Federal Power Over Things Which Affect Interstate Commerce

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The commerce power of the federal government has been one of the most prolific sources of that government's authority to regulate. Interstate commerce, the life stream of the nation, is subject to regulation by only one supreme authority, and the United States Supreme Court, in permitting the commerce power to be extended, has recognized the importance of that power in preserving an indestructible union composed of 48 sovereign states, capable of solving the problems created by conflicting interests and correcting conditions arising beyond the jurisdiction of any particular state.[1]

Any attempt to discover the beginning of the broad interpretation of the commerce power by the Supreme Court must date back to the decision in *Gibbons* v. *Ogden*.[2] The language of Chief Justice Marshall in that case has become classic. In the following words we find the ultimate basis for most extensions of the federal power where the commerce clause has been invoked:

> 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. . . . 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

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[1] See note 100, *infra*.

[2] 9 Wheat. 1, 6 L. Ed. 23 (1824). A New York statute granting exclusive navigation of all the waters within the jurisdiction of the state with steam propelled vessels was held to be repugnant to the commerce clause of the Constitution so far as it prohibited vessels duly licensed by the United States to carry on the coasting trade from navigating those waters.

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.[3]

Another landmark in the history of the extension of the federal government's power to regulate by authority of the commerce clause is embodied in the Supreme Court's decision in *United States* v. *Ferger*.[4] Congress may punish the forging of bills of lading used in interstate commerce on the ground that commerce would be directly impaired and weakened by the unrestrained right to fabricate and circulate spurious bills of lading apparently connected with such commerce. Genuine bills of lading for the movement of interstate commerce are convenient and highly necessary instrumentalities of that commerce, and the injection of fraudulent imitations into the stream must necessarily have an impeding effect. Thus it is the threat of such obstruction which Congress has the power to remove, in order to prevent material injury to the flow of commerce. In speaking of the extent of Congress' power to regulate interstate commerce, the court said:

> Obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce . . . and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, *although they are not interstate commerce in and of themselves.*[5] (Italics ours).

The year 1937 has been marked by a third milestone, in the form of the Supreme Court's decisions upholding the National Labor Relations Act in its application to three companies of a type heretofore considered local and entirely beyond the federal power to regulate; one manufacturing steel;[6] another, trailers;[7] and a third making clothing.[8]

[3] *Id.*, at pp. 196-197.

[4] 250 U.S. 199, 39 S. Ct. 445, 63 L. Ed. 936 (1919).

[5] *Id.*, at p. 203.

[6] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 563 (1937).

[7] *National Labor Relations Board* v. *Fruehauf Trailer Co.*, 301 U.S. 49, 57 S. Ct. 642, 81 L. Ed. 563 (1937).

[8] *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.*, 301 U.S. 58, 57 S. Ct. 645, 81 L. Ed. 563 (1937).

The Act itself makes it unlawful to interfere with the right to organize or to collectively bargain in any case where such "unfair labor practices" will affect interstate commerce. Its purpose is to eliminate obstructions to the free flow of commerce caused by the denial by particular employers of the right of employees to organize and from the refusal by employers to accept the procedure of collective bargaining. Whether or not particular action does affect interstate commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the National Labor Relations Board, is left by the statute to be determined as individual cases arise.

In the *Jones & Laughlin* case the court had the following to say with respect to things which may affect interstate commerce:

> Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.[9]

With respect to the case at hand, the court further said:

> In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intelligent vacuum. Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern. When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect

[9] *Op. cit.*, note 6, at p. 37. Authority cited for this statement is *Schechter Corporation* v. *United States*, 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935).

interstate commerce from the paralyzing consequences of industrial war?[10]

Two of the most significant statements in the Wagner Act decisions are contained in the opinion in the *Jones & Laughlin* case:

It is the effect upon commerce, not the source of the injury, which is the criterion.[11]

The question is necessarily one of degree.[12]

There is no doubt as to the meaning of these expressions. This, the present position of the majority of the Supreme Court, represents the recognition of a new principle hardly to be reconciled with the language in the opinions rendered in *Schechter Corporation* v. *United States*[13] and *Carter* v. *Carter Coal Co.*[14]

The *Schechter* decision reiterates the "necessary and well-established distinction between direct and indirect effects," but the court's discussion does not add much more to the fund of already existing knowledge on the subject, except to hold that the hours and wages of employees engaged in slaughtering and selling in the local trade have no direct relation to interstate

[10] *Op. cit.*, note 6, at p. 41. The Jones & Laughlin Steel Corp., located in the state of Pennsylvania, is the fourth largest producer of steel in the country. With 19 subsidiaries it owns or controls its own railroads, ore steamships, quarries, warehouses, shops, fabricating plants and stores. Its operations are carried on in at least a dozen states and 75 per cent of its products are shipped outside of Pennsylvania.

In the *Fruehauf* case, the corporation, with its plant located in Detroit, Michigan, was engaged in the manufacture and sale of trailers, the largest concern of its kind in the country. Most of its raw materials and parts were shipped in from other states, and more than 80 per cent of its sales were of products shipped outside of the state.

The *Friedman* case involved a corporation having its plant in Virginia but which obtained over 99 per cent of its raw material from other states, in the form of woolen and worsted goods. Cotton linings were shipped in from the southern states. More than 82 per cent of the finished garments were purchased by customers outside of the state of Virginia, mainly large department stores and men's clothing establishments. With respect to the men's clothing industry as a whole, it was shown that the finished product is sold throughout the nation, only about 48 per cent of the total sales being made in the seven states which produce about 90 per cent of the total output.

[11] *Op. cit.*, note 6, at p. 32.

[12] *Op. cit.*, note 6, at p. 37.

[13] 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935).

[14] 298 U.S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936).

commerce, and that the other violations charged, relating to the making of local sales, have merely an indirect effect upon interstate commerce.

"If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce," the court explained, "the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government."[15]

The Supreme Court was more explicit in the *Carter* case. The following quotation explains the attitude of the majority at that time:

> Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect upon prices; and it is insisted that interstate commerce is *greatly* affected thereby. But, in addition to what has just been said, the conclusive answer is that the evils are all local evils over which the federal government has no legislative control. The relation of employer and employee is a local relation. At common law it is one of the domestic relations. The wages are paid for the doing of local work. Working conditions are obviously local conditions. The employees are not engaged in or about commerce, but exclusively in producing a commodity. And the controversies and evils, which it is the object of the act to regulate and minimize, are local controversies and evils affecting local work undertaken to accomplish that local result. Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character.[16]

Justice McReynolds, delivering the dissenting opinion in

[15] *Op. cit.*, note 13, at p. 546. The existence of a limit on federal authority was recognized by the majority of the court in the *Jones & Laughlin* case, as the following words indicate: "Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *Op. cit.*, note 6, at p. 37. See Powell, *Commerce, Pensions, and Codes*, 49 Harv. L. Rev. 193, 210.

[16] *Op. cit.*, note 14, at p. 308.

the *Labor Board* cases, quoted freely the language of the *Carter* opinion and concluded with the protest that, "Any effect on interstate commerce by the discharge of employees shown here, would be indirect and remote in the highest degree, as consideration of the facts will show."[17]

It is interesting to note that the opinion in the *Carter* case is dependent largely upon the authority of the *Schechter* decision. First, it involved exactly the same situation as confronted the court in the *Schechter* case, except that in the latter case the power was asserted over goods which had come to rest, while in the former it was exerted over goods at rest before interstate commerce began. In the court's own words, this difference "is without significance." Second, the *Schechter* case is the only authority cited in support of the court's deductions concerning direct and indirect effect upon interstate commerce. Third, the court repeated the fear expressed in the *Schechter* case, that if the federal government were allowed to regulate these matters, there would be no end to the local things which might be controlled by the federal authority.

The decisions in *Schechter Corporation* v. *United States* and *Carter* v. *Carter Coal Co.* were not overruled by the majority in the *Jones & Laughlin* case. The former was distinguished on the ground that to have found immediacy or directness there would have been to find it almost everywhere, a result inconsistent with the maintenance of our federal system. The latter was distinguished because in that case there was improper delegation of legislative power, and the requirements not only went beyond any sustainable measure of protection of interstate commerce but were also inconsistent with due process.

Nevertheless, it is submitted that both the language and the holding in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.* have repudiated the test based upon a determination of whether the effect upon interstate commerce is direct or indirect, set forth in the *Carter* opinion. An artificial test based

[17] *Op. cit.*, note 6, at p. 96.

upon the proximity of the activity or condition and the character of the effect, has given way to a test which realistically considers primarily the extent of the effect, disregarding the source of the injury which has been inflicted, or is threatened, upon interstate commerce. The recognition of this new criterion may well be the basis for a continuation of the steady growth of the federal power, according to the needs of the nation.

