XIII

Interstate Commerce

NOTE

The commerce clause was first interpreted by the Supreme Court in 1824 in *Gibbons* v. *Ogden*. This is the parent decision of a great mass of subsequent decisions justifying federal control on the basis of the commerce power.

Under the Articles of Confederation, each state tended to further its own prosperity at the expense of other states. 'Any state,' says Farrand, 'which enjoyed superior conditions to a neighboring state was only too apt to take advantage of that fact. Some of the states, as James Madison described it, "having no convenient ports for foreign commerce, were subject to be taxed by their neighbors, through whose ports their commerce was carried on. New Jersey, placed between Philadelphia and New York, was likened to a cask tapped at both ends; and North Carolina, between Virginia and South Carolina, to a patient bleeding at both arms." The Americans were an agricultural and a trading people. Interference with the arteries of commerce was cutting off the very life-blood of the nation, and something had to be done. The articles of confederation provided no remedy. . .'[1] The gentlemen who met in Philadelphia in the summer of 1787, however, were resourceful. In an effort to improve interstate trade relations, to ensure the development of improved arteries of commerce, to provide a larger market for the products of farm and what little industry there was, the Congress was empowered in the Constitution 'to regulate commerce . . . among the several states. . .'

Towards the end of the 18th century, Robert R. Livingston of New York became interested in the development of a vessel propelled by steam. In 1798, he prevailed upon the New York Legislature to grant to him the exclusive right for twenty years to operate steam vessels on the waters of the State, provided that within a year he could produce a steam vessel whose progress should not be less than four miles an hour against the current of the Hudson.[2] Not meeting the requirement of the proviso, Livingston secured a renewal of the grant. Though the vessel was not built, the legislature continued to renew the grant. In the meantime, Livingston had met Robert Fulton. Impressed with the latter's achievements in developing a steam-propelled vessel, Livingston and Fulton formed a partnership.

In 1803, the legislature granted monopoly privileges to Livingston and Fulton.[3] Again the grant lapsed and again it was renewed. Finally, on 17 April 1807, their vessel successfully made the run from New York to Albany.

[1] Farrand, Max, *The Framing of the Constitution of the United States*, New Haven, 1926, p. 7.
[2] Act of 27 March, Laws of New York, 21st sess., chap. 55.
[3] Act of 5 April, Laws of New York, 26th sess., chap. 94.

The New York legislature on 11 April 1808 passed an act which provided that 'whenever Robert R. Livingston and Robert Fulton, and such persons as they may associate with them, shall establish one, or more steam-boats or vessels, other than that already established, they shall, for each and every additional boat, be entitled to five years prolongation of their grant or contract with this state: *Provided nevertheless,* That the whole term of their exclusive privileges shall not exceed thirty years, after the passage of this act.'[4] The act provided further 'That no person or persons, without the license of . . . ,' Livingston and Fulton, 'shall set in motion, or navigate upon the waters of this state . . . any boat or vessel moved by steam or fire. . .'[5]

Aaron Ogden purchased from the monopoly the right to operate steam ferry boats from New York to various points on the New Jersey shore. Ogden combined with Thomas Gibbons who operated a steam vessel between New Jersey landings. The combination provided only for the exchange of passengers at Elizabethtown Point in New Jersey; but, in a sense, Gibbons was carrying passengers from New York to points in New Jersey not served by Ogden directly. This practice was considered a violation of the right purchased by Ogden from the monopoly, and the latter sought an injunction against Ogden and Gibbons. In the Court of Chancery Ogden declared that his license applied only to the waters of New York and had no application to the waters of New Jersey. Gibbons argued that he operated under a coasting license procured from the Federal government in accord with an act of Congress.[6] He denied that the monopoly had the exclusive privilege of running steam vessels between New York and New Jersey. The Court of Chancery declared that by act of 6 April 1808 New York had asserted jurisdiction over the whole Hudson River. 'I shall therefore deny the motion,' said Chancellor James Kent, 'as against the defendant Ogden, who navigates his boat under authority from the plaintiff, and who does not appear, in any instance, to have exceeded that authority; and I shall grant the motion, as against the defendant Gibbons, so far only as to enjoin him from navigating the waters in the Bay of New York or Hudson River between Staten Island and Powles Hook.'[7]

Gibbons, thereupon, began to run steam vessels regularly between New York and New Jersey, in competition with Ogden. The latter sued for an injunction to restrain his former partner. Gibbons in defense asserted his right to run his

[4] Laws of New York, 31st sess., chap. 225.

[5] Ibid. Not content with monopoly privileges in New York, Livingston and Fulton placed steam vessels on the Mississippi, and in 1811, procured a monopoly from the territorial legislature of Orleans; thus, the most important artery of trade in middle America came under the control of Livingston and Fulton. And the monopoly virus spread. Samuel Howard of Savannah was granted exclusive rights to transport merchandise upon Georgia waters in all vessels propelled by steam. Massachusetts by act of February 1815 granted similar privileges to Langdon Sullivan. New Hampshire provided the same accommodation to the same Sullivan. Vermont, also, granted navigation privileges in that part of Lake Champlain which came under her jurisdiction to a monopoly. Such conditions were hardly conducive to a free flow of interstate commerce. See Beveridge, Albert J., *The Life of John Marshall,* Boston, 1929, IV, pp. 414-15.

[6] 1 Stat. 305-18 (1793).

[7] *Livingston* v. *Ogden and Gibbons,* 4 Johnson's Chancery Reports, 48, 52-53 (1819).

vessels between the two states on the ground that he was licensed to do so by the Federal Government. 'The Act of Congress (passed 18 Feb. 1793, chap. 8),' declared Kent, 'referred to in the answer, provides for the enrolling and licensing ships and vessels to be employed in the coasting trade and fisheries. Without being enrolled and licensed, they are not entitled to the privileges of American vessels, but must pay the same fees and tonnage as foreign vessels; and if they have on board articles of foreign growth and manufacture, or distilled spirits, they are liable to forfeiture. I do not perceive that this Act confers any right incompatible with an exclusive right in Livingston and Fulton to navigate steamboats upon the waters of this State. . .'[8]

Gibbons then appealed to the highest court in the state, the Court for the Trial of Impeachments and the Correction of Errors. This court rejected the arguments of Gibbons and affirmed the decree of the Court of Chancery.[9] Gibbons then appealed to the Supreme Court of the United States.

'[A]re these laws [granting monopoly privileges to Livingston and Fulton],' queried Daniel Webster as counsel for Gibbons, 'such as the legislature of New York had a right to pass? If so, do they, secondly, in their operation, interfere with any right enjoyed under the constitution and laws of the United States, and are they, therefore, void, as far as such interference extends?'

GIBBONS v. OGDEN
9 Wheaton 1 (1824)

MARSHALL, C. J., delivered the opinion of the Court.

The appellant contends that this decree is erroneous, because the laws which purport to give the exclusive privilege it sustains, are repugnant to the constitution and laws of the United States.

They are said to be repugnant:

1st. To that clause in the constitution which authorizes Congress to regulate commerce. . .

