgan v. Virginia\(^{19}\) in 1946 where the court held unconstitutional under the commerce clause the Virginia statute requiring separation of passengers on a color basis, he has acquiesced in the Court's phrasing of the power of the states over interstate commerce. The late Mr. Justice Jackson tried in Hood and Sons v. DuMond\(^{20}\) to revive an idea from the Marshall era that the commerce clause of its own effect prohibited regulation of certain subjects concerning commerce by the states. He also was unsuccessful. Thus we may say as the court says almost every term: "The commerce clause of its own force inhibits to some extent the power of the states" and we may further say that it is the Supreme Court not the state legislature which determines the extent of this inhibition.

To say that the states are to some extent inhibited by the commerce clause from regulating or even to say that federal legislation sometimes displaces state legislation does not tell us how much nor does it give us a real picture of the impact of Supreme Court decisions on our federal system. Historically (and I think correctly) critical appraisal of the court's work has assumed that the doctrine of federalism does not permit a quick and easy conclusion that state power was inhibited by the constitution or restricted by the passage of an act by the national legislature. Thus it was that critics of the Supreme Court before 1940 thought that the Court was unduly restricting state power under a theory that congressional power under the Commerce Clause was exclusive.

In this time when it is easy to criticize the Supreme Court for weakening the states, it is pleasant to report that as far as the dormant commerce clause is concerned the Supreme Court since the late 1940's has considerably enhanced the power of the states to regulate economic activity which touches more than one state. As far as the commerce clause is concerned "to some extent" in the quoted phrase means "very little."

But if the doctrine of federalism requires us to believe that a heavy burden of persuasion should be on him who asserts that an act of Congress displaces state exercised power, then we must assert that since 1940 the Supreme Court and Congress between them have drastically reduced a state's ability to deal with its own social order and economic enterprise as it wishes. The Congressional contribution to the consequent decline of federalism has been the expansion of the exercise of federal power. The Court's contribution has been to find from vague inferences concerning the exercise of federal power that Congress intended to displace state law by such legislation.

Two matters will be described in this monograph: (1) the factors which the Supreme Court appears to consider in arbitrating the competing demands of state and national interests under the Commerce Clause when Congress has not acted; and (2) the factors which the Court appears to consider in determining
whether congressional regulation of a matter precludes state regulation of a related matter or field. State taxation of interstate commerce and federal and state regulation of labor will not be considered.

At first thought it might appear incongruous to combine in one paper a consideration of the factors which determine the constitutionality of a state statute under the commerce clause with a consideration of factors which govern the construction of an act of Congress.21 One justification for this combination of subjects comes from the fact that whether it be the negative implication of the dormant Commerce Clause which voids a state statute or it be a conclusion that Congressional statutes have occupied the field, the decision of the Supreme Court is subject to the control of Congress. As the Supreme Court has said on numerous occasions and held several times "Congress has undoubted power to redelegate the distribution of power over interstate commerce."22 Congress may either permit the states to regulate the commerce in a manner which would otherwise not be permissible under Court decisions or it may exclude state regulation even of matters of local concern if it believes interstate commerce is affected. Thus it may be said that whether the Court is arbitrating between state and federal power under the Commerce Clause or whether it is construing a federal statute to determine whether Congress intended that state law be superseded, the problem is basically the same. In the former case the question before the court is the significance to be attached to Congressional silence or failure to act; in the latter case the question before the court is the significance to be attached to the fact that Congressional legislation regulated only a limited amount of that which could have been regulated. In both cases the Court must decide for itself, without much help from Congress whether an industry or activity should be left in some respect unregulated. In California v. Zook, in 1949 the Court equated the two problems thus: "Whether Congress has or has not expressed itself, the fundamental inquiry is the same: does the state action conflict with national policy."23

While attempts have been made from time to time to work with mechanistic formulae and thus to avoid making a judgment, it is now clear that in this area at least a court cannot avoid judging. The attempt to determine whether a state act is a regulation of commerce and therefore void or an exercise of the police power and therefore good;24 the attempt to determine when interstate commerce ends, for example after the original package is broken or when interstate commerce begins, for example after natural gas is pressurized for transmission in pipes;25 the attempt to determine whether a burden on interstate transactions is direct and therefore bad or indirect and therefore good26 have each ended in failure. As Justice Stone said in his dissent in the DiSanto case over 30 years ago the judges who make this attempt "are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached."27 Something more substantial is needed and courts should avoid searching for the unobtainable in this field, there is no substitute for hard analysis, mustering of facts and ultimately, the making of judgments hard to make.

