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Richard A. Epstein, "The Proper Scope of the Commerce Power," 73 Virginia Law Review 1387 (1987).

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VIRGINIA LAW REVIEW

VOLUME 73

NOVEMBER 1987

NUMBER 8

THE PROPER SCOPE OF THE COMMERCE POWER

*Richard A. Epstein**

THE Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"¹—such is the clause in the Constitution to which most federal power can be traced in today's general welfare state. The labor statutes, the civil rights statutes, the farm and agricultural statutes, and countless others rest on the commerce power, or more accurately on a construction of the commerce clause that grants the federal government jurisdiction so long as it can show (as it always can) that the regulated activity burdens, obstructs, or affects interstate commerce, however indirectly. Is this underlying interpretation of the commerce clause correct?²

The entire inquiry may be idle theoretical speculation, or it may have profound practical importance. I cannot say which, although at present I should guess the former; too much water has passed over the dam for there to be a candid judicial reexamination of the commerce clause that looks only to first principles. Still, in an age

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¹ U.S. Const. art. I, § 8.

² More accurately, the inquiry might be stated: How should the grant to Congress be understood when the commerce clause is construed in light of the necessary and proper clause? See *infra* notes 22-28 and accompanying text.

in which the theory of government is again subject to general theoretical discussion, it is instructive to ask, as a matter both of first principle and of Supreme Court precedent: What is the proper construction of the grant of congressional power contained within article I, section 8, clause 3?

In Part I of this Article, I introduce the question of the scope of the commerce power by discussing its intended role in limiting government power and its relation to the individual rights protections of the Constitution. In Parts II and III, I analyze the text of the commerce clause and look at the place of the commerce clause in the overall constitutional structure. Finally, in Parts IV and V, I analyze the clause in light of the cases that have construed and extended its scope during our entire constitutional history. My analysis places special emphasis on the fifty-year period of the rise of the administrative state, from the onset of the Interstate Commerce Commission in 1887 to the height of the New Deal. My conclusion is clear enough. I think that the expansive construction of the clause accepted by the New Deal Supreme Court is wrong, and clearly so, and that a host of other interpretations are more consistent with both the text and the structure of our constitutional government.

I. THE PROBLEM: STRUCTURE AND INDIVIDUAL RIGHTS

The commerce power is not a comprehensive grant of federal power. It does not convert the Constitution from a system of government with enumerated federal powers into one in which the only subject matter limitations placed on Congress are those which it chooses to impose upon itself. Nor does the "necessary and proper" clause work to change this basic design; although it seeks to insure that the federal power may be exercised upon its appropriate targets, it is not designed to run roughshod over the entire scheme of enumerated powers that precedes it in the Constitution.³ If forced to summarize what the commerce clause means, I would

³ This theme of limited and enumerated powers was central to the distinction between a federal and national government. It is evident on the face of article I, which begins with the words "All legislative powers herein granted" (without specifying who the grantor was), and it was reiterated in all the ratification debates. See, e.g., 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 435-36, 454, 540 (J. Elliot 2d ed. 1836) (dialogue of Wilson and McKean); 3 *id.* at 95, 246, 444, 553 (dialogue of Madison, Nicholas, and Marshall); 4 *id.* at 147-49, 259-60 (dialogue of Iredell and Pinckney).

say that it refers more to “commerce” as that term has been developed in connection with the “negative” or “dormant” commerce clause cases, which concern the instrumentalities of interstate commerce and the goods that are shipped into it. Stated otherwise, the term commerce has a stable usage in various other contexts. Zoning for “commercial” uses, for example, is often used in opposition to zoning for “manufacturing” uses. The Uniform Commercial Code does not cover the law of manufacturers. More generally, the idea of commerce seems closer to the idea of “trade” than to other economic activities. It is in just this sense that the term was used in ordinary discourse at the time of the founding. Hume’s essay *Of Commerce*, for example, explicitly places the idea of commerce in opposition to that of manufacturing.⁴ The same usage, restrictive by modern standards, was adopted by Hamilton, who for example in the *Federalist* No. 11 uses commerce as a synonym for trade and navigation, and links his discussion of the commerce power with the need to have an American navy to police and protect the seas.⁵ But whatever the uncertainties, commerce does not comprise the sum of all productive activities in which individuals may engage. There is at least a slight irony here, for the Uniform Commercial Code is enacted under state law, whereas everything from manufacturing to welfare is regulated comprehensively at the federal level.

Finding the proper interpretation is of course no easy task. One great problem has to do with the function of the commerce clause itself. The Constitution contains two general types of provisions;

⁴ See, D. Hume, *Of Commerce* (1752), reprinted in *Essays: Moral, Political, and Literary* 252, 263-64 (Liberty Classics ed. 1985). Hume’s basic theory was that nations that tolerate foreign commerce are able to realize gains from trade that permit them to accumulate greater wealth, and to achieve greater prosperity and political stability, than those that rely upon domestic manufacture and agriculture alone. Hume’s essay mixes historical example with analytical propositions in a style that anticipates the *Federalist*.

⁵ The *Federalist* No. 11 (A. Hamilton) (“Concerning Commerce and a Navy”). The opposition between commerce on the one hand, and agriculture and manufacture on the other, seems clear enough. Thus in speaking of the control over foreign commerce, Hamilton wrote:

By prohibitory regulations, extending, at the same Time throughout the States, we may oblige foreign countries to bid against each other, for the privileges of our markets. This assertion will not appear chimerical to those who are able to appreciate the importance of the markets of three millions of people—increasing in rapid progression, for the most part exclusively addicted to agriculture, and likely from local circumstances to remain so—to any manufacturing nation.

Id. at 63 (Modern Library College ed. 1937).

the first class is structural and was designed to divide powers between state and federal government, and, at the federal level, between the different branches of government. The second class was designed to protect individual rights against wrongdoing by government. The two types of provisions are in some sense parts of an integral strategy to ensure that the government, state or federal, does not become the enemy of the very people whom it is organized to protect. But the provisions work in very different ways, and their proper construction proceeds along rather different paths.

In considering guaranties of individual rights, we address the highest ends of government and civilization. Generally it is possible to look to the common law, to a rich political theory, and to a long political tradition in order to gather hints about what these provisions mean and how they should function. The framers understood the protection of speech, contract, and property as ends good in themselves, as rights so "natural" and ends so clear that they did not receive the intellectual justification they so desperately needed—and still need. In reading these provisions, we can draw upon a large body of materials to guide our interpretation: Hobbes, Locke, Hume, Montesquieu, and a host of lesser, but still able, writers.⁶ The differences that emerge in dealing with these questions are often attributable to the richness and the centrality of their subject, not to the want of speculation about them.

Provisions that go to the question of jurisdiction are no less important to sound governance than those that govern individual rights. Yet jurisdictional principles have a very different intellectual pedigree. Jurisdiction is not part of ordinary moral discourse, or of our common understanding of right and wrong. Instead, jurisdiction is always regarded as a means towards an end rather than as an end in itself. Hamilton treated jurisdiction as a more effective guarantor of individual rights than a bill of rights, because he believed that it provided clear and powerful lines to keep government from straying beyond its appointed limits.⁷ Hamilton's judg-

⁶ See, e.g., T. Hobbes, *Leviathan* (Everyman's Library ed. 1950) (1651); D. Hume, *supra* note 4; J. Locke, *An Essay Concerning Human Understanding* (R. Wilburn ed. 1947) (1689); Montesquieu, *The Spirit of Laws* (T. Nugent trans. 1949) (1748).

⁷ *The Federalist* No. 84 (A. Hamilton). Hamilton continued:

I go further, and affirm that bills of rights . . . are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pre-

ment was, I think, wrong to the extent that it relied on jurisdictional provisions as the sole limit to government power.⁸ But it contained a fair measure of good sense in using jurisdictional limitations as an important, indeed indispensable, limitation upon government power.

The difficulty lies in construing jurisdictional provisions to achieve this political end. Here there is no comparable tradition of political philosophy upon which to draw. The classical writers who extolled the virtues of liberty and property did not have the practical experience of the founders in forming governments. The great debates over the social contract always asked the question of how individuals in a state of nature could enter into a social contract for their mutual advantage. They never considered the possibility that in practice social contract theory would be tested in a world in which it was hardly clear whether Sovereign States or ordinary persons were the contracting parties. It is hardly surprising therefore that the classical writers never addressed federalism, enumer-

text to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?

Id. at 559 (Modern Library College ed. 1937). Hamilton's argument presupposes that the doctrine of enumerated powers places substantial limitations upon all grants of power to the federal government, including those under the commerce power.

* Thus Hamilton thought that the principle of freedom of speech could not protect the press from arbitrary taxation:

It cannot certainly be pretended that any degree of duties, however low, would be an abridgment of the liberty of the press. . . . And if duties of any kind may be laid without a violation of that liberty, it is evident that the extent must depend on legislative discretion, regulated by public opinion; so that, after all, general declarations respecting the liberty of the press, will give it no greater security than it will have without them.

Id. at 560 n.

Hamilton was clearly wrong on this issue. It may not be possible to use the first amendment to insist that the press be free of all general taxes, but it is possible to limit the nature of the taxes that are imposed, so that special taxes placed upon the press, but not other industries, are prohibited, or that special taxes placed on some portions of the press, but not others, are prohibited. Courts have intervened to prevent disproportionate taxation when public opinion has failed to do so. See, e.g., *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). *Grosjean* has had little development because its holding was clear enough to stop most forms of abusive taxes in their tracks.

ated powers, and jurisdiction, even though these form fundamental features of our constitutional system.⁹

We must, therefore, examine this question in an artificial world devoid of theories of natural rights. We must take our cue from more immediate, technical considerations. Or so it seems. Appearances are deceiving, however, and I shall argue throughout this Article that the reasons for the expansion of the commerce clause were strongly substantive. The rationale for limited government became obscure in an age when the Progressive tradition of good government came to dominate American intellectual life.¹⁰ Judges who were persuaded that national solutions were needed for national problems could hardly be expected to invoke the commerce clause as a barrier to federal action when they believed in the importance of popular democracy, the soundness of the underlying legislation, the need for national uniformity, or all three. A judge's view of the commerce clause might be very different, however, if the perils of collective choice and the wisdom of the underlying substantive legislation were called into question. A court which shared the framers' view of government as a necessary evil could, if it so chose, put more teeth into the commerce clause than has existing case law.

Cases from both the Progressive Era and the New Deal showed a close fusion between issues of substantive rights and questions of federal jurisdiction. The very attitudes that led to the demise of substantive due process protection of economic liberties lay behind

⁹ Some sense of the twist of history is found in Patrick Henry's speech in opposition to the ratification of the Constitution in the Virginia debates:

[W]hat right had they to say, We, the People? My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask, who authorized them to speak the language of, We, the People instead of We, the States? States are the characteristics, and the soul of a confederation. If the states be not the agents of this compact, it must be one great consolidated National Government of the people of all the States.

H. Storing, *What the Antifederalists Were For* 12 (1981) (quoting Henry). Henry was a better prophet than even his supporters would have allowed at the time. Storing rightly notes that the Anti-Federalists were on their strongest ground when they used a principle of ratification that put the Constitution into effect, at least as between the parties, when nine states ratified it. Under the Articles of the Confederation, each state had a blocking position against the changes, and Rhode Island had not bothered to send a delegate to the Philadelphia Convention.

¹⁰ See A. Ekirch, *Progressivism in America: A Study of the Era from Theodore Roosevelt to Woodrow Wilson* (1974).

judicial interpretation of the commerce clause.¹¹ To trace this history, it is necessary to discard the aura of inevitability that modern courts and writers have placed around the commerce clause.¹² At each stage in the historical analysis, the right question to ask is: Was this extension of federal power justified by the text and structure of the Constitution? There are no shortcuts in the journey. Let us start with the text.

II. THE TEXT

The first place to look to find the meaning of the commerce clause is the text of the clause itself. Here one notices that the word "commerce" governs three separate sets of relations—those with foreign nations, among the states, and with Indian tribes.¹³ One should assume that the word commerce applies with equal force to all three cases, and bears the same meaning with respect to each of its objects. One cannot, for example, assign a meaning to "commerce" which is intelligible only with respect to foreign nations. The asserted construction must make equally good sense for commerce among the states and for commerce with the Indian tribes.

Similarly, one does not want a meaning of the term commerce which renders any one of these three heads of the commerce power redundant or unnecessary. The modern view which says that commerce among the several states includes all manufacture and other productive activity within each and every state, because of the effect that such manufacture has upon commerce, violates this constraint. If commerce includes all that precedes trade with foreign nations, among the states, and with Indian tribes, then the three heads of jurisdiction cover the same ground; that is, each by itself covers manufacturing or agriculture within each of the states. The

¹¹ It is no coincidence, for example, that *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding minimum wage law for women), was decided in the same term as *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), discussed *infra* notes 185-202 and accompanying text.

¹² See, e.g., Cohen, *The Inevitable Constitutional Revolution of 1937* (speech to the AALS Constitutional Law Meeting, Washington, D.C., Oct. 8, 1987), written in response to my short paper, R. Epstein, *Why the Revolution of 1937 Was a Mistake*. Cohen places heavy reliance upon the Roosevelt landslide of 1936 as justification for the expanded construction of the commerce clause.

¹³ U.S. Const. art. I, § 8.

scope of the clause would thus be plenary even if it said only that Congress shall have power to regulate commerce with foreign nations, or even with the Indian tribes, and remained silent about commerce among the several states. The level of industrial production within each state, after all, influences the amount, type, and price of goods available for the export trade or for the Indian trade. Granting Congress the power over commerce among the states thus accomplishes nothing that has not been already provided for elsewhere in the document. What possible sense does it make as a matter of ordinary English to say that Congress can regulate "manufacturing with foreign nations, or with Indian tribes," or for that matter "manufacturing among the several states," when the particular fabrication or production takes place in one state, even with goods purchased from another?

Taking the alternative position, that commerce means trade, or as Chief Justice Marshall said, "intercourse,"¹⁴ with or among the parties named, changes the situation dramatically. By Chief Justice Marshall's account, "intercourse" covered both shipping and navigation, and the contracts regulating buying and selling. Using that two-part definition it becomes clear that trade with foreign nations is not trade among the several states or with the Indian tribes. Each part of the clause attributes the same meaning to the term commerce, and each of the objects of the clause—foreign nations, the states, and Indian tribes—becomes an indispensable part of the constitutional structure. The power to regulate commerce with foreign nations, for example, is needed to ensure that trade negotiations with foreign nations are not conducted by each of the

¹⁴ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824). Chief Justice Marshall continued: Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive of a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

Id. at 189-90. Chief Justice Marshall may well have borrowed the term "intercourse" from Hamilton, who in speaking of "The importance of the Union, in a commercial light," also spoke of "our intercourse with foreign countries as well as with each other." *The Federalist* No. 11, at 62 (A. Hamilton) (Modern Library College ed. 1937). Note too that in *The Federalist* No. 11, Hamilton repeatedly stressed that navigation was comprehended in commerce, the very point that Chief Justice Marshall had emphasized in his decision.

several states in its own individual capacity.¹⁵

It is worth noting that this view of commerce as trade is consistent with the other prominent mention of the word commerce in the Constitution. Article I also states that “[n]o preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another”¹⁶ The term “commerce” is used in opposition to the term “revenue,” and seems clearly to refer to shipping and its incidental activities; this much seems evident from the use of the term “port.” The clause itself would sound odd if it referred, for example, to preferences “given by any Regulation of Commerce, Manufacture or Revenue to the ports of one State.” The term commerce in this commerce provision does not carry with it the extensive baggage placed upon it by the better-known New Deal cases concerning the commerce clause.

III. THE STRUCTURE

One obtains the same interpretation of the commerce clause when considering the clause in light of the overall constitutional structure. Article I, section 8, contains an extensive list of separate, discrete, and enumerated powers granted to Congress, whereas article I, section 9, contains a comparable list of powers specifically denied to it. The lists of inclusion and exclusion suggest that the provisions contained in any one section should be read to recognize the existence and necessity of other specific powers and limitations contained elsewhere in article I, as well as the certainty that some matters are wholly beyond the power of Congress.

This view certainly appears to agree with the original theory of the Constitution. The federal government received delegated powers from the states and the individuals within the states. The exact source of the granting power might be somewhat unclear; after all, the preamble begins with “We the People,”¹⁷ yet ratification was by nine of the thirteen sovereign states.¹⁸ Yet whatever the pedi-

¹⁵ This point was stressed by Hamilton in *The Federalist* No. 11, as in the sentence quoted *supra* note 5. For those of us who believe in free trade, the powers given Congress seem far too broad, as the debates over the current protectionist trade bills reveal. See also Kitch, *Regulation and the American Common Market*, in *Regulation, Federalism, and Interstate Commerce* 16, 51 (A. Tarlock ed. 1981).

¹⁶ U.S. Const. art. I, § 9.

¹⁷ *Id.* preamble.

