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STATES' RIGHTS AND THE WAGNER ACT DECISIONS

MARY LOUISE RAMSEY*

"Commerce among the States," said Chief Justice Marshall in *Gibbons v. Ogden*,¹ "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*." (italics the author's).

"Although activities may be intrastate in character when separately considered," said Chief Justice Hughes in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*,² "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."

One hundred and thirteen years separate those two pronouncements. Headlines proclaimed the latter to be revolutionary. A vast extension of federal control over industry has been predicted, with a consequent restriction of the authority of the states. It is the design of this paper to bring into focus at the point settled by the Wagner Act decisions the principles established by earlier cases and some of the problems which inhere in proposed measures for further federal regulation of labor relations.

I

Ironically enough, most of the cases now cited for the proposition that the production of commodities constitutes intrastate commerce arose out of the resistance of manufacturers and mine operators to state taxation and regulation on the ground that interstate commerce in their products would

*Attorney, Chicago, Illinois. A.B. and LL.B., University of Missouri; S.J.D., University of Michigan.

1. 22 U. S. 1 (1824). Compare this statement from Alexander Hamilton's opinion on the constitutionality of the Bank of the United States: "The Secretary of State further argues that if this was a regulation of commerce, it would be void, as extending as much to the internal commerce of every state as to its external. But what regulation of commerce does not extend to the internal commerce of every State? . . . What can operate upon the whole, but must extend to every part?" THE FEDERALIST (Ford's ed. 1886) 673.

2. 301 U. S. 1, 37 (1937).

be burdened thereby.³ Problems of industrial regulation did not emerge into national importance until about fifty years ago. The passage of the Interstate Commerce Act was followed three years later by the Sherman Anti-Trust law. Until the advent of the New Deal, the two fields of regulation covered by successive transportation and anti-trust laws, together with the Packers' and Stockyards and Grain Futures Acts, furnished most of the occasions for judicial decisions concerning the extent of federal power over commerce vis-a-vis states' rights.

When Congress passed its first Employers' Liability Act, imposing on "every common carrier engaged in trade or commerce" liability for injuries sustained under specified circumstances by "any of its employees," a majority of five held the act invalid because not limited to employees engaged in interstate commerce.⁴ Soon thereafter, new jurisdictional conflicts between state and nation were precipitated by federal statutes prescribing the safety equipment to be used by railroads and limiting the rates to be charged by them. Even conservative Justices had no difficulty in finding Congressional power adequate in these premises. In *Southern Railway v. United States*,⁵ Justice Van Devanter, speaking for a unanimous Court, held that the Safety Appliance Acts⁶ could be applied to cars moving intrastate traffic:

"And this is so, not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it."

The present Chief Justice, while serving as an Associate Justice, delivered the opinion which confirmed federal power to alter rates for intrastate transportation, when necessary to remove discrimination against interstate commerce:⁷

3. *Veazie v. Moor*, 55 U. S. 568 (1852); *Kidd v. Pearson*, 128 U. S. 1 (1888); *American Mfg. Co. v. St. Louis*, 250 U. S. 459 (1919); *Heisler v. Thomas Colliery Co.*, 260 U. S. 245 (1922); *Oliver Iron Mining Co. v. Lord*, 262 U. S. 172 (1923); *Champlin Refining Co. v. Corp. Comm.*, 286 U. S. 210 (1932).

4. *Employers' Liability Cases*, 207 U. S. 463 (1908).

5. 222 U. S. 20, 26, 27 (1911).

6. 27 STAT. 531 (1893), 56 U. S. C. A. §§ 1-7 (1928); 32 STAT. 943 (1903), 45 U. S. C. A. §§ 8-10 (1928).

7. *Shreveport Rate Cases*, 234 U. S. 342, 354, 355 (1914).

"It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. . . . It is for Congress to supply the needed correction where the relation between intrastate and interstate rates presents the evil to be corrected, and this it may do completely by reason of its control over the interstate carrier in all matters having such a close and substantial relation to interstate commerce that it is necessary or appropriate to exercise the control for the effective government of that commerce."

