THE FEDERAL CHILD-LABOR LAW

ANOTHER VIEW OF ITS CONSTITUTIONALITY

ANY consideration of the constitutionality of the federal Child-Labor Law[1] may well begin with an admission that Congress cannot directly prohibit the employment of children in a mining or manufacturing industry within a state. However much the Knight case[2] may have been undermined by more recent decisions,[3] its distinction between production and commerce is still effective to prevent direct congressional regulation of manufacturing and production as distinguished from sale and transportation. This admitted lack of power directly to prohibit child labor is not, however, conclusive against congressional regulation affecting the employment of children. Neither the Knight case, nor any other decision of the Supreme Court, has ever held that Congress could not, in the exercise of its power over commerce, affect the conditions under which manufacturing is carried on within a state. Notwithstanding the lack of power to regulate intrastate railroad rates, Congress may affect such rates through a regulation of interstate rates.[4] In like manner, Congress may, and frequently does, indirectly affect conditions of manufacturing. The immunity from congressional action which is sometimes sought for manufacturing would require an amendment to the Federal Constitution declaring that under no circumstances shall an act of Congress affect conditions of production within a state.

In the absence of such a negation of power, Congress may accomplish indirectly what it may not be able to do directly. There is nothing in the manufacture of goods, any more than in the other conditions and relationships involved in personal

[1] Chapter 432, Acts of Congress of 1916.

[2] United States *v.* E. C. Knight Co. (1895) 156 U. S. 1.

[3] Addystone Pipe and Steel Co. *v.* United States (1899) 175 U. S. 211.

[4] Minnesota Rate Cases (1913) 230 U. S. 352, 399; Houston, East and West Texas R. Co. *v.* United States (Shreveport Rate Case) (1914) 234 U. S. 342.

actions within a state, which excludes the possibility of indirect regulation by Congress. Congress had no power to prohibit the conduct of lotteries, but a congressional prohibition of interstate commerce in lottery tickets was upheld by the Supreme Court and had the effect of practically abolishing lotteries;[1] Congress had no power directly to regulate the quality of food and drugs manufactured or sold within a state, but acts of Congress prohibiting interstate commerce in adulterated or misbranded food or drugs have been upheld by the courts, and have in a large measure prevented the manufacture of impure foods and the sale of misbranded foods;[2] Congress had no power to prohibit the use of poisonous phosphorus in the manufacture of matches, but an act of Congress placing a prohibitive tax on phosphorus matches has had the effect of driving poisonous phosphorus out of the match factories of the country.[3] These and many other instances of prohibitions of interstate commerce and of regulations under the guise of taxation establish beyond all doubt the power of Congress to reach conditions and accomplish results by indirect action, which admittedly it cannot reach and accomplish by direct action.

The constitutionality of a prohibition of interstate commerce depends on the interpretation to be given to the commerce clause and to the Fifth Amendment to the Federal Constitution. The commerce clause determines the jurisdiction over commerce which has been delegated to Congress as distinguished from that which has been reserved to the states. The Fifth Amendment determines the extent to which the federal government in the exercise of its delegated powers is controlled by the right of the individual—not the state—to insist that the federal action shall not deprive him of life, liberty or property without due process.

In determining the respective jurisdictions of the federal

[1] Act of 1895, held constitutional in Champion *v.* Ames (1903) 188 U. S. 321.

[2] Act of June 30, 1906 (34 Stat. 768, Ch. 3915) interpreted and its penalties enforced in Hipolite Egg Co. *v.* United States (1911) 220 U. S. 45, and United States *v.* Lexington Mill and Elevator Co. (1914) 232 U. S, 399; see also Seven Cases *v.* United States (1916) 239 U. S. 510.

[3] Act of April 9, 1912 (37 Stat. 81).

government and the states over commerce, we are confronted with the necessity of ascertaining, first, what is "commerce among the several states" and, second, what is included within the power "to regulate." Mr. Hull's article contains an interesting description of the extreme limits of interstate as distinguished from intrastate commerce. The cases involving this problem are interesting and might be controlling if Congress had legislated directly to prohibit the employment of children in industries carried on within a state. Then, as in the Adair case,[1] and the Employers' Liability Cases,[2] the question would have been whether the conditions and relationships regulated were included within the field of "commerce among the several states." But Congress did not directly prohibit the employment of children; it simply prohibited the transportation in interstate commerce of specified goods. These goods undoubtedly are articles of commerce. They are by the Act excluded from commerce "among the several states." Can there be any doubt that the carriage of these goods from one state to another is interstate commerce, and, if it is, does it not follow that the only question under the commerce clause, raised by the Child-Labor Law, is the extent of the power to regulate?