As preliminary to the very able discussions of the constitution, which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these states, anterior to its formation. It has been said, that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But when these allied sovereigns converted their league into a government, when they converted their congress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character in which the states appear, underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said, that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the

[8] *Ogden* v. *Gibbons*, 4 Johnson's Chancery Reports, 150, 156 (1819).
[9] *Gibbons* v. *Ogden*, 17 Johnson's Chancery Reports (Court of Errors), 488 (1820).

means for carrying all others into execution, congress is authorized 'to make all 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; nor is there one sentence in the constitution which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. . . If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well-settled rule that the objects for which it was given, especially, when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. . .

The words are, 'congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.' The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. 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 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. If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word 'commerce' to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late.

If the opinion that 'commerce' as the word is used in the constitution, comprehends navigation also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself. It is a rule of construction, acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power, that which was not granted—that which the words of the grant could not comprehend, if, then, there are in the constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted. The 9th section of the last[1] article declares that 'no preference

[1] Editors' note: This is an error; the *first* Article was intended.

shall be given, by any regulation of commerce or revenue, to the ports of one state over those of another.' This clause cannot be understood as applicable to those laws only which are passed for the purposes of revenue, because it is expressly applied to commercial regulations; and the most obvious preference which can be given to one port over another, in regulating commerce, relates to navigation. But the subsequent part of the sentence is still more explicit. It is, 'nor shall vessels bound to or from one state, be obliged to enter, clear, or pay duties in another.' These words have a direct reference to navigation.

The universally acknowledged power of the government to impose embargoes, must also be considered as showing, that all America is united in that construction which comprehends navigation in the word commerce. Gentlemen have said, in argument, that this is a branch of the war-making power, and that an embargo is an instrument of war, not a regulation of trade. That it may be, and often is, used as an instrument of war, cannot be denied. An embargo may be imposed, for the purpose of facilitating the equipment or manning of a fleet, or for the purpose of concealing the progress of an expedition preparing to sail from a particular port. In these, and in similar cases, it is a military instrument, and partakes of the nature of war. But all embargoes are not of this description. They are sometimes resorted to, without a view to war, and with a single view to commerce. In such case, an embargo is no more a war measure, than a merchantman is a ship of war, because both are vessels which navigate the ocean with sails and seamen. . .

The word used in the constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation, is as expressly granted, as if that term had been added to the word 'commerce.' To what commerce does this power extend? The constitution informs us, to commerce 'with foreign nations, and among the several states, and with the Indian tribes.' It has, we believe, been universally admitted, that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend. It has been truly said, that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term.

If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it. The subject to which the power is next applied, is to commerce, 'among the several states.' The word 'among' means intermingled with. A thing which is among others, is intermingled with them. 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. The 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 generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.

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. If congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the states, if a foreign voyage may commence or terminate at a port within a state, then the power of congress may be exercised within a state. . .

We are now arrived at the inquiry—what is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. 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. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. 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. . .

But it has been urged, with great earnestness, that although the power of congress to regulate commerce with foreign nations, and among the several states, be co-extensive with the subject itself, and have no other limits than are prescribed in the constitution, yet the states may severally exercise the same power, within their respective jurisdictions. In support of this argument, it is said, that they possessed it as an inseparable attribute of sovereignty, before the formation of the constitution, and still retain it, except so far as they have surrendered it by that instrument; that this principle results from the nature of the government, and is secured by the tenth amendment; that an affirmative grant of power is not exclusive, unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant, and that this is not of that description. The appellant, conceding these postulates, except the last, contends, that full power to regulate a particular subject, implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it. Both parties have appealed to the constitution, to legislative acts, and judicial decisions; and have drawn arguments from all these sources, to support and illustrate the propositions they respectively maintain.

The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with

the exercise of the same power by the states; and hence has been drawn an argument which has been applied to the question under consideration. But the two grants are not, it is conceived, similar in their terms or their nature. Although many of the powers formerly exercised by the states, are transferred to the government of the Union, yet the state governments remain, and constitute a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities, at the same time. . . When, then, each government exercises the power of taxation, neither is exercising the power of the other. But when a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power that is granted to congress, and is doing the very thing which congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce.

In discussing the question, whether this power is still in the states, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to congress, or is retained until congress shall exercise the power. We may dismiss that inquiry, because it has been exercised, and the regulations which congress deemed it proper to make, are now in full operation. The sole question is, can a state regulate commerce with foreign nations and among the states, while congress is regulating it?

The counsel for the respondent answer this question in the affirmative, and rely very much on the restrictions in the 10th section, as supporting their opinion. They say, very truly, that limitations of a power furnish a strong argument in favor of the existence of that power, and that the section which prohibits the states from laying duties on imports or exports, proves that this power might have been exercised, had it not been expressly forbidden; and, consequently, that any other commercial regulation, not expressly forbidden, to which the original power of the state was competent, may still be made. That this restriction shows the opinion of the convention, that a state might impose duties on exports and imports, if not expressly forbidden, will be conceded; but that it follows, as a consequence, from this concession, that a state may regulate commerce with foreign nations and among the states, cannot be admitted.

We must first determine, whether the act of laying 'duties or imposts on imports or exports' is considered, in the constitution as a branch of the taxing power, or of the power to regulate commerce. We think it very clear, that it is considered as a branch of the taxing power. It is so treated in the first clause of the 8th section: 'Congress shall have power to lay and collect taxes, duties, imposts and excises'; and before commerce is mentioned, the rule by which the exercise of this power must be governed, is declared. It is, that all duties, imposts and excises shall be uniform. In a separate clause of the enumeration, the power to regulate commerce is given, as being entirely distinct from the right to levy taxes and imposts, and as being a new power, not before conferred. The constitution, then, considers these powers as substantive, and distinct from each other; and so places them in the enumeration it contains. The power of imposing duties on imports is classed with the power to levy taxes, and that seems to be its natural place. But the power to levy taxes could never be considered as abridging the right of the states on that subject; and they might, consequently, have exercised it, by levying duties on imports or exports, had the constitution contained no prohibition on this subject. This prohibition, then, is an exception from the acknowledged power of the states to levy taxes, not from the questionable power to regulate commerce. . .

These restrictions, then, are on the taxing power, not on that to regulate commerce; and presuppose the existence of that which they restrain, not of that which they do not purport to restrain.

But the inspection laws are said to be regulations of commerce, and are certainly recognized in the constitution, as being passed in the exercise of a power remaining with the states. 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 labor 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. They form a portion of that immense mass of legislation which embraces everything within the territory of a state, not surrendered to the general government; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike-roads, ferries, etc. are component parts of this mass.

No direct general power over these objects is granted to congress; and, consequently, they remain subject to state legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be, where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. It is obvious, that the government of the Union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the states, may use means that may also be employed by a state, in the exercise of its acknowledged powers; that, for example, of regulating commerce within the state. If congress license vessels to sail from one port to another, in the same state, the act is supposed to be, necessarily, incidental to the power expressly granted to congress, and implies no claim of a direct power to regulate the purely internal commerce of a state, or to act directly on its system of police. So, if a state, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the state, and may be executed by the same means. All experience shows, that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct, to establish their individuality.

In our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous state governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers, would often be of the same description, and might, sometimes, interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other.