This proposition is now so well established⁸ that one is mildly shocked to note that two Justices dissented, and to find, in early issues of law reviews, learned articles challenging its validity.⁹

The point of departure for any discussion of the reach of the anti-trust acts into state domains is *United States v. E. C. Knight Company*.¹⁰ That was a suit to compel the American Sugar Refining Company to divest itself of stock control over competing refiners, which control was alleged to have been acquired with the purpose and effect of eliminating competition and obtaining a monopoly. It was dismissed on the ground that the refining of sugar was intrastate commerce, and, therefore, not subject to the Sherman Act. The force of this decision is minimized by the fact that it involved only a point of statutory construction, but the opinion of the Court is dogmatic:

"Commerce succeeds to manufacture, and is not a part of it."¹¹

The popular demand for trust busting was not to be curbed by judicial fiat. Further prosecutions were begun, with sufficient verbal variations in the pleadings to permit fresh consideration by the Court. *Addyston Pipe & Steel Company v. United States*¹² was the fruit of that effort. There the

8. *Illinois Cent. R. R. v. Illinois Public Utilities Comm.*, 245 U. S. 493 (1918); *Wisconsin R. R. Comm. v. C. B. & Q. R. R.*, 257 U. S. 563 (1922); *New York v. United States*, 257 U. S. 591 (1922); *United States v. Louisiana*, 290 U. S. 70 (1933); *Texas v. United States*, 292 U. S. 522 (1934).

9. See Coleman, *The Evolution of Federal Regulation of Intrastate Rates: The Shreveport Rate Cases* (1914) 28 HARV. L. REV. 34. In criticizing the Minnesota Rate case decision in an earlier article, the same author had made a familiar argument: "Why did not the Supreme Court in the Minnesota case face the situation squarely and admit that amendment of the Constitution, albeit it is difficult of attainment (and rightly so), is the only true remedy?" *The Vanishing Rate-Making Power of the States* (1914) 14 COL. L. REV. 122, 145.

10. 156 U. S. 1 (1895).

11. *Id.* at 12.

12. 175 U. S. 211 (1899). See *Hopkins v. United States*, 171 U. S. 578 (1898); *Anderson v. United States*, 171 U. S. 604 (1898); *Standard Oil Co. v. United States*, 221 U. S. 1 (1911).

Court held that a combination of pipe manufacturers were subject to prosecution where their agreements were designed to increase prices of products sold in interstate commerce. The *Knight* case was not overruled; on the contrary, the Court resorted to a familiar formula to justify the difference in the conclusion reached:¹³

“ . . . the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally and collaterally, regulate to a greater or less degree commerce among the States.”

In *Swift & Company v. United States*, the large packing companies were charged with a long list of offenses, chief among which was an alleged combination to keep down prices of live stock by refusing to bid against each other. The defendants' plea that such activities constituted intrastate commerce and were beyond the power of Congress evoked an opinion by Justice Holmes which has become a landmark:¹⁴

“ . . . commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is the typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce.”

This conception of interstate commerce has been confirmed and extended by decisions upholding the Packers and Stockyards Act of 1921.¹⁵ That act forbade packers to engage in unfair, discriminatory or deceptive practices in interstate commerce, or to control prices or establish a monopoly. It provided for federal supervision over the business of commission men and live stock dealers, and required all charges for services and facilities in stockyards to be just, reasonable, non-discriminatory and non-deceptive. The Secretary of Agriculture was empowered to make rules and regulations to carry out the act, fix rates, and prescribe how every packer, stockyard owner, commission man and dealer should keep accounts.

13. 175 U. S. 211, 229 (1895).

14. 196 U. S. 375, 398, 399 (1905).

15. 42 STAT. 159 (1921), 7 U. S. C. A. §§ 181, 182 (1927).

Such an extension of federal control beyond anything previously attempted over "local" activities was immediately challenged as unconstitutional. In an opinion from which only Justice McReynolds dissented, Chief Justice Taft held it valid:¹⁶

"Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent."

