ENTREPRENEURIAL LIBERTY AND THE COMMERCE POWER: EXPANSION, CONTRACTION, AND CASUISTRY IN THE AGE OF ENTERPRISE*

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THE half-century that separated 1870 from 1920 was the Age of Enterprise, the era in which the industrial revolution took the United States by storm, an era in which the terrific pressures of a new economic and social order were confronted, and largely contained, by the authority of the entrepreneurial elite. Only later, in the throes of the Depression, would the legitimacy of this "old order" come under serious attack. (Ironically, it was overturned by the New Deal electorate more as a penalty for failure than for any moral shortcomings implicit or explicit in its philosophy.) The key dogma of the "old order" was the concept of entrepreneurial liberty.¹ Put in its starkest terms, it amounted to the notion that what was good for business was good for the nation—more broadly, that the values of the business elite determined the political theory of the community as a whole. Aristotle pointed out long before Karl Marx that the character of the "political class" (*politeuma*) would establish the core values of the community (*polis*), and without any recourse to the Hegelian mystifications of Marxism one can assert that the entrepreneurs of the Age of Enterprise constituted the political class.

Moreover, and here the divergence from Marxist and Progressive critics of the "Robber Barons" becomes decisive, the authority of the entrepreneurial elite rested, I submit, on the foundation of public approval. There was no conspiracy—there was no need for one: Until they demonstrated their incompetence to govern, and to provide the rationale for government in the shambles of the Depression, the entrepreneurial elite and its political spokesmen had the confidence of a clear majority of the American people. Since I have elaborated this proposition at some length in a forthcoming work,² I will pass over it here except to emphasize in specific terms what I take to be a simple fact: That even in the heavily industrialized states of the Northeast

* This article is adapted from a chapter of the forthcoming volume, *THE CONSTITUTION IN THE INDUSTRIAL AGE*.

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¹ Roche, *Entrepreneurial Liberty and the Fourteenth Amendment*, 4 *LABOR HISTORY* 3 (1963).

² ROCHE, *THE QUEST FOR THE DREAM—CIVIL LIBERTIES IN MODERN AMERICA* (to be published by Macmillan Co. in October, 1963).

a majority of the population looked with suspicion on the work of trade unions. Indeed, I am not even convinced that trade union sentiments dominated among the "proletariat" itself—Horatio Alger was an ideal type with almost universal appeal.

Thus the critic in 1963 must face the hard reality that the behavior he condemns in terms of his own liberal standards was the outgrowth of a whole social pattern, not the work of a few insidious, capitalist plotters. And if he is to understand the workings of the Age of Enterprise, he must transport himself into a different universe of discourse, into a time when Socialist leader Eugene Victor Debs could write John D. Rockefeller a letter requesting the Oil Baron's financial help in establishing a cooperative commonwealth.³ Perhaps the *reductio ad absurdum* of the Age was reached when the Negro graduating class at Tuskegee in 1886 chose as its motto: "There's Always Room at the Top."⁴

The thesis here is that the interests of the entrepreneurial elite provided the warp and woof of American political and legal theory in the Age of Enterprise—indeed, well on into the 1930's so far as certain crucial aspects of public law were concerned. There is a persistent legend that throughout this period the country was dominated by "conservatism," "rugged individualism," and *laissez-faire*; this seems to me to fly squarely into the face of the facts. As I have put it elsewhere, in an examination of "Entrepreneurial Liberty and the Fourteenth Amendment":

There was clearly an elite of businessmen, but it was neither ruggedly individualistic, in terms of classic liberal economic thought, nor "conservative," in any acceptable definition of that much-abused term. On the contrary, this elite lived at the public trough, was nourished by state protection, and devoted most of its time and energies to evading Adam Smith's individualistic injunctions. In ideological terms, it was totally opportunistic: It demanded and applauded vigorous state action in behalf of its key values, and denounced state intervention in behalf of its enemies.⁵

In discussing the Supreme Court's interpretation of the police powers of the states, I argued that the "Constitution was not . . . adapted to the needs of *laissez-faire* 'conservatism' . . . but to the exigent needs of the great private governments."⁶ It is my contention in this article that the same analysis can be rewardingly applied to the Court's interpretations of the commerce clause, indeed that only this set of interests can provide a framework of rationality to the contradictions that drive the logical analyst to despair. There is no master key to constitutional law, but this one seems to open more doors than most,

³ GINGER, *THE BENDING CROSS* 201 (1949).

⁴ WOODWARD, *ORIGINS OF THE NEW SOUTH* 218 (1951).

⁵ Roche, *supra* note 1, at 3.

⁶ *Ibid.*

and, in the tradition of William of Ockham, suggests an analytical proposition which eliminates both elaborate ideological and legal rationalizations and the need for villainous capitalists and meretricious judges. Honest and sincere men, like the dishonest and insincere, simply applied the dominant values of the epoch in their own fashions to the world around them.

When the Supreme Court in the 1870's and 1880's was forced to come to grips with the commerce clause, it discovered that the ambiguities of the Constitution and of constitutional interpretation by prior Courts provided little guidance for coping with novel situations, particularly those arising from the conflicts and disruptions of the new industrial order. Precedents gave little succor.

The Framers of the Constitution had been characteristically Delphic: Article I, Section 8 gave Congress power over "Commerce with foreign Nations, and among the several States." This sounds simple and adequate, but upon reflection several difficulties emerge. First of all, what is "commerce"? Second, assuming we know the answer to that one, is the federal power to regulate interstate commerce exclusive? Or do the states also have jurisdiction? If so, when?

John Marshall, whose talent for avoiding constitutional clarity was positively unnerving, laid down a broad definition of "commerce" in the famous "steamboat case," *Gibbons v. Ogden*,⁷ but flatly refused to divulge the broad basis of his opinion that New York had no right to regulate (in this case, grant a steamboat monopoly) Hudson River traffic. It had been argued—as Justice William Johnson contended in his separate concurrence—that congressional power over interstate commerce was complete and exclusive even if Congress took no action to implement its jurisdiction. That is, the very existence of this power in Congress excluded the states from the area. Marshall, however, was unwilling to go out on this limb. As he put it, "whether this power . . . is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power [was a problem that needed no exploration] because [the power] has been exercised The sole question is, can a State regulate commerce . . . while Congress is regulating it?"⁸ "No" was his reply, but to justify it he put on an intricate legal Morris dance and terminated with a sardonic denunciation of that "refined and metaphysical reasoning" which led men away from common-sense principles of constitutional interpretation. It was patent, he observed, that a national statute of 1793 licensing coastal vessels deprived the states of authority over interstate shipping.⁹

⁷ 22 U.S. (9 Wheat.) 1 (1824).

⁸ *Id.* at 200.

⁹ 1 Stat. 305 (1793) (now 46 U.S.C. §§ 251-336 (1958)).

This is not said to denigrate the "Great Chief Justice." On the contrary, his capacity for broken-field running—approached only by Chief Justice Hughes in the 1930's—deserves the admiration of those who appreciate the political function of the Supreme Court. The point is that Marshall's opinion in *Gibbons v. Ogden*,¹⁰ like his masterly and elusive holdings in *Dartmouth College v. Woodward*,¹¹ *Fletcher v. Peck*,¹² and *Cohens v. Virginia*,¹³ were better politics than they were precedent. In each case, state power was checked in precise terms, but the grounds of decision were set out by Marshall in such a fashion that a seemingly broad rule of law was in fact hung on a very narrow holding.