¹⁸ See *id.* art. VII.

gree of the Constitution, there was clearly no sense that either grantor conferred upon the Congress the plenary power to act as a roving commission, in order to do whatever it thought best for the common good. The looseness of vague grants of power would have given rise to the possibility of massive abuse, a possibility the framers seemed determined to control. The federal government was to have supremacy in the areas under its control, but the quid pro quo was that these areas were to be limited by specific jurisdictional grants. A system which says that the commerce clause essentially allows the government to regulate anything that even indirectly burdens or affects commerce does away with the key understanding that the federal government has received only enumerated powers. The doctrine of "internal relations" is not only a philosophical creed that says every event is related to every other separate event; it is also something of an economic truth in a world in which the price of any given commodity depends upon the costs of its inputs and upon the alternatives available to potential buyers. To say that Congress may regulate *X* because of its price effects upon any goods in interstate commerce, or because of its effects upon the quantity of goods so shipped, is to say that Congress can regulate whatever it pleases, a theory that cases such as *Wickard v. Filburn*¹⁹ have so eagerly inferred.

On this score, moreover, there is no reason to distinguish the commerce of the eighteenth and nineteenth centuries from that of the twentieth. Business in one state has always had profound economic effects upon the fortunes of other states. The pre-Civil War battles between North and South over the tariff show just how much the fate of each state has always depended upon national economic policies.²⁰ There was no economic revolution during the Progressive Era or the New Deal that justifies the convenient escape of saying that it is only the nature of business and trade that has changed, not the appropriate construction of the commerce clause.²¹ The intimate interdependence between trade and national

¹⁹ 317 U.S. 111 (1942). For further elaboration, see *infra* notes 221-26 and accompanying text.

²⁰ See S. Morrison, H. Commager & W. Leutehenburg, *A Concise History of the American Republic 188-91* (1977).

²¹ See, for one illustration of this escape, a superb new casebook:

The Civil War and its aftermath inaugurated an era in which Congress began to act more vigorously. The very success of the national economy created problems. The

economic conditions was as clear to the Phoenicians and the Romans as it is to ourselves. There has been no basic transformation of the economy that requires, or allows, a parallel transformation in the scope of the commerce clause. International trade is driven by the principle of comparative advantage and the costs of reaching distant markets. It did not begin with either the steamship or the railroad.

If the constitutional limitations on federal powers were designed to act as a substitute Bill of Rights, then the expansive interpretation of the commerce clause has done away with this protection completely. The necessary effect is that greater burdens are placed upon the substantive limitations, such as the Bill of Rights, found elsewhere in the Constitution. These limitations have met with varying fates themselves; one need only contrast the takings clause of the fifth amendment with the first amendment protection of the freedom of speech. In some cases, the second barrier against expanded government has held. In other cases, chiefly those concerning economic liberties, it has crumbled, leaving liberty at the mercy of the "good faith" of the Congress whose mischief the barrier was designed to constrain.

Nor is any of this understanding upset by the "necessary and proper" clause of the Constitution, which may expand the power of Congress, but does not provide for an unlimited grant of federal power. The necessary and proper clause provides that Congress shall have the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."²² As drafted the clause does nothing to upset the balance of power between the federal and the state governments, nor to contravene the principle of enumerated powers on which the structure of article I, section 8 rests. What the necessary and proper clause does is to ensure that the Congress shall have all means at its disposal to reach the heads of power that admittedly fall within its grasp.

economy became obviously interconnected; problems were no longer localized, so that it became difficult to imagine a purely internal commerce that affected no other states.

G. Stone, L. Seidman, C. Sunstein & M. Tushnet, *Constitutional Law* 138 (1986).

²² U.S. Const. art. I, § 8.

Such is the import of the phrase "for carrying into Execution": Congress shall not fail because it lacks the means of implementation. The clause does not, however, authorize the creation of new and independent heads of power, such as over local manufacture or agriculture, that obliterate the distinction between a federal and a national government. The necessary and proper clause thus permits the regulation of local affairs that are in a sense inseparable from national ones, as happens when local and interstate cars, for example, move along the same line.²³ But it is hardly "necessary" to regulate every form of local activity in order to regulate the three heads of commerce over which Congress has power. And it is surely not "proper" to do so.²⁴

This reading of the necessary and proper clause may appear somewhat narrower than that given by Chief Justice Marshall in *McCulloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."²⁵ Yet as stated, Chief Justice Marshall's broad reading of the clause does take into account the risks of overinclusion, by reference to matters which "consist with the letter and spirit of the constitution," which surely includes respect for the principle of enumerated powers, which Chief Justice Marshall acknowledged as being preserved in the tenth amendment.²⁶ More to the point, Chief Justice Marshall adopted just this limited interpretation of "necessary and proper" in *Gibbons v. Ogden* when he wrote: "In the last of the enumerated powers, that which

²³ See *infra* notes 83-88 and accompanying text.

²⁴ See The Federalist No. 33, in which Hamilton gives a relatively narrow reading of the necessary and proper clause, when he tries to allay the fear that the necessary and proper clause will allow the national government to run roughshod over the states:

But SUSPICION may ask, Why then was it introduced? The answer is, that it could only have been done for greater caution, and to guard against all cavilling refinements in those who might hereafter feel a disposition to curtail and evade the legitimate authorities of the Union.

The Federalist No. 33, at 200 (A. Hamilton) (Modern Library College ed. 1937). In the subsequent dispute over the clause in connection with the creation of a national bank, Hamilton gave a broader interpretation, similar to that put forward by Chief Justice Marshall. See D. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888*, at 160-69.

²⁵ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

²⁶ *Id.* at 406.

grants, expressly, the means for carrying all others into execution, Congress is authorized 'to make laws which shall be necessary and proper' for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred."²⁷ In essence he treats the clause as a *limitation* upon means only, and surely not as an extension of *permitted* ends. So understood, the necessary and proper clause places a small but important weight upon the jurisdictional scales. But it is far from an automatic trump that overrides other jurisdictional limitations. Its historical role in the explication of the commerce clause is relatively small, and deservedly so.²⁸

IV. THE CASE LAW BEFORE THE NEW DEAL: 1824-1936

The elaborate case law under the commerce clause can be profitably interpreted in light of the above understandings. Thus it is often said today that the New Deal does not represent violent revolution but prudent reformation²⁹ (one thinks of Martin Luther and that other reformation). More precisely, the newer cases are said only to have returned to the wisdom of Chief Justice Marshall, who understood the importance of an expansive interpretation of the commerce clause to the maintenance of the Union.³⁰ In between, in such cases as *United States v. E.C. Knight Co.*,³¹ the courts are said to have strayed from the original understanding to a view that effectively hampered the power of Congress to impose much-needed social and economic regulation. This set of insights has even been dressed up in plausible philosophical garb. Professor Tribe's treatise, *American Constitutional Law*, tells us that the Supreme Court between 1887 and 1937 substituted a "formal clas-

²⁷ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187 (1824). Note too that Chief Justice Marshall addressed the necessary and proper clause in order to show that it does not require a rule of strict construction.

²⁸ Thus Professor Tribe gives but one brief connection between the two clauses, where they are discussed in connection with the so-called protective principle, which allows Congress to reach matters outside the scope of the commerce clause in order to govern those matters that fall within it. See L. Tribe, *American Constitutional Law* § 5-7, at 240 (1978). The threat this principle poses to the doctrine of enumerated powers is ignored by Professor Tribe, but is discussed herein. See *infra* notes 69-73 and accompanying text.

²⁹ See, e.g., L. Tribe, *supra* note 28, § 5-4, at 232-35.

³⁰ See *id.*

³¹ 156 U.S. 1 (1895).

sification" of economic activities for the "empiricism"³² that characterized Chief Justice Marshall's great judgment in the pivotal case of *Gibbons v. Ogden*.³³

The New Deal was not a reformation, but a sharp departure from previous case law, and one that moved federal power far beyond anything Chief Justice Marshall had in mind. *Gibbons* is often regarded as an expansive interpretation, and for its time so it was. Yet when the critical passages of the opinion are read as a whole, it seems quite clear that the case strongly adumbrated the subsequent holding in *E.C. Knight*, with which it is said to contrast so clearly. It is worth a minute to describe Chief Justice Marshall's logic, for the key to understanding his view is to understand that he found in the rigid and formal structures of the Constitution the materials that enabled it to be the foundation on which a perpetual Union could rest. His vision of the Constitution was not that of a living and changing organism, but of a great temple of government that, properly understood, could endure for the ages.³⁴

³² L. Tribe, *supra* note 28, § 5-4, at 234-35. He continued: "But with its watershed decision in *NLRB v. Jones & Laughlin Steel Corp.* [301 U.S. 1 (1937)], the Court acceded to political pressure and to its own sense of its doctrine's irrelevance and manipulability, abandoning the formally analytical approach to the commerce clause, and returning to Chief Justice Marshall's original empiricism." *Id.* at 235. Professor Tribe was not the first to develop this line of thought. It was documented in great detail in Stern, *The Commerce Clause and the National Economy 1933-1946*, 59 *Harv. L. Rev.* 645 (1946), a highly readable and happily partisan defense of the New Deal decisions written by a member of the Solicitor General's office, who had participated actively on the government's side.

³³ 22 U.S. (9 Wheat.) 1 (1824).

³⁴ See Chief Justice Marshall's discussion in *McCulloch*, where his famous phrase, "we must never forget, that it is a constitution we are expounding," was designed to show only the opposition between a document which spoke in great outlines and the detailed positions of, say, a commercial code. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819). See also his dissent in *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827) (Marshall, C.J., dissenting), where his argument for the prospective application of the contract clause rested in part on his vision that individuals preserve in civil society the rights to contract that they have in the state of nature. *Id.* at 345-49. Chief Justice Marshall also wrote:

In framing an instrument, which was intended to be perpetual, the presumption is strong, that every important principle introduced into it is intended to be perpetual also; that a principle expressed in terms to operate in all future time, is intended so to operate. But if the construction for which the plaintiff's counsel contend be the true one [i.e. retroactive legislation only], the constitution will have imposed a restriction in language indicating perpetuity, which every State in the Union may elude at pleasure. The obligation of contracts in force, at any given time, is but of short duration; and, if the inhibition be of retroactive laws only, a very short lapse of time will remove every subject on which the act is forbidden to operate, and make this provision of the constitution so far useless.

A. *Gibbons v. Ogden*

At issue in *Gibbons v. Ogden* was whether New York could grant an exclusive franchise that permitted steamships to ply between New Jersey and New York only with the franchisees' permission.³⁵ New Jersey had passed a retaliatory law; citizens of New Jersey sued in New York for violating New York law could recoup treble damages against the New Yorker in a New Jersey court.³⁶ The New York statute threatened massive commercial balkanization.³⁷ Chief Justice Marshall decided, first, that navigation among the several states was interstate commerce, and second (in order to avoid the question of whether any dormant commerce power could be identified) that a 1793 federal statute that licensed ships in the "coasting trade" had preempted the New York statute.³⁸

Professor Tribe has summarized his view of the broad scope of *Gibbons* as follows:

[I]n an elaborate preliminary discussion, [Chief Justice] Marshall indicated that, in his view, congressional power to regulate "com-

Id. at 355.

It is at least a little ironic that Chief Justice Hughes refers to the Chief Justice Marshall of *McCulloch* in *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 442-43 (1934), while ignoring the Chief Justice Marshall of *Ogden*.

I have given a modified defense of Chief Justice Marshall's position in Epstein, *Toward a Revitalization of the Commerce Clause*, 51 U. Chi. L. Rev. 703, 723-30 (1984). For criticism, see Kmiec & McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 *Hastings Const. L.Q.* 525, 557-59 (1987).

³⁵ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 1-2 (1824). *Ogden* was the assignee of the original franchisees, Robert Livingston and Robert Fulton.

³⁶ Id. at 4-5 (argument of Daniel Webster for appellant).

³⁷ Also at issue was whether the exclusive franchise was an impairment of contract by the state of New York. The conclusion that it was would seem quite plausible if the contracts clause was given the prospective interpretation that Chief Justice Marshall urged three years after *Gibbons*. See *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 354-56 (1827) (Marshall, C.J., dissenting). But Chief Justice Marshall was in dissent in *Saunders* and the interpretation was lost. One might also note that *Gibbons* involved the conversion of public property (to which access is open and equal) to private property. It was a taking, albeit of public and not private property. The public trust issue surfaced in *Livingston v. Van Ingen*, 9 Johns. 507, 572-573 (N.Y. 1812), in which New York Chief Justice Kent brushed aside the argument there was an impropriety in the grant under state law doctrine. On the vexing use of the public trust doctrine, see *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892); Rose, *The Comedy of the Commons: Custom, Commerce and Inherently Public Property*, 53 U. Chi. L. Rev. 711 (1986); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 *Mich. L. Rev.* 471 (1970). For my views, see Epstein, *The Public Trust Doctrine*, 7 *Cato J.* (forthcoming 1987).

³⁸ *Gibbons*, 22 U.S. (9 Wheat.) at 190-91, 213-17.

mercial intercourse" extended to all activity having any interstate impact—however indirect. Acting under the commerce clause, Congress could legislate with respect to all "commerce which concerns more states than one." This power would be plenary: absolute within its sphere, subject only to the Constitution's affirmative prohibitions on the exercise of federal authority.³⁹

This passage suggests that Chief Justice Marshall in *Gibbons* gave a very extensive reading to the reach of the commerce clause. But that is only because of the redactor's power of selection. Consider the fuller context of the quotation from *Gibbons*:

Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State.⁴⁰

The passage gives a quite different sense of the commerce clause's scope than the one that Tribe suggests. It is hard to find in the phrase "commerce which concerns more States than one" a total jurisdiction over all commercial activity, especially when the phrase is preceded by the word "restricted."⁴¹ Quite the opposite;

³⁹ L. Tribe, *supra* note 28, § 5-4, at 232 (footnotes omitted).

⁴⁰ *Gibbons*, 22 U.S. (9 Wheat.) at 195 (emphasis added).

⁴¹ *Id.* Stern used the same selective powers of quotation, stating that "the Commerce Clause comprehended 'that commerce which concerns more states than one.'" Stern, *supra* note 32, at 648 (quoting *Gibbons*, 22 U.S. at 194-95). He then dropped the rest of the material quoted above and continued with the remainder of the passage, beginning "[t]he genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states gener-

it looks as though Chief Justice Marshall wanted only to refute the argument (see his first sentence quoted) that interstate commerce can only take place on the narrow boundary between the two states.⁴² Such a position, if carried into law, would have rendered the commerce clause a dead letter. Commerce between two states, or among many, must take place physically within the confines of one or both of them. It is therefore the nature of a transaction, rather than its location, that stamps it as part of interstate commerce. Navigation between states takes place at one instant in one state, and at another instant in another. Both portions of the journey are covered by the commerce clause, even if purely intrastate navigation is excluded. The power may be plenary, but it is surely limited as to its objects. Matters outside its scope are fully reserved to the states. Chief Justice Marshall did write, as Tribe suggests, of the "plenary" nature of the commerce power. But again his words must be set in context. Chief Justice Marshall thus wrote: "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution."⁴³ But he continued:

If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States.⁴⁴

It follows therefore that "plenary" powers were understood by

ally." *Id.* The passage reads more broadly without the omitted language.

⁴² Marshall emphasized this point elsewhere in *Gibbons*:

But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power, if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising this right.

Gibbons, 22 U.S. at 195. Note that Marshall assigned to commerce a uniform meaning with regard both to commerce with foreign nations and to that among the several states.

⁴³ *Gibbons*, 22 U.S. (9 Wheat.) at 196.

⁴⁴ *Id.* at 197.

Chief Justice Marshall to be wholly consistent with powers "limited to specified objects."

This view is, moreover, reinforced when we take into account Chief Justice Marshall's own principles of construction, which should give caution to advocates of both judicial restraint and judicial activism. His attitude was essentially that the Constitution should be construed in its "natural sense." He was rightly suspicious of any effort to impose principles of "strict construction," but by the same token did not wish to give words an extravagant meaning given their function and purpose within the framework of the constitution.⁴⁵ He followed a middle course on the issue of construction, that of ordinary meaning, no different from that which a good contracts judge follows when he attaches ordinary meaning to contractual provisions.⁴⁶ Even with an explicit reference to the necessary and proper clause,⁴⁷ Chief Justice Marshall acknowledged that the commerce clause was itself directed toward specific ends, as was captured by the distinction between "internal" and "external" commerce, where internal commerce was that trade "between man and man in a State, or between different parts of the same State."⁴⁸ By that definition internal commerce is as commonplace in our own time as it was in Marshall's: every purchase

⁴⁵ Chief Justice Marshall wrote:

What do gentlemen mean, by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded.

Id. at 188.

⁴⁶ Farnsworth writes: "An especially common rule of construction is that if language supplied by one party is reasonably susceptible to two interpretations, one of which favors each party, the one that is less favorable to the party who supplied the language is preferred." E. Farnsworth, *Contracts* § 7.11, at 499 (1982). The rule is widely used with standard form contracts, and even beyond them. Its major cost is that it biases the way in which the original documents are drafted, rendering them more complicated and less clear than they would under a rule of ordinary and natural meaning, without the presumption.