Of similar import is *Board of Trade v. Olsen*,¹⁷ wherein the Court upheld the Grain Futures Act¹⁸ limiting trading in grain futures to "contract markets" licensed and supervised by the Secretary of Agriculture. This case is particularly significant because its result was directly contrary to that reached by the same Court the year before in *Hill v. Wallace*.¹⁹ The latter involved the Future Trading Act²⁰ under which Congress purported to levy a prohibitive tax on future trading; exemption from this tax could be bought by compliance with the regulations set forth in the act. The Court held this was a penalty, and as such, invalid; that "sales for future delivery on the Board of Trade are not in and of themselves interstate commerce." In the light of that decision, the opinion in the *Olsen* case takes on an added meaning:²¹

"The question of price 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."

16. *Stafford v. Wallace*, 258 U. S. 495, 521 (1922).

17. 262 U. S. 1 (1923).

18. 42 STAT. 998 (1922), 7 U. S. C. A. §§ 1-4 (1927).

19. 259 U. S. 44 (1922).

20. 42 STAT. 187 (1921), 7 U. S. C. A. note 1 (1927).

21. 262 U. S. 1, 40 (1923).

Even stronger light is shed by cases in which labor organizations have been charged with violations of the Sherman Act. In a series of cases beginning with *Loewe v. Lawlor*,²² combinations of employees engaged in such intrastate activities as manufacturing,²³ mining,²⁴ building construction,²⁵ and distribution of poultry²⁶ have been subjected to the penalties of the act because of the effect, or intended effect, of their actions on interstate commerce. Two of these, *Coronado Coal Company v. United Mine Workers*,²⁷ and *Local 167 v. United States*,²⁸ have an immediate interest because of their contrast with recent decisions invalidating New Deal legislation. In the former, striking miners were held liable for penalties under the Sherman Act because of a supposed intent to restrain interstate commerce by cutting off the supply of coal entering into such commerce from the mine in which they were employed. This contrasts with *Carter v. Carter Coal Company*,²⁹ wherein the majority of the court held the entire Guffey Coal Act invalid because of its provisions for regulating wages and hours of labor. The Court rested its conclusion upon the categorical assertion that mining was intrastate commerce. In the *Coronado* case, Chief Justice Taft said:³⁰

“The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect or remote obstruction to that commerce. But when the intent to those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act.”

In *Local 167 v. United States*,³¹ a restraint of interstate commerce was held to have been proved by evidence that poultry marketmen in New York City, in combination with teamsters and “shochtim” allocated retailers

22. 208 U. S. 274 (1908).

23. Duplex Printing Press Co. v. Deering, 254 U. S. 443 (1921).

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

25. U. S. v. Brims, 272 U. S. 549 (1926); Bedford Cut Stone Co. v. Journey-men Stone Cutters' Ass'n, 274 U. S. 37 (1927).

26. Local 167 v. United States, 291 U. S. 293 (1934).

27. Coronado Coal Co. v. United Mine Workers, 268 U. S. 295 (1925), cited note 24, *supra*.

28. Local 167 v. United States, 291 U. S. 293 (1934), cited note 26, *supra*.

29. 298 U. S. 238 (1936).

30. 268 U. S. 295, 310 (1925).

31. Local 167 v. United States, 291 U. S. 293 (1934), cited note 26, *supra*.

among themselves, fixed prices and by violence and intimidation prevented wholesalers and retailers from freely purchasing live poultry. Said Justice Butler for an undivided court:³²

“It may be assumed that some time after delivery of carload lots by interstate carriers to the receivers the movement of the poultry ceases to be interstate commerce. . . . But we need not decide when interstate commerce ends and that which is intrastate begins. *The control of the handling, the sales and the prices at the place of origin before the interstate journey begins or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce.*” (italics the author’s).