The acts of congress, passed in 1796 and 1799 (1 U.S. Stat. 474, 619), empowering and directing the officers of the general government to conform to, and assist in the execution of the quarantine and health laws of a state, proceed, it is said, upon

the idea that these laws are constitutional. It is undoubtedly true, that they do proceed upon that idea; and the constitutionality of such laws has never, so far we are informed, been denied. But they do not imply an acknowledgment that a state may rightfully regulate commerce with foreign nations, or among the states; for they do not imply that such laws are an exercise of that power, or enacted with a view to it. On the contrary, they are treated as quarantine and health laws, are so denominated in the acts of congress, and are considered as flowing from the acknowledged power of a state, to provide for the health of its citizens. But as it was apparent, that some of the provisions made for this purpose, and in virtue of this power, might interfere with, and be affected by the laws of the United States, made for the regulation of commerce, congress, in that spirit of harmony and conciliation which ought always to characterize the conduct of governments standing in the relation which that of the Union and those of the states bear to each other, has directed its officers to aid in the execution of these laws; and has, in some measure, adapted its own legislation to this object, by making provisions in aid of those of the states. But in making these provisions, the opinion is unequivocably manifested, that congress may control the state laws, so far as it may be necessary to control them, for the regulation of commerce. . .

It has been said, that the act of August 7th, 1789, acknowledges a concurrent power in the states to regulate the conduct of pilots, and hence is inferred an admission of their concurrent right with congress to regulate commerce with foreign nations, and amongst the states. But this inference is not, we think, justified by the fact. Although congress cannot enable a state to legislate, congress may adopt the provisions of a state on any subject. When the government of the Union was brought into existence, it found a system for the regulation of its pilots in full force in every state. The act which has been mentioned, adopts this system, and gives it the same validity as if its provisions had been specially made by congress. But the act, it may be said, is prospective also, and the adoption of laws to be made in future, presupposes the right in the maker to legislate on the subject. The act unquestionably manifests an intention to leave this subject entirely to the states, until congress should think proper to interpose; but the very enactment of such a law indicates an opinion that it was necessary; that the existing system would not be applicable to the new state of things, unless expressly applied to it by congress. But this section is confined to pilots within the 'bays, inlets, rivers, harbors and ports of the United States,' which are, of course, in whole or in part, also within the limits of some particular state. The acknowledged power of a state to regulate its police, its domestic trade, and to govern its own citizens, may enable it to legislate on this subject, to a considerable extent; and the adoption of its system by congress, and the application of it to the whole subject of commerce, does not seem to the court to imply a right in the states so to apply it of their own authority. But the adoption of the state system being temporary, being only 'until further legislative provision shall be made by congress,' shows, conclusively, an opinion that congress could control the whole subject, and might adopt the system of the states, or provide one of its own. . .

It has been contended by the counsel for the appellant, that, as the word 'to regulate' implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what

the regulating power designs to leave untouched, as that on which it has operated. There is great force in this argument, and the court is not satisfied that it has been refuted.

Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the states may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of congress passed in pursuance of the constitution, the court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that state, have, in their application to this case, come into collision with an act of congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial, whether those laws were passed in virtue of a concurrent power 'to regulate commerce with foreign nations and among the several states,' or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous. . .

In pursuing this inquiry at the bar, it has been said, that the constitution does not confer the right of intercourse between state and state. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The constitution found it an existing right, and gave to congress the power to regulate it. In the exercise of this power, congress has passed 'an act for enrolling or licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same.' The counsel for the respondent contend, that this act does not give the right to sail from port to port, but confines itself to regulating a pre-existing right, so far only as to confer certain privileges on enrolled and licensed vessels in its exercise. . . This act demonstrates the opinion of congress, that steamboats may be enrolled and licensed, in common with vessels using sails. They are, of course, entitled to the same privileges, and can no more be restrained from navigating waters, and entering ports which are free to such vessels, than if they were wafted on their voyage by the winds, instead of being propelled by the agency of fire. The one element may be as legitimately used as the other, for every commercial purpose authorized by the laws of the Union; and the act of a state inhibiting the use of either, to any vessel having a license under the act of congress, comes, we think, in direct collision with that act. . .

Reversed.

[Mr. Justice Johnson wrote a concurring opinion.]

NOTE

The case which follows provides an example of the use of the commerce clause to restrict the powers of the state. It is in the field of commerce, particularly, that the Supreme Court, in a quasi-arbitral role, endeavors to balance national and state interests. This is clear if *Baldwin* v. *Seelig* and *Parker* v. *Brown* [1] are compared.

The Seelig Company of New York purchased milk in Vermont; the milk was shipped to New York in cans, a small quantity of which was sold in bottles, and the remainder sold to hotels, restaurants, and stores in the original containers. Seelig refused to pay the Vermont producers the minimum price established for New York producers by the New York Milk Control Board acting in accordance with law. As a consequence, the Milk Board refused to license Seelig's business. Seelig sought an injunction in a Federal District Court to restrain the enforcement of the statute, alleging its unconstitutionality under the commerce clause. The District Court granted a decree in Seelig's favor concerning the milk sold in the original container, but denied relief in regard to milk sold in bottles. Both parties then appealed to the Supreme Court: Baldwin, Commissioner of Agriculture and Markets, sought a reversal of the District Court's decision regarding milk sold in the original cans; Seelig sought a reversal of the lower court's refusal to issue an injunction restraining enforcement of the act in regard to milk sold in bottles. This controversy raised the question of the original package doctrine.

The Constitution provides that Congress shall have power to regulate commerce among the several states and foreign commerce. The Supreme Court interpreted the words 'commerce,' 'commerce among the several states,' and 'to regulate,' in the early case of *Gibbons* v. *Ogden*.[2] The question was bound to arise, however, concerning the point at which interstate commerce passed over into intrastate commerce; in other words, when did interstate commerce end and thus permit state regulation or taxation?

Chief Justice Marshall answered the question partially in *Brown* v. *Maryland*,[3] with his statement of what came to be called the original package doctrine. This case did not involve interstate commerce but foreign commerce. A Maryland statute forbade, without a license from the State, the wholesale disposal of goods imported from foreign countries. The Court held the State statute to be unconstitutional, first, because it conflicted with the power of Congress to regulate foreign commerce; and second, because it violated that clause of the Constitu-

[1] 317 U.S. 341 (1943). See *post*, p. 198.
[2] See *ante*, p. 181.
[3] 12 Wheat. 419 (1827).

tion which prohibits the states from taxing imports without the consent of Congress. In the course of his opinion, Chief Justice Marshall said: 'When the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the constitution.'[4] In an *obiter dictum,* Marshall declared that 'we suppose the principles laid down in this case, to apply equally to importations from a sister state.'[5]

The original package doctrine was not applied to interstate commerce until 1890 in the case of *Leisy* v. *Hardin.*[6] Iowa by law prohibited the sale of intoxicating liquors, including the sale of liquor or beer by the importer to the dispensers, but the Supreme Court held this prohibition to be unconstitutional. The plaintiffs were citizens of Illinois; they imported into Iowa beer which they sold in the original packages; they had a right to do so; finally, 'they had the right to sell it, by which act alone it (the beer) would become mingled in the common mass of property within the State,'[7] and thus subject to state regulation or taxation.[8]

The original package doctrine is a rough rule of thumb and it was presented as such in *Brown* v. *Maryland.* However, it is not always simple to apply; in some cases, there is no original package to be broken.