An example can be found in the interpretation of the commerce clause. Marshall founded his extensive rhetorical foray against state power over interstate shipping on the coasting statute of 1793, but five years after the New York "steamboat case," he endorsed a different, and contradictory, construction of state jurisdiction over commerce. Delaware had authorized a dam across Black-Bird Creek—a navigable stream—and a ship-owner knocked the dam down as an illegal obstruction to interstate commerce. *Willson v. Black-Bird Creek Marsh Co.*¹⁴ reached the Supreme Court in 1829 on what appeared to be a simple variation of the facts of *Gibbons*: The shipowner had a license from the federal government under the act of 1793, and a state had impeded his right to conduct interstate commerce on an admittedly navigable stream. But this time John Marshall was not having any broad constructions. In a brief opinion, which reads as though he was rather annoyed at being bothered with such trivia, he suggested that the Middle and Southern states were full of small navigable creeks and that "under all circumstances of the case" the state was within its rights in authorizing a dam.¹⁵ Presumably Willson should have picked a creek without a dam for the exercise of his commerce activities. The Chief Justice simply ignored the principle involved: Unlike a monopoly on the Hudson River, a dam on Black-Bird Creek was hardly worth the Court's concern. Metaphysicians could worry about matters of this sort; Marshall merely applied the maxim *de minimis*.

Marshall, in short, left the commerce clause strengthened as to content, but open-ended as to jurisdiction. Commerce was interpreted to include the process of transportation as well as the "stuff" transported, that is, Marshall set out a functional rather than a static definition of commerce.¹⁶ But when it came to the problem of the relationship between federal and state control of interstate commerce, Marshall's precedents worked both ways. One defending a state limitation on interstate commerce could cite the *Black-Bird Creek*

¹⁰ 22 U.S. (9 Wheat.) 1 (1824).

¹³ 19 U.S. (6 Wheat.) 264 (1821).

¹¹ 17 U.S. (4 Wheat.) 518 (1819).

¹⁴ 27 U.S. (2 Pet.) 245 (1829).

¹² 10 U.S. (6 Cranch.) 87 (1810).

¹⁵ *Id.* at 251.

¹⁶ *Cf.* FRANKFURTER, THE COMMERCE CLAUSE ch. 1 (1937).

case, while his opponent could quote *Gibbons v. Ogden*. Both these precedential traditions marched on through the Taney years when because of the explosive problems of slavery and its states' rights buttress, the commerce clause of the Constitution became a controversial issue.¹⁷ The Taney Court reflected this national dissension: Its interpretations of the commerce clause were literally a shambles of constitutional construction.¹⁸

Among the opinions, dissents, partial concurrences and partial dissents that litter the battlefield where the Taney Court met the commerce clause, one decision stands out: *Cooley v. Board of Wardens of Philadelphia*.¹⁹ Without going into the details of the case, we can summarize by stating that in his opinion Justice Benjamin Curtis attempted to delineate the extent of state authority over interstate commerce. Congressional power over commerce, Curtis said, was only exclusive when the subject matter required exclusive congressional control. "Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question [pilot regulation in the Delaware River], as imperatively demanding that diversity, which alone can meet the local necessities of navigation."²⁰

Curtis went on to imply that some sectors of commerce were beyond regulation even if Congress had not acted. (The so-called theory of "dormant exclusion" which postulates that the *latent* power of Congress *ex proprio vigore* bars the states from exercising jurisdiction even though the national government has not exercised its authority.) "Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be such a nature as to require exclusive regulation by Congress."²¹ This has a fine solid ring about it—only Congress can regulate those aspects of commerce which require a national rule—but a moment's meditation will indicate that this formulation opens up a series of problems that would probably disconcert a master theologian. How, precisely, does one determine whether some aspect "imperatively" demands national uniformity? If Curtis knew, he was not telling; his opinion, he noted, was limited to the facts of the case at bar; it did not "extend to the question what other subjects . . . are within the exclusive control of Congress, or may be regulated by the states in the absence of all congressional legislation; nor to the general question how far any regulation of a subject by Congress may be

¹⁷ If slaves were "property," could Congress exercise jurisdiction over interstate slave transactions? In 1803, Congress had prohibited the importation of slaves into states whose laws prohibited slavery. 2 Stat. 205 (1803). The Southerners wanted no more statutes on this model.

¹⁸ FRANKFURTER, *op. cit. supra* note 16, ch. 2.

²⁰ *Id.* at 319.

¹⁹ 53 U.S. (12 How.) 929 (1851).

²¹ *Ibid.*

deemed to operate as an exclusion of all legislation by the states upon the same subject.”²²

With this as background, let us move ahead to the 1870's and 1880's and the specific issue of railroad regulation. In *Munn v. Illinois*,²³ one of the lines of attack on the Granger laws which subjected railroads to state regulation was that they invaded a sector of interstate commerce which imperatively demanded a uniform national rule, that is, they intruded on the “dormant” commerce power. Chief Justice Waite refused to be drawn into Curtis' theological web. State railroad regulation, he asserted, was simply a regulation of railroad activities *in* a state; it did not attempt to regulate matters in another state, but stopped at the state line. Quietly deserting Marshall's functional definition of commerce, Waite took his stand on geography: When Wisconsin, Minnesota, Iowa, or Illinois clamped restrictions on railroads operating in their geographical jurisdiction, they were not impinging on commerce among the states. As in *Willson v. Black-Bird Creek Marsh Co.*, the state laws were not concerned with commerce; they were police regulations.

Munn v. Illinois was decided in the same year that the great railroad insurrection swept across the North and West, an episode that strongly attached the railroad managers to the federal government which had so decisively intervened in their behalf. The protection of the national government had demonstrated potency in yet another area: Federal judges were willing to defend railroads that were in federal receivership from the damage that strikes involved. Indeed, this seems to have been the first trying-ground for the anti-strike injunction enforced in federal court by contempt proceedings, the “paper gatling gun” that later became the major corporate weapon in the anti-union struggle. In short, far-sighted railroad leaders worked throughout the late 1870's and early 1880's to bring their enterprises within the scope of the *Cooley* rule of “dormant exclusion.”

In 1886, the Supreme Court in the *Wabash* case²⁴ changed its position, despite a denial of change. Actually, said Mr. Justice Miller, *Munn v. Illinois* was still good law so far as the narrow facts presented in the Granger cases were concerned. But in the broader picture presented by Illinois' attempt to regulate freight rate abuse it was apparent that the jurisdiction of the national government had been invaded: “We must, therefore, hold that it is not, and never has been, the deliberate opinion of a majority of this Court that a statute of a State which attempts to regulate the fares and charges by railroad companies within its limits for a transportation which constitutes a part of commerce among the States, is a valid law.”²⁵

²² *Id.* at 320.

²³ 94 U.S. 113 (1876). *Munn* was concerned with grain elevators; the other seven cases in the group dealt with state railroad regulations.

²⁴ *Wabash, St. L. & Pac. Ry. v. Illinois*, 118 U.S. 557 (1886).

²⁵ *Id.* at 575.