Presumably it was this decision which influenced the government to select the prosecution of the Schechters as a test case for the NRA. Yet a unanimous Court held that wages and hours of labor in a wholesale poultry business in New York City had merely an indirect effect on interstate commerce and was therefore outside the orbit of Congressional power.³³

II

“Thus Mr. Justice Hughes would carry us back again over those ninety years of decisions that we have just reviewed—back to *Gibbons v. Ogden*—and have us understand, from the lips of Chief Justice Marshall, that if Congress so wills it there shall be no internal commerce of a State.”³⁴

Those words were written in 1914, in criticism of the opinion delivered by the present Chief Justice in the *Shreveport Rate Cases*.³⁵ Despite their similarity to comments recently heard, they could not have been written concerning the Wagner Act decisions because the Chief Justice did not cite *Gibbons v. Ogden* therein. His failure to do so was made the more pointed by the fact that he lifted bodily from the same page of the *Shreveport* opinion on which *Gibbons v. Ogden* was cited, a section containing several quotations from other cases.

Comparison of the opinions discloses a significant difference in point of view which may account for the omission. Marshall, the nationalist, excepted from the power granted to Congress only commerce “completely internal . . . which does not extend to or affect other States.” He drew no

32. *Id.* at 297.

33. *A. L. R. Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935).

34. *Coleman, op. cit. supra* note 9, at 79.

35. *Shreveport Rate Cases*, 234 U. S. 342 (1914), cited note 7, *supra*.

distinctions of degree. He did not admit that state prerogatives could limit federal authority over any commerce which affects "more States than one." That attitude contrasts sharply with the linguistic formula to which the Court now resorts to harmonize the disparate results of its various decisions—the asserted distinction between direct and indirect effects of "local" activities on interstate commerce. In the Wagner Act cases, the Chief Justice did not hold that the manufacturing operations of the complaining companies were part of the flow of commerce among the several states. He expressly withheld commitment on that point. He merely said that they were so intimately related to interstate commerce that Congress, in aid of its power to protect the latter, might impose the challenged regulations.

This direct-indirect antithesis does not decide concrete cases. Some further standards must be supplied to mediate between its generality and the facts of particular cases. In the *Jones & Laughlin* case, the Chief Justice professed to be guided by two principles, which become instructive when compared and contrasted with earlier decisions:

"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."³⁶

"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 intellectual vacuum. . . . We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience."³⁷

Neither of these propositions is new. Indeed, with a little verbal condensation, the author of the opinion could have supported the first by the following from *Gibbons v. Ogden*:³⁸

". . . 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

36. 301 U. S. 1, 37 (1937), cited note 2, *supra*.

37. *Id.* at 41.

38. 22 U. S. 1, 194 (1824), cited note 1, *supra*.

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something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State.”

Instead, he cited *Schechter Poultry Corporation v. United States*!³⁹

The fundamental fact underlying all this verbiage is that in the simpler economy of Marshall's day, the “completely internal” commerce of the states covered the larger portion of the economic map; in the closely integrated economy of 1937, so little commerce can be said to be “completely internal” that if the states' exclusive domain were confined thereto, it would be very narrow indeed. So the critical issue is whether or not the preservation of a substantial acreage as the states' exclusive hunting ground is so imperative that Congress must be debarred from some of that part which does affect more states than one. Apparently the present personnel of the Court thinks that it is.

The second proposition must be appraised in the light of the *Guffey Coal* case. In the latter, the Guffey Coal Act was, as we have noted, held invalid on the specific ground of the incompetency of Congress to regulate wages and hours in a “local” productive industry. In the hope of escaping judicial execution, section one of the act recited at length the circumstances in the coal industry thought to render federal regulation thereof essential for the protection of interstate commerce. But the majority were not impressed. Said Justice Sutherland:⁴⁰

“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. . . . 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.” (italics the author's).

Difficult it would have been to find language more inclusive, or better calculated to stand as a bar to judicial retreat in the future. The distinction between direct and indirect effects is drawn from a pre-established conception, which is accepted as fixed and immutable—not susceptible of

39. 295 U. S. 495 (1935), cited note 33, *supra*. In this case, *Gibbons v. Ogden* was not referred to by the Supreme Court, but it was cited by the lower court in affirming the conviction of the Schechters on certain counts. 76 Fed. (2d) 617 (C. C. A. 2d, 1935).