It was contended in one case that the original packages were not the larger boxes or cases in which goods were imported, but the smaller packages contained therein, and that until these were broken, the state could not impose a tax upon them. The Supreme Court, however, held that the larger case was the original package.[9]

In *Austin* v. *Tennessee,*[10] the defendant was convicted of attempting to evade a Tennessee law prohibiting the sale of cigarettes. He had sold cigarettes in unbroken packages of ten, the packages having been shipped from North Carolina in baskets. 'The whole theory,' said the Court, 'of the exemption of the original package from the operation of state laws is based upon the idea that the property is imported in the ordinary form in which, from time to time immemorial, foreign goods have been brought into the country.'[11] The Court declared that 'If there be any original package at all in this case we think it is the basket and not the paper box.'[12]

[4] Ibid. 441-2. [5] Ibid. 449. [6] 135 U.S. 100.

[7] Ibid. 124. 'Sale,' said Marshall in *Brown* v. *Maryland,* 'is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part.' 12 Wheat. 419, 447.

[8] If Congress wishes it may forbid the importation of intoxicating liquors into 'dry' states. Webb-Kenyon Act of 1913, 37 Stat. 699, upheld in *Clark Distilling Co.* v. *Western Maryland Railroad,* 242 U.S. 311 (1917). In *Whitfield* v. *Ohio,* 297 U.S. 431 (1936), the Court upheld the Hawes-Cooper Convict-made Goods Act, 45 Stat. 1084, which provided that convict-made goods when shipped into a state shall be subject to the laws of that state, and 'shall not be exempt therefrom by reason of being introduced in the original package or otherwise.'

[9] *May & Co.* v. *New Orleans,* 178 U.S. 496 (1900).

[10] 179 U.S. 343 (1900).

[11] Ibid. 359.

[12] Ibid.

When a new automobile is transported from the factory in one state to the dealer in another state, obviously the original package doctrine is not applicable.

In addition, by virtue of the police power, and if a menace to health and safety, a state may forbid the importation of diseased meat and explosives even while in the original package.

The original package doctrine is not a hard and fast rule for the transactions of interstate commerce; in fact, it is flexible and has been spoken of as a rule of judicial convenience. In *Baldwin* v. *Seelig,* Mr. Justice Cardozo asserts that 'the test of the original package is not an ultimate principle. It is an illustration of a principle. . . It marks a convenient boundary and one sufficiently precise save in exceptional conditions. What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.'

BALDWIN v. G. A. F. SEELIG, INC.

294 U.S. 511 (1935)

Mr. Justice Cardozo delivered the opinion of the Court.

Whether and to what extent the New York Milk Control Act (N.Y. Laws of 1933, c. 158; Laws of 1934, c. 126) may be applied against a dealer who has acquired title to the milk as the result of a transaction in interstate commerce is the question here to be determined.

G. A. F. Seelig, Inc. (appellee in No. 604 and appellant in No. 605) is engaged in business as a milk dealer in the city of New York. It buys its milk, including cream, in Fair Haven, Vermont, from the Seelig Creamery Corporation, which in turn buys from the producers on the neighboring farms. The milk is transported to New York by rail in forty-quart cans, the daily shipment amounting to about 200 cans of milk and 20 cans of cream. Upon arrival in New York about 90% is sold to customers in the original cans, the buyers being chiefly hotels, restaurants and stores. About 10% is bottled in New York, and sold to customers in bottles. By concession, title passes from the Seelig Creamery to G. A. F. Seelig, Inc. at Fair Haven, Vermont. For convenience the one company will be referred to as the Creamery and the other as Seelig.

The New York Milk Control Act with the aid of regulations made thereunder has set up a system of minimum prices to be paid by dealers to producers. The validity of that system in its application to producers doing business in New York State has support in our decisions. *Nebbia* v. *New York,* 291 U.S. 502; *Hegeman Farms Corp.* v. *Baldwin,* 293 U.S. 163. . . From the farms of New York the inhabitants of the so-called Metropolitan Milk District, comprising the City of New York and certain neighboring communities, derive about 70% of the milk requisite for their use. To keep the system unimpaired by competition from afar, the Act has a provision whereby the protective prices are extended to that part of the supply (about 30%) which comes from other states. The substance of the provision is that, so far as such a prohibition is permitted by the Constitution, there shall be no sale within the state of milk bought outside unless the price paid to the producers was one that would be lawful upon a like transaction within the state. . .

Seelig buys its milk from the Creamery in Vermont at prices lower than the minimum payable to producers in New York. The Commissioner of Farms and Markets refuses to license the transaction of its business unless it signs an agreement to con-

form to the New York statute and regulations in the sale of the imported product. This the applicant declines to do. Because of that refusal other public officers, parties to these appeals, announce a purpose to prosecute for trading without a license and to recover heavy penalties. This suit has been brought to restrain the enforcement of the Act in its application to the complainant, repugnancy being charged between its provisions when so applied and limitations imposed by the Constitution of the United States. United States Constitution, Art. 1, § 8, clause 3; Fourteenth Amendment, § 1. A District Court of three judges, organized in accordance with § 266 of the Judicial Code (28 U.S.C. § 380), has granted a final decree restraining the enforcement of the Act in so far as sales are made by the complainant while the milk is in the cans or other original packages in which it was brought into New York, but refusing an injunction as to milk taken out of the cans for bottling, and thereafter sold in bottles. See opinion on application for interlocutory injunction:—7 F. Supp. 776; and cf. 293 U.S. 522. The case is here on cross-appeals. 28 U.S.C. § 380.

First. An injunction was properly granted restraining the enforcement of the Act in its application to sales in the original packages.

New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there. So much is not disputed. New York is equally without power to prohibit the introduction within her territory of milk of wholesome quality acquired in Vermont, whether at high prices or at low ones. This again is not disputed. Accepting those postulates, New York asserts her power to outlaw milk so introduced by prohibiting its sale thereafter if the price that has been paid for it to the farmers of Vermont is less than would be owing in like circumstances to farmers in New York. The importer in that view may keep his milk or drink it, but sell it he may not.

Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. Imposts or duties upon commerce with other countries are placed by an express prohibition of the Constitution, beyond the power of a state, 'except what may be absolutely necessary for executing its inspection laws.' Constitution, Art. 1, § 10, clause 2; *Woodruff* v. *Parham*, 8 Wall. 123. Imposts and duties upon interstate commerce are placed beyond the power of a state, without mention of an exception, by the provision committing commerce of that order to the power of Congress. Constitution, Art. 1, § 8, clause 3. 'It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business.' *International Textbook Co.* v. *Pigg*, 217 U.S. 91, 112. . . Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis. We are reminded in the opinion below that a chief occasion of the commerce clauses was 'the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation.' Farrand, *Records of the Federal Convention*, vol. II, p. 308; vol. III, pp. 478, 547, 548; *The Federalist*, No. XLII; Curtis, *History of the Constitution*, vol. I, p. 502; *Story on the Constitution*, § 259. If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting com-

merce between the states to the power of the nation.

