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"AN EIGHTEENTH CENTURY CONSTITUTION"—A COMMENT

By James Parker Hall.[1]

The editor-in-chief of the Review has asked me to comment upon Mr. Johnstone's very interesting paper. I should not disagree with his ultimate proposal to amend the amending clause of the federal constitution so as to permit a constitutional amendment to be *proposed* by a majority of each house of Congress at two consecutive sessions, and to be *adopted* by the concurrent vote of a majority of the people and a majority of the states. I think, however, that the paper somewhat exaggerates the difficulty of amending the present constitution, as witness the sixteenth and seventeenth amendments now well on their way toward ratification; and I am quite sure that it underestimates the power the federal government now has to deal with our important national problems.

The powers upon which the United States must chiefly rely in dealing with the problems mentioned by Mr. Johnstone are the power to regulate commerce among the states and with foreign nations, the power of taxation, and the power over the postal service.[2]

The federal courts have construed the commerce clause to include all intercourse that crosses a state line, and thus defined it appears to include all activities substantially affecting the transportation of any kind of property or property symbol, the transmission of intelligence in any form, and all modes of personal travel. Doubtless the transmission of any form of energy will also be included when the case arises.[3] The courts have also been liberal in includ-

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1. Dean of the University of Chicago Law School.
2. The substance of much of the following comment is taken from a paper of the writer read before the Western Economic Society at Chicago, in March, 1912.
3. By an act of Congress approved Aug. 13, 1912, every one within the jurisdiction of the United States is forbidden to operate any apparatus for radio-communication as a means of commercial intercourse among the several states, or with foreign nations, or upon any vessel of the United States engaged in interstate or foreign commerce, or for the transmission of radiograms or signals the effect of which extends beyond the jurisdicion of the state or territory in which the same are made or interferes with the reception of radiograms or signals from beyond said jurisdiction—except under and in accordance with the terms of a revocable license granted by the Secretary of Commerce and Labor.

ing within the notion of "intercourse" activities that are incidental to the actual intercourse or transmission itself. Thus, the sale or the solicitation of the sale of commodities for the purpose of transmission between the states, or their sale for the first time in the original packages after transmission have been held to be part of interstate commerce itself. But the production of commodities, whether by manufacturing, agriculture, mining, or fishing, has repeatedly been said to be no part of such commerce. The interstate transportation or marketing of goods may thus be controlled by Congress (the Sherman Anti-Trust law being an instance of such control), but is there any method by which it might indirectly also control capitalization and production? I venture to suggest that there are several ways in which, if desired by Congress, this could be done.

In the first place the power to regulate interstate commerce is given to Congress unqualifiedly, and is subject to no limitation except the general prohibitions upon congressional action to be found in the constitution, the most important of which in this connection is that liberty and property shall not be taken without due process of law. It is apparently well settled that Congress may exercise its granted powers for any purpose it pleases (subject to the abovementioned prohibitions), even though the object and effect of its action be to accomplish indirectly what it could not do by direct action. For instance, Congress has no power directly to prohibit lotteries in a state. It did, however, forbid the transmission of lottery matter through the mails—not at all in the interest of the postal service as such, or in furtherance of any other power granted to Congress, but solely in order to embarrass the operations of lotteries in states where they were legal and where Congress was under the constitution powerless directly to forbid them.[4] When this hindrance to lotteries proved insufficient, Congress absolutely forbade the carriage of lottery tickets from one state to another under its power to regulate interstate commerce. Obviously no commercial object was sought by this—only the suppression of lotteries in places where under the constitution they were legal. But the law was upheld on the ground that Congress could regulate interstate

By an act of Congress approved July 31, 1912, it is made unlawful to bring into the United States, or to deposit in the mails or with a carrier for carriage, or to send or carry between any states or territories of the United States or the District of Columbia, any pictorial representation of any pugilistic encounter which may be used for public exhibition.