⁴⁷ *Gibbons*, 22 U.S. (9 Wheat.) at 187; see *supra* notes 22-28 for a discussion of the clause.

⁴⁸ *Gibbons*, 22 U.S. (9 Wheat.) at 194.

at a supermarket is internal commerce, even if the market itself acquired its own goods from a supplier out of state.

Nor is this balance between internal and external commerce undone because Chief Justice Marshall used the word "affects" to round out the scope of Congress' power. Those references to activities that "affect" interstate commerce cannot be read in isolation from the rest of the text, as an effort to nullify the basic doctrine of enumerated powers. Instead, his purpose was to counter prior contentions about the scope of internal commerce that had been stated by the New York court in *Livingston v. Van Ingen*.⁴⁹ There, New York Chief Justice Kent gave the commerce clause its narrowest possible construction, and thus treated as part of internal commerce any portion of an interstate journey that was undertaken wholly within local waters.⁵⁰ When Chief Justice Marshall spoke of local regulations that "affect" interstate commerce, he did so to reject the argument that New York could insist that all rival carriers be required to use sails in New York waters, even if they used steam elsewhere. So long as this local restriction "affected" the journey as a whole, the regulation reached commerce among the several states, notwithstanding that its "direct" impact was on New York waters alone. There is not the slightest hint that Chief Justice Marshall meant to have the "affects" qualification expand the specific objects to which the "plenary" commerce clause applies, beyond the control of interstate commercial transactions and the instrumentalities of interstate commerce.

Further elaboration of Chief Justice Marshall's meaning appeared elsewhere in his opinion. At one point he addressed whether the states could pass inspection laws, or whether these laws fell solely within the domain of the congressional commerce power.⁵¹ He finessed that question by giving a very narrow definition of what interstate commerce included:

⁴⁹ 9 Johns. 506 (N.Y. 1812).

⁵⁰ New York Chief Justice Kent wrote:

Our turnpike roads, our toll-bridges, the exclusive grant to run stage-wagons, our laws relating to paupers from other states, our *Sunday* laws, our rights of ferriage over navigable rivers and lakes, our auction licenses, our licences to retail spiritous liquors, the laws to restrain hawkers and pedlars; what are all these provisions but regulations of internal commerce, affecting as well the intercourse between the citizens of this and other states, as between our own citizens.

Id. at 579.

⁵¹ See *Gibbons*, 22 U.S. (9 Wheat.) at 203.

That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The object of inspection laws, is to improve the quality of articles produced by the labour of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose.⁵²

It is instructive to compare this passage with the most famous sentence of *E.C. Knight*, which has been cited as a sign of its narrow and indefensible rigidity: "Commerce succeeds to manufacture, and is not a part of it."⁵³ Chief Justice Marshall himself could have written that sentence, citing *Gibbons* as authority. His style was anything but "empirical," if that term is used to identify the necessary economic connection between intrastate and interstate commerce. Indeed the passage just quoted is wholly inconsistent with the indirect burden on interstate commerce approach taken in the modern law. Chief Justice Marshall's greatness rests upon his appreciation of the boundaries which should dominate the constitutional playing field. Individual cases may fall close to the boundary lines, and must be placed on one side or the other. Yet the position of the boundary lines must remain fixed if the power to adjudicate is to remain. Things cannot be partly in and partly out of interstate commerce. As long as one government or the other must regulate, the boundaries must be sharp—such as the foul lines in baseball—and not fuzzy. It has been said that modern constitutional law represents the triumph of "formalism" over "realism."⁵⁴ If this is true, then Chief Justice Marshall was the great formalist, not the precursor of the modern realists.

There is a good deal to be said for Marshall's categorical approach. If pressed to give a common law analogy to Marshall's way of thinking, I would offer the common law trilogy of the liabilities

⁵² *Id.*

⁵³ *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895).

⁵⁴ One new casebook states: "Under the *formal* approach, the Court examines the statute and the regulated activity to determine whether certain objective criteria are satisfied. . . . In contrast, the *realist* approach attempts to determine the actual economic impact of the regulation or the actual motivation of Congress." G. Stone, L. Seidman, C. Sunstein & M. Tushnet, *supra* note 21, at 139.

of a landowner to the trespasser, the licensee, and the invitee. No judge ever thought that these categories were crystal clear, nor that individual cases would not give rise to honest disagreements of opinion. But it was thought that the categories were fixed and limited as a matter of principle: "There is no half-way house, no no-man's land between adjacent territories. When I say rigid, I mean rigid in law."⁵⁵ And the modern disintegration of the categories has done little to produce any coherent law of occupiers' liability.⁵⁶ So it is with interstate commerce. The principle that the power of Congress *did not* extend to the internal commerce of the state was as important to the overall scheme as the recognition that the power of Congress extended to interstate commerce. Marshall well understood the fact that local events affected interstate commerce, but he *rejected* it as a basis for extension of congressional power over internal matters. *Gibbons* thus stands in sharp opposition to the very assertion of federal power that characterizes such cases as *United States v. Darby*⁵⁷ and *Wickard v. Filburn*.⁵⁸ In *Wickard*,

⁵⁵ Robert Addie & Sons (Collieries), Ltd. v. Dumbreck, 1929 App. Cas. 358, 371 (H.L.). The passage continues:

When you come to the facts it may well be that there is great difficulty—such difficulty as may give rise to difference of judicial opinion—in deciding into which category a particular case falls, but a judge must decide and, having decided, then the law of that category will rule and there must be no looking to the law of the adjoining category. I cannot help thinking that the use of epithets, "bare licensees," "pure trespassers" and so on, has much to answer for in obscuring what I think is a vital proposition; that, in deciding cases of the class we are considering, the first duty of the tribunal is to fix once and for all into which of the three classes the person in question falls.

Id. at 371-72.

⁵⁶ The key case is still *Rowland v. Christian*, 69 Cal.2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). *Rowland* was in a sense wholly gratuitous, as recovery could have been awarded under the traditional view holding hosts responsible for latent defects causing harm under ordinary usage. See id. at 115, 443 P.2d at 566, 70 Cal. Rptr. at 102. For a criticism of the modern tendency of balancing in the tort area, see Epstein, *The Risks of Risk/Utility*, 47 Ohio St. L.J. (forthcoming 1987).

⁵⁷ 312 U.S. 100 (1941); see discussion *infra* notes 206-17 and accompanying text. Note too that *Darby's* view of the clause makes hash of the reserved powers clause of the tenth amendment. If jurisdiction under the commerce clause is both plenary and unlimited, then there is nothing left to reserve. The tenth amendment thus really becomes a truism. Yet the amendment sharply confirms that the federal government has only delegated powers: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Why bother with the amendment if *Darby* is correct? By contrast, the tenth amendment makes good sense if Chief Justice Marshall's view in *Gibbons* is followed.

⁵⁸ 317 U.S. 111 (1942); see discussion *infra* notes 221-27 and accompanying text.

Justice Jackson captured the transformation of *Gibbons* when he wrote: "At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded."⁵⁹ No way.

B. *The Expansion of Commerce Clause Jurisdiction*

There is a long road from *Gibbons* to modern doctrine of the broad reach of congressional power under the commerce clause. This section will trace the twists and turns in that road. In one sense *Gibbons*, for all its importance, is an odd place from which to begin the journey, because the case itself as much concerned the limitation of state power as it did the extent of congressional power under the coastal trading statute. Indeed, the negative, or dormant, commerce clause power that prohibits states from intruding on the federal authority over interstate commerce even absent any congressional legislation on the subject of the state action dates from *Gibbons* as well; Justice Johnson's concurring opinion argued that the commerce clause standing alone prohibited New York from passing the statute in question.⁶⁰ The primary purpose

⁵⁹ Id. at 120. Justice Jackson went on to note that Chief Justice Marshall in *Gibbons* warned that "effective restraints on its exercise must proceed from political rather than from judicial processes." Id. The passage in *Gibbons* reads in full:

The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

The power of Congress, then, comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several States, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New-York, and act upon the very waters to which the prohibition now under consideration applies.

Gibbons, 22 U.S. (9 Wheat.) at 197. Justice Jackson thus confused two points. First, the need for political decisions for matters properly within the scope of the commerce powers, and, second, the scope of the clause itself. The latter was only held to "comprehend navigation" in New York waters, not all productive activities within the state.

⁶⁰ Justice Johnson wrote:

The power of a sovereign state over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits to its freedom, necessarily implies the power to determine what shall remain unrestrained, it follows, that the power must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon.

. . . .

of this Article is not, however, to trace the negative side of the clause,⁶¹ which has proven quite stable in recent times. Rather, the purpose is to follow the expansion of the affirmative power of the clause. This development took place along three separate lines.⁶² The first line took its cue from the narrow holding of *Gibbons* that navigation counted as commerce under the clause, and concerned the “instrumentalities of commerce.” This Article follows the expansion of the clause, briefly in connection with navigable water-

It is impossible, with the views which I entertain of the principle on which the commercial privileges of the people of the United States, among themselves, rests, to concur in the view which this Court takes of the effect of the coasting license in this cause. I do not regard it as the foundation of the right set up in behalf of the appellant. . . . And I cannot overcome the conviction, that if the licensing act was repealed to-morrow, the rights of the appellant to a reversal of the decision complained of, would be as strong as it is under this license.

Gibbons, 22 U.S. at 227-32 (Johnson, J., concurring).

⁶¹ It is strange to think of how little the commerce power moved in the decades that followed *Gibbons*. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), stood for the principle that the federal jurisdiction under the commerce clause comes in two parts. For those matters, such as pilotage in local waters, that fall within interstate commerce but that are of great local concern as well, the federal and state jurisdictions are concurrent. *Id.* at 319-20. For those matters for which there should be a uniform rule, the power of Congress is exclusive. *Id.* at 319. This delicate compromise is somewhat tricky to reconcile with the constitutional text, even if greater feats of legerdemain have been done in the name of constitutional construction. The power granted by the commerce clause seems to be unitary for all objects that fall within it; how then can federal jurisdiction be exclusive for some areas and concurrent for others?

Nonetheless the *Cooley* solution does have a structural sense that makes it more durable than might appear at first blush. Local conditions easily could demand separate treatments, which do not threaten interstate commerce in the same way as did the New York statute at issue in *Gibbons*. Local practices shown to discriminate against outsiders could be addressed by the privileges and immunities clause of the Constitution, and arguably by other substantive provisions as well. U.S. Const. art. IV, § 2, cl. 1

⁶² In analyzing this division, I do not discuss in depth *United States v. Coombs*, 37 U.S. (13 Pet.) 71 (1838), which upheld the constitutionality of a statute that imposed criminal penalties against “any person who shall plunder, steal or destroy any money, goods,” etc. from a ship under the admiralty jurisdiction of the United States. Justice Story sustained the constitutionality of that statute, writing that the commerce clause “extends to such acts, done on land, which interfere with, obstruct, or prevent the due exercise of the power to regulate commerce and navigation with foreign nations and among the states.” *Id.* at 78. Note that there are actions outside of interstate commerce that have evident effects upon interstate commerce. Yet the decision does little to threaten the system of enumerated powers found in the constitution, because the train of physical effects is quite limited, and do not involve the federal government in the operations of the local economies. *Coombs* is another case for which the necessary and proper clause could sensibly make the difference. But, given its limited extent, it is not surprising that *Coombs* was not invoked in the subsequent expansionary period of the commerce clause.

ways, and more extensively with the systematic and inexorable expansion of the federal power to regulate the railroads under the Interstate Commerce Act of 1887, as amended.⁶³

The second line of cases involved the regulation of goods admittedly in interstate commerce (that is, goods in transit across state lines) in order to control the primary conduct of persons in either the sending or receiving state. This line of cases might be called the "indirect regulation" cases. The third line of cases, emanating from *E.C. Knight* itself, explored the distinction between manufacture and commerce among the several states.

Between 1870 and 1937 the scope of federal power under these three lines of case law continued to expand, but in ways that still left an extensive area of economic life outside the power of Congress. In particular, the distinction between manufacture and commerce laid down in *E.C. Knight* in 1895 retained its validity until it was at last overturned in 1937 by *NLRB v. Jones & Laughlin Steel Corp.*⁶⁴ In general the expansion of the first and second heads of the commerce power fall within the general scheme set out by Chief Justice Marshall in *Gibbons* in that they address both the power of Congress to regulate the means by which goods are shipped in interstate commerce, as well as the types of goods that can be shipped. In my judgment, the scope of the federal power under these two heads moved, prior to 1937, a step or two beyond where proper argument would take them. But although these difficult cases can be argued at the margin, nothing in the case law under these two heads undermined the essential validity of the line between commerce, on the one hand, and manufacture and agriculture on the other, clearly adumbrated in *Gibbons* and accepted in *E.C. Knight*. It is only when that last distinction is rejected that a system of enumerated powers is dismantled. Yet there is no conceptual necessity for saying that power to regulate commerce among the several states must reach everything if it is to reach anything. The modern generation of negative commerce clause cases is instructive because it proves that it is possible, and sensible, to articulate an enduring conception of interstate commerce—just as Chief Justice Marshall had insisted.

⁶³ Ch. 104, 24 Stat. 379 (1887) (current version at 49 U.S.C.A. §§ 10101-11917 (Supp. 1987)).

⁶⁴ 301 U.S. 1 (1937).

1. *The Instrumentalities of Commerce*

Gibbons itself laid down the distinction between the “internal commerce” or “interior traffic” of a state and commerce among the states.⁶⁵ Although Chief Justice Marshall articulated the distinction with confident assurance, its limits were not really tested until 1870, when the Court in *The Daniel Ball*⁶⁶ considered an 1852 inspection statute for steam passenger vessels operating on the navigable waters of the United States. The appellant questioned whether Congress had the power to inspect a ship that remained solely within a single state, even though it carried goods that had been shipped from other states, or were eventually destined for shipment into other states.⁶⁷ As framed, the case offered an instructive counterpoint to *Gibbons*, which had decided that the federal commerce power reached a single, continuous journey that started in one state and ended in another. The Court in *The Daniel Ball* asked what happened when that same journey involved two ships instead of one. If Chief Justice Marshall’s view of the commerce clause was as expansive as the received wisdom has it—if “plenary” had meant “wholly unbounded”—then it is unintelligible why the Supreme Court should have paused a second to decide *The Daniel Ball*. It is only because *Gibbons* extended the scope of the commerce power to “intercourse,” and kept it there, that there was any occasion to deliberate on the loose ends left open by *Gibbons*.

Relative to the understandings of its time, *The Daniel Ball* gave *Gibbons* a modestly expansive interpretation. The opinion by Justice Field—no friend of big government—upheld the 1852 inspection statute because of the Court’s explicit fear that any other interpretation of the commerce clause would strip the federal government of its fundamental powers. “Several agencies combining, each taking up the commodity transported at the boundary line at one end of a State, and leaving it at the boundary line at the other end,” he wrote, “the Federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter.”⁶⁸

⁶⁵ *Gibbons*, 22 U.S. (9 Wheat.) at 194-95.

⁶⁶ 77 U.S. (10 Wall.) 557 (1870).

⁶⁷ *Id.* at 562 (argument of appellant).

⁶⁸ *Id.* at 566.

Justice Field's conclusion has assumed the status of a necessary truth. Nonetheless, there is reason to ask whether the decision is as impregnable as it seems. It appears that the commerce clause could well apply to *goods* destined for sale in another state as part of a continuous transaction, even if they are shipped by boats that operate solely within the territorial waters of one state. Where the transfer of goods from boat to boat is part of a comprehensive plan—as when the various carriers have coordinated travel schedules—then Congress should have jurisdiction. But it is far from self-evident that because the goods are in the interstate market the ships which carry them on parts of the journey are in interstate commerce as well. The states could regulate the safety of the boats on which the goods are carried, while the federal government could (as it has never seen fit to do) pass a statute dealing with the rights and duties of common carriers and their customers, as well as maintain jurisdiction over any ship that did cross a state line. There need be no gap in the system of regulation. And as long as ships remain within a single state, shipowners hardly need the federal power to protect them from inconsistent regulation. If state regulation became overly onerous, a shipowner could escape it by explicitly organizing his business to specialize in interstate transport, or by moving to another state. Deciding *The Daniel Ball* the other way would have promoted competition between state governments. Such an outcome would hardly have made the commerce clause a dead letter, as Justice Field insisted, even if it would have stopped the further expansion of federal power.

There is a danger in this alternative analysis of *The Daniel Ball* that federal jurisdiction will be less comprehensive than is needed to perform a particular regulatory task. The Court in *The Daniel Ball* and subsequent decisions reacted to this danger by weighing the risk of underinclusion within the federal power more heavily than the reverse danger of overinclusion. With the vantage of hindsight, *The Daniel Ball* originated the "protective principle" which, when pushed to its limit, finds that the use of federal power in a doubtful case is *always* "necessary," perhaps in the sense of the "necessary and proper" clause.⁶⁹ But there are some risks to the strategy, that although not evident here, must be kept in mind. Unless the countervailing principle of enumerated powers is

⁶⁹ See *infra* notes 22-28; L. Tribe, *supra* note 28, § 5-6, at 238-39.

brought to the fore, then the basic structure may be lost in a series of small accretions, each one palatable on its own, even though the whole structure is not.