According to the Supreme Court in *Schechter Corporation* v. *United States*, "The power of Congress extends, not only to the regulation of transactions which are part of interstate commerce, but to the protection of that commerce from injury." Anything which is important enough to threaten substantial injury to that commerce should logically fall within the pale. In the final analysis, if the object is the prevention of injury, of what moment is the source of the activity which threatens it! Is it not conceivable that great and irreparable injury may result from a source which may technically be referred to as indirect?

The Supreme Court's decision in the *Jones & Laughlin* case is not the first indication that the question is primarily one of degree. In 1935, Judge Learned Hand, in the course of his opinion in *United States* v. *Schechter Poultry Corporation*,[18] made the following observation:

> In an industrial society bound together by means of transport and communication as rapid and certain as ours, it is idle to seek for any transaction, however apparently isolated, which may not have an effect elsewhere; such a society is an elastic medium which transmits all tremors throughout its territory; the only question is of their size.[19]

"The true question," according to Howard E. Wahrenbrock, "seems to be one of the degree of effect upon interstate commerce. This involves a question of fact."[20]

[18] 76 Fed. (2d) 617, 624, 295 U.S. 723, 79 L. Ed. 1676.

[19] After reviewing a group of the Supreme Court's decisions bearing upon the point, Judge Hand concluded, "The truth really is that where the border shall be fixed is a question of degree, dependent upon the consequences in each case." *Op. cit.*, note 18, at p. 625.

[20] *Federal Anti-Trust Law and the National Industrial Recovery Act*, 31 Mich. L. Rev. 1009, 1054 (1933).

An examination of the decisions of the Supreme Court in this field, in the light of their facts, seems to lend further support to this position and aids in defining the scope of the federal power to regulate things not themselves a part of interstate commerce.

The Packers and Stockyards Act of 1921, seeking to regulate the business of packers and commission men done in interstate commerce was upheld in *Stafford* v. *Wallace*.[21] It was conceded that the sales and purchases by commission men and dealers were in and of themselves intrastate commerce and would ordinarily be treated as such, the parties to the sales and purchases, as well as the cattle, all being at the time within the city of Chicago. But because the stockyards were merely a "throat" through which the current of commerce flowed, the stockyards themselves and the sales therein being necessary factors in the middle of this current, such activities were found to threaten interstate commerce with a "direct and undue burden." Thus the regulatory power of Congress was extended to whatever threatens "to obstruct or unduly to burden the freedom of interstate commerce."

In *Tagg Bros. & Moorhead* v. *United States*,[22] an order of the Secretary of Agriculture prescribing a tariff of maximum charges to be made by brokers, issued pursuant to the Packers and Stockyards Act, was sustained. Here it was emphasized that the plaintiffs performed indispensable service in the interstate commerce in livestock and enjoyed a substantial monopoly at the Omaha stockyards. "The purpose of the regulation attacked," said the court, "is to prevent their service from thus becoming an undue burden upon, and obstruction of, that commerce."

Another case involving the Chicago "throat," *Chicago Board of Trade* v. *Olson*,[23] upheld the Grain Futures Act which regulated boards of trade and was designed to prevent market ma-

[21] 258 U.S. 495, 42 S. Ct. 397, 66 L. Ed. 735 (1922).
[22] 280 U.S. 420, 50 S. Ct. 220, 74 L. Ed. 524 (1930).
[23] 262 U.S. 1, 43 S. Ct. 470, 67 L. Ed. 839 (1923).

nipulations in grain futures. Here again the objects of the regulation were in no sense engaged in interstate commerce, but the court explained that, "the act only purports to regulate interstate commerce and sales of grain for future delivery on boards of trade because it finds that by manipulation they have become a constantly recurring burden and obstruction to that commerce."

The unique location of the Chicago Board of Trade at the scene of the greatest concentration of wheat in the world gave its manipulations a countrywide effect on the price of the article, which in tutrn directly affected the country-wide commerce in it. The same was true of the Chicago stockyards and, to a lesser extent, of the Omaha yards. The immediate and direct effect of the activities regulated had to do with the price of the commodities concerned, the price in turn exerting an influence on the interstate movement of such commodities. Precisely speaking, the effect in these cases was indirect, but it was real nevertheless, and by reason of the unique location of the activities mentioned, at the throat of a nation-wide movement, substantial injury to interstate commerce was threatened. This, it is submitted, is the underlying reason for the court's decisions upholding the acts in question, the reason for the court's finding that the effect was "direct."[24]

The railroads have been a frequent source of controversies regarding the regulatory power of Congress. Railroads must perhaps be relegated to a distinct class of their own because of the important part they play in the actual movement of inter-

[24] "The question of price," explained the Supreme Court in *Chicago Board of Trade* v. *Olson*, "dominates trade between the states. Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it. By reason and authority, therefore, in determining the validity of this act, we are prevented from questioning the conclusion of Congress that manipulation of the market for futures on the Chicago Board of Trade may, and from time to time does, directly burden and obstruct commerce between the states in grain, and that it recurs and is a constantly possible danger. For this reason, Congress has the power to provide the appropriate means adopted in this act by which this abuse may be restrained and avoided." *Op. cit.*, note 23, at p. 40.

state commerce. All the activities in which the railroads engage, however, are not a part of interstate commerce, and those activities which are purely local, or relate solely to intrastate commerce, are beyond Congress' power to regulate.[25] Only those things which have or threaten to have a substantial effect upon the interstate business of the carrier are considered within that power.

The recent decision of the Supreme Court in *Virginian R. Co.* v. *System Fed. No. 40*,[26] upholding the Railway Labor Act which contained provisions designed in general to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions, indicates clearly the test applied in these cases. The application of the Act to the "back shop" employees of the carrier who took no part in the actual interstate activities, was specifically upheld. "The power of Congress over interstate commerce," it was said, "extends to such regulations of the relations of rail carriers to their employees as are reasonably calculated to prevent the interruption of interstate commerce by strikes and their attendent disorders."[27]

The following words of the court are noteworthy for the emphasis they give to size or extent of the effect which is threatened:

> The relation of the back shop to transportation is such that a strike of petitioner's employees there, quite apart from the likelihood of its spreading to the department, would subject petitioner to the danger, substantial, though possibly indefinable in its extent, of interruption of

[25] *Employers' Liability Cases*, 207 U.S. 463, 28 S. Ct. 141, 52 L. Ed. 297 (1908), where a statute seeking to regulate the liability of interstate carriers for injuries to any employee even though his employment had no connection whatever with interstate commerce, was held beyond the power of Congress; *Florida* v. *United States*, 282 U.S. 194, 51 S. Ct. 119, 75 L. Ed. 291 (1930).

[26] 300 U.S. 515, 57 S. Ct. 592, 81 L. Ed. 470 (1937).

[27] *Op. cit.*, note 26, at p. 553. See, also, *Texas & N. O. R. Co.* v. *Railway Clerks*, 281 U.S. 548, 570, 50 S. Ct. 427, 74 L. Ed. 1034 (1930), holding that Congress may facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation.

the transportation service. The cause is not too remote from the effect. The relation between them is not tenuous. The effect on commerce cannot be regarded as negligible.[28]

The fixing of intrastate rates by the Interstate Commerce Commission affords an excellent illustration of the power of the federal government over things which might technically be held to have only an indirect effect upon interstate commerce. Low intrastate rates may reduce the income of the carrier, which in turn may burden the carrier's general revenues, with the final result that there may be an interference with the maintenance of an adequate interstate transportation system.[29] However remote, the danger is real and the possible effect upon interstate commerce is substantial. It has been definitely decided that Congress has power to control intrastate charges of an interstate carrier to the extent necessary to prevent injurious or unreasonable discrimination against interstate commerce.[30]

Congress has the power to protect the safety of persons and property employed or being transported in interstate commerce. The Supreme Court has upheld the Safety Appliance Act in its

[28] *Op. cit.*, note 26, at p. 556. The Supreme Court said: "The *Employers' Liability* Cases, 207 U.S. 463, 498, which mentioned railroad repair shops as a subject beyond the power to regulate commerce, are not controlling here. Whatever else may be said of that pronouncement, it is obvious that the commerce power is as much dependent upon the type of regulation as its subject matter. It is enough for present purposes that experience has shown that the failure to settle, by peaceful means, the grievances of railroad employees with respect to rates of pay, rules or working conditions, is far more likely to hinder interstate commerce than the failure to compensate workers who have suffered injury in the course of their employment. *Op. cit.*, note 26, at p. 557.