Justices Bradley and Gray, and Chief Justice Waite, the latter the author of the *Granger* opinions, dissented with some vigor.²⁶ They took their position squarely on the *Munn* case and denounced the Court for undermining precedent in so devious a manner; essentially they concluded that if Congress chose to regulate interstate rates, the states would be superseded, but until such positive regulation was enacted, the states were surely within their rights under the police power.²⁷

The impact of the *Wabash* decision was to withdraw the interstate activities of railroads from the jurisdiction of the states, thus leaving the corporations subject only to potential congressional regulation. Congress, however, took immediate action: Four months later, in February, 1887, it created the Interstate Commerce Commission, the first national regulatory agency.²⁸ The ICC was assigned a broad jurisdiction in the area of rates, but was given virtually no armament; President Cleveland signed the bill with "reservations" about its constitutionality and wisdom, stating that "the cure might be worse than the disease."²⁹ Whatever curative powers it might have had were exorcised by the courts, which soon held that the ICC had no rate-fixing powers of its own and tied it up in a procedural strait-jacket.³⁰ Some railroad leaders attacked the Commission, but wiser heads prevailed. As Richard Olney, Cleveland's Attorney General, wrote one railroad president who had urged the abolition of the ICC:

The attempt [at abolition] would not be likely to succeed; if it did not succeed, and were made on the ground of the inefficiency and uselessness of the Commission, the result would very probably be giving it the power it now lacks. The Commission, as its functions have now been limited by the courts, is, or can be made, of great use to the railroads. It satisfies the popular clamor for a government supervision of railroads, at the same time that such supervision is almost entirely nominal. Further, the older such a commission gets to be, the more inclined it will be found to take the business and railroad view of things. It thus becomes a sort of barrier between the railroad corporations and the people and a sort of protection against hasty and crude legislation hostile to railroad interests The part of wisdom is not to destroy the Commission, but to utilize it.³¹

²⁶ Bradley and Waite were perhaps a bit miffed by Miller's calm observation that when they had upheld the state rate laws in 1877, they were unaware of what they were doing—Miller and Bradley were the two strong minds on the Court and they often clashed. Miller, in addition, had been an active candidate for the Chief Justiceship in 1874, and was understandably aggrieved when Waite received the post. See FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT, 1862–1890 (1939), especially chapter 11. He also suspected that Bradley, who had ambitions of his own, had helped to block his nomination. See generally MAGRATH, MORRISON R. WAITE: THE TRIUMPH OF CHARACTER (1963).

²⁷ *Wabash, St. L. & Pac. Ry. v. Illinois*, 118 U.S. 557, 577 (1886) (dissenting opinion).

²⁸ 24 Stat. 379 (1887), 49 U.S.C. §§ 1–27 (1958).

²⁹ Cited by JOSEPHSON, *THE POLITICOS*, 1865–1896, at 389 (1938).

³⁰ See CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* (1941), especially pp. 65–68.

³¹ Cited by JOSEPHSON, *op cit. supra* note 29, at 526.

Many close students of American government would argue that Olney here predicted in uncanny terms the history of the ICC; we shall take the opportunity at a later point in the narrative to pay tribute again to his dialectical insight.

Three years after the Interstate Commerce Act, Congress again utilized the commerce clause for regulatory purposes, this time to strike at the "trusts" which had aroused a considerable amount of bad publicity by their total disinterest in the common weal. The Sherman Antitrust Act, passed in July, 1890, on a wave of congressional apathy, was in institutional terms what the Chinese call a "paper dragon." Among other things it provided that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal;"³² and that "every person who shall monopolize, or attempt to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor."³³ Enforcement was to be by action in federal courts; no agency was established.

In common-sense terms, this statute probably made a criminal out of almost every businessman in the United States. In legal terms, it was hardly worth the paper it was inscribed on. What exactly was a "trust"? Or a "monopoly"? Or a "restraint of trade"? The Sherman Act was not so much an antitrust measure as it was a legal full-employment bill. Every one of these ambiguities had to be glossed in court. Antitrust law in the United States thus resembled nothing so much as the Jewish Talmud in which a few obscure texts were the basis of an enormous body of exegesis—with the Supreme Court as the Sanhedrin. Congress did not again concern itself with the problem for a quarter of a century.

Before we examine intensively what the Court and the inferior courts did with the commerce clause as an instrument of regulation, let us specify the dimensions of the problem. First, the Court had to determine the *reach* of the commerce power. Take for instance insurance contracts. In *Paul v. Virginia*³⁴ the Court had tersely held that insurance contracts were local in nature and thus (1) within state regulatory jurisdiction; and (2) by implication not subject to national control under the commerce clause. The Sherman Act, however, outlawed "every contract" in restraint of interstate commerce. Could a contract which was not itself *in* interstate commerce yet be a restraint *on* interstate commerce within the purview of the antitrust law? In other words, was it possible for something to be within the scope of the commerce power for one purpose, and not for another?

As a second dimension of the problem the Court had to determine the *limits* or *checks*, if any, on the exercise of congressional jurisdiction. Were some substantive areas, such as agriculture, manufacturing, mining, complete-

³² 26 Stat. 209 (1890), 15 U.S.C. § 1 (1958).

³³ *Ibid.*

³⁴ 75 U.S. (8 Wall.) 168 (1868).

ly within the police power of the respective states? Or could Congress regulate certain aspects of enterprises essentially local in character? Finally, were there any procedural checks on Congress? Were any techniques of regulation *ultra vires*? On all of these matters the Constitution was obscure, the precedents were open-ended, and the Supreme Court was on its own.

Now a study of this sort cannot go into the intricate aspects of judicial construction of the commerce clause for obvious reasons. There are many volumes dedicated to the analysis of railroad regulation, antitrust, and other ramifications of that one ambiguous constitutional pronouncement. Here we are concerned with the broader issues with full recognition of the fact that when a wide brush is used, details are often blurred. The important proposition is that there was no road map for the Court to follow: Every constitutional route forked before the Justices, and no matter which fork they took, there were adequate precedents to supply legal rationalization. In applying the antique commerce clause to an unforeseen industrial universe, the Court was rewriting the Constitution in terms of its own dominant value patterns.

Let us begin the analysis with the growth of the "national police power," an area which leads naturally to the more complex sectors of judicial improvisation. By its terms, the Constitution did not grant to the federal government plenary authority to legislate for the health, safety, morals and welfare of the people—the so-called "police power." The national government was to exercise authority only in those areas specifically designated in the Constitution, largely those specified in Article I, Section 8. From the outset, as we have seen, congressional authority naturally came into conflict with the police power of the states—both *Gibbons v. Ogden* and *Willson v. Black-Bird Creek Marsh Co.* were instances of this confrontation—and the Court always made explicit the point that, properly understood, there was no overlap. The powers of the federal government ended where the police power of the states began and vice versa.³⁵ The law is the nesting-place par excellence of circular definition, of propositions that are mutually validating when stripped to their essentials. National and state jurisdiction have always been in an uneasy, definitional equilibrium in which state authority is authority which is not national.

The Framers of the Constitution were an extremely shrewd group of professional politicians and were quite aware of this central ambiguity. At certain points they took special measures to guarantee the police power of the states against *indirect* federal encroachment. After all, one of the big issues in the struggle with Britain had been the parliamentary employment of trade regulations for taxation purposes and in *Letters from a Farmer in Pennsylvania*, John Dickinson, later a member of the Constitutional Convention, had made an ingenious and rather disingenuous distinction between parliamentary regula-

³⁵ See Powell, *Child Labor, Congress, and the Constitution*, in 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 527 (1938).

tions of trade (which were legitimate) and taxes (which were illegitimate).³⁶

The Framers, then, were not babes in the woods. They were quite aware that such powers as the taxation and commerce clauses bestowed were capable of employment to achieve social goals or political purposes seemingly unrelated to raising revenue or establishing interstate commercial rationality. This can be verified by turning to Article I, Section 9, of the Constitution, a section that represented institutionalized suspicion. The slavery interests at the Convention, led by the South Carolinians, were concerned lest the commerce and taxation powers be used for antislavery purposes.³⁷ They demanded guarantees, and one of the resulting compromises provided that "the Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year 1808, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person." Later in the same section, the mercantile interests got some protection they felt necessary: "No preference shall be given in any Regulation of Commerce or Taxation to the Ports of one State over those of another."