It is precisely that form of incrementalism that characterized the later cases involving the use of railroads in interstate commerce. The impetus for national regulation clearly came from the famous decision in *Wabash, St. Louis & Pacific Railway v. Illinois*.⁷⁰ That case prevented state governments from regulating railroad fares from points within a state to points outside it.⁷¹ There was a functional reason for the decision, given the risk that separate states could impose inconsistent obligations upon carriers. Congress attempted to solve this problem by passing the Interstate Commerce Act (ICA)⁷² in 1887.

Sensible economic concerns led to the passage of the first ICA, which was designed to prevent discrimination against short-haul carriers. The problem arose because of the structure of the railroad lines. Different carriers went by different routes from one population center to another. Thus there was competition on the long-haul routes (such as San Francisco to Chicago) because shippers had many choices. But, once out in the plains, any given line had a local monopoly that it could exploit against farmers and others. When it exacted monopoly profit, its short-haul rates could easily exceed its long-haul rates, even if the actual cost of long-haul shipment was greater. But simply preventing the price per segment from exceeding the price for the whole trip would have gone a long

⁷⁰ 118 U.S. 557 (1886).

⁷¹ *Id.* at 577.

⁷² Ch. 104, 24 Stat. 379 (1887) (current version at 49 U.S.C.A. §§ 10101-11917 (Supp. 1987)). Section 4 of the statute provided:

That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance.

Id. § 4, 24 Stat. at 380.

A proviso to the section then gave the ICC the power to relieve carriers from this obligation "in special cases," but did not set out any standards which indicated when this general obligation should be suspended, and none are apparent as a general matter. Section 3 of the Act contained a prohibition against undue preferences, and § 5 prevented certain kinds of pooling of freight.

way toward eliminating monopoly profit without getting the government involved in the ratemaking that characterized the Interstate Commerce Commission (ICC) after the "reforms" of this century, including the Transportation Act of 1920.⁷³

One question was whether the ICC's authority reached trips that began and ended within a single state. In essence this was the land-based version of the question raised, and answered in the affirmative, in *The Daniel Ball*. Nonetheless, as a matter of first principle, one could forcefully insist that the proper answer should have been no. The obvious response to this assertion is that unprincipled exploitation of short-haul users would have continued on a limited scale even after the passage of the ICA. But that need not have been the case. The states could have had exclusive jurisdiction over these short-haul runs, and their local laws could have replicated the key substantive provision of the ICA, thereby protecting purely intrastate shippers: the railroad could not charge more for the intrastate run than it charged for any longer interstate run of which the intrastate segment was a part. The danger of radical state restrictions on the power of carriers to cover their costs for internal runs could have been avoided by constitutional protections against confiscation, such as those invoked during this period in *Smyth v. Ames*.⁷⁴ The jurisdictional balance between federal and state governments could have been quite stable if left where *Gibbons* had placed it. More to the point, *Gibbons'* limits on the extent of the commerce clause would have been important because they would have limited the degree to which Congress could have used its commerce power to cartelize the entire railroad industry, as it did by amending the ICA after World War I.⁷⁵

Historically, however, the dividing line between interstate and intrastate journeys did not endure. It is instructive to trace the expansion of the commerce clause in the railroad cases. At each point the Supreme Court seemed aware that there must be some

⁷³ Transportation Act of 1920, ch. 91, 41 Stat. 456 (current version at scattered sections of 49 U.S.C.A. (Supp. 1987)); see *infra* notes 93-101 and accompanying text. For a general account of the early changes in the Interstate Commerce Act, see Aitchison, *The Evolution of the Interstate Commerce Act: 1887-1937*, 5 *Geo. Wash. L. Rev.* 289 (1937).

⁷⁴ 169 U.S. 466 (1898) (holding state railroad regulations to be violations of the 14th amendment).

⁷⁵ See Transportation Act of 1920, ch. 91, 41 Stat. 456 (current version at scattered sections of 49 U.S.C.A. (Supp. 1987)).

limit to the commerce power, but on virtually every occasion it found the federal legislation at issue not to exceed the limit. The Court failed to understand that too much federal jurisdiction was as dangerous as too little. In this regard, *Houston, East & West Texas Railway v. United States (The Shreveport Rate Case)*,⁷⁶ decided in 1914, marked an especially instructive watershed. This case has been read as an important step forward (the bias is implicit) for the commerce power. The facts were complicated, and the details have unfortunately been forgotten in modern times. Nonetheless they deserve close attention today.

Various points in East Texas were served by interstate carriers operating out of Shreveport, Louisiana on one end, and Dallas and Houston, Texas on the other.⁷⁷ Before the intercession of the ICC, the prices charged by these railroad lines were far higher for shipping goods from Shreveport to Texas than were the rates for shipping goods within Texas, where rates were set by a state body, the Texas Railroad Commission.⁷⁸ The ICC ordered adjustments to railroad rate structures that “unjustly discriminated in favor of traffic within the State of Texas and against similar traffic between Louisiana and Texas.”⁷⁹

The ICC proposed a compound remedy to alleviate the perceived ills. The first part of the ICC order imposed specific maximum rates that the carriers could charge on their interstate, i.e., Louisiana-Texas, routes.⁸⁰ The second part was a general nondiscrimination provision which held that the rates in interstate traffic could not be higher than those in intrastate traffic.⁸¹ The order, however, left it to the railroads to decide whether they raised intrastate rates, lowered interstate ones, or did a little of both. All that was required was equalization of rates within the ceilings set by the first part of the ICC order. Given the structure of the order, it was possible for the railroads to comply in full with the ICC order

⁷⁶ 234 U.S. 342 (1914). I am most indebted to Professor Edmund Kitch for pointing out to me the genuine complexities that this case raises, and for insisting that I deal more fully with the matter.

⁷⁷ *Id.* at 346.

⁷⁸ *Id.*

⁷⁹ *Id.* at 345. One example of the discrimination was that “a rate of 60 cents carried first class traffic a distance of 160 miles to the eastward from Dallas, while the same rate would carry the same class of traffic only 55 miles into Texas from Shreveport.” *Id.* at 346.

⁸⁰ *Id.* at 346-47.

⁸¹ *Id.* at 347.

without changing their intrastate rates: the railroads simply had to reduce their interstate rates until they equalled the rates charged on the intrastate runs. Accordingly, the decision upholding the ICC order could be read not to involve a conflict between the rates established by the ICC for interstate traffic and those set by the Texas Railroad Commission for intrastate traffic, and as such the decision does not appear to have extended the scope of the commerce clause very far.

This narrow reading of the case, however, is belied in at least two respects. First, the *Shreveport Rate Case* protected the railroads if they chose to raise their intrastate rates in defiance of the rates set by the Texas Railroad Commission. Although there was no necessary regulation of intrastate rates, the remedy envisioned made the state powerless to set any intrastate maximum below the ICC maximum if the railroads chose to raise their local rates to the ICC levels. The unmistakable thrust of the opinion was to make the congressional power paramount over state authority:

Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field.⁸²

Second, the *Shreveport Rate Case* relied upon and extended earlier decisions that had sustained the power of Congress to regulate railroad safety, even when there was a "commingling of duties relating to interstate and intrastate operations."⁸³ *Southern Railway v. United States*,⁸⁴ had sustained the Safety Appliance Act⁸⁵ with respect to cars in interstate travel even though it necessarily embraced cars that were used in intrastate travel as well. In the *Second Employers' Liability Cases*,⁸⁶ the Court had sustained Congress' authority to allocate liability for accidents caused to employees in interstate commerce, even when they were caused by employees engaged in intrastate commerce. These cases arguably

⁸² Id. at 351-52.

⁸³ Id. at 352.

⁸⁴ 222 U.S. 20 (1911).

⁸⁵ Ch. 196, 27 Stat. 531 (1893) (current version at 45 U.S.C. §§ 1-7 (1982)).

⁸⁶ 223 U.S. 1 (1912).

could be justified under some protective principle as a response to the same hard choice faced by the Court in *The Daniel Ball*: if Congress were confined to matters that were purely in interstate commerce, then it could never legislate to the limit of its jurisdiction.⁸⁷ Yet for Congress to reach the full limits of its jurisdiction it must on some occasions go beyond it. The choice is necessarily either over- or underinclusion. It is hard to gainsay a judicial decision that opts for the former over the latter, at least in cases where interstate and intrastate commerce are inextricable, such as different railroad cars on the same train. A necessary and proper clause argument has evident force here.⁸⁸

Justice Hughes (the same Justice Hughes who later as Chief Justice wrote *NLRB v. Jones & Laughlin Steel Corp.*)⁸⁹ made it appear in the *Shreveport Rate Case* that there was a seamless web encompassing both the safety cases and the rate regulation cases. But the rate regulation case marked an expansion of the commerce power, although perhaps an inadvertent one, beyond the safety cases that preceded it. The commerce clause was at issue in the safety cases because railroad cars were used for both interstate and intrastate runs at different times, and were often mixed on the same train. There was thus a "commingling of duties relating to interstate and intrastate operations."⁹⁰ Yet no such commingling existed with respect to the rate structures, as it was surely possible to regulate interstate fares without regulating intrastate fares. The various rate schedules were distinct; it was possible for the ICC to set rates on the interstate runs without having to set them on intrastate activities. Indeed, it appears that this was Congress' intention in passing the original statute.⁹¹ In order to uphold the ex-

⁸⁷ See supra notes 65-69 and accompanying text.

⁸⁸ See supra notes 22-28 and accompanying text.

⁸⁹ 301 U.S. 1 (1937); see infra notes 185-205 and accompanying text.

⁹⁰ *The Shreveport Rate Case*, 234 U.S. at 352.

⁹¹ The actual language of the Interstate Commerce Act appears to have precluded the regulations that were sustained in the case. Section 3, which prevented "undue or unreasonable preference or advantage" to one person over another, was subject to a proviso that read:

Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country or to any State or Territory as aforesaid.

The Shreveport Rate Case, 234 U.S. at 356-57 (quoting the Interstate Commerce Act).

Yet this remnant of Chief Justice Marshall's "internal commerce" of the several states did

panded jurisdiction sought by the ICC, the "commingled" approach of the safety cases had to yield to a broader formulation whereby Congress could extend "its control over the interstate carrier in all matters having . . . a close and substantial relation to interstate commerce."⁹² At this point the Justices should have considered whether the risks of overextension of federal power were worth running. But, lacking an underlying theory of the risks of regulation, the Court acted as though any exercise of the congressional jurisdiction were benign. The path of broad construction and social virtue again coincided, in the Court's view.

For all their nimble footwork, the authors of the *Shreveport Rate Case* did not necessarily commit the Court to an all-inclusive view of the commerce clause. The regulations in question were imposed upon the intrastate business of interstate carriers. Congress' commerce power did not yet necessarily reach intrastate carriers that did not engage in any interstate business. In addition, the *Shreveport Rate Case* tied federal regulation of local business to proof of discrimination against interstate commerce. The ICC could not have comprehensively regulated the entire railway business under its authority alone, for some local rates at least were not set in conjunction with discriminatory interstate rates. Yet this barrier too was quickly overrun by the Court in *Wisconsin Railroad Commission v. Chicago, Burlington & Quincy Railroad*,⁹³ which upheld the constitutionality of one of the worst pieces of modern economic legislation, the Transportation Act of 1920.⁹⁴ The Act replaced specific control of long-haul/short-haul problems with comprehensive regulation of the railroad industry, and helped cartelize an entire industry by imposing comprehensive rate of return regulation.⁹⁵ Yet, under the rationale of the *Shreveport Rate*

not long survive. The Court concluded that the proviso did not apply "when the Commission finds that unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by a carrier subject to the act." *Id.* at 358. Certainly there was no reference to unjust discrimination in the proviso, which would have been wholly redundant if it reached only those cases in which no discrimination was present, for these were precisely the cases lacking conduct which the ICC could find unlawful.

⁹² *Id.* at 355.

⁹³ 257 U.S. 563 (1922).

⁹⁴ Transportation Act of 1920, ch. 91, 41 Stat. 456 (current version at scattered sections of 49 U.S.C.A. (Supp. 1987)).

⁹⁵ "The . . . most novel and most important feature of the act, requires the Commission to prescribe rates as to enable the carriers as a whole, or in groups selected by the Com-

Case, the statute could *not* have been sustained in its entirety under the commerce clause because it reached local railroad runs that by no stretch of the imagination competed with interstate runs.⁹⁶ On these local routes a showing of nondiscrimination, so critical to the *Shreveport Rate Case*, could not be made. But the Court again took a benevolent view of an expansive statute,⁹⁷ finding that Congress could ensure that the costs of running railroads were properly distributed between interstate and intrastate carriers.⁹⁸

The connection between federal jurisdiction, interest group politics, and substantive entitlements is clear. The Court adopted a benevolent, public interest interpretation of the 1920 statute, and hence saw no risk in extending federal power farther than prior law had taken it. But too much regulation is always at least as risky as too little.⁹⁹ Furthermore, the Court's extension of the commerce clause in the *Shreveport Rate Case* dictated the likely structure of future regulation, to which the Court also was to acquiesce. It was

mission, to earn an aggregate annual net railway operating income equal to a fair return on the aggregate value of the railway property used in transportation." *Wisconsin R.R. Comm'n*, 257 U.S. at 584. This is merely a nice way to describe cartelization of the railroad industry.

⁹⁶ See *id.* at 579-80.

⁹⁷ See *id.* at 583. Typically, expanded government authority during the First World War set the stage for expanded government authority after peace had returned.

⁹⁸ The Court wrote:

Congress in its control of its interstate commerce system is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonable compensatory return for all the work it does. The States are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. Congress as the dominant controller of interstate commerce may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state work. The affirmative power of Congress in developing interstate commerce agencies is clear.

Id. at 589-90.

⁹⁹ "Capture," whether by railroads wishing to cartelize their industry, or by shippers wishing to ship their goods below cost, is an inherent risk of all forms of regulation. The basic insight here is that regulation of all forms constitutes an implicit transfer of wealth among private individuals. The difficult question is to determine which interest group or groups will be able to take over, or capture the process. See McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 *J. Legal Stud.* 101 (1987); Peltzman, *Toward a More General Theory of Regulation*, 19 *J. Law & Econ.* 211 (1976); Posner, *Taxation by Regulation*, 2 *Bell J. Econ. & Mgmt. Sci.* 22 (1971); Stigler, *The Theory of Economic Regulation*, 2 *Bell J. Econ. & Mgmt. Sci.* 3 (1971).

not possible, or at least it was less possible, to have comprehensive rate-of-return regulation, complete with control over entry, if Congress could not touch the local portions of the railroad business. If the emphasis had remained on the long-haul/short-haul problem, then a system of federal and state regulation that limited congressional control to wholly interstate trips would have been adequate to the task. The original ICA thus was clearly superior to its 1920 version. It was only the judicial expansion of the commerce clause that made it possible for Congress to adopt its own unfortunate substantive provisions.

The game has still not run its course, for even the decisions of the Court in rate cases after the *Shreveport Rate Case* do not mandate the conclusion that the commerce clause is all-embracing. To see the remaining distinctions, consider the fate of one critical passage from the *Shreveport Rate Case*:

Congress is empowered to regulate,—that is, to provide the law for the government of interstate commerce; to enact ‘all appropriate legislation’ for its ‘protection and advancement;’ to adopt measures ‘to promote its growth and insure its safety;’ ‘to foster, protect, control and restrain.’ Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance.¹⁰⁰

This passage appears to say that the commerce clause supports congressional power over the *instruments of commerce*, that is, the railroads and the highways, because of the impossibility of disentangling the various threads of interstate and intrastate business, but extends no further. Federal jurisdiction over commerce would end at the railroad station, with the already bloated ICC of the 1920 Act. This judgment implies no preference for regulated over-competitive industries. The railroads have serious long-haul/short-haul problems that make the competitive solution difficult. In any event, the conflict is not between federal regulation and market competition. Instead it is a conflict between state and federal regu-

¹⁰⁰ *The Shreveport Rate Case*, 234 U.S. at 351 (citation omitted).

lation, and there is no reason to think a priori that one will be superior, by whatever measure, to the other.

One could therefore find a stable stopping point to the commerce power by limiting its reach to transportation by rail, river, road, and today, by air. Congressional power would be limited to commerce as traditionally understood, even though it would reach intrastate as well as interstate commerce with respect to those transportation facilities that were devoted to both.

It is possible, however, to unhinge the last fragment of the previous passage from the whole so as to make it appear that any competition, from whatever source, justifies federal regulation. Just that step was taken during the New Deal. But before we turn to this ultimate transformation of the *Shreveport Rate Case* line of cases,¹⁰¹ it will be instructive to examine the other two lines of commerce clause cases.