[29] In *Florida* v. *United States*, *supra.*, note 24, the court indicated this much when it held that the Interstate Commerce Commission was not justified in fixing statewide rates without a finding, suported by evidence, as to the essential facts and the effect of intrastate rates upon the income of the carrier, which would justify the conclusion that the order was needed to avoid an undue burden on the carrier's revenues and a consequent interference with an adequate transportation system. Mere existence of the disparity was not enough.

[30] *Houston & Texas R. Co.* v. *United States*, 234 U.S. 342, 34 S. Ct. 833, 58 L. Ed. 1341 (1914); *Railway Commission of Wisconsin* v. *Chicago B & Q R. Co.*, 257 U.S. 563, 42 S. Ct. 232, 66 L. Ed. 371, 22 A.L.R. 1086 (1922); *Penna. R. Co.* v. *Illinois Brick Co.*, 297 U.S. 447, 56 S. Ct. 556, 80 L. Ed. 796 (1936); *New York* v. *United States*, 257 U.S. 591, 42 S. Ct. 239, 66 L. Ed. 385 (1922).

application to all of the locomotives, cars and similar vehicles used on any railroad that is a highway of interstate commerce, whether such cars or vehicles are being used to move interstate or intrastate traffic.[31] In upholding the Employers' Liability Act after it was changed to apply solely to the liability of a carrier engaged in interstate commerce for injuries sustained by its employees while engaged in such commerce, the court indicated that the federal control over the employer's liability was not altered by the fact that the injury might be caused by an employee engaged in intrastate commerce. The court made it clear that the effect of the injury upon interstate commerce, rather than its source, is the "criterion of congressional power," and the negligence of an employee engaged in intrastate commerce, "when operating injuriously upon an employee engaged in interstate commerce, has the same effect upon that commerce as if the negligent employee were also engaged therein."[32]

The intrastate activities of interstate railroads, other than those relating to rates and the safety of passengers and employees, have been brought within the scope of federal regulation in numerous instances. The Interstate Commerce Commission may require a railroad to furnish transportation service between a public terminal and shippers on its own and connecting lines, although the transportation so required includes intrastate as well as interstate traffic.[33] The commission may require the adoption of a uniform system of accounting by carriers engaged in interstate transportation under a common arrangement for continuous carriage, even though such system embraces the accounts of purely local activities of the carrier, such as the operation of an amusement park.[34] The Hours of Service Act

[31] *Southern R. Co.* v. *United States*, 222 U.S. 20, 32 S. Ct. 2, 56 L. Ed. 72 (1911).

[32] *Second Employers' Liability Cases*, 223 U.S. 1, 32 S. Ct. 169, 56 L. Ed. 327, 38 L.R.A. (NS) 44 (1912); See, also, *Pederson* v. *D. L. & W. R. Co.*, 229 U.S. 146, 33 S. Ct. 648.

[33] *United States* v. *N. Y. C. R. Co.*, 272 U.S. 457, 47 S. Ct. 130, 71 L. Ed. 350 (1926).

applies to employees of an interstate line although engaged partly in intrastate work.[35]

A similar situation exists in the cases where the Interstate Commerce Commission has been granted the oversight of projects entirely local in nature when it appeared that the financial stability and efficiency of the interstate lines might thereby be impaired. Before an extension of the main lines and terminals of several interstate railroads could be made within a city, accompanied by the abandonment of available sites and existing stations and the building of a new union station, a finding of the Interstate Commerce Commission was required that the expense would not impair the ability of the carriers to perform their duty to the public, *i.e.*, their interstate function.[36] Likewise, it was held that a railroad could not build an extension into new territory within a single state unless the Commission issued a certificate that public convenience and necessity required its construction.[37]. The exercise of federal power in authorizing the abandonment of a branch line of a railroad lying wholly within the state of the owning company's incorporation, was held not to be an invasion of the field reserved by the Constitution to the states, for the paramount power of Congress over interstate commerce enabled it to determine to what extent and in what manner intrastate service had to be subordinated in order that interstate service might be adequately rendered.[38]

The latter instances of federal control of the intrastate activities of railroads are much like the jurisdiction of Congress over intrastate rates. Close analysis will reveal that several steps must be taken before any effect upon interstate commerce

[34] *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U.S. 194, 32 S. Ct. 436, 56 L. Ed. 729 (1912).

[35] *B. & O. R. Co.* v. *Interstate Commerce Commission*, 221 U.S. 612, 31 S. Ct. 621, 55 L. Ed. 878 (1911).

[36] *Railway Commission* v. *So. Pacific R. Co.*, 264 U.S. 331, 44 S. Ct. 376, 68 L. Ed. 713 (1924).

[37] *Texas & Pacific R. Co.* v. *Gulf, Etc. R. Co.*, 270 U.S. 266, 46 S. Ct. 263, 70 L. Ed. 578 (1926).

[38] *Colorado* v. *United States*, 271 U.S. 153, 46 S. Ct. 452, 70 L. Ed. 878 (1926).

itself can be detected. But here again the effect is real and it is likely to be substantial. This may be said to result mainly from the commingling of interstate and intrastate traffic and the difficulty of separating the two for the purpose of operation or effective regulation.[39]

Further illustration of the things which may be said to affect interstate commerce directly is found in the decisions of the Supreme Court applying the Sherman Anti-Trust Act.[40] Cases in this field have abundantly shown that even activities related to productive industry, which, when viewed separately, is local, may have the requisite directness to come within reach of the federal regulatory power.[41]

The Anti-Trust Act condemns all combinations or conspiracies in restraint of trade among the several states or with foreign countries. Although the cases arising under this statute involve its application rather than its constitutional validity, the distinction between a direct and an indirect effect upon interstate commerce is almost invariably applied. "The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate."[42] On the other hand, where the intent to restrain interstate commerce or to monopolize any part of it is absent, and the objectives are limited to intrastate activities, the fact that there may be an indirect effect upon interstate commerce

[39] The language of the *Dayton-Goose Creek R. Co.* v. *United States*, 263 U.S. 456, 44 S. Ct. 169, 68 L. Ed. 388 (1924) is revealing: "In solving the problem of maintaining the efficiency of an interstate commerce railway system which serves both the states and the nation, Congress is dealing with a unit in which state and interstate operations are often inextricably commingled. When the adequate maintenance of interstate commerce involves and makes necessary on this account the incidental and partial control of intrastate commerce, the power of Congress to exercise such control has been clearly established." *Ib.*, at p. 485.

[40] 26 Stat. 209, 15 U.S.C.A., sec. 1.

[41] See the words of the Supreme Court to this effect in the *Jones & Laughlin* case, *supra*, note 6, at p. 38.

[42] *Hopkins* v. *United States*, 171 U.S. 578, 592, 19 S. Ct. 40, 43 L. Ed. 290 (1898).

does not subject the parties concerned to the Anti-Trust Act, notwithstanding its broad provisions.[43]

The primary purpose of the Anti-Trust Act is to foster competition. Its basic principle, as explained by the Supreme Court, is that the natural effect of competition is to increase commerce, and that an agreement, the intent or direct effect of which is to prevent free competition, tends to restrain rather than promote trade and commerce.[44] Any conspiracy or combination which has for its immediate object the stifling of competition in interstate commerce is brought directly within the prohibition of the statute.[45] In such a case, interstate commerce is the direct object of the attack and there is no question concerning the federal government's authority to act. But the specific intent to obstruct interstate commerce is not always essential. As the Supreme Court said in *United States* v. *Reading Co.*,[46] "Of course, if the necessary result is materially to restrain trade between the states, the intent with which the thing was done is of no consequence."[47] "In other words, when the threatened effect of the combination or activity upon interstate commerce is sufficiently great, the federal government may act." Here again is definite support for the court's statement in the *Jones & Laughlin* case that the question is necessarily one of degree.[48]

An examination of the opinions of the Supreme Court in *United Mine Workers* v. *Coronado Coal Co.*[49] and *Coronado*

[43] *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344, 42 S. Ct. 570, 66 L. Ed. 975, 27 A.L.R. 762 (1922). *Industrial Association* v. *United States*, 268 U.S. 64, 45 S. Ct. 403, 69 L. Ed. 849 (1925).

[44] *Northern Securities Co.* v. *United States*, 193 N.S. 197, 331, 24 S. Ct. 436, 48 L. Ed. 679 (1904).

[45] *Coronado Coal Co.* v. *United Mine Workers*, 268 U.S. 295, 45 S. Ct. 551, 69 L. Ed. 963 (1925).

[46] 226 U.S. 324, 33 S. Ct. 90, 57 L. Ed. 243 (1912).