Does the power to regulate include the power to prohibit, and, if so, what are the limitations, if any, on the power to prohibit with relation, either to the nature of the persons or goods excluded from interstate commerce, or the purposes actuating such exclusion? The power of Congress to prohibit foreign commerce was recognized early in our history and has been frequently exercised. This recognition of power to prohibit foreign commerce drawn from a delegation of power "to regulate" such commerce is important when considering prohibitions of interstate commerce, because, as the Supreme Court has said, "the grant is conceived under the same terms and the two powers are undoubtedly of the same class and character and equally extensive."[3] The Supreme Court has also said:

[1] Adair *v.* United States (1907) 208 U. S. 161.

[2] 207 U. S. 463.

[3] Bowman *v.* Chicago and Northwestern Ry. (1888) 125 U. S. 465, 482.

"It has frequently been laid down by this court, that the power of Congress over interstate commerce is as absolute as it is over foreign commerce."[1] If this is true, it follows that these authorized congressional prohibitions of foreign commerce are precedents in support of congressional prohibitions of interstate commerce. This is not to say that in the exercise of its power to prohibit interstate commerce Congress may exercise the same arbitrary power of prohibition which has been sustained in the field of foreign commerce. Congress may exercise an arbitrary power of prohibition of foreign commerce, because it has been held that the individual has no right to engage in foreign commerce which will be protected under the Fifth Amendment. The individual has, however, a right to seek an interstate market, and this right Congress cannot take from him, except by due process.[2] To hold, therefore, that prohibitions of foreign commerce are precedents in support of prohibitions of interstate commerce, does not mean that Congress may prohibit as freely *in the field of interstate commerce as in the field of foreign* commerce. The reason for the difference, however, is found, not in the commerce clause defining the federal power over commerce, but in the Fifth Amendment limiting the power of Congress to affect the private rights of the individual.

The power of Congress to prohibit interstate commerce, while supported by the precedents establishing the right to prohibit foreign commerce, is not dependent upon them. The Supreme Court has sanctioned congressional prohibitions of the shipment or transportation in interstate commerce of lottery tickets, obscene literature and adulterated or misbranded food or drugs. It has held constitutional the Mann Act, prohibiting the transportation of women in interstate commerce for immoral purposes;[3] and it has upheld the equivalent of prohibition of interstate transportation of intoxicating liquors.[4] We must,

[1] Crutcher *v.* Kentucky (1891) 141 U. S. 47, 57.

[2] See note 1, p. 539, *infra*.

[3] Act of Congress, June 25, 1910, held constitutional in Hoke *v.* United States (1913) 227 U. S. 308.

[4] The Wilson Act, held constitutional in In re Rahrer (1891) 140 U. S. 545, and the Webb-Kenyon Act, interpreted in Adams Express Co. *v.* Kentucky (1914) 238 U. S. 190.

therefore, take it as established, that the power to "regulate commerce among the states" includes, under some circumstances at least, the power to prohibit such commerce.

What are the circumstances under which interstate commerce may be prohibited? This power might have been confined to the advancement of interstate commerce or the protection of its instrumentalities. The Supreme Court might have ruled that prohibitions of interstate commerce would be sustained only when they exclude dynamite, diseased cattle or other things or persons dangerous or detrimental to interstate commerce or its instrumentalities. The Supreme Court, however, has not seen fit thus to limit the power of Congress to prohibit commerce. It has sustained many prohibitions enacted, not for the protection or advancement of commerce, but solely in the interest of promoting the public health or welfare. It was this authorization of the use of congressional prohibitions of interstate commerce in specified persons or things in the interest of the betterment of conditions in the community which made possible such legislation as the Child-Labor Act.

As early as 1808 it was said: "The power to regulate commerce is not to be confined to the adoption of measures exclusively beneficial to commerce itself, or tending to its advancement, but in our national system as in all modern sovereignties it is also to be considered as an instrument for other purposes of general policy and interest."[1] While this remark was made in a case involving foreign commerce, recent cases have demonstrated that it is equally true in the field of interstate commerce that the power of Congress may be used "as an instrument for the purposes of general policy." In the Lottery Case the court said:

> If a state when considering legislation for the suppression of lotteries within its own limits may properly take into view the evils that inhere in the raising of money in that mode, 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?[2]

[1] United States *v.* Williams (1808) 18 Fed. Cases 614.

[2] Champion *v.* Ames, *supra*, p. 532, n. 1.