4. *In re Rapier,* 143 U. S. 110 (1892).

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commerce for any purpose not forbidden by the constitution, not merely for purposes granted by the constitution.[5]

In like manner, may not Congress indirectly control methods of production in industry in a state by forbidding the privileges of interstate commerce to the product unless its rules regarding production are complied with? Witness the Meat Inspection law, which excludes from interstate commerce all meat not submitted to federal inspection, and the Pure Food and Drugs law which requires the proper labeling of these articles before their admission to interstate commerce. It may be argued that these laws aim at securing more healthful articles of commerce and the prevention of fraud in commerce. Granted—but what was the object of the law against lottery tickets? Not to prevent sickness or fraud, but to suppress an economic and social evil. And so the recent federal law against bringing women into a state for immoral purposes has no commercial object, but only a moral one.[6]

Now, Congress cannot directly forbid child labor in North Caroline, or a 12-hour day in the Pittsburg steel mills, but, if it wishes seriously to hinder such practices, can it not forbid the products of such labor from being carried to other states, where they compete with products produced under better but more expensive conditions, and so tend to render economically difficult or impossible the maintenance of improved conditions in industry elsewhere? One of the stock arguments against laws for the betterment of industrial conditions in every state has been the protest, "If you make us do that, we can't compete with employers in other states who don't have to do it." Surely Congress may as readily use its commercial powers to prevent sweat-shop and child-labor competition in interstate commerce, as to secure freedom from combination, or fraud, or gambling in that commerce.

In the second place, Congress probably has considerably more power over corporations engaged in interstate commerce than it would have over individuals similarly engaged. As practically all business important enough to require federal regulation is conducted

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5. *Lottery Case,* 188 U. S. 321 (1903).

6. 36 Stat. 825, c. 395. See especially § 6, requiring all persons harboring alien girls for immoral purposes to file statements regarding them with the federal authorities. The power of the United States to require information is very extensive, and in regard to certain matters publicity alone is a very effective mode of regulation even without legislation. The United States could doubtless go far along this line.

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by corporations, this consideration is of great importance. The argument that appears to establish it runs as follows:

The right to become a corporation or to act in corporate form is not a natural right of individuals protected from arbitrary interference by the liberty and due process clauses of our constitutions, as it is the right to engage individually in harmless business pursuits. The right to act in corporate form is a franchise, permission to exercise which must be granted by a government, state or national, before it can lawfully be exercised by anyone for any purpose no matter how innocent. Thus, Illinois could not deny absolutely to individuals the right to sell wholesome sugar as an article of food, or to till the soil—these being arbitrary interferences with the natural liberty of the individual. But Illinois may decline, for any reason or for no reason, to grant to anyone a franchise to sell sugar or to conduct farming operations in corporate form, and may thus confine these activities to individual effort. What Illinois may absolutely forbid, it may of course grant on terms, and so may require, as the price of its consent to a grant of corporate privileges, that corporations submit to exactions and regulations that could not be demanded from individuals. The state may thus gain the right to supervise a corporation's issues of stock and bonds, its methods of production and distribution, its obligations to employes and to the public, and all of the details of its organization and business, including its rates and dividends.

As regards corporations of other states seeking to do business in Illinois the same principles apply, with two exceptions. Illinois may, of course, if it sees fit, admit foreign corporations to do business there without restriction. If Illinois takes no action whatever upon the matter, it is assumed to assent to this; but, if it dissents, foreign corporations must submit to such terms as Illinois may prescribe for admission to do business in the state. The two exceptions to this are corporations employed in the service of the United States, and those engaged in interstate commerce. Such corporations may not be excluded by a state, because the business in which they are engaged is by the constitution placed within the control of the United States instead of the separate states.

