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Constitutional Validity of a Federal Reforestation Program for Upper Tributaries of Navigable Waters

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CONSTITUTIONAL VALIDITY OF A FEDERAL REFORESTATION PROGRAM FOR UPPER TRIBUTARIES OF NAVIGABLE WATERS

The question has arisen as to whether or not it would be constitutional for Congress to initiate a program of reforestation along the upper tributaries of navigable streams to assist in a comprehensive flood control program. The answer to such a question cannot be definitely determined in advance of a Supreme Court decision on the matter. However in the light of existing case law a prediction can nevertheless be attempted as to what an answer might be. Such is the purpose of this Comment.

In the famous case of *Gibbons v. Ogden*[1] Chief Justice John Marshall set the pace of our whole constitutional scheme in regard to the commerce clause of the federal constitution. New York having granted an exclusive right to navigate the waters of the state by steam vessels, the holders of that privilege sought to enjoin Gibbons from operating his steamboats between New Jersey and New York. Gibbons invoked the protection both of the commerce clause and of a license under an Act of Congress regulating the coastal trade.[2] Chief Justice Marshall disposed of the case and invalidated the New York legislation by construing the act of Congress as protecting the right of free passage over the navigable waters of the United States.[3] As facetiously stated by Thomas Reed Powell, he "flirts with the idea that commerce power of Congress is 'exclusive,' but . . . doesn't quite propose marriage."[4] Marshall's opinion advanced the idea that the commerce clause, by its own force and without federal legislation, puts it in the power of the court to place limits upon state authority.[5] Commerce was held to include navigation and not be confined to trade.[6]

Once a broad doctrine is asserted the question arises as to its limits. Since Congress must act under the commerce clause in order to alleviate problems of flood control, it is necessary to ascertain not only the limits which the commerce clause places on state action, but also the limits on congressional exercise of power over commerce. Marshall's opinion in the *Gibbons* case stated that the "sovereignty of congress, though limited to specified objects is plenary as to those objects . . . ."[7] In *Willson v. Blackbird Creek Marsh Co.*[8] Delaware granted a right to dam a navigable stream. Marshall sustained the state act even though the dam completely obstructed navigation of the stream by vessels sailing under the federal coasting license. His decision was that Congress could not have intended to grant right of passage over all the small navigable creeks into which the tide flows.[9] The result of

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1. 22 U.S. (9 Wheat.) 1 (1824).
2. Act of Feb. 18, 1793, ch. 8, 1 Stat. 305.
3. Gibbons v. Ogden, *supra* note 1, at 209.
4. POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 51 (1956).
5. FRANKFURTER, THE COMMERCE CLAUSE 18-19 (1937).
6. Gibbons v. Ogden, *supra* note 1, at 5.
7. *Id.* at 197.
8. 27 U.S. (2 Pet.) 245 (1829).
9. *Id.* at 252.

these early cases, according to Mr. Justice Frankfurter, is to "make the Court collaborator with Congress in the regulation of foreign and interstate commerce, and thereby to bring before the Court questions inescapably implicating legislative policy."[10] Rather clearly then, the importance of the Court's judicial discretion cannot be underestimated in attempting to discern limitations not only on state action, but, what is of importance to a flood control problem—congressional action.

In the case of *Cooley v. Board of Wardens*[11] the classic doctrine of "selective exclusiveness" of federal power over commerce is enunciated in the opinion of Mr. Justice Curtis:

> Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature . . . Whatever subjects of this power are in their nature national, or admit only of one uniform system, a plan of regulation, may justly be said to be of such a nature as to require exclusive regulation by congress.[12]

The clear result of the preceding cases is that the plenary but selective exclusiveness of congressional power over commerce, limited by the judicial discretion of the Supreme Court, includes the power to control navigable streams and waterways as highways of interstate and foreign commerce—being subjects of this power which are in their nature national.