Although not fool proof in predictability the judicial method used and suggested in Southern Pacific Co. v. Arizona28 decided in 1944 offers real suggestions for courts struggling with this difficult problem. The facts of the case were these: In 1912 Arizona made it unlawful to operate within the state a railroad train of more than 14 passengers or 80 freight cars. In 1941 the state brought suit against the Southern Pacific Company to recover the statutory penalties for violation of the statute. The Supreme Court of Arizona upheld the act as a safety measure designed to reduce the number of accidents. The Supreme Court speaking through Chief Justice Stone reversed. In this opinion he outlined various steps in analysis leading to exercise of judgment.

First he required that any asserted violation of the Commerce Clause be supported by relevant factual material which "will afford a sure basis" for an informed judgment. This is another way of putting the usual presumption of constitutionality but the similarity with the presumption rule ends at this point for as the Chief Justice said:

"in considering the effect of the statute as a safety measure, therefore, the factor of controlling significance for present purposes is not whether there is basis for the conclusion of the Arizona Supreme Court that the increase in length of trains beyond the statutory maximum has an adverse effect upon safety of operation. The decisive question is whether in the circumstances the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it and subject to local regulation which does not have a uniform effect. . . ."29 (italics supplied)

Where did the Supreme Court get the idea that this was a safety measure? Chief Justice Stone said that while he accepted the Arizona conclusion in this case that there was a need for safety and that the measure served this purpose, this conclusion is not binding on the Supreme Court. In other words the legislative recital that this is a safety measure does not bind the Supreme Court in Commerce Clause cases; the court
must analyze the statute and its effect to determine this for itself. *Hale v. Bimeco Trading Co.*,\(^{24}\) decided in 1939, is illustrative of this part of the Court's function. A Florida statute recited that the poor quality of foreign cement jeopardized public safety and that therefore inspection of the quality of such cement was required and a substantial fee was charged for the inspection. The recital in the statute seemed to bring it within the traditional subject matter of local regulation. But the Supreme Court did not stop with the recital. It noticed that the statute by its terms was applicable only to imported cement. Justice Frankfurter pointed out that if public safety was the real objective of this inspection fee that objective demanded equal application of the quality and inspection requirements to all cement used in construction in Florida. From this analysis the court concluded that this law was really a restraint on competition and therefore an invalid discrimination against foreign commerce.

The Court's statement in *Southern Pacific* that it was accepting the regulation as a safety measure and the Court's analysis in *Hale* to conclude that this was a measure regulating competition indicate another factor of significance. It would appear from the decided cases that the extent of the permissible burden on interstate commerce varies with the objective of the state statute. There may be some objectives which are not permissible whatever the effect on commerce. Mr. Justice Jackson attempted to carve out such an area in *H. P. Hood and Sons v. DuMond*\(^{25}\) in 1949. Petitioner was a milk distributor in Massachusetts who operated three licensed receiving stations in New York. It applied for license for an additional receiving station but the New York authorities denied the application on the ground that expansion of facilities would reduce the supply of milk for local markets and would result in destructive competition. Speaking for a majority of five Justice Jackson held the refusal to license petitioner an unconstitutional burden on interstate commerce. He said:

> "This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage is one deeply rooted in both our history and our law."\(^{26}\)

If Justice Jackson meant to establish an absolute principle concerning economic regulation, the cases before and after the *Hood* case do not support it. A producing state has been given considerable leeway in fixing prices to be paid producers even when the bulk of the product is sold in interstate commerce and even when the purpose of the regulation is to improve the economic well-being of the producers at the expense of out-of-state consumers. Thus in *Milk Control Board v. Eisenberg*\(^{27}\) sustaining an order fixing the price to be paid milk producers by a dealer selling the product out of the state, *Parker v. Brown*\(^{28}\) sustaining an elaborate scheme to control the supply of raisins sold primarily to out of state consumers; and *Cities Service Co. v. Peerless Co.*\(^{29}\) sustaining an order of the Oklahoma Corporation Commission fixing a minimum wellhead price, regulations designed to protect the competitive position of sellers against resident and non-resident buyers were upheld. In the *Cities Service Case* the court distinguished the *Hood* case on the ground that New York was, in that case, trying to protect the supplies needed for local consumers to the disadvantage of the non-resident consumers rather than to protect the competitive position of suppliers. In the following year the Supreme Court upheld a Michigan requirement that an interstate natural gas pipeline obtain a certificate of necessity and convenience before selling gas directly to industrial consumers in competition with a local supplier who purchased his gas from an interstate pipeline. *Panhandle Eastern Pipeline Co. v. Michigan Public Service Commission*.\(^{30}\)