[47] *Id.* at p. 370. To the same effect is *United States* v. *Patten*, 226 U.S. 525, 543, 33 S. Ct. 141, 57 L. Ed. 333 (1913).

[48] Further in this connection, note the words of the court in *United States* v. *Reading Co.*, note 59, *infra*.

[49] *Supra*, note 43.

Coal Co. v. *United Mine Workers*[50] discloses quite clearly that the court is not oblivious to considerations of size. In the first case it was held that the activities of the defendants did not amount to a violation of the Anti-Trust Act. The court was of the opinion that the animosity growing out of bringing in non-union labor and other aggravating circumstances presented sufficient local reason for the violence and the destruction of the mines, so that there could be no necessary inference of an intent to interfere with interstate commerce. The court also felt that the normal output of the mines concerned (5000 tons a week as compared to 150,000 tons for the entire district) was not enough to have a substantial effect on prices and competition in interstate commerce, which would dispense with the necessity of finding a specific intent.[51]

The second case involved the same controversy, but new evidence was presented for the court's consideration. First, testimony was introduced to show that the strike leaders and union men participating in the destruction of the mines had discussed the competitive effects of cheaper coal from non-union mines after it was shipped to other states, both in a union convention and in speeches made throughout the district in which the strike occurred. Second, more accurate testimony disclosed that the capacity of the mines which were destroyed more nearly approximated 5000 tons a day, or about 35,000 tons a week. On the basis of these facts, the court held that the case came within the terms of the Anti-Trust Act, both the intent and the actual effect being to interfere with interstate commerce. That both factors were considered in reaching their decision is indicated by the court's statement that the "total capacity . . . became more important, in view of the direct testimony as to the mov-

[50] *Supra*, note 45.

[51] The court did indicate, however, that "if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain, or burden it, it has the power to subject them to national supervision and restraint." *Op. cit.*, note 43, at p. 408.

ing purpose of District No. 21 to restrain and prevent the plaintiff's competition."[52]

In most of the cases involving combinations which were challenged under the Sherman Act, the dominating factor in the Supreme Court's decisions was the effectiveness of the activities sought to be curtailed. If a combination is so extensive that an entire industry is brought within its control, competition is necessarily destroyed and questions of price, interstate movement of the products, etc., are decided entirely at the discretion of the group in control. In *United States* v. *E. C. Knight Co.*,[53] the first decision involving the application of the Anti-Trust Act, such facts were said to be immaterial, the court being of the opinion that the federal government had no authority to intervene if the combination related solely to the manufacture of an article. The American Sugar Refining Company, through the purchase of stock in four Philadelphia refineries, gained a practical monopoly of the entire business, but it was held that the Anti-Trust Act did not apply since no intent was shown to monopolize interstate commerce and any effect upon that commerce was necessarily indirect. Since the date of the *Knight* case, however, it is apparent that the court has taken a different position, adopting the view expressed by Justice Harlan in his dissent, that "the free course of trade among the states cannot coexist with such combinations."[54]

The effectiveness of a particular combination may result from the strategic location of the activities challenged. A combination of meat dealers which was centered in the Chicago area, within the state of Illinois and embracing a monopoly of the trade solely within that area, was held to be illegal and subject to restraint under the Anti-Trust Act.[55] Chicago was the heart of the meat packing industry, and by reason of its strategic

[52] *Op. cit.*, note 45, at p. 309.

[53] 156 U.S. 1, 15 S. Ct. 249, 39 L. Ed. 325 (1895).

[54] *Id.*, at p. 37.

[55] *Swift & Co.* v. *United States*, 196 U.S. 375, 25 S. Ct. 276, 49 L. Ed. 518 (1905).

position the combination in question obtained a strangle hold on the national "flow" of fresh meat and meat products. By virtue of this power, the combination sought to regulate prices in other states, to induce shipments to markets therein, and to get less than the lawful rates from interstate railroads, and these facts were held sufficient to show an intent to monopolize interstate commerce itself.

Size alone may be just as effective. Dealings in cotton futures, where they were part of a conspiracy to bring the entire cotton trade within its influence, were held to be in restraint of interstate commerce and in violation of the Anti-Trust Act.[56] The corner would have enabled the conspirators to obtain control of the entire available supply of cotton and to enhance the price to all buyers in every market in the country. Confronted by these facts, the court ruled that, "by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result."

Other cases further substantiate the position that no additional objection is created by the fact that the activities concerned are themselves entirely intrastate in nature. A series of identical contracts, between interstate carriers and a great majority of the independent coal operators in the Pennsylvania hard coal region, to market all the coal of the latter for all time at an agreed percentage of the tide-water price, was held to be part of a concerted scheme to control the sale of the independent output and therefore constituted an unreasonable combination in restraint of trade within the prohibition of the Sherman Act.[57] The contracts at the time of the suit covered nearly half the tonnage of independent operators and it was highly probable that the entire independent output would be absorbed. After indicating that the mere fact that the sales and deliveries took place in Pennsylvania was not controlling,[58] the court said,

[56] *United States* v. *Patten*, *supra*, note 47.
[57] *United States* v. *Reading Co.*, *supra*, note 46.
[58] *Op. cit.*, note 46, at pp. 367 and 368.

"Whether a particular act, contract, or agreement was a reasonable and normal method in furtherance of trade and commerce may, in doubtful cases, turn upon the intent to be inferred from the extent of the control thereby secured over the commerce affected, as well as the method which was used."[59]

The same result was reached where there was a combination of six large corporations engaged in the manufacture and sale of cast iron pipe, with plants strategically located in the middle west and south the output of which was considerably more than half of the entire production of the territory affected, the scheme covering the sale of their product in thirty-six states;[60] where there was an agreement between concerns controlling over 80 per cent of the business of manufacturing and distributing pottery throughout the country, to fix and maintain uniform prices;[61] where it was sought by combination to gain control of the entire petroleum industry,[62] as well as the entire tobacco business.[63]

A particular combination may be effective within a more limited area, but this fact does not affect the power of the federal government to act. If the effect is to materially impede interstate commerce between two states it is enough to constitute a violation of the Anti-Trust Act. Thus violations of the Act were found where manufacturers, contractors, and carpenters in Chicago combined to destroy the competition of non-union mills situated in Wisconsin by refusing to install non-union made millwork, there being evidence to show that outside competition was materially lessened, proving that the combination was large and powerful enough to accomplish the control of competition

[59] *Op. cit.*, note 46, at p. 370.

[60] *Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211, 20 S. Ct. 96, 44 L. Ed. 136 (1899).

[61] *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 47 S. Ct. 377, 71 L. Ed. 700 (1927).

[62] *Standard Oil Co.* v. *United States*, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911).

[63] *United States* v. *American Tobacco Co.*, 221 U.S. 106, 31 S. Ct. 632, 55 L. Ed. 663 (1911).

in interstate commerce;[64] where dealers in tile in San Francisco combined to prevent non-members from buying from manufacturers outside of the state, the latter having agreed with the association to sell only to members;[65] where retail lumber dealers combined and agreed to blacklist or boycott any wholesaler who engaged in retail trade;[66] where a combination threatened the free movement of live poultry into the metropolitan area of New York, by means of interference with unloading, transportation within local area, sales by marketmen to retailers, the prices charged and the amount of profits exacted.[67]

The articles involved in the latter cases were being transported in interstate commerce, and the effect of the local combinations was to destroy competition in such articles in the particular areas of activity. In this limited sense, the combinations were highly effective and destroyed, or threatened to destroy, competition in interstate commerce. On the other hand, where the combination is directed only against competition in local matters or contemplates control of a purely local situation, and is reasonably conducted, so that any effect upon interstate commerce is so indefinite or slight as to render it indiscernible for all practical purposes, the Anti-Trust Act has been held inapplicable.[68]

[64] *United States* v. *Brims*, 272 U.S. 549, 47 S. Ct. 169, 71 L. Ed. 403 (1926).

[65] *Montague & Co.* v. *Lowry*, 193 U.S. 38, 24 S. Ct. 307, 48 L. Ed. 608 (1904).

[66] *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U.S. 600, 34 S. Ct. 951, 58 L. Ed. 1490 (1914).

[67] *Local 167 of International Brotherhood of Teamsters, Etc.* v. *United States*, 291 U.S. 293, 54 S. Ct. 396, 78 L. Ed. 804 (1934).