The question must be answered as to what are navigable streams. In an early case the Court rejected the common law test of ebb and flow of tide water being synonomous with navigable water, as being unsuited to the conditions of this country.[13] The test adopted was that if a stream or waterway is navigable in fact it is navigable in law.[14] A stream is navigable in fact if it is susceptible of being used in its natural state for commercial purposes in the manner in which these purposes are ordinarily conducted.[15] The application of these tests to great rivers like the Mississippi or Missouri, produces little difficulty in holding them to be navigable in law. However, this does not answer the question of how Congress may regulate the non-navigable tributaries to the great navigable streams of the nation in order to prevent floods on the latter. In order that Congress may provide for the reforestation of land surrounding these non-navigable tributaries, something more is needed than power to regulate only the navigable portions of a stream or waterway. Such are the postulates that somehow must be extracted from the processes of the commerce clause.

The Court has often been disturbed by the fact that in order for Congress to effectively regulate that which is interstate commerce, it must also regulate that

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10. FRANKFURTER, *op. cit. supra* note 5, at 21.
11. 53 U.S. (12 How.) 299 (1851).
12. *Id.* at 319.
13. Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851).
14. The Montello, 87 U.S. (20 Wall.) 430 (1874); The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870).
15. The Montello, *supra* note 14; Elder v. Delcour, 364 Mo. 835, 269 S.W.2d 17 (1954) (en banc); Smith v. State, 184 Wash. 58, 50 P.2d 32 (1935).

which is not, but related thereto. The *Shreveport Case*[16] is illustrative of this proposition. The regulation of intrastate railroad rates by the Interstate Commerce Commission was upheld by the Court because of the injurious and burdensome effect imposed upon interstate commerce by competition of the lower state rates with interstate rates. Unquestionably this decision was correct, as the power of Congress to regulate interstate rates was incontestable. If state action, requiring lower rates of intrastate railroads, was to be allowed to disrupt and destroy the efficacy of an order regarding interstate rates, this power of Congress under the commerce clause would be nullified.

After several ill fated attempts,[17] Congress was allowed to go beyond the point reached in the *Shreveport* case. Historically the case of *United States v. Butler*[18] is important. In 1933 the plight of the nation's farmers was desperate, and consequently Congress passed the Agricultural Adjustment Act[19] which taxed the processing of agricultural products, and used the proceeds to induce farmers to limit production. The court held the subject of production so clearly fell within the field reserved to the states by the tenth amendment that it was unnecessary to determine whether a statute affecting it came within a power granted to the United States. The processing tax provisions of the act did not rest on the commerce clause, so that the case did not pass upon the relationship between agricultural production and interstate commerce.

After this defeat Congress tried again, this time resorting to the commerce clause. Substandard wages in some states were forcing down wages in other states trying to maintain a higher standard of living. To remedy this situation, Congress enacted the Fair Labor Standards Act of 1938.[20] This act fixed minimum wages and maximum hours of labor for employees engaged in interstate commerce or in the production of goods for such commerce. In the case of *United States v. Darby Lumber Co.*,[21] the act was challenged in that it unconstitutionally sought to regulate a local business, *i.e.*, manufacturing is not interstate commerce. Mr. Justice Stone in his opinion agreed that manufacturing was not interstate commerce, but escaped from this proposition by saying:

> it does not follow that Congress may not by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce.[22]

This substantial effect of substandard wages on interstate commerce was found through the force of competition between factories located in states observing high wage standards and those located in states of low standards for the same markets.

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16. 234 U.S. 342 (1914).
17. Child Labor Tax Case, 259 U.S. 20 (1922); Hammer v. Dagenhart, 247 U.S. 251 (1918).
18. 297 U.S. 1 (1936).
19. 48 Stat. 31 (1933).
20. 52 Stat. 1060 (1938), 29 U.S.C. § 201 (1949).
21. 312 U.S. 100 (1941).
22. *Id.* at 119.

Thus the court refined a principle by which Congress may extend its regulatory powers beyond interstate commerce and subject intrastate activities to its control, if those activities have a *substantial effect* upon interstate commerce. In this modern age of complex interplay of social and economic forces, numerous activities unquestionably affect interstate commerce; hence the principle becomes complicated in determining how *substantial* this effect must be before Congress can apply its regulatory powers. The final step in analyzing the question undertaken by this Comment is applying the principle thus announced in the *Darby* case.