Lottery tickets were harmless articles of commerce; there was nothing dangerous or immoral in transporting them from one state to another. They were innocent articles, the only harm in which consisted in the fact that they were the instrumentalities of a gambling transaction. Congress prohibited their transportation, not with a view to protecting or advancing commerce, but solely for the purpose of sustaining established standards of public morality and ideals of public welfare against the insidious effects of public gambling. The purpose of this prohibition was recognized by the court and it was sustained as a proper regulation of commerce. The principle underlying this case has been reaffirmed and applied to sustain an equally important prohibition of interstate commerce—the Mann White-Slave Act—where the congressional purpose was to prevent the use of the instrumentalities of interstate commerce to further practices contrary to public morals.[1]

Since the Supreme Court has gone thus far in supporting congressional prohibition of interstate commerce in the interest of public morality and public welfare, on what ground can the Child-Labor Act be distinguished and annulled? The principal ground of distinction between the lottery and like cases, and the child-labor case, which has thus far been advanced, is that there is a difference between congressional prohibitions of commerce to protect the consumer and congressional prohibitions to protect the producer. It is said that while Congress may look forward to protect the consumer against articles transported to him through interstate commerce, Congress may not look backward to protect the producer of articles which are later to be sold and transported in interstate commerce. In the latter case it is urged that the evil aimed at has been completed in the production of the goods which are offered for transportation, and no additional evil may be expected to flow from their transportation to another state.

This attempted distinction between protection of the consumer and protection of the producer finds no support either in the opinions of the Supreme Court or in the acts of Con-

[1] Hoke *v.* United States, *supra*, p. 534, n. 2.

gress. The Lacey Act[1] prohibiting interstate shipment of game killed contrary to state laws had for its obvious purpose, not the protection of the consumer, but the protection of the people or the hunters of the state of origin. The principal purpose of the White-Slave Act was to protect women and girls against that enslavement which might follow their interstate transportation. Interstate transportation facilitated the accomplishment of the criminal purpose and thereby contributed to the possibility of serious wrong to persons in the jurisdiction from which the interstate journey took place. Under both of these acts, therefore, it is not the community to which, but the community from which, the transportation occurred that received the most direct benefit from the legislation. Indeed, this attempted distinction between protection of consumer and protection of producer was evolved by the critics of the lottery case who sought vainly for some bar which would prevent further extensions of the federal power. Its proponents are standing on their political ideas of what ought to be in the Constitution rather than on what the Supreme Court has said is there.

The fact is, these prohibitions of interstate commerce have been sustained, not because they protect the consumer or the producer, or the community at the beginning or at the end of an interstate journey; they were sustained by the Supreme Court as regulations of interstate commerce in the interest of protecting and advancing the public morals and the public welfare by suppressing gambling and the white-slave traffic. It was not the welfare of the consumer which justified the lottery prohibition; it was the welfare of the nation. It was not the welfare of any individual which justified the Mann Act, it was again the welfare of the nation. If the national welfare is the real underlying justification for the indirect use of the commerce power in these cases, what is there in the fact that in the one case the public welfare is affected by what happens at the end of an interstate journey and in the other by what precedes that journey, which would justify holding the one a reasonable exercise of the commerce power for the protection of the public

[1] 242 of the Criminal Code of the United States.

morals and the public welfare and the other an unreasonable interference with the reserved powers of the state?

Mr. Hull makes an interesting suggestion when he says that the power of Congress to regulate commerce in the interest of public health, safety, morals or welfare—i. e., the so-called police power of Congress—is limited to "a matter or thing menacing, threatening, harming or injuring the morals, health or welfare of that sovereignty's [Congress] subject." "Therefore," he says, "to uphold the Child-Labor Law under the theory of the police power it must be clear that interstate commerce (the domain over which Congress has a sovereignty) is menaced." He points out that the "menace to health and morals" involved in child labor has a "locality," namely, the place in which the child is employed. He admits that a prohibition of interstate commerce would constitute a "deterrent" to this "menace"; but he says that by such prohibition "the police power becomes operative outside of the domain of interstate commerce; and beyond the borders of that domain the police power of Congress, like the king's writ beyond his kingdom, does not run."

This is a limitation of the power of Congress to regulate commerce in the interest of public welfare—the police power—which is directly contrary to the decisions in the lottery and the white-slave cases. There the menace to health and morals was the conduct of a gambling business and improper practices through interstate commerce. The lottery proprietor sought his market through interstate commerce, and Congress took that market away from him in order that he might find his business unprofitable and discontinue it. Congress, in effect, abolished the lottery business; and to that extent its exercise of the police power became "operative outside of the domain of interstate commerce." Child labor is a menace to health and morals and it has more and more become a menace which involves matters of national concern. As a nation we are interested in the health and vigor of our future citizenship. Therefore, Congress steps in and says to the employers of children: You may not make use of the instrumentalities of interstate commerce in order to find a market for the goods which you have produced,

at the expense of the national interest in health and morals. The two cases seem identical from the point of view of the real purpose sought by Congress; and if the police power of Congress, under the commerce clause, is limited to "the domain over which Congress has a sovereignty" and cannot be "operative outside of the domain of interstate commerce," then the Lottery Case must be qualified or overruled.