This line of cases cast considerable doubt on *Buck v. Kuykendall* decided in 1925 where the Court held that a state could not deny a permit to an interstate truck line on the ground that such service was unnecessary in view of existing facilities. On the other hand the Court as late as 1948 exhibited this hostility to a regulation designed to control the competition of outsiders in *Toomer v. Witsell*.\(^{31}\) In this case a regulation about licenses, berthing and other matters appeared to the court to have as a primary purpose the preference of local commercial fishermen over non-residents and the court had no difficulty in striking it down. But the two chances which the Court had to reconsider *Buck v. Kuykendall* since the Panhandle case and explain its position have been dodged. In *Fry Roofing Co. v. Wood*,\(^{32}\) where an interstate motor carrier was required to obtain a certificate called a certificate of convenience and necessity the Court upheld the regulation but on the basis that the Arkansas commission had, as the Commission interpreted the statute, no right to refuse the certificate. Thus the certificate was for identification purposes and not for economic regulation. In *City of Chicago v. Atchison, Topeka and Santa Fe Ry. Co.*\(^{33}\) decided in June 1958, the licensing statute clearly gave the City power to refuse the certificate on economic considerations and the Court held the ordinance bad but not on the basis of the Commerce Clause but on a conclusion that the Interstate Commerce Act precluded the city
from exercising any veto power on economic considerations over the interstate transfer service.

While we can say that if the purpose and effect of the regulation is to restrict seriously the competition between local and interstate competitors for a particular supply or consumers market, the Court will closely scrutinize the regulation, we cannot, from this factor predict with accuracy the outcome of the case. At this point a very significant factor is the tradition or convention of regulation. Thus in the raisin case, Parker v. Brown, the state regulation was in the pattern of a previously approved Congressional policy; in the interstate pipeline cases the Congressional regulation was built upon certain assumptions as to what the states could do and were doing. National regulation of railroads is old and strong; state regulation of trucks is equally strong. It is this long standing conventional pattern of regulation, almost as much as the financial state of the states in ownership of the highways, which explains why the regulation of trucks and motor buses seems to be treated so much differently from regulation of similar matters with railroads. The Court usually emphasizes this point by saying that "there are few subjects of state regulation affecting interstate commerce which are so peculiarly of local concern as the use of the state's highways." The Court has, of course, in no small part contributed to the truth of this statement by allowing the states more power over trucks than over trains.

But having determined that the subject matter of the regulation is a clearly permissible local subject is not enough to sustain the validity of the state regulation. The next step is to determine the extent of the burden on interstate commerce. At one extreme are the situations where the regulation wholly prohibits the interstate activity or transaction; at the other are the situations where the regulation is at most a certain amount of paper work, red tape and predetermination of the action to be taken. The seriousness of the burden also is involved and this varies with the need for uniformity and the strength of the interests of the states.

Two cases will illustrate the applicability of these considerations and how the seriousness is estimated.

In Clason v. Indiana in 1939 a comprehensive Indiana statute dealing with the disposal of the bodies of large dead animals required the bodies to be disposed of by the owner either at the place of death or by transportation to a disposal plant licensed and inspected by the state. Thus the statute prohibited the export of such bodies and also the import of them. The conviction of a person transporting such a body without a license to a disposal plant out of the state was upheld as a health and safety measure which could be enforced only if transportation was limited to delivery to licensed and inspected disposal plants. Here it appeared to the court that the only method of achieving the legitimate state objective was the prohibition of interstate commerce altogether. It further appeared that the state interest outweighed any national interest in the free transportation of such bodies.