The power of Congress over navigable waters, discussed earlier, was the primary basis for the creation of Tennessee Valley Authority in 1933.[23] The dams constructed on the Tennessee River and its waters produced water power under public ownership, which inevitably would compete with power companies under private ownership. The result was a campaign by the privately owned companies to nullify the Tennessee Valley Authority Act. In *Ashwander v. TVA*[24] the power developed at Wilson Dam on the Tennessee River was in issue. The Court held that the Tennessee River was unquestionably navigable and even susceptible of development as an important waterway. The petitioners, however, did not challenge the navigability of the Tennessee River. Their argument was that for the TVA as an agency of the federal government to sell electric power at this dam for ultimate consumption was to enter into an ordinary business enterprise in violation of the tenth amendment. The Court rebutted this argument by holding that the dam had been constructed in the exercise of two legitimate constitutional powers, commerce and war, that title of the government to the dam gave it property rights in the water power and that under the property clause of the constitution,[25] Congress could sell any power not used for commercial or war purposes despite the fact that it would intrude into the private power company's non-competitive domain.

Subsequently, a more difficult problem arose in connection with the New River in West Virginia. The Appalachian Electric Power Company had tried unsuccessfully to obtain a judicial determination as to the necessity of obtaining a license from the Federal Power Commission under the Federal Water Power Act of 1920.[26] The company then proceeded to construct a power dam on the river, and the United States brought a suit to enjoin the construction until a license was obtained from the commission as required for dams on rivers that were navigable or affected interstate commerce. The district court and circuit court of appeals found the river non-navigable.[27] As a matter of fact, the New River had been sporadically navigated by flatboats of small draft. At various stretches there were obstacles to vessels drawing two feet of water, and these could be overcome only with some

23. 48 Stat. 58 (1933), 16 U.S.C. § 831 (1940).
24. 297 U.S. 288 (1936).
25. U.S. CONST. art. IV, § 3.
26. 41 Stat. 1063 (1920), 49 Stat. 838 (1935), 16 U.S.C. § 791(a) (1940).
27. United States v. Appalachian Elec. Power Co., 23 F. Supp. 83 (W.D. Va. 1938), *aff'd*, 107 F.2d 769 (4th Cir. 1939).

difficulty. The Court, through Mr. Justice Reed, expanded the test of navigability in fact stating:

> it is proper to consider the feasibility of interstate use after reasonable improvements which might be made.[28]

Stated another way:

> The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic.[29]

Under this expanded test, *i.e.,* navigability in fact through reasonable improvements, the New River was found to be navigable on the basis of early investigations showing that the expenditure of a relatively small sum of money would have enabled keel boats to travel the waters without difficulty. The fact that modern transportation had made these improvements economically unjustifiable was held immaterial.

The company claimed that even if the river were navigable, the commission could not attach conditions to its license to construct a dam if the conditions were unrelated to the protection or control of navigation. The required conditions were that the project must be maintained in the interests of both navigation and efficient power operation, that for protection of health and property the company must conform to commission regulations governing these matters, and that the United States was to be accorded the right, upon expiration of the license, to take over the project upon payment of the net investment. The Court held that even though the conditions might not all be in the interest of navigation, they nevertheless had

> an obvious relationship to the exercise of the commerce power.[30]

Congressional power over navigation under the commerce clause is the power to regulate commerce on the water, not merely the

> operation of boats and improvement of the waterway [which] is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control . . . . Water power development from dams in navigable streams is from the public's standpoint a by-product of the general use of the rivers for commerce. . . . The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted to the Federal Government.[31]

Obviously the doctrine of this case considerably extended the power of Congress to regulate navigable streams and waterways. The Court is clearly correct in recognizing that flood control is a proper objective within the commerce clause, for floods destroy not only river commerce, but also interstate land transportation and communication.

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28. United States v. Appalachian Elec. Power Co., 311 U.S. 377, 409 (1940).
29. *Id.* at 408.
30. *Id.* at 427.
31. *Id.* at 426-27.