It is not true, however, that an admission of power in Congress to prohibit interstate transportation in any case where such prohibition will protect or advance the public health, safety, morals or welfare, involves an admission of arbitrary power to prohibit any or all interstate commerce.[1] The Fifth Amendment, while primarily adopted in the interest of protecting the personal and property rights of the individual against congressional aggression is, nevertheless, sufficient guarantee against any arbitrary or unreasonable use of the commerce power to affect seriously the jurisdiction of the states. In providing that Congress may not exercise even its admitted powers in such manner as to deprive a person of life, liberty, or property with-

[1] "Like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument and among them is that of the Fifth Amendment." (Mr. Justice Brewer in Monongahela Navigation Co. *v.* United States (1893) 148 U. S. 312, 336.) See also Champion *v.* Ames (1903) 188 U. S. 321, 362, where Mr. Justice Harlan, in answer to the contention that if Congress could exclude lottery tickets from interstate commerce, it could arbitrarily exclude any article, replied: "The power of Congress to regulate commerce among the states, although plenary, cannot be deemed arbitrary, since it is subject to such limitations or restrictions as are prescribed by the Constitution. This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument. . . . The possible abuse of a power is not an argument against its existence." In Adair *v.* United States (1908) 208 U. S. 161, 172, Mr. Justice Harlan said in considering an Act of Congress making it a criminal offence against the United States for an agent or officer of an interstate carrier to discharge an employee because of his membership in a labor organization: "The first inquiry is whether the . . . 10th section of the Act . . . is repugnant to the Fifth Amendment of the Constitution, declaring that no person shall be deprived of liberty or property without due process of law. In our opinion that section, in the particular mentioned, is an invasion of the personal liberty, as well as of the right of property, guaranteed by that Amendment." This interpretation of the due-process clause of the Fifth Amendment was the basis for a similar interpretation of the due-process clause of the Fourteenth Amendment in Coppage *v.* Kansas (1915) 236 U. S. 1, 10–11.

out due process of law, the Fifth Amendment has effectively prevented arbitrary or unreasonable prohibitions of the right to ship or transport goods from one state to another. Such prohibitions, under the provisions of this amendment, will be valid only when they are reasonable regulations of private rights bearing a substantial relation to the betterment of evil conditions existing in the nation. They will be upheld only where experience has demonstrated the existence of a menace to the public welfare and has developed a public opinion favorable to its legislative control. No serious disturbance of the relation between the federal government and the states may be expected from the exercise of a power thus limited in the interest of the individual. Economy of governmental effort and substantial improvement in the public health and welfare may, however, be expected to follow congressional insistence, even though it be by indirection, upon maintenance in all of the states of standards which have been accepted and enforced in most of the states.

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THE TRAINMEN'S EIGHT-HOUR DAY

THE American people have recently witnessed what, in some respects, has been the most forceful demonstration of the strength of organized labor in the history of the United States. Four unions, representing approximately 325,000 trainmen,[1] with power to paralyze the nation's transportation facilities, petitioned their employers for an eight-hour day for part of their number,[2] and when the request was refused, these organizations, by an overwhelming vote, decided to strike rather than relinquish their position. Private agencies, the Federal Board of Mediation and Conciliation, and the President of the United States, all failed to bring about an amicable settlement. Only when Congress in the closing hours of its session hastily passed an act granting the wishes of the men was the impending catastrophe averted—a piece of legislation which has been variously characterized as "turning an emergency to constructive purposes,"[3] and as "the most disgraceful scene ever enacted in the history of America."[4] This article and one which is to follow are intended to be accounts of the crisis as it is recorded in the authorized statements and printed matter of the railroads and brotherhoods, as well as in the stenographic reports of conferences held between the railway managers and union leaders. The present paper deals specifically with the following: such information concerning the origin and development of the brotherhoods as seems germane to an understanding of their purposes and methods of procedure; the

[1] The total membership of the four organizations in round numbers is: conductors, 50,000; engineers, 75,000; firemen, 80,000; trainmen, 120,000.

[2] There is a popular notion that the demand of the unions for an eight-hour day embraced all branches of road, yard and hostling service. There was no request on behalf of passenger crews. The fact that the passenger men later voted to strike to enforce the demand in other lines is merely indicative of the remarkable degree of solidarity existing among train-service employees.

[3] *New Republic*, Sept. 2, 1916, p. 100.

[4] *Railway Age Gazette*, Sept. 8, 1916, p. 393.