

COMMENT

INDUSTRY AND COURT*

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I

A THEORY of the proper relation between industry and government, and not the historical or grammatical meaning of words in the constitution, supplies the only clew to the most important constitutional decisions of the Supreme Court of the United States.

As an examination of the cases in which the court has changed its mind seems to indicate, the view that industry and trade ought to be free from government control has been a consistent influence on the court's decisions. Mr. Justice Story and Chief Justice Marshall tried unsuccessfully to derive some general theory of protection to freedom of trade from the words of the contract clause.¹ The development of a modern interpretation of the meaning of the "liberty" and "property" protected by the due process clauses resulted later in a body of decisions such as they would doubtless have approved.

The creation of modern due process doctrine has followed a familiar but somewhat curious course. "Liberty" and "property" were first given federal constitutional protection in the form of property in slaves and liberty to deal with slave property as the owner wished.² The appearance

* For the writer's background, and earlier brief comments on related matters, see 1 *Univ. Chi. L. Rev.* 320 (1933); 2 *Univ. Chi. L. Rev.* 301 (1935). The experience there referred to has been further supplemented by continued work as a special consultant, particularly in connection with the steel code administration, in the recovery administration. The present comment is for the most part a brief summary of a position based on earlier study, and more fully discussed in an earlier paper. See the writer's *Movement in Supreme Court Adjudication*, 46 *Harv. L. Rev.* 361, 593, 795 (1933). Support for and explanation of these brief observations must be left partly to that paper.

Thoughtful and more or less critical comments on *Schechter Poultry Corporation v. United States*, 295 U.S. 495 (1935), have appeared. See Clark, *The Supreme Court and the N.R.A.*, 83 *New Republic* 120 (June 12, 1935); McBain, *The Constitution and the New Deal*, 25 *Yale Review* 114 (1935); Powell, *Would the Supreme Court Block a Planned Economy?*, 12 *Fortune*, no. 2, 48 (August, 1935). See also Corwin, *The Twilight of the Supreme Court* (1934). The psychological effects of the publication of a book with this title may be worth some speculation.

Corbin, *What's a United State?*, 98 *Scribner's Magazine* 257 (November 1935) has appeared since this comment went to press.

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¹ *Ogden v. Saunders*, 12 *Wheat. (U.S.)* 213 (1827).

² *Dred Scott v. Sandford*, 19 *How. (U.S.)* 393, 450-452, 488, 490, 508, 515-17, 527-29, 624-27 (1857).

of constitutional liberty and property in this form was, of course, one of the occasions for the Civil War. It is, indeed, one of the ironies of current history that Lincoln, who was responsible for the destruction of the property rights which the Dred Scott decision tried to protect,³ and who was responsible both for fundamental changes in the constitution and for saving it, should be appealed to as the supposed opponent of all constitutional change.

The appearance of constitutional liberty and property in the Dred Scott case was somewhat tentative. An effort to invoke due process doctrine against the inflationary legal tender legislation was rather summarily disposed of.⁴ The idea persisted, however, and was expressed forcefully in the dissenting opinions in the *Slaughter House* cases.⁵ Finally in 1897 the idea was used to give to a national insurance business the kind of protection against state laws that had been developed for many other businesses by the construction of the commerce clause; and in a limited decision, useful commercially, the modern view of the meaning of liberty and property in the due process clauses was finally adopted by the Supreme Court.⁶

The social consequences of the development of this modern doctrine have since become apparent. One need only recall the decision that states may not impose a penalty upon the formation of yellow dog contracts;⁷ and that Congress may not authorize a commission to require the payment of living wages to women in the District of Columbia.⁸

The decisions establishing the modern view of the meaning of liberty and property in the due process clauses, write into the law an economic doctrine which has the support of one group of students of economic theory, but which has no adequate support in the legislative or judicial history of the due process clauses.

General considerations similarly seem necessary, to explain the development of a useful and less notable line of decisions. The commerce clause provides that "the Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ." It was early, and necessarily, decided that in consequence

³ See 2 Warren, *The Supreme Court in United States History* 329-332 (2d ed. 1926) for interesting observations on Lincoln's attitude toward the Dred Scott decision.

⁴ *Legal Tender Cases*, 12 Wall. (U.S.) 457, 551 (1870).

⁵ 16 Wall. (U.S.) 36 (1873).

⁶ *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

⁷ *Coppage v. Kansas*, 236 U.S. 1 (1915). Cf. *Texas and New Orleans R. R. v. Brotherhood of Ry. and Steamship Clerks*, 281 U.S. 548, 570-571 (1930).

⁸ *Adkins v. Children's Hospital*, 261 U.S. 525 (1923). Cf. *Nebbia v. New York*, 291 U.S. 502 (1934).

of this clause state legislation inconsistent with authorized congressional legislation must be treated as ineffectual by the courts.⁹ In arguing the case which established this proposition, however, Daniel Webster went further, and urged that a limit on state legislation was to be found in the words of the clause themselves. His argument was that the power of states over interstate commerce met at some point a limit in the grant of power to Congress over interstate commerce.