Soon after the *Appalachian* case was decided a further problem arose in *Oklahoma v. Guy F. Atkinson Co.*[32] Congress had authorized the construction of a large dam on the Red River, a tributary of the Mississippi, as part of a plan to control floods in the Mississippi Valley. The damsite was located on a non-navigable portion of the river on the Oklahoma-Texas state line. The state of Oklahoma sued to enjoin the construction of the dam, alleging that valuable property would be flooded in violation of the sovereign and proprietary rights of the state and that the construction was in violation of the tenth amendment. The Court upheld the project on two grounds: (1) to improve navigation on the lower navigable stretches of the Red River[33] and (2) to control floods in the Mississippi Valley, since that is a matter of *national concern* which the states cannot cope with effectively.[34] Elaborating on the second ground, the court stated:

> There is no constitutional reason why Congress cannot, under the commerce power, treat the watersheds as a key to flood control on navigable streams and their tributaries. Nor is there a constitutional necessity for viewing each reservoir project in isolation from a comprehensive plan covering the entire basin of a particular river . . . it is common knowledge that Mississippi floods have paralyzed commerce in the affected areas and have impaired navigation itself . . . the power of flood control extends to tributaries. . . . For, just as control over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries. As repeatedly recognized by the Court from *McColloch v. Maryland*, 4 Wheat. 316, to *United States v. Darby*, 312 U.S. 100, *the exercise of the granted power of Congress to regulate interstate commerce may be aided by appropriate and needful control of activities and agencies, which though intrastate, affect that commerce.*[35] (Emphasis added.)

The Court further stated that it would not

> inquire into the motives of members of Congress who voted for this project, in an endeavor to ascertain whether their concern over the great national loss from soil erosion, the enormous crop damages . . . and other like ravages of floods, overshadowed in their minds the desirability of protecting the Mississippi and other arteries of commerce . . . . It is sufficient for us that Congress has exercised its commerce power, though other purposes will also be served.[36]

The effects of this case have been well stated by Robert L. Stern:

> Flood control was thus elevated to an equal stature with navigation as a legitimate basis for exercising the commerce power over the nation's waterways . . . . The Atkinson and Appalachian cases together establish the complete authority of the Federal Government over the watersheds of navigable streams. So long as a program has the improvement of naviga-

32. 313 U.S. 508 (1941).
33. *Id.* at 523.
34. *Id.* at 521-22.
35. *Id.* at 525-26.
36. *Id.* at 528.

> tion or the prevention of floods—at any point and not merely at the point of construction—as one of its goals, it may extend to all of the interrelated aspects of the watershed development, including the control of water power.[37]

A more recent illustration of the fact that flood control has become a basis for exercising federal control over the nation's waterways appears in the case of *United States v. Twin City Power Co.*[38] The court of appeals indicated that a federal project on the Savannah River was not for the purpose of improvement of navigation, but was designed to serve flood control and water power development.[39] The Supreme Court held that if navigational interests are served, it is constitutionally irrelevant that other purposes may be advanced and that flood control and watershed development are also parts of commerce control,[40] citing the *Appalachian* and *Atkinson* cases as authority.

In the case of *Anderson v. Seeman*,[41] a law authorizing condemnation of lands for the purpose of generating hydroelectric power was alleged to be invalid because Congress could not conclude that the top segment of the dam (added to generate power) would benefit navigation or flood control. The court of appeals, relying on the *Appalachian* case, refused to inquire into the motive of Congress and determine how many feet of a dam are necessary for navigation or flood control on one hand, and how many for hydroelectric power on the other hand.[42]

By reason of the flexibility of the United States Constitution to meet the socio-economic needs of changing times, it would seem reasonable to conclude that a federal reforestation program in the upper tributaries of navigable streams, being such a need, is constitutional under the "substantial relation to commerce" theory as extended by the *Appalachian* and *Atkinson* cases.

The reforestation idea is certainly not new, and has even reached the halls of Congress where it was incorporated into a highly comprehensive basin development plan presented before the Senate.[43] Were such a plan to be initiated by Congress based on it's constitutional powers over navigation and flood control, it is highly improbable that the Supreme Court would substitute it's judgment for, or inquire into the motive of, the legislature. In conclusion it seems highly probable that such a measure would be sustained.

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37. Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 883, 899-901 (1946).
38. 350 U.S. 222 (1955).
39. United States v. Twin City Power Co., 215 F.2d 592 (4th Cir. 1954).
40. 350 U.S. at 224.
41. 252 F.2d 321 (5th Cir.), *cert. denied*, 358 U.S. 820 (1958).
42. 252 F.2d at 327.
43. 95 CONG. REC. 1706 (1949) (remarks of Senator Murray); 95 CONG. REC. 1711 (1949) (remarks of Senator Gillette); 95 CONG. REC. 1714 (1949) (remarks of Senator Humphrey).