Almost immediately the commerce power was put to work as an instrument of foreign policy. In 1794, President Washington put a temporary embargo on shipments to Britain and France, which were seizing American shipping, and asked Congress to enact a strong measure. Senator Aaron Burr prepared a bill which was directed against England; it lost in the House, and a subsequent anti-French proposal failed in the Senate. The power to regulate foreign commerce had become an instrument for attaining a pro-British or pro-French foreign policy.³⁸ Later President Jefferson was to employ the same embargo device in a utopian quest for American disengagement from European problems. The Embargo of 1807 was a massive exercise of national power; it forbade Americans to engage in commerce with the belligerents.³⁹

³⁶ See Dickinson's Letter II (1767-68) cited in MASON, *FREE GOVERNMENT IN THE MAKING* 102-04 (1949). Dickinson's logic is worth brief mention: He anticipated fully the logomachy of the Supreme Court a century and a half later when the judges came to grips with regulatory problems. There were two categories—one legal: trade regulation; the other illegal: taxation for revenue—and the question was how to identify a specific parliamentary act that *appeared* to be a trade regulation, but could also be a tax. The answer, said Dickinson was simple: The *intention* of the enactment determined its category. So far, so good—but how did one ascertain the intention of the legislation? Different men have supported it for different reasons and a clever draftsman may in his preamble have announced an innocent purpose for a sinister act (parliamentary debates were still secret). Again, Dickinson urged, the answer was plain: The intention was evaluated by the *consequences*. In short, an act was "illegal" if founded on "illegal" motives, and "illegal" motives were established on the basis of "illegal" consequences.

³⁷ See Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 AM. POL. SCI. REV. 799, 811 (1961).

³⁸ SCHACHNER, AARON BURR 134-35 (Perpetua ed. 1961).

³⁹ See 2 ADAMS, *HISTORY OF THE UNITED STATES OF AMERICA DURING THE ADMINISTRATION OF THOMAS JEFFERSON* 249-71 (1930).

In other words, the congressional power over foreign commerce was employed to prohibit it. The Federalists, hastily abandoning national power in the interests of New England shipping, denounced the bill as unconstitutional—the power over commerce, they claimed, was not the power to destroy it—but in the United States District Court for Massachusetts, Judge John David delivered a resounding defense of national authority.⁴⁰ No case reached the Supreme Court.

There were other instances of “police” regulations being enacted under the commerce and taxing powers. In 1803, for example, Congress passed an act⁴¹ that made it a federal offense to import slaves into a state whose laws banned importation. This enactment was an early example of a so-called “divesting statute,” an enactment which delegated federal authority to the states in specified areas as a buttress for state law. And in 1866, Congress imposed a ten per cent tax on state banknotes, designed to drive this erratic currency out of existence, and despite great howls that it was a violation of states’ rights disguised as a tax, the statute was sustained by the Court in 1869.⁴² Henceforth the discussion will be confined to the development of a national police power with regard to the commerce clause only—the taxing power underwent a parallel development.⁴³

There is an inherent paradox in the concept of interstate commerce: Everything that happens in interstate commerce simultaneously happens in a state (or territory). Consequently, every regulation based on the commerce clause directly affects goods, people, or transactions that are within the geographical jurisdiction of a local legislature. From a logical perspective, the big problem has always been to specify the point at which this invisible entity called commerce among the states begins or ends. But logic, as usual, supplies no answer—or rather, supplies several, depending on the premise adopted. If, for example, a farmer refuses to grow corn in Iowa for sale in Illinois, it can be argued that he is hindering interstate commerce. If a group of radicals tell farmers not to grow Iowa corn for “exploiters” in Illinois, it can be urged that they are conspiring to hinder interstate commerce. If a newspaper urges a group of radicals, . . . and so it goes to infinity. Another syllogism begins with an assertion that the regulation of morals is a matter exclusively within state jurisdiction⁴⁴ and thence argues *ex hypothesi* that the federal government can have no authority over private morality; thus a federal law prohibiting interstate shipment of, say, poker chips would be an unconstitutional and unwarranted extension of the commerce power. Put

⁴⁰ *United States v. The William*, 28 Fed. Cas. 614 (No. 16,700) (D. Mass. 1808).

⁴¹ See note 17 *supra*.

⁴² *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 333 (1869).

⁴³ See Cushman, *Social and Economic Control Through Federal Taxation*, 18 MINN. L. REV. 759 (1934).

⁴⁴ This argument is based upon the tenth amendment.

differently, the courts had the task of identifying the external manifestations of an intangible process—it was rather like designing a suit for a poltergeist.

By 1890 certain broad propositions seemed to be taken for granted; both the Interstate Commerce Act and the Sherman Act were in principle affirmations of Congress' power to police certain categories of interstate business. Moreover, beginning about 1890, a succession of statutes were enacted which were designed to prevent "the arteries of interstate commerce from being employed as conduits for articles hurtful to the public health, safety, or morals."⁴⁵ Leading the procession here were the prohibitionists. (John Marshall had ruled in *Brown v. Maryland*,⁴⁶ that state jurisdiction over articles in interstate commerce began only when the "original package" had been broken and in 1890, the Supreme Court had manipulated the "original package" doctrine to make a shambles of state prohibition laws by applying this rule to interstate liquor shipments.)⁴⁷ The prohibition lobby succeeded in 1890 by gaining congressional enactment of the Wilson Act which gave the states control over interstate shipments of liquor upon arrival in the state.⁴⁸ While the Supreme Court subsequently sustained the act, it crushed the prohibitionist ambition of stopping liquor at the state line by holding that "arrival in the state" meant arrival at the address of the consignee.⁴⁹ Instead of succeeding in blocking the border and holding the carriers liable for violations—the key to effective enforcement—the drys were again forced to pursue each shipment to its destination before applying sanctions. Back they went to Congress for redress and eventually, in the Webb-Kenyon Act of 1913,⁵⁰ the technique was perfected: Liquor was simply defined out of interstate commerce! That is, liquor shipped across state lines was by definition *not* interstate commerce, but instead was subject to the plenary authority of the states.

While the prohibitionists led the way with amazing legal creativity, others were not far behind. It is often forgotten that the Sherman Act contained a provision (section 6) that barred the products made by "trusts" from using the facilities of interstate commerce. The legislative antechambers in Washington seemed full of lobbyists proposing that Congress should use its control over commerce to eliminate lotteries, obscene literature, contraceptives, oleomargarine, prostitution, impure food and drugs, and a number of other items

⁴⁵ The phrase is Senator Knox's, cited in Cushman, *The National Police Power Under the Commerce Clause of the Constitution*, 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 36, 64 (1938).

⁴⁶ 25 U.S. (12 Wheat.) 419 (1827).

⁴⁷ *Leisy v. Hardin*, 135 U.S. 100 (1890).

⁴⁸ 26 Stat. 313 (1890), 27 U.S.C. § 121 (1958); see CUSHMAN, *op. cit. supra* note 30, at 81–84.

⁴⁹ See *In re Rahrer*, 140 U.S. 545 (1891) (sustaining statute); *Rhodes v. Iowa*, 170 U.S. 412 (1898) ("arrival in the state" means arrival at address of consignee).

⁵⁰ 37 Stat. 699 (1913), 27 U.S.C. § 122 (1958).

adjudged evil for one reason or another.⁵¹ The opponents of this sort of regulation knew they had a bad case with liquor, which had been traditionally subjected to extraordinary regulations and which was in poor repute, in theory at least, among the better elements of the community. But in 1895 a better instance for legal defense emerged when Congress passed an anti-lottery statute forbidding the shipment of lottery tickets either through the mails or in interstate commerce.