[68] *Industrial Association* v. *United States*, *supra*, note 43 (all the materials affected were produced in California except one, and that one was not dealt with until it had become commingled with local property); *Hopkins* v. *United States*, *supra*, note 42 (where there was a combination of brokers in the Kansas City Live Stock Exchange, who merely furnished certain facilities for sales and were not themselves the buyers and sellers); *Anderson* v. *United States*, 171 U.S. 604, 19 S. Ct. 50, 43 L. Ed. 300 (1898) (where there was a combination of brokers who were the purchasers of cattle on the market, but their agreement was merely not to employ brokers, or to recognize yard traders, who were not members of the association).

The last two cases illustrate the line of demarcation. Charges made by

Combinations involving railroads have been a frequent source of litigation under the Anti-Trust Act. These cases seem clearly to recognize the importance of size when the effect upon interstate commerce is being considered. Thus the Supreme Court, in *United States* v. *Union Pacific R. Co.*,[69] found a violation of the Act where the Union Pacific attempted to purchase 46 per cent of the stock of the Southern Pacific, a competing line, which would have been sufficient to gain control of the latter. The crux of the opinion is contained in the following words:

> It is the scope of such combinations and their power to suppress or stifle competition or create monopoly which determines the applicability of the Act.[70]

A holding company organized to control the stock of two competing railroads, the Great Northern and the Union Pacific,[71] a combination of all of the railroads west of the Missouri River, covering shipments of every description from that territory to the East,[72] a combination of 31 railroads running between Chicago and the Atlantic coast, formed to fix rates and

the brokers in the *Hopkins* case, and the regulations in the *Anderson* case, were found to be entirely fair and reasonable. The combination was not calculated to, nor was it capable of, controlling or affecting competition in interstate commerce. By reason of its nature and limited scope, its effect upon the "flow" of livestock through the yards and in interstate commerece was imperceptible. These facts are in striking contrast with those of the *Swift* case, *supra* (note 55), where, by reason of its nature and scope, the combination threatened to embrace the entire meat packing industry.

In the *Hopkins* case, the Supreme Court made the following suggestion: "It is possible that exorbitant charges for the use of these facilities might have similar effect as a burden upon commerce that a charge upon commerce itself might have. In a case like that the remedy would probably be forthcoming." *Op. cit.*, note 42, at p. 595. There would, in that case, have been a substantial effect upon interstate commerce, which was not apparent under the facts as actually presented.

See, also, *Blumenstock Bro. Advertising Agency* v. *Curtis Publishing Co.*, 252 U.S. 436, 40 S. Ct. 385, 64 L. Ed. 649 (1920).

[69] 226 U.S. 61, 33 S. Ct. 53, 57 L. Ed. 124 (1912).

[70] *Id.*, at p. 88.

[71] *Northern Securities Co.* v. *United States*, *supra*, note 44.

[72] *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290, 17 S. Ct. 540, 41 L. Ed. 1007 (1897).

fares,[73] and a plan for the unification of practically every terminal facility in St. Louis;[74] were all held to be sufficiently large and powerful to completely suppress competition, thus falling directly within the condemnation of the Sherman Act.

In comparatively recent times, combinations or associations of dealers or manufacturers have been formed for the purpose of disseminating trade information designed to promote the intelligent cooperation and best interests of the industry or business concerned. So long as no concert of action on the part of the members appears, or obligation to act in any prescribed way upon the information thus obtained, and the activities can be reasonably expected to promote interstate commerce rather than hinder it, such associations have been upheld.[75] But where the associations subject the members to certain rules and regulations limiting the output or sales of their product, or where the character of the information gathered and the use made thereof leads irrestistibly to the conclusion that it necessarily would result in a concerted effort to curtail production or raise the

[73] *United States* v. *Joint Traffic Association*, 171 U.S. 505, 19 S. Ct. 25, 43 L. Ed. 259 (1898).

[74] *United States* v. *St. Louis Terminal Association*, 224 U.S. 383, 32 S. Ct. 507, 56 L. Ed. 810 (1912). St. Louis was a focal point for many east to west railroad systems, and by reason of the physical and topographical conditions of the locality the combination in question gained control of the entire movement of interstate commerce. Thus it was said by the court: "Whether it is a facility in aid of interstate commerce or an unreasonable restraint forbidden by the act of Congress . . . will depend upon the intent to be inferred from the extent of the control thereby secured over instrumentalities which such commerce is under compulsion to use, the method by which such control has been brought about and the manner in which that control has been exerted." *Ib.*, at pp. 394 and 395.

[75] *Maple Flooring Association* v. *United States*, 268 U.S. 563, 45 S. Ct. 578, 69 L. Ed. 1093 (1925); *Cement Mfg. Association* v. *United States*, 268 U.S. 588, 45 S. Ct. 586, 69 L. Ed. 1104 (1925); *Appalachian Coals* v. *United States*, 288 U.S. 344, 53 S. Ct. 471, 77 L. Ed. 825 (1933). See, also, *Sugar Institute, Inc.* v. *United States*, 297 U.S. 553, 56 S. Ct. 629, 80 L. Ed. 859 (1936).

In the *Maple Flooring Association* case the court made the following comment: "Restraint upon free competition begins when improper use is made of that information through any concerted action which operates to restrain the freedom of action of those who buy and sell." 268 U.S. at p. 583.

price of the commodities in interstate commerce, they have been held illegal under the Anti-Trust Act.[76]

In a prosecution under the Sherman Act, a trader who simply refuses to sell to others is not guilty of violating its terms, and he may withhold his goods from those who will not sell them at the price which he fixes for their resale.[77] He may not, however, consistently with the Act, go beyond the exercise of this right, and by contracts or combinations, express or implied, attempt to fix the price of his products.[78] The effect upon competition, where binding agreements are included in the trader's activities, cannot be doubted, and in such cases there is more likelihood of a material burden upon interstate commerce.

The Anti-Trust Act has been invoked to restrain the efforts

[76] *American Column & Lumber Co.* v. *United States*, 257 U.S. 377, 42 S. Ct. 114, 66 L. Ed. 284 (1921) (where the association's plan covered one-third of the hardwood output of the country, its secretary actively urged curtailment of production and increase in prices, and frequent meetings were held, tending to show an attempt to secure concerted action); *United States* v. *American Linseed Oil Co.*, 262 U.S. 371, 43 S. Ct. 607, 67 L. Ed. 1035 (1923) (where there was an elaborate system of reports covering variations in prices, prospective buyers and other confidential details, the members were bound to give such information when requested, and regular meetings were held); *Straus* v. *American Publishers' Association*, 231 U.S. 222, 34 S. Ct. 84, 58 L. Ed. 192 (1913) (where the association, composed of about 75% of the publishers in the country, made agreements with the Booksellers' Association, including a majority of the booksellers of the country, which obligated the members to sell copyrighted books only to those who would maintain retail prices—the court found that competition was almost totally destroyed); *Standard Sanitary Mfg. Co.* v. *United States*, 226 U.S. 20, 33 S. Ct. 9, 57 L. Ed. 107 (1912).

Size and concert of action characterize each one of these cases, thus enabling the control of competition and the resulting material burden upon interstate commerce.

[77] *United States* v. *Colgate & Co.*, 250 U.S. 300, 39 S. Ct. 465, 63 L. Ed. 992 (1919); *Frey & Sons, Inc.* v. *Cudahy Packing Co.*, 256 U.S. 208, 41 S. Ct. 451, 65 L. Ed. 892 (1921). In the latter case, the fact that the manufacturer suggested a sales plan which fixed minimum prices and most of the retailers cooperated with the plan, was held not to change the rule.

[78] *United States* v. *Schrader's Sons, Inc.*, 252 U.S. 85, 40 S. Ct. 251, 64 L. Ed. 471 (1920) (where there were agreements to observe certain retail prices); *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911) (where a system of contracts between manufacturer, wholesaler, and retailer fixed the amount which the consumer had to pay).

of employees to compel the employment of union members exclusively, in cases where the destruction of the employer's interstate trade is the means used to accomplish the desired end. So long as the workers' strike is confined to local operations and there is little likelihood of material interference with interstate trade in the article or articles concerned, the Act has no application.[79] But where methods are employed by the union members to discourage the interstate sales of the employer's product, such as the instigation of a secondary boycott,[80] or the designation of the products as "unfair,"[81] the Anti-Trust Act has been applied and the activities enjoined.

An Act designed to supplement the Sherman Anti-Trust Act and to "protect competitive business from further inroads by monopoly,"[82] the Federal Trade Commission Act,[83] involves

[79] *Levering & Garrigues Co.* v. *Morrin*, 289 U.S. 103, 53 S. Ct. 549, 77 L. Ed. 1062 (1933) (involving a conspiracy to halt or suppress local building operations); *United Leather Workers' International Union* v. *Herkert*, 265 U.S. 457, 44 S. Ct. 623, 68 L. Ed. 1104, 33 A.L.R. 566 (1924) (involving a strike intended to prevent the continued manufacture of goods by the employer which were intended for interstate shipment. In neither case were facts presented to show that a material effect upon interstate commerce would result).