The argument is pressed upon us, however, that the end to be served by the Milk Control Act is something more than the economic welfare of the farmers or of any other class or classes. The end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk, the supply being put in jeopardy when the farmers of the state are unable to earn a living income. *Nebbia* v. *New York*, *supra*. Price security, we are told, is only a special form of sanitary security; the economic motive is secondary and subordinate; the state intervenes to make its inhabitants healthy, and not to make them rich. On that assumption we are asked to say that intervention will be upheld as a valid exercise by the state of its internal police power, though there is an incidental obstruction to commerce between one state and another. This would be to eat up the rule under the guise of an exception. Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.

We have dwelt up to this point upon the argument of the state that economic security for farmers in the milk-shed may be a means of assuring to consumers a steady supply of a food of prime necessity. There is, however, another argument which seeks to establish a relation between the well-being of the producer and the quality of the product. We are told that farmers who are underpaid will be tempted to save the expense of sanitary precautions. This temptation will affect the farmers outside New York as well as those within it. For that reason the exclusion of milk paid for in Vermont below the New York minimum will tend, it is said, to impose a higher standard of quality and thereby promote health. We think the argument will not avail to justify impediments to commerce between the states. There is neither evidence nor presumption that the same minimum prices established by order of the Board for producers in New York are necessary also for producers in Vermont. But apart from such defects of proof, the evils springing from uncared for cattle must be remedied by measures of repression more direct and certain than the creation of a parity of prices between New York and other states. Appropriate certificates may be exacted from farmers in Vermont and elsewhere (*Mintz* v. *Baldwin*, 289 U.S. 346; *Reid* v. *Colorado*, 187 U.S. 137); milk may be excluded if necessary safeguards have been omitted; but commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in another, in the faith that augmentation of prices will lift up the level of economic welfare, and that this will stimulate the observance of sanitary requirements in the preparation of the product. The next step would be to condition importation upon proof of a satisfactory wage scale in factory or shop, or even upon proof of the profits of the business. Whatever relation there may be between earnings and sanitation is too remote and indirect to justify obstructions to the normal flow of commerce in its movement between states. . . One state may not put pressure of that sort upon others to reform their economic standards. If farmers or manufacturers in Vermont are abandoning farms or factories, or are failing to maintain them properly, the

legislature of Vermont and not that of New York must supply the fitting remedy.

Many cases from our reports are cited by counsel for the state. They do not touch the case at hand. The line of division between direct and indirect restraints of commerce involves in its marking a reference to considerations of degree. Even so, the borderland is wide between the restraints upheld as incidental and those attempted here. Subject to the paramount power of the Congress, a state may regulate the importation of unhealthy swine or cattle . . . or decayed or noxious foods. *Crossman* v. *Lurman,* 192 U.S. 189; *Savage* v. *Jones,* 225 U.S. 501; *Price* v. *Illinois,* 238 U.S. 446. Things such as these are not proper subjects of commerce, and there is no unreasonable interference when they are inspected and excluded. So a state may protect its inhabitants against the fraudulent substitution, by deceptive coloring or otherwise, of one article for another. *Plumley* v. *Massachusetts,* 155 U.S. 461; *Hebe Co.* v. *Shaw,* 248 U.S. 297; *Hygrade Provision Co.* v. *Sherman,* 266 U.S. 497. It may give protection to travelers against the dangers of overcrowded highways (*Bradley* v. *Public Utilities Comm'n,* 289 U.S. 92) and protection to its residents against unnecessary noises. *Hennington* v. *Georgia,* 163 U.S. 229. . . At times there are border cases, such as *Silz* v. *Hesterberg,* 211 U.S. 31, where the decision in all likelihood was influenced, even if it is not wholly explained, by a recognition of the special and restricted nature of rights of property in game. Interference was there permitted with sale and importation, but interference for a close season and no longer, and in aid of a policy of conservation common to many states. . . None of these statutes—inspection laws, game laws, laws intended to curb fraud or exterminate disease—approaches in drastic quality the statute here in controversy which would neutralize the economic consequences of free trade among the states.

Second. There was error in refusing an injunction to restrain the enforcement of the Act in its application to milk in bottles to be sold by the importer.

The test of the 'original package,' which came into our law with *Brown* v. *Maryland,* 12 Wheat. 419, is not inflexible and final for the transactions of interstate commerce, whatever may be its validity for commerce with other countries. . . There are purposes for which merchandise, transported from another state, will be treated as a part of the general mass of property at the state of destination though still in the original containers. This is so, for illustration, where merchandise so contained is subjected to a non-discriminatory property tax which it bears equally with other merchandise produced within the state. *Sonneborn Bros.* v. *Cureton,* 262 U.S. 506; *Texas Co.* v. *Brown,* 258 U.S. 466, 475; *American Steel & Wire Co.* v. *Speed,* 192 U.S. 500. There are other purposes for which the same merchandise will have the benefit of the protection appropriate to interstate commerce, though the original packages have been broken and the contents subdivided. 'A state tax upon merchandise brought in from another State, or upon its sales, whether in original packages or not, after it has reached its destination and is in a state of rest, is lawful only when the tax is not discriminating in its incidence against the merchandise because of its origin in another State.' *Sonneborn Bros.* v. *Cureton, supra,* at p. 516. . . In brief, the test of the original package is not an ultimate principle. It is an illustration of a principle. *Pennsylvania Gas Co.* v. *Public Service Comm'n,* 225 N.Y. 397, 403; 122 N.E. 260. It marks a convenient boundary and one sufficiently precise save in exceptional conditions. What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement. Neither the power to tax nor the police power may be used by

the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result. The form of the packages in such circumstances is immaterial, whether they are original or broken. The importer must be free from imposts framed for the very purpose of suppressing competition from without and leading inescapably to the suppression so intended.

The statute here in controversy will not survive that test. A dealer in milk buys it in Vermont at prices there prevailing. He brings it to New York, and is told he may not sell it if he removes it from the can and pours it into bottles. He may not do this for the reason that milk in Vermont is cheaper than milk in New York at the regimented prices, and New York is moved by the desire to protect her inhabitants from the cut prices and other consequences of Vermont competition. To overcome that competition a common incident of ownership—the privilege of sale in convenient receptacles—is denied to one who has bought in interstate commerce. He may not sell on any terms to any one, whether the orders were given in advance or came to him thereafter. The decisions of this court as to the significance of the original package in interstate transactions were not meant to be a cover for retortion or suppression.

The distinction is clear between a statute so designed and statutes of the type considered in *Leisy* v. *Hardin*, 135 U.S. 100, to take one example out of many available. By the teaching of that decision intoxicating liquors are not subject to license or prohibition by the state of destination without congressional consent.[1] They become subject, however, to such laws when the packages are broken. There is little, if any, analogy between restrictions of that type and those in controversy here. In licensing or prohibiting the sale of intoxicating liquors a state does not attempt to neutralize economic advantages belonging to the place of origin. What it does is no more than to apply its domestic policy, rooted in its conceptions of morality and order, to property which for such a purpose may fairly be deemed to have passed out of commerce and to be commingled in an absorbing mass. So also the analogy is remote between restrictions like the present ones upon the sale of imported milk and restrictions affecting sales in unsanitary sweat-shops. It is one thing for a state to exact adherence by an importer to fitting standards of sanitation before the products of the farm or factory may be sold in its markets. It is a very different thing to establish a wage scale or a scale of prices for use in other states, and to bar the sale of the products, whether in the original packages or in others, unless the scale has been observed.