The lottery was a fine old American institution that had fallen on evil days. In colonial America it had been a fund-raising technique for charities⁵² and later a standard method for raising revenue in many states but, by the turn of the century, had apparently become a racket with many citizens protesting that they could not collect on winning tickets. Modern techniques of communication had made it possible for a crook in Louisiana (a big lottery state) to bilk investors fifteen hundred miles away. When the aggregations of the bilked got their own state legislatures to act, they found that, while local lotteries could be suppressed, nothing could be done about those in other states who solicited by mail or express. So Congress was wheeled into action, and the mails and express channels were closed.⁵³

A Texas lottery promoter, appropriately named Champion, provided the test case. Indicted for conspiring to ship lottery tickets to California by express, he sought release by habeas corpus claiming the statute to be unconstitutional and void. A tremendous legal battle developed: The Supreme Court twice asked for reargument and was seriously divided in the final decision which downed Champion five-to-four. The opinion in *Champion v. Ames*,⁵⁴ delivered by Mr. Justice Harlan, deserves close attention, for it supplied the constitutional foundations of what will be referred to here (in Robert E. Cushman's phrase) as the commerce-police power. What Harlan had to do was provide a rationale for this exercise of congressional power that would not automatically open the door for legislative regulation of anything that struck its whimsy. To repeat, the precedent of liquor was not too useful since the argument there was that alcoholic beverages were things harmful in themselves—Bad Things. But a lottery ticket was not intrinsically Evil—it could not even harm a small child who found it, a characteristic test of Bad Things.

Justice Harlan was not daunted by this difficulty: He knew an immoral enterprise when he saw one. Once he had asked himself the question in the form he used—“[W]hy may not Congress, invested with the power to regulate

⁵¹ During the same period, the taxing power was moving in an identical direction: The dairy interests, for example, managed to get a commerce bill barring colored oleo from shipment into states which forbade it, and a special excise tax on colored oleo: ¼ cent per pound on uncolored margarine and 10 cents per pound on oleo colored to resemble butter. Cushman, *supra* note 43, at 774.

⁵² The founders of Princeton University, good Calvinists all, ran a lottery. SCHACHNER, *op. cit supra* note 38, at 12.

⁵³ 18 U.S.C. § 1302 (1958).

⁵⁴ 188 U.S. 321 (1903).

commerce among the several States, provide that such commerce *shall not be polluted* by . . . lottery tickets . . . ?”⁵⁵—the reply was obvious. A lottery ticket was symbolic of a Bad Thing; thus, while not harmful in itself, it represented what Harlan referred to as the “widespread pestilence of lotteries” and was an essential component in a process “confessedly injurious to the public morals.” The Chief Justice (Fuller) dissented with strong support from Justices Brewer, Peckham, and Shiras on the ground that Congress was invading the reserved powers of the states.⁵⁶

After *Champion v. Ames*, the road to regulation seemed clear; it appeared as though Congress had extensive authority to employ the commerce power for social, political, health and moral purposes. Naturally enough, Justice Harlan had engaged in the usual judicial fudging about potential limitations: “[T]he power of Congress to regulate commerce among the States,” he noted darkly, “although plenary, cannot be deemed arbitrary, since it is subject to such limitations or restrictions as are prescribed by the Constitution.”⁵⁷ However, he also suggested that the Constitution offered little protection to a Bad Thing, or a Bad Man doing a Bad Thing. Referring to the fifth amendment’s guarantee of entrepreneurial liberty he excluded Champion’s lottery business from its protection—like liquor distillers, lottery managers were under the entrepreneurial ban of excommunication.⁵⁸ The laws, and the decisions sustaining them, came thick and fast after 1900, and it would be tedious to enumerate them here. What would be useful is a classification from the other end of the problem; that is, an examination of the character of the things regulated and the legal justifications for the regulations.

Initially, the answers are easy. The first group of things barred from interstate commerce were clearly *bad in themselves*: poorly packed explosives, opium, diseased animals, infected food products, poisonous patent medicines. Next was the category of items that could be harmful, but hardly ranked with poisons—notably alcoholic beverages and narcotics. However, this second group still retained a tangible quality—one could get drunk or narcotized. With the third category, one entered the realm of legal metaphysics—a realm no less real for being repudiated by its very progenitors—and was confronted by things *harmless in themselves* which involved or symbolized bad and immoral activities. At the risk of boring the reader with classification, this third group can be roughly subdivided into two further classes: Those things which symbolized Evil because of the way they were manufactured (goods produced by “trusts” or by child labor are fine examples), and those

⁵⁵ *Id.* at 356. (Emphasis added.)

⁵⁶ *Id.* at 364 (dissenting opinion).

⁵⁷ *Id.* at 362–63.

⁵⁸ See Roche, *supra* note 1, for an examination of the interesting question: When was property not property? I have there suggested that the real problems of the fifth and fourteenth amendments in this connection are not so much in defining “due process” as in defining “property.” See also *Mugler v. Kansas*, 123 U.S. 623 (1887).

which were corrupted by the purpose to which they were destined (prostitutes under the terms of the Mann Act, for instance, could be transported interstate to visit their grandmothers but not their customers).

Little more need be said about the things (a clumsy word, perhaps, but the only one that takes in the whole genus) which were patently or potentially harmful in themselves; the crux of the problem of the federal police power lay in identifying things properly in the third category. Let us examine a few cases which exemplify the two suggested subclassifications. Congress, disturbed by the fact that some railroads owned coal mines and other industrial holdings, provided in 1906—in the so-called “commodities clause” of the Hepburn Act—that a carrier could not haul its own commodities.⁵⁹ The purpose was to prevent rate discrimination in favor of the road’s own products. Now coal is coal; there is no intrinsic difference between coal owned by a railroad and that owned by some other party—*ownership* was the basis of classification. From the viewpoint of the commerce-police power, coal owned by a carrier was Bad Coal, barred from interstate commerce. In 1909, this proposition was sustained by the Supreme Court in *United States v. Delaware & Hudson Co.*⁶⁰ Section 6 of the Sherman Act, which prohibited the shipment of “trust”-made items in interstate commerce was similarly upheld in *United States v. American Tobacco Co.*⁶¹

A somewhat different application of the same technique was employed in 1900 in the Lacey Act.⁶² Under great pressure from conservationists to protect egrets and other birds that were being mercilessly butchered to feed the millinery market—no woman was complete without a plumed hat—and recognizing the inadequacy of state conservation laws to cope with the problem, Congress made it unlawful to ship in interstate commerce any birds or animals (or components thereof) killed in violation of state law. Yet the legality or illegality of the shooting in no way affected the character of an egret’s plume. The Lacey Act was the ancestor of many laws today which penalize criminal acts committed in a state on the basis of subsequent utilization of the channels of interstate commerce—the federal kidnapping statute, the “Lindbergh Law,”⁶³ is the most famous, but another widely employed law, the Dwyer Act, makes it a federal offense to take a stolen car across a state line.⁶⁴ One wonders how the police could possibly deal with crime in our day—when a criminal may be at the other end of the Continent in five hours—if this particular technique had not been devised. It made nationwide law enforcement possible.

⁵⁹ Lumber was excepted. 34 Stat. 584 (1906), 49 U.S.C. §§ 1, 6, 14, 15, 16, 16(a), 18, 20, 41 (1958).

⁶⁰ 213 U.S. 366 (1909).

⁶¹ 221 U.S. 106 (1911).

⁶² 31 Stat. 187 (1900), as amended, 16 U.S.C. §§ 668(d), 701 (1958).

⁶³ 18 U.S.C. §§ 10, 1201 (1958).

⁶⁴ 18 U.S.C. § 2312 (1958).

In the same way that a lump of railroad-owned coal looks like any other lump of coal, a woman bound across a state line for immoral purposes looks about like any other woman. But for a man to escort her is a crime against the United States. The Mann Act, passed in 1910 after the newspapers and magazines had discovered and publicized the "White Slave Trade" or organized prostitution, was based on the theoretical principle that a man who took a woman from one state to another for a lascivious purpose, converted her into a Bad Thing. Originally aimed at organized vice, the Mann Act was later extended by the Court to cover interstate movement for sheer, unorganized, unpaid concupiscence.⁶⁵ The evil purpose alone was sufficient to bring the national government's police power into action. The Mann Act may have harassed the white slavers, but unfortunately it has also supplied a fertile basis for blackmail against rich young men in fast cars who have not kept adequate track of either the state lines or of the legal education of their companions.