Now, what control has Congress over corporations engaged in interstate commerce? Has it not the same power over them that the states have over those engaged in purely internal commerce? And, if so, may it not use this power of corporate control as rigorously as the states may and do? The argument from analogy seems

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strong. A state-chartered corporation may engage in interstate commerce until Congress dissents, just as a New Jersey corporation may do internal business in Illinois until Illinois dissents. If Illinois chooses, however, it may require a license from the foreign corporation, the compliance with conditions laid down by the state, or even reincorporation in Illinois, as a prerequisite to the doing of internal business in Illinois in corporate form. So, also, it would seem that the United States could require state corporations doing interstate commerce either to obtain a federal license, comply with conditions laid down by Congress, or take out federal charters altogether, as a prerequisite to engaging in interstate commerce in corporate form.

If so, what conditions may be imposed as the price of either license or charter? If a charter is required, of course stock and bonds may be regulated as well as all other details of corporate management. If a license is required it may be conditioned upon compliance with congressional regulations as to production, distribution, methods of competition, publicity of accounts, prices, and so forth, that would give Congress a virtual control over many matters other than those directly connected with the interstate transmission of commodities by such corporations. If Congress has the same measure of control over interstate commerce by corporations that a state has over internal commerce by corporations, such conditions would be valid; and the convenience and necessity of carrying on large businesses in corporate form would compel the acceptance of such conditions provided they were at all reasonable. The nature of a corporation as the basis of governmental control must play an important part in the legal theory of any thoroughgoing measure of federal regulation of business.

In the third place, Congress is likely to find the power of taxation an important instrument of regulation. The power to levy taxes (except upon exports) is conferred upon the United States without express limitation, save that direct taxes must be apportioned and all taxes must be geographically uniform throughout the states. It has been decided that this power of taxation is not confined to cases where the object and effect of the law is to raise revenue, but that the United States may tax where the result is regulation or prohibition of the act or object taxed. In 1902 Congress imposed a tax of 10 cents a pound upon all artificially colored oleomargarine, an amount assumed to be prohibitive of its manufacture. Congress, of course, had no direct power to prohibit the

manufacture of this article in a state, but the tax was upheld by the Supreme Court, a decision which seems to establish in regard to taxation the principle previously recognized in regard to the postal and commercial powers of the United States—that they may be exercised for any indirect purpose not so arbitrary as to be a taking of property without due process of law.[7]

Within this principle Congress may apparently regulate the purely internal business of a state by taxing objectionable features of it so heavily that they will no longer be profitable. Regulation by taxation may thus become an important item in future governmental programs. One instance of it we have already in operation as incidental to the present federal tax upon corporate earnings, namely the requirement of a certain amount of publicity regarding corporate business. The Esch Phosphorus law is another.[8]

Finally, as a last resort, Congress might deny the privileges of the mails to businesses, which, though operating wholly within a state, persisted in practices that Congress within a reasonable discretion saw fit to disapprove, following the precedent of the lottery cases. What Congress may feel disposed, upon occasion, to do here, may perhaps be indicated by its recent act requiring most classes of periodicals to file with the postmaster general and to publish themselves a sworn statement giving the names and addresses of their editors, publishers, business managers, and owners; their stockholders, if a corporation; their known bondholders, mortgagees, or other security holders; and, in the case of daily papers, the average number of copies sold or sent to paid subscribers during the preceding six months, under penalty of exclusion from the mails for failure to comply therewith. The additional provision that all editorial or reading matter, for the publication of which payment has been made or promised, shall be marked "advertisement," is perhaps invalid because not expressly confined to publications using the mails; but the addition of a few words would remedy this and leave in force an act to preserve these powerful and indispensable agencies of public opinion from fraudulent and secret influences.[9]

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7. *McCray v. United States,* 195 U. S. 27 (1904).
8. Act approved April 9, 1912, taxing white phosphorus matches 2 cents a hundred, a prohibitive tax designed to prevent the manufacure of such matches on account of the effect of white phosphorus upon the health of those employed in match factories.
9. Act of Congress of Aug. 24, 1912, §2.

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