40. *Carter v. Carter Coal Co.*, 298 U. S. 238, 308, 309 (1936).

being deflected in the slightest degree by the impact of facts, however compelling.

All of this could have been said *mutatis mutandis* in the Wagner Act cases. All of it was said in substance in the minority opinion.⁴¹ But to the majority "the fact that the employees here concerned were engaged in production is not determinative. The question remains as to the effect on interstate commerce of the labor practice involved." After a brief reference to the fact that the *Carter* decision was based on several grounds—"That there was improper delegation of legislative power, and that the requirements not only went beyond any sustainable measure of protection for interstate commerce but also were inconsistent with due process"—that case was curtly dismissed as "not controlling here."

By thus ignoring the sweeping dictum of the *Carter* case, by restoring experience as the ultimate arbiter between state and nation, or, if you prefer, between nation and industry, the Court has, partially at least, levelled the barrier which that case placed in the way of any new venture by Congress into the regulation of labor conditions in productive industry.

III

What then of the future? Do the Wagner Act decisions emit any directional beams by which the course of new decisions can be charted? In particular, do they adumbrate the Court's reading of the Constitution in respect of federal prescription of wages and hours of labor in the production of commodities for the interstate market, or federal incorporation of labor unions, and prohibition of sit down strikes, Are they relevant to the issues raised by the proposed use of the so-called Anti-Ku Klux Klan act against violators of the Wagner Act?

In all his discussion of precedents, principles and the teachings of experience, the Chief Justice supplied no formula by which the judicial disposition of any new regulation can be predicted. He took pains to preserve the Court's freedom to determine the "necessity" of new measures as they may be presented. Even as applied to the *Jones & Laughlin Steel Corporation* case the Court would feel no more compulsion to uphold a different

41. The subtlety of the judgments underlying the determination of these cases is attested by the following from Justice McReynolds' dissenting opinion: "Every consideration brought forward to uphold the Act before us was applicable to support the Acts held unconstitutional in causes decided within two years." *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U. S. 1, 77 (1937).

statute than it did to sustain the prosecution of the Schechters under the NRA because of *Local 167 v. United States*.⁴²

A

The *Carter* case is a direct precedent denying the power of Congress to regulate wages and hours of labor in productive industry. It would be hard to find an industry which the Court classifies as "local" whose interstate ramifications are more extensive than those of mining coal. To sidestep that decision on the subject of wages and hours would be more difficult than to disregard its *obiter dicta*, as was done in the *Jones & Laughlin* case. It must be remembered, too, that while the Chief Justice dissented in the *Carter* case, he agreed that the wages and hours provisions went beyond "any proper measure of protection of interstate commerce,"⁴³ and the other dissenters expressed no opinion as to the constitutionality of those sections.

The pending fair labor standards act attempts to reach labor relation in industries engaged in production by two different means: it forbids the transportation in interstate commerce of goods produced under substandard labor conditions, as defined in the act, and it also forbids the employment under substandard conditions of any employee "engaged in interstate commerce, or in the production of goods for transportation or sale" in such commerce.⁴⁴

The constitutional issue posed by the first prohibition is entirely different from that involved in the Wagner Act cases. In forbidding interstate transportation of anything, Congress is exercising a power which clearly does not belong to the states. Unquestionably that power is limited by the Fifth Amendment; the controversial issue is whether it is also limited by the existence of the states. *Hammer v. Dagenhart*⁴⁵ stands as authority for the proposition that it is; that decision will have to be overruled if this subsection of the labor standards act is to be upheld. The Wagner Act decisions are of interest in this connection because the emphasis on the necessity of preserving "our dual system of government" suggests that the Court will be reluctant to espouse any doctrine which might threaten that system. The devastating criticism which has been levelled at the opinion

42. 291 U. S. 293 (1934), cited note 26, *supra*. Compare the following from Justice Stone's opinion in *Virginian Ry. v. System Federation*, 300 U. S. 515, 557 (1937): "... the commerce power is as much dependent upon the type of regulation as its subject matter."