Each of these commerce-police statutes was passed, in the usual American fashion, to deal with a specific problem over which the public was momentarily up in arms. After the muckrakers got through with the patent medicine industry, for example, millions of Americans purged their bathroom cabinets, fearfully consulted their doctors, and wrote outraged letters to their congressmen. The latter, who had probably undergone a similar sequence themselves, rushed to enact the Pure Food and Drug Act of 1906.⁶⁶ The Supreme Court, whose members also read the horror stories of the "poison-squad" experiments in the *Ladies' Home Journal* (Dr. Harvey W. Wiley, the driving force behind the pure food and drug movement, had fed food preservatives and similar material to guinea pigs with horrifying results) and Mark Sullivan's blasts against the patent medicine quacks in *Collier's*,⁶⁷ upheld the statute without a murmur in 1911.⁶⁸

Or take the regulation of meat packing. When, during the Spanish-American War, troops had been sickened and killed by "embalmed meat," the nation had been horrified, but little good came of it. Then, topping several articles about the filthy conditions in the packinghouses presented in muckraking journals, came Upton Sinclair's literally nauseating blockbuster—*The Jungle*.⁶⁹ Like the patent-medicine industry, the meat packers fought vigorously against federal regulation. Both were successful in the sense that they prevented legislation with real teeth from being enacted.⁷⁰ But still, public re-

⁶⁵ 36 Stat. 825 (1910) (now 18 U.S.C. §§ 1421-24 (1958)) upheld in *Hoke v. United States*, 227 U.S. 308 (1913), and extended by the Court to outlaw mistresses in *Caminetti v. United States*, 242 U.S. 470 (1917).

⁶⁶ 34 Stat. 768 (1906) (repealed in 1938) (now 52 Stat. 1059 (1938), 21 U.S.C. §§ 1-5, 7-15 (1958)).

⁶⁷ Cited by FILLER, *CRUSADERS FOR AMERICAN LIBERALISM* 144-56 (Rev. ed. 1950).

⁶⁸ *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911).

⁶⁹ SINCLAIR, *THE JUNGLE* (1906).

⁷⁰ See FILLER, *op. cit. supra* note 67, at 168-70.

vulsion against the packers forced through a meat inspection statute in 1906⁷¹ which provided the wedge for later effective regulation. The public demanded action and Congress turned to the commerce power for the peg on which to hang an inspection law and a set of regulations governing the "manufacture" of canned and preserved meat. No one worried much about the country's Constitution; they were concerned wholly with their own constitutions.

From this narrative, one might get the impression that there was no opposition to the expansion of the commerce power or that the judiciary simply and invariably endorsed congressional action—an erroneous assumption. While it is true that after the close decision in *Champion v. Ames* the other commerce-police cases fell into line and that in none of the instances of legislation mentioned here did the Court hold an act of Congress unconstitutional, in most of these areas judicial opinion merely coincided with public opinion. No one particularly wanted to be poisoned by cough medicine or eat hams prepared in *The Jungle*. Nor was there much sympathy for prostitution among the judges. Yet the fight against the widening of the national police power went on and in certain sectors was extremely successful. These cases have been retained for analysis after the main lines of the argument have been established, for they provide startling contrasts with the decisions we have been examining. It will hardly come as a surprise to learn that the two sectors in which the Court refused to permit the Congress a wide range of authority were those intimately associated with entrepreneurial liberty; the regulation of big business and corrective labor legislation.

When in the early 1890's, the American Sugar Refining Company, popularly known as the Sugar Trust, bought out its last big competitors and achieved control of roughly ninety-eight per cent of the nation's production of refined sugar, the United States government invoked the Sherman Act. The Department of Justice claimed that the contracts eliminating the competition constituted a conspiracy in restraint of trade as they were designed to monopolize interstate commerce in sugar. In 1895 the Supreme Court blasted the Government's hopes, ruling eight-to-one that "commerce succeeds to manufacture, and is not a part of it."⁷² The Sherman Act was thus judicially emasculated so far as its primary purpose, "trust-busting," was concerned. Chief Justice Fuller, who two years earlier had dissented in the lottery case, this time carried the day with only Mr. Justice Harlan dissenting. He effectively defined commerce and the concomitant federal police power as beginning after the production process is complete—"trade and commerce [only] served manufacture to fulfill its function," and were not part of one continuous entity.⁷³

⁷¹ 34 Stat. 674 (1906); see 34 Stat. 1260 (1907), 21 U.S.C. §§ 71-91 (1958).

⁷² *United States v. E. C. Knight Co.*, 156 U.S. 1, 12 (1895).

⁷³ *Id.* at 17.

Moreover, he revived the doctrine of *Paul v. Virginia*⁷⁴ that contracts were matters of local concern, and simply ignored the conspiracy aspects of the indictment. Thus the agreements signed in Philadelphia which brought ninety-eight per cent of the sugar production in the country under one corporate roof were not subject to national regulation—even though in common-sense economic terms they determined, on a nationwide basis, the price of sugar.

What must be kept in mind here is the curious fact that the Court limited the scope of the commerce power here without in any direct way intruding on the precedential value of *Champion v. Ames* or any of the other subsequent decisions putting a wide construction on the commerce clause. In the *Knight* case, the Court initiated the two-track approach to the commerce clause which became so distinctive in later years. Indeed, in the same year of 1895, the Court speaking through Mr. Justice Brewer interpreted the commerce authority broadly enough to justify the imprisonment of Eugene V. Debs,⁷⁵ who in one view of his activities with the American Railway Union had merely been influencing workers not to fulfil their (local) labor contracts—that is, to strike. Apparently the commerce-police power was broad enough to enforce labor contracts, but too weak to inhibit business agreements. And Mr. Justice Harlan, who disliked trade unions about as much as he despised “trusts,” concurred in the *Debs* opinion.

Justice Harlan returned to the fray in 1904 summarily to dispose, for a minority of the Court,⁷⁶ of the contention that an agreement to form a holding company was not in interstate commerce. In *Northern Securities Co. v. United States*, Harlan set forth the decisions on the Sherman Act, including the *Sugar Trust Case*, and announced that they fully supported the following propositions:

That although . . . [the antitrust act] has no reference to the mere manufacture or production of articles or commodities within the limits of the several States, it does embrace and declare to be illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates in restraint of . . . [interstate and foreign commerce];

That the act is not limited to restraints of interstate and international commerce that are unreasonable in their nature, but embraces all direct restraints imposed by any combination, conspiracy or monopoly upon such trade or commerce;

That combinations even among private manufacturers or dealers whereby interstate or international commerce is restrained are equally embraced by the act. . . .⁷⁷

⁷⁴ 75 U.S. (8 Wall.) 168 (1868); see text at note 34 *supra*.

⁷⁵ *In re Debs*, 158 U.S. 564 (1895).

⁷⁶ *Northern Securities Co. v. United States*, 193 U.S. 197 (1904). Brown, McKenna and Day, J.J., joined in the opinion. Fuller, C.J., and Holmes, White and Peckham, J.J., dissented while Brewer, J., concurred on narrow grounds.

⁷⁷ *Id.* at 331.

It is impossible to reconcile Harlan's summary of the antitrust law with the decision in the *Sugar Trust* case, and not unexpectedly Chief Justice Fuller joined the dissent. Harlan's remark that *all* restraints of trade, not merely "unreasonable" ones, were comprehended in the statutory ban was directed at Mr. Justice Brewer, who was plugging for the "Rule of Reason"—a judicial amendment to the Sherman Act that will be discussed subsequently. It is noteworthy that the conspiracy provisions were crucially emphasized by Harlan—and burked in Fuller's dissent.