2. *What Goods May Be Shipped in Interstate Commerce?*

The pre-New Deal expansion of the commerce clause did not stem solely from the federal regulation of the instrumentalities of interstate commerce. It was also intimately connected to the types of goods that could be shipped in interstate commerce at all. These cases, it seems clear, did not necessarily involve only commerce among the several states, although the regulated goods were in transit from one state to another. But the relevant questions were, and remain, intractable because both the motive and effect of congressional regulation concerned matters that were themselves not within the "stream of commerce," at least as the phrase was understood before 1937. The true goal of these regulations was to govern—"influence" is not a strong enough word—the behavior of individuals and firms before their goods entered commerce or after they left it. In evaluating the statutes, the Court was required to consider the interaction between the commerce clause and the rest of the constitutional structure, in particular the principle that Congress possessed only the limited and enumerated powers conferred upon it by article I—powers that did not allow it to intrude upon the reserved powers of the states. The drawing of the relevant lines is by no means an easy task. But there is on balance

¹⁰¹ See *infra* notes 185-234 and accompanying text.

good reason to believe that here too the Court, even before the 1937 revolution, construed the commerce clause in ways that extended the power of Congress beyond its proper scope.

The first case in the line was *Champion v. Ames*¹⁰² in 1903. The question before the Court was whether Congress under the commerce clause could prohibit the transportation of lottery tickets across state lines.¹⁰³ The first Justice Harlan's opinion upheld the statute as a proper application of the commerce power.¹⁰⁴ But Justice Harlan's defense of federal power in *Champion* is problematic. Although the statute in question operated on articles of interstate commerce, its purpose surely was not to protect or to facilitate interstate commerce. Quite the opposite—its purpose was designed to influence the primary conduct of individuals, either before the goods entered interstate commerce or before it left them. One tell-tale sign of the new aggressiveness to which the commerce power was turned was that Congress sought to *prohibit*, not to regulate, the transfer of lottery tickets in interstate commerce. In and of itself, this fact hardly seems dispositive, for it is doubtful that the commerce clause could be read so that "regulation" occupies a domain so narrow that all types of prohibition fall outside the power of Congress. Hamilton himself spoke of "prohibitory regulations" when addressing in *The Federalist* No. 11 the need to regulate commerce with foreign nations.¹⁰⁵ If these prohibitions are (regrettably) proper in the foreign context, then they cannot be wholly banished in the domestic one.

Analytically, too, it seems that regulations comprehend prohibitions. To be sure, regulation and prohibition do not mean the same thing, and the Constitution itself uses the two terms in clear opposition to each other.¹⁰⁶ It would be very odd indeed to say that

¹⁰² 188 U.S. 321 (1903). The appellants attempted as an initial maneuver to keep the case outside the commerce clause altogether, by arguing that lottery tickets were not articles of commerce at all, but were instead "mere evidences of contract made wholly within the boundaries of a State, which contracts are valid or invalid according to the municipal law of the State where made or attempted to be enforced." *Id.* at 327. This argument seems weak. If the writing has a tangible form, and if the ticket can be bought or sold, then something, rather than nothing, is working its way through the channels of interstate commerce.

¹⁰³ *Id.* at 327.

¹⁰⁴ See *id.* at 353-54.

¹⁰⁵ See *supra* note 14.

¹⁰⁶ See U.S. Const. art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any States now existing shall think proper to admit, shall not be prohibited by the Congress

Congress had the power "to prohibit all commerce with foreign nations, among the states, or with the Indian tribes," for the total elimination of all trade seems hard to reconcile with the original vision of vibrant national markets unimpeded by petty local regulations.¹⁰⁷ But it is difficult to have the extreme case determine the principle, given the massive overlap between regulations and prohibitions in ordinary speech. The class of conditional prohibitions—of the sort which say that no goods may travel in interstate commerce unless evidenced by a bill of lading—is so extensive, and benign, that it is difficult to see how any jurisdictional limitation on congressional power could be erected on the strength of the verbal distinction alone.

The source of the uneasiness with *Champion* does not, however, disappear even if we acknowledge, however uneasily, that all prohibitions are regulations within the meaning of the commerce clause. Instead, the common concern with both regulations and prohibitions of the sort found in *Champion* and its progeny is that Congress will use its powers of regulation to upset the doctrine of enumerated powers. Stated otherwise, *Champion* is perhaps the first case in which Congress had consciously sought to exploit the outer reaches of the commerce clause in ways that might trench upon the power of the states. In one sense, the Congress stayed within the commerce clause because Chief Justice Marshall told us that the commerce power is "plenary" over everything that comes within its specified limits. But in another sense Congress used its plenary power to arrogate to itself matters reserved to the states. The uneasiness that one thus feels with *Champion* is quite similar to that which is provoked by the troublesome doctrine of unconsti-

prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person."). Clearly any regulation that made it impossible to import slaves (note the euphemism in the text) into the United States was prohibited as well. For the vexed relationship of this clause to the commerce power, see Berns, *The Constitution and the Migration of Slaves*, 78 *Yale L.J.* 198 (1968). Note, however, that although the commerce clause might have given Congress the power to regulate (or even prohibit) the slave trade, it did not give it the power to regulate the position of the slaves located within the state, much less to prohibit slavery.

¹⁰⁷ This argument was well made by the appellant's counsel in oral argument. *Champion*, 188 U.S. at 329-30 (argument of appellant). There the point was limited to the transfer of "promissory notes, of deed, of bonds, of contracts for personal services, etc." *Id.* In principle, however, it could extend to the underlying goods shipped in interstate commerce as well.

tutional conditions, which no one quite understands, but which no one will nonetheless ignore.¹⁰⁸ One way to read unconstitutional conditions is an effort by the state to expand its power over the private activities of individuals by conditioning their access to public facilities, most typically roads: thus the doctrine has been invoked to hold that the state cannot allow a private carrier to use the public highways unless it first agrees (without compensation) to be regulated as a public carrier.¹⁰⁹ The clear function of the doctrine is to curb the state desire to use its power of public instrumentalities to control private behavior, even though it is allowed to exclude vehicles of certain classes from the highways altogether.

The *Champion* line of cases shows the same type of tensions at work, as the Court struggled to find the line that allowed the power of Congress to remain plenary, without undermining the reserved powers of the state. Some forms of regulations, and indeed prohibitions, seem not to threaten the delicate balance of the federal system. As the dissent in *Champion* suggested, for example, a clear instance of an acceptable prohibition is one preventing the shipment in interstate commerce of goods that are themselves a peril to interstate commerce:

The power to prohibit the transportation of diseased animals and infected goods over railroads or on steamboats is an entirely different thing, for they would be in themselves injurious to the transaction of interstate commerce, and, moreover, are essentially commercial in their nature. And the exclusion of diseased persons rests on different ground, for nobody would pretend that persons could be kept off the trains because they were going from one State to another to engage in the lottery business.¹¹⁰

Here there is no concern that Congress by the use of a single enumerated power is trying to dominate the states in the exercise of

¹⁰⁸ The principle states that "a state is without power to impose an unconstitutional requirement as a condition for granting a privilege." *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 598 (1926). The most exhaustive treatment of the subject is found in Kreimer, *Allocation Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. Pa. L. Rev. 1293 (1984). I have addressed the use of the doctrine of unconstitutional conditions in the context of eminent domain in Epstein, *Takings: Descent and Resurrection*, 1986 Sup. Ct. Rev. (forthcoming).

¹⁰⁹ This connection between the commerce clause and the fifth amendment was noted by counsel for appellees in *Hammer v. Dagenbart*, 247 U.S. 251 (1917), who insisted that there was a higher level of judicial review under the commerce clause. See *id.* at 267.

¹¹⁰ *Champion*, 188 U.S. at 374 (Fuller, C.J., dissenting).

their reserved powers.

Similarly, a somewhat broader but wholly defensible line could stress the harmony between federal and state regulation. Suppose that the statute at issue in *Champion* prohibited the shipment of lottery tickets from any state in which their production was illegal or into any state in which their possession was illegal. Here the congressional statute would be *in aid of* valid legislation at the state level. It would reinforce, rather than contradict, state law. In *Champion*, however, the tie between state and federal regulation was nonexistent, or even negative. The shipment of lottery tickets was forbidden in interstate commerce although their use may have been wholly legal in the states from which and to which they were sent. To be sure, if congressional power under the commerce clause had been clearly established, the supremacy clause would have resolved the conflict between state and federal laws in Congress' favor.¹¹¹ But the supremacy clause is of no help until the proper scope of the commerce clause has been first determined, in light of the concerns raised by the doctrine of unconstitutional conditions. The narrower tests previously discussed would not seem to allow the *Champion* prohibition. These two tests—"in aid of" state legislation, and the "noxious use" test—would not make the commerce clause a dead letter, but they also respect the independent power of the states.

There was yet a third line of argument that could have prevailed in *Champion*. The case could have rested on a peculiar amalgam of the police power and the commerce clause, showing yet again the affinity between jurisdictional and substantive concerns. Lottery tickets were an issue toward which states had long taken a quite schizophrenic attitude. Sometimes the states prohibited lotteries; sometimes they allowed private firms to run them under state charter; sometimes they ran the lotteries themselves.¹¹² Generally speaking, gambling fell within the class of dubious private activities subject to police power regulation, along with, for example, prostitution. One possible stopping point under the commerce clause would provide that Congress could prohibit the transmission in interstate commerce of those goods which a state *could* ban

¹¹¹ See U.S. Const. art. VI.

¹¹² For a checkered history of lotteries passing in and out of favor in one state, see *Stone v. Mississippi*, 101 U.S. 814 (1881).

under its police power, as it was then understood, even if the state had not actually prohibited their use. Justice Harlan, who wrote the majority opinion in *Champion*, always gave an expansive,¹¹³ and occasionally maddeningly extravagant,¹¹⁴ scope to the police power whenever supposed issues of health and morals arose, though otherwise he was a tiger in defense of individual liberty and freedom of contract.¹¹⁵ Justice Harlan's opinion in *Champion* emphasized the police power, stressing the iniquitous nature of lotteries and asking, "why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another?"¹¹⁶ Harlan rejected the idea that the commerce clause "countenances the suggestion that one may, of right, carry or cause to be carried from one State to another that which will harm the public morals."¹¹⁷

The question then arises: Could the argument equating prohibition under the police power with prohibition under the commerce clause survive? Why not? It is an argument that could permit the federal government to regulate the transport of prostitutes across state lines,¹¹⁸ whether or not prostitution was legal in the state to which they were sent, or to prohibit the sale of adulterated foods and drugs.¹¹⁹ Note that each of these examples would be far more secure if the sale of the ultimate product or service were illegal in the state to which the goods were shipped, as was typically the

¹¹³ See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding compulsory vaccination); *Mugler v. Kansas*, 123 U.S. 623, 674 (1887) (upholding prohibition of alcoholic beverages); *Lochner v. New York*, 198 U.S. 45, 65 (1905) (Harlan, J., dissenting from holding that New York could not limit bakers' working hours).

¹¹⁴ See *Powell v. Pennsylvania*, 127 U.S. 678, 683-87 (1888) (upholding prohibition of manufacture or sale of margarine).

¹¹⁵ See, e.g., *Adair v. United States*, 208 U.S. 161 (1908) (upholding freedom of contract between employer and employee); *Smyth v. Ames*, 169 U.S. 466 (1898) (holding confiscatory state railroad rate regulations to be violations of the 14th amendment); *Berea College v. Kentucky*, 211 U.S. 45, 58-70 (1908) (Harlan, J., dissenting) (criticizing racial segregation).

¹¹⁶ *Champion*, 188 U.S. at 356.

¹¹⁷ *Id.*

¹¹⁸ See *Caminetti v. United States*, 242 U.S. 470 (1917); *Hoke v. United States*, 227 U.S. 308, 322 (1913) (noting the link between the police power and the commerce clause).

¹¹⁹ See *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911). *Hipolite* was confined to "illicit articles—articles which the law seeks to keep out of commerce because, they are debased by adulteration," *id.* at 57, and which were "at their point of destination in the original, unbroken packages," *id.* at 58.

case. This somewhat broader conception, although perhaps less preferable than the more limited versions of the commerce clause discussed above, would still have left its scope less than comprehensive.

It was just this conception of the relationship between the commerce clause and the police power that held the line against federal power in *Hammer v. Dagenhart*.¹²⁰ In *Hammer*, federal legislation forbade the shipment in interstate commerce of any goods manufactured in any plant that used child labor in ways prohibited by the statute within a thirty-day period prior to the shipment.¹²¹ There was no requirement that the actual goods shipped in interstate commerce had to have been made by child labor—only that some goods made at the plant had been made with the use of child labor. The validity of the statute was hardly compelled by *Champion*, for the sale of ordinary clothing could not be prohibited as an illicit item of commerce under even the most extravagant version of the police power. Indeed, the Court understood the statute for what it was; it was not an effort to control the goods themselves, but to prescribe the internal rules governing their manufacture within the state.¹²² The delicacy of this legislation was manifest in an age when direct federal regulation of manufacture had been precluded by the Supreme Court in *United States v. E.C. Knight*.¹²³ In *Hammer* the Supreme Court stuck to its guns, and by a narrow five-four decision refused to extend *Champion* beyond the noxious or dangerous products to which it applied.

On balance, *Hammer* was correctly decided, assuming that the commerce clause must be understood within the larger structural context of the Constitution. Thus, if the child labor statute in *Hammer* had been good law, one can envision the following cycle of evasion and response: A firm using child labor now divides its business into two halves, subject to common stock ownership. One half makes goods for intrastate commerce using child labor, while the other half makes goods for interstate commerce without using

¹²⁰ 247 U.S. 251 (1918).

¹²¹ Act of Sept. 1, 1916, ch. 432, 39 Stat. 675. This act prohibited all labor by children under 14, and allowed children between the ages of 14 and 16 to work only eight-hour days, six days per week.

¹²² *Hammer*, 247 U.S. at 272.

¹²³ 156 U.S. 1 (1895); see *infra* notes 141-58 and accompanying text.

child labor. Congress then passes a new statute which says that no firm whose shareholders have a dominant interest in a second firm that uses child labor may send its goods into interstate commerce. The firm decides to go out of the interstate business altogether. Congress next passes a statute which says that no firm that acquires part of its supplies from any firm that uses child labor may ship its goods in interstate commerce, whether or not the goods made with child labor are incorporated into its own goods shipped interstate.

Why stop here? If the political will exists, Congress can pass a law which states that no firm in any state may ship its goods in interstate commerce unless every other firm within that state forswears the use of child labor. In each case the statute technically regulates only goods within the stream of interstate commerce. If prohibitions are simply forms of regulation, then Congress can raise the price of state independence so high that even the foolhardy must capitulate. Congress can make any use of child labor a federal issue by redefining the keys that unlock the gates to interstate commerce. If child labor can be reached by Congress, then so can everything else reserved to the states. A "Congressional Marriage Act" could provide that "no manufacturer can ship its goods in interstate commerce unless its state legislature passes a statute under which all local marriages conform to the federal requirements." These concerns were indeed raised by Justice Day, who wrote the majority opinion in *Hammer*.¹²⁴ Justice Day correctly noted that prior cases were limited to cases in which the "use of interstate transportation was necessary to the accomplishment of harmful results,"¹²⁵ and held that only the limited version of the commerce clause was consistent with the tenth amendment.¹²⁶ He noted that competition within the federal system was essential to the original constitutional design.¹²⁷

¹²⁴ *Hammer*, 247 U.S. at 271.

¹²⁵ *Id.*

¹²⁶ *Id.* at 273-74.

¹²⁷ Justice Day wrote:

There is no power vested in Congress to require the States to exercise their police power so as to prevent possible unfair competition. Many causes may cooperate to give one State, by reason of local laws or conditions, an economic advantage over others. The Commerce Clause was not intended to give to Congress a general authority to equalize such conditions.

Id. at 273.

Justice Holmes in dissent wrote a spirited and perceptive defense of the congressional power:

The act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the States but to Congress to regulate.¹²⁸

Holmes surely overstated his point. No one doubted that Congress had the power to override any state effort to block the shipment of goods in interstate commerce. But the justification of one use of that power hardly demanded acceptance of any use of it. The child labor statute in *Hammer* was invalid because Congress had used its admitted powers over interstate commerce to eliminate a state's "internal affairs" completely. Holmes never addressed this limit to his principles, nor identified the expansive statutes that his views necessarily tolerated—even though he had previously warned against interpreting the commerce clause so as to allow Congress to reach every productive endeavor of human life.¹²⁹ His observation that no statute should be upset because it has "indirect effects" upon the domestic affairs of the state¹³⁰ simply failed to address the structural threats that the child labor statutes posed to the distribution of state and federal power.

Justice Day's majority opinion in *Hammer* was strong on the jurisdictional side, but apologetic on the substantive side.¹³¹ The issue of child labor laws had long been an emotional one, and there was a powerful consensus in the Progressive movement that these statutes were absolutely necessary to counteract the evils of an unrestrained laissez-faire economic system which tolerated, and indeed encouraged, child labor. The Solicitor General, John W. Davis (who later represented the southern states in *Brown v. Board of Education*¹³²), insisted that, although the need was pressing, indi-

¹²⁸ Id. at 281 (Holmes, J., dissenting).

¹²⁹ See *Northern Secs. Co. v. United States*, 193 U.S. 197, 402-03 (1904) (Holmes, J., dissenting).