This case may be contrasted with Dean Milk Co. v. Madison in 1951. A Madison, Wisconsin, ordinance made it unlawful to sell milk in Madison unless it had been processed and bottled at an approved pasteurization plant within a radius of five miles from the center of Madison. The objective of the ordinance was obvious and the problem of inspecting milk processed at a distance away from the location of the inspectors was recognized. The majority concluded however that the ordinance was invalid because there were alternative methods of securing the legitimate local interest. In short the state may exclude an interstate transaction in order to achieve a serious local objective if it appears that there is no reasonable way to achieve the objective other than the one selected. Castle v. Hayes Freight Lines Inc. also belongs in this category. The question was whether Illinois could bar an interstate motor carrier from use of state highways for interstate purposes as punishment for repeated violations of the state highway weight regulations. The Supreme Court agreed with the Illinois Supreme Court that it could not. Not only did the state fail to show that suspension of intrastate business rights would not be sufficient to secure compliance but also that the federal motor carrier act provided the state with a procedure whereby it could secure suspension of the federal certificate to operate in interstate commerce by the Commerce Commission. The available alternatives made the selected regulation seem drastic.

At the other extreme from complete prohibition of interstate commerce is the situation where the burden seems so infinitesimal as to be almost de minimus. Of the cases in recent years which fall in this category, Fry Roofing Co. v. Wood in 1952, Terminal RR Ass'n of St. Louis v. Brotherhood in 1943 and Carter v. Virginia in 1944 are illustrative. In the first an interstate motor carrier was required to obtain a certificate called a certificate of convenience and necessity but one which the Arkansas commission conceded it had no right to refuse. The Court held that Arkansas could require interstate motor carriers to identify themselves. In the Terminal Railroad case the state commerce commission ordered a terminal railroad operating in East St. Louis to provide cabooses on its trains. This was upheld even though some of the runs went across state lines and back. In the Carter case
the Virginia Alcoholic Beverage Act required transpor-
ters of liquor through Virginia to file a paper desig-
nating the consignee and the direct route through the
state and a bond assuring performance. This was
upheld as a necessary adjunct of the state regulation
of liquor within the state.
In between these two extremes—complete prohibi-
tion and a requirement of notices and other minimal
activity, we have the great bulk of the cases and also
the area of most difficult judgment. It is here that
the Courts must assess the relative weights of state
and national interests. The cases also indicate signifi-
cant factors here. One broad category which is per-
haps a continuation of the one suggested above is
distinguishing a regulation which is in the nature of
a physical obstruction to the free movement of goods
and one which imposes only greater financial costs.
This contrast is seen in the Southern Pacific case in-
volving the Arizona Train Limit Law and Collins v.
American Bus Lines Inc.46 involving the applicability
of an Arizona Workmen’s Compensation law to the
death in Arizona of a non-resident employee of an
interstate bus company. The train crew law not only
imposed greater costs on interstate commerce, it necess-
itated conversion and reconversion of train lengths
with consequent delay in traffic time and diminution
of volume moved in a given time. The court regarded
this burden in the physical sense to be extremely sig-
nificant in balancing the state’s interest in safety
against the national interest of free movement of com-
merce. It thus distinguished the train size cases from
state laws prohibiting the care stove, requiring locomo-
tives to be supplied with headlights and the like which
at most increased the financial costs of commerce.
These did not affect uniformity of train operation. In
the Collins case the court pointed out that the South-
ern Pacific case was not at all applicable because here
the burden on interstate commerce was at most finan-
cial.
When the court is acting as arbiter, under the Com-
merce Clause, it uses many factors which in varying
combinations produce varying results. Underlying
almost all factors is the court’s assessment of the ability
of normal political processes to correct any excess in
regulation. Thus in the Southern Pacific case, the
court in explaining the difference between truck and
railroad regulation made this observation: “The fact
that they (regulation of trucks on highways) affect
alike shippers in interstate and intrastate commerce
in great numbers within as well as without the state, is
a safeguard against regulatory abuse.”49 The milk
cases and the Oklahoma regulation of the price of
natural gas at the well-head also contain this element.
Because of the large number of local as well as out-
of-state consumers, an abusive regulation designed to
increase the price which a local seller may charge to
all of his customers may be corrected by the electoral
process. On the other hand if a state seeks to give its
suppliers a competitive advantage in the market for
the custom of local consumers, the out-of-state pro-
ducer does not have as effective a political process to
obtain an elimination of the competitive advantage.
The factors which seem most significant for a state
court judge in making this arbitration in the first in-
estance seems to be these: (1) Whether the field of
state regulation is one which the states have tradi-
tionally occupied. Highway regulations are an ex-
ample. (2) What, considering the effect of the statute
as well as its recited purpose, seems to be its true
objective. A presumption of constitutionality is not
to be used as a substitute for thorough analysis of the
situation. (3) Assuming the objective of the legisla-
tion to be within permissible bounds such as protect-
ing the health and safety of the state citizens, are there
any relevant data for an informed judgment as to the
seriousness of the burden of the regulation on com-
merce. If there is not the state legislation should not
be invalidated. (4) Assuming the objective of the reg-
ulation to be in the field of regulating the position of
competitors, the state court should examine carefully
the effect of the regulation and should require rather
persuasive reasons to find the effect of no significance.
Although there may be some inconsistency in the
cases, such as the tolerance of state regulation of
interstate pipelines and interstate purchasers from
farmers, in the main, the court in the past twenty years
has exhibited no marked tendency to depart from
traditional approaches to an ancient problem. The
Court is making a value judgment and in so doing it
has expanded state power under the commerce clause.
At the same time that this expansion of state power
has occurred, the Supreme Court has been increasingly
concerned with the question whether a federal act in
the field of commerce regulation supersedes a state
act in the same field. This is to be expected for no
other reason than that Congress is legislating in many
more areas of economic life than it did when Mun
v. Illinois was decided in 1876. So are the states legis-
lating in more areas than in 1876. More cases involving
the supremacy of federal statutes over state
statutes should therefore be expected.
It requires no disagreement with the doctrine of
federalism under our constitution to say that when a
state and federal act covering the same general sub-
ject puts the regulated person in the position that if
he complies with one act he must defy or violate the
other, then the federal act controls or supersedes or
displaces the state act. The Union could not hold to-
gether without such a rule as the Supremacy Clause
making the Constitution and the laws of the United
States supreme over state laws. This kind of conflict between federal and state law seldom arises since most regulation is prohibitory or negative in form and does not require that which is permitted. Thus a federal law prohibiting truck bodies greater than 10 feet in width on an interstate motor truck would not conflict, in this sense, with a state law prohibiting truck bodies greater than eight feet in width. Compliance with the eight-foot law of the state would not require a violation of the federal ten-foot law.