Whether considered in the light of history, grammar, or logic, the argument will not bear a moment's examination. It did, however, appeal to the practical sense of persons who were familiar with interstate commercial jealousies; and it won a cautious and qualified suggestion of approval in a dictum by Chief Justice Marshall.

Webster pressed the argument again in cases which divided the court under Chief Justice Taney.¹⁰ The cases were decided without any final determination about the proposed doctrine; and it was not applied to invalidate legislation until 1873.¹¹ Since then the basic theory of Webster's arguments has been developed into a large body of technical rules, protecting interstate commerce against many kinds of interference by regulatory and tax measures of the states.

Again general ideas with respect to freedom of trade appear to have had their influence on decisions defining the power of Congress over interstate commerce. The Sherman Act was at first threatened with frustration by a decision that a monopoly of the sugar refining capacity of the country was not engaged in interstate commerce;¹² and it has been held that while Congress could forbid the transportation of contraceptives, women, lottery tickets, impure food, and stolen automobiles in interstate commerce,¹³ it could not assure railroad workers the right to organize¹⁴ nor prevent the transportation of the products of child labor in interstate commerce.¹⁵

⁹ *Gibbons v. Ogden*, 9 Wheat. (U.S.) 1 (1824). *Cf.* *Brown v. Maryland*, 12 Wheat. (U.S.) 419 (1827).

¹⁰ *The License Cases*, 5 How. (U.S.) 504 (1847); *The Passenger Cases*, 7 How. (U.S.) 283 (1849). *Cf.* *Cooley v. Board of Wardens of the Port of Philadelphia*, 12 How. (U.S.) 299 (1852); *Steamship Co. v. Portwardens*, 6 Wall. (U.S.) 31 (1867).

¹¹ *Case of the State Freight Tax*, 15 Wall. (U.S.) 232 (1873).

¹² *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895).

¹³ *Lottery Case*, 188 U.S. 321 (1903); *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911); *Hoke v. United States*, 227 U.S. 308, 321 (1913); *Brooks v. United States*, 267 U.S. 432 (1925).

¹⁴ *Adair v. United States*, 208 U.S. 161 (1908). *Cf.* *Texas and New Orleans R. R. v. Brotherhood of Ry. and Steamship Clerks*, *supra* note 7. *But cf.* *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935).

¹⁵ *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

Similar influences seem necessary to explain the development and recent adoption by the Supreme Court of the American doctrine limiting delegation of legislative power to executive and administrative officers.

Insofar as the doctrine is supposed to be derived from the principle of the separation of powers, it should be remembered that that principle was originally conceived of as a means of limiting the power of any government by dividing its functions among various organs.¹⁶ For the success of the principle no clear-cut, consistent, analytical distinction between the three or four or five sorts of power which governments exercise is necessary; nor is any such distinction possible. A simple recognition of the obvious directions of the constitution with respect to such matters as elections, tenure of office, the assembly of Congress, impeachment, veto, pardon, and more important functions specifically assigned, would go far to assure the organization which those who developed the theory of the separation of powers had in mind.

Insofar as the new doctrine with respect to the delegation of powers has an independent origin, there is little or no historical justification for it. The Latin maxim which has been used to give it sanctity has been shown to be derived from a misprint in an early edition of Bracton; and it is a maxim whose serious application to commercial matters would interfere seriously with industry and trade. As the maxim should have appeared in Bracton it meant only that the king could not delegate official authority on such terms as to deprive himself of ultimate authority.¹⁷ In discussing the English government in 1690, Locke made some observations about the delegation of power which suggest the modern doctrine; but which do not seem necessarily to imply any principle but one which would prevent Parliament from giving up its power to the crown irrevocably.¹⁸ Again it would seem that an observation of the obvious directions of the constitution with respect to elections, the assembly of Congress, and legislation would be enough to protect the country against the kind of dictatorship which would result from a congressional decision to confer large powers irrevocably or for an extended period on the president.

American lawyers have, however, developed the principles of the separation of powers and the non-delegability of legislative power into a re-

¹⁶ See the writer's *The Classical American Doctrine of "The Separation of Powers,"* 2 *Univ. Chi. L. Rev.* 385 (1935).

¹⁷ Duff and Whiteside, *Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law,* 14 *Corn. L.Q.* 168 (1929).

¹⁸ Locke, *Of Civil Government* Bk. II, c. XI, § 141; c. XIV, § 159. (Everyman's ed. 1924)

fined doctrine; and this doctrine was this year for the first time applied by the Supreme Court.¹⁹

II

The development of our major constitutional doctrines has taken place by a subtle, cautious, and tentative type of reasoning; which has not infrequently involved the court in changes of mind.