The decree in No. 604 is affirmed, and that in No. 605 reversed, and the cause remanded for proceedings in accordance with this opinion.

No. 604. Affirmed.
No. 605. Reversed.

[1] The rule is different today under the Twenty-first Amendment. Art. xxi, § 2.

NOTE

In *Parker* v. *Brown,* decided in 1943, the Supreme Court upheld a California agricultural proration program [1] designed to restrict competition and to maintain producers' prices. Under the act a proration program was instituted which required, in this case, raisin growers to turn over two-thirds of their individual crops to a central committee which controlled the marketing of the crop to the packers. About 95% of the raisin crop was destined for interstate and foreign commerce. The act was alleged to be invalid under the Sherman Act,[2] the Agricultural Marketing Agreement Act of 1937,[3] and the commerce clause of the Constitution. Invocation of the commerce clause failed to persuade the Court of the program's unconstitutionality.

Gibbons v. *Ogden* opened, but did not decide, the question of the validity of state regulation of interstate commerce in the absence of congressional legislation. This question came before the Supreme Court in 1851 in *Cooley* v. *Board of Port Wardens.*[4] Here the Court sustained a Pennsylvania statute regulating pilots of vessels entering and leaving the port of Philadelphia. The act, obviously, was a regulation of interstate and foreign commerce. Speaking for a majority of the Court, Mr. Justice Curtis set forth an interpretation of the commerce clause which has never been directly repudiated. He said: 'Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage, is plain.' [5] This principle implies that the state possesses a concurrent power to regulate interstate commerce in areas where Congress has not acted.

The rule set forth in the Cooley case is at present little relied upon as a source of state power to regulate any part of interstate commerce; [6] such power is generally derived from either the state taxing power or the police power.

The state may not tax the commerce among the states nor foreign commerce. But short of the regulation of interstate commerce which the Constitution gives to Congress, a state may, for example, impose a non-discriminatory tax upon the instrumentalities of that commerce. A state tax on net income derived wholly

[1] Agricultural Prorate Act, Statutes of California of 1933, as amended, 1935, 1938, 1939, 1941.
[2] 15 U.S.C. § 1.
[3] 50 Stat. 246 (1937).
[4] 12 How. 299 (1851).
[5] Ibid. 319.
[6] However, see *California* v. *Thompson,* 313 U.S. 109 (1941).

from interstate commerce is legitimate. A state tax, first upon the storage of gasoline brought into the state by an interstate railroad, and second, upon its withdrawal for use in both intrastate and interstate commerce, was deemed valid. A non-discriminatory municipal sales tax upon coal shipped from Pennsylvania and delivered in New York City was held not to be a burden upon interstate commerce. 'If, as guides to decision,' said Mr. Justice Stone, 'we look to the purpose of the commerce clause to protect interstate commerce from discriminatory or destructive state action, and at the same time to the purpose of the state taxing power under which interstate commerce admittedly must bear its fair share of state tax burdens, and to the necessity of judicial reconciliation of these competing demands, we can find no adequate ground for saying that the present tax is a regulation which, in the absence of Congressional action the commerce clause forbids.'[7]

The police power may be defined as the power of a state to promote the public health and safety, the morals, the convenience, and general welfare of its people. In the exercise of this power the state restricts personal freedom and property rights, and sometimes imposes burdens upon, or affects, interstate commerce. In the latter connection, where the burden is only incidental, and the restriction warranted by local needs, the Supreme Court will hold such legislation valid. The Court's function, says Professor Corwin, 'in the handling of this type of case is that of an arbitral, rather than of a strictly judicial, body.'[8]

On the basis of the police power the state may license trainmen engaged in interstate commerce in order to insure their skill and fitness. The state may prescribe regulations for the payment of wages to interstate train crews. It may require interstate passenger cars to be heated. It may regulate the speed of interstate trains within city limits. It may require interstate railroads to eliminate dangerous grade crossings. It may enact local quarantine laws applicable to goods moving in interstate commerce as a means of protecting public health. The state may regulate pilots and pilotage in its harbors.

Despite the absence of controlling Federal law, the state may not regulate interstate commerce so as to restrict materially its flow or to deprive it of necessary regulatory uniformity by 'simply invoking the convenient apologetics of the police power.'[9] Thus, a state may not as a safety measure require interstate trains to reduce speed almost to a stop at grade crossings when compliance with the act increased the running time more than six hours over a distance of one hundred and twenty-three miles. As applied to interstate trains, a state statute making it unlawful to operate a passenger train of more than fourteen cars, or a freight train of more than seventy, would contravene the commerce clause.

It was in the exercise of the police power that California enacted the Agricultural Prorate Act. The object of the act was the conservation of the agricultural wealth of the State, and the prevention of economic waste in the marketing of its agricultural products.

[7] *McGoldrick* v. *Berwind-White Co.*, 309 U.S. 33, 49-50 (1940).
[8] Corwin, Edward S., *The Constitution and What It Means Today*, Princeton, 1946, p. 45.
[9] Mr. Justice Holmes in *Kansas City Southern R. Co.* v. *Kaw Valley District*, 233 U.S. 75, 79 (1914).

PARKER v. BROWN
317 U.S. 341 (1943)

Appeal from a decree of a district court of three judges enjoining the enforcement, against the appellee, of a marketing program adopted pursuant to the California Agricultural Prorate Act. . .

MR. CHIEF JUSTICE STONE delivered the opinion of the Court.

The questions for our consideration are whether the marketing program adopted for the 1940 raisin crop under the California Agricultural Prorate Act is rendered invalid (1) by the Sherman Act, or (2) by the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. §§ 601, *et seq.*, or (3) by the Commerce Clause of the Constitution. . .

Validity of the Prorate Program under the Sherman Act.

Section 1 of the Sherman Act, 15 U.S.C. § 1, makes unlawful 'every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States.' And § 2, 15 U.S.C. § 2, makes it unlawful to 'monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States.' We may assume for present purposes that the California prorate program would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate. . .

But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. . . The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only 'business combinations.' 21 Cong. Rec. 2562, 2457; see also at 2459, 2461. . .

The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. . .

Validity of the Program under the Agricultural Marketing Agreement Act

The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U.S.C. §§ 601 *et seq.*, authorizes the Secretary of Agriculture to issue orders limiting the quantity of specified agricultural products, including fruits, which may be marketed 'in the current of . . . or so as directly to burden, obstruct, or affect interstate or foreign commerce.' Such orders may allot the amounts which handlers may purchase from any producer by means which equalize the amount marketed among producers; may provide for the control and elimination of surpluses and for the establishment of reserve pools of the regulated produce. § 8c (6). The federal statute differs from the California Prorate Act in that its sanction falls upon handlers alone while the state act (§ 22.5 (3)) applies to growers and extends also to handlers so far as they may unlawfully receive or have in their possession within the state any commodity subject to a prorate program. . .

The declared objective of the California Act is to prevent excessive supplies of agricultural commodities from 'adversely affecting' the market, and although the statute speaks in terms of 'economic stability' and 'agricultural waste' rather than of price, the evident purpose and effect of the regulation is to 'conserve agricultural wealth of the state' by raising and maintaining prices, but 'without permitting unreasonable profits to producers.' § 10. The only possibility of conflict would seem to be if a state program were to raise prices beyond the parity price prescribed by the federal act, a condition which has not occurred.