It requires no discussion to show that when Congress has provided all of the regulation it deems desirable for a given bit of commerce that state action is excluded. The problem is the factors to be used to determine when Congress intends there to be no further regulation. The factors used depend, in no small part, on the attitude of the judges toward centralism and federalism. In the past, and today by a minority of the court, we have been reminded that respect for the federal system requires a belief that federal acts do not displace state acts unless Congress say so. The rule prior to Hines v. Davidowitz, in 1941 seemed to be that state law was not displaced "unless the statute plainly and palpably... enforces upon the exercise of some authority delegated to the United States..." (Stone J. Dissenting). Prior to 1940 the bloc on the court who believed that there was little in the Constitution restricting the states under the Fourteenth Amendment or Commerce Clause also believed that the court should not infer that Congress intended to displace state law when it legislated. Since 1940 the dominant majority, while finding little in the Constitution restricting state economic regulation, has been quick to find that state law is displaced.

The Court has never taken the position that there is no displacement unless Congress expressly directs supersede or unless there is an essential conflict. It has always drawn inferences from the policy and effect of the state and federal laws in question. The result is that we have had the decision described by Justice Butler in 1939: "Our decisions provide no formulae for discovering the implied effect of federal statutes upon state measures." Two cases under the Federal Pure Food and Drug Act in 1912 and 1913 illustrate the problem. The federal act prohibits, among other things, interstate shipment of food and drugs if misbranded by bearing any statement, design or device which is false or misleading. An Indiana statute required the labels on certain food offered for sale in that state to disclose the formula for the food. A Wisconsin statute required glucose mixtures offered for sale to contain on the label one designation "glucose flavored with..." and prohibited any other designation. As an original proposition it could be argued that since the federal act dealt with statements on the labels of food and drugs, any state law dealing with statements on the package was displaced. At the other extreme it could be argued that until the state acts required a statement on the package which the federal act called misleading the state acts should be allowed to stand as there was no conflict. The Supreme Court upheld the Indiana act in 1912 and struck down the Wisconsin act in 1913. In the latter case the court found an inconsistency in policy between the federal act which permitted any label or statement as long as it was not misleading and the state act which permitted only one type of label.

Over time the Court has used a number of tests or doctrines which become so confused in statement and application that it is often difficult to decide which test is being used. The simplest test is that of conflict between state and federal act but this test has been referred to in recent years only when the court upholds state legislation. The highwater mark of this test is Mauer v. Hamilton decided in 1940. The question was whether a Pennsylvania statute prohibiting the operation on its highways of motor vehicles carrying other vehicles over the cab was superseded by rules concerning safety of equipment promulgated by the Interstate Commerce Commission.