[80] *Loewe* v. *Lawlor*, 208 U.S. 274, 28 S. Ct. 301, 52 L. Ed. 488 (1908); *Duplex Co.* v. *Deering*, 254 U.S. 443, 41 S. Ct. 172, 65 L. Ed. 349 (1921). In these two cases, the first involving a hat manufacturer and the second, a manufacturer of printing presses, the products were almost exclusively articles of interstate trade. By means of the boycott, the union members were attempting to destroy the employer's interstate sales, interstate commerce being the direct object of the attack, and a material effect was threatened.

[81] *Bedford Cut Stone Co.* v. *Stone Cutters' Association*, 274 U.S. 37, 47 S. Ct. 522, 71 L. Ed. 916, 54 L. Ed. 791 (1927) (where there was a combination of union stone-cutters to restrain the interstate trade of certain building stone producers by declaring their stone "unfair" and forbidding members of the union to work on it in building construction in other states, for which it was extensively bought and used, and thereby coercing or inducing local employers to refrain from purchasing it); *Lawlor* v. *Loewe*, 235 U.S. 522, 35 S. Ct. 170, 59 L. Ed. 341 (1915) (where a list of "unfair" dealers, manifestly intended to put a ban upon those whose names appeared therein, was circulated among an important body of possible customers who were combined with a view to joint action and in anticipation of such reports).

[82] A full explanation of the purpose of the Act is given by Justice Brandeis in his dissent in *Federal Trade Commission* v. *Gratz*, 253 U.S. 421, 435, 40 S. Ct. 572, 64 L. Ed. 993 (1920).

[83] 38 Stat. 717, 719, 15 U.S.C.A., sec. 45.

the same considerations. In particular, it was designed to aid in combating any further tendencies toward concentration and monopoly based upon unfair trade practices. It applies, of course, only to unfair methods of competition in interstate commerce.

Practices not characterized by deception or fraud, but considered reasonable under the particular circumstances presented, and showing no tendency to unduly hinder competition, are held not to amount to unfair methods of competition and are therefore beyond reproach.[84] Likewise, where claims are made concerning a product which is not the subject of distinct competition, and such claims are not of a nature to substantially injure persons who might be classed as competitors, there is said to be no unfair method of competition within the meaning of the Act.[85]

But where the product concerned is the subject of active competition, any claims or activities which are calculated to gain an unfair advantage over competitors and are of a nature calculated to seriously threaten continued competition in that commodity, may be outlawed by order of the Federal Trade Commission.[86]

[84] *Federal Trade Commission* v. *Gratz*, *supra*, note 82. Merchants acting independently refused to sell cotton ties unless purchasers bought from them a corresponding amount of jute bagging. Since the merchants were operating alone and in good faith, and in view of the fact that ties and bagging for cotton were closely associated articles, the court decided that no unfair methods of competition were shown.

[85] *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643, 51 S. Ct. 587, 75 L. Ed. 1324 (1931). The Commission ordered a party to cease representing his "obesity cure" as a scientific method and a remedy for obesity unless the claims were accompanied by a statement that the cure could not be taken safely except under medical direction. The order was held beyond the commission's jurisdiction, since such claims were not of a nature to substantially injure competitors.

[86] *Federal Trade Commission* v. *Keppel Bros.*, 291 U.S. 304, 54 S. Ct. 423, 78 L. Ed. 814 (1933), noted in 82 U. of Pa. L. Rev. 664 (1934) (distribution of candy packages that encouraged buying through a gambling device); *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212, 53 S. Ct. 335, 77 L. Ed. 706 (1933) (sale of flour under false representation that the flour was manufactured by the sellers); *Federal Trade Commission* v. *Winsted Co.*, 258 U.S. 483, 42 S. Ct. 384, 66 L. Ed. 729 (1922) (a manu-

The cases under the Sherman Anti-Trust Act and the Federal Trade Commission Act demonstrate that the activities enjoined are those which are extensive enough, or sufficiently effective by reason of their character or location, to exercise a distinct and profound effect upon competition in articles which are the subjects of interstate commerce. It is true that many of these cases have been decided on the ostensibly independent doctrine of the "rule of reason." Yet at the very least it can be reasoned that, just as judicial acceptance of the rule of reason eased away the perplexing question of the validity of the Sherman Act under the Fifth Amendment,[87] so the same doctrine bears a relation to the problem of the scope of the anti-trust acts as concerns the area of federal authority. To go further, the stricter attitude of the court toward railroad than toward industrial combinations may be rationalized as logically in terms of the greater quantitative effect of railroad combinations upon interstate commerce, arising as a result of the peculiar relation of the carrier to commerce, as in those of conflicting conceptions of monopoly and restraint of trade inherited from the common law.

Approaching the problem from another direction, the commerce clause of the Constitution has been interpreted as a limitation upon state action. The power over interstate commerce resides exclusively in the federal government, and the individual states can do nothing which will materially interfere with, or in any way tend to control, the free movement of commodities in interstate commerce. If a state's action threat-

facturer labeled goods "natural wool" when in fact they were in large part cotton); *Algoma Lumber Co.* v. *Federal Trade Commission*, 291 U.S. 67, 54 S. Ct. 315, 78 L. Ed. 655 (1933) (sales of yellow pine products under the name "California White Pine"); *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 42 S. Ct. 150, 66 L. Ed. 307 (1922) (a plan under which special agents were employed to locate violators who sold below the prices "suggested" and such violators placed on a list of those to whom the company's goods were not to be sold, reinstatement being withheld until assurance was given that the products would be sold at the right prices in the future).

[87] Corwin, *Anti-Trust Acts and the Constitution*, 18 Va. L. Rev. 355 (1932).

ens to impose a substantial burden upon interstate commerce, there is said to be a direct effect upon that commerce and such action is immediately condemned. But where the state acts pursuant to a reasonable exercise of its governmental functions of raising necessary revenue or protecting the lives, health, and general well being of its citizens, no objection is raised by the Supreme Court, the effect upon interstate commerce, if any, being referred to as indirect. The qualification that the exercise of such powers must be reasonable presupposes that the effect upon interstate commerce will not be too great. The cases in this field demonstrate again that the question is primarily one of degree.

A direct burden upon interstate commerce was found where one state attempted to require a license of a corporation located in another state before it could buy and ship grain from the first state to the second;[88] where practically all of the wheat harvested in one state was shipped to other states, and a law of the state where the grain was produced provided for inspectors who were required to fix the price of the wheat after it had been stored in local elevators, which amounted to fixing the profit which the buyers could make;[89] and where the same state attempted to regulate the marketing of wheat by establishing a system of grading, weighing, and measuring.[90] In all three of these situations there was an attempt on the part of the state to control the interstate shipment of grain by statutory regulations which would necessarily have a material effect upon the interstate trade in grain.

A New York act attempting to regulate the price paid by a New York dealer for milk acquired in Vermont was enjoined in its operation upon sales of such milk in the original pack-

[88] *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, 42 St. Ct. 106, 66 L. Ed. 239 (1921).

[89] *Lemke* v. *Farmers' Grain Co.*, 258 U.S. 50, 42 S. Ct. 244, 66 L. Ed. 458 (1922).

[90] *Shafer* v. *Farmers' Grain Co.*, 268 U.S. 189, 45 S. Ct. 481, 69 L. Ed. 909 (1925).

ages.[91] "Nice distinctions," the court said, "have been made 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."[92]

Such a regulation by the state of New York threatened to materially interfere with the interstate movement of Vermont milk into New York. The economic welfare of New York citizens was not deemed sufficient reason for permitting such a substantial restraint of interstate commerce.

An agency established within a state for the purpose of soliciting passengers and selling tickets for an interstate carrier by rail or steamship, is an important part of interstate or foreign commerce, a necessary adjunct thereto, and a state statute requiring a license fee from such an agency constitutes a direct burden upon interstate commerce.[93] The power to tax such an agency, it was said, involved the lessening of the commerce of the road to an extent commensurate with the amount of business done by the agent.[94]

A state law providing for the inspection of animals whose meats are used for human consumption, is not a rightful exertion of the state's police power, but a burden upon interstate commerce, where the inspection is of such a character that it will prevent the introduction into the state of sound meats, the product of animals slaughtered in other states.[95] An act forbidding the agent of an express company not incorporated by the laws of the state to carry on business without first obtaining a

[91] *Baldwin* v. *Seelig*, 294 U.S. 511, 55 S. Ct. 497, 79 L. Ed. 1032 (1935).