That the Secretary has reason to believe that the state act will tend to effectuate the policies of the federal act so as not to require the issuance of an order under the latter is evidenced by the approval given by the Department of Agriculture to the state program by the loan agreement between the state and the Commodity Credit Corporation. By § 302 of the Agricultural Adjustment Act of 1938, 52 Stat. 43, 7 U.S.C. § 1302 (a), the Commodity Credit Corporation is authorized 'upon the recommendation of the Secretary and with the approval of the President, to make available loans on agricultural commodities. . .' The 'amount, terms, and conditions' of such loans are to be 'fixed by the Secretary, subject to the approval of the Corporation and the President.' Under this authority the Commodity Credit Corporation made loans of $5,146,000 to Zone No. 1, secured by a pledge of 109,000 tons of 1940 crop raisins in the surplus and stabilization pools. These loans were ultimately liquidated by sales of 76,000 tons to packers and 33,000 tons to the Federal Surplus Marketing Administration, an agency of the Department of Agriculture, for relief distribution and for export under the Lend-Lease program. The loans were conditional upon the adoption by the state of the present seasonal marketing program. We are informed by the Government, which at our request filed a brief amicus curiae, that under the loan agreement prices and sales policies as to the pledged raisins were to be controlled by a committee appointed by the Secretary, and that officials of the Department of Agriculture collaborated in drafting the 1940 state raisin program.

Section 302 of the Agricultural Adjustment Act of 1938 requires the Commodity Credit Corporation to make non-recourse loans to producers of certain agricultural products at specified percentages of the parity price, and authorizes loans on any agricultural commodity. The Government informs us that in making loans under the latter authority, § 302 has been construed by the Department of Agriculture as requiring the loans to be made only in order to effectuate the policy of federal agricultural legislation. Section 2 of the Agricultural Adjustment Act of 1938 declares it to be the policy of Congress to achieve the statutory objectives through loans. The Agricultural Adjustment Act of 1938 and the Agricultural Marketing Agreement Act of 1937 were both derived from the Agricultural Adjustment Act of 1933, 48 Stat. 31, and are coördinate parts of a single plan for raising farm prices to parity levels. The conditions imposed by the Secretary of Agriculture in the loan agreement with the State of California, and the collaboration of federal officials in the drafting of the program, must be taken as an expression of opinion by the Department of Agriculture that the state program thus aided by the loan is consistent with the policies of the Agricultural Adjustment and Agricultural Marketing Agreement Acts. We find no conflict between the two acts and no such occupation of the legislative field by the mere adoption of the Agricultural Marketing Agreement Act, without the issuance of any order by the Secretary putting it into effect, as would preclude the effective operation of the state act.

We have no occasion to decide whether

the same conclusion would follow if the state program had not been adopted with the collaboration of officials of the Department of Agriculture and aided by loans from the Commodity Credit Corporation recommended by the Secretary of Agriculture.

Validity of the Program under the Commerce Clause

The court below found that approximately 95 per cent of the California raisin crop finds its way into interstate or foreign commerce. It is not denied that the proration program is so devised as to compel the delivery by each producer, including appellee, of over two-thirds of his 1940 raisin crop to the program committee, and to subject it to the marketing control of the committee. The program, adopted through the exercise of the legislative power delegated to state officials, has the force of law. It clothes the committee with power and imposes on it the duty to control marketing of the crop so as to enhance the price or at least to maintain prices by restraints on competition of producers in the sale of their crop. The program operates to eliminate competition of the producers in the terms of sale of the crop, including price. And since 95 per cent of the crop is marketed in interstate commerce, the program may be taken to have a substantial effect on the commerce, in placing restrictions on the sale and marketing of a product to buyers who eventually sell and ship it in interstate commerce.

The question is thus presented whether in the absence of Congressional legislation prohibiting or regulating the transactions affected by the state program, the restrictions which it imposes upon the sale within the state of a commodity by its producer to a processor who contemplates doing, and in fact does, work upon the commodity before packing and shipping it in interstate commerce, violate the Commerce Clause.

The governments of the states are sovereign within their territory save only as they are subject to the prohibitions of the Constitution or as their action in some measure conflicts with powers delegated to the National Government, or with Congressional legislation enacted in the exercise of those powers. This Court has repeatedly held that the grant of power to Congress by the Commerce Clause did not wholly withdraw from the states the authority to regulate the commerce with respect to matters of local concern, on which Congress has not spoken. *Minnesota Rate Cases*, 230 U.S. 352, 399-400; *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U.S. 177, 187, *et seq.*; *California* v. *Thompson*, 313 U.S. 109, 113-14 and cases cited; *Duckworth* v. *Arkansas*, 314 U.S. 390. *A fortiori* there are many subjects and transactions of local concern not themselves interstate commerce or a part of its operations which are within the regulatory and taxing power of the states, so long as state action serves local ends and does not discriminate against the commerce, even though the exercise of those powers may materially affect it. Whether we resort to the mechanical test sometimes applied by this Court in determining when interstate commerce begins with respect to a commodity grown or manufactured within a state and then sold and shipped out of it—or whether we consider only the power of the state in the absence of Congressional action to regulate matters of local concern, even though the regulation affects or in some measure restricts the commerce —we think the present regulation is within state power.

In applying the mechanical test to determine when interstate commerce begins and ends (see *Federal Compress Co.* v. *McLean*, 291 U.S. 17, 21 and cases cited; *Minnesota* v. *Blasius*, 290 U.S. 1 and cases cited) this Court has frequently held that for purposes of local taxation or regulation 'manufacture' is not interstate commerce even though the manufacturing

process is of slight extent. *Crescent Oil Co.* v. *Mississippi,* 257 U.S. 129; *Oliver Iron Co.* v. *Lord,* 262 U.S. 172; *Utah Power & Light Co.* v. *Pfost,* 286 U.S. 165; *Hope Gas Co.* v. *Hall,* 274 U.S. 284; *Heisler* v. *Thomas Colliery Co.,* 260 U.S. 245; *Champlin Refining Co.* v. *Commission,* 286 U.S. 210; *Bayside Fish Co.* v. *Gentry,* 297 U.S. 422. And such regulations of manufacture have been sustained where, aimed at matters of local concern, they had the effect of preventing commerce in the regulated article. *Kidd* v. *Pearson,* 128 U.S. 1; *Champlin Refining Co.* v. *Commission, supra; Sligh* v. *Kirkwood,* 237 U.S. 52; see *Capital City Dairy Co.* v. *Ohio,* 183 U.S. 238, 245; *Thompson* v. *Consolidated Gas Co.,* 300 U.S. 55, 77; cf. *Bayside Fish Co.* v. *Gentry, supra.* A state is also free to license and tax intrastate buying where the purchaser expects in the usual course of business to resell in interstate commerce. *Chassaniol* v. *Greenwood,* 291 U.S. 584. And no case has gone so far as to hold that a state could not license or otherwise regulate the sale of articles within the state because the buyer, after processing and packing them, will, in the normal course of business, sell and ship them in interstate commerce.