After extensive hearings the Commission had issued a report in which it concluded that there was no evidence of the load over the cab being unsafe and it issued rules concerning safety of truck equipment which omitted regulation of the load over the cab. The Supreme Court upheld the state statute against a claim of supersEDURE. It analyzed the legislative history and the federal statute to find that Congress was hesitant to enter the field of weight regulation in which the states had a special interest because of their investment in the highways. The Court refused to infer that the Congress intended to displace state regulations by its own entry into regulation of safety and operation and equipment. The Court said that "As a matter of statutory construction Congressional intention to displace local laws in the exercise of its commerce power is not, in general, to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose." In assessing today's critical comment note should be taken that comment on this case thought the court went too far in upholding state action.

The shift in emphasis began the next year in 1941 in Hines v. Davidowitz which is not a commerce clause case. The United States had an alien registration act which did not require the alien to carry his identification card. Pennsylvania had an alien registration act which did. The majority of the court held that the state act was superseded because it served
the same general policy and purpose as the federal act. Unless the state action serves some independent purpose within its province, coincidence of the state and federal regulation will require the state act to give way. That the shift in emphasis is not complete and that it is difficult to find a consistent policy can be seen from California v. Zook in 1949. California had a statute which imposed a penalty for sale of transportation by a carrier which had no permit from the Interstate Commerce Commission or the California Commission. A regulation of the Commerce Commission covered this type of unscheduled transportation. The question was whether the federal statute superseded the state act. The majority of the court found that it did not. It stated that the coincidence of the two acts is not enough absent some evidence of conflict of policy. This case should be compared with Pennsylvania v. Nelson involving the Pennsylvania sedition act where the result was the opposite and the common personnel in the two split-decision cases shifted sides.

Just as the Court attempted to restate the factors involved in a “dormant” commerce clause case in Southern Pacific Co. v. Arizona so it also sought to restate the law in Rice v. Santa Fe Elevator Corp. as to the significant factors in a displacement or supersede case. Mr. Justice Douglas listed as his first factor the historical or conventional classification of the subject: is it a matter which Congress has historically legislated about or is it one in which the states have traditionally acted. If the case falls into the latter category the court is less likely to read federal legislation as precluding any state regulation. In California v. Zook, Mr. Justice Murphy refers to the “usual police power of the states” as a useful factor in displacement questions. What does the court mean by “traditional” or “usual”? Apparently not first in the field. In California v. Zook it would appear that Murphy really meant, protection of health, safety and protection against fraud. This point of health and safety is also emphasized in Mauer v. Hamilton as subjects traditionally belonging to the states. In the Rice case the states were clearly first in time yet the court found displacement of state law. The regulation was of prices, selling practices and other factors commonly found in highly regulatory economic statutes.

Particularly significant in this historical approach to the problem is the question whether the subject became national because of earlier Supreme Court decisions excluding the states from regulation. If earlier Supreme Court decisions had precluded the states under the commerce clause and if Congress thereafter began regulating the matter, then state regulation is thereafter precluded even though subsequent interpretations of the Constitution would allow the states to regulate. Likewise if the earlier decisions had carved out an area of permissible state regulation then subsequent federal legislation designed to fill in the gaps will not be interpreted as ousting the states. Many of the supersedure cases under the Natural Gas Act are illustrative of this principle. Prior to this act, the Supreme Court had held that the states could not regulate the sales for resale by interstate pipelines and gas companies but the states could regulate direct sales of such companies to local consumers. The Supreme Court has suggested that the states could now regulate both types of sales. But in the meantime the Natural Gas Act of 1938 was passed for the purpose of regulating activity which in 1938 the court had said the states could not regulate. The cases fairly consistently hold that Congress has occupied the field which the old Supreme Court said the states could not regulate but that the federal act does not occupy the field which the old Supreme Court said the states could regulate.