¹³⁰ *Hammer*, 247 U.S. at 277.

¹³¹ See id. at 276-77.

¹³² 347 U.S. 483 (1954).

vidual states were reluctant to enact their own child labor statutes because they feared that their manufacturers would be harmed by competition from industries in states still employing child labor:

The shipment of child-made goods outside of one State directly induces similar employment of children in competing States. It is not enough to answer that each State theoretically may regulate conditions of manufacturing within its own borders. As Congress saw the situation, the States were not entirely free agents. For salutary statutes had been repealed, legislative action on their part had been defeated and postponed time and again, solely by reason of the argument (valid or not) that interstate competition could not be withstood.¹³³

The quoted passage was something of an overstatement, as every state in the Union, including North Carolina (the state at issue in *Hammer*), had some statute regulating child labor on its books.¹³⁴ The real question was whether the weaker North Carolina statute, which forbade child labor below the age of twelve, was preferable to the federal minimum of fourteen.¹³⁵

Justice Day made no substantive attack on the child labor laws—rather, he sympathized with them.¹³⁶ Justice Day was in the awkward position of having to defend jurisdictional limitations that worked against what he thought to be highly desirable social regulation.

The case takes on a different complexion, however, if one looks with even modest suspicion on child labor statutes, as I do, and thinks that as a general rule the only proper grounds for government intervention in family relations are abuse or neglect. Any reader of Laura Ingalls Wilder's *Farmer Boy* knows that child labor was not a creature of the industrial revolution.¹³⁷ Arduous labor, day and night, without any employer to regulate or to sue has always been the lot of farm children. The children in the factories were certainly not as well off as we would like, but they were prob-

¹³³ *Hammer*, 247 U.S. at 256-57 (argument of appellant).

¹³⁴ *Id.* at 275 ("That such employment [e.g., child labor] is generally deemed to require regulation is shown by the fact that the brief of counsel states that every State in the Union has a law upon the subject, limiting the right to thus employ children.")

¹³⁵ *Hammer*, 247 U.S. at 268-69 n.1.

¹³⁶ "That there should be limitations upon the right to employ children in mines and factories in the interest of their own and the public welfare, all will admit." *Id.* at 275.

¹³⁷ See L. Wilder, *Farmer Boy* (1933).

ably better off than they would have been back on the farm, or than if they had been left in the city without any opportunity to sell their labor. Their families had voted to leave the farm or the old country with their feet, as a matter of life and death.¹³⁸ Under this view, the substantive reforms may well have been misguided initiatives that inflicted harm upon the very persons they were ostensibly intended to benefit. Child labor changes in its character and intensity as changes occur in the means of production, the income level of parents, and the returns to children from more education. Restrictions on child labor may be proposed as ways to prevent child neglect and abuse, but the case for them is far from self-evident. Even if the police power is thought to be extensive enough to “protect” children from their parents as a constitutional matter, as it surely was by 1918,¹³⁹ there is a clear risk that the proper limits of the police power will be exceeded when legislation is used by interest groups that do not rely upon child labor to undercut rivals who do. Stated otherwise, child labor legislation could well be misguided paternalism or interest-group politics.

This skeptical view of the substantive issues in *Hammer* should caution one against reading more into the commerce clause than its language, or its place in the overall constitutional structure, allows. There is no obvious reason to approach the jurisdiction question with the assumption that child labor laws are intrinsically good, if only we knew how to enact them. Their strength, far from being a given, should be tested in competition between states. Such competition would show the true importance of child labor laws to the state: Will a state impose the restriction even when local firms may be hampered in interstate competition? The legislative question surely is not an all-or-nothing one. Indeed, the difference between North Carolina’s twelve-year limit and Congress’ fourteen is surely only a question of degree, and it is far from self-

¹³⁸ See I. Howe, *The World of Our Fathers* (1976). Howe’s book is notable for its discussion of the unintended harmful consequences of turn-of-the-century social legislation on the very people it was supposed to protect. Howe himself is a social democrat who supports such legislation, but his accounts reveal his obvious sense of puzzlement about the issue, although he was not moved to change his substantive positions. See, e.g., *id.* at 150-53 (discussing the mixed results of housing legislation in New York, including the 1901 statute that forbade further construction of the so-called “dumbbell” tenements).

¹³⁹ See, e.g., the account of the police power given in *New York Cent. R.R. v. White*, 243 U.S. 188, 207 (1917).

evident which minimum is better, assuming there should be child labor laws at all.

The relatively clean line in *Hammer* prevented Congress from using its power over the movement of goods in interstate commerce to regulate the terms and conditions of their production. The line of cases regarding what types of goods could be shipped in interstate commerce thus imposed real limitations on the power of Congress. To be sure, the ICC cases afforded Congress powerful jurisdiction over the instrumentalities of interstate commerce.¹⁴⁰ But even when broadly construed these still stopped with the railroads and navigable waters (and by obvious extension interstate highways and interstate airplane transportation). The line between state police power and the commerce clause had shifted, and there is reason to think that some of the shifts had already placed too many matters on the federal side of the line. But the case law was still a long way from giving Congress comprehensive powers to regulate all productive activities.

3. *Manufacturing and Commerce*

I now turn to the last line of cases necessary to complete the overall picture—those that drew the sharp and structural line between commerce on one hand and manufacture (or production and agriculture) on the other. This line of cases began with *United States v. E.C. Knight Co.*¹⁴¹ in 1895, and retained its overall validity until the 1937 term. What follows is an account of how that line of cases developed, and retained, its distinct position from the two groups of cases just considered.

E.C. Knight was the first constitutional challenge to the Sherman Act.¹⁴² At issue was the acquisition by the American Sugar Refining Company, a New Jersey corporation, of four Pennsylvania corporations that manufactured refined sugar. The United States challenged the merger under the Sherman Act as “a combination or contract in restraint of trade or commerce among the several states.”¹⁴³ The Court held that the merger could not be reached by the Sherman Act because it was not part of interstate commerce

¹⁴⁰ See *supra* notes 74-101 and accompanying text.

¹⁴¹ 156 U.S. 1 (1895).

¹⁴² Ch. 647, 26 Stat. 209 (1980) (current version at 15 U.S.C. §§ 1-8 (1982)).

¹⁴³ *E.C. Knight*, 156 U.S. at 9.

and had no "direct" effect upon it.¹⁴⁴ Chief Justice Fuller made a conscious effort to delineate the respective spheres of the state police power and the commerce clause in his majority opinion in ways that harken back to *Gibbons v. Ogden*:

Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed or whenever the transaction is itself a monopoly of commerce.

It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality.

. . . .
Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce.¹⁴⁵

Chief Justice Fuller tried to raise a barrier between manufacture, on the one hand, and sale or shipment of goods in interstate commerce, on the other. But the barrier was not as well-defined as Chief Justice Fuller made it out to be. Justice Harlan forcefully made this point in his dissent, noting that this merger was designed to regulate not only the manufacturing of refined sugar

¹⁴⁴ Id. at 16-17.

¹⁴⁵ Id. at 12-13.

but also "selling sugar in different parts of the country."¹⁴⁶ The transaction in *E.C. Knight* had two purposes: manufacture, over which there could be a local monopoly that Congress could not reach, and a plan for restrictive interstate sale, designed to raise prices in interstate markets. The status of the sales plan element of the merger was the subject of dispute between the Justices. Chief Justice Fuller's majority opinion allowed federal regulation of the contracts by which the sugar was bought and sold.¹⁴⁷ Yet it reads as though it would not have allowed the regulation of a structural agreement made prior to actual sales, by which the parties agreed to sell only certain amounts in interstate commerce at certain prices. According to his view, this master agreement would fall outside of the scope of the commerce clause. Justice Harlan's dissent, on the other hand, did *not* attack Chief Justice Fuller's position that "commerce succeeds manufacture." Instead he argued that manufacture became commerce when the sugar was sold to be transported, not subsequently, when it actually was placed in interstate transport:

It is said that manufacture precedes commerce and is not a part of it. But it is equally true that when manufacture ends, that which has been manufactured becomes a subject of commerce; that buying and selling succeed manufacture, come into existence after the process of manufacture is completed, precede transportation and are as much commercial intercourse, where articles are bought to be carried from one State to another, as is the manual transportation of such articles after they have been so purchased.¹⁴⁸

Justice Harlan never quite closed in on the essential issue in the case. The government did not attack the individual contracts for sale of sugar in interstate commerce, but only the prior structural arrangements that influenced the terms on which the interstate sales were made. In most antitrust cases the contracts for the division of markets or the maintenance of prices are separate and distinct from any contract arrangements for the manufacture or sale of goods. But the transaction at issue in *E.C. Knight* was a merger that was quite impossible for Congress to reach by a plan to regulate the interstate sales of the combined sugar business (even if

¹⁴⁶ *Id.* at 18 (Harlan, J., dissenting).

¹⁴⁷ *See id.* at 12-13.

¹⁴⁸ *Id.* at 35-36 (Harlan, J., dissenting).

these preliminary merger agreements were regarded as in interstate commerce) without necessarily intruding into the regulation of manufacture, which *both* the majority and the dissent expressly regarded as outside the scope of the commerce clause.¹⁴⁹ *E.C. Knight* was thus an early version of the *Shreveport Rate Case* problem, in which the Court recognized that the regulation of interstate commerce was necessarily either over- or underinclusive.¹⁵⁰ The difference between the majority and dissenting opinions in *E.C. Knight* is best explained as a response to the issue of whether too much or too little regulation was desired. Justice Harlan in dissent thought that the regulation was appropriate, for the peril of national monopolies was too great to be ignored.¹⁵¹ To Chief Justice Fuller, on the other hand, the decisive consideration was that the expansion of the commerce power to meet the danger of monopoly ran the far greater risk of upsetting the grand constitutional balance between the federal and the state governments.¹⁵² That is why he was so eager to strike down any statute of "even doubtful constitutionality."¹⁵³

Unfortunately, these genuine substantive concerns were not incorporated into a careful analysis of the error costs of alternative jurisdictional rules. Instead the debate focused on the question whether the regulation had an impact on interstate commerce that was "direct or immediate" or "remote or indirect."¹⁵⁴ These abstract, largely nondescriptive terms simply could not carry the vast institutional weight placed upon them in future years. The *E.C. Knight* opinions, in retrospect, seem in large part to be simple word games or metaphysical abstractions rather than debates about important principles.

¹⁴⁹ See *id.* at 12, 36-37 (Harlan, J., dissenting).

¹⁵⁰ See *supra* note 87 and accompanying text.

¹⁵¹ Justice Harlan wrote:

If this combination, so far as its operations necessarily or directly affect interstate commerce, cannot be restrained or suppressed under some power granted to Congress, it will be cause for regret that the patriotic statesmen who framed the Constitution did not foresee the necessity of investing the national government with power to deal with gigantic monopolies holding in their grasp, and injuriously controlling in their own interest, the entire trade *among the States* in food products that are essential to the comfort of every household in the land.

E.C. Knight, 156 U.S. at 19 (Harlan, J., dissenting).

¹⁵² *Id.* at 13.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 15-16.

The difference between the two sides, moreover, was not as great as might be supposed. The substantial common ground between Chief Justice Fuller and Justice Harlan is clearly borne out by looking at the next important case in the line, *Addyston Pipe & Steel Co. v. United States*,¹⁵⁶ written for a unanimous Supreme Court by Justice Peckham, who is today largely remembered for his opinion in *Lochner v. New York* striking down New York's ten-hour maximum daily labor law for bakers.¹⁵⁶ *Addyston Pipe* upheld a federal attack on an explicit contract by cast-iron pipe producers to divide the territorial market for their product among themselves in order to create a set of local monopolies.¹⁵⁷ At one level the case appears indistinguishable from *E.C. Knight*, from which it differed solely by the method chosen by the parties to obtain their monopoly prices. A merger of manufacturing businesses was the method of choice in *E.C. Knight*, while an explicit cartelization was chosen in *Addyston Pipe*. If the sole question was whether there was a "direct" or "indirect" effect upon commerce, whether by the price or volume of goods shipped, the two cases could hardly be distinguished. If a merger designed to raise prices has only an "indirect" effect upon commerce, then so too does a cartel arrangement with that same purpose and effect.

¹⁵⁶ 175 U.S. 211 (1899).

¹⁵⁶ 198 U.S. 45 (1905). Yet Justice Peckham did not simply use "freedom of contract" as a phrase to conceal all understanding of regulatory issues. In *Addyston Pipe*, for example, he was explicit about the limits of freedom of contract in its constitutional guise:

It has been held that the word "liberty," as used in the Constitution, was not to be confined to the mere liberty of person, but included, among others, a right to enter into certain classes of contracts for the purpose of enabling the citizen to carry on his business. But it has never been, and in our opinion ought not to be, held that the word included the right of an individual to enter into private contracts upon all subjects, no matter what their nature and wholly irrespective (among other things) of the fact that they would, if performed, result in the regulation of interstate commerce and in the violation of an act of Congress upon that subject.

Addyston Pipe, 175 U.S. at 228-29 (citation omitted).

The passage is odd in the sense that it treats private contracts as the equivalent of public regulation, and because it inverts the relationship between constitutional principle and legislative action. But otherwise stated, the principle of freedom of contract does not protect contracts in restraint of trade. The explanation for the distinction lies in the external effects of two kinds of contracts. Contracts in restraint of trade may well have negative, systematic, economic effects; ordinary commercial contracts have positive systematic effects. The issue could be understood, although it was not by Justice Peckham, in terms of the just compensation requirements associated with limitation of both contract and property rights. See R. Epstein, *Takings: Private Property and the Power of Eminent Domain* 202-03 (1985).

¹⁵⁷ See *Addyston Pipe*, 175 U.S. at 248.

Yet if the distinction between the two cases is viewed in light of the underlying substantive concerns motivating the Court, then it makes perfect sense. *E.C. Knight* raised two questions: first, whether a preliminary step (be it merger or cartel) toward a proposed sale of goods in interstate commerce was itself part of interstate commerce; and second, even if a preliminary step was part of interstate commerce, could Congress reach it by regulating manufacture, which everyone conceded was not part of interstate commerce? Chief Justice Fuller found *E.C. Knight* an easy case because he was prepared to answer the second question in the negative, given his doubts about the first. Yet in *Addyston Pipe* the second question vanished, because the cartel arrangement reached only planned interstate sales and had no influence at all upon manufacturing. Only the first question had to be addressed. The difficult choice between necessary over- and necessary under-inclusion did not arise in *Addyston*. To apply the Sherman Act, it needed only to be said that preliminary agreements, designed by the parties to regulate their private sales in interstate commerce, were themselves part of interstate commerce.¹⁵⁸ It did not take a very inventive reading of *Gibbons* to say that these outward-looking contracts were not part of the purely internal commerce of the state. This refinement of *E.C. Knight* therefore did not challenge the view that manufacture and commerce were distinct spheres. Despite giving Congress its head in *Addyston Pipe*, the Court did not intrude upon the basic principle that the power to regulate commerce among the several states was only one of a list of enumerated powers. *Addyston Pipe* therefore hardly broke with the past. The Court reached a unanimous decision (with Fuller still Chief Justice) because the risk of excessive congressional power was not present.

The same can be said about the two other major early antitrust decisions that invoked the commerce clause. The issue in *Northern Securities Co. v. United States*¹⁵⁹ was whether Congress could reach a stock merger of two railroad lines. Congressional power was sustained by a five-four vote, with Justice Harlan writing for the Court and with Chief Justice Fuller and Justice Peckham (joined by Justices Holmes and White) in dissent. The latent disagreement

¹⁵⁸ *Id.* at 226-27.

¹⁵⁹ 193 U.S. 197 (1904).

that divided the Court in *E.C. Knight* again came to the fore, albeit in somewhat different form. Justice Harlan's basic posture was unchanged. If a merger of gigantic manufacturing concerns was of federal concern because of its direct influence on prices, he had no reason to pause simply because the antitrust laws were applied to a transaction in shares of stock that was local in origin and governed by state law.¹⁶⁰ Indeed, the fact that the underlying assets were two interstate railroads could have only strengthened Justice Harlan's view that the transaction had to be reached by the antitrust laws. It was no longer necessary, after all, to tiptoe along the narrow line between manufacture and commerce, for the merger did not involve any regulation of manufacturing. If Congress could regulate the rates on interstate lines, then why should it not be able to stop the merger?

The four dissenting Justices took a very different position. To them, the appropriate balance between state and federal power was as primary an issue as it had been to Chief Justice Fuller in *E.C. Knight*, given that the regulation of state corporate ownership, a local matter, was inseparable from the regulation of interstate transport.¹⁶¹ A passage from Justice Holmes' dissent shows the interplay between two dominant motifs of the early decisions:

The point decided in [*E.C. Knight*] was that "the fact that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree." Commerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce. If the act before us is to be carried out according to what seems to me the logic of the argument for the Government, which I do not believe that it will be, I can see no part of the conduct of life with which on similar principles Congress might not interfere.¹⁶²

In a single passage, Justice Holmes was able to merge and confuse two distinct ideas: first, that Congress could not regulate absent direct effects on interstate commerce; and second, that the federal-state balance of power under the founders' plan required that the commerce clause be given some effective limits, lest the independent powers of the states be undermined. In a sense the five-four

¹⁶⁰ See *id.* at 327-28.