It is possible that a number of previous decisions were overruled when it was decided last June that Congress could not authorize the president to permit industrial groups to combine to improve their economic position, subject to safeguards in the public interest, and protected against minority interference by legal sanctions; and that, even if Congress defined more specifically the functions of the president, it could not authorize the application of such a scheme of legislation to commercial transactions not in a stream of interstate commerce nor affecting by competition a stream of interstate commerce.²⁰

The large objectives of promoting the development of a solvent and efficient railroad system have been entrusted by Congress to the Interstate Commerce Commission; and these large objectives may be promoted, among other means, by authority from the Commission for the lease of property by one railroad to another whenever it is found to be "in the public interest," and "on such terms and conditions as shall be found by the commission to be just and reasonable in the premises."²¹ In deciding that it had authority to condemn a plan of consolidation by the use of leases, on the ground that it gave control to persons who might have little or no interest in the system as owners, the commission assumed its widest power under these provisions.²² Its exercise of power for this purpose seems—though it has not been squarely passed upon—to have been given some approval by the Supreme Court.²³

¹⁹ *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1934); *Schechter Poultry Corporation v. United States*, 295 U.S. 495 (1935). Cf. *Washington v. Dawson & Co.*, 264 U.S. 219 (1924). See 2 *Univ. Chi. L. Rev.* 632 (1935). Cf. *Ray and Wienke, Hot Oil on Uncharted Seas of Delegated Powers*, 29 *Ill. L. Rev.* 1021 (1935).

²⁰ *Schechter Poultry Corporation v. United States*, *supra* note 19.

²¹ See 41 *Stat.* 480-482 (1920), 49 U.S.C.A. § 5 (1), (2), (4), (8) (1929) for portions of the statute which should be considered together.

²² *Nickle Plate Unification*, 105 *I.C.C.* 425 (1926).

²³ Discussing the section under consideration, the court has said: "The provisions now before us were the additions made by Transportation Act, 1920, and the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred." *New York Central Securities Corporation v. United States*, 287 U.S. 12, 25 (1932).

The validity of the section itself has been squarely upheld by the court.²⁴ Differences may of course be pointed out;²⁵ but it is difficult to see any controlling distinction between the delegation of power to promote the prosperity of the railroad industry to an administrative commission, and the delegation of power to promote the prosperity of other industries to the president of the United States.

The recent decision of the court has a more important application to the problem of interstate commerce. The court seems to disclaim making any judgment upon the economic theory on which the Recovery Act was framed and administered. It must, therefore, for purposes of its discussion, assume that Congress and the Administration might legitimately have acted on the theory that the protection of wage levels and price stability everywhere would prove an effective means of restoring the entire commerce of the country.

On these assumptions it is difficult to determine whether the court's early decision that a monopoly of the sugar refining capacity of the country was not engaged in interstate commerce and so not subject to the Sherman Act, has had its authority revived.²⁶ It has been commonly supposed that this early decision had been silently overruled by a long line of intervening decisions.²⁷ Are these decisions in turn now to be treated as overruled? The question is made particularly acute by the court's quotation of the observation that "building is as essentially local as mining, manufacturing, or growing crops."²⁸ This quotation has been read by some as a warning; but it is either a meaningless truism or a return in the direction of the theory of the sugar case.

Again it has been held that Congress may authorize the Interstate Commerce Commission to regulate purely intra-state rates, or to permit the abandonment of an intra-state carrier's track, when authority to exercise such power has been seriously regarded by Congress as essential to the effective exercise of the Commission's power over interstate transportation.²⁹ And Congress has been held authorized to provide for the control

²⁴ *New York Central Securities Corporation v. United States*, *supra* note 23. And *cf.* *New England Divisions Case*, 261 U.S. 184 (1923).

²⁵ Is it significant, for example, that one act enumerates the subjects on which an administrative agency is authorized to exercise its practical judgment?

²⁶ *United States v. E. C. Knight Co.*, *supra* note 12.

²⁷ *Cf.*, for example, *Swift & Co. v. United States*, 196 U.S. 375 (1905).

²⁸ *Schechter Poultry Corporation v. United States*, *supra* note 19, at 547, quoted from *Industrial Association v. United States*, 268 U.S. 64, 82 (1925).

²⁹ *Railroad Comm. of Wisconsin v. Chicago, B. & Q. R. R.*, 257 U.S. 563 (1922); *Transit Comm. v. United States*, 284 U.S. 360 (1932).

of transactions in grain futures, on the ground that such transactions—than which nothing could be more local—might legitimately be regarded as having a significant effect on transactions controlling the interstate movement of grain.³⁰

If economic development has reached a stage at which much that was formerly regarded as of local concern has taken on national significance, and become closely related to the health of interstate trade, it may indeed require the development of new conceptions about the power of Congress in dealing with interstate commerce. The development of these new conceptions seems required, under conditions, for example, like those of 1933, by the underlying theory of the constitution.

In view of the history of constitutional doctrine, the Chief Justice's observation that "It is not the province of the court to consider the advantages or disadvantages . . . of a centralized system"³¹ seems a little lacking in completeness. It is difficult to understand how measures seriously designed to rescue or protect all our commerce from paralysis, can be condemned as not within the power of Congress to regulate interstate commerce. There were serious economic and administrative objections to the measures undertaken by the Administration in 1933, as there were to any course of action or inaction then open to any administration. But to turn economic objections into constitutional prohibitions seems unconstitutional.

³⁰ Chicago Board of Trade v. Olsen, 262 U.S. 1 (1923).

³¹ Schechter Poultry Corporation v. United States, *supra* note 19, at 549.