Parker v. Motor Boat Sales in 1941 is an extreme illustration of the significance of this factor. The Longshoremen’s Act specifically said that the Federal Act should not apply where recovery under local workmen’s compensation acts could validly be had under state law. In 1917 in Southern Pacific v. Jensen the Supreme Court had decided that the jurisdiction of Congress over admiralty was so exclusive that a state workmen’s compensation law could not be applied to those employees in admiralty, such as longshoremen, not covered by the federal act concerning seamen. Subsequently the Congress filled up this gap between the Jones Act, applicable to seamen, and state workmen’s compensation laws by enacting the longshoremen’s act but with the proviso mentioned above. In the Parker case an office employee of a boat dealer was drowned in inland navigable waters while demonstrating a boat. The Virginia workmen’s compensation act was in terms applicable and under constitutional doctrine current by 1941 could constitutionally be applied. The Supreme Court held that the federal law occupied the field. It interpreted the proviso as meaning state law was applicable to the extent Southern Pacific v. Jensen and its doctrine would have permitted.

If the field of regulation is one traditionally occupied by the states then a further question concerning displacement is necessary and that is whether it can be inferred that the Congressional intent is to displace state law. Four factors are here relevant according to the Rice case. The pervasiveness and scope of the federal act is significant. The more it appears to be a complete system of regulation the more likely state acts are to be displaced. Although
there are no cases under the act, it is doubtful that state law touching atomic energy, even the extent of tort liability can survive the Atomic Energy Act for this reason.

Cloverleaf Butter Co. v. Patterson\textsuperscript{15} in 1942 is illustrative of both this principle or factor and the difficulty of its application. The federal act in question regulated the processing of renovated butter for health and sanitation purposes, admittedly a purpose traditionally within the state police power. It was a comprehensive statute which dealt with renovated butter at two points in the processing and distribution system: it imposed rigid sanitary regulations on the manufacture and distribution of such butter; and it subjected butter approved by the federal inspectors to the laws of the importing state. The Alabama act in question, for the same objectives regulated the other end of the process which the federal act had left unregulated: the packing stock butter from which the finished product subject to federal and state regulations came and to which the manufacturing process subject to federal regulation was applied. The majority of the Supreme Court thought that the all pervasive federal scheme supported an inference that Congress desired the raw material left unregulated. The minority thought this inference was not overwhelmingly supportable and it relied on a presumption of no displacement.

Secondly, said Justice Douglas in the Rice case, the federal act may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. This, according to Douglas, is the basis of Illinois v. Davidovitz to which reference has been made. The alien registration act touched an area in which the federal interest was dominant—field of foreign affairs; power over immigration and naturalization and deportation. A similar case is Pennsylvania v. Nelson.\textsuperscript{68}

Third, the object of the federal act and the character of the obligation imposed thereby may reveal a purpose to supersede the states. Examples of this type of supersedeure are instances where federal legislation was avowedly passed to obtain uniformity such as the safety appliance act.\textsuperscript{67}

Finally, state policy may produce a result inconsistent with an objective of the federal act. Many of the labor supersedeure cases are of this variety. Hill v. Florida\textsuperscript{88} in 1945 where a Florida law requiring registration of union business agents was found to conflict with the policy of the national labor relations act is illustrative.

After listing these factors Mr. Justice Douglas adds that the cases which do not fall into any of these categories are “difficult” cases. As examples of difficulc he cites two cases where state power was upheld: South Carolina Highway Department v. Barnwell Bros.\textsuperscript{19} (width and weight regulation of interstate trucks); and Union Brokerage Co. v. Jensen\textsuperscript{20} (federal license of a customs broker v. qualification under Minnesota Foreign Corporation Act). Unless the justice is cavalier in his citations, the reference to these cases as “difficult” is really revealing of an intent on Douglas’ part to sweep aside past law and indeed to change the rule of construction. The areas of law referred to in these cases have traditionally been regulated by the states even though there is also some federal regulation and the court has seldom had sharp divergence of views on these matters. This reference may well mean that Douglas is prepared to sweep all other rules aside and apply only one test to which he refers in the Rice case. He summarizes the matter by saying:

“The test, therefore, is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State.” (Italics supplied.)

The latest case on displacement of state law, City of Chicago v. Atchison, Topeka and Santa Fe Ry. Co.,\textsuperscript{21} would seem to indicate that the court has about reached this point. In that case the City proposed to require a certificate of necessity from the carrier selected by the railroads to provide transfer service between stations in Chicago. Without reference to any legislative history or any of the tests referred to in the Rice case, the majority concluded that two general sections of the Interstate Commerce Act imposing a duty on carriers to establish through routes and passenger interchanges made Chicago impotent to license the transfer agent. These cases seem to have eliminated a search for Congressional intent as to supersedeure and substituted the court’s judgment whether the state act might be inconsistent with some unexpressed Congressional policy. The only search for Congressional intent seems now to be a search for an intent not to displace. Thus in Rice v. Board of Trade\textsuperscript{22} Justice Douglas found no displacement of state regulation of boards of trade by the Commodity Exchange Act\textsuperscript{23} which had an express reservation of state power in some sections. Douglas reasoned that if Congress used such care to preserve state authority where conflict possible, there is no displacement where there is no conflict.