43. 298 U. S. 238, 318 (1936), cited note 40, *supra*.

44. S. 2475, 75th Cong., 1st Sess. (1937) § 7.

45. 247 U. S. 251 (1918).

in *Hammer v. Dagenhart* might induce the court to adopt some other theory to attain substantially the same result. In 1918, nullification of the federal child labor act on due process grounds would have involved denial of state power on the subject. Since then, the Court has decided that a state violates the due process clause when it subjects a foreign corporation doing intrastate business to conditions which in effect constitute regulation of its extrastate activities.⁴⁶ That doctrine of unconstitutional conditions could be invoked to invalidate any prohibition of interstate transportation which the Court regarded as subversive of dual federalism.

Assuming the *Carter* case to be put out of the way in some manner, the direct prohibition of substandard labor conditions in interstate commerce or in the production of commodities for interstate commerce, could be upheld either as a means of eliminating unfair competition in such commerce, or of avoiding industrial disputes which threaten to burden or obstruct its free flow.

Chief Justice Taft's statement that "The question of price dominates trade between the States" is pertinent. Wages, as an important element of cost, are a determinative factor in the price of goods sold in the national market. As Professor Powell has suggested,⁴⁷ since Congress is permitted to require that competition in interstate commerce be kept "free," why may it not require that competition to be "fair"? If it can legislate against the manipulation of prices on a board of trade, or against activities tending to raise prices to consumers, why may it not legislate to prevent payment of wages so low as to drive out of interstate competition producers who pay fair wages? Such might be the tenor of the argument. The *Schechter* case could be distinguished. There the movement of poultry in interstate commerce had ended. The influence of wages on competition in interstate commerce would be exerted through their relation to the buying power of labor. The classification of that influence as remote would not be conclusive as to the effect of labor costs which are an ingredient of the price of commodities flowing in interstate commerce. The relation of hours of labor to costs may be more debatable as a theoretical proposition, but no practical person supposes that employers would maintain long hours so

46. *Fidelity & Deposit Co. v. Tafoya*, 270 U. S. 426 (1926); See *Western Union Tel. Co. v. Kansas*, 216 U. S. 1 (1910); *Terral v. Burke Construction Co.*, 257 U. S. 529 (1922); *St. Louis Cotton Compress Co. v. Arkansas*, 260 U. S. 346 (1922).

47. *Commerce, Pensions & Codes* (1935) 49 HARV. L. REV. 193.

persistently if they did not derive a pecuniary advantage therefrom. Here, as always, the due process hurdle would also have to be cleared.

In relying on the tendency of employer interference with union activities to breed industrial strife which might lead to strikes which might interrupt the flow of interstate commerce, Chief Justice Hughes made available an argument which could be extended to support federal regulation of any aspect of labor relations in any employment in any way related to interstate commerce. But no one familiar with the backing and filling technique of judicial navigation will draw confident conclusions as to when that argument will be accepted and when it will be brushed aside.

B

Section nineteen of the Criminal Code imposes penalties

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States. . . ."⁴⁸

Two important limitations on the scope of this statute are apparent: it protects citizens, not corporations, and it penalizes only interferences with rights or privileges "secured . . . by the Constitution or laws of the United States." The first limitation could be removed by amendment of the statute; the second could not.

It is well settled that the general civil rights to security of life, liberty, and property were not granted by the Constitution; that the first ten Amendments merely protect such rights from encroachment by Congress; that the Fourteenth Amendment likewise secures them from infringement by the states; that to the states, and to the states alone is committed the power and duty of assuring their enjoyment without interference by individuals;⁴⁹ that Congress is empowered to protect against invasion by private persons only those rights and privileges created by the Constitution, or arising out of the execution of powers expressly granted to it.⁵⁰

The crucial question in respect of the proposed application of this act in labor cases, is whether any of the rights claimed by the various parties

48. 35 STAT. 1092 (1909), 18 U. S. C. A. 51 (1927).