All of these cases proceed on the ground that the taxation or regulation involved, however drastically it may affect interstate commerce, is nevertheless not prohibited by the Commerce Clause where the regulation is imposed before any operation of interstate commerce occurs. Applying that test, the regulation here controls the disposition, including the sale and purchase, of raisins before they are processed and packed preparatory to interstate sale and shipment. The regulation is thus applied to transactions wholly intrastate before the raisins are ready for shipment in interstate commerce.

It is for this reason that the present case is to be distinguished from *Lemke* v. *Farmers Grain Co.,* 258 U.S. 50, and *Shafer* v. *Farmers Grain Co.,* 268 U.S. 189, on which appellee relies. There the state regulation held invalid was of the business of those who purchased grain within the state for immediate shipment out of it. The Court was of opinion that the purchase of the wheat for shipment out of the state without resale or processing was a part of the interstate commerce. Compare *Chassaniol* v. *Greenwood, supra.*

This distinction between local regulation of those who are not engaged in commerce, although the commodity which they produce and sell to local buyers is ultimately destined for interstate commerce, and the regulation of those who engage in the commerce by selling the product interstate, has in general served, and serves here, as a ready means of distinguishing those local activities which, under the Commerce Clause, are the appropriate subject of state regulation despite their effect on interstate commerce. But courts are not confined to so mechanical a test. When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved. See *Di Santo* v. *Pennsylvania,* 273 U.S. 34, 44 (with which compare *California* v. *Thompson, supra*); *South Carolina Highway Dept.* v. *Barnwell Bros., supra; Milk Control Board* v. *Eisenberg Co.,* 306 U.S. 346; *Illinois Gas Co.* v. *Public Service Co.,* 314 U.S. 498, 504-5.

Such regulations by the state are to be sustained, not because they are 'indirect' rather than 'direct,' see *Di Santo* v. *Pennsylvania, supra;* cf. *Wickard* v. *Filburn, supra* [317 U.S. 111], not because they control interstate activities in such a manner as only to affect the commerce rather than to command its operations. But they are to be upheld because upon a consideration of all the relevant facts and circum-

stances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress. Because of its local character also there may be wide scope for local regulation without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the Commerce Clause. See *Minnesota Rate Cases, supra,* 398-412; *California* v. *Thompson, supra,* 113. There may also be, as in the present case, local regulations whose effect upon the national commerce is such as not to conflict but to coincide with a policy which Congress has established with respect to it.

Examination of the evidence in this case and of available data of the raisin industry in California, of which we may take judicial notice, leaves no doubt that the evils attending the production and marketing of raisins in that state present a problem local in character and urgently demanding state action for the economic protection of those engaged in one of its important industries. Between 1914 and 1920 there was a spectacular rise in price of all types of California grapes, including raisin grapes. The price of raisins reached its peak, $235 per ton, in 1921, and was followed by large increase in acreage with accompanying reduction in price. The price of raisins in most years since 1922 has ranged from $40 to $60 per ton but acreage continued to increase until 1926 and production reached its peak, 1,433,000 tons of raisin grapes and 290,000 tons of raisins, in 1938. Since 1920 there has been a substantial carry over of 30 to 50% of each year's crop. The result has been that at least since 1934 the industry, with a large increase in acreage and the attendant fall in price, has been unable to market its product and has been compelled to sell at less than parity prices and in some years at prices regarded by students of the industry as less than the cost of production.

The history of the industry, at least since 1929, is a record of a continuous search for expedients which would stabilize the marketing of the raisin crop and maintain a price standard which would bring fair return to the producers. It is significant of the relation of the local interest in maintaining this program to the national interest in interstate commerce, that throughout the period from 1929 until the adoption of the prorate program for the 1940 raisin crop, the national government has contributed to these efforts either by its establishment of marketing programs pursuant to Act of Congress or by aiding programs sponsored by the state. Local co-operative market stabilization programs for raisins in 1929 and 1930 were approved by the Federal Farm Board which supported them with large loans. In 1934 a marketing agreement for California raisins was put into effect under § 8 (2) of the Agricultural Adjustment Act of 1933, as amended, 48 Stat. 528, which authorized the Secretary of Agriculture, in order to effectuate the Act's declared policy of achieving parity prices, to enter into marketing agreements with processors, producers and others engaged in handling agricultural commodities 'in the current of or in competition with, or so as to burden, obstruct, or in any way affect, interstate or foreign commerce.'

Raisin Proration Zone No. 1 was organized in the latter part of 1937. No proration program was adopted for the 1937 crop, but loans of $1,244,000 were made on raisins of that crop by the Commodity Credit Corporation. In aid of a proration program adopted under the California Act for the 1938 crop, a substantial part of that crop was pledged to the

Commodity Credit Corporation as security for a loan of $2,688,000, and was ultimately sold to the Federal Surplus Commodities Corporation for relief distribution. Substantial purchases of raisins of the 1939 crop were also made by Federal Surplus Commodities Corporation, although no proration program was adopted for that year. In aid of the 1940 program, as we have already noted, the Commodity Credit Corporation made loans in excess of $5,000,000, and 33,000 tons of the raisins pledged to it were sold to the Federal Surplus Marketing Administration.

This history shows clearly enough that the adoption of legislative measures to prevent the demoralization of the industry by stabilizing the marketing of the raisin crop is a matter of state as well as national concern and, in the absence of inconsistent Congressional action, is a problem whose solution is peculiarly within the province of the state. In the exercise of its power the state has adopted a measure appropriate to the end sought. The program was not aimed at nor did it discriminate against interstate commerce, although it undoubtedly affected the commerce by increasing the interstate price of raisins and curtailing interstate shipments to some undetermined extent. The effect on the commerce is not greater, and in some instances was far less, than that which this Court has held not to afford a basis for denying to the states the right to pursue a legitimate state end. . .

In comparing the relative weights of the conflicting local and national interests involved, it is significant that Congress, by its agricultural legislation, has recognized the distressed condition of much of the agricultural production of the United States, and has authorized marketing procedures, substantially like the California prorate program, for stabilizing the marketing of agricultural products. Acting under this legislation the Secretary of Agriculture has established a large number of market stabilization programs for agricultural commodities moving in interstate commerce in various parts of the country, including seven affecting California crops. All involved attempts in one way or another to prevent over-production of agricultural products and excessive competition in marketing them, with price stabilization as the ultimate objective. Most if not all had a like effect in restricting shipments and raising or maintaining prices of agricultural commodities moving in interstate commerce.

It thus appears that whatever effect the operation of the California program may have on interstate commerce, it is one which it has been the policy of Congress to aid and encourage through federal agencies in conformity to the Agricultural Marketing Agreement Act, and § 302 of the Agricultural Adjustment Act. Nor is the effect on the commerce greater than or substantially different in kind from that contemplated by the stabilization programs authorized by federal statutes. As we have seen, the Agricultural Marketing Agreement Act is applicable to raisins only on the direction of the Secretary of Agriculture who, instead of establishing a federal program has, as the statute authorizes, co-operated in promoting the state program and aided it by substantial federal loans. Hence we cannot say that the effect of the state program on interstate commerce is one which conflicts with Congressional policy or is such as to preclude the state from this exercise of its reserved power to regulate domestic agricultural production.

We conclude that the California prorate program for the 1940 raisin crop is a regulation of state industry of local concern which, in all the circumstances of this case which we have detailed, does not impair national control over the commerce in a manner or to a degree forbidden by the Constitution.

Reversed.