There is a definite trend in the Court toward a reversal of the historic attitude toward this problem. The reversal of attitude can only mean that the doctrine of federalism has suffered. A true federalist cannot regard state exercise of power as unique where Congress has also acted. A nationalist cannot expect
the states to legislate on many subjects without the consent of Congress. But the important point is, that the problem is one for Congress. If it expresses itself either generally or specifically as to its desires on the displacement question, there is little indication that the Court will ignore a clear Congressional mandate.

FOOTNOTES
1 See 2 Warren, The Supreme Court in United States History (Rev. Ed. 1926) 574-591.
2 94 U.S. 113 (1876). The cases decided at the same time as Mann v. Illinois were concerned with state regulation of railroad rates. Chicago, B. and Q. R. R. v. Iowa, 94 U.S. 155 (1876); Peik v. Chicago and N. W. Ry., 94 U.S. 159 (1876); Chicago, Milwaukee and St. Paul R. R. v. Ackley, 94 U.S. 173 (1876); Winona and St. Peter R. R. v. Blake, 94 U.S. 181 (1876); and Stone v. Wisconsin, 94 U.S. 189 (1876).
3 For a discussion of the significance of these cases see Frankfurter, The Commerce Clause (1937) pp 83-90; Trimble, Chief Justice Waite (1938) pp 175-184.
4 2 Warren, op. cit. supra n. 1 p. 574, 581.
7 331 U. S. 218 (1947).
8 39 Stat. 490, Sec. 29 “Nothing in this Act shall be construed to conflict with . . . or to impair or limit the effect or operation of the laws of any State . . .”
9 46 Stat. 1465 “the power, jurisdiction and authority conferred upon the Secretary of Agriculture . . . shall be exclusive . . .”
10 In his book on the Commerce Clause, Professor Frankfurter, as he then was, noted that the federal act had assumed partial control “and to some extent dislodged the states” but he refused to speculate on the extent of the supersession. In Rice v. Santa Fe Elevator Corp., infra n. 58, Justice Frankfurter thought the 1931 amendment only outlawed “conflicts” between the two statutes.
12 U. S. Const. Art. I, Sec. 8 cl. 3.
* See H. W. How. 540, 579 (1847).
15 12 How. 209 (1851).
17 Ibid. at 769.
19 328 U.S. 373 (1946).
21 State taxation of interstate commerce is more difficult than regulation because there are usually many other sources of revenue available. See Frankfurter dissenting in Hood & Son v. Dwork, 336 U.S. 525 (1949).
24 See op. cit. supra n. 16.
26 See Brooks v. Maryland, 12 Wheat. 419 (1827).
31 Ibid. at 775.
33 336 U.S. 525 (1949).
34 Ibid. at 533.
36 317 U.S. 341 (1943).
40 334 U.S. 385 (1948).
42 1 U. S. (1858).
47 318 U.S. 1 (1943).
48 321 U.S. 131 (1944).
49 350 U.S. 528 (1956).
52 312 U.S. 52 (1941).
56 McDermott v. Wisconsin, 228 U.S. 115 (1913).
57 309 U.S. 598 (1940).
58 See e.g. comment, Power of States to Regulate Interstate Motor Carriers, 39 Mich. L. Rev. 631, 633-637 (1941).
59 312 U.S. 82 (1941).
60 See op. cit. supra n. 16.
61 350 U.S. 497 (1956).
63 See e.g. P. U. C. of Ohio v. United Fuel Gas Co., 317 U.S. 456 (1943); Interstate Natural Gas Co. v. Power Commission, 331 U.S. 682 (1946); Panhandle Eastern Pipe Line Co. v.

(a) 314 U. S. 244 (1941).
(c) 315 U. S. 148 (1942).
(d) Op. cit. supra n. 60.

(f) 325 U. S. 538 (1945).
(g) 303 U. S. 181 (1938).
(h) 322 U. S. 202 (1944).
(j) Rice v. Board of Trade, 331 U. S. 247 (1947).
(k) U. S. C.