¹⁶¹ *Id.* at 402 (Holmes, J., dissenting).

¹⁶² *Id.* at 402-03 (Holmes, J., dissenting) (citation omitted).

vote in *Northern Securities* is explained in that the case was a more powerful one for congressional action under the commerce power than was *E.C. Knight*. But the differences between the majority and dissent on the question of principle were minor, and at best *Northern Securities* identified the tipping point at which the interstate elements start to dominate the overall transaction.

In *Swift & Co. v. United States*¹⁶³ decided a year later, the consensus of *Addyston Pipe* reasserted itself. In *Swift*, the government brought an antitrust case against fresh food dealers who sought to organize bidding in livestock markets across the United States.¹⁶⁴ The distinction between this cartel and the one in *Addyston Pipe* was not worth pursuing, so Justice Holmes came out of his dissent in *Northern Securities* and wrote for a unanimous Court condemning this cartel for its effect on interstate commerce:

[I]t is a direct object, it is that for the sake of which the several specific acts and courses of conduct are done and adopted. Therefore the case is not like [*E.C. Knight*], where the subject matter of the combination was manufacture and the direct object monopoly of manufacture within a State. However likely monopoly of commerce among the States in the article manufactured was to follow from the agreement it was not a necessary consequence nor a primary end. Here the subject matter is sales and the very point of the combination is to restrain and monopolize commerce among the States in respect of such sales.¹⁶⁵

Holmes's distinction between direct and indirect consequences is unpersuasive. To use a tort analogy, it was an effort to smuggle all the limitations on liability into the rules on remoteness of damages, without recognizing the independent status of the standard excuses and justifications in tort law. Imagine, to push the analogy, what tort law would look like without the defenses of consent, self-defense, contributory negligence, or assumption of risk. In tort, the consequence of this approach is to place incredible stress upon the idea of causation, with a consequent loss of analytical clarity. In constitutional law too the burden upon the idea of direct consequences was too great. What was needed was an explicit acknowledgment that the doctrine of enumerated powers played, in consti-

¹⁶³ 196 U.S. 375 (1905).

¹⁶⁴ *Id.* at 388.

¹⁶⁵ *Id.* at 397.

tutional discourse, a role parallel to the one that affirmative defenses play under tort law.

Whatever the weaknesses in basic theory, *Swift* and its predecessors articulated a set of boundary lines that was reasonably easy to apply. The Court read *Swift* as the decisive precedent in favor of federal power in both *Stafford v. Wallace*¹⁶⁶ and *Chicago Board of Trade v. Olsen*.¹⁶⁷ In neither case was the line between manufacture and commerce tested, let alone overthrown.

In *Stafford*, the court upheld the constitutionality of the Packers and Stockyards Act of 1921,¹⁶⁸ which regulated the middlemen who arranged the sale and shipment of cattle from the West to purchasers in the Chicago stockyards.¹⁶⁹ The Act gave to the Secretary of Agriculture the power to set maximum and minimum prices and to prohibit discriminatory and deceptive trade practices.¹⁷⁰ The Court relied heavily on an analogy to the "instrumentalities of interstate commerce":

The stockyards are not a place of rest or final destination. Thousands of head of live stock arrive daily by carload and train-load lots, and must be promptly sold and disposed of and moved out to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East, and from one State to another.¹⁷¹

Olsen upheld the Grain Futures Act,¹⁷² which regulated the sale of grain for future delivery on boards of trade under the rationale that manipulation of futures prices had burdened and obstructed interstate commerce.¹⁷³ Chief Justice Taft again emphasized the

¹⁶⁶ 258 U.S. 495, 517 (1922) ("The judgment in [*Swift*] gives a clear and comprehensive exposition which leaves to us in this case little but the obvious application of the principles there declared.").

¹⁶⁷ 262 U.S. 1, 35 (1923) ("[*Swift*] merely fitted the commerce clause to the real and practical essence of modern business growth. It applies to the case before us just as it did in [*Stafford*].").

¹⁶⁸ Ch. 64, 42 Stat. 159 (current version at 7 U.S.C. §§ 181-231 (1982)).

¹⁶⁹ *Stafford*, 258 U.S. at 514.

¹⁷⁰ *Id.* at 513-14.

¹⁷¹ *Id.* at 515-16.

¹⁷² Ch. 369, 42 Stat. 998 (1922) (current version codified as part of the Commodity Exchange Act, 7 U.S.C. §§ 1-24 (1982 & Supp. III 1985)).

¹⁷³ *Olsen*, 262 U.S. at 32.

link between trade in goods and the railroads.¹⁷⁴

These two decisions, by involving matters ancillary to the actual shipment of goods by the railroads, clearly expanded the scope of the commerce power. General concern about fraud and manipulation (both of which are wrongs under state law) is not an obvious reason to allow federal regulation. It is possible therefore to argue that the statutes themselves were unconstitutional, despite the unanimous decisions of the Supreme Court. For the purposes of this Article, however, it is sufficient to note that *nothing* in either case challenged *E.C. Knight's* distinction between manufacture or production on the one hand, and interstate commerce on the other. As late as 1935 in *Schechter Poultry Corp. v. United States*,¹⁷⁵ Chief Justice Hughes wrote, in limiting the jurisdiction of Congress under the commerce clause, "The distinction between direct and indirect effects has been clearly recognized in the application of the Anti-Trust Act," and then used the distinction to strike down the National Industrial Recovery Act.¹⁷⁶ The next year, in *Carter v. Carter Coal Co.*,¹⁷⁷ a majority of the Supreme Court struck down various provisions of the Bituminous Coal Conservation Act of 1935¹⁷⁸ on the ground that the commerce clause did not allow the federal government to regulate the terms of employment within the mines.¹⁷⁹ The *Carter* Court correctly distinguished *Stafford* as a "flow of commerce" case, in which Congress had regulated the "throat" of interstate commerce, and nothing more.¹⁸⁰ Elsewhere

¹⁷⁴ Chief Justice Taft wrote:

The railroads of the country accommodate themselves to the interstate function of the Chicago market by giving shippers from western States bills of lading through Chicago . . . for temporary purposes of storing, inspecting, weighing, grading, or mixing, and changing the ownership, consignee or destination and then to continue the shipment under the same contract and at a through rate. . . . The fact that the grain shipped from the west and taken from the cars may have been stored in warehouses and mixed with other grain, so that the owner receives other grain when presenting his receipt for continuing the shipment, does not take away from the interstate character of the through shipment

Id. at 33-34.

¹⁷⁵ 295 U.S. 495 (1935).

¹⁷⁶ Id. at 521, 547, 551 (citing the National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933)).

¹⁷⁷ 298 U.S. 238 (1936).

¹⁷⁸ Ch. 824, 49 Stat. 991 (1935).

¹⁷⁹ *Carter*, 298 U.S. at 239.

¹⁸⁰ Id. at 305.

in his majority opinion, Justice Sutherland wrote categorically that "[t]he relation of employer and employee is a local relation."¹⁸¹

E.C. Knight's basic distinction between manufacture and commerce thus held firm as late as *Carter* in 1936. The emerging pattern said, for example, that the Ford Motor Company did not manufacture goods in interstate commerce, but the Northern Pacific Railroad shipped them in interstate commerce. As constitutional principles go, this line was relatively clear. It is just the line that is observed today in the dormant commerce clause cases,¹⁸² and it is as intelligible with the affirmative power cases as with the dormant power cases.

This third line of cases under the commerce clause added to congressional power, but it surely did not lead to the conclusion that Congress should have the comprehensive power to regulate the entire business of life. The Court had expanded the reach of earlier cases involving the "instrumentalities of interstate commerce." This broadened scope to the commerce power allowed Congress to regulate matters actually outside the scope of commerce in order to regulate what fell within its admitted power. But the overbreadth doctrine was applied only in cases that did not involve common carriers. And Congress' power to prohibit the shipment of certain kinds of goods in commerce was sharply, but correctly, limited by *Hammer v. Dagenhart* to those things noxious in themselves.¹⁸³ The totality of commerce clause jurisprudence as it emerged before the New Deal may not have been perfect; indeed it probably yielded a bit too much to federal power, at least under the power to regulate instrumentalities of commerce and the power to regulate the type of goods shipped in interstate commerce. But the set of rules was surely workable. This state of affairs was to change in the 1930's. The final Part of this Article will trace the rapid decline of the old distinctions, and will briefly note the regrettable social consequences that followed in the wake of departures from sound constitutional principle.

¹⁸¹ *Id.* at 308.

¹⁸² See *supra* notes 60-61 and accompanying text.

¹⁸³ *Hammer v. Dagenhart*, 247 U.S. 25, 271 (1918); see *supra* notes 120-40.

V. THE NEW DEAL TRANSFORMATION OF THE COMMERCE CLAUSE

The New Deal cases systematically removed each of the previous limitations on the scope of the commerce clause. This expansion of federal power was not driven by any textual necessity. Instead, it is better understood, but hardly justified, as a response to two separate but related forces. First, the 1936 Roosevelt mandate and the prospect of court packing could hardly have been lost on the Court.¹⁸⁴ Second, a narrow majority of the Court was in sympathy with the dominant intellectual belief of the time that national problems required national responses. The New Deal cases worked a revolution in constitutional theory as well as in textual interpretation. The original theory of the Constitution was based on the belief that government was not an unrequited good, but was at best a necessary evil. The system of enumerated powers allowed state governments to compete among themselves, thus limiting the risks of governmental abuse even absent explicit, substantive limitations on the laws that states could pass. The various limitations upon the federal power helped achieve this end. The New Deal conception, on the other hand, saw no virtue in competition, whether between states or between firms. The old barriers were stripped away; in their place has emerged the vast and unwarranted concentration of power in Congress that remains the hallmark of the modern regulatory state.

The first major case to test the traditional analysis of the commerce clause was *NLRB v. Jones & Laughlin Steel Corp.*,¹⁸⁵ which involved a challenge to the National Labor Relations Act (Wagner Act).¹⁸⁶ The Wagner Act in essence removed employers' power to hire and fire at will, instead requiring extensive collective bargaining in good faith between employers and unions if the union is approved by a majority of employees.¹⁸⁷ The unions were selected by a majority of workers, but had the power to bind workers who dissented.¹⁸⁸ Individual contracts inconsistent with the master agree-

¹⁸⁴ See G. Gunther, *Constitutional Law* 128-30 (11th ed. 1985).

¹⁸⁵ 301 U.S. 1 (1937). Companion cases to *Jones & Laughlin* were *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937), and *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937).

¹⁸⁶ Ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-169 (1982 & Supp. III 1985)).

¹⁸⁷ See *id.* § 8(a)(5), 29 U.S.C. § 158 (a)(5).

¹⁸⁸ See *id.* § 9(a), 29 U.S.C. § 159 (a).

ment were unenforceable, lest the union's power be undermined by dissatisfied workers.¹⁸⁹

The Wagner Act was based squarely upon the commerce clause. The draftsmen sought to meet the fundamental challenge of jurisdiction by providing that federal jurisdiction extended not only to cases of "commerce" but also to cases "affecting commerce": "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."¹⁹⁰

This extended definition proves that Congress used a legal fiction to expand federal jurisdiction beyond its original grant. The commerce clause does not say "Congress shall have the power to regulate commerce, and all matters affecting commerce with foreign nations, among the several states, and with the Indian tribes." The statutory text, moreover, invited a favorable outcome on the jurisdictional question by smuggling into its expanded definition of commerce the desirable effects that the labor statute was intended to achieve. Yet there was no real evidence that local regulation of employment markets was incapable of achieving desired economic goals. It was only the distinct New Deal bias for worker monopolies protected by explicit barriers to entry (here, against rival workers who would work for less) that could have led to the conclusion that the Wagner Act would improve the free flow of commerce. How cartelization of labor markets would remove barriers or obstructions to interstate commerce has never been explained. Labor cartelization generally raises the level of wages and reduces the quantity of goods produced. When a cartel is legally protected against new entrants into its market, the new entrants are no longer able to take advantage of the price "umbrella" that an unregulated cartel necessarily creates for enterprising rivals. The Wagner Act surely had an effect on commerce, and that effect was negative.

A system of limited government keeps local governments in competition with each other. This sensible institutional arrangement was wholly undermined by Congress' decision, in the teeth of the commerce clause, to subject all employment markets to nationally

¹⁸⁹ See *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

¹⁹⁰ *Id.* at 450.

uniform regulation. As in the case of child labor laws, the power of states to impose collective bargaining requirements on firms is effectively limited by the ability of old firms to leave the state and of new ones not to enter it. Also, since domestic firms can escape whatever misguided tariff barriers may be thrown up against international suppliers of goods and services, the level of state regulation is effectively curtailed, and the volume of goods and services in commerce increases.

The transformation in legislative and judicial thinking about the commerce clause is revealed by the reversal in substantive outcomes. *Gibbons v. Ogden* ensured free trade by overturning a state-granted legal monopoly.¹⁹¹ The Sherman Act cases were also directed against private monopolies—a lesser peril—which were seen improperly as “regulating” interstate commerce.¹⁹² Both *Gibbons* and the Sherman Act cases were attempts to facilitate free trade in open markets—one at the constitutional, the other at the statutory, level. With the later expansion of congressional jurisdiction by such laws as the Transportation Act of 1920, however, the commerce clause became an instrument to suppress competition, rather than one to further it.¹⁹³ It is only if one thinks that government can neutrally determine when there is too much competition as well as when there is too little that the broader interpretation of the commerce power becomes plausible. And it is clear that the New Deal thinkers thought they understood the vices of competition.¹⁹⁴

It is always, however, a precarious venture for judges to make independent normative judgments about the desirability of certain social arrangements when passing on the constitutionality of certain acts. In a sense, the task of interpretation should depend, as Chief Justice Marshall did in *Gibbons v. Ogden*, on the natural and ordinary sense of the word.¹⁹⁵ The approach also leads, however, to

¹⁹¹ See supra notes 35-59 and accompanying text.

¹⁹² See supra notes 141-83 and accompanying text.

¹⁹³ See supra notes 93-101 and accompanying text.

¹⁹⁴ “There would appear to be no difference in the constitutional power to protect interstate commerce against unduly high prices, as in the Sherman Act, and excessively low prices, as in the New Deal legislation.” Stern, supra note 32, at 651. The economic error is to think that prices, rather than economic structure, are the source of any misallocation of resources.

¹⁹⁵ See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824).

the conclusion that the Wagner Act goes beyond the scope of the commerce clause under the authority of *E.C. Knight* and, most notably, *Carter*.¹⁹⁶ The three decisions of the United States Courts of Appeals that passed upon the Wagner Act declared it unconstitutional by applying the precedents mechanically.¹⁹⁷ Recall that the hard question in *E.C. Knight* was whether prospective restraints of trade in interstate markets could justify an intrusion into manufacture, an area normally regulated by the states. *Jones & Laughlin*, of course, involved no effort to monopolize an interstate market. Quite the opposite; the contracts at issue concerned only matters of local employment which, as the Court's opinion in *Carter* had confirmed, had never been thought a federal matter under any prior conception of the commerce clause.¹⁹⁸

To respond to this difficulty, the Court in *Jones & Laughlin* resurrected the losing argument of *Carter*—that anything which had a substantial effect upon interstate commerce could be regulated regardless of its source.¹⁹⁹ In so doing, the Court in effect borrowed the language of those cases concerned with the instrumentalities of interstate commerce²⁰⁰ and applied it generally, as if the original subject-matter restriction had not been integral to the earlier decisions. Manufacture was no longer distinguishable from commerce, because the manufacturing process involved “a great movement of iron ore, coal and limestone along well-defined paths to the steel mills, thence through them, and thence in the form of steel products into the consuming centers of the country—a definite and well-understood course of business.”²⁰¹

To be sure, Chief Justice Hughes acknowledged in *Jones & Laughlin* that some “internal concerns” of the state remained

¹⁹⁶ See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *E.C. Knight Co. v. United States*, 156 U.S. 1 (1895).

¹⁹⁷ See *NLRB v. Fruehauf Trailer Co.*, 85 F.2d 391 (6th Cir. 1936), rev'd, 301 U.S. 49 (1937); *NLRB v. Friedman-Harry Marks Clothing Co.*, 85 F.2d 1 (2d Cir. 1936), rev'd, 301 U.S. 58 (1937); *NLRB v. Jones & Laughlin Steel Corp.*, 83 F.2d 998 (5th Cir. 1936), rev'd, 301 U.S. 1 (1937). The circuit opinions were reprinted in full in Justice McReynolds' dissent to all three of these cases. See *Labor Board Cases*, 301 U.S. 76, 79-84 (1937) (McReynolds, J., dissenting).

¹⁹⁸ *Carter*, 298 U.S. at 308-09.

¹⁹⁹ *Jones & Laughlin*, 301 U.S. at 37; see *Carter*, 298 U.S. at 317 (Cardozo, J., dissenting).