[92] *Id.*, at p. 522.

[93] *McCall* v. *California*, 136 U.S. 104, 10 S. Ct. 881, 34 L. Ed. 391 (1890); *Di Santo* v. *Pennsylvania*, 273 U.S. 34, 47 S. Ct. 267, 71 L. Ed. 524 (1927).

[94] 136 U.S. at p. 111.

[95] *Minnesota* v. *Barber*, 136 U.S. 313, 10 S. Ct. 862, 34 L. Ed. 455 (1890); *Brimmer* v. *Rebman*, 138 U.S. 78, 11 S. Ct. 213, 34 L. Ed. 862 (1891).

license was held to be a regulation of interstate commerce and invalid.[96] An act forbidding the shipment of unshelled shrimps outside of the state, but permitting their transportation as soon as shelled, was held to directly burden and obstruct interstate commerce.[97] And in *Pennsylvania* v. *West Virginia*,[98] a law of a state wherein natural gas was produced and was the recognized subject of interstate commerce, which required that consumers in that state should be accorded a preferred right to purchase the gas over consumers in other states, was held invalid, the court saying:

> Its provisions and the conditions which must surround its operation are such that it necessarily and directly will compel the diversion to local consumers of a large and increasing part of the gas heretofore and now going to consumers in the complainant states, and therefore will work a serious interference with that commerce.[99]

Serious consequences to the continued freedom of interstate commerce were apprehended in this last group of cases, as in the others, if the state regulations were allowed to stand. Those regulations threatened to impose a substantial burden upon interstate commerce.

In contrast to the cases where the effect upon interstate commerce is substantial by reason of the extent or character of the state's control, numerous charges and regulations imposed by the states have been held entirely valid regardless of the fact that they may have had some effect upon interstate commerce.[100]

[96] *Crutcher* v. *Kentucky*, 141 U.S. 47, 11 S. Ct. 851, 35 L. Ed. 649 (1891).

[97] *Foster-Fountain Packing Co.* v. *Haydel*, 278 U.S. 1, 49 S. Ct. 1, 73 L. Ed. 147 (1928).

[98] 262 U.S. 553, 43 S. Ct. 658, 67 L. Ed. 1117 (1923).

[99] *Id.*, at p. 597.

[100] A state may prescribe reasonable charges for intrastate transportation, *Minnesota Rate Cases*, 230 U.S. 352, 33 S. Ct. 729, 57 L. Ed. 1511 (1913); it may impose a license on locomotive engineers running trains within the state, even though they are bound for points outside, *Smith* v. *Alabama*, 124 U.S. 465, 8 S. Ct. 564, 31 L. Ed. 508 (1888); a state may regulate the manufacture and sale of liquor within its own borders, regardless of the fact that it may be intended for export, *Kidd* v. *Pearson*, 128 U.S. 1, 9 S. Ct. 6, 32 L. Ed. 346 (1888); but it cannot prohibit such sale where it is imported

These are cases where the effect is slight and therefore not calculated to cause any noticeable diminution of the trade among the several states, or where the charge or regulation is a reasonable exercise of local authority and is not likely to produce a heavy or undue burden upon interstate commerce.

Any attempt on the part of a state to require a license fee from agents or solicitors engaged in selling goods by sample for concerns located in other states, is invalid, amounting to a "direct" burden upon interstate commerce.[101] In *Robbins* v.

in the original packages from other states, *Leisy* v. *Hardin*, 135 U.S. 100, 10 S. Ct. 681, 34 L. Ed. 128 (1890); a state's wrongful death act is valid as applied to a cause of action arising out of a river boat collision, *Sherlock* v. *Alling*, 93 U.S. 99, 23 L. Ed. 819 (1876); a state may subject coal and coke barges to inspection although traveling in interstate commerce, *Pittsburgh & Southern Coal Co.* v. *Louisiana*, 156 U.S. 590, 15 S. Ct. 459, 39 L. Ed. 544 (1895); reasonable charges for the use of a facility in interstate commerce, such as a state or municipally owned wharf, have been upheld even though such charges might enhance the cost of doing the business, *Transportation Co.* v. *Parkersburg*, 107 U.S. 691, 2 S. Ct. 732, 27 L. Ed. 584 (1882); *Packet Co.* v. *St. Louis*, 100 U.S. 423, 25 L. Ed. 688 (1879), *Packet Co.* v. *Catlettsburg*, 105 U.S. 559, 26 L. Ed. 1169 (1881), *Huse* v. *Glover*, 119 U.S. 543, 7 S. Ct. 313, 30 L. Ed. 487 (1886) (involving a reasonable charge for the use of river improvements), *Ouachita Packet Co.* v. *Aiken*, 121 U.S. 444, 7 S. Ct. 907, 30 L. Ed. 976 (1887); a city may make a reasonable charge for the use of its streets, *St. Louis* v. *Western Union Telegraph Co.*, 148 U.S. 92, 13 S. Ct. 485, 37 L. Ed. 380 (1893); a state may prohibit the waste of petroleum and may issue proration orders applying to the production of oil (not to sales or transportation), even though the product is intended for and is in fact immediately shipped in interstate commerce, *Champlin Rfg. Co.* v. *Corp. Com. of Oklahoma*, 286 U.S. 210, 52 S. Ct. 559, 76 L. Ed. 1062 (1932).

[101] *Rearick* v. *Pennsylvania*, 203 U.S. 507, 27 S. Ct. 159, 51 L. Ed. 295 (1906); *Caldwell* v. *North Carolina*, 187 U.S. 622, 23 S. Ct. 229, 47 L. Ed. 336 (1903); *Brennan* v. *Titusville*, 153 U.S. 289, 14 S. Ct. 829, 38 L. Ed. 719 (1894); *Asher* v. *Texas*, 128 U.S. 129, 9 S. Ct. 1, 32 L. Ed. 368 (1888); *Stoutenburgh* v. *Hennick*, 129 U.S. 141, 9 S. Ct. 256, 32 L. Ed. 637 (1889); *Real Silk Hosiery Mills, Inc.* v. *Portland*, 268 U.S. 325, 45 S. Ct. 525, 69 L. Ed. 982 (1925).

That such license fees would subject interstate commerce to a substantial burden was indicated in *Welton* v. *Missouri*, 91 U.S. 275, 23 L. Ed. 347 (1875), where the court said: "Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating state legislation, favorable to the interests of one state, and injurious to the interests of other states and countries, which existed previous to the adoption of the Consitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some states. *Ib.*, at p. 281."

Shelby Taxing District,[102] the Supreme Court made the following statement:

> The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several states, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation.[103]

This suggests a broad, basic test for all cases involving things which affect interstate commerce. The federal government may control all activities which, by reason of their nature or extent have such an effect upon interstate commerce that the national interest in them must be said to be greater than their local interest and their regulation by the national authority more practical, if not absolutely necessary.[104]

A reasonable wharfage charge upon river boats engaged in interstate transportation[105] is no less direct in its effect upon interstate commerce than a license fee upon agents and solicitors. In both cases, the charge is made directly upon an instrumentality of interstate trade, but because of the difference in the character of the instrumentalities, their relative ability to pay, and other similar considerations, the effect to be apprehended in the former case is not nearly so great as that to be expected in the latter case.

The same trend may be detected in the Supreme Court's decisions relative to the states' power of taxation. No state has the right to lay a tax on interstate commerce in any form,

[102] 120 U.S. 489, 7 S. Ct. 592, 30 L. Ed. 694 (1887).

[103] *Id.*, at p. 492.

[104] In the *Robbins* case, *supra* (note 98), the court said further: "If the selling of goods by sample and the employment of drummers for that purpose, injuriously affect local interests of the states, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it, for it is obvious that such regulations should be based on a uniform system applicable to the whole country, and not left to the varied, discordant, or retaliatory enactments of forty different states. *Op. cit.*, note 102, at p. 498. See, Jane Alvies, *The Commerce Power—from Gibbons* v. *Ogden to the Wagner Act Cases*, 3 O.S.L.J. 307, 326 (1937).

[105] See cases cited in note 100, *supra*.

whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on.[106] Nevertheless, reasonable sources of revenue must be left to the states, and it is only when a state tax threatens to materially burden the interstate movement of commodities or to become a regulation thereof, that it is declared invalid. The power to tax is the power to destroy, and where the state attempts to tax, in effect, the interstate business of a corporation,[107] the traffic over an interstate bridge,[108] or the stream of gas and oil flowing through the state,[109] very serious consequences to the freedom of such movement between the states may be expected and the court has held such attempts unconstitutional. But where the tax is merely laid upon the local property of a company, even though that company may be doing interstate business, the likelihood of such consequences is much less and what effect there may be is said to be indirect.[110]

[106] *Lyng* v. *Michigan*, 135 U.S. 161, 10 S. Ct. 725, 34 L. Ed. 150 (1890).