Some "local" contracts were thus Bad Things from the perspective of the commerce-police power; both the *Debs* and the *Northern Securities* decisions suggested that railroad contracts in particular were within the national jurisdiction. Then came the first *Employer's Liability Cases*⁷⁸ and *Adair v. United States*⁷⁹ in which Justice Harlan put on a spectacular display of judicial existentialism in considering each case as an original matter, with no connection or continuity. Although the Government contended that the Federal Employers Liability Act of 1906⁸⁰ could be considered to fall under the general heading of a safety measure, it was radically different from previous enactments of the sort which had prescribed safety regulations for railroads engaged in interstate commerce. Instead of prescribing automatic coupling devices, adequate lights, or reasonable speeds, this statute altered the traditional master-servant relationship in liability actions. Without going into the details of the common law of liability, suffice it to say that this federal act undermined the carriers' legal defenses against damage suits. It applied to all railroad employees, not just to those engaged in interstate railroad operations. The Supreme Court, over Harlan's semi-dissent,⁸¹ held the statute to be unconstitutional because it applied to employers of workers in intrastate as well as interstate commerce⁸² (though three years later the Safety Appliance Act of 1903 was sustained in its application to equipment used only in intrastate commerce⁸³). Harlan insisted that the statute was constitutional in its application to workers in *interstate* commerce and felt that the Court had misconstrued the law.

However, in the *Adair* case Justice Harlan went wild. He declared that the congressional attempt to bar "yellow dog" contracts in the railroad industry violated the due process clause of the fifth amendment as an impairment of entrepreneurial liberty. Then he proceeded to proclaim further, in a totally unnecessary judicial safari, that the commerce power did not reach labor rela-

⁷⁸ 207 U.S. 463 (1908).

⁷⁹ 208 U.S. 161 (1908).

⁸⁰ 34 Stat. 23 (1906) (now Employers' Liability Act (Railroads) of 1908, 34 Stat. 65, as amended, 45 U.S.C. §§ 51-60 (1958)).

⁸¹ 207 U.S. at 540.

⁸² *Id.* at 504.

⁸³ *Southern Ry. v. United States*, 222 U.S. 20 (1911), upholding 32 Stat. 943 (1903), 45 U.S.C. § 8 (1958).

tions! Not only did Harlan cite with seeming approval the opinion of the Court in the first *Employers' Liability Cases*, but he proceeded to set out the view that labor contracts (unlike liability rules) were *not* subject to regulation: "[W]hat possible legal or logical connection is there here," he asked, "between an employee's membership in a labor organization and the carrying on of interstate commerce?" His answer? "Such relation to a labor organization cannot have, in itself and in the eye of the law, any bearing upon the commerce with which the employee is connected by his labor and services."⁸⁴

Now this was a two-edged sword. If it forbade federal government intervention on the worker's behalf, it also implied that federal action to enforce labor contracts, that is, break strikes, would be ultra vires the commerce power. In other words, if railway labor relations were beyond the reach of the national government, the *Debs* case would silently be overruled. Not unexpectedly, Richard Olney, whose ruthless intervention as Attorney General had broken the Pullman strike and accompanying boycott, picked this intimation up from the decision and hastened to write an article criticizing this aspect of the opinion in the *American Law Review*.⁸⁵ However, as the *Danbury Hatters* case⁸⁶ later demonstrated, Olney was needlessly distressed: The Supreme Court was only excluding from the commerce-police power pro-labor legislation.

Before examining the legal legerdemain that characterized the *Danbury Hatters* case, it might be well to reiterate the line of argument so far. Contemporaneously with a series of decisions sustaining the commerce-police power of Congress over a broad congeries of national problems, the Supreme Court was marching up the hill and down again on the subject of contracts in restraint of trade. A lot of loose logic went into the discussion on both sides of the argument, but the law might be summarized as declaring that (1) production and manufacture and contracts relating to them were local in character *except* (2) when they were part of a process that restrained interstate or foreign commerce or "directly affected" it. To point up the paradoxes involved in the *Danbury Hatters* case, it should be emphasized that control of ninety-eight per cent of the nation's sugar production did not deprive the American Sugar Refining Co. of its "local" character, and that the labor contracts even of interstate railroad workers appeared to be outside the range of federal control.

In 1901, the United Hatters of North America, AFL, began a campaign to unionize the Danbury hat shop of Loewe and Fuchs and in 1902 they called a strike. When Loewe and Fuchs continued to produce hats with nonunion

⁸⁴ 208 U.S. at 178. The commerce clause, in his view, could thus reach the liability aspects of a labor contract but not the conditions of employment presumably encompassed in the same agreement!

⁸⁵ Olney, *Discrimination Against Union Labor—Legal?*, 42 AM. L. REV. 11 (1908); see LIEBERMAN, *UNIONS BEFORE THE BAR* 54 (1950).

⁸⁶ *Loewe v. Lawlor*, 208 U.S. 274 (1908).

labor, the union began a nationwide campaign to bring the firm into disrepute. Merchants were requested not to handle Loewe's hats, and the union asked the public to refuse to buy hats made in nonunion premises. The American Federation of Labor put the firm on its "boycott" list.⁸⁷ Loewe, with a war chest supplied by the American Anti-Boycott Association, then went into the United States District Court and brought a civil action for conspiracy in restraint of trade under the provisions of the Sherman Act claiming 240,000 dollars in treble damages.⁸⁸ The only jurisdictional basis for this suit was that indirect interference with the production and sale of Loewe's hats was an illegal restraint on interstate commerce. Leaving aside the problem of statutory construction as to whether the Sherman Act was intended to include trade union activities, which is highly improbable,⁸⁹ the courts had to determine if the litigation fell legitimately within the purview of the commerce clause. If they were to rule that an embroglio between labor and management in Danbury was local in character, thus following the trail cut in the *Sugar Trust* and *Adair* cases, no federal court could entertain jurisdiction over the suit. It would be a problem for the Connecticut courts to settle under applicable state law.

The district judge denied jurisdiction, the court of appeals was uncertain and passed the question to the Supreme Court, and in 1908—still the same confused year—Chief Justice Fuller ruled for a unanimous Court that there was sufficient cause for jurisdiction under the Sherman Act.⁹⁰ The case went back for trial on the merits; the union lost a long legal battle in November, 1912, and treble damages plus costs were assessed against its members at 252,000 dollars—a decision sustained by Justice Oliver Wendell Holmes for a unanimous Supreme Court in January, 1915.⁹¹ At this point, had the Clayton Act not been injected into the statute books, there was good reason to believe that any trade union action hindering production or distribution of goods would have been a conspiracy in restraint of trade under the antitrust law. Loewe and Fuchs was a small firm with a small proportion of the market. (The strike and boycott had in fact had an insignificant impact on the national hat market.) But in contrast with the American Sugar Refining Co., Loewe and Fuchs' status had a *direct* effect on interstate commerce and a "local" squabble over labor contracts fell under the jurisdiction of the federal commerce-police power. The Clayton Act theoretically put an end to this sort of litigation by providing that unions were not per se conspiracies in restraint of trade, but the Court later rewrote the Clayton Act to minimize this immunity.

⁸⁷ Technically this was a "secondary boycott," a "Do Not Patronize" list appealing to individuals not involved in the strike, rather than a "primary boycott" in which union members refuse to work or to handle, ship, or process their own employer's goods.

⁸⁸ LIEBERMAN, *op. cit. supra* note 85, at 59.

⁸⁹ See GREGORY, *LABOR AND THE LAW* 205-17 (1st ed. 1946).

⁹⁰ *Loewe v. Lawlor*, 208 U.S. 278, 309 (1908).

⁹¹ *Lawlor v. Loewe*, 235 U.S. 522 (1915).