²⁰⁰ See *Jones & Laughlin*, 301 U.S. at 36-37 (quoting *Second Employers' Liability Cases*, 223 U.S. 1, 47 (1911); *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 564 (1870)).

²⁰¹ *Jones & Laughlin*, 301 U.S. at 34-35 (quoting the government's argument).

outside the power of Congress to regulate.²⁰² But it was all lip service; the companion cases to *Jones & Laughlin* showed that the “internal concerns of a state” had become an empty vessel. *NLRB v. Fruehauf Co.* applied the Wagner Act to a manufacturer of commercial trailers that obtained more than fifty percent of its material out of state and sold eighty percent of its output to out-of-state customers.²⁰³ *NLRB v. Friedman-Harry Marks Clothing Co.* used the same logic, applying the statute to a clothing manufacturer that purchased most of its raw cloth out of state, and sold a majority of its finished garments there as well.²⁰⁴ The commerce clause was thus hardly limited to the integrated multistate firms like *Jones & Laughlin*. And beneath the legal analysis lay the ultimate policy reason for the decisions: Congress and the NLRB believed that industry-wide unionizations could not succeed without federal assistance, and the Court accepted this belief, and the desirability of the substantive conclusion, at face value.²⁰⁵

The cases that followed *Jones & Laughlin* continued to sustain the power of the federal government to regulate interstate commerce expansively, on the ground that any competition among states necessarily restricted the scope of government action. The government’s argument in *United States v. Darby*²⁰⁶ in defense of the Fair Labor Standards Act (FLSA),²⁰⁷ for example, was essentially identical to that made unsuccessfully a generation before in

²⁰² Chief Justice Hughes wrote:

The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce “among the several States” and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.

Id. at 30.

²⁰³ *NLRB v. Fruehauf Co.*, 301 U.S. 49, 50 (1937).

²⁰⁴ *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58, 73 (1937).

²⁰⁵ The Court in *Friedman-Harry Marks* wrote:

With effective competition between the industry’s enterprises an accepted fact regardless of location, and bearing in mind the purpose and effect of the migration of enterprises, it seems unavoidable that the members of the Amalgamated Clothing Workers should, as they do, regard the industry as one whose economic organization is not based on the interests of each individual enterprise, but is one in which union conditions, to be maintained at all, must prevail generally.

Id. at 59.

²⁰⁶ 312 U.S. 100 (1941).

²⁰⁷ Ch. 676, 52 Stat. 1060 (1938) (current version at 29 U.S.C. §§ 201-209 (1982 & Supp. III 1985)).

Hammer v. Dagenhart:

No State, acting alone, could require labor standards substantially higher than those obtaining in other States whose producers and manufacturers competed in the interstate market. Employers with lower labor standards possess an unfair advantage in interstate competition, and only the national government can deal with the problem.²⁰⁸

The Court's unanimous decision upholding the FLSA accepted the substantive case for the statute at face value, and regarded the FLSA as essentially public interest rather than interest-group legislation.²⁰⁹ Arguments in favor of *Hammer's* limits on federal power were curtly dismissed: "The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control."²¹⁰

There remained only the question whether federal power extended to those goods of local manufacture which were not shipped in interstate commerce. In this regard Justice Stone cited the *Shreveport Rate Case* to support the proposition that a "familiar like exercise of power is the regulation of intrastate transactions which are so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled."²¹¹ Justice Stone omitted any reference to the desire to fight local discrimination against interstate commerce that was so critical to the earlier decision, or to any recognition that the *Shreveport Rate Case* did not apply to all "intrastate transactions" but only to the "instrumentalities" of interstate commerce—in particular to interstate railroad operations.²¹² Nor did Justice Stone acknowledge that the *Shreveport Rate Case* never challenged the distinction between commerce and manufacture defended in *E.C. Knight*. Justice Holmes in his *Hammer* dissent defending federal authority still recognized that some manufacture

²⁰⁸ *Darby*, 312 U.S. at 102 (the government's argument).

²⁰⁹ *Id.* at 115.

²¹⁰ *Id.*

²¹¹ *Id.* at 121.

²¹² *Id.* at 109 n.1. Justice Stone's version of *The Shreveport Rate Case*, 234 U.S. 342 (1914), was adopted by Justice Jackson in *Wickard v. Filburn*, 317 U.S. 111, 123-34 (1942). See *infra* notes 221-26 and accompanying text.

was part of the purely internal commerce of the state.²¹³ Yet such was the strength of the federal tide that Justice Stone abandoned that vestige of state autonomy in *Darby*.²¹⁴ The question of state autonomy, so critical to *E.C. Knight*, also received back-of-the-hand treatment in *Darby*; the Court brushed aside the tenth amendment, and the principle of enumerated powers that it articulated, as "but a truism that all is retained which has not been surrendered."²¹⁵

Justice Stone's cavalier treatment of jurisdictional objections to the FLSA resulted from his powerful belief in the soundness of the basic social legislation involved.²¹⁶ To him, the suppression of "unfair" competition from exploited labor was the dominant "evil" the FLSA attacked.²¹⁷ The possibility that the minimum wage law could be a barrier to the entry of unskilled labor into the labor market, and hence the very evil to be avoided, was never assessed. What failed in *Darby* was not the language of the Constitution, but the willingness of the Justices to accept the theory of limited government upon which it rested.

The same failure was repeated in cases that sustained the powerful system of agricultural price supports and acreage restrictions that was introduced by the New Deal. The question in *United States v. Wrightwood Dairy*²¹⁸ was whether Congress could authorize the Secretary of Agriculture to set minimum prices for milk that was produced and consumed within a single state. The usual language which spoke of a transaction "which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof," was duly set out in the statutory language.²¹⁹ Ironically, the anticompetitive effect of federal interstate milk regulation became the justification for a further expansion of federal power:

As the court below recognized, and as seems not to be disputed, the marketing of intrastate milk which competes with that shipped

²¹³ *Hammer v. Dagenhart*, 247 U.S. 251, 281 (1918) (Holmes, J., dissenting).

²¹⁴ See *Darby*, 312 U.S. at 115.

²¹⁵ *Id.* at 124.

²¹⁶ See *id.* at 122.

²¹⁷ *Id.*

²¹⁸ 315 U.S. 110 (1942).

²¹⁹ See *id.* at 116 (quoting the Agricultural Marketing Agreement Act of 1937, ch. 296, 50 Stat. 246 (current version at scattered sections of 7 U.S.C. (1982 & Supp. III 1985))).

interstate would tend seriously to break down price regulation of the latter. Under the conditions prevailing in the milk industry, as the record shows, the unregulated sale of the intrastate milk tends to reduce the sales price received by handlers and the amount which they in turn pay to producers."²²⁰

Even after *Wrightwood* plugged the loophole of intrastate sales, another obstacle remained to comprehensive federal agricultural regulation. Farmers could still influence the price of agricultural products in interstate commerce simply by keeping and using them on their own farms. The scope of agricultural regulation expanded to meet this challenge. *Wickard v. Filburn*²²¹ upheld the statutory authority of the Secretary of Agriculture to limit the consumption of wheat on the very farms that grew it. Here there was no sale transaction at all, but this did not matter to the Court. The government's ability to maintain artificially high regulated prices for goods shipped across interstate lines would surely have been compromised if local consumption had been allowed to expand supply to meet demand. The economic interdependence of the various activities was held to preclude any watertight division between production and commerce.²²² The Court regarded the distinction between direct and indirect effects on interstate commerce as quite beside the point (as indeed it was), and the entire issue of enumerated powers and state autonomy disappeared from view.²²³ Once the Court decided to ignore the limitations of the *Shreveport Rate Case*,²²⁴ it saw *Wickard* as a natural extension of the *Shreveport Rate Case* doctrine. This is just the approach that Justice Jackson took:

The opinion of Mr. Justice Hughes found federal intervention constitutionally authorized because of "matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance."²²⁵

²²⁰ Id. at 120.

²²¹ 317 U.S. 111 (1942).

²²² See id. at 120.

²²³ See id.

²²⁴ The *Shreveport Rate Case*, 234 U.S. 342 (1914).

²²⁵ *Wickard*, 317 U.S. at 123 (quoting *The Shreveport Rate Case*, 234 U.S. at 351).

Carefully excised from the quotation was the beginning of Justice Hughes's sentence: "[Congress'] authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters"²²⁶ This excision, doubtless deliberate, completed the transformation of the commerce clause.

The question then arises as to how is it possible to stand a clause of the Constitution upon its head. I do not think that the explanation comes from any vagueness in the language of the commerce clause.²²⁷ If a Court innocent of political theory or of any predeliction on the merits of the underlying legislation approached a commerce case, it could not possibly parse the words of the clause so as to reach the extravagant interpretations of federal power accepted in *Jones & Laughlin*, *Darby*, *Wrightwood*, and *Wickard*. Could anyone say with a straight face that the consumption of home-grown wheat is "commerce among the several states?" A powerful principle must have led to so fanciful a conclusion. That principle has to go to the idea of what kind of government and social organization is thought to be just and proper for society at large.

I have no doubt that the Justices of the Supreme Court who forged so powerful a doctrine had such a conception in mind. At one level they rejected the idea of limited federal government and decentralized power. That idea only made sense if there was a risk that governments could misbehave. If it was thought that they always acted in the public interest, then any effort to deny them substantive power would have hobbled the forces of virtue and enhanced those of wickedness. It is noticeable that all the key New Deal commerce clause opinions took the substantive findings of Congress at face value. None was prepared to identify the powerful interest group politics that were so evident in both the labor and agricultural cases—the very policy areas in which the commerce clause reached its present scope. Once government is thought to be the source of risk, however, then competition between governments makes sense, and there is good reason to uphold the ideas of lim-

²²⁶ *The Shreveport Rate Case*, 234 U.S. at 351. Professor Tribe's rendition of the *The Shreveport Rate Case*'s sentence suppresses this first clause as well, with the exception of keeping the word "control" and dropping the words "their operations in." Tribe, *supra* note 28, § 5-4, at 235 (quoting *The Shreveport Rate Case*, 234 U.S. at 351).

²²⁷ See *supra* notes 13-16 and accompanying text.

ited government and enumerated federal powers that were part of the original design. The New Deal's change in attitude toward the commerce clause thus depended upon a radical reorientation of judicial views toward the role of government that in the end overwhelmed the relatively clean lines of the commerce clause.

In addition, the key federal laws of the New Deal cartelized either labor or product markets that would otherwise have been highly competitive absent government regulation.²²⁸ Indeed, there were substantive challenges to each of these laws, usually under the due process clause.²²⁹ These developments were not unrelated, for jurisdictional limitations upon the power of Congress only made sense if there was reason to think that use of the power would have been harmful. Yet once the idea that markets performed useful functions was cast aside, the jurisdictional limitations ceased to make any sense. The war cry became a call for Congress to act because, in an age of economic interdependence, national problems demanded national solutions.²³⁰

Yet the point about economic interdependence mistakes the disease for the cure. It is precisely because markets are interdependent that there is reason to fear comprehensive federal regulation.²³¹ Competitive markets are the best way to allocate scarce

²²⁸ Descriptively, one reason why there is little federal regulation of land use, for example, is that the markets for land tend to be more local than national. For these markets federal regulation is of little assistance, so regulation is apt to take place at the local level. But where the economics change, as with strip-mining, the regulation becomes federal. For my views on how the eminent domain clause of the fifth amendment, as applied to both federal and state governments, should function, see R. Epstein, *supra* note 156; Epstein, *supra* note 34.

²²⁹ See, e.g., *Wickard*, 317 U.S. at 129-33; *Darby*, 312 U.S. at 125; *Jones & Laughlin*, 301 U.S. at 43-49. *Wrightwood Dairy*, 315 U.S. at 110, is an apparent exception, but only because the question whether the state could control the price of milk had already been resolved in favor of the state. See *Nebbia v. New York*, 291 U.S. 502 (1934).

²³⁰ Professor Tribe has written that

Hammer v. Dagenhart highlights the tension that existed between the Supreme Court's taxonomic approach to the commerce clause in the early 20th century—an approach grounded in the theory of dual sovereignty and sustained by a faith in the market as the proper mechanism for distributing wealth—and the increasingly undeniable consequences of economic interdependence.

Tribe, *supra* note 28, § 5-7, at 238 n.1. The word "creating" should be inserted in place of "distributing" to understand the economic case.

²³¹ Moreover, there is reason to fear local regulation that is designed to preclude external competition, as in *Gibbons*. Indeed, the great achievement of the commerce clause has been its negative side, which has precluded state regulation even when the federal government has not acted. Perhaps the ideal form of the commerce clause should have been negative:

goods and services. They promise to bring price into line with the marginal cost of production, and they hold out some hope that all the possible gains from trade will be achieved by voluntary transactions. Markets are not just a good in themselves. They are powerful instruments for human happiness and well-being.

Legal monopolies have precisely the opposite effect. They raise price above marginal cost and they prevent many voluntary transactions from taking place, so that the total social output is reduced by the deadweight loss that they cause. Worse still, the ability to obtain legal protection against competition invites individuals and groups to spend valuable resources in order to obtain (or resist obtaining) economic rents.²³² Even though no market is an ideal competitive market, there is absolutely no reason to impose economic regulations, such as minimum price laws or cartelization of labor markets, whose only effect is to drive quantity and price further from the competitive equilibrium. When viewed from this perspective, the Wagner Act, the Fair Labor Standards Act, and the Agricultural Marketing Acts appear to be long-standing social disasters that could not long have survived with their present vigor solely at the state level.

There is a dangerous tendency to assume that competitive injury and physical injury form part of a seamless web, so that the power to regulate the one necessarily confers the authority to regulate the other. It is as though the power to protect interstate commerce against robbers and thieves²³³ is sufficient warrant for the far more extensive social controls that treat competitive activities undertaken within different states, when the social consequences of violence and competition are so radically different.²³⁴ The ability to conceive of competitive injury as a justification for the exercise of federal power lies at the root of all the modern commerce clause

"No state shall have any power to pass legislation that interferes with the freedom of commerce among the several states." There are of course difficulties to this proposal. For example, it makes any sensible response to the long-haul/short-haul problem difficult. The mischief of excessive federal action, however, is far greater.

²³² See Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 *W. Econ. J.* 224, 232 (1967), for the first demonstration of the point. I have addressed some of these problems in Epstein, *supra* note 34.

²³³ See *supra* note 62.

²³⁴ For the modern analogue, see *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), dealing with the ability of the federal government to regulate the states themselves under the commerce clause.

decisions. The ability to perceive the essential difference between violence and competition is *all* that is needed to respect the limitation on federal power that is implicit in the commerce clause.

VI. CONCLUSION

I thus return to my original theme: Although questions of jurisdiction and substantive rights appear to be distinct, the unfortunate history of decisionmaking under the commerce clause shows how unbreakable is the link between them. The very distinction between violence and competitive harm that is necessary for organizing the private and public substantive law is critical to an understanding of the proper principles of federal jurisdiction. Hamilton may not have had it all correct when he said that sound limitations on government jurisdiction obviated the need for a bill of rights.²³⁵ But he was surely correct when he said that the maintenance of those jurisdictional limitations is one essential bulwark to sound constitutional government.²³⁶

The problem of sovereignty remains: How do the people compel the holders of governmental monopoly power to act as though they could only obtain a competitive return for their services?²³⁷ Federalism facilitates a solution by allowing easy exit, as well as by allowing voice. National regulation prevents unhealthy types of competition among jurisdictions, such as were present in *Gibbons*. Under this view, the old construction of the commerce clause makes sense; it facilitates national markets by preventing state balkanization. This was the achievement of *Gibbons*. The great peril of national regulation is that it may be taken too far, to impose national uniformity which frustrates, rather than facilitates markets. This was the New Deal. I cannot help thinking that a sound view of the commerce clause is one that returns to *Gibbons*. The affirmative scope of the commerce power should be limited to those matters that today are governed by the dormant commerce clause: interstate transportation, navigation and sales, and the activities closely incident to them. All else should be left to the states.

I realize that this conclusion seems radical because of the way

²³⁵ See The Federalist No. 84 (A. Hamilton); supra notes 5-8 and accompanying text.

²³⁶ See id.

²³⁷ See R. Epstein, supra note 156, ch. 2.

the clock has turned. One is hesitant to require dismantling of large portions of the modern federal government, given the enormous reliance interests that have been created. And I do not have, nor do I know of anyone who has, a good theory that explains when it is appropriate to correct past errors that have become embedded in the legal system. It is far easier to keep power from the hands of government officials than it is to wrest it back from them once it has been conferred. We had our chance with the commerce clause, and we have lost it.

Still, the argument from principle seems clear enough, even if one is left at a loss as to what should be done about it. And in a sense that is just the point. Congress and the courts can proceed merrily on their way if they are convinced that the basis for an extensive federal commerce power is rooted firmly in the original constitutional text or structure. But uneasiness necessarily creeps into the legislative picture if, as I have argued, the commerce clause is far narrower in scope than modern courts have held. There is a powerful tension between the legacy of the past fifty years and the original constitutional understanding. It is a tension that we must face, even if we cannot resolve it.