[107] *Western Union Telegraph Co.* v. *Kansas*, 216 U.S. 1, 30 S. Ct. 190, 54 L. Ed. 355 (1910) (where a state attempted by statute to impose the requirement that a company, as a condition to its right of engaging in local business, first pay into the state school fund a given per cent of its authorized capital, representing all of its business and property everywhere); *Leloup* v. *Mobile*, 127 U.S. 640, 8 S. Ct. 1380, 32 L. Ed. 311 (1888) (a general license tax upon a telegraph company, which was said to affect its entire business, interstate and domestic). Compare, *State Tax on Railway Gross Receipts*, 82 U.S. 284, 21 L. Ed. 164 (1872), where the tax was said to be upon the income of the carrier, i.e., the fruits of transportation, realized and reduced to possession, so as to have become part of the general capital and property of the taxpayer. Such a tax was held valid.

[108] *Covington Bridge Co.* v. *Kentucky*, 154 U.S. 204, 14 S. Ct. 1087, 38 L. Ed. 962 (1894).

[109] *Eureka Pipe Line Co.* v. *Hallanan*, 257 U.S. 265, 42 S. Ct. 101, 66 L. Ed. 227 (1921); *United Fuel Gas Co.* v. *Hallanan*, 257 U.S. 277, 42 S. Ct. 105, 66 L. Ed. 234 (1921). The state of West Virginia sought to tax a stream of oil and gas flowing constantly through the state, but the court held that the mere power of those who directed the stream to divert it from interstate commerce, when as a course of business it was constantly interstate, with only minor diversions to intrastate commerce, did not expose to the state's taxing power that part of the flow which crossed state lines.

[110] Where a state taxed tolls which were received by a railroad from other carriers for the privilege of using its tracks within the state, it was held that

To again adopt the words of the Supreme Court, "The states cannot under under any guise impose direct burdens upon interstate commerce. For this is but to hold that the states are not permitted directly to regulate or restrain that which from

the tax was laid upon the corporation on account of its property in a railroad and that this requirement of the usual proportional contribution to public maintenance had merely an incidental effect upon interstate commerce. *New York, Etc. R. Co.* v. *Pennsylvania*, 158 U.S. 431, 438, 15 S. Ct. 896, 39 L. Ed. 1043 (1895).

A state has the power to impose a tax on a general commission business carried on within the state, where the concern is not acting for any particular firm within or without the state, *Ficklen* v. *Shelby County*, 145 U.S. 1, 12 S. Ct. 810, 36 L. Ed. 601 (1892); the business of buying and selling cotton locally produced, processed and warehoused, is local in character, and a local occupation tax upon the buyer does not contravene the commerce clause, although the course of business is such that all of the cotton so bought is ultimately shipped by the buyer in interstate or foreign commerce, *Chassaniol* v. *Greenwood*, 291 U.S. 584, 54 S. Ct. 541, 78 L. Ed. 1004 (1934); the business of storing and compressing cotton produced locally and shipped into local warehouses is local, and a non-discriminatory state tax upon it is valid, *Federal Compress Co.* v. *McLean*, 291 U.S. 17, 54 S. Ct. 267, 78 L. Ed. 622 (1934); although a state tax on the gross earnings from interstate commerce is a burden thereon and repugnant to the commerce clause, the net income justly attributable to all classes of business done within the state, whether derived from subsequent interstate transportation or not, may be used as a measure of a tax imposed to pay the state for the use therein of a domestic corporation's franchise, *Matson Nav. Co.* v. *State Board of Equalization of California*, 297 U.S. 441, 56 S. Ct. 553, 80 L. Ed. 791 (1936). See, also, *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245, 43 S. Ct. 83, 67 L. Ed. 237 (1922).

Neither is there any objection to a state tax upon goods coming to rest within a state, although they have been transported there from outside and are intended to later continue their journey in interstate or foreign commerce. *Bacon* v. *Illinois*, 227 U.S. 504, 33 S. Ct. 299, 57 L. Ed. 615 (1913); *Brown* v. *Houston*, 114 U.S. 622, 5 S. Ct. 1091, 29 L. Ed. 257 (1885). In the latter case, the court felt that there was "only an exercise of local administration under the general taxing power, which, though it may incidentally affect the subjects of commerce, is entirely within the power of the state until Congress shall see fit to interfere and make express regulations on the subject." *Ib.*, at p. 632. These words indicate that many of the decisions above may not preclude regulation of the same subjects by the federal government if and when it sees fit to enter. The cases where the state's action affects interstate commerce only incidentally are sometimes grouped within a class wherein it is said that the states have concurrent jurisdiction. See *Covington Bridge Co.* v. *Kentucky*, *supra*, note 108, at p. 211. According to the Supreme Court in this case, the jurisdiction of Congress is exclusive in matters national in character. *Op. cit.*, note 108, at p. 212.

its nature should be under the control of one authority and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains."[111] But where the subject is peculiarly one of local concern, and from its nature belongs to the class of things with which the state appropriately deals in providing for local needs, the burden upon interstate commerce is said to be indirect and the state tax or other regulation is valid. It has become increasingly apparent that the degree of the burden upon interstate commerce is the "tip-off" when it becomes necessary to decide whether a particular activity is national in its character and admits only of one uniform system or plan of regulation or is a local matter which must be controlled by the states.

The purpose of this discussion has been to reveal the true nature of the shibboleth which has served the Supreme Court of the United States so faithfully and for so many years. It is submitted that the formula which conditions the exercise of the federal commerce power upon a determination that the subject of regulation affects interstate commerce directly rather than indirectly, is little more than a convenient label which in reality merely serves to describe the result of the court's deliberations. The thought is not entirely novel, nor yet without precedent. It has found expression in the words of at least two of the Justices seated on the Supreme Bench.

Justice Stone, in his dissenting opinion in *Di Santo* v. *Pennsylvania*,[112] is responsible for the following statement, which is one of the most searching and thoughtful explanations of the real problem involved to be found anywhere:

> In this case the traditional test of the limit of state action by inquiring whether the interference with commerce is direct or indirect seems to me too mechanical, too uncertain in its application, and too remote from actualities, to be of value. In thus making use of the expressions, "direct" and "indirect interference" with commerce, we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached.

[111] *Minnesota Rate* Cases, *supra*, note 100, at p. 400.
[112] Note 93, *supra*.

But it seems clear that those interferences not deemed forbidden are to be sustained, not because the effect on commerce is nominally indirect, but because a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce, lead to the conclusion that the regulation concerns interests peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across state lines.[113]

The principle applies as well to cases involving the federal government's power to regulate by virtue of the authority conferred by the commerce clause of the Constitution, bringing within that power those activities which are peculiarly national in character and which affect interstate commerce to the extent of imposing a substantial burden thereon.

Justice Cardozo, in his dissenting opinion in the *Carter* case, pointed out that many of the effects upon interstate commerce, agreed by everyone to be direct, are in fact indirect in the true sense of the word. "A survey of the cases," he concluded, "shows that the words have been interpreted with suppleness of adaptation and flexibility of meaning. The power is as broad as the need that evokes it."[114]

The decisions of the Supreme Court cited in this article reveal that almost invariably the court is chiefly concerned with the degree of the effect upon interstate commerce. If sufficient danger to interstate commerce appears, no matter how remote the source, Congress will be conceded the power to act. Recognition of this fact, officially, has been somewhat belated, but it has finally appeared in the opinion of the majority in the *Jones & Laughlin* case.

If a precise formula is needed, the following deductions may be suggested:

(1) The federal government has the power to control those things which affect interstate commerce when all the factors and circumstances involved give the things concerned a national

[113] *Op. cit.*, note 93, at p. 44.
[114] *Op. cit.*, note 14, at p. 328.

character and significance which outweighs their inherently local characteristics.

(2) So long as the local interest remains predominant and the things concerned are best controlled by local regulation, any effect upon interstate commerce which may be found will not be sufficient to invoke the federal power.

(3) One of the most important factors in determining the character of the things concerned is the degree of the effect upon interstate commerce.

(4) The consideration of the degree of the effect, however, may be offset to some extent where the things concerned are of such a nature that they cannot be readily distinguished from a large number of other things which are intrinsically local and cannot be brought within the power of the federal government without obliterating the federal system.

In any event, it must be recognized that the direct and indirect test is not a trustworthy formula. The primary question, from a practical standpoint, is one of degree.