49. *United States v. Reese*, 92 U. S. 214 (1875); *United States v. Cruikshank*, 92 U. S. 542 (1875); *United States v. Harris*, 106 U. S. 629 (1882); *Civil Rights Cases*, 109 U. S. 3 (1883); *Hodges v. United States*, 203 U. S. 1 (1906); *United States v. Wheeler*, 254 U. S. 281 (1920); See *Trade-Mark Cases*, 100 U. S. 82 (1879).

50. *United States v. Reese*, 92 U. S. 214 (1875), cited note 49, *supra*; *United States v. Waddell*, 112 U. S. 76 (1884).

are, or may be, secured by the Constitution or laws of the United States. In casual conversation, the "right to work" is often referred to as a constitutional right; similarly, the origin of the right of collective bargaining is sometimes ascribed to the Wagner Act. The truth is that such rights, in so far as they have been judicially recognized, are constituents of the "liberty" which Congress and the states may not deny without due process of law, but which are not derived from the Federal Constitution.

The opinion in the *Jones & Laughlin* case clearly recognized the right to bargain collectively as having antecedent existence. The Chief Justice carefully refers to the National Labor Relations Act as being designed to "safeguard" that right, within the limits of federal power.⁵¹ Assuming that the right so "safeguarded" is "secured" by a law of the United States (an assumption which might be controverted by counsel for defendants) the penalties of section nineteen could have no broader application than the Wagner Act itself. The extent of the necessity for the protection of interstate commerce would also mark the limits of other federal measures relating to the civil rights of employers and employees. For that reason, the pending Hoffman bills⁵² which require federal incorporation for any labor union whose membership includes any employee of any employer engaged in interstate commerce and forbid sit down strikers against any such employer, appear to be too broad. Taken literally, they would reach the household employees of a baker in South Chicago who sells a few loaves of bread to a grocer in Whiting, Indiana. It would hardly be necessary to invoke the first *Employers' Liability* cases⁵³ or the *Schechter Poultry Corporation* decision⁵⁴ to defeat such application of a federal law.

Under the doctrine of *M'Culloch v. Maryland*,⁵⁵ Congress may have power to incorporate labor unions; perhaps it might make such incorporation mandatory for unions whose activities "directly" affect interstate commerce. Proposals therefor, as well as the suggested federal incorporation or licensing of companies or persons engaged in interstate commerce⁵⁶

51. See *Texas & New Orleans R. R. v. Brotherhood of Ry. & S. S. Clerks*, 281 U. S. 548 (1930); *Virginian Ry. v. System Federation*, 300 U. S. 515 (1937), cited note 42, *supra*.

52. H. R. 6148, 6456, 75th Cong., 1st Sess. (1937).

53. 207 U. S. 463 (1908), cited note 4, *supra*.

54. 295 U. S. 495 (1935), cited note 33, *supra*.

55. 17 U. S. 316 (1819).

56. See S. 10, S. 721, H. R. 1667, H. R. 1999, H. R. 7180, H. R. 7272, 75th Cong., 1st Sess. (1937).

open vistas of fascinating speculation concerning the possible assimilation into the category of rights "secured . . . by the laws of the United States" of all rights inhering in the employer-employee relationship where either party is a federal corporation or federal licensee, or a member of a federal labor union. At the moment such speculations are too far removed from any accepted legislative policies or judicial postulates to be of practical significance.

To all questions as to what the Court may do with this legislation or with that, we can respond only in the words of a recent presidential candidate: "The answer is, 'No one can be sure!'" But since the Wagner act decisions, we can be reasonably sure that the Court will not soon return either to the broad nationalism of John Marshall, or to the narrow conceptualism of the *Guffey Coal* case. Instead, it will strive to protect states' rights as fully as possible, while measuring federal authority by the principle so aptly phrased by Justice Cardozo:⁵⁷

"The power is as broad as the need that evokes it."

57. 298 U. S. 238, 328 (1936), cited note 29, *supra*.