While the Supreme Court was applying the dogma of entrepreneurial liberty to the commerce power in a fashion which effectively made successful or militant union activity a conspiracy in violation of the antitrust laws, it was moving towards vitiation of the provisions relating to "trusts" themselves. In the *Danbury Hatters* case Chief Justice Fuller went to some length to point out that the Sherman Act interdicted *any combination whatsoever* in restraint of trade—its ban was complete.⁹² Mr. Justice Brewer, who had argued for the "Rule of Reason" in his separate concurrence in the *Northern Securities* case, issued no complaint in the instance of the hatters. But the judicial concern that Congress could not have meant what it said continued and in 1911 reached fruition. In the *Standard Oil*⁹³ and *American Tobacco Co.*⁹⁴ cases, while sustaining the Government's demand that these two great "trusts" be dissolved, Chief Justice White inserted the "Rule of Reason" into the Sherman Act. He announced that the language of the statute should be construed in the tradition of the common law as barring only "unreasonable" restraints of trade, not all.

In the light of history, this was a poignant day for the Court—it featured John Marshall Harlan's last great dissent. Appointed in 1877, the "massive, organ voiced Kentuckian"⁹⁵ had become a fixture in the Court. He appears at his worst in the labor decisions we have examined, but in the field of civil rights, it will be seen⁹⁶ that he was the conscience of the Court with respect to the Negro and a vigorous proponent of enforcing federal standards of criminal due process on the states. Moreover, he hated monopolies in the best Populist tradition. Harlan was always troubled by what he once called "dissent-ary."⁹⁷ After White had delivered the opinion of the Court in the *Standard Oil* case Harlan, "His tongue loosened by whiskey," rose to dissent in bitter terms against the "Rule of Reason": He "bellowed bitter invectives that caused his brethren to blush with shame" and "rattled the benches of the staid old courtroom." Charles Evans Hughes, newly appointed to the bench, later observed that it "was not a swan song, but the roar of an angry lion."⁹⁸ Shortly Harlan was dead and President Taft appointed his sixth new Justice; the Court had been virtually reconstituted in the space of four years.

⁹² *Loewe v. Lawlor*, 208 U.S. 278, 292-93 (1908). His *Knight* opinion was no barrier to this conclusion because the contracts in that case related to *manufacture* and were thus, by definition, not efforts to restrain trade. Q.E.D.

⁹³ *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

⁹⁴ *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

⁹⁵ 1 PUSEY, CHARLES EVANS HUGHES 283 (1951).

⁹⁶ See Roche, *Civil Rights in the Age of Enterprise*, to be published in Volume 31, No. 1, U. CHI. L. REV. (1963).

⁹⁷ See Westin, *Stephen J. Field and the Headnote to O'Neil v. Vermont: A Snapshot of the Fuller Court*, 67 YALE L.J. 361, 376 (1958).

⁹⁸ 1 PUSEY, *op. cit. supra* note 95, at 283.

The consequence of the judicial amendment of the Sherman Act to incorporate the "Rule of Reason" was that thenceforth every antitrust case was *wholly* at the mercy of the courts—who according to the mythology of American jurisprudence were the sole oracles of reasonableness. In practice this came down to a definition which stated that a reasonable restraint of trade was one which appeared reasonable to five Justices of the Supreme Court. Given the political and economic convictions of the members of the Court, and their intense dedication to the doctrine of entrepreneurial liberty, it is not surprising that for the next quarter of a century the antitrust laws became a *laughing-stock*—except among trade unionists.

To conclude, in the years that we have examined the Supreme Court spent a good deal of time and energy construing the commerce clause of the Constitution. In doing so, it established two streams of precedent which would go on into the 1920's and 1930's to provide the constitutional bases for either upholding or rejecting new exercises of national power. At times the Court expanded the commerce power to such a point that it appeared ready to permit Congress to regulate matters which were traditionally within the police power of the states. In two cases not discussed here, *Swift & Co. v. United States*⁹⁹ and the *Shreveport* case,¹⁰⁰ the Justices had devised the "stream of commerce" doctrine to justify regulating local enterprises (stockyards) which were necessary intermediary stops in a flow of commerce, and the "Shreveport doctrine" that activities admittedly in intrastate commerce which directly affected interstate commerce (railroad lines in this instance) were subject to federal regulation. The door seemed to be open—at least in logical terms—for federal oversight of most significant industrial endeavors in the nation as well as for a mass of ancillary regulations arising from the new police problems created by rapid communications and transportation.

At the same time, and without admitted contradictions, the Court had also narrowly construed the commerce clause on certain occasions and asserted that the reserved powers of the states constituted a check on the reach of the commerce-police power. For example, in *Hammer v. Dagenhart*¹⁰¹ the Court declared unconstitutional the Child Labor Act of 1916,¹⁰² which had barred from interstate commerce goods produced by children. Congress, Mr. Justice Day asserted, could not legitimately achieve an illegitimate goal by employing the commerce power to regulate local manufacture. Yet the Court had earlier sustained section 6 of the Sherman Act which operated on the identical principle by closing interstate commerce to "trust-made" goods. And it might be added that, despite the pieties of the Clayton Act, it would continue to find

⁹⁹ 196 U.S. 375 (1905).

¹⁰⁰ *Houston E. & W. Tex. Ry. v. United States*, 234 U.S. 342 (1914).

¹⁰¹ 247 U.S. 251 (1918).

¹⁰² 39 Stat. 675 (1916).

local conditions of employment within the ambit of the antitrust laws with respect to labor relations.¹⁰³

The commerce clause was thus capable of almost infinite adjustment to the needs of a Court majority: In accordion-like fashion it could be expanded or contracted as the imperatives of a factual situation dictated. The fundamental problem for liberals and New Dealers in the 1930's was not therefore any absence of adequate precedents for their labor and welfare legislation—all New Deal measures could be justified on one authoritative interpretation of the commerce power or another—but rather that the dominant judicial philosophy militated against their particular precedents. (Cardozo's dissent in *Carter v. Carter Coal Co.*¹⁰⁴ rested, for example, on a perfectly valid body of precedent—one no less encompassed by *stare decisis* than that which supported the opinion of the Court.) In short, the determination that one body of precedent would be invoked (to sustain) rather than another, equally valid (to overturn), was not a *legal* problem. Every Justice came equipped with a double-barreled shotgun—the question was, *which* barrel would he fire? And this in turn rested, at base, on the extent to which he took for granted the legitimacy of the fundamental dogmas of entrepreneurial liberty. The tragedy of the New Deal Court was thus not rooted in Platonic irresponsibility or simple arrogance—on the contrary, the “Nine Old Men” were desperately responsible and faithful to the value system which had permeated their political and legal careers and which they, with good empirical reason, believed to express the “will of the people.” When they chose the “wrong” precedents and lambasted the New Deal experiments, the Court majority was simply unaware, and probably incapable of learning, that the era of entrepreneurial liberty was over. Still living in an era where their economic views coincided with the election returns, they refused to believe that the American people had abandoned the creed of the “old order.” Thus, at base, it was their political insensitivity rather than their jurisprudence which betrayed them.¹⁰⁵

¹⁰³ *Cf.* *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925).

¹⁰⁴ 298 U.S. 238, 324 (1936).

¹⁰⁵ From this analytical viewpoint, it was the election of 1936 rather than the “Court packing” plan which led, in Reed Powell's immortal phrase, to the “switch in time that saved nine.” It also helps to explain the eccentric behavior of Chief Justice Hughes. Hughes, surely one of the most intelligent American politicians of this century, seems to have labored desperately to escape from the constitutional *culs de sac* so beloved by Justices Butler, VanDeventer, McReynolds and Sutherland. (See, for example, his extraordinary dissent in *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).) See generally, Roche, *Executive Power and Domestic Emergency*, 4 WESTERN POLITICAL QUARTERLY 592 (1952).